

October 19, 2020

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Submitted via www.regulations.gov

**Re: Docket ID No. EPA–HQ–OW–2020–0426; Proposed 2020
Financial Capability Assessment for Clean Water Act Obligations**

On behalf of the 97 undersigned organizations and their millions of members across the country, please accept these comments on the Environmental Protection Agency’s (“EPA” or “the Agency”) Proposed 2020 Financial Capability Assessment for Clean Water Act Obligations (“Guidance”). Although the Guidance pertains to EPA’s own decision-making criteria under the Clean Water Act (“CWA” or “the Act”), many states will also look to the Guidance as a basis for their own decisions.

The Guidance would amend an existing CWA guidance document, which was first issued in 1997. EPA and states have used the 1997 guidance to help determine how long to allow continued discharges of raw sewage into waters used for drinking, recreation, and/or ecological habitat, depending upon on the ability of a wastewater system and its customers to pay for necessary infrastructure upgrades. Over the years, the 1997 guidance has also been used to determine compliance schedules for other sources of municipal wastewater and stormwater pollution. The new Guidance would apply to all of those situations. Unlike the 1997 guidance, it would also apply to requests by municipal dischargers to lower the bar for what counts as “clean” water under the Act, so that polluted waterways may never have to be cleaned up.

EPA must withdraw the current draft of the Guidance and fundamentally reconsider the Agency’s approach. The Guidance protects neither public health and the environment nor the low-income households it purports to protect. Instead, the Guidance makes it easier for EPA to reinforce existing inequities in access to clean water and sanitation, in which health and environmental burdens fall disproportionately on communities of color and low-income communities. The ongoing COVID-19 pandemic has highlighted and exacerbated the health impacts of inequitable access to water and sanitation. EPA should be working on every front to eradicate that underlying inequity, not taking any actions that would further entrench it.

Across the country, there is tremendous need for investment in failing and outdated wastewater and stormwater infrastructure—many hundreds of millions of dollars over the next twenty years. A complete solution requires action, not only by regulators and dischargers themselves, but also by Congress and state legislatures, which must direct more funding to municipal water infrastructure, allocate it more equitably to disadvantaged communities, and increase the amounts available as grants rather than loans. Our groups advocate forcefully for that funding.

This investment shortfall does not affect all communities equally. Many areas of the country have fallen into a two-tiered system, where the wealthy enjoy safe sanitation services and clean water while others get second-class services that pose risks to their health and environment. In some cases, areas with poor water and sanitation service are subjected to rate increases that are used to fund capital improvements that primarily benefit wealthier areas. This inequitable outcome, which especially burdens environmental justice communities and rural communities, is not consistent with the Clean Water Act’s regulatory approach.

Instead, CWA regulatory agencies must ensure that municipal wastewater and stormwater systems pursue all available opportunities to adequately and equitably fund necessary investments in clean water. EPA, the states, and municipal dischargers must work to implement solutions that enable those investments while also protecting customers who are least able to pay. A revised version of the Guidance should be a driver for those solutions, rather than an escape hatch that enables EPA to look the other way when a municipality points to high levels of poverty in its service area. We offer some specific recommendations below. Ultimately, achieving this goal will require local officials and state and federal regulators to re-think the “business model” on which municipal wastewater utilities operate, to ensure universal access to essential services regardless of a customer’s ability to pay.

During the years-long development of this Guidance, EPA primarily solicited the opinions of regulated parties, leading to a framework that promotes their interest in avoiding regulatory obligations, rather than the people’s interest in having access to safe, clean water. We urge EPA to step back and seek input, openly and comprehensively, from a much wider set of stakeholders, especially impacted environmental justice communities, to inform the development of a revised proposal. We would welcome the opportunity to engage in this dialogue with the Agency.

We also encourage EPA to consult its National Environmental Justice Advisory Council (NEJAC) as part of this process, and to pursue the recommendations in NEJAC’s March 2019 report, “EPA’s Role in Addressing the Urgent Water Infrastructure Needs of Environmental Justice Communities,” which urges EPA in all of its activities to treat water and sanitation as a human right and to prioritize long-standing issues in environmental justice communities.¹

We offer the following additional comments to highlight some of our major concerns and provide high-level recommendations on how EPA can address them in developing a revised proposal.

- 1. The Guidance uses legitimate concerns about affordability for low-income customers as justification to prolong ongoing pollution that harms human health and the environment, rather than driving solutions that achieve both affordability and clean water.**

The Guidance does include at least one valuable improvement over the existing 1997 guidance, by considering costs for low-income customers specifically. We support EPA’s proposal to modify the existing reliance on median household income (“MHI”) when evaluating the cost of wastewater and stormwater service. As recognized in the Guidance, the metric of cost per

¹ https://www.epa.gov/sites/production/files/2019-05/documents/nejac_white_paper_water-final-3-1-19.pdf.

residential customer as a percentage of MHI, which is used in the 1997 guidance, fails to account for the affordability of service to low-income customers. We welcome the acknowledgement that poverty measures for low-income customers must be considered in decisions concerning wastewater infrastructure investment.

The Guidance, however, completely misses the mark on what to do when a “financial capability assessment” determines that low-income customers face affordability challenges or that the utility as a whole faces financial challenges.² The Guidance takes that finding as a license to allow extended compliance schedules under the Act, up to 25 years or more. In effect, this relegates communities to decades of continued pollution, and falsely sets up affordability and clean water as objectives that are inherently in conflict. What the Guidance should do is direct municipalities, EPA, and the states to do everything they can to solve affordability challenges without sacrificing clean water.

There are many steps that utilities can take, often with support from EPA or state regulatory agencies, to improve affordability without deferring necessary clean water investments. EPA must revise the Guidance so that identification of affordability challenges will trigger further assessment of those options—in effect, a “Financial *Alternatives* Assessment.”

Such a financial alternatives assessment must consider an array of options and implement them to the maximum possible extent, in order to maximize the municipality’s “financial capability” to achieve compliance with clean water requirements. These options must include, for example:

- adopting or expanding low income-based affordability programs that reduce bills for vulnerable customers, including chronically low-income households;
- modifying rate structures to more equitably generate revenue for capital investments;
- ensuring that a utility is taking advantage of all available federal and state infrastructure grant programs and subsidized loan programs;
- taking advantage of other financing options that can reduce project costs;
- optimizing operations, maintenance, and capital programs overall to reduce life cycle costs; and
- ensuring that rate revenues are not diverted to non-utility purposes.

At the same time, federal and state agencies—including permitting and enforcement offices working in concert with the offices that manage funding programs—must prioritize disadvantaged communities for funding, ensure that municipalities actually can and do access available funds, and provide technical assistance on matters of infrastructure financing and low-income affordability. *Any approach to assessing a municipality’s “financial capability” to meet CWA requirements is incomplete without all of these elements.*

2. The Guidance must consider not only the costs of compliance, but also the benefits.

The Guidance focuses entirely on assessing a municipality’s “financial capacity” to pay for infrastructure investments. It does not consider at all the “return” on that investment. As the

² Some of the groups signing this letter will also submit separate comments critiquing the Guidance’s technical methodologies, such as the methods for calculating the “Residential Indicator” and “Financial Capability Indicator.”

Guidance would have it, CWA compliance is nothing but a financial *liability* for the municipality and its ratepayers. This turns the CWA on its head.

EPA's approach to permitting and enforcement must account for the benefits of clean water investments, which are the animating purpose of the Act itself. These benefits accrue largely to the communities (including ratepayers) served by a municipal wastewater or stormwater system. For example, water infrastructure investments can provide communities with improved public health outcomes, greater job availability, and increased resilience to climate change. Therefore, when determining appropriate compliance schedules, EPA must consider the environmental and economic benefits of compliance, including those that are readily quantifiable in monetary terms and those that are not. Those benefits include both the benefits associated with water quality and public health improvement and any co-benefits, such as those identifiable through "triple bottom line" analysis of environmental, social, and economic benefits.

Further, the benefits to be considered should include consideration of the beneficial effects on water quality on downstream communities, which may themselves be disadvantaged, as well as the effects on others living outside the community at issue. Communities do not exist in a vacuum and recognition of benefits outside the specific community faced with the need for upgrades may lead to state funding or development of other resources necessary to address the pollution problems.

3. EPA should not apply the Guidance to decisions concerning water quality standards.

The Guidance also includes a new proposal, entirely beyond the scope of the existing 1997 guidance, to use the same methodology to justify weakening water quality standards, such as through the removal of designated uses pursuant to a use attainability analysis.

This proposal goes well beyond allowing extended timelines to achieve future compliance with existing standards. It effectively authorizes permanent degradation of our waters—removing any obligation to meet existing water quality standards on any timeline—based on an assessment of "financial capability" that is, as explained above, deeply flawed. EPA must withdraw this proposal.

If EPA wishes to develop guidance on how to consider compliance costs under the Agency's water quality standards regulations, it should establish a separate process, including all stakeholders, to consider thoroughly any legal, technical, and practical considerations that may be unique to the water quality standards context. Moreover, EPA cannot use this or any other guidance effectively to amend existing water quality standard regulations, such as the rules on variances, use designations, and anti-degradation that are referenced in the Guidance.

4. EPA must ensure robust community engagement whenever cost and affordability concerns may influence decisions about local Clean Water Act compliance.

The Guidance does not provide for any public participation in developing financial capability assessments or in determining how a completed assessment should impact a municipality's Clean Water Act compliance obligations. EPA must ensure that affected communities have

opportunities for meaningful input when these issues play out at the local level, as the results have profound impacts for people’s health, environment, and access to affordable water and sanitation. A revised version of the guidance must address this critical issue, consistent with principles of environmental justice.

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Thank you for your consideration of these comments. We would welcome the opportunity to discuss them further with you.

Sincerely,

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