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Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: Docket ID No. EPA–HQ–OW–2020–0426; Proposed 2022  
Clean Water Act Financial Capability Assessment Guidance**

On behalf of the undersigned 40 organizations and their millions of members across the country, please accept these comments on the Environmental Protection Agency’s (“EPA” or “the Agency”) Proposed 2022 Clean Water Act Financial Capability Assessment Guidance (“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.<sup>1</sup>

For the reasons explained below, we support many of the changes reflected in the proposed Guidance, as compared to a draft proposed in 2020 and a similar “pre-publication” version, dated Jan. 2021, which EPA withdrew last year. We also urge EPA to go further, strengthening the Guidance in several ways that can more effectively drive just and equitable clean water investments that ensure affordable access to essential wastewater service for low-income households.

EPA’s 2020 and 2021 versions of the guidance purported to address legitimate concerns about the affordability of water and sewer service for low-income households. But they falsely set up affordability and clean water as objectives that are inherently in conflict. They would have reinforced 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. Specifically, they would have allowed municipalities to continue for decades the discharge of raw sewage and other pollution in violation of Clean Water Act standards—or to weaken the standards themselves—specifically because a city has a significant population of low-income residents.

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<sup>1</sup> The Guidance amends 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. Further, a portion of the Guidance also amends an existing CWA guidance document, first issued in 1995, which addresses financial considerations related to water quality standards. That portion would apply to requests by municipal dischargers to lower the bar for what counts as “clean” water under the Act—including requests for temporary “variances” from standards, as well as requests to weaken standards so that polluted waterways may never have to be cleaned up or high-quality waterways may be degraded.

In response to EPA’s 2020 draft, our organizations and others urged the Agency to take a fundamentally different approach—to revise the 1997 guidance in ways that can help remedy, rather than perpetuate, existing environmental injustices.<sup>2</sup>

EPA’s 2022 proposed Guidance makes a good-faith effort to respond to that concern. It represents an important step in the right direction. As discussed further below, the most notable improvements in the Guidance (as compared to the prior drafts) are requiring a “Financial Alternatives Analysis” that seeks to minimize cost burdens on low-income households and placing firmer (and shorter) outer limits on the recommended length of compliance schedules.

We also urge EPA, however, to go further by:

- strengthening the Financial Alternatives Analysis requirements to more effectively drive solutions to affordability challenges;
- providing more specific justification for the particular “scheduling benchmarks” included in the Guidance;
- giving significant weight to the benefits of compliance—not only the costs of compliance—when determining a compliance schedule;
- limiting the applicability of the Guidance to water quality standards decisions; and
- ensuring that there is proactive community outreach and engagement, especially to environmental justice communities, including downstream communities and Tribes, whenever the analyses envisioned under the Guidance are performed.

Finally, EPA must ensure that the Guidance works hand-in-hand with other systemic solutions to meet the tremendous need for investment in failing and outdated wastewater and stormwater infrastructure. A complete solution requires action, not only by regulators and dischargers themselves, but also by Congress, state legislatures, federal agencies (especially EPA), and state agencies, which must direct more funding to municipal water infrastructure, allocate it more equitably to disadvantaged communities, increase the amounts available as grants rather than loans, and offer targeted support for low-income households. As EPA notes in the Guidance, the 2021 Bipartisan Infrastructure Law, which includes nearly \$12 billion for clean water infrastructure, provides “a historic opportunity” to meet many of these needs. We fully support EPA’s efforts to ensure effective and equitable implementation of the funds under that law—especially in environmental justice, rural, and other poor communities that have long been left behind. Many of our groups are also engaged at the state level to achieve that same goal. And we continue to advocate forcefully for additional federal and state funding.

Our more specific comments on the Guidance follow below.

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<sup>2</sup> Comments submitted jointly in 2020, signed by nearly 100 groups, can be found in the docket here: [https://downloads.regulations.gov/EPA-HQ-OW-2020-0426-0037/attachment\\_1.pdf](https://downloads.regulations.gov/EPA-HQ-OW-2020-0426-0037/attachment_1.pdf).

**1. We strongly support the “Financial Alternatives Analysis” requirements, but EPA should strengthen them to more effectively drive solutions to affordability challenges.**

We strongly support the proposal to include a “Financial Alternatives Analysis” (FAA) as a new step in a financial capability assessment. By adding this step, the Guidance acknowledges that there are many actions utilities can take, often with support from EPA or state regulatory agencies, to improve their financial capability without resorting to decades-long CWA compliance schedules.

The Guidance states that a FAA must consider actions that reduce costs for all of a utility’s customers (such as lower-cost financing and improved financial and utility management) and actions that can reduce cost burdens specifically for low-income households (such as targeted affordability and assistance programs and changes to rate design). If the FAA concept is implemented effectively, it has the potential to drive real solutions to affordability challenges.

However, EPA must be extremely attentive to making sure that FAAs are effective in practice, not only in theory. We urge EPA to further refine the Guidance’s approach to FAAs, in the ways described below, to make it more likely to achieve the intended result.<sup>3</sup>

*First, the Guidance must ensure that a FAA will thoroughly evaluate alternatives and that permittees will be held accountable for selecting and implementing all that are feasible. We acknowledge and support EPA’s intent that FAAs should be meaningful tools to mitigate cost impacts on low-income households and facilitate shorter Clean Water Act compliance schedules. However, there is a risk that FAAs may become mere box-checking exercises, particularly if they are conducted without public input and without meaningful review by EPA or state regulators. It remains unclear, for example, how EPA and state regulators will determine whether a permittee’s FAA rigorously identified and selected feasible alternatives; whether the selected alternatives are likely to be effective at reducing impacts; and how the permittee will be held accountable for effectively implementing the selected alternatives and, if needed, improving implementation over time to ensure cost impacts are reduced as expected.*

To help address these concerns, we urge EPA to do the following:

- The Guidance should insist on transparency and robust community engagement in conducting a FAA, including in the selection of alternatives and implementation of any new programs intended to specifically benefit low-income households. FAAs must not be conducted behind closed doors or shared only with EPA or state regulators. The most directly impacted members of the community, as well as community-based organizations, have essential knowledge and insight that must inform these analyses. Moreover, the FAA process presents an important opportunity for them to engage with decisionmakers

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<sup>3</sup> Some of the individual organizations signing this letter may submit additional, detailed comments regarding the Financial Alternatives Analysis provisions.

on issues of enormous significance that are often considered, if at all, out of the public's view.

- The Guidance should state that a FAA will not be considered adequate if a utility does not commit to implementing certain alternatives that can be considered universally “feasible.” To take one especially stark example, any utility that diverts rate revenues to other non-utility purposes is not, by definition, doing everything feasible to reduce wastewater bills to residential customers, including low-income households. As another example, if a utility is eligible for SRF assistance with better terms than other available financing options, it must commit to applying for that assistance.
- The Guidance should require that a FAA must not only consider whether to implement certain types of programs generically (for example, a “customer assistance program”), but must also examine options for program design and assess the extent to which a proposed program design would improve affordability of bills, especially bills for low-income households.<sup>4</sup>
- The Guidance should require that commitments to implement selected alternatives must be included in enforceable mechanisms, alongside the compliance schedule. This should include reporting on implementation, evaluation of the results, and adaptive management as needed to ensure that the intended results are achieved.
- EPA must offer technical assistance not only to permittees doing these analyses, as the Guidance suggests, but must also build EPA's own capacity to critically review permittees' analyses, conclusions, and recommendations.
- Since states are responsible for most Clean Water Act permitting and enforcement, EPA must provide technical support to states to enable them to perform a critical review of permittees' analyses, conclusions, and recommendations.

*Second, EPA should require a FAA in any situation where alternative means of funding or financing a project could enhance a community's “financial capability” to meet Clean Water Act requirements. As proposed, a FAA is triggered only when a new poverty-related indicator (Lowest Quintile Poverty Indicator (LQPI)) indicates a “medium” or “high” impact. However, many of the alternatives to be considered under a FAA would also help reduce cost impacts that are not specific to low-income households.<sup>5</sup> Therefore, EPA should revise the Guidance to*

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<sup>4</sup> For example, Appendix C (p. 3) identifies lifeline rates, percentage-of-income payment plans, and bill discounts as three types of “customer assistance” programs for low-income residential customers. But for each of these options, specific choices regarding program design—and program implementation—can make all of the difference to whether the program provides meaningful relief to low-income households. *See, e.g.,* Sridhar Vedachalam and Randall Dobkin. 2021. “H2 Affordability: How water bill assistance programs miss the mark.” Environmental Policy Innovation Center, Washington D.C., <https://static1.squarespace.com/static/611cc20b78b5f677dad664ab/t/614ceba138df2542c1af1d70/1632431025551/Cap+Report-Final-May.20.2021.pdf>.

<sup>5</sup> For example, a medium impact or high impact score on the “Residential Indicator” can result from high compliance costs, as a share of median household income, being passed through to customers. Alternatives identified through a FAA can reduce the costs of compliance (for example, by reducing borrowing costs). They can

require a Financial Alternatives Analysis whenever a “medium impact” or “high impact” is indicated under any relevant metric used in the FCA, if the impact could be mitigated by alternative financing and funding approaches. Additionally, whenever a permittee cites drinking water compliance costs as grounds to seek an extended Clean Water Act compliance schedule, a FAA should be required to find solutions that reduce those costs (without sacrificing or delaying drinking water compliance).

**2. We support EPA’s proposal to include recommended limits on the length of compliance schedules that are shorter than EPA had previously proposed, but we urge EPA to provide more specific justification for the particular “scheduling benchmarks” included in the Guidance.**

In the Guidance, EPA explains (on p. 15) that it has reduced the length of recommended compliance schedules, as compared to the 2020 draft guidance, in recognition of the need to “consider human health and environmental impacts as well as costs when determining compliance schedules” and the fact that “prolonging [water pollution] could exacerbate environmental justice concerns.” We welcome this change.<sup>6</sup>

However, the Guidance’s recommended compliance schedule “benchmarks” remain longer than they are in the existing 1997 guidance. (For communities with “medium” financial capability challenges, the 1997 guidance recommends up to 10 years, whereas the 2022 draft Guidance recommends up to 15 years. For communities with “high” financial capability challenges, the 1997 guidance recommends up to 15 years, or in “unusually ‘High Burden’ situations up to 20 years; the 2022 draft Guidance recommends up to 20 years, or up to 25 years in situations with “unusually high” financial capability challenges.)

EPA has provided little or no rationale for the specific scheduling benchmarks selected. Ironically, EPA asks (on p. 16) that if commenters propose different benchmarks they should provide “examples to support the basis for such benchmarks.” We urge EPA to “support the basis” for the benchmarks it is proposing in the Guidance and allow a further opportunity for feedback.

**3. The Guidance should give significant weight to the benefits of compliance—not only the costs of compliance—when determining a compliance schedule.**

With limited exception, the Guidance focuses on myriad ways that permittees can use compliance *costs* to argue in favor of a *longer* compliance schedule, without identifying the *benefits* of compliance as a factor in favor of a *shorter* compliance schedule.<sup>7</sup> In other words, the

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also reduce the share of costs that are passed on to customers (for example, by securing grant funds in lieu of loans). The Guidance must require a FAA to identify alternatives that reduce those impacts.

<sup>6</sup> Among other things, the Guidance removes an allowance, included in prior drafts, for schedules of compliance to be up to the “useful life of the selected CWA control measures.” This would have opened the door to compliance schedules lasting untold decades.

<sup>7</sup> As noted above, the Guidance cites the need to address “human health and environmental impacts” and “environmental justice concerns” as reasons that EPA is now proposing shorter compliance schedule benchmarks than the Agency had proposed in the 2020 draft guidance. The Guidance also states (pp. 37-39) that certain

Guidance (like the existing 1997 guidance) presents clean water investments as a financial liability for the municipality and its ratepayers without meaningfully considering the “return” on that investment. 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 Tribes and 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.

**4. Certain aspects of the Guidance, which are meant to drive faster and more equitable progress towards meeting Clean Water Act goals, should be applied to water quality standards decisions, but EPA should not apply the Guidance in its entirety in the water quality standards context.**

EPA’s “1995 Interim Economic Guidance for Water Quality Standards” describes how municipal CWA compliance costs should be factored-in to water quality standards decisions, including decisions on variances, removal of designated uses, and antidegradation reviews. The 2022 proposed Guidance explains that the 1995 water quality standards guidance uses essentially the same methodology as the 1997 Financial Capability Assessment Guidance. Therefore, EPA is proposing to apply the 2022 proposed Guidance to water quality standards decisions on variances, designated uses, and antidegradation.

Certain aspects of the Guidance, which are meant to drive faster and more equitable progress towards meeting Clean Water Act goals, should be applied in the context of water quality standards decisions. We agree with EPA (on pp. 46-47) that a Financial Alternatives Analysis should be used whenever water quality standards decisions involve a consideration of municipal compliance costs, in order to solve affordability challenges rather than allowing them to become a barrier to achieving the goals of the Clean Water Act. Likewise, we agree with EPA (on p. 44) that, just as environmental justice concerns should receive priority in sequencing pollution reductions under a compliance schedule, environmental justice concerns should receive priority in sequencing pollution reductions under a water quality standards variance.

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environmental, health, and environmental justice concerns should affect the sequencing of projects within a compliance schedule.

Beyond those specific aspects of the Guidance, however, EPA should establish a separate process, including all stakeholders, to consider thoroughly any legal, technical, and practical considerations that may be unique in the context of water quality standards. The implications of applying the Guidance in its entirety to water quality standards decisions are unclear. They have not been vetted in a deliberate or transparent way. The Guidance itself attempts to draw some distinctions between water quality decisions that are time-limited (i.e., variances) and those that are not (i.e., removal of designated uses and allowing degradation of high-quality waters), but the Guidance's recommendations on how methodologies should differ in those two contexts are murky.<sup>8</sup> A much more deliberative and open process is needed.

**5. EPA must ensure that there is proactive community outreach and engagement, especially to environmental justice communities, whenever the analyses envisioned under the Guidance are performed.**

In comments many of our groups submitted on the 2020 draft of the guidance, we urged EPA to ensure that affected members of the community have opportunities for meaningful input in developing financial capability assessments and in determining how a completed assessment should impact a municipality's Clean Water Act compliance obligations. When these issues play out at the local level, as the results have profound impacts for people's health, environment, and affordable access to essential water and sanitation services. A financial capability assessment must not be a closed-door process that ignores their knowledge, insights, and preferences—or that considers them only at the tail-end of a process when proposals have been solidified and decisions have largely been made.

The 2022 proposed Guidance includes a couple of references to public participation, which were missing from EPA's 2020 draft of the guidance. But these brief references suggest only a limited role for public engagement, with no special focus on the most acutely impacted environmental justice and low-income communities and no clear expectations of proactive outreach and engagement.<sup>9</sup> Moreover, these references only offer recommendations to municipalities and

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<sup>8</sup> The Guidance asserts that many of the methodologies it proposes for weighing municipal financial capability are “most appropriate” in the context of variances, as compared to other sorts of water quality standards decisions. This is because variances, like compliance schedules, allow an extended timeline to meet existing pollution limits. In contrast, because removing a designated use eliminates entirely the obligation to comply with certain pollution limits, the Guidance (on pp. 43-44) vaguely “recommends caution” when applying the same methodologies in that context. Similarly, the Guidance also suggests (on p. 46) that antidegradation reviews warrant greater caution because they can result in more lasting, adverse water quality impacts than a temporary variance. For all three types of water quality standards decisions, however, the Guidance does recommend (on pp. 46-47) using a “Financial Alternatives Analysis” to examine options that could ameliorate financial impacts instead of weakening water quality standards.

<sup>9</sup> For example, the Guidance states (p. 39) “Before seeking an extended schedule, EPA also encourages communities to actively involve the affected public by holding public meetings. The affected public includes rate payers, industrial users of the sewer system, persons who reside downstream from the CSOs, persons who use and enjoy these downstream waters, and any other interested persons. For any change to WQS, a public hearing is required per 40 CFR 131.20.” Similarly, the Guidance states (on p. 44) “[P]ublic hearings, required by the WQS regulations when reviewing or revising WQS, provide opportunities for public comments, including comments on potential environmental justice concerns resulting from changes to designated uses when they are initially proposed and during subsequent triennial reviews.”

utilities, without stating a commitment by EPA and state regulators to ensure that effective public engagement takes place.

The Guidance must do more. It must clearly set expectations for proactive outreach to and substantive engagement with residents of affected communities who have a unique understanding, from firsthand experience, of factors that are critical to the analyses required under the Guidance. This must include targeted outreach early in the process, especially to environmental justice communities and local organizations representing the interests of, for example, low-income people, people of color, and immigrant populations. The residents and organizations have unique knowledge, for example, of how sensitive populations use water bodies impacted by wastewater and stormwater pollution and of the localized health and environmental harms of that pollution. Likewise, as noted above (in point #1 of this letter), they have a unique knowledge of how water and sewer rates affect low-income households and insights into (as well as the greatest stake in) how alternative rate designs and customer assistance programs, which must be considered in a Financial Alternatives Analysis, can most effectively reduce cost burdens on low-income households. This public engagement must include genuine give-and-take with community members, not only opportunities for public comment or hearings where decisionmakers passively listen without engaging in joint problem-solving.

The Guidance should also make clear that the Clean Water Act regulatory agencies – the states and EPA – must take responsibility for ensuring this happens, and that it is done effectively, rather than simply encouraging municipalities and utilities to take these steps. Moreover, states and EPA should be directly involved in public engagement efforts.

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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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