



THE UNITED STATES
CONFERENCE OF MAYORS



March 21, 2024

Ms. Kathryn Kazior
U.S. Environmental Protection Agency
Office of Wastewater Management, Water Permits Division (MC4203M)
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Draft Guidance for Future National Pollutant Discharge Elimination System (NPDES) Permitting of Combined Sewer Systems, Docket ID No. EPA-HQ-OW-2023-0475

Dear Ms. Kazior,

On behalf of The United States Conference of Mayors and the National League of Cities, we appreciate the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA) *Draft Guidance for Future National Pollutant Discharge Elimination System (NPDES) Permitting of Combined Sewer Systems*. Our comments also address a separate, yet interconnected recent EPA water quality standard (WQS) memo, *CSO Temporal Recreational Uses or WQS Variances based on 40 CFR 131.10(g)(3)*.

Overall, we appreciate the Agency's efforts to make Clean Water Act (CWA) compliance programs more flexible and to inform communities of future paths forward for managing wet weather. However, in its current form, the Draft Guidance lacks clarity, and in conjunction with the Memo, does not provide a reasonable level of certainty regarding future action for communities managing combined sewer overflows (CSOs). We are concerned that the actions taken by EPA on this issue hinder the ability of local governments to improve water quality and protect public health. **As such, we urge EPA to modify both the Draft Guidance and the Memo before finalizing. Furthermore, it is our view that because of the potential economic significance for local governments, the Agency should review the Draft Guidance and Memo as it relates to Executive Order 13132: Federalism and, if necessary, adhere to the consultation requirements to improve the effectiveness and implementability of these policies.**

Local governments serve as co-regulators in implementing and enforcing many federal laws with states, including the CWA, and our members take these responsibilities seriously. Today, there may be over 800 communities in the United States served by combined sewer systems (CSSs). CSO events that result during heavy rain or storm-related weather occurrences represent a critical clean water and public health concern for our members and their constituents. To address this, the Agency issued its first CSO Policy in 1994 and since then

local governments have made significant progress in working towards the policy's goals, including monitoring for water quality standards (WQSs), implementing long term-control plans (LTCPs), and reducing overflows.

Despite this progress, municipalities still face challenges in addressing CSOs, mainly surrounding affordability concerns with implementing their LTCP. Because CSO policy relies on consent decrees that establish legally enforceable LTCPs, significant capital investments and substantial annual operating and maintenance investments are necessary to implement the plans.

It is critical to emphasize that it is local governments, not the federal government, who fund the majority of all water and wastewater investments. Therefore, the cascading effects of costly new mandates combined with aging infrastructure needs has placed local governments, and more specifically local ratepayers, in an increasingly unsustainable position to finance public operations that provide clean, safe and affordable wastewater services. At a time when many CSO communities are nearing, or having already completed the goals outlined in their LTCPs, EPA needs to ensure communities are not spending exorbitant costs on additional CSO controls that result in marginal water quality benefits.

We express concern that the joint effects of EPA's Draft Guidance and Memo will result in confusion and constrain local government's ability to utilize flexible tools, such as those made available through the Integrated Planning and Permitting model. The information provided in both documents should be clear, consistent, conform to federal regulations, and adhere to existing CSO Policy. We point to several examples of confusing language.

Variances, for example, are an important tool used by local governments that provide temporary relief to improve water quality. Federal regulations outline six factors states can point to when attempting to obtain a use attainability analysis (UAA), and these factors may be analyzed either separately or in combination with each other. However, both documents appear to ignore this and instead focus on a single different factor in each. We are concerned that the Agency is stating that the other five statutory factors available would not or could not be considered. Additionally, where the Memo does mention the role of Factor 3 it only describes a portion of Factor 3 as a critical criteria.

The Agency should specify that it is not limiting pathways for communities trying to obtain a UAA or variance, and that all currently codified Factors are available to National Pollutant Discharge Elimination System permit holders if needed.

We urge the Agency to revise both the Draft Guidance and its Memo to clarify that any or all of the six factors can be considered when communities seek to obtain a UAA and/or variance when they are in compliance with their CSO LTCPs.

The Draft Guidance is also unclear regarding under what determinations CSO discharges will be considered as the source for remaining WQSs concerns, specifically in the scenario where performance objectives have already been achieved. For example, nonattainment WQSs often are the result of sources of pollution not related to CSO discharges. Our concern is that local governments will be held responsible for additional costs to implement additional controls even

when these will not result in improved water quality. This situation would be contrary to existing CSO policy. As mentioned before, communities at this stage of their LTCPs have already committed a substantial amount of resources to meet the goals outlined in EPA's CSO Policy. Therefore, as the Agency moves forward on how best to inform communities, further clarity on this issue would help provide certainty and address liability concerns.

The discussion of integrated planning is another area where the Draft Guidance and Memo fall short as they seem to mischaracterize the purpose of an integrated plan. As you know, our organizations worked with EPA for years to develop the Integrated Planning Framework, which was later codified into law. Integrated planning provides important flexibilities for local governments for meeting their CWA requirements in a cost-effective and efficient manner. The Draft Guidance and Memo should be revised to align with the Integrated Planning Framework as codified under the CWA.

Finally, the Draft Guidance also suggests permit authorities take additional climate and equity factors into account when assessing future CSO planning. While we support the Agency's focus on advancing environmental justice and adapting to climate impacts, we urge EPA to ensure that any additional required actions or considerations by a permitting authority fall under the appropriate scope and authority of EPA and the CWA. Failing to do so jeopardizes implementation of the Draft Guidance in a cost-effective and practical manner.

Conclusion

On behalf of the nation's mayors and cities we urge EPA to modify both the Draft Guidance and the Memo to address local government concerns. Additionally, we advise the Agency to coordinate and consult with key stakeholders (water industry groups, local government organizations, etc.) to ensure meaningful and constructive input, including through the Federalism Consultation process. In addition to the comments raised in this letter, we support the comments submitted by the National Association of Clean Water Agencies and Barnes and Thornburg on behalf of local government clients.

If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; and Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org.

Sincerely,



Tom Cochran
CEO and Executive Director
The United States Conference of Mayors



Clarence E. Anthony
CEO and Executive Director
National League of Cities