August 2, 2016

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Submitted Via: www.regulations.gov

Re: Comments on NPDES Applications and Program Updates [EPA-HQ-OW-2016-0145]

The National Association of Clean Water Agencies (NACWA) is pleased to provide comments on the U.S. Environmental Protection Agency's (EPA's) proposed rulemaking regarding updates to the National Pollutant Discharge Elimination System (NPDES) program (81 *Fed. Reg.* 31344). NACWA circulated the proposed rule to its public clean water utility members for review and comment. We have received numerous responses from our membership, demonstrating both support and opposition to various elements of the proposal but all universally opposed to the proposed revisions of 40 CFR 123.44 regarding the EPA's objection to administratively continued permits. NACWA's overall comments and provision-specific comments are included below, many of which highlight that the rule's intent seems at odds with its likely consequences.

Permit Application Requirements

NPDES Program Definition of Whole Effluent Toxicity Definition (40 CFR 122.2)

EPA proposes to revise the existing definition of whole effluent toxicity (WET) to refer to both acute and chronic WET test endpoints. EPA argues that this change is consistent with the Agency's current interpretation, but not every state is implementing the WET program as EPA has envisioned. EPA explains that if a state chooses to have its WET water quality standards focus on either acute or chronic toxicity, then permit limits would be written only to address the chosen endpoint. If the proposed definition makes no difference in how states or EPA conduct business, this suggests the change is unnecessary and is simply a new pressure point for the Agency to use on states that may not currently impose both acute and chronic WET endpoints.

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Changes to Existing Application Requirements (40 CFR 122.21)

Under the proposal, publicly owned treatment works (POTWs) will be required to provide the latitude and longitude of the discharging facility to the nearest second, along with the method of data collection. Permittees with combined sewer overflows (CSOs) are already required to report the latitude and longitude of their CSO outfalls, but would be newly required by this rule to report the method of data collection used. POTWs and collection systems have access to, and can reasonably provide, all of this information.

The proposal clarifies that POTWs are required to submit, in their application, all relevant information from all significant and nonsignificant industrial users (SIU and NSIUs). NACWA's Pretreatment Committee confirms that this change aligns the permitting regulations with the pretreatment regulations at 40 CFR 403.3(v) and will not impact POTW's existing pretreatment programs. Most already account for both categories of SIU/NSIUs.

This section also includes a proposed change to the application for new municipal dischargers allowing the permit authority to collect data 18 months after commencement of discharge. NACWA opposes this change -- the current 24-month deadline is the most appropriate time frame because it provides a more complete data set over two full annual cycles. Two years allows the permitting authority a better representation of effluent water quality variability and allows comparison of water quality and flow conditions across two complete years, thus accounting for seasonal abnormalities.

Water Quality-Based Permitting Process

As currently written, the proposal's language on antidegradation, dilution allowances, anti-backsliding, and design flow appear to establish more rigid parameters for writing permits than the flexibility that has existed in the past. These are all areas where EPA has raised concerns with certain states during their permit reviews, and although the Agency may feel that including more explicit language in the NPDES regulations will help to address inconsistences, the full and perhaps unintended consequences of the proposed language must be considered.

Antidegradation Reference (40 CFR 122.44(d))

The federal regulations at 40 CFR 122 are the primary source for implementation of the NPDES permit program. Antidegradation is a policy to be implemented by the water quality standards (WQS) program, not to be used in a permitting context. There is no mention of antidegradation requirements in the current Part 122 regulations beyond the requirement that permits must include limitations that will ensure water quality standards are met. This is appropriate because antidegradation cannot be addressed in the NPDES program. There is no direct relationship between the permit limit setting process and the antidegradation policy.

The antidegradation policy focuses on existing uses while permit limits are set to protect designated uses. In order to set a limit to address an existing use the permit writer would need to establish a criteria to protect the existing use. This is done via the WQS program. If an existing use exceeds a designated use, this should be identified in the WQS program and a new use and criteria set, which can then be used in the permit program.

Dilution Allowances (40 CFR 122.44(d))

EPA proposes to replace the current language that allows consideration of dilution "where appropriate" with language specifying that any dilution allowances must comply with applicable dilution and mixing zone requirements, low flows established in state WQS, and be supported by data or analyses quantifying or accounting for the presence of each pollutant in the receiving water. While EPA indicates it is looking for states to better justify their permitting decisions and provide more extensive documentation and clarification, this language is vague given that mixing zones are a state policy issue and will vary greatly from state to state. The proposed language increases ambiguity because it appears to reduce state authority to authorize mixing zones. Also, the preamble provides no specificity to guide the permit writer. For instance, the preamble states, "Where the actual assimilative capacity of the receiving water cannot be accurately determined or predicted (e.g., by using data, models, or analyses)." How would "accurately" be defined? When doing a dilution analysis, third party data submitted for use in the analysis, though consistent with current EPA guidance, must not interfere with states' existing QA/QC processes. It would be up to the permit authorities to verify and substantiate any data.

The proposed language should be modified to acknowledge that states already have a policy for accounting for levels of pollutant in a receiving water which use relevant and available data pertaining to the discharge. One NACWA member notes that because of the way this new language is phrased, they potentially would have to do a water quality study on pollutant background levels when a dilution or mixing zone is applied – which provides little environmental benefit and would cost $10,000 - $30,000 per facility.

Anti-backsliding (40 CFR 122.44(l))

Anti-backsliding sections were added to the Clean Water Act (CWA) in 1987, but EPA never updated its regulations to be consistent with the statute. The Agency states that the statutory language is incorporated verbatim, when in fact the new Section 122.44(l)(3)(ii) is missing the first clause of CWA 303(d)(4)(B), "For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards." EPA should incorporate the missing language into the regulation so that the anti-backsliding provision applies only to those waters that are attaining standards, not all waters, as intended by the CWA.

Design Flow for Publicly Owned Treatment Works (40 CFR 122.45(b))

The proposed revisions to 40 CFR 122.45(b) would provide permit writers with additional flow options, not just design flow, for modeling and calculating water quality based effluent limitations (WQBELs) for POTWs. Any limits based on actual flows versus design flows could restrict the ability of POTWs to use existing infrastructure to its full capacity. For example, mass-based limits set using actual flows instead of design flow would be exceeded if the POTW's flow increases due to growth in the community, over which the facility has no control. The majority of NACWA members oppose the use of anything other than design flow, especially in light of anti-backsliding provisions which would prevent future changes in effluent limitations even as flows increase. Many members noted they see per capita water use in decline over time, causing facilities to run well below design discharge during drought or similar conditions. This "new normal" is a good example of why facilities need the flexibility to account for not only existing conditions but also plan for future changes in weather and growth patterns.

If, as EPA states, the proposed change "is not intended to discourage permitting authorities from current practices under which design flow is used for WQBEL development," then why propose the change in the first place? As currently drafted, the regulation change will not achieve what seems to be intended in the preamble.

Public Notice Requirements (40 CFR 124.10)

The proposal makes minor revisions that would allow permitting authorities to public notice both general and individual NPDES permit actions via a publicly available website in lieu of the newspaper publication requirement. NACWA members overwhelmingly support the proposed changes to the public notice posting requirements as described to allow for public notices of major NPDES permits to be posted on the permitting authority's public website, in lieu of posting in a daily or weekly newspaper. In many cases, permitting authorities already use their websites to publicly notice their permitting activities, and in regions with near-ubiquitous connectivity, there would be considerable cost savings to eliminating the newspaper notification. That being said, EPA should not require NPDES permitting authorities to public notice all NPDES notice and hearings on their website.

Fact Sheet (40 CFR 124.56)

EPA is also proposing new language that more precisely outlines the information and documentation required in fact sheets prepared by the permitting authority for each individual and general NPDES permit. It is NACWA's understanding that the level of detail contained in fact sheets varies significantly across permit types, as well as within and between states. Most of NACWA's members support consistent fact sheets that would require the state to include documentation and background information about how each limit and determination was made. More detail in permit fact sheets would provide permittees with a clear record and documentation of how limits were derived, and in cases when there is no limit, the analysis in the fact sheet could provide needed legal protections in the event of a permit challenge by an outside stakeholder.

Objection to Administratively Continued Permits (40 CFR 123.44)

EPA proposes to revise section 40 CFR 123.44 to allow its regional administrators to designate certain expired NPDES permits that are deemed "environmentally significant" as "proposed permits." While we recognize that administratively continued permits may in rare instances result in lengthy delays for permit reissuance, NACWA member utilities universally do not support EPA's proposal to revise 40 CFR 123.44 to allow for EPA's designation of expired, administratively continued permits as "proposed permits."

This approach will not achieve EPA's goal of ensuring timely permit renewals. First, EPA already has a number of tools to address delays in the state permit reissuance process. Currently, EPA is able to identify expired permits as priorities and work with states to get them revised and reissued. NACWA believes EPA's existing tools are adequate to ensure that states dedicate appropriate resources to timely renewing permits. Where permits have not been timely renewed despite existing state and EPA tools, our members and state clean water organization counterparts have indicated it is likely because other factors as variable as total maximum daily load (TMDL) development and loan funding issues are at play.

Second, the Agency itself has limited resources to address a significant additional number of permits. The proposal notes approximately 17,000 facilities are operating under expired permits as of September 2015. By citing what appears to be a high number of administratively continued permits, EPA seems to be suggesting

states and permit authorities have an unreasonable permit backlog. But this argument falls flat when, based on our research, delegated states out-perform EPA in terms of issuing permits on schedule.

The proposed rule change would give EPA more leverage with states over those permits it considers "environmentally significant." But it is not entirely clear what could be deemed "environmentally significant"; the proposal highlights everything from new and revised WQS to public health issues as examples. EPA's potential triggers for use of this provision are basic elements of the CWA program, such as whether there is a new or revised WQS that has not been implemented in the permit. Given the frequency with which EPA revises its water quality criteria, this provision could pull in hundreds if not thousands of the facilities operating under expired permits as of September 2015, including POTWs and municipal stormwater systems. Despite EPA's assurances, if this provision is finalized, many municipal permits will be affected when the Agency exercise this authority.

This provision also raises significant legal concerns. EPA has stated that it would only exercise this authority when a permittee has filed a timely application for a new permit and the state has not acted for a substantial period of time. One concern is that, during this review, EPA would be examining the existing, expired permit - which could be significantly out of date - and not the new permit application from the permittee. Such "proposed permits" would not reflect the most recent application for renewal (filed at the end of the original term of the administratively continued permit). The result is that the "proposed permit" likely does not contain the appropriate effluent limitations and conditions.

This raises important questions regarding the compliance status of the permittee operating under a permit that has received an EPA objection. As written, the proposal does not ensure permittees are not penalized by the perceived failure of the permitting authority to renew their permits. Additionally, should a permit get to the point where EPA becomes the administrator, it would now be a federal permit. Outside stakeholders tend to be more quick to challenge federal permits for a number of reasons, not the least of which are the generous terms of the CWA's citizen suit provision. This could in turn lead to municipal permittees using municipal funds to pay attorneys' fees.

Every effort should be made to preserve the state and federal partnership, and this could be accomplished using existing mechanisms. To the extent EPA believes that these programs for timely issuance of key permits need improvement, that is a program management issue that should be addressed by EPA and states cooperatively. For example, if the Agency feels that it needs greater ability to focus on a particular permit and get that permit reissued in the near-term, a provision promoting that goal could be made part of the EPA/State agreements under which the Federal Government provides funding for state water programs under Section 106 of the CWA. EPA and states authorized to implement the NPDES program also enter into Memoranda of Agreement (MOAs) to improve effective implementation of the program. Although they are not legally binding or enforceable, it is worth noting that individual MOAs between EPA and states include a definition of "proposed permit" and could be revised accordingly. It would make sense to modify those agreements first, and see if that addresses the concern, before making major changes to the NPDES rules to try to accomplish the same aim.

For all of these reasons, the "Objection to Administratively Continued Permits" provision should not be adopted. To the extent EPA chooses to move forward with this approach, we believe it should only become an

option after a permit has been continued for five years (instead of the two years proposed). Additionally, EPA should provide the permittee and the state with no less than 180 days' notice of EPA's intention to designate a proposed permit for this unusual renewal process.

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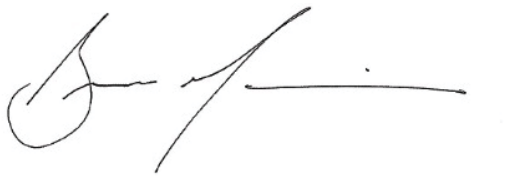
NACWA appreciates the opportunity to submit these comments concerning EPA's proposed changes to the NPDES regulations on behalf of our members. Please feel free to call (202/533-1839) or e-mail if you have any questions, or if you would like any additional information on the above issues.

Sincerely,



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