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Adam Krantz

June 6, 2017

Jeffrey H. Wood
Office of the Assistant Attorney General
Environment and Natural Resource Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Via mail and email: JWood@ENRD.USDOJ.GOV

RE: Municipal Wet Weather Consent Decrees

Dear Jeff:

Thank you again for meeting with the National Association of Clean Water Agencies (NACWA) on May 8 and for your follow-up letter welcoming the opportunity to work together to accomplish our shared goal of ensuring a strong clean water future for the environment and the American public. The NACWA utility leaders who attended the meeting appreciated the ability to share their on-the-ground perspectives of enforcement challenges and ways we can address those challenges to achieve net environmental benefits in a responsible and sustainable manner.

I will recap and elaborate on some of the issues addressed during our meeting.

- *A Focus on Compliance Assistance Instead of Enforcement* – One of the largest cost drivers for public clean water utilities has been the massive expenditures mandated by enforcement orders and consent decrees. Although enforcement may be necessary in certain situations, EPA should focus on assisting communities with compliance assistance first and only refer cases to DOJ and begin formal judicial enforcement proceedings when efforts at compliance assistance have failed. Likewise, DOJ should exercise its enforcement discretion and conserve enforcement resources for recalcitrant entities. NACWA would like to see DOJ and EPA work jointly on this “assistance first, enforcement second” approach and would be happy to provide additional thoughts and ideas on how this might work if that would be helpful.
- *Rethink Civil and Stipulated Penalties* - One of the metrics EPA uses to evaluate its success on the wet weather enforcement front is amount of penalties assessed in a given year (see [EPA’s Annual Enforcement Results Numbers at a Glance for Fiscal Year \(FY\) 2014](#)). In addition to including penalties assessed in its annual enforcement report, every press release issued by EPA and DOJ announcing a consent decree emphasizes the penalty as one of the key components of the decree. While penalties may be necessary from a diligent prosecution standpoint, taking resources from a local community/government that will be saddled with significant financial obligations affecting current and future

generations should be viewed as a legal necessity of the process rather than a highlight of the success of the program.

Indeed, EPA and DOJ should focus on minimizing penalties as much as possible, so that more funds can be spent on local water quality investments that will result in actual environmental improvements. EPA and DOJ should also consider the stigma associated with such punitive measures and how the negative rhetoric and course of action might be perceived at the local level by decision-makers, stakeholders, and ratepayers, all of whom will be relied upon for the needed revenue to comply with the consent decree. The reality is that penalties provide no tangible benefits to the communities that pay them nor result in any water quality improvements. They are accordingly a poor metric to measure success.

Furthermore, public utilities do not profit from noncompliance; thus, penalties do not serve the same objective as with private industry – e.g., deterrent effect and leveling of the economic playing field by eliminating monetary benefit from noncompliance. Municipal, state and federal entities are all public stewards with vitally important roles to ensure environmental and public health. We are, in short, all in this together and the focus on monetary penalties as a benchmark of success undermines this fundamental reality and unnecessarily leads to a confrontational rather than a coordinated and collaborative environmental ethic.

- *New Metrics of Success*– The focus of the wet weather enforcement program has been to control pollutants to lower and lower levels with little consideration of the other sources of pollution and with insufficient scientific evidence to support whether the new pollutant levels will lead to actual water quality improvements. NACWA is committed to changing this approach to shift the focus to more holistic solutions centered around net environmental improvements, not just individual pollutant levels. This is particularly true with complex issues like nutrients, where nonpoint sources are the leading contributors in most watersheds. Given our common overarching goals, DOJ and EPA should help NACWA champion *net environmental benefit* as the key metric of success.
- *Affordability Challenges* – Affordability issues are confronting clean water agencies nationwide, and are creating significant barriers to additional investments. A recent report, [A Burgeoning Crisis? A Nationwide Assessment of the Geography of Water Affordability in the United States](#), published by Michigan State University explores the geographic and socio-economic factors influencing water affordability across the United States. The authors found that 11.9% of households in the U.S. currently are unable to adequately afford their water services; the report found that this figure could almost triple over the next five years based on rate increases for water services. EPA and DOJ must acknowledge the increasing and worsening affordability challenges and work more proactively with communities to address affordability.
- *Continued Support for Integrated Planning & Community Prioritization of Clean Water Investments* – EPA’s embrace and support of Integrated Planning concepts, which provide clean water utilities with more flexibility and control in how they meet their regulatory compliance obligations and prioritize their investments, is one of the most important clean water regulatory developments of the past decade. DOJ should promote the inclusion of integrated planning in new decrees and should welcome modifications to existing decrees to incorporate this common-sense approach.
- *Consistency* - EPA and DOJ should ensure consistent negotiation of wet weather enforcement initiatives among its Regional offices. One of the biggest frustrations NACWA members have experienced over the years on enforcement issues – and one of the biggest complaints NACWA has received from its members who have engaged in consent decree negotiations – is the wide disparity in EPA and DOJ negotiation tactics and enforcement approaches across the country. For example, the lack of a national sanitary sewer overflow (SSO) policy has created inconsistencies in how EPA addresses SSOs in various enforcement actions. While compliance solutions should vary depending on the unique circumstances of each community, the terms of

an agreement should not depend on the personalities of representatives assigned to the matter from DOJ and the EPA enforcement offices, EPA enforcement quotas, regional politics, or the sophistication of the entity and ability to afford representation by attorneys skilled in these types of agreements. The goal of any negotiation or renegotiation should be achieving the best environmental and public health return for each ratepayer dollar invested.

- *Modification of Existing Decrees* - EPA's 2015 data shows that 201 out of a universe of 213 Combined Sewer Systems serving a population greater than 50,000 have been addressed through federal and/or state decrees or permit requirements. Of an estimated total of 1103 large separate sanitary systems (discharging more than 10 million gallons per day of wastewater) that have SSOs, 914 systems have been addressed. These figures demonstrate the breadth of existing enforcement. Indeed, approximately 100 of NACWA's 300 public utility members are under some form of consent decree related to sewer overflows. The infrastructure programs and projects that arise under these decrees will often be the most expensive public infrastructure investments a local government ever makes. Yet decrees are relatively static vehicles to address a dynamic problem. With aging infrastructure, changing wet weather patterns, evolving technology, diminishing funding sources and options, community affordability challenges, population growth, development, and shifting regulatory drivers and priorities, an adaptive management approach is critical. Many of our members are also encountering regulatory barriers as they work to embrace innovative approaches and technologies related to energy production, water reuse, green infrastructure, and non-traditional partnerships. To continue to make the kind of progress that justifies the large expenditures mandated, EPA and DOJ should not only be open to modification, but should champion a policy encouraging modification of decrees where the utility/community can demonstrate that the modification will result in an increased net environmental benefit outcome.

In closing, the solutions and flexibility that NACWA seeks are non-partisan. It is in the public's best interest to ensure that these approaches are memorialized in a way that will transcend politics and administration changes.

The challenges facing our nation's public clean water agencies are significant, but the opportunities to address these challenges and improve water quality by working together have never been greater. NACWA looks forward to continuing to work with you and members of your team. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Adam Krantz". The signature is written in a cursive, flowing style.

Adam Krantz
CEO