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March 14, 2017

Kevin Weiss
Water Permits Division
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460
Submitted via www.regulations.gov

Re: Docket EPA-HQ-OW-2016-0376, Public Notification Requirements for Combined Sewer Overflows to the Great Lakes Basin

Dear Kevin:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the proposed public notification requirements for combined sewer overflows (CSOs) into the Great Lakes (82 FR 4233, January 13, 2017). NACWA represents the interests of nearly 300 publicly owned wastewater treatment agencies nationwide, including 30 utilities that have CSO discharges into the Great Lakes. NACWA's utility members are committed to protecting the environment and public health, and are on the front lines every day providing clean water services to their communities. NACWA and its Great Lakes utility members are supportive of providing public notification of CSOs in a manner that is appropriate for each community and that does not divert utility resources from their work to manage and control CSOs.

Section 425 of the Consolidated Appropriations Act of 2016 ("Section 425") requires EPA to work with the Great Lakes states to create CSO public notification requirements for the Great Lakes. Section 425 allows EPA to determine the method of the notice, the contents of the notice (to include date, time, and volume of the discharge and any public access areas affected), and the requirements for public availability of the notice. In addition, Section 425 directs EPA to develop a follow-up notice requirement to provide the cause of the discharge, plans to prevent a reoccurrence, and an annual list of utilities submitting a follow-up notice.

As Congress crafted the legislative language, a key goal was to provide maximum flexibility in notification requirements given the wide variability that exists in terms

of utility size, structure, and capacity. Congress thus provided EPA with considerable discretion in determining how utilities must provide public notification of CSOs.

NACWA appreciates that EPA has provided some flexibility for utilities in the proposal, including the ability to use either modeling or monitoring for determining the occurrence of CSOs, but NACWA is concerned about aspects of the proposal that are impractical for utilities and do not take advantage of the flexibility provided in Section 425. In addition, NACWA believes that EPA has expanded the applicability of the rule beyond the intended scope of Section 425 and proposed requirements that exceed those outlined in Section 425. NACWA's comments below outline recommendations for revising the notification requirements to align them with the Section 425 requirements and make them suitable for all utilities with CSO discharges into the Great Lakes basin.

Applicability of Requirements

NACWA believes that EPA has significantly expanded the applicability of the proposed requirements beyond what is specified in Section 425, which directs EPA to "create public notice requirements for a combined sewer overflow discharge to the Great Lakes." Section 425 states that "Great Lakes" is defined by 33 USC 1268(a)(3)(B):

(B) "Great Lakes" means Lake Ontario, Lake Erie, Lake Huron (including Lake St. Clair), Lake Michigan, and Lake Superior, and the connecting channels (Saint Mary's River, Saint Clair River, Detroit River, and Saint Lawrence River to the Canadian Border)

This definition does not include tributaries to the Great Lakes, which are included in the definition of "Great Lakes System" in 33 USC 1268(a)(3)(C):

(C) "Great Lakes System" means all the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes.

However, EPA proposes applying the notification requirements to all discharges in the "Great Lakes Basin," which it defines as a combination of the "Great Lakes" and "Great Lakes System." If Congress had intended all of the tributaries to the Great Lakes to be included in the notice requirements, then Section 425 would have referred to "Great Lakes System" and 33 USC 1268(a)(3)(C) instead of "Great Lakes" and 33 USC 1268(a)(3)(B). NACWA requests that EPA apply the notifications only to CSO discharges into the Great Lakes, as defined in Section 425, not the EPA-defined "Great Lakes Basin."

NACWA also requests that EPA not apply the notification requirements to CSO discharges that do not flow to the Great Lakes. For example, EPA makes multiple references to the Metropolitan Water Reclamation District of Greater Chicago's (MWRDGC) multiple permitted CSOs as discharging to the "Great Lakes Basin". While the MWRDGC has an extensive CSO Public Notification System that it has implemented for many years and will continue to do so, the vast majority of the MWRDGC's CSOs do not discharge to the Great Lakes or Great Lakes System.

Modeling and Monitoring Requirements

NACWA supports EPA's proposal to allow utilities to use modeling, monitoring, or other means to determine the occurrence of CSOs and to estimate or measure the volume and duration of CSO discharges. Since Section 425 does not specify how the information required in notifications should be determined by utilities, utilities should be able to use the approach that works best with their infrastructure and staff.

Monitoring and modeling of combined sewer systems can both be effective methods for determining the occurrence and characteristics of CSOs. However, both present different challenges for utilities. Modeling is not always an accurate depiction of what actually occurs in a system, and models can be difficult to upgrade and calibrate. Not all utilities have the ability to model their collection system and this work must be contracted out, which is costly for the utility. Sensors and other equipment used for monitoring can be expensive, easily broken, and can be difficult to maintain due to the high flows, debris, remote locations, and other harsh environmental conditions in a combined sewer system. Installing a monitoring system (real-time or otherwise) also may not make sense for a utility that is working to control or eliminate CSOs or is otherwise performing significant work on its system. For these and other reasons, EPA should ensure that the final rule allows each individual utility to decide on the data collection approach that works best for them.

NACWA requests that EPA remove its proposed requirement that "CSO permittees that are a municipality or sewer district with a population of 75,000 or more must calibrate their model at least once every 5 years." This requirement is unnecessary, since there is no need to calibrate a model at this arbitrary frequency if no significant changes have occurred in the system. Since calibrating a model can cost hundreds of thousands of dollars, recalibrating the model should be done when the utility determines that it is necessary based on data collected or alterations of the system. The use of resources needed for recalibration is also not justified for utilities with control programs that require elimination of CSOs.

Initial Notification

EPA proposes that "As soon as possible, but no later than four (4) hours after becoming aware by monitoring, modeling or other means that a CSO discharge has occurred, the Great Lakes Basin CSO permittee shall provide initial notice of the CSO discharge" to the local health department, any affected public entity, and the public. This four-hour notification period is too short and "becoming aware" is too vague to determine when this brief notification period should begin. The utility's obligation related to "becoming aware" is not clear, creating a potential for citizen lawsuits against utilities. NACWA urges EPA to specify a 24-hour time period for reporting and to clarify what it means for a utility to "become aware" of a CSO.

Although some states have requirements for notification in four hours or less, NACWA members in these states indicate that during this time period they typically report the *potential* of a CSO, based on a threshold rainfall. In some regions where rainfall amounts are very unpredictable, a utility would be inclined to send out notifications prior to each rain event, which will end up being ignored by the public.

A 24-hour reporting period is more practical than a four hour one for some utilities with CSO discharges to the Great Lakes. Utilities have different levels of staffing throughout each day and week. Some utilities are not staffed 24 hours a day, seven days a week, or have limited staff during night and weekend shifts. Although utility staff during nights or weekends may be aware of the potential of a CSO occurring due to heavy rainfall, the staff that can determine whether a CSO is actually occurring and provide the proper notification to the public health department, affected entities, and the public, may not be available until the following workday.

Allowing a 24-hour time-period for notification would provide sufficient time for the proper staff to evaluate the occurrence of CSOs and make the required notifications. Additionally, entities to whom permittees would be making such notifications, such as local health departments, may not be available 24 hours a day or on weekends and holidays.

EPA requested input on the content of the initial notification and NACWA recommends that EPA only require the information requested by Congress in Section 425, specifically that the CSO is occurring and that certain water bodies may be affected. CSO volume should not be a requirement of the initial notification, since the duration of a CSO cannot be determined in advance. The end of the CSO discharge should only be included in the supplemental notification, so that it is not seen as an “all clear” signal by the public. CSO discharges are not the only sources of bacteria in the Great Lakes, and in some cases, CSO discharges may even be insignificant compared to other sources. Although recreational water users might like notification of when a CSO event has ended, the inconsistent nature of CSO flow makes this difficult or impossible. This type of notification might give a false impression that the water is safe after a CSO event has concluded. In addition, any risk to public health should be defined by the public health departments, not the utilities.

The issue of when a utility “becomes aware” of a CSO, and thus must follow the reporting notification requirement, needs clarification. NACWA believes each utility should be empowered to determine, based on the specifics of how its system operates, when it should appropriately “become aware” of a discharge. This could include modeling, monitoring, or other methods as determined by the utility. “Awareness” should not be based solely on unsubstantiated reports from the public. For instance, a phone call or email from a member of the public about an alleged overflow in the middle of the night should not be enough for a utility to “become aware” of a CSO event and trigger the mandatory reporting requirements. Each utility should be able to determine a systematic process to verify the existence of an overflow through appropriate methods before the reporting requirements kick in. Determining how a utility “becomes aware” of an overflow is an area where NACWA would like to work closely with EPA moving forward before any final requirements are promulgated.

Supplemental Notification

EPA proposes that a supplemental notification be submitted within 24 hours after the end of a CSO, to include the volume of the CSO and the time the discharge ended. NACWA requests that EPA provide a minimum of seven days for the supplemental notification, because 24 hours is not enough time for utilities to determine this information. CSO discharges can be discontinuous, and utilities need time to determine if the CSO discharge has actually ended. In addition, if modeling is required to determine the volume of the CSO, this cannot be completed within 24 hours, even for utilities with staff that can run the models. NACWA members indicate that modeling can take five days when all necessary staff are available. For utilities without modelers on staff, the work is contracted out to a consulting firm and completion will depend on the schedule of the consultants.

Some permittees currently have a requirement to report all CSO information on a monthly basis in an electronic Monthly Operating Report. There is no need, nor is it possible, to report this information within 24 hours or even within seven days in some cases. Given that the purpose of supplemental notification is to improve overall data about CSOs in the Great Lakes, and not immediate public health information, utilities should be given adequate time to accurately collect and analyze data on volume and timing.

Notification Method

NACWA recommends that EPA allow utilities the discretion to choose the method of public notification that is most practical for their communities. Some NACWA members have indicated that posting notices on a website is not easy, since their website is controlled and updated by the city or other government entity, not the utility itself. Using direct local government communication methods, such as Nixle, is currently the only way for some utilities to get a public notice out in a short time period. However, using these types of notification methods that are generally reserved for emergency situations may be inappropriate for CSOs, and the public may eventually ignore other more important notifications if they live in an area with numerous CSOs each year. Some municipalities have stipulations that only elected officials (such as the mayor or city manager) can push notifications out through Nixle and other outlets. Providing information on where to look for CSO notifications, or simply providing public education about the likelihood of CSOs during and after heavy rainfall, are likely the best notification methods for these utilities, and these should be acceptable options. EPA should provide flexibility for the utility to determine the notification methods that will be most practical and effective to implement.

Annual Report

The statutory language does not require an annual report from utilities, rather, it states that “The Administrator shall work with the affected States to include. . . annual publication requirements that list each treatment works from which the Administrator or the affected State receive a follow-up notice.” Utilities compiling their supplemental notices into an annual report is redundant, unnecessary, and is simply a paperwork burden that is not required by the law and does not provide additional information the States will not already have. In addition, some utilities are already submitting an annual CSO report as part of their CMOM program, which are usually not due on May 1, as proposed by EPA. Requiring an additional annual report, due at a different time of year than the annual CSO report, would be duplicative and require additional utility resources with no benefit.

Since the States can use the supplemental notices to compile an annual report meeting the Section 425 requirement, NACWA asks EPA to remove this requirement for utilities from the proposed regulation.

Effective Date

Because compliance with the notification requirements may require many utilities to invest in new technology to facilitate monitoring, modeling, and public notification of overflows, the rule should not immediately apply to all utilities. The notification requirements should instead be imposed at the NPDES permit application or renewal stage, and should allow for a compliance schedule to be developed that provides time for development and installation of required technology. NPDES permits operate like contracts between regulated entities and permitting agencies, and establish the parties’ expectations and obligations for the life of the permit. This contractual relationship allows POTWs to plan their compliance and any necessary technology and infrastructure upgrades to coincide with their permit obligations. Imposing new, unexpected requirements midway through a permit cycle, particularly without the opportunity for a compliance schedule, upends these expectations and may not be within the financial capability of the permittee.

For this reason, permit modifications are allowed only in very specific and very limited circumstances. For example, for NPDES permits issued by EPA, permits may be modified based on new regulations only under the following circumstances:

- (i) For promulgation of amended standards or regulations, when:
 - (A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards, or the Secondary Treatment Regulations under part 133; and
 - (B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and
 - (C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

40 C.F.R. § 122.62. The proposed rule dictates that all permittees must begin complying with the notification requirements within 6 months of publication of the final rule, but the rule does not meet the requirements of §122.62 and should therefore not effectively modify all impacted NPDES permits. Instead, NACWA requests that this language requiring compliance within 6 months of publication of the final rule be deleted and replaced with language providing for implementation in coordination with new or renewal permit applications, and that it allow for compliance schedules based on any necessary technology or infrastructure upgrades.

Cost of Proposed Rule

EPA estimates that the average incremental cost of the rule per CSO permittee is about \$2,000 per year, but this cost is much lower than estimates made by NACWA members. One utility estimates that the rule, as proposed, will cost \$8,000-10,000 per year in additional staff time, which would include technician overtime for compiling data and sending out notifications on evenings, weekends, and holidays to meet the four-hour initial notification requirement. If posting electronic CSO data on a website is required, this utility estimates the cost of hiring an outside contractor at \$30,000-40,000.

Another utility, which has over 100 CSO outfalls, estimates the cost of model calibration at \$9 million every five years. The cost of predictive modeling, to inform the public of potential CSOs at threshold rainfalls, would be \$100,000 each year.

NACWA requests that EPA reconsider the proposal requirements and its cost estimate in light of this utility-specific information.

Other Considerations

NACWA members raised additional points related to the reporting requirements based on circumstances of individual utilities. For example, it was suggested that utilities that do not have public access areas or other critical uses of their receiving waters, such as drinking water intakes, should have less stringent requirements or be exempt from these public notification requirements. Some municipalities have ordinances banning primary contact recreation in the receiving stream within their jurisdictions, making such public notifications unwarranted.

In addition, utilities that provide continuous multimedia notifications that CSO overflows can occur during wet weather events, including the effects these overflows can have, should also be exempt from these public notification requirements. These multimedia notifications would include signage at the receiving stream, information and continuous advertisements provided to local newspapers and radio stations, information

posted on pertinent websites and social media outlets, and handout materials available at public buildings and during special events.

Thank you for your consideration of these comments. Please contact me at 202-533-1836 or cfinley@nacwa.org if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Cynthia A. Finley". The signature is written in a cursive style with a large, looping initial "C".

Cynthia A. Finley, Ph.D.
Director, Regulatory Affairs