

March 15, 2018

Alexandra Dapolito Dunn  
Regional Administrator  
U.S. Environmental Protection Agency Region 1  
5 Post Office SQ Ste 100  
Mail Code: ORA01-4  
Boston, MA 02109-3946

Re: February 15 NACWA Meeting

Dear Alex:

Thank you again for meeting with NACWA on February 15. The NACWA utility leaders who attended the meeting appreciated the ability to share their on-the-ground perspectives and welcome the opportunity to work with you to accomplish our shared goal of sustainable environmental and public health protection.

This letter is intended to expand on the issues that we raised during the meeting, and to set the stage for further discussions between NACWA members, the Agency, the States, and other affected parties.

- *Cooperative Federalism.* NACWA is encouraged by the Administration's focus on fostering coordination and avoiding duplication of efforts and disputes over policy, implementation, and enforcement. As a champion of cooperative federalism, you know that if implemented properly it increases efficiency and reduces operating costs, improves relationships, encourages the sharing of best practices, fosters innovation, and provides a more effective allocation of limited resources and division of services/obligations by establishing the roles each partner is best suited to perform. To achieve these desired results in the context of the Clean Water Act, public clean water utilities must be considered and treated like an equal partner in the cooperative federalism calculation. They have earned an appropriate amount of deference and are best suited to determine how to meet their local environmental obligations.
- *A Focus on Compliance Assistance Instead of Enforcement* – As the regulated entity, the onus is on the clean water utility to comply with regulations. When compliance is not being achieved, cooperative federalism dictates that EPA should first look to the state to lead in compliance assistance/assurance efforts. Noncompliance should not prematurely lead to an adversarial mentality. In the past, our members have witnessed firsthand efforts by EPA to try and get the best deal for the federal government at the expense of the locality and environment (e.g., assessment of costly civil and stipulated penalties that do nothing to improve water quality in the community). In some cases, enforcement is necessary. But where a utility is acting in good faith to achieve compliance, the focus should be on assisting the utility first and only beginning administrative or judicial enforcement proceedings when efforts at compliance assistance have failed.

EPA should also consider the stigma associated with enforcement 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 achieve compliance.

Enforcement can, at times, be counter-productive by undermining the trust among the local community and stakeholders necessary to raise funds and complete essential projects.

The January 22, 2018, memo from Susan Bodine, Assistant Administrator of the EPA Office of Enforcement and Compliance Assurance, to all Regional Offices - [\*Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States\*](#) – directs an “informal enforcement” approach where EPA would notify a utility of a problem and then work to quickly return the entity to compliance without resorting to enforcement measures. While this directive seems to focus on new noncompliance and not the legacy issues that many utilities face in the Region including chronic noncompliance due to wet weather, it embodies the “assistance first, enforcement second” approach NACWA has long sought and is a step in the right direction.

- *New Metrics of Success*– Assistant Administrator Bodine’s memo also indicates a welcome shift in philosophy regarding metrics of success: “[W]hat we care about are the outcomes, we care about compliance.” We have reached a point of relentless incrementalism, where EPA is focused on controlling pollutants to ever lower levels without sufficient consideration of other sources of impairment or whether the effort will improve water quality. NACWA is committed to shifting 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. We look forward to working with you on *net environmental benefit* as the key metric of success.
- *Support for Integrated Planning & Community Prioritization of Clean Water Investments* – 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. In Massachusetts and New Hampshire, EPA Region 1 should promote the inclusion of integrated planning in new decrees and should welcome modifications to existing decrees to incorporate this common-sense approach. In addition, the Region should, consistent with cooperative federalism principles, work with delegated states to help them advance integrated planning, adaptive management, and holistic solutions centered around net environmental improvements.
  - *Modification of Existing Decrees* – Approximately 100 of NACWA’s 300 public utility members are under some form of consent decree related to sewer overflows. In a [2015 report](#), EPA’s Office of Inspector General estimates that public water utilities will spend an estimated \$32 billion on combined sewer overflow consent decree compliance.

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 and loss, 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 enable utilities to maximize the environmental return on investments, EPA should not only be open to modification, but should champion a policy encouraging modification of decrees when the utility/community can demonstrate that the modification will result in an increased net

environmental benefit outcome. In addition, EPA must acknowledge the increasing and worsening affordability challenges and work more proactively with communities to address affordability.

- NACWA highlighted three concerns specific to Region 1: The Long Island Sound Enhanced Nutrient Reduction Strategy; the small municipal stormwater permits issued by EPA Region 1 to Massachusetts and New Hampshire; and the nexus of drinking water and clean water issues around the use of orthophosphates for corrosion control under the Lead and Copper Rule.
  - *LIS Nutrient Reduction Strategy* – As we discussed, NACWA and many other stakeholders are concerned with how the Agency is currently addressing Long Island Sound water quality issues, both from a process standpoint and from a scientific perspective. It is critical that EPA work with the States and all stakeholders using a fully transparent process that pays adequate attention to the challenging scientific issues that are presented. NACWA will be submitting a separate letter summarizing our concerns and suggesting a path forward that will better ensure that adequate financial resources are devoted to collecting the needed data, performing the necessary analyses, and ultimately designing the allocations – and the consequent control actions – that will bring the Sound, and its tributaries, into compliance with water quality standards.
  - *Small Municipal Separate Storm Sewer System (MS4) General Permits for New Hampshire and Massachusetts* – The general permits at issue, which are effectively identical, impose requirements that exceed the Clean Water Act’s “maximum extent practicable” compliance standard and required level of effort. The permits are not only impracticable, but impossible, to meet within the five-year permit term. The permits set up most if not all of the localities to which they apply for assured noncompliance, risk of enforcement by EPA or citizen suit, and exposure to tens of millions in statutory civil penalties.

NACWA envisions a revised permit that would require the permittee to protect water quality by reducing the discharge of pollutants from its MS4s to the maximum extent practicable – the high standard that the Clean Water Act requires.

NACWA recognizes that the permittee should be required to develop and implement a Storm Water Management Program (SWMP) with an implementation schedule. However, the excessive requirements and extremely detailed nature of those requirements in the challenged permits and its appendices are better addressed in agency guidance to be considered during community-specific SWMP development. This will enable the development of SWMPs that better serve the priority water quality needs of the different communities in question, as compared to the current permits’ excessively prescriptive, one-size-fits-all approach.

The permits will have a significant impact on municipalities in both states. For example, in Massachusetts alone, more than 250 communities will be affected. The outcome of this case is likely to set an especially important national precedent defining the scope of EPA’s regulatory authority relative to local governments and their MS4s, because the requirements in question were established by EPA itself and will squarely address the extent and limits of federal CWA authority.

The permits are being litigated and parties are currently engaged in mediation. The effective date of the permits – July 1, 2018 – is fast approaching and if mediation is still ongoing or fails, there will be insufficient time for a judicial decision prior to the effective date. Thus, time is of the essence and we are hopeful that you and your staff will reconsider the permit terms in light of the severe consequences for communities in Region 1 and the national precedent of regulatory overreach that

the permits will establish.

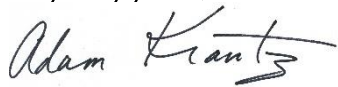
- *Lead and Copper Rule (LCR)* – The rule is primarily an issue that impacts public water systems (PWSs) under the Safe Drinking Water Act (SDWA), but NACWA continues to stress with EPA Headquarters that the Agency must also consider how the LCR can impact wastewater treatment facilities regulated by the Clean Water Act. Work to standardize and/or enhance corrosion control treatment (CCT) techniques for drinking water utilities can have considerable impacts on wastewater treatment plants. As national attention over protecting the public from lead exposure in drinking water continues and EPA engages in long-term LCR revisions, this intersection of the SDWA and the CWA is a critical consideration.

We look forward to advancing this discussion at the Region 1 Utility Forum on July 23 at the Boston Marriott Copley Place, which will be held in conjunction with the NACWA [Utility Leadership Conference & 48th Annual Meeting](#). In the interim, we will keep in touch as many of these issues are time sensitive.

In closing, thank you again for your time and consideration. We applaud your commitment to increased transparency, cooperative federalism, and more productive communication with the regulated community and we look forward to working with you and your staff on the many pending Clean Water Act issues in the Region.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Adam Krantz", with a stylized flourish at the end.

Adam Krantz  
CEO