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Sharon Cooperstein  
Policy and Regulatory Analysis Division  
Office of Regulatory Policy and Management  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460  
Mail Code (1803A)

Submitted via: [regulations.gov](http://regulations.gov)

***Re: NACWA Comments on the U.S. Environmental Protection Agency's Proposed Rule, EPA Guidance; Administrative Procedures for Issuance and Public Petitions (EPA-HQ-OA-2020-0128)***

Dear Ms. Cooperstein:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA) proposed rule, "EPA Guidance; Administrative Procedures for Issuance and Public Petitions."<sup>1</sup>

NACWA represents public wastewater and stormwater agencies of all sizes nationwide. NACWA's members are responsible for providing affordable and sustainable clean water for communities across the country, and are subject to various EPA regulatory regimes, particularly those arising under the Clean Water Act (CWA). As such, NACWA has an interest in fair and transparent administrative processes.

EPA's stated goals of "increasing the transparency of guidance practices and improving the process used to manage EPA's guidance documents" are important to the clean water community. The proposed establishment of a public portal where active guidance documents can easily be located and accessed will help disseminate key information necessary to understand how Agency regulations will be implemented. Too often the regulated community is left to wade through multiple government websites and archive documents to find relevant regulatory guidance, and even so may not find the most current or up to date federal

<sup>1</sup> 85 Fed. Reg. 31,104 (May 22, 2020).

guidance. A properly maintained and organized guidance portal would ensure public access to this important information.

However, NACWA is concerned with other provisions contained in the proposal that call into question the potential scope of its impacts and utility. Specifically, the proposal states at various times that it is a “proposed rule,” “regulation,” and “codification.” Indeed, it seeks to amend the Code of Federal Regulations (CFR). Yet the proposal also purports to have “no force and effect of law,”<sup>2</sup> and states in the proposed “Scope” section at 40 CFR Part 2 Subpart D § 2.502(f) that “the Agency may deviate from [the rule] when necessary...the decision to deviate from [the rule] is in the Administrator’s sole and unreviewable discretion.”

It is difficult to discern what the impacts of the procedural aspects of the rule may be in light of these seemingly contradictory statements. Additionally, it is unclear if the proposal is itself a guidance document or a rulemaking, which seems particularly problematic given that it is expressly intended to foster clarity and transparency concerning EPA guidance. For example, does the regulated community have a legal cause of action if EPA arbitrarily fails to adhere to the provisions in the proposal? EPA should re-propose for public comment a document that clearly outlines its legal implications for the regulated community so that potentially impacted parties can properly assess its likely costs and benefits.

NACWA requests that EPA explicitly address CWA Sec. 304(a) water quality criteria documents as part of this initiative. While these criteria provide “guidance” in the form of recommendations to states that states must consider in their periodic water quality standards reviews, it is unclear that they would qualify as “significant guidance”—or even “guidance”—under the proposal, as states can deviate from them with justification. However, because states frequently do not have the resources to do anything but adopt them whole cloth or nearly so, these criteria often ultimately have significant ramifications for the clean water community and effectively function as the type of “guidance” addressed by the proposal, or even arguably as regulations. Further, EPA staff often refer to these criteria documents as “guidance.”

Notably, while EPA typically provides for public input during the criteria development process, the rigor of the scientific peer review for these guidance documents does not rise to the level that is required for “highly influential” documents (*i.e.*, significant guidance documents or rulemakings) despite the fact that these criteria more often than not ultimately lead to stringent CWA permitting requirements that have major impacts on clean water utilities and their communities in terms of compliance obligations.<sup>3</sup> Additional transparency, stakeholder and scientific review and discourse, and public input in the criteria development process is needed and would not only be beneficial to the regulated community, but also to the states who ultimately have to determine whether or not to adopt, modify, or decline to include the criteria in their water quality standards. The public at large would also benefit in a revised criteria development approach, as they may be indirectly on the hook as ratepayers for the economic investments required to meet any stringent compliance obligations necessitated by the criteria.

<sup>2</sup> 85 Fed. Reg. at 33,105.

<sup>3</sup> See Office of Management and Budget, Final Information Quality Bulletin for Peer Review (Dec. 16, 2004).

An orderly process whereby parties could petition EPA to revisit criteria and other guidance documents where appropriate would also serve the interests of greater transparency and fairness. New scientific information, “lessons learned” from implementation, and new legal precedents are just some of the factors that may justify amendments to EPA guidance. EPA should consider establishing a public, transparent process for the regulated community to bring such information to EPA for consideration that likewise allows other interested parties to provide input, as well as a transparent process defining how EPA will review and make decisions concerning such petitions. In doing so, however, EPA needs to be careful not to unduly hamper its ability to issue useful guidance to regions, states, and the regulated public, or to inadvertently convert informal guidance documents into more formal rulemaking procedures where unintended.

NACWA applauds EPA for its continuing efforts to better improve the regulatory process and increase government transparency and accountability. NACWA also appreciates EPA’s recognition of the real on-the-ground impacts these “non legally binding” guidance documents can have for the regulated community. NACWA requests that EPA re-propose a document that would address these issues as well as the ones outlined above before it moves forward with this initiative.

Thank you for the opportunity to comment on this proposal. Please contact me by phone at 202/533-1839 or by email at [eremmel@nacwa.org](mailto:eremmel@nacwa.org) if you would like to discuss these comments further.

Sincerely,

A handwritten signature in cursive script, appearing to read "Emily Rimmel".

Emily Rimmel  
Director, Regulatory Affairs