



April 25, 2022

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Via Electronic Mail

RE: NACWA Comments on EPA's 2022 Proposed Financial Capability Assessment Guidance – Docket ID No. EPA-HQ-OW-2020-0426

Dear Administrator Regan,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) [2022 Proposed Financial Capability Assessment \(FCA\) Guidance](#) (87 Fed. Reg. 10193). NACWA and its 350 public clean water utility members have been working on the issue of how to revise EPA's 1997 FCA Guidance and its flawed and outdated methodology for almost two decades.

Our public clean water utility members who engaged with EPA, often through years of negotiations, over the amount of time they would be allowed to complete their combined sewer overflow (CSO) control programs and other Clean Water Act (CWA) requirements, are now working diligently to implement massive spending programs on schedules that were dictated by the 1997 FCA Guidance. Now that the methodologies in the 1997 FCA Guidance have been roundly criticized by Congress, the National Academy of Public Administration (NAPA), and a broad array of stakeholders, it is critical that meaningful updates be made to ensure that future investments are guided by appropriate and equitable financial considerations.

NACWA's members and other clean water utilities were, over time, increasingly able to advance negotiations with EPA beyond the simple calculations in the 1997 FCA Guidance and effectively demonstrate the acute affordability challenges caused by the CWA-related compliance spending. As such, in an effort to ensure greater national consistency, NACWA and its water sector partners have sought a wholesale revision of the 1997 FCA Guidance to ensure financial capability assessments going forward better measure the financial implications of mandated CWA spending with a particular focus on the impacts on low-income households. EPA's 2020 Proposed FCA Guidance, released in January 2021 but subsequently withdrawn by the Biden Administration, for the

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first time included a measure of the true financial impacts these CWA mandates were having on low-income households.

The 2020 Proposed FCA Guidance reflected years of expert analysis, stakeholder input and dialogue between EPA, the water sector, and numerous other interests. It was the result of valuable collaborative engagement between NACWA's members and EPA leadership and career staff, which began during the Obama Administration and continued into the Trump Administration. Those conversations sought to advance bipartisan concepts like integrated planning, as well as revising the financial capability guidelines, to empower local governments to have more say over how they spend their limited public dollars to achieve the maximum environmental benefit for their ratepayers' investment, especially low-income ratepayers.

But after the 2020 Proposed FCA Guidance was withdrawn in January 2021, NACWA and its members did not have the opportunity to engage meaningfully on the new revisions EPA was considering. Instead, in the fall of 2021, EPA briefed the water sector on the major substantive changes it had decided to make to key elements of the document – changes that ignore numerous reports and Congressional directives as to how the guidance should be revised. EPA's revisions eliminated any true accounting of the impacts on low-income households and in some respects make the 2022 Proposed FCA Guidance more onerous and subjective than the original 1997 FCA Guidance.

NACWA cannot support finalizing the 2022 Proposed FCA Guidance absent wholesale modifications, given the serious concerns outlined in these comments and in the more detailed expert review that NACWA, along with the American Water Works Association (AWWA) and the Water Environment Federation (WEF), are submitting with their joint response to EPA's request for comments.

Affordability is an Environmental Justice Issue

Some of the changes EPA is making in the 2022 Proposed FCA Guidance are in response to concerns raised in comments on the 2020 Proposed FCA Guidance by environmental activist groups. These groups do not disagree that EPA's current financial capability assessment methodology is flawed, but instead of commenting on how the methodology should be revised, they argue that utilities should instead be required to solve the local affordability challenges in their communities before being provided any scheduling relief.

Environmental groups who argue against giving communities more time to meet their CWA obligations point to any delay in water quality improvements as having a disproportionate impact on environmental justice (EJ) communities and low-income residents, because those communities in many cases have not benefited from past investment and should not have to wait longer for the environmental protection they deserve. The water quality benefits from local investment, if fairly and appropriately targeted to where the need is most acute, accrue to everyone in the community regardless of socio-economic status, race, and/or other factors. In practice, however, water quality investments historically have often overlooked the lower income portions of many

communities. Those low-income areas have been disproportionately impacted and deserve to have their homes and areas where they recreate protected from adverse water quality conditions. These past inequities must be addressed, and future investments must not repeat the sins of the past.

However, while water quality benefits can be enjoyed by the entire community when the investments are made equitably, the impacts of accelerating environmental improvements, including those intended to offset past inequities, hit the low-income residents of a community – who often are already paying a larger share of their limited income for water and wastewater service – the hardest. ***These disproportionate financial impacts raise equally important EJ concerns.*** The underlying methodological flaw of the 1997 FCA Guidance and EPA's proposed new version is that they both fail to properly document that poor people and EJ communities comprised of lower-income earners are paying proportionately more for the same water and wastewater services as a percentage of their income than rich people. How can we fully examine the equity of our water investments if we are not willing to openly discuss the true impact of our spending on low-income households?

Low-income households should not be burdened with extreme affordability challenges to correct past inequities. The public clean water community has understood this challenge for decades and has actively pursued federal support to address this very issue – how to bring the benefits these communities need and deserve without the financial impact that can burden a family for generations. NACWA has fought for decades to ensure that the impacts on low-income customers are fully considered in any assessment of CWA financial capability.

The clean water sector's push for Integrated Planning was driven by the desire to better prioritize how utilities spend their ratepayers' money so they can address the biggest needs first while also providing the flexibility to ensure the increase in rates was sustainable for the long term. A key driver behind Integrated Planning and a more transparent approach to affordability is the need to facilitate better community-level discussion and decision-making to prioritize these required investments. How do communities want to spend their limited resources to achieve the needed environmental benefit in a manner that reflects their values rather than a top-down approach from EPA? To answer questions like these, we must be willing to examine the true impacts of CWA spending on all customers.

The Biden Administration has made the needs of EJ communities a hallmark of its environmental policy – an approach that NACWA strongly supports. But the 2022 Proposed FCA Guidance turns this focus on EJ communities on its head, ensuring there will be no meaningful opportunity to examine and discuss the disproportionate financial burden EJ communities will continue to bear as we work to address the nation's clean water needs, and therefore no meaningful opportunity to evaluate the best way to mitigate that burden.

Environmental activist groups are insisting that utilities be required to evaluate every feasible alternative to address these disproportionate financial impacts before they are given more time to meet their clean water obligations. NACWA's members are on the forefront of exploring what

options are available, but holding relief for a community at bay until the utility has solved all of its community's affordability challenges is simply unacceptable.

We cannot address past inequities and have a meaningful discussion about impacts and benefits if the tools we are using obfuscate the actual financial impacts on low-income households by employing community- and national-level comparisons, as EPA's 2022 FCA Guidance proposes to do. Showing the true impacts of these mandated CWA spending programs on low-income households is going to be difficult. EPA will have to acknowledge that past Consent Decrees have imposed disproportionate impacts on low-income households. But we cannot advance this conversation if we are not willing to have an open dialogue about the true impacts and what we can do together to address them, which was the goal of this effort from its inception.

Water Policy Issues Should Be Guided by Policy Experts, Not Enforcement Personnel

It is clear throughout the 2022 Proposed FCA Guidance that EPA's Office of Enforcement and Compliance Assurance (OECA) was heavily involved in making the revisions since the release of the 2020 Proposed FCA Guidance. The enforcement office's preferred (and fundamentally flawed) matrix calculation relying on median household income (MHI) is preserved; strict scheduling benchmarks are now back in the document with even more restrictions on overall schedule length; the true impacts on low-income households are no longer evaluated; and the onus is put on the utilities to make every feasible effort – including taking actions that are counter to state law – to address the local affordability challenge in order to even retain the level of burden that EPA's guidance says should apply to the community when deciding on scheduling.

It is understandable that OECA wants to preserve the status quo when it comes to how the Agency addresses financial capability and water affordability. It has numerous consent decrees negotiated under the 1997 approach that it does not want to revisit under new affordability criteria because it knows a true financial analysis looking at actual low-income burden will show many of those agreements are unaffordable for poor households. OECA has also operated from the same playbook for the past 25 years when it negotiates with communities over compliance timelines and likes the amount of pressure that the status quo allows it to exert in these negotiations. The 2022 Proposed FCA Guidance will only strengthen OECA's hand in these negotiations, once again leaving low-income ratepayers out of the discussion.

Summary of NACWA's Major Concerns with the 2022 Proposed FCA Guidance

Below is a brief summary of NACWA's major concerns with the 2022 Proposed FCA Guidance, based on feedback from our utility members and the expert review conducted on behalf of NACWA, AWWA and WEF.

The 2022 Proposed FCA Guidance eliminates most of the substantive policy and methodological improvements included in the Proposed 2020 FCA Guidance (withdrawn in January of 2021) that were called for by a broad array of stakeholders – not just utilities – and by the congressionally mandated, independent review of the 1997 FCA Guidance by NAPA.

As a result, the 2022 Proposed FCA Guidance fails to address the well documented problems with the original 1997 FCA Guidance matrix, including its reliance on a questionable cost per household calculation divorced from actual rates paid by utility customers, its reference to the problematic Median Household Income (MHI) measure, and its use of a flawed list of equally weighted Financial Capability Indicator measures.

- The 2022 Proposed FCA guidance no longer considers financial impacts on low-income households and suggests that consideration of low-income households should be limited to amplifying measures of the prevalence of poverty.

EPA has effectively abandoned the use of the Lowest Quintile Residential Indicator (LQRI) metric from the 2020 Proposed FCA Guidance that examined the costs of planned compliance measures on economically disadvantaged households. The LQRI was directly responsive to the NAPA report recommendation to: “[f]ocus on the income of low-income users most vulnerable to rate increases rather than Median Household Income.”¹ Instead, EPA is now outlining two slightly different approaches to using a new metric – lowest quintile income as benchmarked against the national lowest quintile income.² The new metric, however, does not consider compliance cost impacts on low-income households. Furthermore, both approaches to using the new metric lack in analytical rigor, including the seemingly arbitrary selection of the 25% threshold for comparing community lowest quintile income to the national value.

EPA's request for public comment centers on the merit of these two approaches but does not seek comment on the more important question of whether it is appropriate to abandon the LQRI metric from the 2020 Proposed FCA Guidance. Absent an evaluation of impacts on low-income households, there is no ability to have a meaningful discussion of the actual burden on the community and its ratepayers associated with the required spending. Looking solely at measures of the prevalence of poverty dilutes the value of the entire assessment, with potentially serious negative consequences for those ratepayers and communities this effort was intended to protect in the first place.

- The 2022 Proposed FCA guidance imposes a new requirement on utilities to conduct a Financial Alternatives Analysis. EPA states that it does not intend to approve extended compliance schedules or water quality standard relief unless the community **demonstrates it has taken all feasible steps** to reduce or mitigate financial impacts on low-income households.³ This demonstration is to be accomplished through completion of a Financial Alternatives Analysis checklist composed of over 25 questions broken into four categories:

¹ National Academy of Public Administration, Developing a New Framework for Community Affordability of Clean Water Services, October 2017, p.8

² Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 12

³ Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 14

- Financing Options for Capital Costs,
- Rate Design,
- Ratepayer Support Options for Lower Income Residential Customers, and
- Financial and Utility Management.

NACWA's members fully support more substantive and sustained local efforts to address water affordability challenges but imposing additional requirements on utilities to retain a Medium or High Burden designation is inappropriate and legally questionable in the context of a guidance document.

The addition of the Financial Alternatives Analysis introduces a level of complexity that has never been contemplated as part of this effort in past discussions and raises policy questions that are simply not appropriate in the context of the FCA guidance, which is intended solely to evaluate the financial impact of a program or requirement on a community. The evaluation of these alternatives must be multi-faceted and cannot be done solely in the context of evaluating one aspect of the larger affordability issue.

There are numerous complicated considerations necessary for weighing the merits, tradeoffs, and feasibility of capital financing and rate design considerations, which place a significant burden on permittees to explain and justify, and EPA and State enforcement staff to understand and fully consider. Furthermore, the extent of the financial, economic, legal, political, market, and risk analysis and the associated added cost necessary to conduct these analyses and fully assess the feasible alternatives, is inappropriate to require of utilities through a guidance document intended only to calculate financial impacts on ratepayers and the community.

Over the past several years as EPA has worked on revising the FCA Guidance, it has repeatedly stressed the importance of keeping the calculations simple to ensure the Agency is not placing an undue burden on smaller utilities. The addition of the Financial Alternatives Analysis upends EPA's efforts to 'keep it simple', creating an undue burden on utilities regardless of size and likely putting the relief EPA proposes to tie to the Financial Alternatives Analysis out of reach for smaller utilities unable to meet EPA's 'implementation of all feasible alternatives' bar. The Financial Alternatives Analysis frankly imposes a "poison pill" for NACWA and its members – large and small – on the FCA document as a whole.

Even once an analysis is completed, uncertainties surround whether EPA will or will not concur with a permittee's assessment of the feasibility of individual financial alternatives, or the practicality of implementation of all feasible alternatives. EPA has not indicated how it will make a determination that all feasible steps to address low-income impacts have been taken, yet notes "[f]or purposes of the Financial Alternatives Analysis, "feasible" steps should include the financial and funding considerations listed in Appendix C, whether or

not they are prohibited by state law.”⁴ ***In this sense, the 2022 Proposed FCA Guidance may impose more onerous, uncertain and subjective determinations than the original 1997 FCA Guidance.***

EPA's request for public comment asks for additional examples or case studies on financing and funding considerations, not whether the proposed Financial Alternatives Analysis is practical or effective for advancing an assessment of financial capability or whether, as a baseline matter, it is even appropriate in the FCA context. Disappointingly, EPA has not requested comment on how it may engage permittees to overcome the logistical, legal, and practical barriers to implementing many of the alternatives the Agency has identified, especially as it relates to rate-setting. It simply ignores the existence of state laws and other prohibitions (e.g., California's Proposition 218) that will prevent some utilities from ever reaching EPA's "feasible steps" threshold. The water sector groups have done work on the legal issues surrounding the use of rate revenues to fund customer assistance programs, including a collaboration with the Environmental Finance Center at the University of North Carolina.⁵ If EPA is going to mandate changes to local utility finance and funding decision-making, it must at least work to ensure that "all feasible alternatives" are, in fact, feasible.

- The 2022 Proposed FCA guidance also reverts to the use of arbitrary scheduling boundaries, notwithstanding the fact that these scheduling boundaries are at odds with several noteworthy Consent Decrees that are straining permittees' financial capabilities despite the extended schedules granted in those instances. For good reasons, the prescribed benchmarks in the 1997 FCA Guidance have been set aside in numerous Consent Decree negotiations where agreed compliance schedules exceed 20 and even 25 years.

In practice, EPA's arbitrary scheduling "benchmarks" have proven to be problematic, engendering acrimonious negotiations, and ultimately irrelevant. Numerous decrees - informed by local circumstances, compliance options, and financial capabilities - have resulted in executed consent decrees that have no relation to the arbitrary benchmarks delineated in the 1997 FCA Guidance. EPA's return to scheduling benchmarks that have proven to be ineffective is disconcerting. Arbitrary scheduling benchmarks simply may not be reasonably applied across the diversity of situations that prevail across the United States. Scheduling can only be reasonably determined through consideration of a community's unique conditions. Scheduling benchmarks have proven to do more harm than good - stoking litigation rather than serving to guide parties to agreement.

⁴ Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 23

⁵ Navigating Legal Pathways to Rate-Funded Customer Assistance Programs, 2017

When the costs of meeting multiple regulatory mandates are high, the affordability implications, especially for the low-income ratepayers the FCA was intended to protect, and the benefits of the investments should be evaluated together. If the community demonstrates a high burden impact due to these CWA compliance investments, the community should be able to develop an Integrated Plan to prioritize projects that provide the greatest environmental cost-benefit, while not imposing an excessive burden on the community. This may require an implementation timeline exceeding the limits contained in the 2022 Proposed FCA Guidance.

While NACWA cannot support the 2022 Proposed FCA Guidance for the reasons outlined above, NACWA does appreciate that EPA has retained Alternative 2, the Cash-Flow Forecasting approach. This approach has been effectively used by NACWA's members, even under the existing 1997 FCA Guidance paradigm, and it provides the most complete picture of the potential financial impacts on a community throughout the entire project schedule. EPA's general description of Alternative 2/Cash-Flow Forecasting provides a reasonable overview of the information to be compiled and the analytical processes. While EPA's listing of supporting data and documentation requirements may appear daunting, relatively simple, user-friendly models may be readily constructed to deliver this information. Their use, even for relatively small systems, is arguably best management practice and should be advanced in any event (irrespective of compliance challenges).

Unfortunately, EPA has burdened Alternative 2 with some of the same problematic elements described above:

- Alternative 2 continues to call for several of the flawed metrics and source data used in Alternative 1. For example, Alternative 2 calls for cash-flow forecasts to provide projections of customer bills as a percentage of median household income rather than the 20th percentile income level. The guidance asks for a calculation of the service area Residential Indicator (RI) based on the percentage of residential flow and households (rather than the number of accounts or based on the contractual relationships between the utility and its customers), though this calculation is irrelevant for purposes of cash-flow projections. And, as with Alternative 1, the Lowest Quintile Poverty Indicator score is requested, despite the numerous problems and opportunities for improvement of this metric as outlined above.

In discussing Alternative 2, EPA states that it intends to keep the percentage of household income spent on wastewater utility bills **within reasonable bounds** when establishing compliance schedules. Yet in the same section, EPA states it does not intend for schedules to exceed 20 years (or 25 years based on unusually high impacts after consideration of other metrics) irrespective of whether or not rate increases to comply with these arbitrary scheduling boundaries would push bills outside of "reasonable bounds".

Finally, as with Alternative 1, EPA requests submittal of a Financial Alternatives Analysis, raising the same concerns as summarized above.

Going forward, it is essential that EPA provide enough flexibility in the FCA Guidance to allow utilities to include additional information and analysis that better reflect the conditions facing their community. MHI is so roundly criticized because it bears little relationship to poverty or economic need, fails to capture impacts across diverse populations, does not consider historical or future trends in a community's economic, demographic, or social conditions, and does not acknowledge the economic burdens that may impact a household's ability to pay for water and sewer bills, among other considerations. For some communities with extremely high cost of living, additional considerations must be included to better account for factors such as the significant differences in housing cost burdens.

NACWA appreciates the opportunity to comment on the 2022 Proposed FCA Guidance. We hope EPA will seriously consider the input from NACWA, its water sector partners and the clean water utilities providing comments on the proposal, and work to establish a meaningful dialogue on how best to move forward on this critically important issue.

We look forward to hearing from you and your team and we would be happy to meet at any time to discuss these concerns further.

Sincerely,

A handwritten signature in black ink that reads "Adam Krantz". The signature is fluid and cursive, with a long horizontal stroke at the end of the name.

Adam Krantz
Chief Executive Officer

cc: Radhika Fox, Assistant Administrator, OW
Lawrence Starfield, Acting Assistant Administrator, OECA
Andrew Sawyers, Director, OWM/OW
Deborah Nagle, Director, OST/OW
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