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Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

Regarding

Integrated Planning and Permitting, Part 2: An Opportunity for EPA to Provide Communities with Flexibility to Make Smart Investments in Water Quality

Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee,

My name is Walt Baker. I am the Director of the Division of Water Quality at the Utah Department of Environmental Quality, and the President of the Association of Clean Water Administrators (ACWA). I have nearly 30 years of experience in implementing Clean Water Act (CWA) Programs.

The Association, now over a half century old, is the national, nonpartisan professional organization representing the State, Interstate, and Territorial water quality control officials

responsible for the implementation of surface water protection programs throughout the nation. In 46 states, we are the CWA National Pollutant Discharge Elimination System (NPDES) permitting authority. We are on the front lines of CWA monitoring, permitting, inspection, compliance, and enforcement across the country, and are dedicated to Congress' goal of restoring and maintaining the chemical, biological, and physical integrity of our nation's waters.

I am pleased to come before this Subcommittee again to present testimony on behalf of the Association regarding the U.S. Environmental Protection Agency's (EPA's) integrated planning initiative. I would like to reiterate our support for the concept of sequencing CWA requirements to allow a state or municipality to address those projects that will have the greatest impact on water quality first. Such sequencing is not a new concept, as many communities have developed such plans in the past without a formal national initiative. However, a wider embrace of sequencing is important in these times of economic hardship, as there is a greater need to maximize the effectiveness of limited infrastructure dollars. Integrated planning can, when executed properly, promote innovative solutions that make sense and deliver greater environmental results, such as promoting green infrastructure over grey.

When I testified in December 2011, EPA's draft integrated planning framework had not been released. At that time, I acknowledged support for prioritization of CWA obligations and for EPA's efforts. However, I also emphasized the need to ensure our main goal remains improvement of water quality, as well as the importance of a commitment to successful implementation by all involved parties.

Following the release of the draft framework in January 2012, ACWA members participated in five EPA-hosted stakeholder workshops, submitted written comments on the draft, and held calls with EPA to further discuss the draft. We appreciate the ability to provide feedback to EPA on this initiative through these avenues, and overall, EPA has been very receptive to state comments and questions. Since the framework was finalized

in June 2012, EPA continues to keep states engaged in implementation and is fostering open communication and collaboration.

At the workshops, it became apparent that states will take the primary role in reviewing and approving the municipalities' integrated plans. As the draft framework did not set forth details regarding our review and approval role, we sought further clarification as to what was expected of states and raised concerns regarding EPA's potential veto power over a plan with state approval. State, and municipal, time and resources are at a premium, and we need to ensure that when states review and approve a municipal plan, our determination will be respected by the Agency.

The final framework still does not elaborate on how states will execute their role. As we move forward, it will be important to cull guidance from experience to ensure this process moves forward productively. For example, in our dialogue with EPA, the role of states will likely be more fully fleshed out after the first integrated planning efforts occur. It is envisioned that states and EPA Regions and Headquarters will work closely together to plan development and review.

I would like to offer the following additional thoughts on EPA's final integrated planning framework and initiative as a whole:

(1) In our comments on EPA's draft framework, we requested further explanation as to how affordability would be assessed. This was somewhat addressed in element four of the final framework, which directs municipalities to the "CSO Guidance for Financial Capability and Schedule Development" and other relevant tools. We urge EPA to develop and further its financial assessment resources. As cost will play a central role in the prioritization effort, this will be greatly beneficial to municipalities in developing the plans, as well as to states in reviewing the plans.
(2) We are glad to see adaptive management concepts in the final framework, with respect to the implementation of a plan via a NPDES permit or enforcement action.

These plans will not be stagnant documents, but rather will need to evolve and be flexible over time.

(3) While we do not wish to see water quality negatively impacted as a result of the use of integrated planning, the language in the framework indicating that EPA prohibits a lessening of standards in this process – which is critical – may cause problems for some municipalities developing and starting to implement a plan. Without a brief period of limited enforcement amnesty, municipalities that otherwise would like to attempt integrated planning may be hesitant to do so.

(4) In undertaking an integrated planning effort, some regulated communities may seek to have certain CWA obligations removed in cases where they determine the return on completing a project would not be justified. EPA has consistently said that the integrated planning initiative is solely a matter of "when" CWA obligations will be addressed, and not a matter of "if" certain obligations will be addressed. According to EPA, all limitations will be met eventually. There may be a disconnect between the regulated community and regulators with respect to the possible outcomes from the planning process.

(5) It will be important for EPA to work with states to lower the priority of some legacy activities so that state resources can be freed up for plan review and working with communities.

(6) EPA has spoken of use attainability analyses (UAAs) being a potential tool to provide some relief to permittees considering integrated planning. However, given how difficult UAAs can be to accomplish in practice, we are not sure how frequently this tool will be used.

(7) States previously expressed concerns regarding the limitations associated with the use of compliance schedules. Under CWA § 301(b)(1)(C), if a state water quality standard (WQS) was established pre-1977, then a compliance schedule is not allowed. However, if the WQS was established post-1977, a compliance schedule is allowed as long as the state clearly allows it in its WQS or implementing regulations. This was further enforced by the Environmental Appeals Board (EAB) in the case of *In The Matter of Star Kist Caribe* (3 E.A.D. 172, 175, 177 (1990)) and in a 2007 Memorandum by then Director of EPA's Office of Wastewater

Management Jim Hanlon. Recently, EPA has assured us that these precedents should not cause great problems with respect to the use of compliance schedules in permits for integrated planning, as there are few pre-1977 water quality standards remaining, and those that do exist tend to be narrative standards (e.g., color, odor and solids). Case specific issues may still arise, however, as I will note later with respect to Oklahoma.

(8) We are already hearing that some regulated communities would like to include drinking water, wastewater, and perhaps even groundwater obligations within an integrated plan. As of now, EPA's framework does not include drinking water or groundwater. To ensure that integrated planning is truly integrated, and a meaningful and useful tool for a wide variety of municipalities, conversations may need to occur to allow a broader focus.

(9) Clarification is needed as to whether integrated planning offers protection for regulated communities and states from third party enforcement actions. The absence of such protection might cause further hesitation on the part of a regulated community to undertake integrated planning. Transparency also will be paramount to reduce the risk of third party actions.

At this early stage, I cannot refer to many mature examples of integrated planning. In those examples that have surfaced, there has been an evident tilt towards integrated planning being more useful in enforcement actions than in permitting. EPA reports that approximately a half dozen ongoing negotiations are considering integrated planning, but details are not available. There has been significantly less activity in the permitting realm. One reason for this disparity is that enforcement tends to provide a level of flexibility that permits do not. However, it should be noted that the flexibility of enforcement actions may be countered by the increased transparency that permits offer.

We inquired our members on the status of integrated planning in their states and offer the following information, which highlights some early feedback on integrated planning:

(1) In my own state of Utah, absent an imminent or actual enforcement action, municipalities do not see an urgency to seek refuge under integrated planning. We have been approached by one municipality to discuss integrated planning in a situation where the city may need to make significant upgrades to its drinking water system to address water quality problems. However, EPA's framework does not account for drinking water issues. The final framework only notes that "integrated plans may address source water protection efforts that protect surface water supplies." (Framework p. 3, Sect. III) Thus, we may entertain a process similar to integrated planning to address their concerns, but this would not technically fall under the integrated planning umbrella.

(2) In Ohio, four entities have indicated a desire to implement the integrated planning process. Some have asked for a delay in their compliance schedules in order to prepare their plans. All of these entities are under enforcement orders, which would need to be modified if Ohio Environmental Protection Agency (OH EPA) chooses to accept their proposals, and two are under federal consent decrees, so EPA would take the lead in those cases.

(3) In Oklahoma, no integrated planning requests have been received yet. The Department of Environmental Quality (DEQ) has been encouraging a small facility to consider integrated planning, but is still early in the process. Facilities are hesitant to approach integrated planning, and are waiting to see concrete examples and to receive assurance that EPA will not object after the state and facility have negotiated a plan. Further, a specific hurdle is a directive to DEQ from Region 6 limiting compliance schedules in NPDES permits to three years – essentially leaving OK with the enforcement avenue to implement integrated planning.

(4) The New York Department of Environmental Conservation (DEC) has not received any integrated planning requests at this point. However, DEC has been working extensively with the NYC Department of Environmental Protection (DEP) to prioritize commitments and schedules under consent orders. One example of this is a recent modification to the NYC Combined Sewer Overflow (CSO) Consent Order. While this was not conducted under the auspices of integrated planning, DEC

believes it is a sterling example of the regulated and regulator coming to terms to advance water quality improvement at a reasonable pace.

(5) Kansas Department of Health and Environment (KDHE) has not yet seen interest to engage in integrated planning. Interest may be tempered due to differing interpretations between Region 7 and EPA on the regulatory standards applicable to peak flow management and sanitary sewer overflows (SSOs). Without agreement on these topics, utilities may be reluctant to pursue an integrated planning approach.

Overall, the states have been largely supportive throughout the development of EPA's integrated planning framework and remain supportive of the general concept of allowing municipalities to sequence CWA requirements in ways most appropriate for a specific entity. However, as noted above, some of our concerns which will not be put to rest until we see actual case studies progress. Again, we encourage EPA to consider developing guiding principles based on early examples to assist others.

I would like to conclude by noting that the success of integrated planning hinges on the continued transparency, communication, and collaboration among all involved parties – municipalities, states, EPA Regions, and EPA Headquarters – throughout the entire plan development and implementation process. We look forward to continue working with EPA as this initiative proceeds.

Mr. Chairman, Members of the Subcommittee, I thank you for this opportunity to share ACWA's thoughts on EPA's integrated planning initiative. I will be happy to answer any questions that you may have.

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