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**Ken Kirk**

December 21, 2005

Office of Management and Budget  
Office of Information and Regulatory Affairs  
725 17<sup>th</sup> Street, NW  
New Executive Office Building  
Washington, D.C. 20503  
Via Electronic Mail: [OMB\\_GGP@omb.eop.gov](mailto:OMB_GGP@omb.eop.gov)

Re: OMB Proposed Bulletin for Good Guidance Practices

Dear Sir or Madam:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide comments on the Office of Information and Regulatory Affairs' (OIRA) *Proposed Bulletin for Good Guidance Practices (GGP)*. NACWA represents the interests of nearly 300 publicly owned wastewater treatment agencies who are responsible for treating and reclaiming a majority of the nation's wastewater. As regulated dischargers under the Clean Water Act, NACWA's public agency members have an important stake in how the U.S. Environmental Protection Agency (EPA or Agency) develops regulation and guidance designed to implement the Act.

NACWA commends OIRA for its effort to ensure that the guidance development processes employed by the various federal agencies are both transparent and consistent. There is often a fine line between guidance and regulation and a set of standards that addresses approval procedures, access, and stakeholder input, will better define the boundaries of both and provide clarity on the extent to which a particular guidance document should be made available for public comment. Agencies like EPA have, in some cases, done an admirable job of involving stakeholders and garnering input from the public on guidance that would not otherwise be subjected to this type of review. Still, there remain instances of guidance or other non-regulatory documents that do more than simply "describe [an] agency's interpretation of or policy on a regulatory or technical issue" and, therefore, a consistent set of practices is needed.

NACWA generally supports the GGP. However, NACWA disagrees with the economic distinction currently used in the GGP and believes that a formal notice and comment process should also be considered for other significant guidance documents. NACWA suggests that other measures of a guidance document's potential impact, including the complexity of implementing its recommendations and the number of stakeholders potentially impacted, be considered when determining whether a formal notice and comment period is needed. NACWA offers the following comments, questions, and recommendations in an effort to better refine the final *Bulletin*.

#### Definition of Guidance and Standard Elements

NACWA agrees that a clear definition of guidance is critical and concurs with the proposed definition of 'guidance document' in section I of the GGP. However, NACWA is not clear on the reasoning behind the proposed definitions for 'significant guidance document' and 'economically significant guidance document'. Specifically, the condition that any guidance leading to 'an annual effect of \$100 million' be considered significant and/or economically significant is troublesome. Guidance documents by their very nature should not require a regulated entity to incur significant costs, though this is often the case. Additional explanation of OIRA's intent here is needed. If this condition is meant to apply to the regulation or technical issue on which the guidance is based, then this language should be reworded accordingly. Furthermore, the phrase "an annual effect of \$100 million or more or adversely affect in a material way the economy or a sector of the economy" seems arbitrary and needs explanation. Other than this financial threshold, NACWA otherwise concurs with the proposed conditions for a 'significant guidance'.

The standard elements for significant guidance are appropriate and will ensure that all agency guidance documents provide at least basic information as to what the guidance document is, including the date of issuance and whether it updates and/or replaces a previously issued document. The seventh standard element that instructs agencies not to include mandatory language such as "shall" and "must" is critical. These words are often used in agency guidance where they can imply additional conditions or requirements beyond those actually mandated by a regulation or statute.

#### Notice and Comment for Significant Guidance

NACWA believes that some guidance documents demand a formal comment period to allow all stakeholders a meaningful opportunity to provide input. A notice in the *Federal Register* is likely the most appropriate way to ensure that all interested parties are aware of the guidance. NACWA does not believe that this notice and comment process should be reserved only for those guidance documents that are deemed economically significant. If a regulation or statute mandates requirements that will result in an economic impact greater than \$100 million (see comment above), NACWA agrees that associated guidance should be subjected to stakeholder review and comment. However, the economic impact of a rule should not be the only factor for determining whether an associated guidance document should be formally vetted. Instead, NACWA believes that the agency should also consider whether the controversial nature or complexity of the issue that defines it as 'significant' according to the GGP demands that it be subjected to a broader, public review.

Many federal agencies, including EPA, already solicit input on some guidance documents through a formal notice and comment period. However, there is very little consistency among different offices at EPA and in some cases within the same office. Key stakeholders may be unaware that an important document is available for comment if, for example, they are not on the right e-mail contact list used to notify interested parties. Clear

procedures will ensure that stakeholders are consistently notified of the availability of important guidance documents.

#### Approval Procedures

NACWA agrees that each agency should have written procedures for how significant guidance documents will be reviewed and approved by senior agency officials. Depending on the significance of the guidance, NACWA understands that in the past OIRA has been involved in the review/approval process. NACWA believes that this type of participation from OIRA in the development and approval of guidance documents is critical. However, these reviews by OIRA must not significantly delay issuance of the guidance and there should be more transparent and consistent policies for when OIRA will be involved in the approval process and for how long these types of reviews should take.

Thank you for providing the opportunity to comment on this important policy. If you have any questions, please call me at 202/833-4651.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is written in a cursive, somewhat stylized font.

Ken Kirk  
Executive Director