



April 25, 2022

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**VIA ELECTRONIC DELIVERY**

Re: Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, Docket #: EPA-HQ-OW-2020-0426

Dear Acting Assistant Administrator Starfield and Assistant Administrator Fox:

The undersigned associations reviewed the 2022 Proposed Clean Water Act (CWA) Financial Capacity Assessment (FCA) Guidance distributed for public comment on February 23, 2022. Our respective members take their CWA regulatory duties seriously and work tirelessly to comply. They cannot, however, do so at a pace that places financially vulnerable households at risk, which is why our associations have worked for years to pursue meaningful change to EPA's FCA Guidance. Importantly, our effort has taken place in close collaboration with Office of Water and Office of Enforcement Compliance Assurance staff and experts. As part of our review of EPA's most recent revision, we again engaged several recognized experts from the sector to evaluate the proposed guidance. Their evaluation is attached for your consideration.

Having compared the proposed guidance against statutory intent, commonly accepted principles of sound government, and the underlying congressional motivations for the revised guidance, it is clear that the Agency's 2022 Proposed FCA Guidance falls well short. Congress directed EPA to (1) fund the National Academy of Public Administration (NAPA) to analyze the current CWA FCA guidance and (2) act on that report. Over a period of several years, the Agency carefully considered input from a range of stakeholders as it worked to develop the 2020 Proposed FCA Guidance, released in January 2021. That draft directly responded to the NAPA report, Congressional directives and the requests of countless stakeholders, by including a specific measure of the financial impact on low-income households.

In crafting the 2022 Proposed FCA Guidance, EPA ignored the expert advice it has received from multiple reports over the last decade and proceeded to remove any evaluation of the actual impacts on low-income ratepayers. In doing so, EPA deliberately created a guidance framework that is designed to fail at doing the one thing it was supposed to do. In addition, the proposed changes (1) create a more onerous process, particularly for smaller utilities, (2) hold water systems accountable for factors well beyond their control, and (3) impose arbitrary time limits that real world examples have shown can be completely inappropriate for some communities. Together, these changes, if finalized in guidance, would serve to impede achieving our shared goal of an equitable and sustainable water service sector.

EPA should not finalize the proposed guidance as drafted or even with modifications. Rather the agency should return to the guidance developed in 2020 and released in January 2021. That guidance:

1. Provided two viable methodologies for assessing financial capability
2. Included the lowest quintile residential income indicator in a framework that supported meaningful decision-criteria
3. Represented a straight-forward evolution of current enforcement practice

Perhaps most importantly, the January 21 guidance was implementable, where the proposed methodology, is not.


EPA has set ambitious goals for achieving just and equitable environmental regulation compliance. Our associations also believe in that goal, and we look forward to continuing to work with EPA on this important topic. Please feel free to contact any of the undersigned if our organizations can be of assistance in the interim.

Sincerely,


ON BEHALF OF THE AMERICAN WATER WORKS  
ASSOCIATION

  
G. Tracy Mehan, III  
Executive Director, Government Affairs

ON BEHALF OF THE NATIONAL ASSOCIATION OF  
CLEAN WATER AGENCIES

  
Adam Krantz  
Chief Executive Officer

ON BEHALF OF THE WATER ENVIRONMENT  
FEDERATION

  
Walter T. Marlowe, P.E., CAE  
Executive Director

Attachment (1)

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ATTACHMENT 1.  
WATER UTILITY ASSOCIATION CONSULTANT REVIEW  
ENVIRONMENTAL PROTECTION AGENCY [EPA-HQ-OW-2020-0426; FRL-8421-02OW]  
PROPOSED 2022 CLEAN WATER ACT FINANCIAL CAPABILITY ASSESSMENT GUIDANCE

# WATER UTILITY ASSOCIATION CONSULTANT REVIEW

ENVIRONMENTAL PROTECTION AGENCY  
 [EPA–HQ–OW–2020–0426; FRL–8421–02OW]

## PROPOSED 2022 CLEAN WATER ACT FINANCIAL CAPABILITY ASSESSMENT GUIDANCE

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### EXECUTIVE SUMMARY / KEY MESSAGES FOR UTILITIES

On February 23, 2022, EPA posted the above referenced proposed guidance for public comment. This proposed 2022 Financial Capability Assessment (FCA) guidance **substantially changes** revisions to the FCA guidance initially published in August 2020 and posted as a pre-publication version in January 2021 but withdrawn under the Biden Administration’s Regulatory Freeze Pending Review. The new FCA guidance compromises many of the methodological and procedural improvements to the original 1997 FCA guidance outlined in EPA’s September 2021 version. These improvements were responsive to long-standing concerns outlined most recently in reports offered by the National Academy of Public Administrators as well as the water industry associations.

Key messages for water, wastewater and stormwater utilities, that may be noted in utility association comments due April 25, 2022 per the Federal Register posting, include that the 2022 Proposed FCA guidance:

- Fails to a consider prospective compliance funding impacts on low-income customers (as called for by NAPA and the utility associations) but rather amplifies consideration of the prevalence of poverty in a permittee’s service area.

- Calls for submittal of a Financial Alternatives Analysis as a precursor to consideration of extended compliance schedules or water quality standards variances. The guidance does not address prevailing legal or logistical constraints on the prescribed alternatives nor how EPA will gauge whether a permittee’s alternatives analysis supports a particular level of burden determination.
- Retains the option (Alternative #2) for communities/permittees to demonstrate financial capability through “dynamic financial and rate models” that evaluate impacts on customers’ bills. Yet, asymmetrically, this option is not recommended for economic impact analysis supporting WQS variance requests or Use Attainability Analyses (though it may be provided as supplemental information).
- Reiterates defined scheduling benchmarks, most notably 20 years for High Burden communities (or up to 25 years based on additional considerations) rather than referencing useful lives or assets, longer-term financing periods, or recognizing that many 25+ year periods have been approved.

## INTRODUCTION AND CONTEXT

The 2022 Proposed Financial Capability Assessment Guidance replaces proposed guidance initially disseminated in August 2020 but never published in the Federal Register. This earlier version was withdrawn for review and approval in accordance with the January 20, 2021 White House Memorandum, *Regulatory Freeze Pending Review*. The Proposed 2022 FCA guidance, which contains substantial changes to EPA’s initial revision, was posted to the Federal Register on February 23, 2022. Public comments are due by April 25, 2022.

This Review Report was contracted<sup>1</sup> by AWWA, NACWA and WEF, who supported a report provided in April 2019 offering recommendations on FCA guidance revisions. The Report is intended to provide utility association members with information to inform their assessment of the FCA guidance revisions, and outline comments that will be submitted by the associations that members may elect to amplify or supplement. The Report offers comments on proposed FCA revisions that present the most acute challenges for utilities charged with Safe Drinking Water Act and Clean Water Act compliance. The Report also addresses the specific questions EPA has put forth in their request for public comment. However, the Report is limited insofar as it does not address all of the concerns that may arise from a detailed review, nor offer local or regional perspectives. The Report has not been revised or edited by the sponsoring utility associations; it reflects the views, opinions, and recommendations of the contributing authors.

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<sup>1</sup> Contributing consultants: John Mastracchio, Raftelis and Eric Rothstein, GalardiRothstein Group.

1997 Financial Capability Assessment Guidance<sup>2</sup>

EPA’s original FCA Guidance outlined a two-phase analysis whereby a Residential Indicator and an index of Permittee’s Financial Capability Indicators are identified. The Residential Indicator provides for a determination of current and projected program costs<sup>3</sup> as a percentage of the permittee’s Median Household Income (MHI); the permittee’s Financial Indicators reference a variety of measures of financial strength and performance. In combination, using the matrix below, the Residential and Financial Indicators are intended to offer insight into the extent of economic burden that a defined program will impose on a community. Essentially, the same methodology is reflected in EPA’s guidance related to social and economic impact assessments used for purpose of considering Use Attainability and potential Water Quality Standards variances in the Safe Drinking Water Act (SDWA) compliance context.

EPA Guidance Financial Capability Matrix			
Permittee Financial Capability Indicators Score (Socioeconomic, Debt and Financial Indicators)	Residential Indicator (Cost Per Household as a % of MHI)		
	Low (Below 1.0%)	Medium (1% - 2%)	High (Above 2%)
Weak (Average below 1.5)	Medium Burden	High Burden	High Burden
Medium (Average between 1.5 and 2.5)	Low Burden	Medium Burden	High Burden
Strong (Average Above 2.5)	Low Burden	Low Burden	Medium Burden

\* United States Environmental Protection Agency, “Combined Sewer Overflows: Guidance for Financial Capability Assessment and Schedule Development,” EPA 832-B-97-004, February 1997. P.41

EPA guidance and negotiation practices also offer general boundaries for adjustments to program schedules established to reflect “normal engineering and construction practices.” These boundaries are based on differing levels of economic burden and, in essence, reflect the notion of enabling schedule relief in response to potential economic burdens. The FCA Guidance also contains many caveats concerning the potential use of FCA results, noting that enforcement actions are subject to negotiation and that “special circumstances” will be considered.

Over the 2.5 decades since original publication, many stakeholders, including the water utility associations and the United States Conference of Mayors, articulated a host of issues with the EPA FCA guidance. These challenges included but were not limited to:

<sup>2</sup> United States Environmental Protection Agency, “Combined Sewer Overflows: Guidance for Financial Capability Assessment and Schedule Development,” EPA 832-B-97-004, February 1997.

<sup>3</sup> “Current and planned wastewater treatment (WWT) and Combined Sewer Overflow (CSO) controls. (p. 10)

- The dubious logic of an indicator-based Financial Capability Matrix approach to determining the extent of burden as signaled by:
  - No financial indicators relating to the relative costs of other household necessities including, for example, shelter costs and electricity rates.
  - Arithmetic averaging of (arguably inadequate and duplicative<sup>4</sup>) financial indicators (e.g. equal weighting) despite undoubted differences in their relative importance,
  - Use of a “snapshot” of indicator values without consideration of past or emerging trends impacting these values.
  - Singular use of Median Household Indicator values without consideration of the distribution of incomes across service populations.
- The absence of references to utility rates or customer bills under alternative rate increase programs that directly impact ratepayer financial capabilities.

### [Financial Capability Assessment Guidance Evolution<sup>5</sup>](#)

In response to a congressional directive to update EPA policies and guidance on affordability, the Environmental Protection Agency (EPA) contracted with the National Academy of Public Administration (NAPA) to conduct an independent study to create a definition of, and framework for, community affordability of clean water. The subsequent report<sup>6</sup> echoed many of the flaws identified in previous advocacy. In April 2019, in advance of EPA’s pending update of its guidance, a report sponsored by water utility associations<sup>7</sup> provided a new framework and methodology to address the shortcomings of the 1997 guidance and accommodate the recommendations contained in the NAPA Report.

In August, 2020 EPA posted a revision to the 1997 guidance<sup>8</sup> that incorporated many of the recommendations of the NAPA and industry association reports including, perhaps most notably, a focus on impacts on low-income populations. This proposed FCA methodology proposed use of an additional “Lowest Quintile Burden” matrix that looked at cost as a percentage of lowest quintile income (the Lowest Quintile Residential Indicator or “LQRI”) and an index of poverty

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<sup>4</sup> These measures are inadequate because of the ready availability of additional and arguably better indicators (as discussed by NACWA in prior publications and in the 2013 USCOM/AWWA/WEF publication: “Affordability Assessment Tool for Federal Water Mandates”); duplicative in that bond ratings, a Guidance indicator, already consider many of the same financial indicators used in the index, and because MHI is already employed in the residential indicator calculation.

<sup>5</sup> United States Environmental Protection Agency, “Combined Sewer Overflows: Guidance for Financial Capability Assessment and Schedule Development,” EPA 832-B-97-004, February 1997.

<sup>6</sup> Developing a New Framework for Community Affordability of Clean Water Services, National Academy Of Public Administration (NAPA), October 2017

<sup>7</sup> Developing a New Framework for Household Affordability and Financial Capability Assessment in the Water Sector, American Water Works Association, National Association of Clean Water Agencies and Water Environment Federation, April 2019.

<sup>8</sup> Proposed 2020 Financial Capability Assessment Guidance, EPA-HQ-OW-2020-0426, USEPA, August 28, 2020 which was followed by prepublication as 2021 Financial Capability Assessment Guidance, 800B21001, January 2021.



prevalence indicators (the Poverty Indicator). The 2020 proposed FCA guidance also indicated an implementation schedule benchmark of up to 25 years (absent consideration of additional information) for a community faced with a “High Burden.” EPA’s Proposed 2020 FCA guidance underwent review per Regulatory Freeze Pending Review Memorandum issued by the White House on January 20, 2021.

In December 2021, EPA outlined potential revisions to the Proposed 2020 FCA guidance in a presentation provided in the context of the Agency’s Water Affordability Learning Exchange.<sup>9</sup> Potential revisions included adding requirements to document affordability strategies, revisions to recommended compliance timelines, update of a Poverty Indicator index, and revising options for incorporating a lowest quintile measure. Perhaps most notable of these potential revisions was the effective abandonment of the Lowest Quintile Residential Indicator measure and relegation of consideration of Lowest Quintile Income as indicative of the prevalence of poverty in a community rather than to highlight potential claims of water service costs on incomes of economically disadvantaged customers.

The Proposed 2022 FCA guidance largely reflect the potential revisions outlined in EPA’s Water Affordability Learning Exchange presentation, which contains substantial changes to EPA’s initial revision. The Proposed 2022 FCA guidance was posted to the Federal Register on February 23, 2022. Public comments are due by April 25, 2022.

### [Proposed 2020 FCA Guidance Improvements](#)

As noted in public comments provided following EPA’s publication of its Proposed 2020 FCA guidance, EPA’s earlier FCA guidance revisions made a number of critical improvements to the original 1995 / 1997 guidance documents. In particular, EPA was commended for:

- Enabling use of cash-flow forecast modeling to facilitate the assessment of community financial capabilities
- Including a measure of cost impacts on lowest quintile income residents, and for considering the prevalence of poverty in communities
- Enabling consideration of total water (e.g., drinking water, wastewater, stormwater) service costs

While the water utility associations, as well as numerous other stakeholders, expressed continuing concerns about several methodological and policy-based aspects of the revised

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<sup>9</sup> Slide presentation: EPA’s Financial Capability Assessment for Clean Water Act Obligations, EPA, December 2021

guidance,<sup>10</sup> the Proposed 2020 FCA guidance revisions were viewed by the regulated community and industry associations and organizations as generally responsive to prior critical reviews.<sup>11</sup>

In contrast, public comments offered by selected environmental advocacy groups<sup>12</sup> indicated acute concerns with the Proposed FCA guidance revisions. In general, these concerns centered on the potential for the guidance revisions to enable extended compliance schedules, delaying remediation of environmental harms (that often impose environmental injustices). These stakeholders called for the guidance to address the potential to revise utility financing practices and rate structures to address water affordability while continuing to require timely compliance.<sup>13</sup>

The Proposed 2020 FCA guidance, as well as the 2022 Proposed Guidance, preserve the acknowledgement that prescribed information submittals may not present a complete and accurate picture of a particular permittee's circumstances.

## MAJOR CHANGES BETWEEN PROPOSED 2020 AND PROPOSED 2022 GUIDANCE

In many respects, the changes between the Proposed 2020 Guidance and the Proposed 2022 guidance reflect responses to the concerns outlined in comments offered by the environmental advocacy groups. Unfortunately, in our view, EPA's revisions compromise many of the methodological improvements to the original guidance and miss opportunities to address stakeholder concerns while failing to recognize practical, legal and administrative constraints that frame permittees' freedom to act as EPA prescribes.

### 1. Consideration of Lowest Quintile Households and Poverty Indicators

EPA has effectively abandoned the use of the Lowest Quintile Residential Indicator metric that examined the costs of planned compliance measures on economically disadvantaged households. This metric 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."<sup>14</sup> Instead, apparently in response to "expressed concerns about the methodology proposed to scale the costs for lowest quintile households and the proposed

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<sup>10</sup> Including retention of the Financial Indicator Index, particularly property tax-related metrics, prescriptions about proposed cost adjustments based on household sizes, and others (as discussed below).

<sup>11</sup> See, for example, AWWA/NACWA/WEF Joint letter dated March 16, 2021; comments submitted by Hamilton County, Ohio and on behalf of: Capital Region Water (Harrisburg, PA), Gary (IN) Sanitary District, City of Lancaster (PA), Muncie (IN) Sanitary District, City of Terre Haute (IN), and the Illinois Association of Wastewater Agencies in October 2021.

<sup>12</sup> Including, for example, the Environmental Protection Network and National Resources Defense Council.

<sup>13</sup> See, for example, Environmental Protection Network Comments on Proposed 2020 Financial Capability Assessment for Clean Water Act Obligations dated October 19, 2020

<sup>14</sup> National Academy of Public Administration, Developing a New Framework for Community Affordability of Clean Water Services, October 2017, Panel Recommendation #2 (2.), p.8.

LQRI thresholds”, EPA has outlined two approaches to using a different metric – “lowest quintile income as benchmarked against the national lowest quintile income” – “to assess the severity and prevalence of poverty in a community’s service area.”<sup>15</sup> Neither of these options consider compliance cost impacts on low-income households. EPA’s request for public comment question #1 centers on the merit of two different ways to use the LQI benchmark metric, not the more important question about whether to abandon the LQRI metric.

## 2. Addition of 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.<sup>16</sup> This demonstration is to be accomplished through completion of a Financial Alternatives Analysis checklist composed of over 25 questions broken into four categories:

- (1) Financing Options for Capital Costs,
- (2) Rate Design,
- (3) Ratepayer Support Options for Lower Income Residential Customers, and
- (4) Financial and Utility Management.

EPA indicates that the Financial Alternatives Analysis may be used to adjust or preserve the Lowest Quintile Poverty Indicator score for purposes of providing increased schedule flexibility (relative to modified scheduling benchmarks as discussed below). Notably, 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.”<sup>17</sup>

EPA’s request for public comment question #2 requests additional examples or case studies on financing and funding considerations, not whether the proposed Financial Alternatives Analysis (and EPA’s proposed use thereof) is practical or effective in advancing an assessment of financial capability.

## 3. Modification of Scheduling Benchmarks

Under the 2020 Proposed FCA guidance, “permittees could receive compliance schedules up to 25 years or the useful life of the CSO controls if they demonstrate an unusually high impact. The Proposed 2022 FCA guidance withdraws the useful life benchmark, reverts back to the 1997

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<sup>15</sup> Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 12

<sup>16</sup> Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 14

<sup>17</sup> Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 23

scheduling boundary of 20 years for “High” impact communities, and allows up to 25 years for “unusually high impacts”.<sup>18</sup> EPA’s request for public comment question #3 requests feedback on the proposed scheduling benchmarks and examples to support the basis for alternatives that may be proposed.

## MAJOR CONCERNS, MISSED OPPORTUNITIES, POTENTIAL IMPLICATIONS

Provided in the following sections are detailed comments on the language in the Proposed 2022 FCA Guidance and general responses to EPA’s Requests for Public Comment noted above. This section offers a summary of major concerns, outlines missed opportunities, and suggests some potential implications and strategies for water utilities engaged in regulatory review of their financial capabilities.

### Major Concerns With 2022 Proposed FCA Guidance Revisions

The 2022 Proposed FCA guidance is discouraging insofar as it largely withdraws substantive policy and methodological improvements called for by a broad array of stakeholders – not just utilities – and as suggested by the congressionally mandated, independent review of the 1997 guidance by the National Academy of Public Administrators (NAPA). It discards consideration of compliance funding impacts on low-income households<sup>19</sup> and suggests that consideration of low-income households ought to be restricted to amplifying measures of the prevalence of poverty, and in any event can be adequately and fully addressed through implementation of an array of “financial alternatives” that may or may not be available or practical in individual communities.

While the call for more substantive and sustained local redress of water affordability challenges may be warranted and laudable, additional requirements to secure a “High Burden” designation<sup>20</sup> are problematic. Uncertainties surround whether or not EPA will concur with permittees’ assessments of the feasibility of individual financial alternatives, or the practicality of implementation of all feasible alternatives. In so doing, the 2022 Proposed FCA Guidance portends to effectively place a High Burden designation out of reach for permittees even with acute financial capability constraints. In this sense, the proposed 2022 FCA guidance may impose more onerous, uncertain and subjective determinations than the original 1997 guidance that this revision was intended to rehabilitate.

Equally distressing is the return to fixed, arbitrary scheduling boundaries, notwithstanding the fact that these scheduling boundaries are at variance with several noteworthy Consent

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<sup>18</sup> Proposed 2022 Clean Water Act Financial Capability Assessment Guidance, February 2022, p. 15 - 16

<sup>19</sup> The Lowest Quintile Residential Indicator metric outlined in the withdrawn 2020 revision that examines compliance cost per household as a percentage of Lowest Quintile Income.

<sup>20</sup> Enabling negotiation of an extended compliance schedule under the FCA guidance prescriptions.

Decrees<sup>21</sup> that are straining those permittees' financial capabilities (despite the extended schedules granted). This return to arbitrary scheduling boundaries seems counter to EPA's Integrated Planning prescriptions and embrace of, for example, green infrastructure initiatives that involve more distributed, long-term investment than buried gray infrastructure. It is blind to the relative urgency and impact of compliance investments across permittees. And, perhaps most disappointingly, it suggests that EPA is inclined to set aside its enforcement discretion rather than preserving the flexibility to work collaboratively with the regulated community to tailor scheduling provisions (including economic reopeners) based on individual permittee's unique circumstances.

In summary, the proposed 2022 guidance:

- Fails to address the well documented methodological problems with the original 1997 guidance matrix with its reliance on a dubious cost per household calculation divorced from actual rates paid by utility customers, its reference to the problematic Median Household Income measure, and its use of a flawed index of equally weighted Financial Capability Indicator measures (that are variously neither indicative or equally important)
- Insists on continued submittal of the 1997 guidance's FCA matrix – a generation removed from the CSO policy – without modification for evidenced nonsensical results that would suggest that there is no limit to spending that could impose undue burdens on relatively strong or higher income communities – irrespective of investments made over the last generation.
- Fails to consider prospective compliance funding impacts on low-income customers (as called for by NAPA and the utility associations) but rather amplifies consideration of the prevalence of poverty in a permittee's service area.
- Calls for submittal of a Financial Alternatives Analysis as a precursor to consideration of extended compliance schedules or water quality standards variances. The guidance does not address prevailing legal or logistical constraints on the prescribed alternatives nor how EPA will gauge whether a permittee's alternatives analysis supports a particular level of burden determination.
- Reiterates defined scheduling benchmarks, most notably of 20 years for High Burden communities (or up to 25 years based on additional considerations) rather than referencing useful lives or assets, longer-term financing periods, or recognizing that many 25+ year periods have been approved.

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<sup>21</sup> For example, the City of Atlanta's Consent Decree extension (2012) that provides a total compliance period of 27 years. Orders or consent decrees for Lancaster, Pennsylvania (2017), Gary, Indiana (2016), Scranton, Pennsylvania (2012), Philadelphia, Pennsylvania (2011), the Northeast Ohio Regional Sewer District (NEORS) (2010), and Honolulu, Hawaii (2010) all have 25-year compliance schedules under CWA orders or decrees. .

### Missed Opportunities

- To finally discontinue the use of highly criticized and discredited median income cost burden measure and to address other flaws of the 1997 guidance – by preserving many of its highly criticized components.
- To stop perpetuating an approach that ignores the realities of most retail – wholesale relationships and inaccurately spreads the total wastewater service costs of permittees over the wholesale portion of the service area. This is illogical and inaccurate when retail customers are provided full wastewater service whereas wholesale customers are only provided with wastewater treatment services.
- To revise the financial capability indicators that are largely general obligation measures that do not necessarily pertain to the financial capability of utility enterprise funds, with indicators that measure the credit worthiness of the utility, rather than the local general government, and measure the financial capability of the community served by the utility.
- To prompt a meaningful discussion of community burden assessments based on actual compliance funding impacts on households and to promote collaborative engagement of community organizations to tailor approaches to low-income affordability that reflect local circumstances and constraints.
- To encourage and include meaningful partnering with the utility community to address the prevailing constraints on their freedom to act to address low-income affordability, such as recognition of huge disparities in administration capacity.
- To reference the use of an Integrated Planning Framework as part of the FCA to prioritize improvements across multiple regulatory requirements to achieve greatest benefit for the costs incurred, rather than perpetuating a siloed approach.

Finally, the 2022 Proposed FCA guidance is also discouraging in that it does not acknowledge the considerable improvements in (at least selected) utilities' environmental performance since the adoption of the CSO policy, nor the extraordinary investments and financial commitments made over the last generation. In the same way that household financing capability decisions are rightfully informed by prior investments (e.g., no home insulation vs. installing R-60 insulation to improve energy efficiency), EPA's financial capability assessment should involve consideration of prior investment patterns. While extended compliance schedules could, as EPA suggests, allow permittees to cure environmental harms that impose acute environmental injustices, these calamities are doubtful among permittees that have heeded the CSO policy over the last generation.

## Potential Implications

Though the 2022 Proposed FCA Guidance revision seems a step backward in many respects, there are several options for permittees and the water utility community collectively to consider in the event that the guidance is put in place largely unaltered.

- Employ the flexibilities that characterize Alternative #2: Financial and Rate Models to advocate for compliance schedules that limit economic burdens. EPA notes that *“[u]nlike Alternative 1, EPA has not established benchmark percentages of household income for Alternative 2. However, EPA intends to keep the percentage of household income spent on wastewater utility bills within reasonable bounds when establishing compliance schedules.”* (p. 28-29)
- Seek to work collaboratively with EPA on readily available means for utilities to demonstrate that selected financial alternatives enumerated in EPA’s checklist (Appendix C, pp. 1-4) are or are not legal or practical, and that all feasible alternatives have been considered.
- Seek to clarify/address (potentially through legal challenge) the boundaries of EPA’s regulatory purview as it pertains to utility management and rate setting (as prescribed in EPA’s Financial Alternatives Analysis).
- Work collaboratively with EPA and other stakeholders to establish federal legislation and/or rulemaking that could reduce barriers to implementation of selected Financial Alternatives.
- Recognizing that EPA’s guidance is guidance alone without the force of law, work to define circumstances under which EPA’s Proposed 2022 FCA guidance is deemed to be inapplicable, enabling consideration of alternative metrics / approaches to assessing financial capabilities and appropriate schedule boundaries.
- Develop CD negotiation recommendations (and sample language) that call for institution of economic re-opener provisions

## **DETAILED REVIEW OF 2022 PROPOSED FCA GUIDANCE PROCEDURES**

This section provides a detailed review sections IV of the 2022 Proposed FCA guidance document titled 2022 Proposed Financial Capability Assessment Guidance and delineating the procedural steps to be taken by permittees to complete an FCA submittal

### b. Alternative #1: Critical Metrics with Established Thresholds and Instructions

Alternative 1 requires the following:

1. Calculation of the Residential Indicator – cost per household as a percentage of MHI.
2. Assessment of Financial Capability Indicators – six socioeconomic, debt, and financial indicators used to benchmark and community’s financial strength
3. Calculation of the Lowest Quintile Poverty Indicator Score
  - o Under Proposed Option 1 – combine the LQPI with five poverty elements to benchmark the severity and prevalence of poverty within a community’s service area with the LQPI given a 50% weighting and the remaining five given a 10% weighting each.
  - o Under Proposed Option 2 – compare the community’s lowest quintile income against the national lowest quintile income, assess five poverty indicators used to benchmark the prevalence of poverty in a community, with each of the five indicators given equal weighting.

### **Residential Indicator**

Even though the EPA acknowledges the importance of focusing on the income of low-income households, Alternative 1 continues to use the problematic Residential Indicator based on a community’s median household income, rather than one that is based on the income of low-income households. The use of the Residential Indicator in the FCA has long been criticized as an inappropriate measurement of financial capability and customer affordability. Such criticism has included the following:

- MHI is a poor indicator of economic distress bearing little relationship to poverty or other measures of economic need across households that make up a community. MHI is not focused on the poor or most economically vulnerable users.
- MHI does not capture impacts across diverse populations. Income distribution can vary widely across a permittee’s service area.
- The Residential Indicator does not fully capture household economic burdens. Economic burdens are measured by comparing the cost of necessities to available household income. The Residential Indicator is an incomplete cost measure that does not consider all water (drinking water, wastewater, stormwater) costs.
- The Residential Indicator does not reflect local cost of living differences between communities, such as the significant differences in housing cost burdens.
- The Residential Indicator is based on an inaccurate measure of residential costs, rather than directly using actual residential customer bills to assess their cost burden. The cost per household calculation is divorced from the actual rates and therefore bills faced by median and low-income households.



This is a missed opportunity to refine the Residential Indicator calculation to improve its accuracy and usefulness as a utility cost burden indicator, and implement a meaningful response to widely expressed concerns about compliance programs impacts on economically disadvantaged households as echoed in the NAPA report.

In lieu of the use of the Residential Indicator, it is recommended that the EPA reconsider replacing the Residential Indicator with the Household Burden Indicator (HBI), which is defined as the total basic water service cost (combined) as a percent of the 20<sup>th</sup> percentile of the community's household income. There are numerous reasons why focusing on the 20<sup>th</sup> percentile household, rather than the median household is an improvement:

1. Households at or below the 20<sup>th</sup> percentile typically reflect those households that are the most economically challenged members of the community (i.e., more so than the median income households).
2. The 20<sup>th</sup> percentile is generally considered the demarcation between low income and middle-class households, and therefore is better income level to measure than MHI.
3. The data defining the 20<sup>th</sup> percentile households are readily available from the U.S. Census and provides no additional burden on EPA for gathering the necessary data for analysis.
4. Total water sector costs (rather than examining wastewater, drinking water, and stormwater costs separately) is recommended because it represents the combined water sector utility burden placed on low-income households.

### **Inclusion of Multiple Jurisdictions in the FCA Analysis**

It is common for permittees to serve multiple jurisdictions with some wholesale customers owning, operating, and maintaining their own conveyance and collection systems. The proposed EPA guidance specifies that the total wastewater service area, including all retail and wholesale service areas should be included in the analysis. EPA further specifies that the Residential Indicator should be calculated by adding together the current and projected costs of wastewater service, estimating the residential share of total system costs based on the residential portion of flows, and dividing the residential share of total costs by the total number of households, including households in retail and wholesale portions of the service area.

This approach ignores the realities of most retail – wholesale relationships and inaccurately spreads the total wastewater service costs of permittees over the wholesale portion of the service area. This is illogical and inaccurate when retail customers are provided full wastewater service whereas wholesale customers are only provided with wastewater treatment services, which is common among wastewater service providers. Further, this approach requires the permittee to include current and projected wastewater collection costs from wholesale

jurisdictions when the permittee may not have access to such information, and the wholesale jurisdiction may not be willing to provide such information to the permittee. A more reasonable approach to dealing with permittees with both retail and wholesale service areas is to provide the permittee with flexibility to either identify and exclude the costs associated with serving wholesale customers, and correspondingly exclude the wholesale households from the Residential Indicator calculation, or include the wholesale customers in the analysis if sufficient information is available and utilize the actual costs that can be allocated to wholesale customers, rather than allocating costs simply based on flow proportion. Doing so would more accurately reflect the cost responsibility and burden on households within the permittee's jurisdiction that receive retail and wholesale wastewater service from the permittee.

### **Assessment of Financial Capability Indicators**

The EPA continues to include financial capability indicators that are largely general obligation measures that do not necessarily pertain to the financial capability of utility enterprise funds. The NAPA Report recommended revising and refocusing the financial capability indicators on the operational efficiency, debt burden, and managerial effectiveness of the utility supplying clean water services and expanding the socioeconomic components directly affecting the utility's market conditions to include trends in population, relative wealth, economic growth, and other economic structural problems in the community served by the utility.

The use of the six financial capability indicators as part of the FCA guidance is also problematic for the following reasons:

- The financial capability indicators are focused on a local municipality's financial and managerial conditions. However, utilities providing wastewater and water services are often separate from, and independent of, the local municipality with taxing authority.
- The use of property tax revenues as a percentage of full market property value is incomplete and ignores other tax burdens, such as income, sales, business taxes, and user fees. The EPA should allow permittees to use the total local tax and fee revenues as a percentage of full market property value.
- Measurements of MHI and unemployment rates as compared to the national average ignores the impact of the absolute levels themselves.
- Local MHI comparisons to the national average do not reflect differences in local cost of living between communities, such as the significant differences in housing cost burdens. This proposed analysis would result in no amount of spending that would support schedule relief for high cost of living communities.
- The financial capability indicators do not take into account trends in the ability of local governments to finance major capital improvements, such as consideration of recent trends in local government revenue growth or decline.

- The debt burden indicator does not take into account unfunded pension and healthcare commitments to active and retired employees.
- The financial capability indicators do not take into account the amount and trends in delinquency rates in water and wastewater payments. The tax collection rate measure should be replaced with the delinquency rates in water and wastewater payments.

Revising the financial capability indicators to be more aligned with measures of utilities financial capability is a missed opportunity by EPA to improve the relevance of these indicators. The EPA could easily have revised these indicators to be more utility specific by selecting indicators used by credit rating agencies in their credit methodologies for water and wastewater utilities.

### **Lowest Quintile Poverty Indicator Score**

We commend the EPA for including a new Lowest Quintile Poverty Indicator Score in its FCA Guidance to measure the severity and prevalence of poverty within a community's service area. However, the selection of the individual measures could be significantly improved to address multicollinearity issues, differences in cost of living between the national average and local community, and focusing more on the severity of poverty within a community's service area.

We offer the following comments to EPA for improving upon the LQPI Score:

1. The inclusion of upper limit of the lowest quintile income (i.e., the 20% percentile of income) is a measure of severity and prevalence of poverty only to the extent that it is compared with the local cost of living rather than the national LQI value. Furthermore, without comparing a community's LQI measure to its utility cost burden, it is a much less useful measurement of affordability and financial capability.
2. Since the cost of housing is one of the most essential costs that most low-income households face, and since housing costs vary considerably from community to community and significantly contribute to cost of living differences, the EPA should consider adding a metric to the poverty indicator score that reflects the local low-income housing burden, such as gross rent as a percentage of LQI. If the gross rent as a percentage of LQI is high (say greater than 40%), it indicates the significant prevalence of poverty and a widespread economic challenge for households in their ability to afford water and wastewater utility service. Including this metric would help balancing out an LQI measure that is unadjusted for local cost of living and compared to the national LQI.
3. LQPI #2 (percentage of population with income below 200% of the Federal Poverty Level) uses the Federal Poverty Level (FPL) as the basis. While widely used as a means test for national assistance programs, the FPL is imperfect as it is not adjusted based on the local community's cost of living and is based on a 60-year-old benchmark, i.e., the poverty threshold of three times the cost of a minimum food diet in 1963, adjusted by the

consumer price index. A more relevant poverty level measurement to use in this instance is the Supplemental Poverty Measure (SPM), which is based on expenditures of food, clothing, shelter, and utilities, and is updated on a five-year rolling average.

4. LQPI #2 (percentage of population with income below 200% of the Federal Poverty Level) and LQPI#3 (percentage of population receiving food stamps/SNAP benefits) are highly correlated since SNAP eligibility is based on the FPL, specifically households with income at or below 130% of the Federal Poverty Level, plus having a certain maximum bank balance are eligible for SNAP.
5. LQPI#3 (percentage of population receiving food stamps/SNAP benefits) does not reflect the full extent of poverty within the community because not all households that are eligible for SNAP are enrolled in SNAP. A better measure would be to focus on the severity of poverty by including a measure of households that are eligible for SNAP benefits, rather than households that are actually enrolled. For example, LQPI#3 could be change to be the percentage of the population with income at or below 100% or 130% of the Federal Poverty Level, which would measure the prevalence of severe poverty better than the 200% FPL measure.
6. For clarity, the terminology for LQPI #4 should be revised from “Percentage of Vacant Households” which is meaningless, to “Percentage of Vacant Housing Units” which is a more meaningful descriptor.
7. Each of the indicators are compared to the national values, with a strong score being more than 25% below the national figure, median score within 25% of the national figure, and a weak score being more than 25% above the national figure. These ranges for strong, mid-range, and weak are unsupported and appear to be arbitrary demarcations and not consistent with distributions of incomes across the Country. The EPA should analyze and provide information on the statistical support of these demarcations.

### c. Alternative #2: Critical Metrics and Instructions

EPA states that “Alternative 2 provides an opportunity for communities that wish to use financial and rate model analyses to submit this more detailed information to assist in developing an appropriate schedule for implementing CWA control measures.” (p.24) Importantly, the guidance notes that “[t]his type of information can be used as an analytic tool to assist in developing schedules for implementing CWA control measures **in lieu of the critical metrics and schedule benchmarks** set forth under Alternative 1.” (p. 25 – emphasis added) Inexplicably, “EPA does not recommend the use of financial and rate model analysis under Alternative 2 in lieu of Alternative 1 for WQS decisions.” (p. 25) Given the profound methodological flaws of the critical metrics required under Alternative #1 (discussed above) and schedule benchmarks (discussed

below), Alternative #2 may have considerable appeal and remains a marked improvement to the 1997 FCA guidance.

EPA's general description of cash-flow forecasting provides a reasonable overview of the information to be compiled and analytical processes. While EPA's listing of supporting data and documentation requirements (p. 26) may appear daunting, relatively simple, user-friendly models<sup>22</sup> may be readily constructed to deliver this information as a matter of course. Their use, even for relatively small systems, is arguably best management practice and should be advanced in any event (irrespective of compliance challenges).

Notably, Alternative #2 continues to call for several of the flawed metrics and source data used in Alternative #1. For example, the cash-flow forecasts are to provide projections of customer bills as a percentage of median household income rather than the 20<sup>th</sup> percentile income level. It 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.

EPA offers Exhibit 5: Examples of Rate Increase Scenarios and Median Household Impacts for Each Scenario that outlines information that maybe readily developed with cash-flow forecasting tools. However, the forecasted metrics need not be constrained to rate increases, costs per household, and bill impacts as a percentage of Median Household income. Several major Consent Decrees that have been entered and other ongoing negotiations have employed projections of bill impacts as a percentage of both MHI and LQI measures.

Reassuringly, though ambiguously, EPA notes that "it has not established benchmark percentages of [Median] household income for Alternative 2. However, EPA intends to keep the percentage of household income spent on wastewater utility bills **within reasonable bounds** when establishing compliance schedules." (p. 29- emphasis added). Yet in the same guidance 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) – apparently (and disingenuously) irrespective of whether or not rate increases to comply with these arbitrary scheduling boundaries will push bills outside of reasonable bounds.

Furthermore, as with Alternative 1, EPA requests submittal of a Financial Alternatives Analysis (discussed below) if its initial Lowest Quintile Poverty Indicator score indicates "medium or high impact." This submittal is to enable EPA to determine whether the permittee's score is to be

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<sup>22</sup> Notwithstanding EPA's discouraging statement: "While useful, financial and rate models may be complicated or costly to develop, particularly for mid-size or small communities, and may be difficult for a regulator to evaluate."

retained, and an extended schedule considered, based on “whether the community has taken all feasible steps to address impacts to the lowest quintile.”

d. Other Metrics with Standardized Instructions and e. Other Metrics with Submission of Information Determined by the Community

EPA has offered standardized instructions on selected metrics, as well as allowed for submittal of other metrics that permittees may offer to provide a more complete and accurate picture of their financial capabilities. This is nominally consistent with the oft-cited statement of the 1997 guidance that “when a permittee believes there are unique circumstances that would affect the conclusion of this guidance, the permittee may submit documentation of its unique financial conditions to the appropriate EPA or State NPDES authorities for consideration. (1997 FCA Guidance, p. 10). EPA notes that these additional submittals may provide for “EPA in its discretion” to modify selected impact designations...” to support a schedule beyond the schedule benchmarks in Exhibit 8, up to 25 years for unusually high impact situations.”

Not only does this seem disingenuous insofar as the Proposed 2022 FCA guidance would place schedule relief out of reach for many permittees, it further begs the question of whether and how these submittals will be evaluated. Asking permittees to compile considerable information should at least be accompanied by a description of how the EPA will consider such information. The Proposed 2022 FCA guidance submittal requirements, including the Financial Alternatives Analysis submittal requirements, already call for provision of substantially more information than EPA has previously required. Prior submittals have arguably strained EPA and state agency administrative and technical review capacities, yet the proposed 2022 Guidance suggests that it will be not only able to appropriately consider substantially more required information, but a diverse array of supplemental filings. This, at best, seems doubtful.

As to the metrics for which standardized instructions are offered, it seems noteworthy that:

- the call for information on drinking water costs, asset management costs, and stormwater management costs are all reflective of an integrated planning approach to water management. As such, these arguably should not be viewed as “Other Metrics” but rather considered part and parcel of any evaluation of community financial capabilities.
- EPA suggest that the displaying of bill impact data based on household size may “provide a more nuanced view of the impact of costs based on likely usage” yet there is nothing nuanced about the assumptions used to estimate costs by “likely usage” estimates, nor any particular insight rendered by the Rorschach inkblot style charts offered in Exhibit 6. (p. 32-33).

- EPA asks for Customer Assistance Program data and Comparisons to National Data that are already largely covered, though perhaps in different formats, between the call for a Financial Alternatives Analysis and the expanded number of metrics called for in the modified workbooks.

#### f. Schedule Development

EPA has outlined an approach to prioritization and sequencing of projects to address environmental and public health considerations that is generally reasonable, logical and consistent with the intent of the Clean Water and Safe Drinking Water Acts. EPA recognizes that such prioritization may mean “discharges to non-sensitive areas would be addressed later in the implementation schedule than would be the case under a normal engineering and construction schedule.” (p. 38). In turn, it should also be recognized that such prioritization may impact the overall costs of compliance with attendant impacts on economic burdens. Program sequencing therefore will require a careful balancing of environmental and economic impacts.

For Alternative #1 Schedule Development, the guidance document states that it does not “dictate specific implementation schedules” but rather offers “scheduling benchmarks... to aid all parties in negotiation of reasonable and effective implementation schedules.(p.39) Regrettably, these fixed and arbitrary benchmarks revert back to the flawed 1997 guidance.<sup>23</sup> For good reasons, these prescribed benchmarks have been set aside in numerous Consent Decree negotiations where agreed compliance schedules exceed 20 and even 25 years. For example, previously negotiated Consent Decrees recognized that implementation of green infrastructure measures may require extended periods but could render substantially greater benefits than gray infrastructure. Ironically in light of its frequent claims of the need for consistent enforcement, EPA’s guidance revisions present the untenable quandary of having selected communities treated differently simply (and nonsensically) by virtue of their having slipped within the regulatory window of EPA inconsistency.

EPA also has called for an additional Financial Alternatives Analysis submittal (discussed below) whereby an indication of High Burden (or substantial social and economic impact for WQS reviews) is only retained in the event the EPA determines that a permittee has considered and is implementing all feasible alternatives to address potential impacts on low-income populations. EPA has offered no indication of how determinations of feasibility will be made, no indication of what will be regarded as adequate implementation, nor how legal and practical implementation barriers may be navigated to qualify permittees for retention of a High Burden designation (rendered through rote completion of Alternative 1 prescribed calculations and matrix analyses).

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<sup>23</sup> Setting aside the fiction – demonstrated with a generation of enforcement - that EPA negotiation posture in practice will not be affixed to these benchmarks, that flexibility maybe available by “EPA’s evaluation of financial capability on a continuum”, or that submittal of “additional documentation to provide a more accurate and complete picture” will compel flexibility relative to the prescribed benchmarks.

Clarification of how these Financial Alternatives Analyses will be reviewed and considered is required to avoid having the 2022 Proposed FCA guidance become more punitive, arbitrary and insensitive to local economic conditions than the 1997 guidance,

#### [g. Review of Recommended Expanded Economic Impact Matrix and Analyses for WQS Decisions for the Public Sector](#)

EPA’s language with regarding to potential determinations of widespread social and economic impact that would provide for “removal of a use or a change to a less stringent use subcategory changes” (p. 35) effectively raises the (unreachable) bar beyond that called for with respect to sewage overflow matters. EPA calls for submittal of the same information to populate the standard matrix analyses and financial alternatives analysis – despite the limitations and analytical flaws documented herein – as well as a 10-year LQPI trend analysis and triennial updates in conjunction with WQS variance reviews. EPA offers no coherent logic for not allowing use of Alternative 2: Financial and Rate Models despite their acknowledgement of the potential importance of changes over time – that are more easily represented through cash-flow analyses.

EPA’s call for prioritization of “opportunities to mitigate impacts of WQS decisions to areas with potential environmental justice concerns” is sensible, appropriate and clearly stated – much in contrast to the remainder of the guidance related to WQS decisions that is mired in language distinguishing variances, from use changes, from anti-degradation reviews when the question at hand, in all cases, is whether a community will suffer undue social and economic burdens.

### **FINANCIAL ALTERNATIVES ANALYSIS – APPENDIX C**

The final steps of Alternative 1 and Alternative 2 is to perform a Financial Alternatives Analysis if the community’s initial LQPI Score equals a “medium” or “high” impact. This analysis is intended to document whether the community has considered all feasible steps to address impacts to the lowest quintile, including the use of variable rate structures, customer assistance programs, and applications for grants or subsidies from the CWSRF. The EPA is expecting to see the permittee provide a list of the programs or steps considered, and the actions that would be necessary to put such measures in place, and the plan for taking those actions. Where available tools are not included in a community’s plans to mitigate financial impacts on its low-income residents, the EPA would expect an explanation as to why those approach are not being pursued.



The addition of the financial alternatives analysis introduces a level of complexity that is not warranted or practical in the context of FCA guidance. Requiring utilities to justify their decisions to use various financing alternatives, structure or restructure their financing alternatives in certain ways, and consider certain utility structural aspects, such as special assessment districts, significantly increases the level of effort and burden placed on utilities in completing the FCA, and is overly burdensome, especially for smaller utilities. The use of “feasible” steps to improve low-income affordability cannot be examined solely with an affordability lens, but must be from multiple perspectives, adding to the complexity and burden required in completing the FCA. For example:

- The consideration of extending financing on loans and restructuring loans to “better terms” involves the utility’s fiscal policy considerations, legal and tax considerations, marketability considerations, and issuance and total cost considerations, risk and impact to future borrowing cost considerations, not just whether or not restructuring would have an initial benefit to low-income customers. It is unclear how the EPA and State permitting and enforcement staff will procure the necessary expertise in these areas to fully consider each of these aspects of the financing of restructuring. In addition, this type of feasibility analysis would be overly burdensome, especially for smaller utilities, let alone adding significant complexity to EPA and State permitting enforcement staff’s evaluation process. Furthermore, in many cases, it would be speculative and inappropriate for permittees to assume that they will receive grants or competitive below market interest rate loans for the majority of its multi-decade capital programs, resulting in the likely understatement of the economic burdens placed on households and the community as a whole.
- The consideration of using special assessment districts and other taxes, such as sales or property taxes are infeasible and unrealistic options for most utilities given the political and legal processes that would be required to implement such structures. Furthermore, many utilities across the country were required to conform to the Clean Water Act, User Charge Regulations, which required utilities to establish a user charge system that is based on the proportional use of the system in order to receive construction grant funds. The tax recovery options included in the FCA guidelines conflict with the Federal Guidelines for User Charges for Operation and Maintenance of Publicly Owned Treatment Works (Subpart E to 40 CFR Part 35). The law states that “the Administration shall not approve any grant for any treatment works unless he shall first determined that the applicant (A) has adopted will adopt a system of charge to assure that each recipient of waste treatment services within the applicant’s jurisdiction...will pay its proportionate share of the cost of operations and maintenance (including replacement...”. The EPA’s financial alternatives evaluation requirement completely ignores these Federal User Charge Regulations.

- Several of the rate design considerations included in Appendix C of the FCA guidance (e.g., wealth-based rates, variable rates, inclining block rates) also conflict with the EPA's Federal User Charge Regulations, and conflict with cost of service-based principles, which have long been recognized by government agencies, courts, financial institutions, businesses, and society in general as the standard for rate setting. The FCA guidance including consideration of wealth-based rates, for example, implies that the cost of utility service ought to be shared based on "socioeconomic impacts", which is poorly supported, if at all when considering the added cost of administration, and is contrary to generally-accepted rate setting principles. Establishing rates based on customer cost responsibility is a key factor that distinguishes fees from taxes.
- Encouraging utilities to not follow a cost-based standard of rate making introduces added litigation risk for utilities. Deviating from cost of service fails to recognize state constitutions and jurisprudence regarding utility rates, which will put utilities at substantial risk for legal challenges that can have significant financial repercussions.
- Increasing the variable portion of a rate structure also increases revenue volatility risk, which credit rating agencies have recognized as a risk factor influencing a utility's credit rating.<sup>24</sup> The consequences of charging more variable rates could be higher borrowing costs, which in turn could raise the cost of wastewater service on customers served by the utility.
- The notion that utilities should consider variable rates and inclining block rates for wastewater cost recovery as a way to lessen the burden on low-income customers assumes that all low-income customers within a wastewater system are low users, and this is simply not true. Low-income customers span a large range of usage levels. Therefore, implementing purely variable rates and inclining block rates may make the cost of wastewater service for some low-income customers more expensive, not less.
- Low-income households living in rental properties may also be negatively impacted by inclining block rates, since large apartment building may pay the highest price for water under such a block rate structure.
- The FCA guidelines require utilities to submit customer assistance program information so that the EPA can confirm that the appropriate CAP costs are being included as part of the FCA. In most states, the ability to fund customer assistance programs with user charges is not clear in the state statutes. According to a report prepared by the UNC Environmental Finance Center<sup>25</sup>, only a few states have laws that have been clarified to specifically address the authority of utilities to establish customer assistance programs

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<sup>24</sup> See Fitch Ratings, U.S. Water and Sewer Ratings Criteria, 2017, which states that "Utilities whose fixed-charge components generate a significant amount (30% or more) of their revenue streams are considered stronger."

<sup>25</sup> Navigating Legal Pathways to Rate-Funded Customer Assistance Programs: A Guide for Water and Wastewater Utilities, UNC Environmental Finance Center, 2017.

from rate revenues. Requiring utilities to assess the feasibility of such CAP programs and include them in user charge funding, without regard to whether or not they are enabled or prohibited by state law, is irresponsible and puts utilities at risk for legal challenges if they attempt to employ such practices.<sup>26</sup>

These are but just a few of the complicated considerations that are necessary for weighing the feasibility and 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 added cost necessary to fully assess the feasibility these alternatives is overly burdensome and cost prohibitive for inclusion in an FCA, especially for smaller utilities with limited resources. Furthermore, the FCA guidance is unclear and provides little, if any guidance, as to how EPA will assess whether a utility's feasibility assessment is adequate.

## EPA REQUESTS FOR PUBLIC COMMENT & PROPOSED RESPONSES

EPA posed three (3) questions for which it is seeking public comment. Provided below are these questions and initial responses offered from the context of a national perspective. Utility association members may supplement these responses to offer local and regional context and permittee specific examples:

1. Should the Final 2022 FCA incorporate a single new metric—LQPI—that considers lowest quintile income and poverty elements together? Or should the Final 2022 FCA incorporate two new metrics (a lowest quintile income indicator and a poverty indicator) to be calculated separately and combined in a matrix?

First and foremost, it should be acknowledged that the proposed alternatives – a single metric or a second matrix analysis – are founded on the logical fallacy that poverty prevalence indicators using lowest quintile income measures are indicative of the impact of CWA compliance funding on low-income communities. They aren't; they offer a marginally different view of the status quo than described by reference to other available poverty prevalence metrics. By abandoning the previously proposed Lowest Quintile Residential Indicator, with its consideration of compliance burdens (e.g., costs per household), the proposed guidance fails to address potential economic impacts on low income households (despite NAPA recommendations and aligned methodological approaches suggested in the Utility Association report).<sup>27</sup>

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<sup>26</sup> The FCA Guidance requires utilities to consider "feasible" steps for implementing these alternative financial and funding considerations, whether or not they are prohibited by state law. See Footnote 20 on p.23 of 50.

<sup>27</sup> Cynically, one could take the view that EPA has attempted a sleight of hand by requesting comment on an inconsequential choice while taking a preferable methodological alternative off the table by fiat.

The two options that EPA requests public comment on, i.e., whether the final FCA should incorporate a single new metric, the LQPI that considers the lowest quintile income and poverty indicators together, or whether two new metrics (a lowest quintile income indicator and a poverty indicator) be calculated separately and combined in a matrix, are very similar and almost without a difference. Weighing the LQPI by 50% in Option 1 versus combining the LQPI with the poverty indicators in a matrix under Option 2, which gives equal (50%) weighting on the LQPI and the poverty indicators, is nearly the same, and is not substantive as options for input and consideration. A more substantive option that the EPA should get feedback on, for example, is whether or not to continue to use median income, or replace median income with LQI, in the Residential Indicator calculation.

## 2. EPA is seeking additional examples or case studies of funding and financing considerations to add to Appendix C.

Appendix C in the Proposed 2022 FCA Guidance provides a reasonably extensive listing of resources and both public and private funding and financing resources. Between the listing of resources provided, additional easily accessed industry literature, and the expertise available through the Environmental Finance Centers, permittees have more than adequate access to information on funding and financing sources. The issues raised by EPA's Financial Alternatives Analysis requirements do not arise from a lack of availability or access to information about funding and financing options.

EPA's request, like that related to use of the Lowest Quintile Poverty Indicator (LQPI), is not particularly substantive and evades fundamental questions related to prescribed requirements that the "community has taken all feasible steps to help lowest quintile households" – notably "whether or not they are prohibited by state law." (p. 46 – Table 2 and footnote 33). Regrettably, the question does not seek input on how "feasibility" should be determined or whether and how EPA could or should approach likely circumstances where permittees have or plan to implement some, but not necessarily all, of the alternatives enumerated. Perhaps most disappointingly, EPA has not requested comment on how it may engage permittees to overcome the logistical, legal, and practical barriers to implementation that characterize many, if not most, of the alternatives enumerated. EPA's request sets aside acknowledgement that its ostensible mandate to effect local utility finance and funding decision-making (related to rate design, debt management, capital structure, etc.), even if not determined to amount to regulatory overreach – carries some responsibility to ensure that "all feasible alternatives" are, in fact, feasible. This seems particularly dubious for the thousands of communities served by communities with acute administrative capacity limitations and financial expertise, to say nothing of those same types of limitations within EPA and state regulatory agencies.

## 3. EPA is seeking feedback on the current proposed scheduling benchmarks of 20 years for "high" Expanded FCA Matrix impacts, or 25 years for unusually high impacts. If

commentors propose different benchmarks, EPA is requesting examples to support the basis for such benchmarks.

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 EPA's prior 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 prior water infrastructure investments, prevailing project delivery constraints, cost-benefit analysis, other environmental protection investment considerations, and other factors as well as program financing capabilities. Scheduling benchmarks have proven to do more harm than good –stoking litigation rather than serving to guide parties to agreement.

The revised FCA guidelines lacks necessary flexibility with regard to scheduling of capital improvements. The EPA should allow for more flexibility in scheduling to reflect the multiple obligations that many clean water agencies are facing and to enable the greatest cost-benefit to be realized within a community's financial capability and affordability constraints. Communities across the country are facing multiple Clean Water Act obligations that require substantial monetary investment to address, such as CSOs and SSOs, sewer backups, surface flooding emanating from sewer systems, pollution from stormwater discharges, and NPDES permit limits to meet stringent nutrient discharge limits. While these mandates are intended to provide better public health protection, water quality enhancements, and other benefits, they are not all the same in terms of the cost and benefits. Some provide greater benefits than others or provide benefits sooner than others.

When the costs of meeting multiple regulatory mandates are high, the affordability implications and the benefits of the investments should be evaluated together. If the community demonstrates substantial and widespread economic impact due to these CWA compliance investments, the community should be able to develop a CWA integrated planning-based compliance program that prioritizes projects that provide the greatest environmental cost-benefit, and would not impose an excessive burden on the community, which may require an implementation timeline exceeding the limits contained in the FCA guidance document. This FCA guidance document should speak to the ability of permittees to develop and submit such an integrated plan. Further, this integrated plan should be able to be developed with the goal of maximizing water quality improvement for the dollar spent consistent with Integrated Planning as now codified in the CWA, rather than requiring the maximum spending on one CWA requirement to achieve a small, incremental improvement, while leaving little or no funding capacity to address other compliance obligations.