

October 19, 2020

Andrew Sawyers  
Director, Office of Wastewater Management  
U.S. Environmental Protection Agency, Office of Water  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

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

**Re: Docket ID No. EPA–HQ–OW–2020–0426; Proposed 2020  
Financial Capability Assessment for Clean Water Act Obligations**

On behalf of NRDC and our over 3 million members and online activists, please accept these comments on the Environmental Protection Agency’s (“EPA” or “the Agency”) Proposed 2020 Financial Capability Assessment for Clean Water Act Obligations (“2020 Guidance”), which was published for public comment on September 18, 2020.<sup>1</sup> NRDC also joins in comments submitted today by 97 national, regional, and local organizations. This letter provides additional detailed comments, consistent with the concerns raised in those joint comments.

The 2020 Guidance would amend an existing guidance document under the Clean Water Act (“CWA” or “the Act”), which was first issued in 1997 (“1997 Guidance”).<sup>2</sup> EPA and states have used the 1997 Guidance to help determine the length of compliance schedules for municipal dischargers—in other words, how many years to allow continued discharges of raw sewage into waters used for drinking, recreation, and/or ecological habitat—depending upon on the ability of a wastewater system and its customers to pay for necessary infrastructure upgrades. Over the years, the 1997 Guidance has also been used to determine compliance schedules for other sources of municipal wastewater and stormwater pollution. The 2020 Guidance would apply to all of those situations. Unlike the 1997 Guidance, it would also apply to requests by municipal dischargers to lower the bar for what counts as “clean” water under the Act—*i.e.*, to weaken water quality standards—so that polluted waterways may never have to be cleaned up.

**EPA must withdraw the current draft of the 2020 Guidance and fundamentally reconsider the Agency’s approach.** The 2020 Guidance protects neither public health and the environment nor the low-income households it purports to protect. Instead, the 2020 Guidance makes it easier for EPA to reinforce existing inequities in access to clean water and sanitation, in which health and environmental burdens fall disproportionately on communities of color and low-income communities. The ongoing COVID-19 pandemic has highlighted and exacerbated the health impacts of inequitable access to water and sanitation. EPA should be working on every front to eradicate that underlying inequity, not taking any actions that would further entrench it.

---

<sup>1</sup> 85 Fed. Reg. 58352. The full draft guidance document is available at the following link in the docket associated with the Federal Register Notice: <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2020-0426-0002&contentType=pdf>.

<sup>2</sup> EPA, “Combined Sewer Overflows–Guidance for Financial Capability Assessment and Schedule Development” (Feb. 1997), <https://www3.epa.gov/npdes/pubs/csofc.pdf>.

Across the country, there is tremendous need for investment in failing and outdated wastewater and stormwater infrastructure—many hundreds of millions of dollars over the next twenty years. A complete solution requires action, not only by regulators and dischargers themselves, but also by Congress and state legislatures, which must direct more funding to municipal water infrastructure, allocate it more equitably to disadvantaged communities, and increase the amounts available as grants rather than loans. We advocate forcefully with coalition partners for that funding.

The current investment shortfall does not affect all communities equally. Many areas of the country have fallen into a two-tiered system, where the wealthy enjoy safe sanitation services and clean water while others get second-class services that pose risks to their health and environment. In some cases, areas with poor water and sanitation service are subjected to rate increases that are used to fund capital improvements that primarily benefit wealthier areas.

This inequitable outcome, which especially burdens environmental justice communities and rural communities, is not consistent with the Clean Water Act’s regulatory approach. Yet, the 2020 Guidance would perpetuate these inequities, rather than helping remedy them. It is an escape hatch that would enable EPA to look the other way on Clean Water Act compliance when a municipality points to high levels of poverty in its service area—or even when a municipality points to the need for investments in Safe Drinking Water Act (“SDWA”) compliance, thereby pitting one set of health and environmental protections against the other in a zero-sum game. A municipality cannot simply plead poverty or cite affordability concerns to avoid statutory or regulatory compliance under either the Clean Water Act or the Safe Drinking Water Act, and no EPA guidance can supersede statutory or regulatory requirements.

An entirely different approach is needed. A revised version of the 2020 Guidance should be a driver for equitable clean water solutions. EPA and states with delegated CWA programs must ensure that municipal wastewater and stormwater systems pursue all available opportunities to adequately and equitably fund necessary investments in clean water. EPA, the states, and municipal dischargers must all work to implement solutions that enable necessary clean water investments while also protecting customers who are least able to pay.

Comprehensive solutions will require local officials and state and federal regulators to re-think the “business model” on which municipal water and wastewater utilities operate, to ensure universal access to essential services regardless of a customer’s ability to pay. Even within the scope of amending the 1997 Guidance, however, there is much that the EPA can and should do to advance real solutions to our nation’s water affordability and clean water challenges. We provide some specific recommendations in our detailed comments below.

During the years-long development of this 2020 Guidance, EPA primarily solicited the opinions of regulated parties, leading to a framework that promotes their interest in avoiding regulatory obligations, rather than the people’s interest in having access to safe, clean water. We urge EPA to step back and seek input, openly and comprehensively, from a much wider set of stakeholders, especially impacted environmental justice communities, to inform the development of a revised proposal. We would welcome the opportunity to engage in this dialogue with the Agency.

We also encourage EPA to consult its National Environmental Justice Advisory Council (“NEJAC”) as part of this process, and to pursue the recommendations in NEJAC’s March 2019 report, “EPA’s Role in Addressing the Urgent Water Infrastructure Needs of Environmental Justice Communities,” which urges EPA in all of its activities to treat water and sanitation as a human right and to prioritize long-standing issues in environmental justice communities.<sup>3</sup>

EPA should also consult its Environmental Financial Advisory Board (“EFAB”) for feedback on the 2020 Guidance. As discussed below, EFAB in 2007 issued recommendations for updating the 1997 Guidance. Some of those recommendations mirror recommendations we include below that were not incorporated into the 2020 Guidance. Now that EPA has proposed specific modifications to the 1997 Guidance, more than a decade after EFAB issued its recommendations, EPA should provide EFAB another opportunity to weigh-in.

Below we provide further detailed comments, which elaborate on our key concerns and provide high-level recommendations on how EPA can address them in developing a revised proposal. In sum:

- EPA must ensure that municipalities, states, and the Agency itself do everything possible to achieve both affordability and clean water, rather than use legitimate affordability concerns as justification to prolong ongoing pollution that harms human health and the environment.
- The 2020 Guidance must consider not only the costs of compliance, but also the benefits.
- EPA must not use the 2020 Guidance to pit Safe Drinking Water Act compliance against Clean Water Act compliance in a zero-sum game.
- EPA must address various methodological problems that will lead to mischaracterization of municipalities’ financial capability to achieve Clean Water Act compliance.
- EPA must provide its justifications for, and provide greater detail concerning, the recommended lengths of compliance schedules and take further public comment on that topic.
- EPA should not apply the 2020 Guidance to decisions concerning water quality standards.
- EPA must ensure robust community engagement whenever cost and affordability concerns may influence decisions about local Clean Water Act compliance.

\* \* \* \* \*

---

<sup>3</sup> <https://www.epa.gov/environmentaljustice/epas-role-addressing-urgent-water-infrastructure-needs-environmental-justice>

**1. EPA must ensure that municipalities, states, and the Agency itself do everything possible to achieve both affordability and clean water, rather than use legitimate affordability concerns as justification to prolong ongoing pollution that harms human health and the environment.**

The 2020 Guidance includes at least one valuable improvement over the existing 1997 guidance, by considering costs for low-income customers specifically. We support EPA’s proposal to modify the existing reliance on median household income (“MHI”) when evaluating the cost of wastewater and stormwater service. As recognized in the 2020 Guidance, the metric of cost per residential customer as a percentage of MHI (referred to in the 1997 Guidance and the 2020 Guidance as the Residential Indicator (“RI”)), fails to account for the affordability of service to low-income customers. We welcome the acknowledgement that poverty measures for low-income customers must be considered in decisions concerning wastewater infrastructure investment. The Guidance does so by adding a new metric called the Lowest Quintile Residential Indicator (“LQRI”), which examines the cost per household for low-income households, as well as a Poverty Indicator (“PI”), based on various measures of poverty within the wastewater system’s service area.

The 2020 Guidance, however, completely misses the mark on what to do when a “financial capability assessment” determines, based on appropriate methodologies, that low-income customers face affordability challenges or that the utility as a whole faces financial challenges. The 2020 Guidance takes that finding as a license to allow extended compliance schedules under the Act, up to 25 years or more. In effect, this relegates communities to decades of continued pollution, and falsely sets up affordability and clean water as objectives that are inherently in conflict. What the 2020 Guidance should do is direct municipalities, EPA, and the states to do everything they can to solve affordability challenges without sacrificing clean water.

There are many steps that utilities can take, often with support from EPA or state regulatory agencies, to improve affordability without deferring necessary clean water investments. **EPA must revise the 2020 Guidance so that identification of affordability challenges will require further assessment of those options—in effect, a “Financial Alternatives Assessment.”**

Such a financial alternatives assessment must consider an array of options and implement them to the maximum possible extent, in order to maximize the municipality’s “financial capability” to achieve compliance with clean water requirements.<sup>4</sup> These options must include, for example:

- **Adopting or expanding affordability programs that reduce bills on an ongoing basis for vulnerable customers, including chronically low-income households.**  
There are many types of affordability programs that can be used to reduce the LQRI,

---

<sup>4</sup> The financial and rate modeling approach under “Alternative 2” does seem to allow for consideration of some of the alternatives listed below: “The models are typically set up so that it is possible to evaluate alternative scenarios in terms of cost, length of time to complete a program, or assumptions related to financing strategies.” 2020 Guidance at 20-21. However, neither Alternative 1 nor Alternative 2 *requires* evaluation of these or any other alternatives to improve a municipality’s financial capability to meet CWA requirements without an extended compliance schedule.

all of which are used by various wastewater utilities, though not as widely as they should be.<sup>5</sup> These include:

- Lifeline Rate—A low rate for an initial amount of water, to cover most or all of a household’s basic needs, such as drinking, cooking, and sanitation. Water consumption above the lifeline amount is charged at a higher rate. Can be applied to all customers, or just to low-income customers.
  - Percentage-of-Income Payment Plan—Rate design that prevents water bills from exceeding a certain percentage of the customer’s income.
  - Bill Discount—Reduces an eligible low-income customer’s bills by a flat dollar amount or a percent discount. Can be used to reduce the fixed service charge, the volumetric consumption charge, or both. Additionally, discounts can be tiered by income.
  - Water Efficiency Assistance—Direct financial assistance (through rebates or upfront subsidies or direct replacement of fixtures) for efficiency improvements like leak repairs or replacement of inefficient fixtures or appliances.
- **Modifying rate structures to more equitably generate revenue for capital investments.** Many wastewater utilities use rate structures that place a disproportionate cost burden on low-income customers, or on residential customers generally. Modifying these rate structures can reduce the RI and/or LQRI score under the Guidance. EPA’s own Environmental Financial Advisory Board, in its 2007 recommendations for modifications to the 1997 Guidance, emphasized that “the cost actually incurred by households will depend on the type of rate structure employed by the utility and the service usage of the households....A recent EFAB paper on affordability highlighted the importance rate structures have on distributing and allocating costs to individual households. A strategic rate structure change or a relatively modest subsidy targeted to assist the households with the greatest need (e.g. creation of emergency assistance funds) may greatly mitigate the financial impact on the most financially disadvantaged households in a community.”<sup>6</sup> Rate structures that promote more equitable distribution of cost burdens include:

---

<sup>5</sup> An April 2016 EPA report surveying wastewater utilities’ practices presented a typology of customer assistance programs. The report found that only a small minority used any of the program types listed here, which provide ongoing bill-paying assistance. EPA, Compendium of Drinking Water and Wastewater Customer Assistance Programs, <https://www.epa.gov/waterfinancecenter/compendium-drinking-water-and-wastewater-customer-assistance-programs>.

<sup>6</sup> EPA Environmental Financial Advisory Board, “EFAB Comments on EPA Document: Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development,” (May 31, 2007), p. 2, <https://nepis.epa.gov/Exec/ZipPDF.cgi/P100AA6V.PDF?Dockey=P100AA6V.PDF> (hereinafter “EFAB Recommendations”).

- Impervious-area based stormwater fees to fund wet-weather compliance costs— This rate structure tends to shift cost burdens from residential customers to non-residential customers, such as commercial and industrial properties that have large impervious areas but use little water.
  - Inclining block rates that charge higher per gallon rates for higher increments of use—This rate structure tends to help lower-income customers who, as noted in the 2020 Guidance, generally use less water than higher-income customers. As EFAB noted in its 2007 recommendations, “a utility system with an increasing block rate structure would see residential customers with large consumption incurring a much larger cost than customers with low consumption.”<sup>7</sup>
  - Adoption of volumetric rates, rather than flat, non-volumetric charges for sanitary sewer service—Non-volumetric rates are common in many areas but penalize customers with below-average levels of usage. (This is discussed further below in Point #4.)
- **Modifying the cost allocation between residential and non-residential customer classes, or between retail and wholesale customers, to reflect best practices or incorporate up-to-date data.** Cost allocations between residential and non-residential customer classes determine the total amount of system revenue needs that must be recovered from residential customers as a whole. These cost allocations may not have been re-visited for years or decades, and may reflect inequitable allocations that disproportionately burden residential customers. Similarly, in cases where a wastewater utility has both retail and wholesale customers—*i.e.*, where a city owns and operates a collection and treatment system (charging its own residents directly for service) and neighboring communities connect their own collection systems into the city’s system (paying a wholesale rate to the city’s utility), formulas for cost allocation between the retail customers and wholesale customers may not have been re-visited for years or decades, and may reflect inequitable allocations that disproportionately burden retail customers who, in core cities, may tend to be disproportionately lower-income relative to the suburban wholesale service area. The 2020 Guidance does not directly address the ability of those wholesale customers to contribute towards compliance costs. The wholesale customers generate revenue to pay their costs through wastewater charges billed to their own retail customers. That means compliance costs are spread across a much larger population than are the direct customers of the utility. Household incomes in the suburban communities may be materially different than incomes in the city, and this ability to pay must be factored in to the residential indicator.
  - **Ensuring that a municipality is taking advantage of all available federal and state infrastructure grant programs and subsidized loan programs:** Eligible municipalities do not always take advantage of available program that provide low-cost financing or grants for wastewater and stormwater infrastructure improvements. In some instances, this is due to limited capacity to complete the application

---

<sup>7</sup> EFAB Recommendations, p. 2.

requirements; in some others it is due to lack of knowledge of all available programs. Federally funded programs include not only the Clean Water State Revolving Fund (which provides subsidized loans and, for economically disadvantaged communities, may also provide grants), but also the US Department of Agriculture Rural Utilities Service (which provides grants for small systems) and Community Development Block Grants. Other grant programs targeted at specific types of infrastructure also exist, such as a recently reauthorized federal grant program for sewage overflow abatement projects. Many states also have their own state-funded programs.

- **Taking advantage of other financing and funding options that can reduce project costs.** For example, EFAB’s 2007 recommendations noted that “the availability of extended term financing (30 to 40 years) compared to shorter term financing (20 years) could have an impact on rates.”<sup>8</sup> Other approaches, particularly for wet-weather management, can reduce costs to ratepayers by placing more of the cost burden on private property owners that contribute runoff to the collection system; for example, under Philadelphia’s Green City clean Water Program, most CSO reductions will be achieved through reduction of runoff from impervious areas into the collection system using green infrastructure, and most of the green infrastructure to date has been “funded,” in effect, by private developers that must meet on-site stormwater retention standards when they redevelop existing imperious area.
- **Optimizing operations, maintenance, and capital programs overall to reduce life cycle costs.** Optimizing the efficiency of a utility’s operations (including through operational changes and strategic capital investments) is an important tool to help reduce a system’s total revenue needs and thereby improve the affordability of bills for all customers. This can often be accomplished through improved asset management, especially over the course of a multi-year compliance schedule. As summarized by the U.S. Environmental Protection Agency, asset management is “the practice of managing infrastructure capital assets to minimize the total cost of owning and operating these assets while delivering the desired service levels.”<sup>9</sup> Proper asset management helps utilities reduce life cycle costs of their infrastructure, including by prioritizing repair or replacement of critical infrastructure before it breaks down and requires even more expensive interventions.<sup>10</sup> A recent report from New Jersey provides an example of a major wastewater utility that was able to use cost efficiency measures, along with state grants and low-interest loans, to improve its infrastructure while avoiding significant rate increases—current rates are well below those in place at the beginning of the program, when adjusted for inflation.<sup>11</sup>

---

<sup>8</sup> EFAB Recommendations, p. 4.

<sup>9</sup> EPA, “Asset Management for Water and Wastewater Utilities,” USEPA, accessed October 19, 2020, <https://www.epa.gov/sustainable-water-infrastructure/asset-management-water-and-wastewater-utilities>.

<sup>10</sup> See, e.g., New Jersey Department of Environmental Protection, “Asset Management Policy Program: Life Cycle Costs,” accessed October 19, 2020, <https://www.nj.gov/dep/assetmanagement/lifecycle.html>.

<sup>11</sup> “Promoting Affordability of Public Water and Sewer Service for Low-Income Households in New Jersey: Policy Options,” Prepared for the Jersey Water Works Asset Management and Finance Committee (April 2019), pp. 29-30, <https://www.jerseywaterworks.org/wp-content/uploads/2019/04/Final-Affordability-Report-JWW-AMF.pdf>.

- **Ensuring that rate revenues are not diverted to non-utility purposes.** In some places, perhaps many, a portion of wastewater system revenues are transferred to general municipal budgets, for use on local government expenses unrelated to services rendered to the system by the municipality. Ending this practice would reduce wastewater bills for all customers.
- **Considering regionalization, consolidation, and/or other partnerships to provide economies of scale.** Where appropriate, these approaches should be considered, provided there is a robust role for affected members of the public in decision-making (such as decisions on utility governance structures and representation on the resulting governing bodies) and that all arrangements provide fair and equitable treatment to the people and communities served by a system entering into partnership.

At the same time, federal and state agencies—including permitting and enforcement offices working in concert with the offices that manage funding programs—must prioritize disadvantaged communities for funding, ensure that municipalities actually can and do access available funds, and provide technical assistance on matters of infrastructure financing and low-income affordability. In a revised version of the 2020 Guidance, EPA should specifically commit that it will make every effort, and should provide that delegated state programs are expected to make every effort, to help municipalities identify, apply for, and obtain available grants and loans from all relevant sources, on the most favorable terms available. EPA and states should also work to improve states’ “affordability criteria” under the Clean Water State Revolving Fund (and the Drinking Water State Revolving Fund), which determine eligibility under those programs for grants (i.e., additional subsidization) rather than loans, to ensure that communities facing affordability challenges pursuant to the metrics used in a revised Financial Capability Assessment guidance will be eligible for those grant funds.

Any approach to assessing a municipality’s “financial capability” to meet CWA requirements is incomplete without all of these elements. To the extent, if any, that the CWA may allow consideration of costs in permitting and enforcement, any compliance schedule adopted without exhausting every opportunity to improve a municipality’s “financial capability” to comply more expeditiously would violate the Act.<sup>12</sup>

## **2. The 2020 Guidance must consider not only the costs of compliance, but also the benefits.**

The 2020 Guidance focuses entirely on assessing a municipality’s “financial capacity” to pay for infrastructure investments. It does not consider at all the “return” on that investment. As the 2020

---

<sup>12</sup> See, e.g., 40 C.F.R. § 122.47(a)(1) (where schedules of compliance are allowed in NPDES permits under the Act, such schedules “shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA” (emphasis added)); see also *U.S. v. City of Akron*, 794 F.Supp.2d 782, 796-800 (N.D. Ohio 2011) (rejecting a city’s proposed Clean Water Act consent decree, including its 19-year schedule of compliance to remedy combined sewer overflows, on the grounds that the city had not exhausted all financial options that would enable it to comply more expeditiously).



Guidance would have it, CWA compliance is nothing but a financial *liability* for the municipality and its ratepayers. This turns the CWA on its head.

EPA's approach to permitting and enforcement must account for the benefits of clean water investments, which are the animating purpose of the Act itself. These benefits accrue largely to the communities (including ratepayers) served by a municipal wastewater or stormwater system. For example, water infrastructure investments can provide communities with improved public health outcomes, greater job availability, and increased resilience to climate change. Therefore, when determining appropriate compliance schedules, EPA must consider the environmental and economic benefits of compliance, including those that are readily quantifiable in monetary terms and those that are not. Those benefits include both the benefits associated with water quality and public health improvement and any co-benefits, such as those identifiable through "triple bottom line" analysis of environmental, social, and economic benefits.<sup>13</sup>

Further, the benefits to be considered should include consideration of the beneficial effects on water quality on downstream communities, which may themselves be disadvantaged, as well as the effects on others living outside the community at issue. Communities do not exist in a vacuum and recognition of benefits outside the specific community faced with the need for upgrades may lead to state funding or development of other resources necessary to address the pollution problems.

### **3. EPA must not use the 2020 Guidance to pit Safe Drinking Water Act compliance against Clean Water Act compliance in a zero-sum game.**

The 2020 Guidance identifies drinking water costs as one of several "other metrics" that can be considered under both Alternative 1 and Alternative 2.<sup>14</sup> It states that "[s]ignificant consideration should be given to drinking water costs as well as the cost of meeting CWA obligations."<sup>15</sup>

When considering customers' ability to pay for wastewater and stormwater service, in certain situations it may be appropriate to consider their ability to pay for those services and essential public water services in the aggregate. However, this does not mean that high costs for public water service or significant need for local investments in drinking water infrastructure can lawfully excuse non-compliance with CWA standards.

Nor can asserted high costs of CWA compliance justify non-compliance with the SDWA. The SDWA has explicit provisions applicable only in narrowly circumscribed circumstances and subject to clear criteria and procedures, in which variances or exemptions from compliance with the Act may be considered.<sup>16</sup>

---

<sup>13</sup> See *U.S. v. City of Akron*, 794 F.Supp.2d at 795 (explaining that a witness's expert testimony about a city's financial capability to complete combined sewer overflow remediation projects was unpersuasive and entitled to little weight because it "included no discussion of the economic benefit the City of Akron and its surrounding communities would receive from a river that is safe for recreational activities such as boating and fishing").

<sup>14</sup> 2020 Guidance at 26-27.

<sup>15</sup> 2020 Guidance at 9.

<sup>16</sup> See SDWA §1415, 42 U.S.C. §300g-4 (variances); SDWA §1416, 42 U.S.C. §300g-5 (exemptions).

Compliance with both the CWA and SDWA are legally required and are necessary to protect human health and the environment. Communities with higher rates of poverty should not have to accept a choice between the two.

For all of these reasons, when a municipality seeks to use drinking water costs to justify extended CWA compliance schedules, our comments above concerning the need for a “Financial Alternatives Assessment” apply equally to the drinking water costs. In other words, rather than pointing the finger at drinking water costs to evade CWA compliance, the municipal discharger, EPA, and relevant state agencies must collaborate to find equitable, affordable ways to fund and finance the necessary drinking water investments, as well as the necessary CWA compliance investments. As described in Point #1 above, this includes such things as adopting low-income drinking water affordability programs; adopting more equitable drinking water rate structures; ensuring that a public water system is taking advantage of all available federal and state infrastructure grant programs and subsidized loan programs; and prioritizing public water systems in disadvantaged communities for financial assistance under those programs.

Further, delayed compliance with CWA requirements can result in *increased* costs for SDWA compliance, either in the same community or in downstream communities, where wastewater discharges degrade the quality of source waters for a drinking water system. Therefore, a Financial Alternatives Assessment should also consider whether wastewater or stormwater discharges affect drinking water treatment costs and, therefore, whether accelerated CWA compliance would help *reduce* SWDA compliance costs.

Finally, to the extent that drinking water costs are used to characterize a community’s financial capability to invest in wastewater and stormwater improvements under the 2020 Guidance, we offer the following comments:

- Household drinking water costs must be based on water usage to meet basic needs: If a municipality chooses to provide information or modeling analysis concerning household costs for drinking water service, the 2020 Guidance must provide that only costs for indoor water usage, which serves basic needs like drinking, cooking, health, and sanitation, may be considered. The cost of additional water usage that serves discretionary purposes, such as outdoor landscape irrigation, should play absolutely no part in assessing a community’s “financial capability” to invest in wastewater infrastructure improvements. Therefore, in many places, the typical or average total monthly usage for residential customers will not be an appropriate basis for calculating household water costs under Alternative 1 or Alternative 2.<sup>17</sup>
- Benchmarks: As highlighted by “Question for Public Comment #15” in the 2020 Guidance, EPA has not proposed any “benchmarks for considering the contribution of drinking water costs to household burdens,” similar to the low, medium, and high impact benchmarks for wastewater costs as a percentage of household income. If EPA chooses to adopt such benchmarks, it should first identify specific benchmarks under consideration,

---

<sup>17</sup> See M. Teodoro, “Measuring Household Water Affordability for Water and Sewer Utilities,” *Journal AWWA*, 110:1 (Jan. 2018).

provide the Agency’s supporting rationales, and provide an opportunity for public comment.

**4. EPA must address various methodological problems that will lead to mischaracterization of municipalities’ financial capability to achieve Clean Water Act compliance.**

The 2020 Guidance’s approach to assessing a municipality’s “financial capability” includes two alternative approaches, as well as “other metrics” that may be considered under either approach. The methodologies presented have a number of flaws that must be addressed, in addition to the over-arching flaws discussed in other sections of these comments.

**A. Peer Review**

As an initial matter, we note that the 2020 Guidance introduces many new technical methods and concepts that were not in the 1997 Guidance, including some that may not be squarely in the “wheelhouse” of EPA’s core expertise. For example, the new Poverty Indicator selects several specific measures of poverty and assigns equal weight to each one for use in determining a community’s financial capability. These poverty measures are based on data and methods developed by other federal agencies, which have more expertise to determine the most effective ways to use these or other poverty metrics. The 2020 Guidance provides no indication that EPA has obtained peer review of the 2020 Guidance by relevant experts at these other agencies, such as the Departments of Health and Human Services, Department of Labor, and the Census Bureau. We urge EPA to obtain such peer review before adopting a final guidance. Similarly, there is significant expertise available in academia on poverty economics generally, as well as water rates and water affordability specifically, and EPA should seek peer review from such experts.

**B. “Alternative 1”**

We offer the following comments specifically on Alternative 1. The methods for calculating the RI and LQRI under Alternative 1 are deeply flawed and must be revised.

**i. Allocation of project costs to residential customer class**

The 2020 Guidance incorporates the method from the 1997 Guidance for allocating project costs between residential and non-residential customers. This allocation is based on the proportional wastewater flow between those classes of ratepayers, regardless of what cost allocation method a particular wastewater system actually uses.<sup>18</sup>

In reality, cost allocation methods for collection and treatment systems typically account for other factors, which significantly affect the resulting allocations. The 2020 Guidance should require use of the utility’s actual cost allocation method (as well as consideration of alternative cost allocation methods where needed, as discussed in Point #1 above).

---

<sup>18</sup> 1997 Guidance, p. 14. The 2020 Guidance does not change this method.

For example, wastewater systems' cost allocations often account for the "strength" of pollutants in the wastewater, which is typically greater for non-residential customers. Therefore, the 2020 Guidance's unrealistic assumption about cost allocation will often overstate the cost for residential customers.

To take another example, some wastewater utilities generate revenue needed for wet weather management through impervious area-based stormwater fees, which are not based at all on wastewater flow. As noted in Point #1 above, these rate structures tend to shift a greater share of the cost burden to non-residential properties. Again, the simplistic methodology in the 2020 Guidance will tend to overstate residential costs for municipalities that use stormwater fees. Further, when the financial capability of a Municipal Separate Storm Sewer System ("MS4") permittee is at issue, wastewater flow rates will have nothing to do with residential cost allocation; often the allocation will be based on impervious area-based fees, and in other instances it will be based on property tax assessments or other criteria, which will also result in significantly different cost allocations than the 2020 Guidance assumes.

The method for cost allocation also does not appear to distinguish between the retail and the wholesale service areas of a regional wastewater utility. Many systems provide both collection and treatment services on a retail basis to customers within a certain territory, but provide only treatment services to adjacent municipalities on a wholesale basis; the adjacent municipalities recover the cost of treatment on a retail basis from customers in their own jurisdictions, based on their own cost allocation formulas, and pass along those revenues to the wastewater treatment utility.<sup>19</sup> Therefore, if cost allocation to residential households across the entire "service area" of a wastewater utility is considered—both retail and wholesale—those cost allocations cannot be calculated without accounting for the differences between wholesale and retail cost allocations.

## **ii. Calculation of cost per household and cost as a percentage of median household income**

After the total cost allocation to residential customer class is determined, the next step in the 1997 Guidance and the 2020 Guidance is to determine the cost per household. The total residential allocation is simply divided by the number of households in the service area.<sup>20</sup> For purposes of the RI, this cost per household is divided by the MHI for the service area. Implicitly, then, the cost per household is meant to represent the cost for a customer at the median income. Also, implicitly, this method assumes that all households are customers, and that the median income household receives a bill equal to the "average" of all residential bills across the service area. As a method to determine costs to those customers, these assumptions are completely unrealistic, for several reasons.

---

<sup>19</sup> The municipalities receiving treatment services on a wholesale basis typically own the collection systems within their boundaries, and charge their own residents on a retail basis to recover wastewater collection costs. The total bill for customers in those areas is a function of the rates charged by the municipality to its customers to recover collection costs (based on the revenue needs of the municipality's own collection system) and treatment costs (based on the revenue needs of the wholesale wastewater treatment provider). Those local rates may differ substantially from the retail rates charged to households that receive both collection and treatment services on a retail basis from the municipality that owns the treatment system.

<sup>20</sup> 1997 Guidance, p. 14. The 2020 Guidance does not change this method.

Many of the same factors that affect cost allocation between customer classes, described above in point #4.B.i., also affect how costs are distributed within the residential customer class. For example, not only may the cost per household differ by geography between households in a wastewater utility's retail service area and wholesale service area, but in many places a wholesale service area may consist of suburban communities with higher median incomes than the retail service area. Therefore, a household with the median income across the entire service area may have a bill that does not at all resemble the average bill for customers across the entire service area. This would result in a skewed assessment of the RI.

The retail rate structure can also result in bills for a median income household that do not resemble the average of all residential bills across the service area. For example, an inclining block rate places proportionately greater cost burdens on higher-volume residential users, who may also correspond to higher-income users. In that case, the median income household may have a bill that is significantly less than the average of all residential bills.

Moreover, this method assumes that all households within the service area are customers of the utility. Renters most often are not customers, however. Typically the landlord is responsible for paying wastewater charges. While wastewater charges and other costs of building ownership are passed on to tenants through rent, many factors go into a landlord's response to higher sewer bills and the determination of rent. Landlords may replace inefficient plumbing to reduce sewer bills, and some jurisdictions may limit the ability to raise rent through rent control. As a result, the assumption that all households in the service area are customers will tend to overstate the cost burdens for renters, who may comprise a large share of the total number of households in a utility's service area and a disproportionate share of low-income households. Indeed, the lack of modeling or supporting studies of the incidence of poverty between customers and non-customer households in a utility service area points to a significant conceptual flaw in EPA's methodology.

### **iii. Scaling factor for household cost at lowest quartile income**

The 2020 Guidance introduces the LQRI, which adjusts the per household cost for lower-income households based on the assumption that those households have lower bills than a household at the median income because they use less water. This is based on the assumption that rates are volumetric, such that bills are directly proportional to usage. But EPA provides no support for that assumption of volumetric rates. In reality, wastewater utilities very often charge residential customers based entirely on a flat, fixed charge. For example, a 2018 study of 323 New Jersey municipalities found that over two-thirds relied entirely on a fixed charge for residential sewer service, with no consideration at all of usage.<sup>21</sup> In California, a 2012 report found that 70 percent of California households served by a public water supplier pay for sewer service through a flat, non-volumetric charge.<sup>22</sup> Any scaling factor must account for the rate structure of the particular

---

<sup>21</sup> Van Abs and Evans, *Assessing the Affordability of Water and Sewer Utility Costs in New Jersey* (2018), pp. 71-81, <https://www.jerseywaterworks.org/wp-content/uploads/2018/09/Van-Abs-and-Evans-2018.09.09-Assessing-Water-Sewer-Utility-Costs.pdf>.

<sup>22</sup> NRDC, "Volumetric Pricing for Sanitary Sewer Service in California Would Save Water and Money," (2012), <https://www.nrdc.org/sites/default/files/Volumetric-Wastewater-FS.pdf>.

utility. If low volume households receive the same bill as high-volume households, scaling reduction is not appropriate.

Further, all of the flaws of the determination of the per household cost for the RI also skew the per household cost for the LQRI. A scaling factor that adjusts downward from an inaccurate cost for a median income household will necessarily result in an inaccurate cost per low-income household. In some instances, those flaws may tend to systematically skew the results in one direction or another.

For example, low-income households tend to be over-represented in multi-family rental housing. Therefore, to the extent that the methods in the 2020 Guidance overstate the costs to households in multi-family buildings (see Point #4.b.ii.), the methods also will tend to overstate the costs to low-income households. Moreover, low-income households in multi-family rental housing are more likely than other renters to be buffered from rate increases because of participation in housing programs that limit their combined rent and utility expenses (*e.g.*, public housing and voucher programs that limit rent and utility expenses based on income; local rent regulations). This further skews the results when assessing costs for low-income households.

#### **iv. Selection of household income level representing the lowest quartile**

The 2020 Guidance does not explain why EPA selected the “upper boundary” of the lowest income quartile as the appropriate income to represent low-income customers in the analysis. By definition, virtually all households within the lowest income quartile will have *less* income than this level. We urge EPA to consider the comments submitted by a group of “Low Income Consumer Representatives,” arguing that the “mean income” within the lowest income quartile is a more appropriate metric, which would more fully represent the extent of affordability challenges for low-income customers.

#### **v. LQRI thresholds for low, medium, and high impact**

EPA asks in “Question for Public Comment #10” whether the RI benchmarks for low impact (below 1% of household income) and high impact (above 2% of household income) should also be used as the benchmarks for LQRI, or whether the LQRI benchmarks should instead be set *higher* (1.7% of income for low impact, 3.4% of income for high impact).<sup>23</sup> The 2020 Guidance states that “EPA is not proposing to institutionalize disparate impacts on low income households”—yet that is exactly what higher thresholds would do. EPA must not take that approach. Higher thresholds would represent a value judgment that it is acceptable for low-income households to pay significantly more for basic sanitation services, as a percentage of household income, than higher-income households. EPA should not make any legal or policy decisions based on that inequitable premise.

---

<sup>23</sup> 2020 Guidance at 15.

We note that income-based water and wastewater affordability programs recently adopted in Philadelphia and Baltimore take precisely the opposite approach.<sup>24</sup> They are designed so that lower-income households pay a lower percentage of their income for water and wastewater service, based on the premise that they can afford only to pay a lower percentage, given the other essential monthly expenses that they must also meet on a limited income. EPA should consider using a similar sliding scale. It definitely should not adopt benchmarks that point in the exact opposite direction.

#### **vi. Over-reliance on static “snapshot” assumptions**

We recognize that Alternative 1 is, by design, less able to account for changes over time than the dynamic rate and financial modeling envisioned under Alternative 2. However, EPA should identify key assumptions for which Alternative 1 should account for anticipated changes over time, without the need for complex modeling.

For example, under the 1997 Guidance and Alternative 1 in the 2020 Guidance, operating and capital costs (as reflected by debt service) are annualized in current dollars and compared with current residential populations and current incomes. Trends in population and/or real income that might bolster the financial capability to service a given amount of debt in future years are ignored, compromising the integrity of the analysis. EFAB made the same point in its 2007 recommendations.<sup>25</sup>

Similarly, the current methodology does not account for anticipated retirement of existing debt. Utilities may currently be paying off debt incurred for projects built decades ago, while new debt assumed to pay future costs of compliance will be amortized for decades into the future. While that new debt is being paid off, however, old debt will be retired, thereby reducing the total debt burden of the system. A snapshot view, as per the methodology in the current guidance, gives the false impression that new debt will be entirely cumulative with existing debt, thereby underestimating the capacity of the system to take on new debt.

### **C. “Alternative 2”**

Alternative 2 provides an alternative method to determine the RI and LQRI. It relies on “Financial and Rate Model Analyses...as an analytic tool in lieu of the recommended critical metrics and [compliance] schedule benchmarks set forth under Alternative 1.”<sup>26</sup> The financial and rate model analyses would focus on the “capital expenditures necessary to meet CWA obligations” and would be used to “determine the revenues and rate increases necessary to support” those expenditures for each individual year during a proposed compliance schedule.<sup>27</sup> The resulting rate increases would be overlaid with household income data to calculate a RI and

---

<sup>24</sup> See <https://www.circleofblue.org/2017/water-management/pricing/philadelphia-water-rate-links-payments-household-income/> and <https://www.circleofblue.org/2019/world/baltimore-council-approves-income-based-water-bills/>.

<sup>25</sup> EFAB, p. 4 (“Over time, a fast growing community with excess wastewater treatment capacity is likely to see the impact on their customers change much less than a slow growing (or shrinking) community with similar CSO control costs.”)

<sup>26</sup> 2020 Guidance at 19-20.

<sup>27</sup> 2020 Guidance at 20.

LQRI.<sup>28</sup> In turn, RI and LQRI would inform the development of a compliance schedule. We offer the following comments on the Alternative 2 methodology for determining RI and LQRI.

**i. Financial and rate models must be used to identify alternatives that would reduce the RI and LQRI.**

As noted above, the 2020 Guidance states that the financial and rate models used under Alternative 2 “are set up so that it is *possible* to evaluate alternative scenarios” (emphasis added), including alternative “assumptions regarding financing strategies.”<sup>29</sup> However, nothing in Alternative 2 *requires* use of the models to evaluate of alternatives that could improve a municipality’s financial capability—e.g., by reducing the RI and LQRI “impact” levels. EPA must revise Alternative 2 to require such an alternatives analysis. In other words, the models must be used as a tool for performing the “Financial Alternatives Analysis” described in Point #1 above.

To take one example, Step 6 of the recommended modeling approach states that the municipality should “[t]ranslate the revenue requirements into annual increases in rates and bills for customers [and] [a]pply the annual percentage increases to the baseline or current average household bill.”<sup>30</sup> It seems to be implied here that the “translation” of revenue requirements into annual rate increases, as well as the baseline bill to which those increases are added, are based on the municipality’s existing rate structure and affordability programs. Instead, EPA must require a municipality to evaluate how alternative rate structures, or new or expanded affordability programs, could reduce the baseline bill and annual rate increases for residential customers, including customers with median household income and/or those in the lowest quintile of household income.

**ii. Financial and rate models should be required to rely on locally-specific data to the greatest possible extent.**

Despite the significant utility-specific data that is needed to implement Alternative 2, the 2020 Guidance allows a municipality to rely on default numbers for key variables that can significantly affect the results. EPA should revise Alternative 2 to require the use of as much locally-specific data as possible, for all variables and assumptions.

For example, Alternative 2 allows a municipality to calculate residential bills based either on “nationwide average” per household usage, suggested to be 5 to 6 CCF per month, or based on “real information on usage from actual billing” by the particular municipality.<sup>31</sup> The 2020 Guidance allows either option despite recognizing that “[i]f the community serves a significant number of households in multi-family structures, then the usage will likely be lower.”<sup>32</sup> Other factors may also affect local or regional variation in household usage, , including the age of the

---

<sup>28</sup> 2020 Guidance at 21-24.

<sup>29</sup> 2020 Guidance at 20-21.

<sup>30</sup> 2020 Guidance at 22.

<sup>31</sup> 2020 Guidance at 21, n. 17.

<sup>32</sup> 2020 Guidance at 21, n. 17.



housing stock and its associated plumbing. Alternative 2 should require the use of locally-specific usage data instead of allowing the use of generic national averages.<sup>33</sup>

### **iii. Recommended submissions should be clarified in key areas.**

The items enumerated on page 21 should be supplemented with the following:

- Documentation for the model being used (creator, peer review status, version, etc.);
- Clear identification of dollar values in all analyses as either constant (year) or nominal dollars;
- Clarification that “basis for the residential bill” includes the cost allocation method used to establish the bill, and the rate design used to construct single-family and multifamily residential bills.

### **D. “Other metrics”**

We offer the following comments specifically on some of the “other metrics” identified in the 2020 Guidance. In Point #3 above, also we provided extensive comments concerning the use of drinking water costs as an “other metric.”

#### **i. EPA must account for the ways in which low-income affordability programs *enhance* a municipality’s financial capability to invest in CWA compliance.**

The 2020 Guidance identifies “customer assistance programs,” or low-income affordability programs, as an “other metric” that may be considered.<sup>34</sup> But it counts low-income affordability programs only as a “cost” to the utility—*i.e.*, a factor weighing in favor of more extended compliance schedules.<sup>35</sup> This puts things exactly backwards. The 2020 Guidance must fully account for the ways in which low-income affordability programs can *improve* a municipality’s financial capability to invest in CWA compliance.

First, as explained in Point #1, low-income affordability programs are a tool to enable shorter compliance schedules by allowing increased total spending on compliance without burdening low-income customers. For example, when Portland, Oregon, was first required to implement a long-term plan to reduce combined sewer overflows (CSOs) in the 1990s, that regulatory compliance obligation spurred creation of the city’s first low-income customer assistance

---

<sup>33</sup> We also emphasize, as explained above in Point #3, that where the combined household burden of water and wastewater bills is considered, water bills should be modeled based only on a level of household water usage necessary to meet basic needs, not usage that serves discretionary purposes such as landscape irrigation.

<sup>34</sup> Many advocates for low-income water and wastewater affordability prefer the term “affordability program,” rather than “customer assistance program.” Whereas the former suggests a program designed specifically to ensure affordability for all customers, the latter may encompass programs that provide some level of assistance but are not designed to ensure affordability for customers at all income levels. For the purposes of these comments, however, we take the term “customer assistance programs,” as used in the 2020 Guidance, to be inclusive of all water affordability programs.

<sup>35</sup> 2020 Guidance at 30-31 (“If a community has developed a CAP to assist individual households, EPA intends to consider both the costs needed to administer the program as well as the revenue lost from the assistance provided (discounted rates, collection fees foregone, improved water efficiency, etc.).”)

program.<sup>36</sup> More recently, Cleveland Heights, Ohio, needed to increase rates to comply with a CSO consent decree, but accompanied this rate increase with a new discount of 40 percent to customers at or below 200 percent of the federal poverty level to mitigate the impacts on low-income customers.<sup>37</sup>

Further, low-income affordability programs can help improve the financial stability of wastewater systems as a whole, financially benefiting all customers. When low-income customers are billed an amount they can afford, they are much more likely to pay those bills, voluntarily and on time, providing a more stable, predictable revenue stream for the utility. Studies in Indiana and Colorado, for example, have shown that affordable bill programs help energy utilities improve their bottom lines through increased customer revenues and/or increased “net back” (i.e., customer revenue minus the costs of collecting unpaid bills).<sup>38</sup> It is not a novel idea to apply these financial lessons to the water sector, and national leaders in the water utility sector have come to embrace them. In 2010, a report by the Water Research Foundation and U.S. Environmental Protection Agency (EPA) stated:

The cost of collections and bad debt are generally accepted cross-subsidies because they are regarded as unavoidable costs of doing business. Ironically, *customer assistance programs have been shown to be capable of producing more total revenue for the dollars expended . . .* This result is documented not only in the short-term, but there are also long-term cost reductions to be won by helping to break the perpetual cycle of nonpayment problems and providing a framework for continuous improvement of collections.<sup>39</sup>

Similarly, in 2017, the American Water Works Association’s (AWWA) executive director for government affairs wrote that:

Frequent service shutoffs and resolving bad debt from customers who cannot afford their rates can be *more expensive for a utility than instituting a [customer assistance program]* and assisting customers in paying their bills . . . The benefit

---

<sup>36</sup> Blake, B., Portland Water Bureau, “Workable Programs for Low Income Utility Rate Assistance,” <https://www.youtube.com/watch?v=doW9rTq3pI0&feature=youtu.be> (presented at EPA webinar on June 7, 2016, starting at 32:12 in the video); American Water Works Association, “AWWA Approves First Affordability Policy Statement,” October 24, 2018, <https://www.awwa.org/AWWA-Articles/ArticleId/4941/cid/157/portland-oregon-leader-in-tackling-water-affordability-challenge?category=connections-article>.

<sup>37</sup> All customers received a letter explaining the reason for the rate increase and the availability of the new low-income assistance program to mitigate the effect of the increase: [https://www.clevelandheights.com/DocumentCenter/View/1999/SewerPLanMailer\\_Corrected](https://www.clevelandheights.com/DocumentCenter/View/1999/SewerPLanMailer_Corrected)

<sup>38</sup> Roger D. Colton, *Water Bill Affordability for the City of Philadelphia*, April 9, 2015, <http://www.povertylaw.org/files/docs/Colton%20City%20Council%20comments--April%208%202015--Final.pdf>; Roger D. Colton, *Baltimore’s Conundrum: Charging for Water/Wastewater Services that Community Residents Cannot Afford to Pay*, November 2017, [https://www.foodandwaterwatch.org/sites/default/files/baltimore\\_water\\_study-final\\_report-2017.pdf](https://www.foodandwaterwatch.org/sites/default/files/baltimore_water_study-final_report-2017.pdf).

<sup>39</sup> Water Research Foundation, *Best Practices in Customer Payment Assistance Programs*, 2010, p. 91 (emphasis added), <http://www.waterrf.org/publicreportlibrary/4004.pdf>.

to the utility of having discounts or lower rates for low-income customers is the increased likelihood of collecting payment from these customers.<sup>40</sup>

Even AWWA’s formal technical guidelines reflect this concept, to some degree; “the past two editions of the American Water Works Association’s ‘M1’ [the industry standard manual for water rate setting] outline the ways that *not* having affordability programs can hurt a utility’s bottom line.”<sup>41</sup>

**ii. The metric of “potential bill impacts relative to household size” should be removed.**

The 2020 Guidance’s discussion of bill impacts relative to household size is of limited utility. Exhibit 8, which illustrates the use of this metric, is only functional in systems where residential customers receive bills for sewer service with a volumetric component, which in some states, such as California, is the minority of households. Further, the eight levels of consumption (from 2 ccf to 9 ccf) that are presented for each household size produce cells that are illustrative, but are not weighted by the actual number of a utility’s customers in each cell. Nor is there any accounting for changes in customer consumption over time; residential per capita water use has been declining for many years across the country and this trend is expected to continue. Nevertheless, EPA offers to allow relaxed implementation deadlines when “most” of the cells show “high burden,” regardless of the share of customers contained within such cells, *i.e.*, regardless of the actual distribution of per household usage across the residential customer base. EPA should withdraw this offer and remove this flawed methodology from the 2020 Guidance.

**5. EPA must provide its justifications for, and provide greater detail concerning, the recommended lengths of compliance schedules and take further public comment on that topic.**

We emphasize throughout these comments that EPA, states, and municipal dischargers must exhaust every opportunity to resolve a community’s “financial capability” challenges without providing an extended compliance schedule. However, to the extent that extended compliance schedules are used after all such opportunities have been exhausted, the 2020 Guidance fails to justify the recommended lengths of compliance schedules under Alternative 1 and fails to offer any meaningful framework for determining the length of a compliance schedule under Alternative 2.

---

<sup>40</sup> G. Tracy Mehan, et al., “Addressing Affordability as a Necessary Element of Full-Cost Pricing,” *Journal AWWA*, 109, no. 10 (October 2017) (emphasis added; internal quotations omitted), [http://aquadoc.typepad.com/files/affordability\\_full-cost\\_pricing\\_jawwa20o2017.pdf](http://aquadoc.typepad.com/files/affordability_full-cost_pricing_jawwa20o2017.pdf).

<sup>41</sup> UNC Environmental Finance Center, *Navigating Legal Pathways to Rate-Funded Customer Assistance Programs: A Guide for Water and Wastewater Utilities*, 2017, at p. 18 (emphasis added), <https://efc.sog.unc.edu/sites/www.efc.sog.unc.edu/files/Pathways%20to%20Rate-Funded%20CAPs.pdf>.

## A. Alternative 1

The 2020 Guidance proposes new “implementation schedule benchmarks” for Alternative 1 that recommend significantly longer compliance schedules than the existing 1997 Guidance.<sup>42</sup> EPA fails to provide adequate justification for these longer schedules, which would prolong the health and environmental harm of untreated or inadequately treated wastewater and stormwater discharges.

Both the 2020 Guidance and the 1997 Guidance use a “matrix” to characterize a community as “low burden,” “medium burden,” or “high burden,” based on consideration of various metrics or “indicators.” The level of “burden” corresponds to a recommended range of years for a compliance schedule. Under both the 1997 Guidance and the 2020 Guidance, a “low” burden, should result in a compliance schedule based on a “normal engineering/construction schedule.” For a “medium” burden, the 1997 Guidance recommends up to a 10-year schedule, but the 2020 Guidance recommends up to a 15-year schedule. For a “high” burden, the 1997 Guidance recommends up to 15 years or, in “unusually ‘High Burden’ situations” up to 20 years; but the 2020 Guidance recommends up to 25 years, or even more based on “consideration of additional information.”

The 2020 Guidance provides only the following, inadequate explanation for the longer timelines: “EPA has developed new schedule benchmarks to account for the consideration of two new critical metrics, the LQRI and the PI. The proposed schedule benchmarks are based on EPA’s experience negotiating over 100 CWA consent decrees with communities of various sizes.”<sup>43</sup> There does not seem to be any reason that adding “two new critical metrics” to the method for determining a low, medium, or high burden would require changing the recommended schedule associated with each level of burden. And the explanation that the new timelines reflect “EPA’s experience negotiating over 100 CWA consent decrees with communities of various sizes” is entirely conclusory. Especially in light of the much longer timelines in the 2020 Guidance, a much more detailed justification must be provided for public review and comment.

## B. Alternative 2

The 2020 Guidance’s explanation of how the analyses under Alternative 2 are actually used to set a particular compliance schedule is so vague and subjective as to be meaningless. A more detailed proposal must be offered for public comment, and a more specific framework must be included in any final guidance.

For Alternative 2, like Alternative 1, uses the RI and LQRI to inform development of a compliance schedule. However, unlike Alternative 1, the 2020 Guidance provides no meaningful explanation of *how* the RI and LQRI would be used under Alternative 2. The guiding principles provided are simply that, under Alternative 2, the compliance schedule should “avoid rate shock and...avoid water utility rates that represent an overly burdensome percentage of household income.”<sup>44</sup> (We assume that by “water utility rates,” EPA actually means “wastewater and/or

---

<sup>42</sup> 2020 Guidance at 18 (Exhibit 6); 1997 Guidance at 46 (Table 4).

<sup>43</sup> 2020 Guidance at 18.

<sup>44</sup> 2020 Guidance at 24, 37.

stormwater rates,” unless the municipality chooses to include drinking water costs in the model, in which case the model would address combined water and wastewater rates and, as applicable, stormwater rates. EPA should clarify this.)

Similarly, the 2020 Guidance says a compliance schedule should “keep the percentage of household income spent on wastewater utility bills (and if added to the model, drinking water utility bills) within reasonable bounds,” provided that the schedule should not “exceed the useful life of the community’s water infrastructure assets.”<sup>45</sup> (We assume that by “water infrastructure assets, EPA actually means “wastewater and/or stormwater infrastructure assets.” EPA should clarify this.)

These vague and subjective statements can neither genuinely “guide” EPA’s decision-making nor provide affected members of the public and regulated entities with any clarity about the approach EPA intends to use. We are not able to meaningfully comment on an EPA proposal, as there effectively is none.

### **C. The role of “other metrics” in determining compliance schedules**

The 2020 Guidance is also vague regarding how the optional “other metrics” should affect the length of the compliance schedule. We urge EPA to provide more detail on this and take further public comment.

Additionally, when consideration of these “other metrics” do affect the length of a compliance schedule, the proposed schedule should be accompanied by an explanation of the extent to which each factor contributed to the length of the proposed schedule as well as supporting rationales.

### **D. Prioritization of projects within the compliance schedule**

We applaud EPA’s inclusion in the 2020 Guidance of two new considerations that were not included in the 1997 Guidance, which relate to the sequencing of projects within the compliance schedule. Specifically, in addition to prioritizing CSO reductions to “sensitive areas” and to waters with “impaired uses,” which were referenced in the 1997 Guidance, the 2020 Guidance states that compliance schedules should prioritize projects that remedy direct human exposure to raw sewage (*i.e.*, from sanitary sewer overflows that result in basement backups and ejection of raw sewage from manholes onto streets) and projects that mitigate impacts of municipal discharges to areas with environmental justice concerns.<sup>46</sup> EPA should develop specific protocols to ensure that these urgent public health and environmental justice concerns are prioritized, including robust opportunities for public participation in the development of compliance schedules. People living in affected communities have the best understanding, from firsthand experience, of the locations and health impacts of wastewater and stormwater discharges; their knowledge and input is essential to prioritize projects that meet the most urgent community needs.

---

<sup>45</sup> 2020 Guidance at 24-25.

<sup>46</sup> 2020 Guidance at 35.

## 6. EPA should not apply the 2020 Guidance to decisions concerning water quality standards.

The 2020 Guidance also includes a new proposal, entirely beyond the scope of the existing 1997 Guidance, to use the same methodology to justify weakening water quality standards, such as through the removal of designated uses pursuant to a use attainability analysis, issuance of variances to allow violations of existing water quality criteria, and the application of anti-degradation standards to allow increased pollution in places where current water quality exceeds existing water quality criteria.<sup>47</sup>

This proposal goes well beyond allowing extended timelines to achieve future compliance with existing standards. It effectively authorizes permanent degradation of our waters—removing any obligation to meet existing water quality standards on any timeline—based on a method for assessing “financial capability” that is, as explained above, deeply flawed. EPA must withdraw this proposal.

If EPA wishes to develop guidance on how to consider compliance costs under the Agency’s water quality standards regulations, it should establish a separate process, including all stakeholders, to consider thoroughly any legal, technical, and practical considerations that may be unique to the water quality standards context. Moreover, EPA cannot use this or any other guidance effectively to amend existing water quality standard regulations, such as the rules on variances, use designations, and anti-degradation that are referenced in the 2020 Guidance.

We also note that, by proposing the same methodology to inform the length of compliance schedules and to evaluate potential weakening of water quality standards, the 2020 Guidance appears to blur the line between deferring pollution reductions and removing the requirement to ever achieve those reductions. The 2020 Guidance states, on the one hand, that it “does not remove obligations to comply with the CWA nor does it reduce regulatory requirements. Rather, EPA uses the FCA to assess a community’s financial capability for the purpose of developing a reasonable implementation schedule that will not overly burden the community.”<sup>48</sup> But it adds in a footnote: “If a permittee cannot meet water quality-based requirements of the CWA, the permittee should work with its state or authorized tribe to evaluate other tools, such as a revision to designated uses under 40 C.F.R. Part 131.”<sup>49</sup> Later in the document, the 2020 Guidance explicitly proposes using the same methodology used to determine whether costs justify an extended compliance schedule to meet existing water quality standards to also determine whether costs justify weakening existing standards by removing a designated use. EPA must clarify the distinction between using costs to inform compliance schedules and costs to justify weakening standards; if the same criteria apply in both instances, what determines whether EPA will

---

<sup>47</sup> The 2020 Guidance states that “EPA proposes to apply the options and flexibilities from Alternative 1 of the proposed [2020 Guidance] to the consideration of economic impacts to public entities when making such WQS decisions.” 2020 Guidance at 19. It also states that “EPA is not considering the use of financial and rate model analysis under Alternative 2 in lieu of Alternative 1 in WQS decisions. However, for WQS decisions, the use of financial and rate models could be used in a manner similar to the other metrics in Sections III.E and III.F of the proposed 2020 FCA, i.e., as additional information for consideration.” 2020 Guidance at 20.

<sup>48</sup> Guidance at 6.

<sup>49</sup> Guidance at 6, n. 3.

propose an extended compliance schedule to meet existing standards, or instead propose to weaken the underlying standard itself?

**7. EPA must ensure robust community engagement whenever cost and affordability concerns may influence decisions about local Clean Water Act compliance.**

The 2020 Guidance does not provide for any public participation in developing financial capability assessments or in determining how a completed assessment should impact a municipality's Clean Water Act compliance obligations. These decisions have profound impacts for people's health, environment, and access to affordable water and sanitation. Therefore, EPA must ensure that, before decisions are made, affected communities have opportunities for meaningful, informed input. A revised version of the guidance must address this critical issue, consistent with principles of environmental justice.

\* \* \* \* \*

Thank you for your consideration of these comments. We would welcome the opportunity to discuss them further with you.

Sincerely,

/s

Lawrence Levine  
Director, Urban Water Infrastructure & Senior Attorney  
Natural Resources Defense Council

cc (via email):

Dave Ross, Assistant Administrator, Office of Water  
Susan Bodine, Assistant Administrator, Office of Enforcement and Compliance Assistance  
Lee Forsgren, Deputy Assistant Administrator, Office of Water  
Mark Pollins, Director, Water Enforcement Division, Office of Civil Enforcement  
Deborah Nagle, Director, Office of Science and Technology  
Sonia Brubaker, Director, Water Infrastructure and Resiliency Finance Center  
EPA Environmental Financial Advisory Board  
National Environmental Justice Advisory Committee