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### **Advocacy Position Statement**

## **Clean Water Act Reauthorization**

### **Statement of Purpose**

The American Public Works Association (APWA) seeks to inform elected officials, regulators, decision-makers and the public at-large of its stated position on the need to modify or amend the Clean Water Act.

### **Statement of Position**

The American Public Works Association believes the Clean Water Act (CWA) should be amended to reflect the improvements made to the nation's water resources since the passage of the Act, the current sources of pollution to the nation's water resources, and to set priorities and allocate resources for addressing the nation's remaining water quality problems based on community affordability, sound proven scientific platform and cost-beneficial solutions

### **Statement of Background and Rationale**

The APWA membership is largely responsible for the local administration of water pollution control programs prescribed by the Clean Water Act. Of the APWA membership, approximately 49 percent are responsible for stormwater management and flood control and 32 percent are responsible for wastewater collection and treatment. Our membership understands the need to continue to improve the nation's water resources but also recognizes that the current model used by regulators as prescribed by the CWA is no longer applicable and is in need of immediate change. In many cases, the current law and associated regulations reflect an outdated technical understanding of water quality problems and fail to consider cost effective solutions. As a result, regulatory agencies issue permits mandating actions that are neither technically sound nor fiscally prudent. Moreover, these mandates are being imposed on communities and ultimately, rate payers without the benefit of meaningful federal funding assistance at a time when states, cities and towns across the nation are grappling with unprecedented budget shortfalls. Despite these failings, new and costly federal requirements continue to be promulgated at an accelerated pace in this time of great fiscal strife for the nation, its states and its communities.

Therefore, APWA supports amendments to the Clean Water Act as follows:

## 1. Regarding the Clean Water Act in general:

(a) Extend permit limits beyond five years so communities can properly budget the cost of compliance while addressing other non-permit required priorities associated with the quality of our nation's waters.

(b) End the isolated approach to permitting that maintains full separation by permit type and instead apply a comprehensive, integrated watershed approach to all CWA permitting (wastewater, stormwater, CSOs) so that maximum flexibility and cost effectiveness drives decision making.

(c) Include affordability and cost effectiveness as basic tenets of the CWA permitting process along with an understanding that affordability varies by community, region and economic conditions.

(d) Allow greater local decision making relative to the importance of individual local water resources so that investments can be directed to improve and protect waters that are environmentally, economically and recreationally important.

***Rationale:*** Permit terms of five years are no longer economically feasible. The cost of compliance is an increasingly burdensome amount typically funded through long term borrowing. Implementation of capital improvement projects often exceeds the term of a permit. New permits may be issued with even more stringent limits before projects to comply with an existing permit are even completed. Accordingly, the length of the permit term needs to be expanded to allow communities to address stormwater, wastewater and CSO issues on a realistic timeframe. An extended permit term allows communities to better plan their programs and more accurately understand and finance their costs while allowing them to make other priority infrastructure improvements necessary to maintain these vital systems

Many communities hold multiple NPDES permits that regulate various types of discharges including wastewater, stormwater and CSOs. Permitting these different types of discharges under the CWA has led to a disjointed approach by regulatory agencies. Decisions made relative to permitting one type of discharge rarely consider the other NPDES permits issued to the same community. This, in turn, can cause a community to expend its limited funds on compliance with one permit when a more cost effective approach that achieves the same or better environmental improvement could be had through other efforts. A better approach is to develop permits based on a comprehensive watershed analysis, identifying all possible pollutant sources and all potential actions for improvement. Such a change would necessitate better coordination between communities but would ultimately result in smart, cost effective investments in infrastructure where they would do the most good.

As currently written, the CWA does not directly consider costs when developing permits and it is critically important that it do so. Since last reauthorized, federal and state financial grant assistance has essentially vanished and communities are left with the SRF program as the only option to finance these costly mandated projects. While appreciated, the SRF program is merely a finance option available to communities and does nothing to reduce mandated costs. Instead, affordability may be dealt with through the use attainability analysis provision but this is a very uncertain process using dubious metrics that produces questionable outcomes. Given that federal CWA grants have disappeared and the burden of funding permit compliance falls entirely on

communities and their ratepayers, it is untenable to continue forward with a law that does not directly consider costs. Costs have to matter and have to be given full consideration. To continue neglecting this reality will surely anger the public and help unravel public support for the basic goals of the CWA.

While the CWA was formulated to protect the waters of the nation, many of these waters are not of national significance nor are they significant on a statewide, regional or even local basis. States have hastily assessed many ponds, lakes and streams within their jurisdictions and followed up with TMDLs for these same waters. Yet, many of these waters are of limited value locally and of no meaningful value beyond the local area. Certainly drinking water supplies and waters supporting recreational pursuits as well as those with high environmental value should be targeted for protection and improvement. But not every pond is important and resources should not be squandered trying to achieve TMDL targets for every body of water. Communities know best what is important in terms of water resources and should be given greater latitude in deciding where their funds should be spent.

2. Regarding federally mandated municipal stormwater programs, clarify or amend that:

(a) “Maximum Extent Practicable (MEP)” is the singular standard governing the removal of pollutants from municipal stormwater discharges, and enforceable numeric limits for stormwater pollutants, have no place as mandatory standards in NPDES stormwater permits, and;

(b) “Maximum Extent Practicable” means applying practical and affordable management practices intended to improve water quality, and;

(c) Implementation of reasonable and effective Best Management Practices (BMP’s) should be the governing approach to stormwater management permitting whether or not they fully achieve water quality standards, and;

(d) Stormwater quality and quantity is directly linked to land use. It is appropriate for the CWA to provide guidance that helps communities grow in a way that is consistent with the purposes of the Act without preempting local land use authority, and;

(e) “Maximum Extent Technically Feasible” should never be used as a standard realizing that the cost to implement such a standard would be “practically infeasible”.

*Rationale:* While the U.S. Environmental Protection Agency has supported management practices as the basis for stormwater permits under current regulations, third parties have sued permitting authorities for excluding numeric end-of-pipe limits from municipal permits. The oft-cited decision in the case of the Defenders of Wildlife v, Browner has been improperly interpreted by EPA to mean that numeric stormwater limits and achievement of water quality standards supersede the MEP standard for municipal stormwater pollutant removal. EPA has recently taken this stance in a national directive to permit writers. APWA and various other stakeholders have challenged and oppose EPA’s interpretation. Congress, recognizing the high variability in stormwater quantity and quality and the impossibility of consistently achieving water quality standards in stormwater when it established MEP as the municipal stormwater standard in the 1987 CWA amendments. Today, science and practical stormwater management only demonstrates that Congress got it right with this statutory assessment. Contrary to EPA,

there is nothing new in terms of knowledge or technology that suggests numeric limits and water quality standards are achievable today.

Numeric limits for stormwater discharges may be appropriate but only as a goal, not as permit standards. Municipal stormwater is not as controllable as some would believe. Variability is inherent and the greatest factors influencing stormwater variability are rainfall intensity and duration-both of which are beyond a community's control.

Application of proven and effective BMPs has been shown to be the proper approach for municipal stormwater management. This methodology has been embraced by regulators and there is no reason to abandon this concept. The BMP approach relies on an iterative process using a model of continuous improvement. Over time, BMPs are refined and improved to the benefit of the environment and without overwhelming costs to the ratepayer. This approach should continue and be supported by technical assessment and assistance from EPA and the public works profession. Indications are that EPA is moving rapidly to stormwater permitting based on surrogate measures such as impervious area. While there is some scientific underpinning for this concept, permits should not infringe upon the rights of communities to make local land use decisions. That is beyond the role and jurisdiction of the federal government. Guidance and education are appropriate but mandates are not.

3. Provide regulatory flexibility for the NPDES permitting of municipal wet weather facilities. Recognize the infrastructure-related and technical and financial limitations of local governments to abating separate sanitary sewer overflows. Describe, using a presumptive approach, the general conditions under which certain unavoidable sanitary sewer overflows would be legal.

*Rationale:* While some sanitary sewer overflows generally are recognized as unavoidable to protect public health and prevent property loss, the EPA has failed to establish a rational national policy, and enforcement of the water quality provisions of the law for unavoidable overflows continues. Fines are being levied against municipal facilities, and uncertainty about what is legal and appropriate remains. EPA's current draft policy preamble clearly states that some number of SSO's are unavoidable even for well-run systems, but the draft rule allows zero, i.e., the draft is inconsistent within the document itself.

4. Codify the EPA's *Combined Sewer Overflow (CSO) Control Policy*, published in the Federal Register on April 19, 1994. The policy, agreed to by a federal advisory committee outlines nine minimum CSO control measures to be implemented by publicly owned treatment works and requires long-term planning for further control of combined sewer overflows. Provide for a compliance schedule of at least 20 years.

*Rationale:* A wide range of stakeholders reached consensus on this approach to controlling combined sewer overflows, and APWA continues to support it. Codifying the policy would provide regulatory certainty to municipal permit holders.

5. Establish a wetlands classification system, which recognizes that not all wetlands are of equal environmental value. Codify a wetlands mitigation banking system. Mitigation banking should be standardized for use in a variety of situations.

*Rationale:* These systems would help to balance the need for resource protection with the public mandate to develop and maintain infrastructure.

6. Provide an exemption from the permitting program for wetlands disturbed during the routine or emergency maintenance of flood and stormwater management facilities. Instruct the U.S. Army Corps of Engineers to establish a general permit for flood control and stormwater management facilities and other publicly owned and maintained infrastructure. Clarify, as a federal appeals court ruled in 1998, that “incidental fallback” resulting from dredging activities is not a “discharge to U.S. waters” within the meaning of the law.

*Rationale:* Municipal public works managers are required to obtain Clean Water Act Section 404 permits for the maintenance of flood control and stormwater management facilities. These are activities intended to protect human health, property and the environment and generally cause little or no environmental disturbance. However, the process of acquiring the permit in many cases results in months of delay.

7. Reauthorize the State Revolving Fund (SRF) to continue to support capital projects through low interest loans along with an enhancement authorizing new funds to forgive 25 percent of the loan principal to be funded through a national infrastructure trust fund. Enhance the program by making these loans available to municipal governments or other appropriate authorities for the planning, design, implementation, construction of water pollution control programs and facilities, including non-structural measures. Extend eligibility for funds to watershed planning activities, and to research and demonstration projects for the management of urban wet weather flows.

*Rationale:* The SRF should continue to be capitalized because clean and safe water is a resource that benefits the entire nation. The cost for maintaining this resource should be shared at the national level. Revolving loans with an appropriate level of principal forgiveness are an appropriate financing mechanism to capitalize water quality projects because federal and state financial participation will ensure that sound science and cost-effective requirements will be the basis for future permits.

8. If the SRF program cannot be fully supported, Congress should recognize the fiscal constraints to achieving the water quality goals that have been set through the interpretation of the clean water act that EPA espouses. The act should be amended to provide clear direction to the courts and to regulatory agencies that requires science based water quality planning that incorporates an assessment of benefits and costs, requires benefits to be clearly established, costs to be well defined, and benefits to be in excess of costs.

*Rationale:* Our nation’s communities are struggling to cope with the mounting costs of providing essential services to our citizens on limited budgets. The costs to achieve marginally beneficial environmental goals are substantial, and supporting those costs takes badly needed funds from other critical programs. In these difficult times we should be assured that our financial resources are being focused on essential needs. Marginally beneficial water quality projects should be postponed until the nation can more responsibly afford them.

Finally, amendments to the Clean Water Act generally should reflect a shift from regulating water pollution on a point-by-point basis to managing the natural resource at the watershed level. APWA believes that science based assessment, planning and management on a watershed basis is the best approach to achieve the most environmental benefit from our investment. Options for regional collaboration and coordination across programs should be provided – to be utilized at

the discretion of permit holders. As such, local governments should be given the flexibility to make ongoing decisions about what is most effective in terms of water quality improvement without the constant risk of exposure to anti-backsliding provisions.

Sponsor

Water Resources Management Committee