



U.S. House of Representatives
Committee on Transportation and Infrastructure

Washington, DC 20515

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December 12, 2011

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MEMORANDUM

TO: Members of the Subcommittee on Water Resources & Environment

FROM: Bob Gibbs
Subcommittee Chairman

RE: Hearing on "Integrated Planning and Permitting:
An Opportunity for EPA to Provide Communities with
Flexibility to Make Smart Investments in Water Quality"

PURPOSE OF HEARING

The Water Resources and Environment Subcommittee is scheduled to meet on Wednesday, December 14, 2011, at 10:00 a.m., in Room 2167 of the Rayburn House Office Building, to receive testimony from city mayors, the commissioner of a city's department of environmental protection, a municipal wastewater utility director, a state water quality program director, an environmental activist advocate, and the U.S. Environmental Protection Agency ("EPA") on EPA's proposed integrated planning and permitting regulatory prioritization effort under the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act").

BACKGROUND

The Water Resources & Environment Subcommittee has jurisdiction, under the Clean Water Act ("CWA"), over water quality and wastewater infrastructure programs administered by EPA. Title III of the CWA places a number of treatment and other regulatory requirements on municipalities' wastewater treatment works, and Title IV of the CWA requires permits, under the National Pollutant Discharge Elimination System ("NPDES") permit program, for the discharge of pollutants from wastewater treatment works and certain municipal storm sewer systems. Title VI of the Clean Water Act provides for the establishment and capitalization of Clean Water State Revolving Loan Funds (SRFs) to aid in funding the construction of wastewater treatment works and other wastewater infrastructure around our nation.

It is widely accepted that clean drinking water and public wastewater services are necessary priorities to sustain public health, support our economy, and protect the environment. Significant amounts of public resources have been devoted to water infrastructure in American communities over the last 40 years to meet these priorities. An impressive inventory of physical assets has been developed over this period.

Our nation's wastewater infrastructure includes 16,000 publicly owned wastewater treatment plants, 100,000 major pumping stations, 600,000 miles of sanitary sewers, and 200,000 miles of storm sewers. Since 1972, with the enactment of the Clean Water Act, Federal, State, and local investment in our national wastewater infrastructure has been over \$250 billion. This investment has provided significant environmental, public health, and economic benefits to the nation. Our farmers, fishermen, manufacturers, and tourism industries rely on clean water to carry out activities that contribute well over \$300 billion to our economy each year.

However, our nation's ability to provide clean water is being challenged, as our existing national wastewater infrastructure is aging, deteriorating, and in need of repair, replacement, and upgrading. Old and deteriorated infrastructure often leak, have blockages, and fail to adequately treat pollutants in wastewater, thereby creating water pollution problems.

REGULATORY PRESSURES AND INADEQUATE INFRASTRUCTURE ISSUES FACING OUR COMMUNITIES

The needs of municipalities to address wastewater infrastructure are substantial. According to studies by EPA, the Congressional Budget Office, and the Water Infrastructure Network, the cost of addressing our nation's clean water infrastructure needs over the next 20 years could exceed \$400 billion, roughly twice the current level of investment by all levels of government.

The needs are especially urgent for many areas trying to remedy the problem of combined sewer overflows ("CSOs") and sanitary sewer overflows ("SSOs"), often associated with wet weather conditions, and for communities lacking sufficient independent financing ability. In recent years, EPA (and activist groups, through citizens suits) has stepped up enforcement actions against many municipalities in an effort to force them to eliminate their CSOs and SSOs. EPA's National Enforcement Initiative for fiscal year 2011 focuses on the reduction of these overflows by winning commitments from municipalities to implement infrastructure upgrades to prevent these problems in the future.

These enforcement actions have resulted in many larger cities and smaller municipalities entering into enforcement settlements, by signing consent agreements with EPA (and/or activist groups) to implement enforceable plans to eliminate their CSOs and SSOs. Many of these settlements are costly to implement, especially in the face of dwindling EPA infrastructure funds.

The projected total cost to larger municipalities of implementing the terms of each of these settlements could end up being as much as \$1-5 billion per city, or even more in some instances. There are approximately 746 communities, located in 31 States and the District of

Columbia, with combined sewer systems and CSO issues potentially facing these sorts of costs. Many more communities have SSO issues. EPA estimates that there are at least 23-75 thousand SSOs per year (not including sewage backups into buildings), amounting to an estimated three to ten billion gallons a year of untreated releases.

In recent years, other regulatory issues also have become national priorities, which is placing a further demand for resources on municipalities' utilities. For example, while our nation's wastewater utilities already have removed the vast majority of conventional pollutants from municipal wastewater, looking forward, they face significantly higher costs to remove the next increment plus control pollutants from urban runoff.

EPA has initiated a national rulemaking to establish a potentially far-reaching program to regulate stormwater discharges from newly developed and redeveloped sites and add to or make other regulatory requirements more stringent under its stormwater program. This includes possibly expanding the scope of the municipal separate storm sewer systems ("MS4") regulatory program, establishing and implementing a municipal program to regulate stormwater discharges from existing development, imposing specific requirements for transportation facilities, and establishing and implementing stormwater regulations specific to the Chesapeake Bay watershed. This stormwater rulemaking, if promulgated, could cost our communities additional billions of dollars in regulatory compliance costs, thereby imposing substantial additional regulatory and economic burdens on municipalities to comply.

In addition, EPA has begun zealously pressing the States and local governments to adopt a new "framework" for managing nutrients pollution, including crafting numerical nutrients criteria, setting strict numerical regulatory requirements, including numerical standards and TMDL load reduction goals for pollutant sources, and adopting stringent numerical nutrient standards and stringent effluent limits for nutrients in NPDES permits for municipal and other dischargers of nutrients. Stringent effluent limits for nutrients in NPDES permits could mean that many municipalities would have to install and operate, at great expense, nutrient treatment and removal technologies at their wastewater treatment plants. These requirements will add still an additional layer of regulatory requirements and economic burdens that our communities will have to deal with.

Further, many communities face increasing regulatory requirements and more stringent standards under the Safe Drinking Water Act for their public drinking water systems. In addition, protection of critical wastewater infrastructure has become important to homeland security. Many of these same communities also have to deal with State-imposed regulatory requirements, on top of the Federal mandates.

A large portion of these Federal and State regulatory mandates are going unfunded by the Federal and State governments. Rather, local governments are being expected to pay for more and more of the costs of these mandates, with the result that local government has made substantial increases in investments in public water and wastewater infrastructure in recent years and local communities and ratepayers are increasingly getting economically tapped out. For example, Jefferson County, Alabama (Alabama's most-populous county and the home of Birmingham) recently declared the largest municipal bankruptcy in U.S. history, in part as a

result of a multi-billion dollar sewer project. Today, local government provides the majority of the capital required to finance water infrastructure investments through loans, grants, bonds, and user fees.

COMMUNITIES' CONCERNS

As a result of many communities becoming financially squeezed, representatives of local government are increasingly voicing concerns over EPA's policies and unfunded mandates, including the cumulative impacts of multiple regulatory requirements being imposed on them, and over how EPA is dealing with communities to address the regulatory mandates that EPA is imposing on them. Some of the concerns include:

- CSO/SSO enforcement actions appear to be overly costly, overly prescriptive, and beyond the financial capability of local government to implement. The local experience in EPA's stormwater management compliance and enforcement efforts, including consent order negotiations, has resulted in extremely expensive requirements to eliminate stormwater overflows from combined sewers and sanitary sewers. These Federal unfunded mandates come at a time when local budgets are hard pressed to afford them.
- EPA does not apply a consistent approach in addressing CSO issues around the nation. The Federal government is inconsistent in how it enforces CSO compliance protocols throughout the nation and often ignores specific local conditions, such as affordability factors and existing plans for cleaner water. The result is a less than optimal engineering solutions for cities, taxpayers, and the environment.
- The complexities and expense of negotiating solutions to wet weather overflows from combined sanitary/storm sewer systems that are acceptable to EPA and the Department of Justice are overwhelming to municipalities.
- Local communities have no sense of partnership with the agency, in that municipalities are often treated as criminals, and that these attitudes permeate the decision-making process. EPA is inflexible with communities in seeking resolution of CSO and other water quality problems. This inflexible approach halts progress in addressing many water quality issues.
- Many of the Federal (and State) regulatory mandates imposed on communities reflect a one-size-fits-all approach that does not account for an individual municipality's specific public health and other needs, and requires the completion of massive capital investments on tight construction schedules. Because these projects are legally mandated and have to be done within a specified time period, many of our communities' construction dollars are not being dedicated to the projects that are most needed by the communities, or are not the most cost-effective in terms of public health and environmental protection. It is time for the national clean water strategy to evolve from a "one size fits all" mandate and enforcement approach, to a strategy that recognizes and funds the individual needs of water and wastewater utilities based on demonstrated public health needs and water quality benefits.

- Each EPA regulatory program is managed in a “stovepipe,” with each program imposing its own requirements on communities without regard to what any of the other programs are doing.
- EPA exhibits an attitude with respect to their regulatory requirements that everything is a priority, so therefore, nothing is a priority.

NEED FOR GREATER REGULATORY FLEXIBILITY AND PRIORITIZATION

Municipalities are very concerned about the impacts the unfunded Federal mandates treadmill has on local government ability to meet compliance obligations, and have been urging EPA officials to limit the massive costs of complying with agency wastewater and stormwater requirements, especially given municipalities’ dwindling revenues due to the economic downturn. Representatives of local government have approached EPA (and representatives of the States) to press them for greater regulatory program/policy flexibility and prioritization to allow municipalities to achieve the goals of the various water regulatory program requirements in a less costly manner and over a slightly longer time frame.

For example, integrating stormwater and wastewater requirements could help address municipalities’ cost concerns because EPA would be better able to weigh municipalities’ financial capabilities to address both sets of requirements, and to trade off investments in wastewater and stormwater management. Where the dollar gets the highest environmental return, that could be prioritized and supported by the agency.

Municipalities want to holistically address the regulatory mandates facing them, and have the flexibility to eliminate inconsistent and duplicative requirements, better plan out and prioritize projects that will provide the greatest water quality benefits the soonest, seek out the most cost-effective approaches, undertake locally designed strategies that reflect local and regional variations in climate, economic stability, population, and other considerations, explore the use of green infrastructure and other flexible and innovative solutions where appropriate, and be able to focus more resources on maintaining their current infrastructure in a state of good repair.

Municipalities also want to employ an adaptive approach that would allow enforceable requirements to be modified to show new modeling or other predictive calculations, or other changed circumstances, including efficacy of treatment and management techniques previously implemented by the community, other watershed protection that has been implemented, water conservation, population changes, and changes in economic circumstances.

Further, they want EPA to reconsider the Agency’s “affordability criteria” for determining how much an individual household or community can pay for water services before they become unaffordable. With local government providing the majority of the capital required to finance water infrastructure investments, the rate payers are picking up an increasingly larger part of the debt service or carrying charges through their user fees. Many communities have

experienced dramatic increases in user fees in recent years to support these infrastructure investments.

Importantly, municipalities are seeking a more collaborative approach where EPA and State water regulators work more like “partners” than “prosecutors” with communities to yield better solutions that achieve the goal of eliminating sewer overflows and addressing other water quality issues through the use of best engineering and innovative approaches at the lowest cost, resulting in the greatest environmental benefits.

EPA’s PROPOSED INTEGRATED PLANNING AND PERMITTING INITIATIVE

It appears that EPA may be starting to listen to municipalities’ concerns. Late in the summer of 2011, EPA announced (as part of an Agency regulatory review plan) that it was going to develop a new policy to allow municipalities to prioritize their water quality requirements, an approach that many municipalities have been seeking, to address the huge unfunded costs associated with the growing number of requirements stemming from EPA water rules and enforcement actions. EPA said it intends to develop a policy to create a new integrated permitting approach for dealing with stormwater flows and combined sewer overflows (CSOs) to allow municipalities and utilities to develop plans for prioritizing wet weather investments. According to the review plan, EPA intends to consider approaches that allow municipalities to evaluate all of their CWA requirements and develop comprehensive plans to meet these requirements.

On October 27, 2011, EPA’s water and enforcement offices followed up with an Agency memorandum, issued jointly by the Assistant Administrators for Water and for Enforcement and Compliance Assurance, to regional permit writers outlining the broad components of an upcoming “framework” the Agency plans to develop to assist EPA regional officials and state and local governments in prioritizing CWA regulatory requirements when funds for infrastructure improvements are limited. The memo acknowledged that the current approach of focusing on each CWA requirement individually can have the “unintended consequence of constraining a municipality from implementing the most cost-effective solutions in a sequence that addresses the most serious water quality issues first.”

In its memo, EPA said that a comprehensive and integrated planning approach to a municipality's wastewater and stormwater obligations offers the greatest opportunity for implementing the most important projects first, noting that the CWA provides the agency the necessary flexibility to utilize this approach. The flexibility includes evaluating a municipality's financial capability in tough economic times and setting appropriate compliance schedules, allowing for implementation of innovative solutions, and sequencing critical wastewater and stormwater projects in a way that ensures human health and environmental protection. The memo said that the integrated planning approach framework that EPA is developing is supposed to identify the essential components of an integrated plan, steps for identifying municipalities that might make best use of such an approach, and how best to implement the plans under CWA permit and enforcement programs.

Once the framework is in draft form, the EPA has said the Agency plans to hold discussions and meetings with states, local governments, utilities, and environmental groups to obtain feedback. EPA also has mentioned about identifying municipalities that are developing or have developed integrated plans that can serve as models for this work. The memo also advocates for the increased use of so-called green infrastructure as a way to meet regulatory requirements.

It remains to be seen how EPA's proposed integrated planning and permitting regulatory prioritization initiative will turn out. Some municipal officials are concerned that EPA is not willing to limit its enforcement efforts against municipalities that have been driving costly infrastructure upgrades to reduce stormwater and sewer overflows during heavy storm events. They are concerned that a continued emphasis on an enforcement approach will undermine the flexibility EPA is ostensibly seeking to provide.

At Wednesday's hearing, the Subcommittee on Water Resources & Environment will hear from EPA's water and enforcement office heads who issued the October memorandum, as well as representatives of local and State government, to get their latest views on EPA's proposed integrated planning and permitting regulatory prioritization initiative.

WITNESSES

Panel One

Mayor Jim Suttle
City of Omaha

Testifying on behalf of the US Conference of Mayors

Mayor Joe Reardon
Mayor/CEO - Unified Government of Wyandotte County and Kansas City, Kansas
Testifying on behalf of the National League of Cities

Mr. Walt Baker
Director, Division of Water Quality - UT Dept. of Environmental Quality
Testifying on behalf of the Association of Clean Water Administrators

Mr. Carter H. Strickland, Jr.
Commissioner - NYC Environmental Protection

Mr. David Williams
Director of Wastewater -East Bay Municipal Utility District
Testifying on behalf of the National Association of Clean Water Agencies

Ms. Katherine Baer
Senior Director, Clean Water Program - American Rivers

Panel Two

Nancy Stoner
Acting Assistant Administrator for Water, US EPA

Cynthia Giles
Assistant Administrator for the Office of Enforcement and Compliance Assurance, US EPA