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What Is Integrated Water Quality Planning And How Does It Work?

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WHAT IS INTEGRATED WATER QUALITY PLANNING AND HOW DOES IT WORK?

I.
Background and Need for Integrated Planning[1]

Municipalities face multiple demands for public services and programs that regularly exceed the limited resources available to perform those services or provide those programs. This problem is particularly acute in municipal service areas such as transportation (roads and bridges), potable water systems, sanitary sewer systems and storm water systems, where the cost of replacing aging infrastructure is often overwhelming. Municipalities must therefore constantly prioritize their expenditures to provide their residents with the highest level of service possible within their limited means.

The ability of municipalities to prioritize their expenditures may be constrained by legislative or regulatory mandates that compel specific infrastructure or service improvements in certain municipal service areas. Such narrowly focused demands may hinder the ability of municipalities to achieve a balanced approach to the provision of all municipal services and programs within the community.

Water quality is one area where, if the laws and regulations are applied inflexibly, municipalities may be forced to make expenditures that are not always consistent with the community's broader priorities and the greatest public good. In 1972, Congress, in what is now known as the Clean Water Act ("CWA"), declared that eliminating the discharge of pollutants to the waters of the United States is a national priority.[2] Through the CWA and its National Pollutant Discharge Elimination System ("NPDES"), Congress armed the United States Environmental Protection Agency ("EPA") with significant powers to compel municipalities to take actions to eliminate pollutant discharges. Among other powers, EPA, or individual states who are authorized to implement the NPDES program, may issue permits that establish limits on pollutant discharges,[3] develop total maximum daily loads ("TMDLs") that ultimately limit the amount of pollutants that may be discharged to certain waters[4] and take enforcement actions, including cease and desist orders, to prevent unpermitted discharges.[5]

As applied to municipalities, the CWA thus governs core municipal operations such as sanitary sewer system operations, storm water management, operation of combined sanitary sewer and storm water systems and, increasingly, land use planning and permitting functions.[6] Improvements in these systems or functions often require major infrastructure projects or planning efforts whose costs often exceed municipal resources. Deficiencies in these systems or functions have led to enforcement actions against many municipalities which have resulted in complex and costly consent decrees that require specific infrastructure improvements on a fixed schedule. Implementation of such consent decrees at

times hinders the ability of municipalities to prioritize their services and, in many cases, has proven to be a daunting, if not impossible, task.

Faced with these regulatory challenges, organizations such as the U.S. Conference of Mayors and the National Association of Clean Water Agencies, among others, have been working with EPA on cost-effective approaches to meeting the shared goal of water quality improvement within the difficult financial conditions municipalities face. These collaborative efforts resulted in EPA's 2012 Integrated Municipal Stormwater and Wastewater Planning Approach Framework ("Integrated Planning Approach").[7] This paper outlines the Integrated Planning Approach and discusses some of the benefits and challenges to implementation of such an approach by municipalities. The paper is intended to provide an overview of the issues that will be discussed in more detail by the panel.

II.
The Integrated Planning Approach

EPA officially commenced its integrated planning effort in October of 2011 when Nancy Stoner, Acting Assistant Administrator in the Office of Water, along with Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance, issued a joint memo regarding integrated planning to EPA regional administrators.[8] The memo encouraged regions "to work with the states to engage our local partners regarding all of their National Pollutant Discharge Elimination System (NPDES) related obligations in an orderly manner." The memo stated that "EPA's existing regulations and policies provide EPA and states flexibility to evaluate a municipality's financial capability in tough economic times and to set appropriate compliance schedules, allow for implementing innovative solutions and sequence critical waste and storm-water capital projects and operation and maintenance related work in a way that ensures human health and environmental protection." The memo promised that an integrated planning approach framework would soon be developed.

A. Elements of an Integrated Planning Approach.

In January of 2012, EPA issued its framework for the Integrated Planning Approach. The framework identifies overarching principles for the Integrated Planning Approach, identifies five (5) elements of Integrated Plans and outlines how Integrated Plans might be incorporated into NPDES permits or otherwise be made enforceable.[9]

With regard to overarching principles, EPA has stated that Integrated Plans will maintain existing regulatory standards while also allowing municipalities to balance various CWA requirements in a manner that addresses the most pressing public health and environmental protection issues first. EPA expects that municipalities will be responsible for developing such Integrated

Plans through a meaningful stakeholder process and in a manner consistent with all state requirements.

In terms of the required elements of an Integrated Plan, EPA has identified five (5) elements. Element 1 would describe the water quality, human health and regulatory issues to be addressed in the Plan. These issues would include:

- An assessment of existing CWA challenges.
- Identification and characterization of human health threats.
- Identification and characterization of water quality impairment and threats.
- Identification of sensitive areas and environmental justice concerns.
- Metrics for evaluating human health and water quality objectives.

Element 2 of an Integrated Plan would describe the existing wastewater and storm water systems and provide information describing system performance. The element would include:

- Identification of municipalities and utilities that are participating in the planning effort.
- Characterization of wastewater and storm water systems.
- Characterization of flows in the wastewater and storm water systems.
- Identification of deficiencies associated with existing assets.

Element 3 of an Integrated Plan would establish a process for involving relevant community stakeholders in the planning and selection process. The municipality must provide meaningful input at various stages of development of the Plan.

Element 4 of an Integrated Plan would establish a process for evaluating and selecting alternatives and proposed implementation schedules. This element would include:

- Use of sustainability planning elements to assist in providing information for prioritizing investments.
- A systematic approach to considering green infrastructure and other innovative measures.

- Identification of criteria to be used for comparing alternative projects.

- Identification of alternatives, including cost estimates, projected pollutant reductions and other benefits associated with each alternative.

- Analysis of alternatives that documents the criteria used, the projects selected, and why they were selected.

- Proposed implementation schedules.

- For each entity participating in the Plan, a financial strategy and capability analysis.

Element 5 of an Integrated Plan would establish performance criteria and ways to measure the success of the Plan. This would include a monitoring program to address the effectiveness of controls, compliance monitoring and ambient monitoring.

In July of 2013, EPA issued a "Frequently Asked Questions" document ("FAQ") regarding Integrated Plans.[10] The FAQ provides valuable information about how EPA anticipates Integrated Plans will be developed and implemented.

B. Implementation of an Integrated Plan.

An Integrated Plan developed by a municipality will not, without additional action, establish legally binding requirements. EPA anticipates that Integrated Plans will be incorporated into either NPDES permits or made binding through enforcement actions, including modifications to existing consent decrees.[11] Through these regulatory vehicles, the Integrated Plans and their locally-driven implementation schedules and prioritization will become enforceable requirements and will establish the schedule for implementation.

III.
Benefits of the Integrated Planning Approach

The Integrated Planning Approach presents several potential benefits to municipalities. First, subject to the constraints discussed in the next section of this paper, an Integrated Plan allows municipalities to prioritize their CWA obligations and implement them in a cost-effective manner. This benefit may be most immediately apparent to those municipalities subject to costly consent decrees or other strict and potentially overlapping CWA requirements. An Integrated Plan at least offers the potential to reorder those obligations in a way that may been more cost-effective while resulting in greater or equivalent water quality results.

Second, an Integrated Plan may offer municipalities a clearer path to prioritizing its CWA obligations within fiscal constraints. One of the main purposes of the Integrated Planning Approach is to acknowledge the fiscal constraints placed on municipalities and to allow for some flexibility based on financial capability. Thus, Integrated Plans allow municipalities to take financial capability into account as part of an overall plan for meeting CWA requirements.

Third, once incorporated into a permit or made binding through an enforcement action, the Integrated Plan should provide a clearer path to achieving CWA compliance, including protections associated with permit shield concepts. That is, implementation of the Integrated Plan should help provide regulatory certainty to municipalities.

Fourth, development and implementation of an Integrated Plan allows a community to comprehensively tackle its water quality obligations and, through public participation, may help educate community members on how they might assist in making water quality improvements. In theory, an Integrated Plan could be a community's shared roadmap to water quality improvements. An Integrated Plan may also help justify the need for additional revenue to make the improvements required to implement the Plan. If the community supports the Integrated Plan, community members may be more willing to pay for its implementation.

IV.
Challenges to Implementation of the Integrated Planning Approach

Although the Integrated Planning Approach offers potentially significant benefits to municipalities, there are challenges to implementation of such Plans. Obtaining the benefits of such Plans will depend on whether these challenges can be successfully navigated.

One major challenge is that Integrated Plans must be consistent with all current CWA and regulatory requirements and are not intended to change or lessen existing statutory or regulatory standards. Whether the flexibility offered by Integrated Plans can actually be achieved will depend on whether the prioritization and implementation schedules in the Integrated Plan meet existing regulatory requirements, particularly regulations related to compliance schedules. An NPDES permit may contain a compliance schedule for water quality-based effluent limitations if the water quality standard was adopted after July 1, 1977 and the state has clearly indicated in the standard or regulations that compliance schedules are acceptable.[12] States may also limit the duration of compliance schedules. Not all municipalities will be able to meet these requirements. Therefore, the flexibility offered by the Integrated Plans may be limited by the existing legal or regulatory requirements.

Whether the flexibility offered by Integrated Plans can actually be achieved within existing CWA and regulatory requirements remains a concern to

organizations such as the U.S. Conference of Mayors. In June of this year, the U.S. Conference of Mayors adopted a resolution calling on Congress to amend the CWA to "[r]emove regulatory barriers to the use of adaptive management and permits to implement integrated plans by specifically determining that a municipality implementing an integrated plan will be in compliance with its permit as long as it is making reasonable progress towards achieving Clean Water Act goals . . . ."[13] It will take time to determine whether, without such changes, the flexibility offered by Integrated Plans is robust or so constrained that its benefits are unattainable.

Second, Integrated Plans may be costly to develop and there is no discrete funding source available to pay for the development and implementation of the Plans. As EPA states in its FAQ, grant funds for preparing an Integrated Plan are not available. EPA believes that some assistance may be available through the Clean Water State Revolving Fund. In its June 2013 resolution, the U.S. Conference of Mayors identifies this lack of funding as a major impediment to achieving the benefits of the Integrated Planning Approach.

Third, the extent to which financial capacity may be used to justify more time to implement CWA requirements is currently unclear. In its FAQ, EPA states that a "community's financial capability and other relevant factors are important when developing appropriate compliance schedules that ensure human health and environmental protection." EPA believes that its existing Guidance for Financial Capability Assessment will continue to be a valuable guide for evaluating financial capability. Organizations such as the National Association of Clean Water Agencies and the U.S. Conference of Mayors have urged EPA to take a broader approach to assessing financial capability.[14] This dialogue is continuing.[15]

Fourth, exactly how Integrated Plans will be incorporated into the existing regulatory process of authorized states is unclear. Whether authorized states have the time, expertise and funding to aggressively pursue the Integrated Planning Approach remains an unanswered question.

V.
Conclusion

EPA's Integrated Planning Approach offers municipalities the potential to have greater local control over implementation of CWA obligations. If certain challenges to full implementation of the Integrated Planning Approach can be resolved, Integrated Plans could provide significant benefits and restore local control over CWA implementation within limited local budgets. Whether these challenges can be overcome remains an open question.

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[1] The views expressed in this paper are solely the views of the author, and do not represent the views of other panel members.

[2] 33 U.S.C. § 1251(a)(1).

[3] 33 U.S.C. §§ 1311 and 1342.
[4] 33 U.S.C. § 1313(d).
[5] 33 U.S.C. § 1319.
[6] Recent examples of the extent to which NPDES permits governs almost all aspects of municipal functions include the recently adopted NPDES Permits for the Municipal Separate Storm Sewer Systems in Los Angeles and San Diego Counties in California.
[7] A copy of the Integrated Planning Approach is attached and may also be found at http://cfpub.epa.gov/npdes/integratedplans.cfm. See also Notice, 77 Fed. Reg. 1687 (January 11, 2012).
[8] U.S. Environmental Protection Agency, Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans, October 27, 2011; a copy of the memorandum is attached and is also available at http://cfpub.epa.gov/npdes/integratedplans.cfm.
[9] The summary of the Integrated Planning Approach presented in this paper is derived from the material contained in EPA's website cited above, as well as from a presentation entitled "Draft Framework for Integrated Municipal Planning Approach" made in a February 27, 2012 listening session.
[10] A copy of the "Frequently Asked Questions" is attached and may also be found at the website cited above.
[11] An example of how this Integrated Planning Approach may be included in a consent decree is the recent consent decree involving the City of Seattle, Washington.
[12] 40 CFR § 122.47; In the Matter of Star-Kist Caribe, Inc. 3 E.A.D. 171, 175-77 (1990).
[13] See, "Resolution to Reinstate a Federal, State and Local Government Partnership for Achievable and Affordable Water Quality Improvements" as adopted at the June 21-24, 2013 annual conference of the U.S. Conference of Mayors.
[14] See, e.g., "The Evolving Landscape for Financial Capability Assessment" prepared by NACWA and available at www.nacwa.org.
[15] See January 13, 2013, EPA memo entitled "Assessing Financial Capability for Municipal Clean Water Act Requirements."