

U.S. Conference of Mayors Draft Position Document

CBPC Meeting (9/20/13) (Att. 3b.)

DISCUSSION DRAFT

August 2013

A Bill

To authorize approaches to and assistance for improving water quality.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short title.

This Act may be cited as the Water Quality Improvement Act of 2013.

SEC. 2 FINDINGS.

Congress finds the following:

(1) The capital costs that cities bear to address combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), treatment plant upgrades, and stormwater controls are unfunded federal mandates and are among the most costly burdens faced by local governments.

(2) Upon the passage of the 1972 Federal Water Pollution Control Act (Clean Water Act), Congress authorized and funded over \$60 billion in grants that created partnerships between municipalities, states and the federal government to share the costs of upgrading publicly owned treatment works around the country to meet the Clean Water Act mandates relating to secondary treatment.

(3) In 1987, Congress determined that large capital grants for municipal wastewater treatment were no longer necessary, and phased out grants to local governments in lieu of a loan program to be managed by the states.

(4) Since 1987 many unanticipated and extremely costly new Clean Water Act and Safe Drinking Water Act mandates have been imposed on local governments and more are to be imposed on local governments in coming months and years, but federal grant money is no longer provided to help meet these mandates.

(5) Today municipalities expend over \$111 billion every year to provide essential water services for the protection of public health and to clean the environment and

meet state and federal water and wastewater mandates, an annual amount that is nearly double the total of all the grants that the federal government provided over nearly 20 years.

(6) The many mandates imposed by the Clean Water Act and the Safe Drinking Water Act have created cumulative financial burdens that cannot be borne by municipalities, their low and moderate income families, and their business enterprises, forcing municipalities to forego investment in competing municipal priorities.

(7) In explicit recognition of the burden of these costs the United States Environmental Protection Agency (U.S. EPA) has recently developed a policy allowing local governments to create Integrated Plans through which a local government can coordinate competing and sometimes conflicting actions, prioritize actions that will provide the greatest environmental and public health benefits for the funds expended, and evaluate progress and the need for further actions to meet water quality standards through adaptive management processes.

(8) Because U.S. EPA currently interprets the Clean Water Act to require immediate compliance with any pre-1977 water quality standards, it relies on aggressive enforcement tools such as consent decrees and orders as its principal method of interacting with municipalities, resulting in overly costly and overly prescriptive mandates that often yield negligible public benefits, and precluding opportunities for flexibility by preempting the use of permits and adaptive management processes to comply with Clean Water Act obligations.

(9) In tandem with these decrees and orders, U.S. EPA and the Department of Justice have adopted policies on penalties and fines that treat local governments as polluters, rather than as partners and stewards in improving our environment.

(10) Local governments that agree to implement plans to address water quality should not be subject to penalties or citizen suits under the Clean Water Act.

(11) Plans implemented by local governments to address water quality should be based on economically achievable and sustainable control measures to meet attainable water quality standards.

SEC. 2. WATER POLLUTION CONTROL GRANTS.

Section 221 of the Federal Water Pollution Control Act (33 U.S.C. 1301) is amended—

(1) by striking subsections (a) through (g) and inserting the following:

“(a) Grants.—The Administrator may—

“(1) make grants to States for the purpose of providing grants to local or regional authorities or a municipality or municipal entity

(A) for use in planning, designing, and constructing treatment works

(I) to intercept, transport, control, or treat municipal combined sewer overflows and sanitary sewer overflows, or

(II) to meet with effluent limitations in a permit issued under section 402 of this Act that are not already being met by the treatment works on the date of enactment of this Act; or

(B) to reduce the discharge of pollutants from a municipal storm sewer;

(C) to retire debt incurred for the purposes identified in subparagraph (A) and (B) in any case in which that debt is imposing significant and widespread social and economic impacts on ratepayers, as determined under the criteria in section 402(r)(3)(B); and

“(2) make a grant directly to a local or regional authority or municipality or municipal entity for the purposes described in paragraph (1).

“(b) Prioritization.—In selecting from among municipalities applying for grants under this section, a State or the Administrator shall give priority to an applicant that is a financially distressed community, as determined by the applicable State under subsection (c).

“(c) Determination.—In determining whether a community is a distressed community for the purposes of subsection (b), a State shall consider, among other factors, the criteria described in section 8(b)(2)(A) of the Water Quality Improvement Act of 2013.

“(d) Cost-Sharing.—

“(1) FEDERAL SHARE.—The Federal share of the cost of any project or activity carried out using funds from a grant made under subsection (a) shall be not less than 75 percent.

“(2) NON-FEDERAL SHARE.—The non-Federal share of the cost of any project or activity carried out using funds from a grant made under subsection (a) may include—

“(A) in any amount, public and private funds and in-kind services; and

“(B) notwithstanding section 603, financial assistance, including loans,

from a State water pollution control revolving fund.

“(e) Administrative Requirements.—

“(1) IN GENERAL.—Subject to paragraph (2), a project that receives grant assistance under subsection (a) shall be carried out subject to the same requirements as a project that receives assistance from a State water pollution control revolving fund established pursuant to title VI.

“(2) DETERMINATION OF GOVERNOR.—The requirement described in paragraph (1) shall not apply to a project that receives grant assistance under subsection (a) to the extent that the Governor of the State in which the project is located determines that a requirement described in title VI is inconsistent with the purposes of this section.

“(f) Allocation of Funds.—

“(1) FISCAL YEAR 2014.—For fiscal year 2014, subject to subsection (g), the Administrator shall use the amounts made available to carry out this section under subsection (i)(1) to provide grants to municipalities and municipal entities under subsection (a)(2) in accordance with the priority criteria described in subsection (b).

“(2) FISCAL YEAR 2015 AND THEREAFTER.—For fiscal year 2014 and each fiscal year thereafter, subject to subsection (g), the Administrator shall use the amounts appropriated to carry out this section under subsection (i)(1) to provide grants to States under subsection (a)(1) in accordance with a formula that—

“(A) shall be established by the Administrator, after providing notice and an opportunity for public comment; and

“(B) allocates to each State a proportional share of the amounts based on the total needs of the State as identified in the most recent survey—

“(i) conducted under section 210; and

“(ii) included in a report required under section 516(a).”;

(2) by redesignating subsections (h) and (i) as subsections (g) and (h), respectively;

(3) in the first sentence of subsection (h) (as redesignated by paragraph (2)), by striking “2003” and inserting “2014”; and

(4) by adding at the end the following:

“(i) Funding.—

“(1) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section—

“(A) \$3,000,000,000 for fiscal year 2014;

“(B) \$3,000,000,000 for fiscal year 2015;

“(C) \$3,000,000,000 for fiscal year 2016;

“(D) \$3,000,000,000 for fiscal year 2017; and

“(E) \$3,000,000,000 for fiscal year 2018.

“(2) AVAILABILITY OF AMOUNTS.—Amounts authorized to be appropriated under paragraph (1) shall remain available until expended.”.

SEC. 3. INTEGRATED PLANNING PROCESS.

1. Integrated Planning Permits.

Section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended by adding at the end the following:

“(r) Implementing Integrated Plans Through Permits.--

(1) Permit flexibility.—Upon the request of the permittee, the Administrator or Director shall issue a permit for municipal discharges¹ that integrates multiple effluent standards and limitations under this Act. In such a permit-

(A) the water quality based effluent limitations shall be based on attainable water quality standards;

(B) the control measures shall be economically achievable and sustainable;
and

(C) the authorized discharges need not immediately meet water quality based effluent limitations as long as the discharger continues to make reasonable progress towards meeting such limitations.

¹ Add definition of “municipal discharges” as follows: “Municipal discharges means discharges from a treatment works as defined in section 212(2) and discharges from a municipal storm sewer under section 402(p). This term includes discharges of wastewater or storm water collected from multiple municipalities if such discharges are covered by the same permit issued under section 402 to the person operating the treatment works or municipal storm sewer.”

(2) Permit compliance.-- A discharge that is in compliance with a permit under this subsection are deemed to be in compliance with effluent standards and limitations under this Act.

(3) Attainable Water Quality Standards. – Attainable water quality standards under paragraph (1) are standards that the Administrator or Director has reviewed and found to be technically achievable and economically affordable.

(A) A determination of technical achievability shall consider²

(i) Naturally occurring pollutant concentrations;

(ii) Natural, ephemeral, intermittent or low flow conditions or water levels;

(iii) Human caused conditions or sources of pollution that cannot be remedied or would cause more environmental damage to correct than to leave in place;

(iv) Dams, diversions or other types of hydrologic modifications where it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment water quality standards;
or

(v) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, that may preclude attainment of water quality standards.

(B) A determination of economic affordability shall consider whether meeting water quality standards would result in substantial and widespread social and economic impact.³

(i) the economic and social impact on a person in the service area of the permittee is substantial if the costs paid by such person to any entity for all federally mandated infrastructure improvements, operation and maintenance, and compliance measures, including costs incurred as a result of this Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, and the National Flood Insurance Act, and similar mandates under state law, and the cost of servicing any

² These are criteria for changing water quality standards under 40 C.F.R. 131.10(g).

³ This is a criterion for changing water quality standards under 40 CFR 131.10(g).

debt incurred or to be incurred to finance such costs exceeds 2 percent of the person's household income.

(ii) an economic and social impact is widespread if twenty percent or more of persons in the service area of the permittee face the substantial impact described in clause (i).⁴

(C) In determining whether the economic and social impacts of existing and potential additional costs, including debt service, on persons living within the service area of the permittee are substantial and widespread, the Administrator also shall consider:

(i) impacts on low income households and the ability of such households to pay basic shelter costs;

(ii) whether or not there is a failing local industry or if a local industry might fail if higher taxes or fees are imposed on it;

(iii) the population trends in the service area of the permittee;

(iv) a municipality's capital improvement plan and whether a municipality would have to forgo projects in its plan in order to finance improvements to comply with existing water quality standards;

(v) the ability of a municipality to incur more debt, including its ability to issue and find a market for additional municipal bonds;

(vi) whether the debt incurred to implement controls has or will result in a lowering of the municipality's bond rating;

(vii) whether the municipality has limited legal authority to pass increased costs through to ratepayers and increased for costs of water quality programs must be paid from their general fund; and

(viii) any other financial factor brought to the Administrator's attention by a municipality.

⁴ EPA can use income data by Census block to make this determination.

(D) A determination of economic affordability shall not be based on median household income and shall not establish a minimum level of expenditure by a municipality.

(E) A determination of economic affordability shall be based on the legally adopted rates in effect at the time that the determination is made.

(4) Economically achievable controls. -- Economically achievable controls under paragraph (1) means

(A) controls that will not result in substantial and widespread social and economic impacts as determined in accordance with paragraph (3)(B) or

(B) in any case in which a discharger is a municipality or other subdivision of a state organized for the purpose of providing services to the public, the annual cost to implement such controls, including debt service on bonds issued to fund such implementation, will not exceed fifty percent of the annual operating budget of the operating utility, unless

(i) the Administrator provides the discharger with a grant covering at least 75 percent of the total capital cost of the control measures, or

(ii) the permit allows at least 40 years for the implementation of controls, and, if requested by the discharger, the permit relies on green infrastructure.

(5) Sustainable controls.—The Administrator, or in the case of an authorized state program, the Director, shall determine whether control measures are sustainable under paragraph (1) by evaluating relevant environmental impacts associated with implementation of the controls over the life of such controls.

(6) Reasonable progress.—The Administrator, or in the case of an authorized state program, the Director, shall determine whether a discharger is making reasonable progress towards meeting attainable water quality standards by implementing economically affordable and sustainable control measures under paragraph (1) based on

(A) the availability and effectiveness of controls,

(B) the cost of controls and the impact of such costs on ratepayers, and

(C) all environmental impacts of the control measures.

(7) Permit Term – At the discretion of the Administrator, or in the case of an authorized state, the Director, a permit described in paragraph (1) may be issued for a term of greater than five years, but not more than ten years.

(8) Adaptive management for the attainment of water quality standards.—

At the time of renewal of a permit described in paragraph (1), the Administrator, or in the case of an authorized state, the Director, shall evaluate the effectiveness of the controls identified in the permit, including whether attainable water quality standards are being met or are expected to be met through the controls implemented during the permit term and shall evaluate whether the controls continue to be affordable and sustainable.

(A) If attainable water quality standards are not being met, the permit may

(i) be renewed to continue implementation of affordable and sustainable controls identified in the permit that are expected to result in the attainment of water quality standards in the future,

(ii) be renewed to replace the controls identified in the permit with alternative affordable and sustainable controls designed to meet attainable water quality standards based on information developed by the discharger, or,

(iii) if controls identified in the permit are fully implemented but water quality standards are not yet met, require the implementation of additional affordable and sustainable controls.

(B) If attainable water quality standards are being met, no additional controls on the discharge shall be required under this section.

(C) If the controls identified in the permit are no longer affordable and sustainable, the permit may be modified to replace the controls identified in the permit with alternative affordable and sustainable controls.

(s) Unavoidable Discharges.—

(1) Permits.- A permit under this section may authorize an unavoidable discharge from a sanitary sewer.

(2) Unavoidable discharges.—A discharge from a sanitary sewer overflow is unavoidable if it is --

(A) a discharge that is necessary to prevent loss of life, personal injury, or severe property damage; or

(B) a discharge that is a temporary, exceptional incident that could not be prevented by proper operation and maintenance of the system, such as exceptional acts of nature, wet weather conditions beyond the capacity of the system, and unforeseen sudden structural, mechanical, or electrical failure that is beyond the control of the operator.

(3) Controls on unavoidable discharges to protect water quality.-- A permit may require controls to prevent the violation of water quality standards from unavoidable discharges from sanitary sewers.”

SEC. 4. MUNICIPAL STORMWATER CONTROLS.

Section 402(p)(3)(B)(iii) of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended to read as follows:

(iii) shall require achievable and affordable controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices; control techniques; system, design and engineering methods; and other achievable and affordable controls on such discharges.

SEC. 5. INTEGRATED PERMIT PILOT PROJECTS

Title I of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended by adding at the end the following:

“Sec. 124. Integrated Permit Pilot Projects.

“(a) In General.-- Within 365 days of the date of enactment of this Act, each Regional Administrator shall issue, or shall work with authorized states to issue, at least one permit that addresses multiple regulatory requirements, as described in section 402(r).

(b) Permit elements.—A permit described in subsection (a) shall integrate at least two, or at the discretion of the permittee, or more, regulatory requirements, such as

- (1) controls on combined sewer overflows,
- (2) controls on sanitary sewer overflows,
- (3) controls on municipal stormwater discharges,
- (4) wastewater treatment,
- (5) controls to meet allocations in a total maximum daily load.

(c) Prioritization and sequencing of controls.—

(1) Prioritization.-- A permit described in section 402(r) shall allow the permittee to identify priority controls that will achieve cost-effective water quality benefits and to implement and assess the effectiveness of such controls before requiring implementation of other regulatory controls.

(2) Controls identified in the permit.- If the permit provides for prioritization and sequencing of controls, any regulatory obligations that are planned to be addressed after the term of the permit shall be identified generally in the permit fact sheet but shall not be mandatory elements of the permit.

(d) Report to Congress – Within two years from the date of enactment of this section, the Administrator shall submit a report to Congress regarding the implementation of integrated permits under section 402(r).

SEC 6. ENFORCEMENT.

1. Inapplicability of Administrative and Civil Penalties.

Section 309 of the Federal Water Pollution Control Act (33 U.S.C. 1319 is amended—

(A) In subsection (d) --

(a) by striking “Any person” and inserting “(1) In General – Any person”;
and

(b) by inserting at the end the following:

“(2) Compliance Plans.—Notwithstanding paragraph (1), no municipality shall be subject to a civil penalty for past violations of the sections of the Act referred to in

paragraph (1) in any case in which the municipality adopts and is implementing a plan to come into compliance with such sections, pursuant to a permit under section 402, an administrative order under section subsection (a), or a civil action under subsection (b).”

(B) In subsection (g) by adding at the end the following –

“(12) Compliance Plans.-- Notwithstanding paragraph (1), no municipality shall be subject to an administrative penalty for past violations of the sections of the Act referred to in paragraph (1) in any case in which the municipality adopts and is implementing a plan to come into compliance with such sections, pursuant to a permit under section 402, an administrative order under section subsection (a), or a civil action under subsection (b).”

2. Implementation of Integrated Plans through Administrative Orders or Consent Decrees.

Section 309 of the Federal Water Pollution Control Act (33 U.S.C. 1319 is amended by adding at the end the following:

“(h) Implementation of Integrated Plans. –

(1) The Administrator shall have no authority to issue an order under subsection (a) or to commence a civil action under subsection (b) against a permittee for municipal discharges unless the Administrator has provided the permittee with the opportunity to come into compliance with this Act through an integrated plan that meets the requirements of a permit issued under subsection (r) of section 402.

(2) At the request of any permittee for municipal discharges that is implementing one or more requirements of this Act under an administrative order or settlement agreement, the Administrator shall modify such administrative order or shall seek the leave of a court with continuing jurisdiction to modify such settlement agreement to allow the permittee to come into compliance with this Act through an integrated plan that meets the requirements of a permit issued under subsection (r) of section 402.

(3) At the request of any permittee for municipal discharges that is implementing an administrative order or settlement agreement that met the requirements of a permit issued under subsection (r) of section 402 when issued, but no longer meets such requirements, the Administrator shall modify such administrative order or shall seek the leave of a court with continuing jurisdiction to modify such settlement agreement to bring the agreement or order back into compliance with

the such requirements.

SEC 7. DEFINITIONS

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362 is amended by adding at the end the following—

“(25) **BYPASS.**—The term “bypass” means an intentional diversion of a waste stream from any portion of a treatment system. Treatment of a waste stream in accordance with the design of the treatment system shall not constitute a “bypass” if the treatment system was approved or permitted by the Administrator, or in the case of an authorized state program, the Director, or if the discharge achieves technology and water quality based effluent limitations at the point of discharge.⁵

(26) **MUNICIPAL DISCHARGES.**—The term “municipal discharges means discharges from a treatment works as defined in section 212(2) or discharges from a municipal storm sewer under section 402(p). This term includes discharges of wastewater or storm water collected from multiple municipalities if such discharges are covered by the same permit issued under section 402.”

SEC. 8. WATER POLLUTION CONTROL REVOLVING LOAN FUNDS.

(a) **Extended Repayment Period.**—Section 603(d)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1383(d)(1)) is amended—

(1) in subparagraph (A), by striking “20 years” and inserting “the lesser of 30 years or the design life of the project to be financed with the proceeds of the loan”; and

(2) in subparagraph (B), by striking “not later than 20 years after project completion” and inserting “upon the expiration of the term of the loan”.

(b) **Authorization of Appropriations.**

Section 607 of the Federal Water Quality Control Act (33 U.S.C. 1387) is amended to read as follows:

⁵ See *Iowa League of Cities v. EPA*, Case No. 11-3412 (8th Cir. Mar. 25, 2013), *pet. For rehearing en banc denied* July 10, 2013.

Sec. 607. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out the purposes of this title the following sums:

\$2,000,000,000 per fiscal year for each of fiscal year 2014, 2015, 2016, 2017, and 2018.

SEC. 9. UPDATING OF GUIDANCE.

(a) Definitions.—In this section:

(1) ADMINISTRATOR.—The term “Administrator” means the Administrator of the Environmental Protection Agency.

(2) AFFORDABILITY.—The term “affordability” means, with respect to payment of a utility bill, a measure of whether an individual customer or household can pay the bill without undue hardship or unreasonable sacrifice in the essential lifestyle or spending patterns of the individual or household, as determined by the Administrator.

(3) FINANCIAL CAPABILITY.—The term “financial capability” means the financial capability of a community to make investments necessary to make water quality-related improvements, taking into consideration the criteria described in subsection (b)(2)(A).

(4) GUIDANCE.—The term “guidance” means the guidance published by the Administrator entitled “Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development” and dated February 1997, as applicable to combined sewer overflows and sanitary sewer overflows.

(b) Updating.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator shall update the guidance to ensure that the evaluations by the Administrator of financial capability assessment and schedule development meet the criteria described in paragraph (2).

(2) CRITERIA.—The criteria described in this paragraph are that, under the updated guidance—

(A) in assessing financial capability of a community—

- (i) greater emphasis should be placed on local economic conditions;
 - (ii) for regional systems, consideration should be given to the economic conditions of political jurisdictions and significant demographic groups within each region;
 - (iii) prescriptive formulas for use in calculating financial capability and thresholds for expenditure should not be considered to be the only indicator of the financial capability of a community;
 - (iv) site-specific local conditions should be taken into consideration in analyzing financial capability;
 - (v) a single measure of financial capability or affordability (such as median household income) should be viewed in the context of other economic measures, rather than as a threshold to be achieved; and
 - (vi)(I) consideration should be given to the economic outlook of a community, including the potential impact of program requirements over time, in the development of implementation schedules; and
 - (II) the assessment should take into consideration other essential community investments relating to water quality improvements;
- (B) with respect to the timing of implementation of water quality-related improvements—
- (i) environmental improvement implementation schedules should be structured to mitigate the potential adverse impact on distressed populations resulting from the costs of the improvements; and
 - (ii) implementation schedules should reflect local community financial conditions and economic impacts;
- (C) with respect to implementation of methodologies—
- (i) a determination of local financial capability may be achieved through an evaluation of an array of factors the relative importance of which may vary across regions and localities; and
 - (ii) an appropriate methodology shall consider various factors as are appropriate to recognize the prevailing and projected economic concerns in a community; and
- (D) the residential indicator should be revised to include—
- (i) a consideration of costs imposed upon ratepayers for essential utilities;

- (ii) increased consideration and quantification of local community-imposed costs in regional systems;
- (iii) a mechanism to assess impacts on communities with disparate economic conditions throughout the entire service area of a utility;
- (iv) a consideration of the industrial and population trends of a community;
- (v) recognition that—
 - (I) the median household income of a service area reflects a numerical median rather than the distribution of incomes within the service area; and
 - (II) more representative methods of determining affordability, such as shelter costs, essential utility payments, and State and local tax efforts, should be considered;
- (vi) a consideration of low-income ratepayer percentages; and
- (vii) impacts relating to program delivery, such as water quality infrastructure market saturation and program management.

(3) IMPLEMENTATION.—The updated guidance should indicate that, in a case in which a previously approved long-term control plan or associated enforceable agreement allows for modification of the plan or terms of the agreement (including financial capability considerations), and all parties are in agreement that a change is needed or that the plan or agreement contains a reopener provision to address changes in the economic or financial status of the community since the effective date of the plan or agreement, reconsideration and modification of financial capability determinations and implementation schedules based on the criteria described in paragraph (2) are appropriate.

(c) Publication and Submission.—Upon completion of the updating of guidance under subsection (b), the Administrator shall publish in the Federal Register and submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives the updated guidance.

(d) Authorization of Appropriations.—There are authorized to be appropriated such sums as are necessary to carry out this section.