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Alexander B. Grannis
Commissioner

MAY 21 2008

Roger R. Martella, Jr., Esq.
General Counsel
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W. (2310A)
Washington, DC 20460

Dear General Counsel Martella:

This letter is being written on behalf of the States of New York and Nevada to request a meeting with you to discuss the intention of the United States Environmental Protection Agency (EPA) to move forward with its proposed "NPDES (National Pollutant Discharge Elimination System) Permit Fee Incentive for Clean Water Act; Allotment Formula" rulemaking (Permit Fee Incentive rule). EPA has announced its intention to take this step despite nearly universal opposition to the proposal by states, interstates, municipalities, regulated industries and members of Congress. As indicated in our prior written comments on this matter¹, the States of New York and Nevada are strongly opposed to EPA's proposed Permit Fee Incentive rule and believe that a meeting is necessary to convey the seriousness of our concerns over the legality of the program, and related federalism implications. We urge EPA to abandon the proposed rulemaking, as it violates the Clean Water Act (CWA), is contrary to Congressional intent, and effectively penalizes states that exercise their independent authority to determine appropriate funding mechanisms for the management of authorized state water quality programs.

If the proposed Permit Fee Incentive rule becomes final, EPA will divert up to 3%, or \$5.08 million, of CWA §106(b) grant funds annually for use as a financial "incentive" to states. A state would be eligible to receive 25%, 50% or 100%, of its full share of the incentive monies (total amount of incentive money divided by number of states with delegated NPDES program) only if it is able to demonstrate that it collects permit fees which equal 75%, 90% or 100% of total NPDES program costs, respectively. Should a state recover anything less than 75% of its total NPDES program costs in permit fees, the state is not eligible to receive any "incentive" monies and must rely solely on the CWA §106 funding that it was allocated in FY2006.

The States of New York and Nevada have significant doubt about the sufficiency of the proposed Permit Fee Incentive rule from both a legal and policy standpoint. Some of the States' concerns include:

1. The proposed Permit Fee Incentive rule is contrary to the intent of CWA §101(b), and interferes with states' rights, because it is the state's responsibility, and not EPA's, to

¹See: comments to Docket ID No. OW 2006-0765 from Sandra Allen, Director of the Division of Water for the New York State Department of Environmental Conservation, March 5, 2007; letter from NYSDEC Commissioner Grannis to EPA Administrator Johnson, November 8, 2007; comments to Docket ID NO. EPA-HQ-OW-2006-0765 from Leo Drozdoff, Administrator, Division of Environmental Protection in the Nevada Department of Conservation and Natural Resources, to EPA Administrator Johnson, March 2, 2007; and Leo Drozdoff to EPA Administrator Johnson, November 15, 2007.

manage pollution ("It is the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..." CWA §101(b));

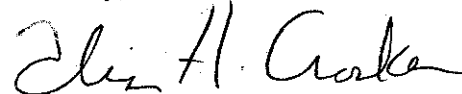
2. The proposed Permit Fee Incentive rule violates CWA §106 because it would allocate funding based on a state's collection of permit fees rather than on the basis of a state's pollution (The EPA "...Administrator shall make allotments to the States and interstate agencies in accordance with the regulations promulgated by him on the basis of the extent of the pollution problem in the respective States." CWA §106(b));
3. The proposed Permit Fee Incentive rule violates Executive Order 13132, by failing to provide meaningful consultation with the states prior to, and during this rulemaking process, and by not consulting with states on the formulation and implementation of policies with federalism implications;
4. The Consolidated Appropriations Committee Report Explanatory Text for the Fiscal Year 2008 Interior and Environment Appropriations Bill specifically denied the request for the proposed Permit Fee Incentive rule, directed EPA to use the same allocation formula as in previous years and also directed EPA to delay implementation of the proposed rule until the many negative comments were addressed;
5. The federal contributions to states' CWA programs continue to decline while the federal mandates for the programs have increased significantly, including the number of NPDES permitted activities and the staff resources needed to meet the requirements to receive federal funding. In 2002, EPA, states and other stakeholders developed a model that identified a resource gap estimated to be \$800 million, and adjusted for inflation, the gap would be nearly \$1 billion.

The proposed Permit Fee Incentive rule presents a particular dilemma for New York State. Pursuant to the CWA, New York receives federal funding to help support its State Pollutant Discharge Elimination System (hereinafter "SPDES") program, matched with significant resources from New York. In New York State FY 2006/2007, the total investments in New York's water quality program amounted to approximately \$57.6 million, with 72% (or \$46 million) of the total expenditures from New York resources. Under the current fee structure, New York would be ineligible for any "incentive" monies under EPA's proposed program and would not be guaranteed any funding above that which it receives under the usual allocation, pursuant to 40 CFR 335.162(b). Other states would suffer similar consequences. It should also be noted that even though Nevada would benefit under the proposed Permit Fee Incentive rule, Nevada opposes the rule on principle.

Over the past five years, New York's federal funding from EPA has declined by more than 30% while its costs to administer the program, with level staffing, have increased 25%. Additionally, in order to receive the full funding appropriated by Congress to the states for the administration of NPDES and other water quality programs, New York would be forced to raise the permit fees of municipalities and small businesses – one-third of fee payers in New York are municipalities. As a matter of policy, New York does not believe that almost the entire cost of operating its NPDES program should be borne by local government and small businesses who are already financially-strained.

Our prior testimony, submission of comments, and letters to EPA Administrator Johnson on these issues have not resulted in a meaningful response from EPA. However, in the spirit of the states' and EPA's long-standing tradition of working together to protect our national water resources, we propose a meeting to discuss our concerns in greater depth. Representatives from the New York State Attorney General's Office would be in attendance, as would representatives from Nevada's Division of Environmental Protection and the Nevada Attorney General's Office. We remain hopeful that a meeting between our offices will help us to clarify our respective concerns and avoid any unnecessary litigation that may result from EPA's adoption of the Permit Fee Incentive rule. We appreciate your attention to this matter and look forward to meeting with you in the very near future.

Sincerely,



Alison H. Crocker
Deputy Commissioner
and General Counsel

cc: Benjamin Grumbles, EPA Assistant Administrator for Water
Senator Hillary Clinton
Senator Charles Schumer
Congressman Maurice Hinchey
Senator Harry Reid
Senator John Ensign
Andrew Cuomo, Esq., New York Attorney General
Catherine Cortez Masto, Esq., Nevada Attorney General
Lisa Kwong, Esq., New York, Assistant Attorney General
William Frey, Esq., Nevada, Senior Deputy Attorney General
Thomas Porta, Deputy Administrator of the Nevada Division of Environmental
Protection
James Tierney, NYSDEC Assistant Commissioner for Water Resources
Sandra Allen, NYSDEC Director of the Clean and Safe Water Infrastructure Funding
Initiative
Carin Spreitzer, NYSDEC Office of General Counsel
Association of State and Interstate Water Pollution Control Administrators
New England Interstate Water Pollution Control Commission
Office of Information and Regulatory Affairs