



# NACWA Consent Decree Workshop April 30-May 1, 2014

Understanding the Process:  
The State of Play, the Players  
and How to Play

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# Statutory Framework for Regulation

**Clean Water Act** – establishes the basic structure and purpose for federal regulation of discharges

➤ History

- Origins in the Federal Water Pollution Control Act of 1948.
- Major amendment in 1972.
- Codified in 33 U.S.C. § 1251, *et seq.*

➤ Structure

- Established a national goal of eliminating the discharge of pollutants to navigable waters (by 1985).
- Prohibits the discharge of “any pollutant by any person” except in accordance with the Act (e.g., without an NPDES permit).

➤ Requires regulation at two points:

- Effluent Limits at discharge points.
- Water Quality Standards within receiving waters.

# Regulatory Framework for Negotiation

## National Pollutant Discharge Elimination System (NPDES)

- Chiefly codified in 40 C.F.R. 122.1, *et seq.* (though some sections elsewhere)
- Regulates discharges from “point sources”
  - Point Source – essentially the end of any discrete conveyance (pipe, ditch, channel, etc.).
- Covers municipal, industrial, and other sources that collect stormwater and discharge it to surface waters (rivers, lakes, streams, etc.), as well as publicly owned treatment works
- Treats Combined Sewer Systems differently from Sanitary Sewer Systems (classifications can sometimes be difficult)

## Policies and Guidance Relevant to Wet Weather Negotiations

- Enforcement and Economic Burden
- Wet Weather Program
- Integrated Planning
- Green Infrastructure
- Consent Decree Terms and Penalty Policies

## Enforcement and Economic Burden

- 1994 CSO Policy Considerations
- 1995 Combined Sewer Overflows Guidance for Funding Options
- 1995 Interim Economic Guidance for Water Quality Standards Workbook
- 1997 Combined Sewer Overflows Guidance for Financial Capability Assessment and Schedule Development
- 2000 Compliance and Enforcement Strategy for CSOs and SSOs
- 2003 Memorandum on Negotiation of CSO Consent Decrees
- 2005 Memorandum on Guidelines for Federal Enforcement in CSO/SSO Cases
- 2013 Assessing Financial Capability for Municipal Clean Water Act Requirements
- Draft EPA Affordability Framework

## The CSO Policy

Combined Sewer Overflow (CSO) Control Policy, 75 Fed. Reg. 18688 (1994)

- The primary effort to develop a comprehensive national strategy for permitting CSOs, and the basis for CSO consent decree negotiation
- Must be considered in writing a consent decree
  - “Each permit, order or decree issued pursuant to this Act after [December 15, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Policy signed by the Administrator on April 11, 1994” 33 U.S.C. § 402(q)(1).
- Recognizes the site-specific nature of CSOs and their impacts, and provides for needed flexibility to tailor controls to local situations.

## The CSO Policy (Cont.)

➤ Three key objectives:

- Ensuring that if CSOs occur, they occur as a result of wet weather;
- Bringing all wet weather CSO discharge points into compliance with technology and water quality-based requirements of the CWA; and
- Minimizing water quality, aquatic biota, and human health impacts from CSOs.

➤ Two-step process:

- Phase I - Demonstrate compliance with Nine Minimum Controls and provide for development of a Long Term Control Plan under an enforceable order.
- Phase II – Incorporate requirements for implementing the LTCP with a compliance schedule.

## The CSO Policy (Cont.)

### CSO Policy on Enforcement

- Provides for the inclusion of an “appropriate enforceable mechanism” such as a permit or administrative or judicial order to ensure implementation of the LTCP:

“Unless the permittee can comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA. *For major permittees, the compliance schedule should be placed in a judicial order.*”

- If Phase II permit compliance is not possible, provides for issuance of an enforceable compliance schedule in conjunction with the Phase II permit scheduling milestones for implementation of the LTCP
- Favors judicial orders, but provides that administrative orders may be appropriate for “minor facilities” and LTCPs less than five years



## The CSO Policy (Cont.)

### CSO Policy on Penalties

- Provides that EPA will not seek penalties for past CSO violations from permittees that fully comply with the enforceable order requiring compliance with the Phase I permit and “if the terms of the judicial order are expeditiously agreed to on consent.”
- Stipulated penalties “generally” should be included in the consent order

### CSO Policy on Financial Capability

- Sets out a suite of factors to consider in assessing a permittee’s financial capability.
- Two of most importance are:
  - Medial household income;
  - Total annual waste water and CSO control costs per household as a percent of medial household income.

# Financial Capability Assessment Guidance

## Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development (February 1997)

- Provides a planning tool for evaluating the financial resources a permittee has available to implement CSO controls.
- Designed to assist the permittee, EPA, and the NPDES authorities in developing CSO control implementation schedules.

## Financial Capability Assessment Guidance (Cont.)

➤ Provides for an assessment of “financial capability indicators” including:

- Total annual wastewater and CSO control cost per household as a percent of median household income;
- Bond ratings;
- Overall net debt as percent of full market property value;
- Unemployment;
- Median household income;
- Property tax revenue collection rate; and
- Property tax revenues as a percent of full market property value.

➤ This list is not exclusive.

“Since flexibility is an important aspect of the CSO Policy, permittees are encouraged to submit any additional documentation that would create a more accurate and complete picture of their financial capability.”

## Financial Capability Assessment Guidance (Cont.)

- Suggests a two-tiered approach to determine a permittee's financial capability:
  - First, calculate the “Residential Indicator”
    - A permittee's average cost per household for wastewater treatment and CSO controls as a percentage of the permittee service area median household income.
    - Greater than 2% constitutes a “high” financial impact.
  - Second, assess the Financial Capability Indicators.
    - Based on 7 non-exclusive factors
    - Results are “weak,” “mid-range,” or “strong”

## Financial Capability Assessment Guidance (Cont.)

- The Residential Indicator and Financial Capability Indicators Score are then put into a Financial Capability Matrix to assess the burden on the permittee.

Permittee Financial Capability indicators Score (Socioeconomic, Debt, and Financial Indicators)	Residential Indicator (Cost Per Household as a % of MHI)		
	Low (Below 1.0%)	Mid-Range (Between 1.0 and 2.0%)	High (Above 2.0%)
Weak (Below 1.5)	Medium Burden	High Burden	High Burden
Mid-Range (Between 1.5 and 2.5)	Low Burden	Medium Burden	High Burden
Strong (Above 2.5)	Low Burden	Low Burden	Medium Burden

- “Low Burden” – implementation should be done on a normal engineering and construction schedule.
- “Medium Burden” – permittee may have up to 10 years to implement.
- “High Burden” – permittee may have up to 15 years to implement.
- Schedules may be phased or extended to reflect the significant of various financial considerations.

## Other Guidance of Interest

### 1995 Combined Sewer Overflows Guidance for Funding Options

- Describes options that may be available to fund the capital, debt service, and operational costs of CSO controls.
- Helps interpret the CSO Policy flexibly.
- Provides an overview of major capital funding options available to permittees, funding mechanisms to meet annual costs, and a discussion on designing a funding solution.

### 1995 Interim Economic Guidance for Water Quality Standards Workbook

- Intended for use by States and Regions in considering economics during the process of setting or revising water quality standards.
- Includes pursuit of a Use Attainability Analysis to potentially change a designated use of a waterbody.

## Other Guidance of Interest (Cont.)

### 2013 Assessing Financial Capability for Municipal Clean Water Act Requirements

- States it is “essential that long-term approaches to meeting CWA objectives are sustainable and within a community’s financial capability.”
- Emphasizes that the 1997 Financial Capability Assessment Guidance should be treated as a “flexible framework” and encourages consideration of additional factors that reflect a community’s unique financial circumstances.
  - Additional factors include poverty rates, income distribution, late payments, terminations, and average wastewater bill as a percentage of the median household income.
- Indicates that clean water utilities can include all wastewater and stormwater costs when considering the demands placed on median household income.

## Wet Weather Program

- 1995 Combined Sewer Overflows Guidance for Long-Term Control Plans
- 1995 Combined Sewer Overflows Guidance for Nine Minimum Control Measures
- 1999 Combined Sewer Overflows Guidance for Monitoring and Modeling
- 2001 Guidance on Coordinating CSO Long-Term Planning with Water Quality Standards Review
- 2005 Guide for Evaluating CMOM Programs
- 2012 CSO Post-Construction Compliance Monitoring Guidance



## Key Wet Weather Guidance

### Combined Sewer Overflows Guidance for Nine Minimum Controls (May 1995)

- Supports implementation of the Nine Minimum Controls
- Provides descriptions of each of the NMCs as well as examples of control measures, considerations for implementation, and suggested documentation.

### Combined Sewer Overflows Guidance for Long-Term Control Plan (September 1995)

- Supports implementation of the CSO Policy
- Provides guidance on development of LTCPs, including how to incorporate water quality based control measures.

## Key Wet Weather Guidance (Cont.)

Combined Sewer Overflows Guidance for Monitoring and Modeling (January 1999)

- Sets out guidelines for developing a site-specific strategy for characterizing CSS operations and impacts and for developing and implementing a comprehensive CSO plan.
- Emphasizes that monitoring and modeling should be tailored to the system.

Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Review (July 2001)

CSO Post Construction Compliance Monitoring Guidance (May 2012)

## Integrated Planning

- 1996 Watershed Approach Framework
- 2011 Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans
- 2012 Integrated Municipal Stormwater Planning Approach Framework and 2013 FAQs

## Integrated Planning (Cont.)

### Integrated Municipal Stormwater and Wastewater Planning Framework (June 2012)

- Allows the use of integrated planning as a practical tool for managing CWA obligations through both permits and enforcement orders.
- Does not eliminate CWA obligations, but allows flexible sequencing of work and can impact level of planned controls.
- Allows agencies to consider the costs associated with drinking water, air, and land issues when evaluating the overall financial health of a community and developing a plan schedule.
- Can be used to facilitate green infrastructure and other sustainable solutions to “manage stormwater as a resource, and support other economic benefits and quality of life attributes that enhance the vitality of communities.”

## Green Infrastructure

- 2007 Memorandum on the Use of Green Infrastructure in NPDES Permits and Enforcement
- 2007 Memorandum on Using Green Infrastructure in Stormwater, CSO and Nonpoint Source Programs
- EPA Green Infrastructure Strategic Agenda
- 2014 EPA Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow (CSO) Control

## Green Infrastructure (Cont.)

Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow (CSO) Control (March 2014)

- Technical resource to assist communities in developing green infrastructure for CSO control.
- Offers green infrastructure as a potentially cost-effective alternative for CSO management.
- Provides for an adaptive management approach to incorporating green infrastructure into LTCPs.
- Green infrastructure studies can be part of your consent decree.

## Consent Decree Terms and Penalty Policies

- 1983 Guidance for Drafting Judicial Consent Decrees
- 1984 Policy on Civil Penalties and 1984 Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties
- 1988 Guidance on Certification of Compliance with Enforcement Agreements
- 1995 EPA Interim CWA Settlement Penalty Policy
- 1998 Final SEP Guidance and 1999 Model SEP Agreement
- 2005 Memorandum, Clean Water Act Municipal Settlements and Supplemental Environmental Projects

## Drafting the Consent Decree

### Guidance for Drafting Judicial Consent Decrees (October 1983)

- Overview of EPA's approach to drafting standard decree provisions.
- Provides sample language and explanations for common provisions (jurisdiction, applicability, notifications, etc.)

### Guidance on Certification of Compliance with Enforcement Agreements (July 1988)



## Penalties

### Interim Clean Water Act Settlement Penalty Policy (March 1995)

- Sets out key factors for CWA penalty calculations:
  - Economic Benefit
  - Gravity
  - Adjustment Factors
  - Litigation Considerations
  - Ability to Pay
  - Supplemental Environmental Projects
- Establishes a matrix for penalty calculations (must be adjusted for inflation)

## Sanitary Sewer Overflows

- CSO Handbook and NACWA's webpage have valuable information on the guidance critical to SSO negotiations.

[www.nacwa.org](http://www.nacwa.org)

- EPA's website contains a comprehensive list of guidance materials.

<http://water.epa.gov/lawsregs/guidance/index.cfm>

## Other Considerations

- In addition to the statutes, regulations, and guidance, it's important to know what EPA is doing in your region and elsewhere to address the same issues:
  - CSO Handbook
  - NACWA's Consent Decree Database
  - Seminars