

NACWA LAW SEMINAR

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AQUALAW

Enforcement

Period of great uncertainty

- Leading up to the Election
- Post-election
- N.b. Here's hoping the election is over when I give this powerpoint and not 269-269....

Bush Administration

- Bush agency political leadership moving on to other challenges
 - Many have stayed to the end
 - Ben Grumbles
 - Granta Nakayama
 - DOJ
 - Some will return to Congressional slots

New Administration

- Career agency staff bracing for new political management
 - Clean sweep likely
 - Shake-out period
 - Summer/Fall 2009 before any hard AGENCY political decisions will be made

Congress with larger Democratic majorities

Will be consumed with

First 100 day agenda congressional agenda

First 100 day presidential agenda

Trends

Democrats

- Opportunity to for significant updates to existing laws and adoption of new laws
 - Especially if 111th Congress has 60 Democratic senators
- Agencies will follow congressional lead
- Generally less enforcement of what is on the books
 - However, Dems have fussed about increasing enforcement staff, esp. criminal types....
- One-party control of government
 - Significant opportunity
 - Major political risk

Trends

Republicans

- Generally modest statutory/regulatory updates
- Focus on enforcement of what's on the books

Enforcement and the Economy

- Enforcers like to say they ignore bad economies as they are:
 - Inevitable
 - Predictable – part of the normal business cycle
 - DOJ/EPA do not want to be dragged into court around the country when bad times hit with defendants seeking relief due to a down economy
 - Consent decrees preclude the court from changing the material terms of the deal

Unprecedented Economic Times

- Enforcers walking gingerly for a change?
- Eyes wide open for NACWA members being invited to ink consent decrees?

Key Enforcement Issues For 2009

Finishing sewer overflow business already in process

- EPA in a mode to have States resume primary enforcement role under CWA regarding sewer overflows
- Movement by EPA away from water/sewer sector now that big programs have all been touched
 - Most attractive “beans” have been collected/counted
- Leave medium/small communities to states?
- EPA will retain oversight role
- EPA available to deal with those who won't cooperate with States
- EPA return in 5-10 years to revisit progress/status

Financial capability

- 1997 EPA CSO Guidance
 - NACWA has shown: Stacked Deck
 - No major system is at 2%
- Congressional legislation seeking update of guidance
 - Other ways to get this done
 - Likely bifurcate from grant funding authorization

Schedule

- DOJ trying to hold the line at 20 years
 - Need to treat everyone fairly
- Intense pressure for longer schedules
 - DOJ softening?
- States retaining problematic programs
 - Columbus
 - Others

Level of control for CSO/SSO

- Most programs to date have been able to afford high levels of control
 - 4 overflows per year or lower
 - Portland, DC, Atlanta, Milwaukee, INDY, etc
 - EPA/States now facing more difficult communities
 - LOC will be lower for both CSO and SSO

Green infrastructure/solutions

- Greater focus on environmental impacts of various solutions/LOC
- Sustainability
- Will EPA continue to support green solutions?
- NACWA members on the threshold of actually formally working green solutions into
 - Overflow control programs
 - Consent decrees

Continue fight for more flexible federal decrees

Examples:

- ALL disputes (including schedule) resolved by the court
- Reasonable force majeure rather than arbitrary notice periods (potential “gotcha”)

Level playing field for sewer overflow control?

- Do we really want this?
- Current approach is community-specific and complicated
 - Complicated facilitates differing impacts/commitments
- One-size fits all will result in a more level playing field

Proposal: Sewer rates raised up to a presumptive 1.5% MHI

- Based on 5,000 gallons monthly usage for residential
- Subtract out PILOT
- All funds raised spent on sewer programs.
- Regional systems
 - 1.5% of core city
 - higher rates, if necessary, for satellites based on cost of service
 - All served systems achieve and maintain at least 1.5%
 - Out where sewers have non-rate funding streams (MMSD?)

Funding/Schedule Proposal

Advantages:

- Simplicity: 1.5% using LAST year's MHI
- Reasonable (but tough)
- Equitable (esp. with adjustment where rates are subsidized by other funding sources)
- Avoids schedule fights
- Disciplines the regulators