

Storm Clouds with a Silver Lining: Federal Update and National Stormwater Trends

SOUTHEAST STORMWATER ASSOCIATION
ANNUAL CONFERENCE



The National Association of Clean Water Agencies

October 7, 2022 | Hilton Head, SC





What is NACWA?

- NACWA is a national trade association for publicly owned stormwater & wastewater utilities
- Over 350 public utility members of all sizes from around the nation
- Membership also includes consulting, engineering & legal firms
- Broad advocacy portfolio on legislative, regulatory, legal & communications issues
- Additional focus on utility professional peer-to-peer learning and networking

Legislative Update



Bipartisan Infrastructure Law (BIL) – Opening Up the Spigot

- Signed into law November 2021
- Historic \$1.2 trillion legislation, with 10% of new spending - \$55 billion - going towards water
- \$11.713 billion in CWSRF direct mandatory appropriations over the next five years on top of annual baseline CWSRF
 - FY22 - \$1.9 billion; FY23 - \$2.2 billion; FY24 - \$2.4 billion; FY25 & FY26 - \$2.6 billion
 - 49% - grants or principal forgiveness loans
 - 51% low-interest loans
- \$1 billion in grants for addressing emerging contaminants and PFAS (\$100 million in FY22 and \$225 million annually for FY23-26)
- Direct mandatory appropriations over five years also of \$1 billion for water recycling and reuse projects and \$1.7 billion for EPA's Geographic Programs

BIL– Other New Programs

- **Drinking Water and Wastewater Infrastructure Act (DWWIA) Authorizations**
 - Reauthorizes (but does not appropriate) existing programs, setting them up for continued/increased funding through annual spending bills
- \$14.65 billion for CWSRF on top of the BIL's appropriated investments
 - FY22 - \$2.4 billion; FY23 - \$2.75 billion; FY24 - \$3 billion; FY25 & 26 - \$3.35 billion
 - At least 10% of funds must be provided by states via subsidization each year
- **\$280 million annually in FY22-FY26 for EPA's Sewer Overflow and Stormwater Reuse Municipal Grants program**
- \$125 million over five years for a new EPA Clean Water Infrastructure Resilience and Sustainability program
- \$225 million over five years for the Water Infrastructure Finance and Innovation Act (WIFIA) program

BIL – Additional New Programs

- **DWWIA Authorizations (Continued)**
- \$125 million over five years for the EPA Alternative Water Source Projects Program
- \$25 million over five years for EPA’s Water Workforce Infrastructure grants program - expands eligibility to public works agencies
- **\$10 million annually in grants for FY22 through FY26 for development of standards, fee structures, training and educational materials for stormwater**
 - **Also creates grant program for research on new and emerging stormwater control technology**
- \$5 million for EPA to complete updated Clean Water Infrastructure Needs Survey and requirement for new survey every 4 years
- EPA to conduct national low-income water needs assessment
- Authorizes establishment of EPA low-income water customer assistance pilot program

BIL Implementation - Key Role of States

- **EPA Implementation Guidance**
 - 49% of funds for grants to be used to
 - i) benefit disadvantaged communities via state CWSRF affordability criteria,
 - ii) benefit individual residential ratepayers struggling with affordability, or
 - iii) address energy efficiency, stormwater, or sustainable projects
 - Encourages states to revisit existing affordability criteria, noting population alone not sufficient metric
 - Includes metrics for states to consider but no mandates
 - Encourages bringing new applicants into program and funding projects in planning/pre-construction stages
 - Directs states to fund projects that enhance resilience, climate adaptation, and energy efficiency
 - Provides \$1 billion for emerging contaminants/PFAS
 - Potential concern: SRF-eligible activities may not align with how utilities address emerging contaminants

Potential BIL Impediments

- **Build America, Buy America Act (BABAA) Mandates**
 - Expands Buy America requirements to cover construction materials and manufactured goods
 - Will apply not only to BIL funding, but all federal infrastructure programs, including SRF and WIFIA projects approved after May 14, 2022
 - EPA has issued waivers for certain funding programs
 - For SRF and WIFIA, waiver applies to any project that initiated project design planning before May 14, 2022
 - For other EPA programs including geographic programs and Sewer/Stormwater Grant program, blanket waiver until March 2023

Federal Budget for Fiscal Year (FY) 2023

- Administration's proposed budget Released in March
- Proposes nearly 25% increase in current overall agency funding (from \$9.5 billion to \$11.9 billion)
 - Reflects new spending on BIL implementation, environmental justice (EJ) and climate change
 - Includes requested \$300 million in part to stand up new national EJ Office led by a Senate-confirmed Asst. Administrator
 - Focus on Justice40 Initiative
- CWSRF proposed funding level with FY22
- However, proposed increases for some key clean water programs including:
 - \$80 million for WIFIA
 - \$280 million for Sewer Overflow and Stormwater Reuse Municipal Grants
 - \$25 million Alternative Water Source Grants Pilot Program for water reuse/recycling projects
- Congressional budget process unfinished
 - Federal government likely to operate under a Continuing Resolution until after midterms
 - Funding for remainder of Fiscal Year contingent on election results



Election Impacts on Key Issues

- Key issues likely to be impacted by congressional election outcomes:
 - Water infrastructure funding programs, including SRFs, WIFIA, and grant programs
 - PFAS regulations
 - Rulemaking around “Waters of the United States” definition
 - Spending on environmental justice and climate change/resiliency issues
 - Greater oversight and questioning of BIL program funding and implementation



Regulatory Update

PFAS – The Next Regulatory Onslaught

- EPA issued PFAS Roadmap in Fall 2021 outlining plans to aggressively regulate PFAS chemicals
- Office of Water to play key role
 - Drinking Water Monitoring
 - “Leveraging” NPDES program to reduce discharges
 - Increased discharge monitoring (but no officially approved analytical method yet)
- Drinking water health advisory issued June 2022 at very low levels
 - Questions raised about PFAS in stormwater and wastewater effluent
- Proposed rule to regulate PFOA and PFOS under CERCLA
- Much of regulation being done before full risk assessments and scientific studies completed

Proposed Rule to List PFOA & PFOS Under CERCLA

- CERCLA is strict liability law with joint and several liability
- If finalized, presents both short-term and long-term concerns for MS4s
- Short-term – requires reporting of “release” of hazardous substance if 1 pound or more per 24 hours
 - Unclear what this means for MS4s – is it the cumulative total for entire system or on a per outfall basis?
 - How do you monitor/measure to determine reporting threshold?
- Longer term – legal and financial liability as a potentially responsible party (PRP)
 - If an MS4 contributes any potential amount to downstream contamination, it is a PRP
 - Can be liable to EPA and/or other PRPs
 - Clean water utilities have already faced CERCLA liability under this theory
- NACWA, others argued for EPA to exempt wastewater and stormwater utilities, EPA declined
- Comment deadline Nov. 7, extension requested
- Why not start with source control instead of clean up?

Waters of the United States – Will We Ever Really Know?

December 2021 Proposal

- EPA says it reflects long-standing 1986 regulatory language with modifications intended to address subsequent Supreme Court precedent
- What's in?
 - Traditional Navigable Waters (TNWs)
 - Interstate waters
 - Territorial seas
 - Adjacent wetlands to the above
 - Exclusions for waste treatment systems and prior converted cropland
- **But exclusions for stormwater control features, groundwater and water recycling that were included in both Obama and Trump rules are NOT included**
- EPA working towards final rule, but Supreme Court may have final say
 - *Sackett v. EPA* argued October 3
 - NACWA filed brief arguing that any definition must include past exemptions, including for stormwater control features
 - Decision by June 2023 if not before

Updates to EPA Phase II Stormwater Program

- Phase II regulations cover areas defined as “urbanized area” by U.S. Census Bureau
- Census Bureau finalized revisions to criteria for urbanized area based on 2020 census in March 2022
- EPA issued interim guidance on how this will impact Phase II program in July 2022
 - Any Phase II community regulated under a previous urbanized area definition will continue to be regulated going forward
 - There will be new and expanded Phase II MS4s based on 2020 Census – however, Census Bureau has not yet published new mapping data so permitting authorities not expected to make formal delegation of new or expanded Phase IIs at this time
 - New Census Bureau mapping data expected in December 2022 – EPA will issue additional guidance at that time

Residual Designation Authority

- Clean Water Act gives EPA authority to regulate MS4s, industrial activities and construction site
- CWA also gives EPA “residual designation authority” (RDA) to regulate other stormwater discharges on case-by-case basis if
 - Discharges contribute to violation of WQS
 - Discharges are significant contributor of pollutant to federally protected surface waters, or
 - Controls are necessary based on a TMDL
- Historically has not been used – eNGOs have been pushing for greater use in recent years but generally not successful
- However, EPA Region 1 announced in September use of RDA to regulate certain stormwater discharges in three watersheds in Massachusetts
- Done in response to eNGO petition – this may well encourage other eNGOs to ramp up similar efforts

Thank You!

Nathan Gardner-Andrews

Chief Advocacy & Policy Officer

ngardner-andrews@nacwa.org | (202) 833-3692

www.nacwa.org



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