

Policy Recommendations for the U.S. Environmental Protection Agency To Promote Sustainable Communities

This document identifies a number of high-priority opportunities for the U.S. Environmental Protection Agency (EPA) to promote sustainable communities within its existing and planned programs. The vast majority of these changes can be accomplished without legislation.

1) **Direct states to prioritize maintenance and repair of existing wastewater treatment facilities and infrastructure through a broader interpretation of the “first use” requirement in the Clean Water Act (CWA) or when approving state Clean Water SRF ranking criteria.**

In its implementation of the Clean Water State Revolving Fund (CWSRF) legislation, the EPA interpreted the broad requirement that CWSRF funds “first be used to assure maintenance of progress ... toward compliance with enforceable deadlines, goals and requirements of [the Act]”¹ to require only that certain publicly owned treatment works (POTWs) in existence at the time of the 1987 CWA amendments meet secondary treatment standards. Consequently, once all states brought these existing systems into compliance with the secondary treatment standards in the 1990s, this provision of the Act was effectively ignored.²

The absence of regulations or guidance for continued monitoring of existing facilities for the entirety of their maintenance and repair needs allows states to spend federal dollars on new wastewater treatment systems before ensuring their current systems are in a state of good repair, which increases their maintenance backlog.

EPA should reexamine its prior interpretation of this “first use” requirement and reinterpret the language more broadly (and consistent with the plain meaning) to incorporate the range of compliance issues that currently exist under the Act. The “first use” requirement, if implemented as written, could be used as a powerful tool to direct limited funds to the repair and replacement of existing infrastructure (wastewater treatment facilities, conveyance systems, etc).

EPA should also require state CWSRF project prioritization criteria to include state of good repair requirements for existing infrastructure and explore the ability to ensure that states properly maintain existing systems within the agency’s existing statutory bounds. This could be done by adding additional requirements to the Grant Agreement, as permitted under §602(b) of the CWA. For example, EPA could consider extending the applicability of §211(a), which directs funding to existing systems or communities.³

¹ Section 601(b)(5) of the Clean Water Act (CWA)

² Government Accountability Office. Clean Water: How States Allocate Revolving Loan Funds and Measure Their Benefits, GAO-06-579. June 2006. Page 8.

³ Under the regulations, at CFR §35.3140, EPA invoked §602(b) to create a new requirement for environmental review for projects that are not “directly” funded by capitalization grants.

2) EPA should consider whether states include location efficiency criteria and address lifecycle costs of investments when approving state CWSRF ranking criteria in order to promote investment in planned growth areas and protect open space.

The Clean Water State Revolving Fund provides annual loans to states for wastewater treatment and infrastructure. As implemented, states are required to establish a priority list for eligible projects; however, EPA plays a limited roll in determining how projects are selected and prioritized. Moreover, once on the priority list, states need not fund projects in their order of priority. As a result, CWSRF funds often support new construction that encourages sprawl and places additional financial strain on existing systems.

EPA should use its oversight over the CWSRF funding criteria developed at the state level to ensure that future state criteria prioritize needed maintenance and repair of existing systems and infrastructure investments in planned growth areas (prioritizing redevelopment sites and infill sites first and then sites adjacent to existing development) that are fiscally sustainable. State programs should also evaluate the life cycle cost of the investments and proposed fee structures and should prioritize those projects that are self-sustaining. Fees to end-users should be structured to more accurately reflect the true cost of construction, maintenance and operations, as well as to encourage conservation. In this way, end-users of existing system will not end up subsidizing new projects that spur sprawl development.

EPA could direct funding toward existing infrastructure by reviving the “first use” requirement and adding requirements to the Grant Agreement, as discussed above. EPA might also be able to exercise its right under §216 to remove specific projects from the priority list that “will not result in compliance with the enforceable requirements of the [CWA]”⁴ (for example, extending trunk lines for sprawl development may result in an increase in non-point discharges that violate an enforceable requirement of the CWA).

EPA should also compile current models for state criteria that prioritize investments based on location into a valuable resource for all state SRF programs.⁵ The recently announced pilot project to work with a select group of states on revising SRF criteria is an opportunity for collecting and disseminating best practices.

3) Ensure that, at minimum, infill, high density and redevelopment projects are not disadvantaged by the forthcoming federal (performance based or volume based) post-

⁴ 40 CFR Part 35, Subpart E (Regulations for the state priority system and project priority list)

⁵ Several state programs have provided incentives for directing investments to smart locations (already developed areas, areas set aside for new growth as part of a long-term comprehensive plan, and/or locations that are targeted for infill and redevelopment). These strategies can include adjustments to the project priority weighting systems, voluntary state set-asides, and strategic use of subsidies.

- Massachusetts’ Commonwealth Capitol Fund Scorecard Program used integrated state goals for housing, transportation, environmental protection, water infrastructure and other areas as a location efficiency screen for all federal discretionary spending in the state.
- The New Jersey priority system includes a number of incentives for smart growth. It is heavily weighted toward repair and replacement of existing systems over new construction or expansion of capacity, and it awards extra points for such things as the existence of watershed-based implementation plans, regional storm-water management plans and sustainability plans (including plans for reduction in water use and green design).
- The US Green Building Council’s Leadership in Energy and Environmental Design for Neighborhood Development (LEED-ND) provides a useful set of criteria that could be used for determining the location of infrastructure investments.

construction stormwater standards, and instead provide incentives for these types of projects within the new standards⁶.

Under the National Pollution Discharge Elimination System (NPDES) permit program (Section 402), the EPA is currently exploring regulatory options for creating specific and enforceable national post-construction stormwater management standards for new development and redevelopment. Because site constraints can make stormwater management for redevelopment and infill projects more difficult and expensive than for development on greenfields, strict stormwater standards could have the unintended consequence of incentivizing greenfield development at the expense of redevelopment.

A few states, such as West Virginia⁷ and Maryland⁸, have adopted innovative approaches to stormwater control by crediting land use strategies with a demonstrated water quality benefit in the general permit, but inconsistency in the permit content and stormwater standards persists across states and municipalities.

The new federal stormwater standards should recognize the superior environmental performance of redevelopment and infill and mitigate the risk further loss of natural stormwater catchment areas to greenfield development by establishing a lower numeric or performance standard for previously developed and smart growth sites (high density, brownfield redevelopment, etc), or providing financial or other support for smart growth sites if the same standards must be met. EPA should continue outreach and education to states during this rulemaking process to ensure that the adoption of the new standards is effective.

EPA should also refine guidance on the “maximum extent practicable” (MEP) standard, a requirement set forth in the CWA that allows the Administrator to determine appropriate techniques and strategies for reducing pollutant discharges.⁹ This would be a good vehicle for establishing a differential for redevelopment of existing properties, versus new development.

EPA has already developed draft guidance for maintaining the predevelopment hydrology of new federal facilities under the agency’s interpretation of Section 438 of the Energy Independence and Security Act (EISA)¹⁰. EPA should consider adopting this predevelopment

⁶ Agency Information Collection Activities; Proposed Collection; Comment Request; Stormwater Management Including Discharges From Newly Developed and Redeveloped Sites; EPA ICR No. 2366.01, OMB Control No. 2040-NEW. Federal Register Vol. 74, No. 209. Friday, October 30, 2009.

⁷ The West Virginia permit gives credits for redevelopment, brownfield development, high density, vertical density, mixed use and transit-oriented development (all development forms that have inherently lower stormwater impacts). Projects meeting these criteria would receive additive reductions from the base stormwater standard.

⁸ The new Maryland stormwater requirements establish very strict stormwater standards, requiring channel protection for the first (1) inch through environmental site design (ESD) and for the next 1.7” from ESD or traditional BMPs. However, redevelopment on sites that are at least 40% impervious must only capture and treat the first ½ inch.

⁹ CWA §402(p)(3)(B)(iii): “Municipal Discharge – Permits for discharges from municipal storm sewers...shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

¹⁰ *Energy Independence and Security Act of 2007* (U.S. EPA 2009) requires “any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore to the maximum extent technically

hydrology standard for new development as part of the proposed new rule making, with a lower standard for redevelopment. The agency could also develop implementation and tracking tools to ensure federal compliance with the intent of this Section. Federal efforts could also be used as case studies for private development.

4) The EPA Office of Water should issue guidance specifying that 319 nonpoint source pollution management program funds can be used for eligible activities in urban areas covered under NPDES permits, per the Region 5 interpretation of the program¹¹.

Section 319 of the CWA charges EPA with developing criteria for a national program to address nonpoint (NPS) sources of water pollution and requires each state to create and implement a nonpoint source management program and provides grants that can be used for specific NPS control projects. Under the current interpretation of the CWA in most EPA Regions, urban areas are often limited in their use of Section 319 funds because they are already regulated by a municipal stormwater NPDES permit program. The theory is that these grants are not to be used to meet the requirements of the NPDES program. However, this interpretation effectively restricts urban areas from accessing this funding.

EPA Region 5 has interpreted the program to allow 319 funds to be used in urban areas for nonpoint source projects if the project is not strictly necessary to meet baseline requirements of the NPDES Permit, even where the project is included by reference in the NPDES Permit. Region 5's approach is based upon the recognition that many aspects of a watershed plan are not necessarily enforceable requirements under the NPDES permit merely because the watershed plan, or aspects of it, are incorporated into the permit by reference. Thus, if a project addresses storm water before it reaches the stormwater sewer system and it is not an enforceable requirement necessary for the implementation of the NPDES permit, it may be eligible for 319 funds.

This has freed up the use of 319 funds for projects that were previously considered ineligible for their application. Eligible projects would capture stormwater at the source and reduce the burden on municipal storm sewer systems. This policy would also favor green infrastructure implementation as a best management practice to intercept and infiltrate runoff from urban areas and would focus 319 funds on retrofit projects.

Feedback on Region 5's interpretation of Section 319 regulations has been positive because it allows for flexible and creative use of stormwater management funds. EPA would meet a need if national guidance were revised to reflect this new framework for managing nonpoint source pollution.

feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow".

EPA, in February 2009, circulated draft guidance to federal agencies, interpreting this statutory requirement (U.S. EPA 2009). According to EPA, "maintaining or restoring...the predevelopment hydrology" can be met by managing rainfall on-site to "prevent the off-site discharge of the precipitation from all rainfall events less than or equal to the 95th percentile rainfall event. This objective shall be accomplished by the use of practices that infiltrate, evapotranspire and/or harvest and reuse rainwater". (Waterkeeper Alliance. *All Stormwater is Local*. June 2009. Pg. 21-22).

¹¹ U.S. EPA Region 5. *Watersheds In and Near Metropolitan Areas - Preventing, Reducing, and/or Eliminating Impacts Associated with Urban Runoff*. Supplemental Guidance 2007-2009.

In addition to the above, EPA should recognize smart growth site design as a best management practice, which would allow a community to apply for funds under Section 319 to receive design assistance on certain projects. The agency should also encourage communities to use Section 319 funds to develop a municipal smart growth plan, redevelopment program or zoning change. These actions would provide for increased flexibility for urban areas currently covered under NPDES programs to leverage federal investment in municipal water quality programs.

5) Use the flexibility inherent in the statute¹² to allow EPA Assessment grants to be used for area-wide planning activities, and create a pilot program that would provide grants to conduct planning, economic analysis, and market studies to inform an area-wide approach to brownfields redevelopment¹³.

Area-wide approaches to brownfields reclamation take into account the benefits of redeveloping multiple brownfields sites in an integrated fashion in order to achieve benefits for entire communities in the areas of sustainability, economic vitality, and neighborhood revitalization. National experts and policy organizations are examining various area-wide models and a few states and localities are working towards area-wide programs. However, in spite of apparent flexibility in the statute¹⁴, EPA currently does not allow brownfields Assessment grants to be directed towards area-wide planning activities, and many communities seeking to replicate area-wide programs implemented in states such as New York and Colorado lack the technical knowledge and resources to do so comprehensively and successfully.

Given EPA's recent movement towards supporting area-wide brownfields activities¹⁵, the agency should start by examining the extent to which brownfields Assessment funding can be directed towards area-wide planning activities under the current statute, EPA should then set aside funding through the brownfields Assessment and/or Training, Research, and Technical Assistance programs for a separately competed pilot program to provide grants for planning, economic analysis, and market studies to inform area-wide visioning. Under this pilot, communities could be serviced by a Brownfields Response Team that could be comprised of a nonprofit Pilot Coordinator or EPA dedicated staff person, key contacts from other federal agencies, contractors/consultants, and/or a peer-exchange mentor. Funding could be used to assist localities in the design and implementation of an area-wide brownfields redevelopment vision and action plan, effectively engage community assets, foster community involvement, and integrate sustainability. To qualify for funding, grantees would be required to demonstrate that they would invoke interagency federal, state, and local government cooperation, and that their plan would include an area-wide analysis of

¹² Sec. 211(b)(k)(2)(A)(i) states that a brownfield site characterization and assessment grant program may be used to "provide grants to inventory, characterize, assess, and conduct **planning** related to brownfields sites". (Emphasis added).

¹³ See the National Brownfields Nonprofit Network Initiative's related Strawman Proposal. (www.npcr.net/policy/StrawSummaries-dist.doc).

¹⁴ See also Sec. 211 (b)(k)(4)(A)(i)(I), which permits either community-wide or site-specific Assessment grants to be awarded.

¹⁵ For instance, EPA Assistant Administrator Mathy Stanislaus' statement before the Sustainable Community Development Group's Capitol Hill Summit on October 15, 2009, which indicated EPA's interest in directing Assessment funds to planning activities.

the relationship between brownfields site redevelopment and transportation, housing, and jobs access as prioritized by the local community.

At its heart, an area-wide approach to brownfields reclamation is the creation and implementation of a strategic policy plan for an entire area that coordinates and targets resources to address such issues as employment/jobs, public amenities, infrastructure improvements, and open space preservation, that both encourages current residents to remain and also attracts new residents. By formally linking community based planning and prioritization with smart growth principles and resources, this initiative addresses the unique neighborhood circumstance of clustered brownfield sites, dilapidated infrastructure, inadequate access to waterfronts and parks, and cumulative environmental exposures in a manner that integrates smart growth, environmental justice, sustainable design and ecosystems management components.¹⁶

6) Proposals that Require Collaboration between EPA and HUD, DOT:

A. Work with DOT and HUD to develop a shared set of “smart location” criteria that would direct federal investments in environmental protection, housing and community development, and transportation to priority areas. EPA, HUD and DOT could apply these criteria to discretionary grant programs and use them as a mechanism to align and effectively target federal programs to promote sustainable communities and increase the return on federal investments. By defining location efficiency, the agencies can also help states, localities and regions identify specific geographical areas that should be top priority for receiving environmental program funding. EPA can provide technical assistance to grantees to map these locations so that communities can see the boundaries of the areas that satisfy these criteria and provide guidance to communities about how to use this information.

Smart location criteria should take into account a variety of sustainability factors, such as the proximity to sensitive lands, distance from public transit stops and job centers, availability of existing infrastructure, and presence of essential community facilities, and be usable in markets of all sizes and in urban, suburban and rural areas. The criteria compiled by Smart Growth America provide a useful place to start.¹⁷

B. Establish a Sustainable Communities research consortium of public and private data and research experts to create a federal partnership to develop a shared database for better evaluating and articulating sustainable community objectives and performance

¹⁶ New York’s Brownfield Opportunity Area (BOA) program (See http://www.nyswaterfronts.org/grantopps_BOA.asp) and Colorado’s Historic Byways Revitalization Initiative are both good examples of state-level efforts to foster an area-wide approach to brownfields redevelopment. NY’s BOA program addresses entire neighborhoods and clusters of brownfields within those neighborhoods, including the conditions fueling abandonment and deterioration, by providing grants to create and implement viable neighborhood plans focused around the cleanup and redevelopment of brownfield projects that will result in new community anchors. Colorado’s Historic Byways Revitalization Initiative (See <http://www.coloradobrownfieldsfoundation.org/HistoricByways.html>) works with multiple communities in a regional context that must plan and act together for the mutual benefit of all. Often, the regional link between communities is a common transportation route, hence the “corridor” approach.

¹⁷ Please see Appendix A, “Smart Growth America: Smart Location Criteria to Promote Sustainable Communities” for a matrix of proposed criteria.

measures, and expedite public adoption of these tools through a streamlined federal peer review process, and open source data collection.

- C. Create a HUD/EPA Grants and Process Working Group** to see how the application and reporting processes for HUD and EPA brownfields funding could be coordinated and streamlined.¹⁸ Consider bringing representatives from USDA, EDA, and other agencies that administer brownfields funding into this working group as well.

It is extremely difficult right now for localities to blend HUD and EPA money, but often necessary to do so since the agencies fund different stages of brownfields assessment, cleanup, and redevelopment. There are different timelines, applications, rules, and reporting requirements that make navigating these programs in conjunction with one another burdensome.

As much as the statutory limitations allow, HUD and EPA should coordinate grant deadlines, criteria, review processes, grant lengths, and other relevant aspects of the differing grant programs. Streamlining HUD/EPA brownfields funding sources would be an ideal project for the Partnership for Sustainable Communities, and result in better outcomes in the areas of affordable housing, social justice, community involvement, and human health and the environment.

¹⁸ For example, both HUD and EPA grant programs are subject to Davis-Bacon Act requirements, but there are currently inconsistencies in the way the agencies apply the law. In order to make combining HUD and EPA funding streams easier, the agencies should clarify that HUD guidelines and waivers used to implement Davis-Bacon for a project also apply to and satisfy EPA Davis-Bacon requirements for that project.