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By Electronic Mail (Gomezj@gao.gov)

J. Alfredo Gómez
Director, Natural Resources and Environment
United States Government Accountability Office
Government Accountability Office
441 G St., NW
Washington, DC 20548

**Re: Response to GAO Survey Regarding EPA's Policy to Address and Control
Combined Sewer Overflows ("CSOs")**

Dear Director Gomez:

On behalf of the Wet Weather Partnership (WWP), I am contacting you regarding the review being conducted by the U.S. Government Accountability Office (GAO) of the U.S. Environmental Protection Agency's (EPA) actions to address and control combined sewer overflows (CSOs). The WWP is a membership organization consisting of public sector wastewater and stormwater utilities, whose mission is to promote environmentally responsible solutions to urban wet weather issues in a fiscally prudent manner.

The WWP participated in the negotiation of the 1994 CSO Policy as well as all of EPA's implementing guidances since that time. The WWP also spearheaded the addition of Section 402(q) to the Clean Water Act to incorporate the CSO Policy by reference. Our members have been in the nationwide trenches of CSO control for decades. Given our focus on and extensive knowledge of the national CSO program, we wish to offer out feedback on EPA's implementation of the program.

It is our understanding that GAO's review primarily focuses on the implementation of EPA's 1994 policy to control and address CSOs nationwide and that as part of your review, you have selected 10 municipalities to present illustrative examples of the different approaches and actions taken to address CSOs. GAO has sent discussion questions to the selected municipalities; we offer the following observations on these questions based upon the experience of the WWP's CSO-member communities.

Discussion Questions/Topics:

1. Describe your overall approach to resolving CSOs.

EPA's implementation of the CSO Policy has evolved. Prior to Congress amending Section 402(q) of the CWA to directly incorporate by reference EPA's CSO Policy, EPA often pushed communities to either separate their sewers or to commit to a very low level of activation during the typical year (four or fewer events). Many CSO communities, especially in EPA Region 1, believed that sewer separation was a poor choice because it was usually the most expensive and disruptive option. Moreover, rather than capturing and treating wet weather flows, sewer separation involves creating separate, stormwater delivery systems, that we feared would one day be regulated. So our members sought to only address their community wet weather runoff once by capturing and treating wet weather rather than separating the stormwater and delivering it untreated (for the time being). Communities worried that this diversion of untreated stormwater would lead to an avoidable decline in the water quality of receiving waters, which would then trigger future EPA regulation – effectively requiring the communities to address wet weather runoff twice. Thus, most communities preferred expanded storage and treatment options. To ensure that EPA would permit non-separation options, these communities worked together to get CWA 402(q) enacted, which included explicit references to the EPA's 1994 CSO Policy. That forced a change in EPA's implementation approach, as communities could then rely on more flexible presumptive approach compliance options, such as percent wet weather capture, rather than specifying “not-to-exceed” activation frequencies at each CSO outfall, or even worse, requiring large scale sewer separation.

For CSO communities with just a handful of outfalls, there are often very straightforward engineering solutions available to address flooding and overflows. But for the remaining majority of CSO communities with numerous outfalls, the engineering solutions are usually very complex and are constantly evolving. Additionally, even though EPA insists on the use of hydraulic and rainfall modeling, all such models are imperfect and incapable at the beginning of a long-term program of sufficiently identifying systemwide CSO controls during a wide range of rainfall, groundwater, tidal, and other circumstances. This has led EPA to force communities to identify and lock into long-term solutions which, in almost every case, were merely engineering guesses based upon woefully inadequate (but state-of-the-art and expensive) information.

When communities have suggested changes or updates to these long-term solutions, EPA's typical response has been to resist changes and to try to stick to the original approach/consent decree agreement. Where federal consent decrees are the implementing vehicle for a community's wet weather overflow program, that means in addition to the EPA Regional and Headquarters' offices, that DOJ will be involved in reviewing and approving such changes. EPA's continued unwillingness to adapt the way in which it imposes these long-term control programs – which often end up being the largest and most expensive control programs in each community's history – is frustrating and inefficient.

It is especially frustrating that EPA consistently requires fixed end dates for programs that are yet to be developed or even approved. It is difficult enough to develop an implementation schedule for a known body of work. But it is nearly impossible to accurately project an implementation end

date *before* a program is developed and approved, and it is unrealistic to expect communities to fully comply with such an end date without numerous changes along the way. The engineering is hard enough to predict. When you add in community growth and development, long-term project commitments are routinely inaccurate.

Most communities will select an 85% or higher capture program (systemwide annual average, typical year) approach to controlling CSOs. The systemwide nature of this performance measure provides communities with critical engineering flexibility to optimize controls on an iterative basis, as opposed to trying to implement rigid, inefficient solutions (like commitments to outfall-specific frequency of activation performance measures). If a particular project underperforms, the City simply bolsters a subsequent project to offset the earlier underperformance.

When addressing CSOs that discharge to streams of varying sensitivity, communities may commit to higher levels of CSO capture or even a low frequency of activation for receiving waters thought to be more sensitive. Such waters might include bathing beaches, swimming areas, public boat access locations, marinas, kayaking areas, environmental justice locations, and more.

In almost every case, these community-wide, massive infrastructure renewal projects require adaptive management as to the optimal projects/improvements, the sequencing of such improvements, and the timing of their implementation (especially when there is a need to coordinate funding for multiple community development projects). Because the program modification process is so long and cumbersome, many communities end up adopting non-optimal solutions simply to avoid the delays and effort required to negotiate a modification with the agencies.

2. Describe the compliance issues and water quality conditions or concerns that led to the enforcement actions by EPA.

We have observed a clear trend from EPA's Office of Enforcement to simply target all the large CSO communities (often in order of size) for enforcement actions. In almost every case, the same – or even better – results could have been achieved through imposing requirements in NPDES permits or through State enforcement actions. Similarly, instead of forcing hundreds of communities to go through the cumbersome federal consent decree process, EPA could have achieved the same or better results using administrative orders but chose not to.

While a federal consent decree may be an appropriate implementation vehicle for some communities, especially those which are recalcitrant to timely implement their approved long-term control plan, EPA should rely on EPA and State administrative orders to achieve faster negotiation times with better short and long-term implementation results.

3. Has the CSO community ever received a Notice of Violation from EPA or the State for violations of its NPDES permit related to CSOs? If so, please describe.

We have observed that in many cases, CSO communities that were the targets of EPA enforcement actions were not actually in violation of their CSO NPDES permit requirements. However, EPA still initiated federal enforcement actions against these communities, resulting in unnecessary and

ineffective enforcement actions. Typically, US EPA would seek to use a community's record of sanitary sewer overflows as a basis to negotiate a federal consent decree that really targeted the CSO control program. EPA would also take the position that a community's CSO LTCP was inadequate as a way to justify federal enforcement when that community had received no feedback on its plan and was given no opportunity to update its submittal (to the extent the submittal was deficient).

4. What is the State of your LTCP Approval?

EPA is often delayed in reviewing and approving community LTCPs. In most of these cases, EPA should not even be involved. It should be the states that approve the LTCPs as part of Phase II NPDES permitting, as dictated by EPA's CSO Policy. Today, most communities have approved CSO LTCPs. However, USEPA still seeks to enforce as a way to limit compliance schedules. EPA does this through the use of their unpromulgated affordability guidance.

5. To what extent are potential revisions to state Water Quality Standards contributing to the delay in LTCP approval?

While the CSO Policy expressly contemplates that NDPEs Permitting Authorities will coordinate state WQS and community LTCPs, the agencies rarely fulfill this obligation. Instead, most communities are forced to negotiate very high levels of control and to implement those programs without any regulatory certainty as to whether that program will be consistent with State Water Quality Standards. Every EPA consent decree makes this state/EPA failure quite clear by stating that compliance with the Consent Decree does not constitute compliance with the Clean Water Act. If the states and EPA actually coordinated CSO LTCPs with State WQS, this qualifier would not be necessary.

Because neither the states nor EPA perform this obligation under the CSO Policy, potential revisions to State WQS are not a hold up for most CSO programs – they are forced by EPA into a high level of control program and WQS compliance will be addressed later.

The goal for most communities will be to achieve a presumptive level of CSO control (unless they can't afford to do so, in which case they will achieve a lower, demonstration, level of control) and then they will address any residual CSO activations through either a WQS variance/designated use subcategory (CSO) or through a scheduling approach using an Integrated Plan. We believe the reality for almost every CSO system is that once they achieve a presumptive level of control (and assuming they adequately address sensitive/priority areas), there is little or nothing to be gained from further CSO control in comparison to addressing other sources of wet weather pollution (agriculture, stormwater, upstream loadings). CSO controls should switch to opportunistic improvements and more general progress, such as through green infrastructure implemented on a community-wide basis as part of development/re-development requirements. Thus, continued further overflow reduction progress is made while other, more significant sources are addressed.

6. Please describe your funding sources for the LTCP and its projects. What are the latest estimated costs?

CSO communities typically utilize the SRF and more recently ARPA and Bipartisan Infrastructure Law funding. CSO control costs are ballooning (along with everything else) given the historic supply chain crisis, unprecedented inflation, and an unprecedented worker shortage. The large amount of federal funding, coupled with the arbitrary and unrealistic requirement to spend all ARPA dollars by the end of 2026, will only cause costs to increase further. We are gravely concerned that communities will be forced into spending unreasonable financial premiums for sub-par, rushed work over the next few years in particular. Because of this economic crisis and the continued impacts of CV-19, we believe EPA should announce the availability of a default three-year extension for all federal deadlines for environmental infrastructure projects with program-specific extensions available on a case-by-case basis.

7. Do you have a green infrastructure component to your LTCP?

Green infrastructure has become a staple of most community overflow control/MS4 programs. We believe GI will continue to grow in popularity as more and more communities streamline and optimize the different types of GI implementation opportunities. GI also provides an exceptional opportunity for meaningful public engagement on otherwise highly technical and complicated infrastructure improvements.

8. Please describe your perspective on EPA's policy and guidance related to CSOs. What, if any, revisions could EPA consider?

EPA should stop requiring fixed program end dates and instead move to an adaptive implementation approach. Under such an approach, a program might be broken down into phases with each successive phase developed with the benefit of the actual implementation of the current phase. Deadlines should be established for the current phase and only imposed for later phases once we are closer in time and the body of work to be performed has been agreed up.

EPA should develop standard CSO variance language that states could then adopt (knowing EPA will approve it) and apply this variance policy to CSO communities once their LTCP is fully implemented. That will put them in compliance with the CWA (providing regulatory certainty) while still being subject to the triennial review requirement to evaluate the need for further controls.

EPA's financial guidance is inadequate and should be abandoned in favor of iterative implementation programs. If EPA's guidance is retained, the agency should at least increase its cap on extended compliance timelines from twenty to thirty years. A thirty-year timeline would better reflect the reality of implementing incredibly complex, multi-million-dollar compliance projects. Meanwhile, twenty years is simply unrealistic based upon the time it has taken dozens and dozens of communities to address their CSO control challenges. EPA's guidance also should allow exclusive use of the rate model approach and set the affordability bar at 2.0 of MHI for each affected community, rather than using an entire service area approach to assessing household burden. EPA's service area approach arbitrarily and inappropriately masks the true burdens which EPA's compliance schedule imposes on low and fixed-income residents.

EPA should also support and encourage peak flow blending as a cost-effective way to achieve higher levels of wet weather capture and treatment. EPA's disapproval of blending has resulted in billions of gallons of untreated sewage being discharged that could have otherwise received partial treatment and full disinfection. If EPA truly wants to reduce untreated overflows in a prompt fashion, it should recognize the value in peak flow blending and take steps to regulate such practices.

9. How does your utility demonstrate progress in controlling CSOs, as well as achieve and measure water quality improvements in your service area?

Reduced CSO volume is the best measure of CSO control progress, especially reduced volume discharged to sensitive and priority areas. In most cases, CSO control makes a greater difference during smaller storm events when CSO discharges may have an actual instream impact. As communities strive to treat flow during larger storms, we face increasing costs and diminishing instream returns due to the unsuitability of the stream for recreation (due to current) as well as the fact that other sources are far more significant than addressing residual CSO volumes.

10. Please discuss any other challenges in addressing and controlling CSO events.

Lack of money and time are the two biggest challenges CSO communities face. Beyond this, our needs would best be served if EPA supported reasonable Integrated Plans and developed a standard CSO variance provision which states could then adopt and implement to provide some level of regulatory certainty. The lack of regulatory certainty hinders CSO communities' ability to develop cost-effective programs.

Sincerely,



Paul Calamita
General Counsel

C: WWP Members