



July 30, 2010

The Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Caswell F. Holloway
Commissioner
cholloway@dep.nyc.gov

Re: Draft EPA Strategic Plan for FY 2011-2015

Dear Administrator Jackson:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) draft FY 2011-15 Strategic Plan. Having recently undertaken a strategic planning process here at the New York City Department of Environmental Protection (DEP), I appreciate what a great challenge it is to develop a consensus document that established both a long-term vision, and concrete strategies to carry it out. Your Draft Strategic Plan is a great achievement, and I congratulate you and your team on the draft and your commitment to a transparent and public process to complete it.

As an agency responsible for delivering high quality drinking water and wastewater services to 9 million New Yorkers every day, and for monitoring and meeting water quality standards in New York Harbor, I hope you will find these comments helpful as you complete your strategic plan. I would welcome the opportunity to discuss these comments, or any other aspect of the plan with you or your staff, and can provide any additional information that you may need.

All the best,

A handwritten signature in blue ink, appearing to read 'Caswell F. Holloway', written over the typed name.

Caswell F. Holloway

Attachment

c: The Hon. Judith Enck
Regional Administrator, U.S. EPA Region 2

The Hon. Alexander "Pete" Grannis, Commissioner
New York State Department of Environmental Conservation

The Hon. Jeff Zients, Acting Director
Federal Office of Management and Budget

New York City Department of Environmental Protection (DEP) Comments on The Draft FY 2011-2015 EPA Strategic Plan (June 18, 2010)

DEP's comments are presented in two categories, general comments that cover issues pertaining to the plan overall, and specific comments on the individual sections.

General Comments on the Draft Strategic Plan

DEP applauds EPA on its effort to present a unified, coherent and transparent approach to environmental protection, and supports many elements of each of the "Strategic Goals" and "Cross-Cutting Fundamental Strategies" in the Draft Strategic Plan (the "EPA Plan.") In particular, EPA's commitment to protect human health by "[f]inancing public water systems infrastructure to protect and maintain drinking water quality" and to protect and restore watersheds and aquatic ecosystems by "financing wastewater treatment infrastructure" is a welcome return to federal participation in the funding of water and wastewater infrastructure that, prior to the 2009 American Recovery and Reinvestment Act (ARRA), has been essentially non-existent for more than 10 years.

During that same period, EPA has promulgated rules that have imposed hundreds of millions of dollars in infrastructure and operating commitments on municipal water and wastewater utilities, without providing any corresponding financial support. In New York City, this has necessitated repeated and substantial year-to-year water rate increases, including four consecutive double-digit increases from 2007 through 2010. We hope that the final EPA plan will recognize the substantial advances and investments that have been made by local governments absent federal support, and that EPA will commit to provide funding in connection with any new rules or standards it may promulgate to fully fund, or at a minimum substantially defray, capital and operating costs associated with future mandates.

In that connection, we hope the final EPA plan will include an express commitment to data driven decisions. President Obama's Executive Budget for FY 2011 directs agencies to improve outcomes and to develop High Priority Performance Goals. EPA's goals are:

- To "improve the country's ability to measure and control Green House Gas (GHG) emissions" (Budget 86);
- To "take actions over the next two years to improve water quality" with specific initiatives to "strengthen public health protection" and to reduce discharges into impaired waterways (87); and
- To "ensure that environmental health and protection is delivered to our communities" (87).

To meet these goals, the Budget and Executive Orders issued by the Obama Administration emphasize the importance of benefit-cost analysis, and recognize that "environmental and workplace safety regulations impose[] compliance costs . . . [and] the American people expect the Federal Government to design programs and policies to manage and allocate scarce fiscal resources prudently, and to ensure that programs achieve the maximum benefit to society and do not impose unjustified or excessive costs" (93). To achieve these mandates, regulation "should

be data-driven and evidence-based, and benefit-cost analysis can help to ensure a careful focus on evidence and a thorough consideration of alternative approaches” (96). While EPA has used robust benefit-cost analysis in some areas, we hope that the final EPA plan will commit to a rigorous benefit-cost approach across the regulatory spectrum, from air, to water, to chemicals.

One of the draft plan’s Cross-Cutting Fundamental Strategies, “Strengthening State, Tribal, and International Support,” though commendable on its own terms, falls short in one fundamental respect: by excluding local municipalities who actually operate facilities and deliver services day-to-day from inclusion in a partnership approach, the strategy as expressed is self-limiting, and perpetuates an adversarial paradigm between state and federal regulatory authorities, and the municipalities that deliver services. Some of the most innovative investments and approaches happening in environmental protection and sustainability are occurring at the local level. For example, Mayor Bloomberg’s PlaNYC has set a national (and international) standard for local sustainability initiatives, from clean air and water to energy investment and climate change.

EPA’s Plan should recognize the importance of local initiative with a commitment to partner with localities—like New York City—that have committed resources and demonstrated the capacity to plan and act, independent of regulation or other legal mandates. New York City provides water and sewer services to 9 million people every day. A commitment to partnership that does not extend beyond the states at least to substantial service providers like New York City simply reinforces the federal/state paradigm that already exists—and has given rise to an unnecessarily adversarial dynamic between regulatory authorities and front-line service providers like DEP.

The National Association of Clean Water Agencies (NACWA) has identified these same concerns as major obstacles impeding clean water policy. NACWA’s 2007 report *Recommendations for a Viable and Vital 21st Century Clean Water Policy* found that:

- Regulatory silos in and between federal, state, and municipal agencies create adversarial relationships “rather than the cooperative relationship necessary for a watershed approach” (NACWA 12);
- Many regulatory mandates are “established without proper scientific research and data” and set “limits based on a national, one-size-fits-all approach [that does] not account for the different assimilative capacities of watersheds” (13);
- The rigidity of these mandates is made worse by the “insufficient flexibility for finding solutions,” such as investing in expensive, single-use CSO containment facilities rather than considering flexible, multiple-use green infrastructure (14); and
- Uneven enforcement of environmental regulations often “does not reflect the most important sources of water quality problems” which have “resulted in court-ordered spending with no real linkages to water quality” (14).

To overcome these obstacles, NACWA recommends that:

- Regulators “reinvigorate the planning process of Section 208 of the Clean Water Act” which “envisioned regional water quality management planning,” in other words, to shift planning toward a long-term watershed-based framework (16);
- The EPA reorganize to provide a regulatory structure that “reflect[s] the new watershed framework” at Federal and regional levels (18, 21);
- Within the uncertainties of this framework, regulators should use an adaptive management approach requiring assessment of watershed priorities, watershed-specific innovation and monitoring, and continual analysis of the program effectiveness (17); and
- EPA establish a “proper sequence for establishing total maximum daily loads (TMDLs),” at regional levels, because the current goals of fishable and swimmable waters are too broad to accommodate local characteristics and designated water uses (18).

In sum, NACWA recommends that the EPA shift the regulatory practices that have developed over the past 35 years away from “chemical and pollutant-specific approaches” toward “watershed-based management” that incorporates the participation of stakeholders and prioritizes watershed management by considering the most cost-effective means of improving water quality (22).

These suggestions are consistent with a partnership approach, and with the Obama Administration’s commitment to data-driven decision making. We hope that the final EPA plan will expand its commitment to partnership beyond the states to local municipalities which provide services, and more clearly articulate a commitment to rigorous, data-based regulation and enforcement that is focused on public health outcomes, not inputs (e.g., the number of enforcement actions initiated) or secondary outcomes such as gross discharge reductions. Moreover, an expanded and inclusive partnership approach is essential to the success of any green infrastructure initiative, which would have to be implemented at the local level.

Experience shows that a partnership model at the local level can work: EPA and DEP have worked together for many years on an integrated source water protection program in the New York City watershed, which has allowed the City to protect more than 110,000 acres of pristine, undeveloped land, help upstate residents preserve working farms, and avoid the environmental degradation, expense, and social costs of a water filtration plant.

Independent water and policy experts, including former EPA experts, collaborated on another report, *Sustainable Water Systems: Step One—Redefining the Nation’s Infrastructure Challenge*, published by The Aspen Institute in 2009. That report recommends significant changes to achieve sustainable water systems:

- Create “ideal water infrastructure governance” that “focuses on achieving specified public and ecosystem health outcomes; balances local, regional, and global outcomes over various timeframes; appropriately addresses all sources that impact ecosystem and public health; fairly allocates responsibility and costs; and achieves its mission at the lowest total cost to society, and is adequately funded” (Aspen Institute 19);

- Federal, state and local entities should “adopt watershed-oriented policies and regulations” and “find ways to remove or modify institutional barriers and practices that impede or prevent sustainable water resource management” (26, 27);
- “[G]overning agencies at all levels should cooperate in pursuing cost savings and additional water quality... that could be derived from closer integration of regulatory programs” (27); and
- Regulators should recognize the challenge of affordability in communities with high proportions of low-income residents (4) and “federal and state funding agencies should direct affordability support principally towards households in need” (4).

DEP urges the EPA to build upon its watershed-based approaches by incorporating these principles into and throughout the 2011-2015 Strategic Plan.

Specific Comments on the Strategic Plan

Administrator’s Message / Introduction

- DEP supports EPA’s reference to advancing “environmental and human-health mission outcomes” as a coherent benchmark for progress to unite the five strategic goals and five cross-cutting fundamental strategies (1). In that respect, it is instructive to compare the EPA’s action on air quality, in which rulemakings are supported by rigorous studies that compare projections of lives saved to the costs of compliance, with water rulemakings, where that strong foundation is often absent.
- With regard to the goal of Enforcing Environmental Laws, the Strategic Plan should provide a clearer explanation of the criteria for “focusing [EPA’s] efforts on the most serious water, air, and chemical hazards” (3). Specifically, EPA should use its discretion to the greatest extent to adopt lives saved and public health impacts as the common criteria for its programs thereby providing significant benefits to the public and coherence to its programs.
- DEP supports the Strategic Plan’s affirmation of the “core values of science, transparency, and the rule of law,” (1), but a focus on economics, including the opportunity costs of regulations and least-cost alternatives to make meaningful improvements to public health, has been and must continue to be a core value for the agency, and should be expressly stated in the Strategic Plan. The Plan recognizes that many municipalities “are operating with significantly reduced budgets and other resource constraints that could impede our joint progress,” (6), and should commit to demonstrate how this reality is accounted for in any future regulatory mandates—whether through least-cost alternatives analysis, federal funding for mandate implementation, or some other means.
- Too often, effects of regulatory programs and mandate enforcement are undertaken in a piecemeal, or siloed approach, and cumulative impacts and overall context are not considered. This can result in unintended regulatory conflicts such as increased water pumping and associated greenhouse gas emissions, increased vehicles on roadways, or increased use and disposal of chemicals. Unintended consequences can be avoided if a more comprehensive evaluation were undertaken to identify cross-cutting issues.

- EPA should consider additional cross-cutting issues: sustainability/cross-media approaches, triple-bottom line assessments (environmental, economic, social), and affordability. As the Plan recognizes, there are limited resources with which to address our most pressing environmental and societal challenges, and the challenge is to adopt a comprehensive and consensus-based prioritization of our investments. Using its administrative discretion, EPA can conduct necessary research and distribute the information to states and localities.
- As noted in the “General Comments” section with respect to EPA’s cross-cutting strategy to strengthen partnerships, the strategic goal to “Protect[] America’s Waters,” speaks about working “hand-in-hand with the states.” This should be expanded to include the municipalities and utilities that build and operate critical infrastructure, who have to make hard choices about delivering services and meeting mandates. Similarly, the Agency’s embrace of “traditional and innovative strategies” should be expanded to encourage holistic, cross-media sustainability plans such as PlaNYC (2). Such plans prioritize the spending of scarce public resources in a manner that will achieve long-term results.

Taking action on Climate Change and Improving Air Quality

- DEP supports the EPA’s efforts to develop “effective air quality strategies that address multiple pollutants and consider the interplay between air quality and factors such as land use, energy, transportation, and climate” (8). This suggests a greater focus on urban air issues and urban areas in general, which combat inefficient sprawl development. Accordingly, all of EPA’s programs should consider urban affordability as a key air quality indicator.
- The report on black carbon mitigation measures should include approaches that have synergy with public health measures. One such measure is New York City’s efforts to reduce the use of residual oil for space heating, which will reduce criteria and other pollutants and will reduce black carbon. Conversions would be greatly facilitated by access to carbon mitigation markets.
- DEP believes that data on public health impacts provides the most compelling support for regulatory action, and that absent such data, the EPA should exercise restraint.
- DEP believes that the use of technical support and financial assistance by the radon program has achieved results instead of enforcement, and provides a useful template for other programs.
- DEP supports reauthorization of the Diesel Emissions Reduction Act (Act), with two changes: (i) the Act should be weighted towards preventing exposure and reducing public health threats, which should result in more awards to urban areas and programs such as school bus retrofits and (ii) the Agency should remove a disincentive for local action by allowing grants to municipalities even if they have voluntarily adopted local laws that require retrofits; under the Agency’s current interpretation, such self-imposed limits disqualify projects.

Protecting America’s Waters

- DEP supports the provision of adequate resources to small drinking water systems and to “disadvantaged communities”. However, a holistic approach to addressing drinking water

issues on a national level should include adequate funding for large urban systems which promote sustainable, densely developed communities and serve a diverse population that includes many disadvantaged families. New York City's system, in fact, serves both the densely populated City as well as over one million customers in many smaller Towns within the City's watershed. (11).

- EPA's list of the comprehensive threats to water quality from point and non-point sources supports the application of holistic solutions such as green infrastructure and watershed-based planning, as the Agency recognizes. A holistic approach would allow municipalities and other stakeholders the flexibility to prioritize investments amongst various water quality obligations (and even other environmental obligations) in the way that achieves the best public health outcomes, and best meets the needs of their residents and visitors. This argues against a one-size-fits-all approach, such as federal minimum technology standards that do not consider local needs or results. EPA should provide holistic solutions, and should not hesitate to use enforcement discretion where science-based evidence shows that public health outcomes can be achieved through more than one approach. Check-the-box regulation compliance/enforcement is not always an effective proxy for achieving science-based public health outcomes.
- DEP supports rigorous scientific, risk-based and site-specific regulations of drinking water, particularly with respect to emerging issues such as pharmaceuticals to ensure that systems devote their limited resources only to issues that pose a threat to public health.
- EPA should extend a partnership approach to its in the enforcement program, which should be aligned more closely with the collaborative approaches used throughout EPA.
- DEP supports the EPA's watershed-based approach to protecting and restoring aquatic ecosystems and its commitment to partnerships with local government. Providing technical and financial support should be central to EPA's core water programs (13).
- The Strategic Plan should explicitly acknowledge that adaptive management principles are a core element of efforts to improve water quality. An iterative process that allows for mid-course corrections is built into the structure of the Clean Water Act and underlies such regulatory mechanisms as the five year cycle of discharge permits. In the context of CSO policy, compliance schedules under consent orders, permits, and LTCPs, should allow for learning by doing and for the maturation of approaches, particularly those that seek to use green infrastructure. (Coordinating CSO Long Term Control Plans with Water Quality Standards Reviews, EPA Guidance on Implementing the Water Quality Based Provisions of the CSO Control Policy (2001) ("An iterative, phased implementation of CSO controls fits well with the watershed approach.")).
- DEP supports the goal of the programs to meet water quality standards that are developed by the states to meet site-specific waterbody conditions and uses, rather than uniform national standards. The Strategic Plan should recognize, consistent with existing regulations, that factors other than pollutant loadings can be responsible for lack of attainment of existing water quality standards. Use attainability analyses, as set forth in EPA's regulations, are appropriate to address those waterbodies.

- Adapting large-scale infrastructure systems to climate change presents new and unique problems requiring flexibility and innovation. Regulatory programs should recognize these challenges and encourage such flexibility and innovation when establishing priorities.
- DEP supports the EPA's commitment to "begin to identify actions to respond and adapt to the current and potential impacts of climate change on aquatic resources" and suggests that the EPA can immediately provide grants and other support to local communities for the restoration of wetlands (13).

Cleaning Up Our Communities

- The EPA can support smart growth principles by considering the societal and environmental benefits of promoting and ensuring the continued affordability of urban centers in its regulatory decisions, and by adopting a holistic, multi-media approach that will consider the overall sustainability of programs. Affordability should be considered when imposing significant resources demands in one program such as water (or, in an uncoordinated manner among the many water programs) to ensure that urban areas with significant infrastructure will not bear higher costs, resulting in population shifts from densely populated areas to low-density, energy-intensive areas. Such action is consistent with the EPA's commitment to create a "set of building 'livability' principles and a partnership agreement [with other federal agencies] ... to protect the environment, promote equitable development, and help to address the challenges of climate change" (15).
- DEP supports the goal of cleaning up contaminated urban waterways. However, listing urban waterways on the National Priority List requires employing alternative strategies to costly and time consuming litigation in identifying who should pay for, design, and undertake remedial activities. In instances where local and State governments were engaged in activities for the purpose of providing necessary public services, and by virtue of such activity have potential Superfund liability, their unique status should be considered in apportioning responsibility. EPA should also consider conducting more joint research among stakeholders and disciplines for addressing the unique issues associated with processing dredge material.

Enforcing Environmental Goals

- Goal 5 refers to "fishable and swimmable" water quality in all waterbodies regardless of appropriate uses, site conditions, or affordability. DEP recognizes the importance of increasing the number of water bodies meeting fishable swimmable criteria where appropriate. Opening more water bodies within the City of New York is a major priority of PlaNYC. However, the Strategic Plan should acknowledge that use designations imposing fishable/swimmable uses in all waterbodies, regardless of cost, and without consideration of whether physical and other characteristics of those water bodies prevent such standards from being achieved, imposes excessive costs upon already financially stressed urban centers. Instead, EPA's Strategy should focus on a science-based approach to water quality and should use its existing authority, or seek new authority, to work with other sectors to adopt many low cost, high impact controls.

- As noted above, EPA should explain the criteria it uses to identify “the most serious water, air, and chemical hazards” and adopt a science-based assessment of public health risk to prioritize its enforcement efforts (22). Similarly, such a standard and criteria should be developed to inform EPA’s efforts to work with states “on the most important water pollution problems (22).” For example, EPA’s goal of eliminating all sewage discharges should consider the public health impacts of such discharges including the assimilative capacity of waters; such efforts will reach a point of diminishing returns short of cessation of all discharges.
- EPA should clarify that repeated statements that it will adopt “vigorous” and “aggressive” enforcement do not imply that it will prioritize such approaches above its other efforts to develop partnerships and to provide technical and financial support for pollution reduction. Enforcement should be a last resort, not a first resort, and should account for site-specific conditions, the magnitude of local investments, and water-quality improvements over time, among other factors. Enforcement should be designed to encourage compliance and innovative solutions rather than be strictly punitive, siphoning scarce resources for purposes other than those with an environmental and public health benefit.

Expanding the Conversation on Environmentalism

- DEP supports the EPA’s commitment to “build stronger working relationships ... with ... economically-distressed cities...” (28). This commitment should be expanded to include all urban municipalities which both contain economically-distressed areas and are under financial pressure. This commitment must also be reflected in the Strategic Plan’s enforcement and water quality chapters.

Working on Environmental Justice and Children’s Health

- All of the EPA’s efforts should be based upon “using the best science and environmental monitoring data to address the potential for adverse health effects from environmental factors...” (29).

Advancing Science, Research, and Technological Innovation

- DEP supports the EPA’s efforts to “[a]dvance a rigorous basic and applied science research agenda” and the use of “robust scientific data and findings to support the Agency’s policy and decision-making needs” (31).

Strengthening State, Tribal, and International Partnerships

- As noted above, the Strategic Plan should explicitly expand this effort to partnerships with cities.

Strategic Management Framework

- DEP supports EPA’s commitment to develop enforcement indicators that are aligned with Goals 1-4 of the Strategic Plan.

- Water quality standard attainment is an appropriate indicator for Goal 2, but those standards must incorporate use attainability analyses.
- The indicators for Goal 2 should be based on public health outcomes as well as ecosystem based outcomes.
- The Strategic Plan's water quality performance measures are comprised, in the main, of measurable improvements to public health and the environment. This focus should be reflected in the regulatory programs that are intended to achieve the performance measurements, rather than on reducing discharges without regard to public health and environmental benefits, or benefit-cost analysis.
- EPA's enforcement performance measures are focused on inputs (*i.e.*, the number of enforcement cases started and concluded) rather than environmental outcomes. This structure incentivizes costly enforcement proceedings at the expense of cooperative partnerships that employ a full range of compliance tools, such as funding and technical support. The use of a baseline measurement implicitly rewards the commencement of more enforcement actions, regardless of the environmental benefit gained and regardless of the likelihood of success of more cooperative approaches. We hope EPA will modify the section entitled "Maintain Enforcement Presence and Deterrence" to emphasize cooperative approaches to achieve compliance, with enforcement being the last use option for persistent, willful non-compliers.
- The water enforcement goal of reducing pounds of water pollutants suggests that all pollutants equally impact public health and water quality. Reduction of water pollutants and the metrics used to measure such reduction should be explicitly tied to measurable public health outcomes developed from rigorous scientific and economic study. Given the sophisticated analytic tools and expertise that can be brought to bear to assess these issues, raw discharge reduction is a poor proxy for improvements to water quality. The Strategic Plan should explicitly embrace this approach.
- In addition, measuring enforcement by tons of pollutants reduced or by the dollar value of equipment imposed provides an incentive to achieve all program goals through administrative or civil actions. It is difficult to overstate the wasteful (and demoralizing) effect of having every initiative written into consent orders. That process dampens bottom-up innovation and local initiatives and often locks localities into long-term capital investments with no flexibility to advance innovative technologies or programs.
- To remedy these significant problems, DEP suggests that enforcement must be closely aligned with the major programs. The most comprehensive way to integrate collaboration, regulation, and enforcement would be a return to an organizational structure whereby enforcement functions are carried out by program offices that can then employ a full range of compliance tools. At a minimum, EPA should tie performance measurements for enforcement to overall program goals. This would recognize that enforcements efforts are not an end in themselves but serve the mission of the Agency to protect and improve public health and the environment.