

Innovative Local Development Leverages EPA's New Integrated Planning Framework

BY LOUIS L. MCMAHON
& KEELY J. O'BRYAN

Cleveland and Northeast Ohio abound with exciting construction projects. A summer of orange barrels and high profile development projects grab headlines. But behind the headlines, generation-long sewer infrastructure investments that dwarf previous public works are happening, and these will shape much of our 21st century metropolis. The promising news is that many of these sewer programs are maximizing flexibility and cost-effectiveness under EPA's new Integrated Planning Framework.

Every community that owns sewers faces increasing Clean Water Act regulation.

Every urbanized community in Northeast Ohio, including townships, faces regulatory requirements governing its sewer systems under the Clean Water Act (CWA). Even within the Northeast Ohio Regional Sewer District (NEORS), the district that owns and operates treatment plants and large interceptor sewers, individual communities own both their storm sewer system and their local sanitary collection system. Multiple communities outside of NEORS, such as Akron, Euclid, Lakewood and Rocky River, also own and operate regulated waste water treatment plants along with collection systems and storm sewers.

Improving the water infrastructure of these communities is a priority for EPA, with the goal of keeping raw sewage and contaminated stormwater discharges out of the local waters. Past EPA enforcement across stormwater, treatment plants and collection systems was often uncoordinated, which resulted in separate programs of staggering cost, complexity and duration. For example, in 2011, NEORS entered into a federal Consent Decree with EPA for an infrastructure program to control Combined Sewer Overflows (CSOs) in the system's 312 miles of interceptors and at the treatment plants, estimated to cost \$3 billion over

a 25-year period. The NEORS Consent Decree does not address additional billions of dollars that communities face for CWA compliance of the collective 3000 miles of collection system sewers plus the stormwater sewers that the communities own. With the proper strategy, communities can now utilize EPA's Integrated Planning approach to create a more efficient and flexible approach to infrastructure upgrades.

EPA offers Integrated Planning Framework to coordinate and innovate.

Integrated Planning, as the name suggests, can be broadly defined as common sense coordination of infrastructure improvements with regulatory compliance, economic affordability, and community development initiatives. In environmental regulatory law, Integrated Planning refers to EPA's new CWA framework. On June 5, 2012, EPA published its guidance document entitled "Integrated Municipal Stormwater and Wastewater Planning Approach Framework." This was followed on November 24, 2014 with "Financial Capability Assessment Framework for Municipal Clean Water Act Requirements." Both documents and other relevant materials are available on EPA's webpage for Integrated Planning.

Together, the guidance documents outline the Integrated Planning requirements for communities, which include detailed systems analyses, articulation of compliance goals, active and ongoing public participation, and a financial plan to achieve compliance. EPA cites opportunities for Integrated Planning as including: the prioritization of CWA compliance activities to achieve the best environmental improvement for public dollar spent; access to innovative approaches such as use of green infrastructure; and affordable and equitable approaches that can harmonize with other community investments and goals, such as brownfields redevelopment. Both documents concede that communities must

be able to prioritize capital investments when implementing CWA upgrade requirements.

Local entities lead Integrated Planning implementation.

Integrated Planning is not a new EPA "program" or regulation. Beyond the guidance documents, there is little legal definition of the process. Integrated Plans will not be approved by EPA, but can form the basis of new permits or revised consent decrees. The burden of developing integrated plans, and getting EPA to agree to implement them in permits and consent decrees, falls completely on the local community. On this path, Northeast Ohio entities already are leading the way.

NEORS

NEORS concluded its CSO Consent Decree before EPA formalized the Integrated Planning approach. Nonetheless, NEORS actively fosters Integrated Planning approaches to achieve water quality improvement. It already has expanded and adjusted its pioneering green infrastructure efforts to leverage community involvement. NEORS is currently reviewing the feasibility of an intensive Sewer System Evaluation Study of the collection systems that are tributary to its regional system. This study can articulate and lead to prioritization of capital infrastructure investments and reduce the amount of stormwater that unnecessarily mixes with sewage. NEORS also is reviewing the possibility of a grants program to assist communities with appropriate infrastructure projects. Coupled with NEORS's expertise on stormwater and wet weather issues, these activities can provide a strong technical foundation that EPA's Integrated Planning documents contemplate.

Lakewood

The City of Lakewood has been implementing Integrated Planning in the context of Clean

Water Act compliance since 2007, long before the efforts were recognized with that name. Lakewood owns and operates its own wastewater treatment plant. It also owns a sewer collection “system” that is a unique mixture of classic single-pipe combined sewers, so-called “over-under” sewers (where storm sewers are located directly over sanitary sewers in the same trench), and some fully separated sewers. The Lakewood “system” was developed by connecting many original neighborhood area sewers after they were built into a city-wide network.

Lakewood’s challenge is that, as a community that is densely populated and has been entirely built up since before WWII, it has limited green space and no ‘unused’ space. Any sewer retrofits or upgrades need extensive analyses so that unintended public health impacts, such as new basement backups, can be avoided.

Today, after many years of detailed investigation and computer modeling, Lakewood has the ability to evaluate the impact of new land use developments on potential system overflows. This complements Lakewood’s success in leveraging stormwater retention in recent public and private construction through zoning and other ordinances. Lakewood has made major investments in specific projects, including a project that will eliminate two of its last three permitted CSOs discharging to the Rocky River. Lakewood’s investment in Integrated Planning allows it to nimbly incorporate new developments in its overall plan, and to have assurance that its sewer and plant investments are not too big or too small.

Irishtown Bend — Integrated Planning Moves Toward Collective Solution.

As part of its recent strategic plan, the Cleveland–Cuyahoga County Port Authority undertook the challenge of addressing potential risk of impairment to navigation on the Cuyahoga River at what is called Irishtown Bend, the area of Cleveland roughly between Detroit Avenue and Columbus Road on the

west side of the river. The risk of hillside failure imperiled not just commercial navigation, but was a hurdle to several infrastructure and neighborhood development issues. These included replacement of bulkheads on the riverfront, protection of city roads and the future route of the Cleveland Foundation Centennial Trail, risks of damage to a major sewer interceptor, flooding of structures associated with the Veterans Memorial Bridge, and significant limitations on development of the east side of W. 25th Street.

Because of the Port’s intensive analysis and coordination with other entities, multiple parties have combined efforts to unlock a major area of greenspace connected to the development occurring along W. 25th Street and around the West Side Market. The players integrating their efforts include the Port, NEORS, the City of Cleveland (multiple departments), the Cleveland Metroparks, Cuyahoga County, ODOT, CMHA and Ohio City, Inc. This project is a prime example of a broadly defined use of the Integrated Planning process to achieve innovative and collaborative results for our communities.

New Integrated Planning Framework is not a panacea.

Where common sense coordination can fit within existing regulation, there is opportunity. But at this stage of regulatory development, it is critical to understand that Integrated Planning is an emerging arena that does not yet have black letter legal authorities. Much depends on context and the relationship among the relevant local entities and the regulating agencies, such as EPA and Ohio EPA. A local example involves the City of Akron, which sought to make changes to its Consent Decree program to incorporate Integrated Planning. Akron provided the technical basis for the requested change, along with an exhaustive affordability analysis pursuant to EPA guidance. But EPA did not support the request, and Akron’s motion to change the Consent Decree was rejected by

the Court on March 18, 2015. *See, US v. City of Akron*, 2015 WL 1246117, Case No. 5:09CV272 (N.D. Ohio).

Integrated Planning enables innovation and flexibility.

In the world of specialized regulatory law, common sense is not always so common. Where local governments constantly struggle to meet immediate needs, long range planning can present a very significant challenge. But long range planning in the area of CWA compliance is the essential element to any cost-effective approach. Those that can integrate future regulatory requirements with other needs can minimize costs and position themselves for grants. They are equipped to incorporate changes in technologies and land use that can occur over a multi-decade program.

It may not be headline-grabbing, but the long work of cost-effectively re-inventing our local infrastructure is well underway and many of our communities are national leaders leveraging all the flexibility EPA has to offer.



Louis L. McMahon is a Partner at McMahon DeGulis LLP, Ohio’s largest environmental law firm. Lou advises local governments regarding EPA compliance and integrated planning of capital investments with other community objectives such as economic development, brownfield redevelopment and “greening” impervious areas. He can be reached at (216) 367-1407 or lmcmahon@mdllp.net.



Keely J. O’Bryan is a Partner at McMahon DeGulis LLP. She focuses her practice on environmental compliance counseling, remediation, environmental cost recovery and litigation. She has been a CMBA member since 2014. She can be reached at (216) 367-1410 or kobryan@mdllp.net.