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May 25, 2010

## **NACWA Ramps up Advocacy on Stormwater with a Win in the Courts, Letter to DOJ**

NACWA continues to aggressively ramp up its involvement in stormwater issues, reinforcing its position as an effective voice on behalf of municipal stormwater utilities. Just this week, the Oregon Court of Appeals issued a favorable opinion in a stormwater case, finding that MS4 permits in that state are not required to contain numeric effluent limits or require strict compliance with state water quality standards. NACWA consulted closely with its Oregon members during the course of the litigation.

NACWA is also leading the charge on ensuring that the federal government steps to the plate and pays stormwater fees being charged by municipal utilities — an issue that has received significant attention this week in the Nation's Capital. The federal government — obviously a major property owner in D.C. — has initially refused to pay the D.C. Water & Sewer Authority's (DCWASA) impervious area charge on the basis that it constitutes a tax on the federal government. NACWA spoke with this week in the local print media against the refusal of federal government facilities in Washington D.C. to pay stormwater fees. NACWA stated that federal properties should not be exempt from paying local stormwater charges and noted that "to the extent that the federal government refuses to pay its fair share, then the economic burden falls even more squarely on the shoulders of local rate payers." As a result of the media attention this issue is receiving in D.C., the Department of Justice is working swiftly to determine its national position on this issue. NACWA will be weighing in today with a strongly worded letter to Attorney General Eric Holder and other key Administration officials, stating that the federal government cannot at once claim that stricter stormwater controls are a national regulatory and enforcement priority while at the same time absolving itself of the responsibility for paying for its share of the solution.

These efforts are but the most recent examples of NACWA's stepped up advocacy in the stormwater arena that began with several more formative actions including changing the Association's bylaws to allow stormwater utilities to be full members and the creation of a Stormwater Management Committee to guide NACWA's actions, including on informing EPA's development of a new national stormwater rule.

NACWA will be taking an even more active role on stormwater issues in the coming months, working to form a coalition to address stormwater concerns in the regulatory, legislative, and judicial arenas. As part of this effort, NACWA will be developing a series of position papers and other resources to help stormwater utilities address the increasing array of requirements and mandates facing them. For more information on NACWA's stormwater activities, please visit the [Stormwater Management](#) section of our website. NACWA urges state groups to contact us with your stormwater related concerns.

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## **NACWA Comments on EPA Florida Nutrient Proposal**

NACWA urged EPA this week to explore the use of new, more reasonable approaches to controlling the impacts of nutrient over-enrichment and announced plans to host a summit of clean water sector representatives on

possible solutions. In its comments on EPA's proposed numeric nutrient criteria for Florida, NACWA expressed concern about EPA's continued reliance on a rigid water quality framework for nutrients based on numeric values for total nitrogen and total phosphorus. NACWA highlighted the need to explore alternative, more sustainable approaches that accomplish significant nutrient reduction while also providing greater flexibility. NACWA's comments noted that reasonable and meaningful water quality goals for nutrients must be technically and scientifically defensible and technically achievable; based on a demonstrated cause and effect relationship between stressor and response variables; and should not be implemented until a biological impact has first been demonstrated. In addition, NACWA noted that an adaptive watershed approach should be used to coordinate control efforts and ensure any goals result in a net environmental benefit.

NACWA's comments raised significant concerns with EPA's proposed numeric nutrient criteria for Florida, noting that the criteria values, based on EPA's flawed reference condition approach, are not needed to protect water quality in Florida. In fact, as NACWA and other stakeholders have outlined, EPA cannot demonstrate whether its proposed criteria will even be able to protect the designated uses of Florida's waters. EPA admits in its proposal that it was not able to demonstrate a causal relationship between the nitrogen and phosphorus concentrations it has established and instream biological impacts. EPA defaulted to its reference condition approach to establish the criteria, which, based on initial assessment by the Florida's Department of Environmental Protection, would deem even some of Florida's most pristine waters as impaired. EPA also vastly underestimated the cost impacts of its proposed criteria on Florida's clean water agencies and other dischargers.

While not acknowledging that the criteria values are flawed, EPA's proposal and cost estimate recognize that the numbers are extremely low and likely unachievable by many dischargers in the state. In an effort to alleviate implementation challenges, EPA's proposal did include some positive elements including the use of annual averaging and a new concept, the restoration standard, which shows promise for improving implementation of nutrient criteria in the future. As proposed, however, the restoration standard concept presents a significant burden in terms of the analysis that would be required to set the interim goals under the standard and leaves many questions unanswered in terms of the consequences for failing to meet those interim goals.

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## **NACWA Challenges EPA Position in Whole Effluent Toxicity Permit Appeal Case, Supports Texas Utility Concerns**

NACWA filed a reply brief recently with the U.S. Environmental Appeals Board (EAB) challenging arguments made by EPA in a hotly contested appeal of a federalized National Pollutant Discharge Elimination System (NPDES) permit containing whole effluent toxicity (WET) limits issued to member agency the San Jacinto River Authority (SJRA) in Texas. The NACWA brief, the second filed by the Association in the case, rebuts arguments made by EPA in the Agency's most recent filing, arguing both that EPA's brief should not be accepted for procedural reasons, and that EPA's legal arguments are not sufficient to prevail. As a procedural matter, NACWA points out that EPA did not receive permission from the EAB to file a response to NACWA's earlier brief, and thus the EPA response must be stricken from the record. As a substantive matter, NACWA's reply brief disputes EPA's legal arguments in the case and reasserts the Association's position that EPA improperly and illegally federalized the SJRA permit. NACWA's brief also requests the opportunity to participate in oral arguments before the EAB when the case is heard in June.

At issue in the appeal are WET limits in a federalized permit given to SJRA by EPA which were not required in a previous permit written by the state. NACWA's filed its first brief in the case in March and raised two key challenges to EPA's actions, arguing that the Agency impermissibly changed its position as to the validity of the Texas WET permitting procedures without any explanation or basis, and that EPA improperly sought to substitute its own view of Texas water quality standards in place of the state's interpretation. NACWA is supporting SJRA in appealing the permit and believes review by the EAB is necessary due to the far-reaching national implications the Agency's actions could have on other CWA programs around the country.

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## **EPA Memo Provides Direction to Regions, States on Priorities for FY 2010 SRF Spending**

EPA recently sent an April 21 memorandum to its regional water management division directors clarifying the parameters for the distribution of clean water and drinking water state revolving loan funds (CWSRF and DWSRF) for fiscal year 2010. The memorandum is the final outcome of a process that included a task force on which several NACWA public agency members provided input. It is also part of a broader effort by EPA, the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Transportation (DOT) to ensure federal infrastructure dollars are targeted to projects that promote sustainable and livable communities. Specifically, the memo finds that “in the CWSRF program States should not encourage the expansion of centralized infrastructure to accommodate growth where there are available projects that repair, replace, and upgrade infrastructure in existing communities.” The memo also seeks to ensure that, in line with the requirements of the appropriations bill, 30% of the funding is used for additional subsidization in the form of grants or grant equivalents and 20% of the funding is used for green projects — two provisions NACWA supported. The memo also discusses the application of Davis-Bacon requirements to FY 2010 CWSRF funds — an issue NACWA continues to seek clarification on from both Congress and EPA.

The FY 2010 appropriations bill provides about \$3.5 billion for wastewater and drinking water infrastructure projects—\$2.1 billion for the CWSRF and \$1.4 billion for the DWSRF.

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## Support for Key Legislation Grows on Capitol Hill, State Groups Urged to Weigh In

Support continued to grow in recent days and weeks for two important legislative proposals: *The Green Infrastructure for Clean Water Act (H.R. 4202)* and the clean water trust fund bill, *The Water Protection and Reinvestment Act (H.R. 3202)*. Both bills reflect many of NACWA’s key priorities and both now enjoy 35 co-sponsors, buoying their momentum and increasing the likelihood of consideration during the 111th Congress. Due to aggressive outreach by NACWA, its members, and other stakeholders, *H.R. 4202* recently gained nine co-sponsors. New supporters include Elijah Cummings (D-Md.), Brian Higgins (D-N.Y.), Barbara Lee (D-Calif.), Dennis Moore (D-Ks.), David Price (D-N.C.), Ed Pastor (D-Ariz.), Albio Sires (D-N.J.), Bennie Thompson (D-Miss.) and John Yarmouth (D-Ky.). At the same time, *H.R. 3202* continues to gain the support of Transportation & Infrastructure (T&I) Committee members, including Steve Cohen (D-Tenn.), Phil Hare (D-Ill.) and Albio Sires (D-N.J.). Support for both bills by T&I Committee Members is critical because it demonstrates to T & I Chair, Jim Oberstar (D-Minn.) that these bills should be taken up by the Committee — a key step before being considered on the House floor. NACWA urges state/regional groups and their member utilities to weigh in and support these bills with your Representative.

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Please feel free to contact Thea Graybill, Government Affairs Assistant with any questions or concerns at [tgraybill@nacwa.org](mailto:tgraybill@nacwa.org).

