



March 17, 2010

## **NACWA Reiterates Concerns on Blending in Letter to AA Silva, Urges Quick Action**

Following up on a February 18 meeting with Pete Silva, EPA's Assistant Administrator for Water, NACWA highlighted its concerns over the lack of a final policy statement on the status of peak wet weather flow blending in a letter to Silva this week. Since EPA's release of its 2005 proposed policy there has been significant confusion in the states and EPA regional offices regarding the appropriate approach to addressing peak flow blending in Clean Water Act (CWA) permits. Where EPA regional offices have sought guidance from Headquarters, the message has been clear – blending constitutes a bypass, and in accordance with the bypass regulations and the December 2005 proposed policy, a 'no feasible alternatives analysis' must be completed before permitting can proceed.

NACWA's letter underscores what the Association and its members told Silva during the February 18 meeting — EPA's assertion that peak flow blending should be handled under the bypass regulation is a new interpretation and a significant departure from long-standing practice, and that EPA cannot simply change its mind and apply an aggressive interpretation of the bypass rule without a clear and final articulation of this policy shift that allows for appropriate public review and comment. EPA's application of this new interpretation will have major cost impacts on utilities, both in conducting the 'no feasible alternatives analysis' and in implementing any identified alternatives, and permit writers and utilities need clear and definitive direction. As recently as 2003, EPA issued a proposal stating that peak flow blending for sanitary sewer systems was not a bypass and could be authorized in a CWA permit. For decades the Agency has sanctioned state permitting programs that specifically identify and authorize peak flow treatment scenarios. NACWA's letter reiterated that EPA must not continue to implement its CWA permitting program based on a new interpretation of a decades-old rule that hinges on a non-final policy proposal. EPA has told NACWA and other stakeholders that while a final decision has not been made, its senior managers are actively considering the Agency's next steps and it would require policy direction from the Administrator's office.

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## **NACWA Makes Headway with EPA on Regulatory Status of Biosolids, Incineration**

NACWA met on March 4 with senior EPA staff from the air, waste and water offices to discuss ongoing Agency rulemaking efforts that have the potential to impact the regulatory status of biosolids and sewage sludge incinerators (SSIs). NACWA's chief concern has been that EPA's carefully crafted balance among the three media offices with regard to the regulation of biosolids could be upended by the rules under development by the air and waste offices. There are two rulemakings underway which NACWA is seeking to ensure do not adversely impact clean water agencies. First, the Office of Resource Conservation and Recovery (ORCR) is working to develop a regulatory definition of non-hazardous solid waste. Second, this definition will be used by EPA's air office to determine how several categories of incinerators, including SSIs, will be regulated under the Clean Air Act (CAA), either under the more stringent CAA Section 129 maximum achievable control technology (MACT) standards or the more flexible Section 112 program. NACWA, through the use of Targeted Action Funds, has consistently been making the case that biosolids should not be included in the definition of solid waste currently under development – and that the Clean Air Act (CAA) specifically directs EPA to regulate SSIs under Section 112, not 129.

Preliminary indications from ORCR last summer were that biosolids that are combusted would be deemed a solid waste for regulatory purposes – meaning that SSIs would be regulated under Section 129. Based on ORCR's preliminary determination, EPA's air office, on a parallel track, has been working to develop 129 standards of performance for SSIs. Several court-ordered deadlines are driving this issue and EPA feels it is obligated to finalize 129 standards for SSIs by December of this year. ORCR's proposed definition of non-hazardous solid waste must be signed by April 15, in order for the air office to meet its deadlines on several other, unrelated incinerator rulemakings. Since January of 2009, however, NACWA has made significant headway with EPA, articulating the impacts of including biosolids in the definition of solid waste and the major consequences for communities that incinerate, should SSIs be regulated under Section 129.

### **The Case for Regulation under CAA Section 112**

NACWA reiterated a number of points from the September 2009 letter to the Assistant Administrators for the three offices. First and foremost, NACWA believes that EPA has overlooked the clear language in the CAA that publicly owned treatment works (POTWs) must be regulated under Section 112. For reasons that are unclear, EPA has handled SSIs on a separate track from treatment plant air emissions under the CAA. The definition of 'treatment works' in the Clean Water Act and EPA's regulations implementing that Act are clearly broad enough to encompass SSIs. In fact, EPA's construction grant program, which provided funding specifically linked to that definition of 'treatment works' has been used to construct and upgrade SSIs. Accordingly, NACWA believes that EPA must regulate the entire POTW, including any SSIs, under Section 112. NACWA also continues to assert that SSIs do not combust solid waste, as specifically required by the CAA for 129 regulation.

On the solid waste side of the issue, NACWA remains concerned that any EPA statement that biosolids are a solid waste could not only have implications for incineration, but could spill over and impact other management options like land application. Of primary concern to EPA's waste office and ORCR is its ability to retain authority over biosolids under its imminent hazard provisions in Section 7003 of the Resource Conservation and Recovery Act. NACWA detailed during the meeting how ORCR can craft a regulatory definition of non-hazardous solid waste that excludes biosolids managed under the Part 503 regulations. EPA has done this in the past, specifically excluding biosolids managed under Part 503 from its Part 257 solid waste regulations, and NACWA believes the Agency must again exclude biosolids from its new definition to preserve the careful balance among the air, waste and water programs and avoid duplicative regulation for biosolids. Creating a regulatory exclusion from the new definition for biosolids managed under Part 503 will preserve EPA's 7003 authority, avoid any of the unintended consequences associated with the solid waste stigma for biosolids, and ensure that SSIs are properly regulated under Section 112 of the CAA. NACWA received positive feedback on this point when Matt Hale, Director of EPA's ORCR, made it clear that the Agency understands NACWA's concerns and the potential for unintended consequences.

EPA faces a court ordered deadline of April 15 to propose several major CAA regulations relating to incineration and ORCR plans to release its proposed definition of non-hazardous solid waste at the same time. NACWA will continue to discuss the issue with EPA staff between now and April 15 and is preparing to develop comments when the proposal is released.

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## **Senate Begins Chemical Security Consideration; DHS Drafts Legislation**

The Senate is moving forward with its consideration of the reauthorization and expansion of the Chemical Facility Anti-Terrorism Standards (CFATS) program. The Committee on Homeland Security & Government Affairs held a hearing this week after the introduction of legislation by Senator Susan Collins (R-Me.), Ranking Member of the committee. The bill would reauthorize the current CFATS program for five years without making many changes, thereby maintaining the exemption for water and wastewater infrastructure. Rand Beers, Acting Deputy Assistant Secretary for Infrastructure Protection, testified at the hearing on behalf of the Department of Homeland Security (DHS). As part of his testimony, Beers informed the panel that DHS is currently drafting its own legislation to reauthorize the program and a draft proposal could be provided to Congress as early as this spring. The DHS draft bill is expected to include controversial "inherently safer technology" (IST) requirements and may include water provisions, as well.

Last November, the House of Representatives passed comprehensive chemical security legislation, *The Chemical and Water Security Act of 2009* (H.R. 2868), that included broad changes to the CFATS program including implementation of IST, the addition of water sector security, and civil suit enforcement provisions.

When pressed on the Administration's position on the House bill at the hearing, Beers said there are many similarities between the Administration's priorities and H.R. 286; however, DHS has concerns over the citizen suit provisions that could compromise sensitive security information. Peter Silva, Assistant Administrator for Water at EPA also testified on behalf of the Administration and both he and Beers re-emphasized that EPA would remain the lead agency with jurisdiction over water security matters; EPA would utilize DHS risk assessment tools and performance standards for water and wastewater facilities; and, where possible, implementation of IST provisions would remain with state primacy agencies.

Including IST requirements in Senate legislation could be a difficult task due to a lack of Democratic support. The legislation introduced by Senator Collins does not contain IST provisions and has the support of Democratic Senators Mark Pryor (Ark.) and Mary Landrieu (La.). In addition, Senators Carl Levin (D-Mich.) and Tom Carper (D-Del.) voiced serious reservations regarding IST requirements at the hearing – increasing the likelihood that the program will be extended in its current form and leaving the water and wastewater community exemption intact. NACWA will continue to voice the clean water community's position throughout this process and to ensure the least onerous outcome possible.

### **NACWA Meets with Key Senator's Office to Discuss Chemical Security**

On March 3 NACWA met with minority staff on the Senate Homeland Security & Government Operations Committee following a hearing on Senator Collins' bill (S. 2696) that seeks to extend the Chemical Facility Anti-Terrorism Standards (CFATS) program for five years in its current form, continuing the exemption for water and wastewater facilities. NACWA met with committee staff to discuss next steps for CFATS and the relationship between this bill and the Administration's stated preference to add water and wastewater chemical security oversight to the CFATS program. At this point, it appears likely that Sen. Collins' legislation will be on hold until the Obama Administration releases a draft bill they are currently working on. The Administration is not expected to release its bill for a number of months. NACWA will continue working with the U.S. Environmental Protection Agency (EPA) to monitor progress on the Administration's bill and will remain committed to ensuring that if Congress moves in the direction of adding chemical security requirements to clean water agencies, they are reasonable and not overly restrictive.

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## **Trust Fund Effort Gathers Momentum, Co-Sponsors Now Total 31**

NACWA continues its efforts to build support for H.R. 3202, *The Water Protection and Reinvestment Act of 2009*. In recent weeks, NACWA staff has been working to target members on the House Transportation & Infrastructure (T&I) Committee to increase support for the bill and build momentum for its consideration by the Committee. As a result of these efforts, last week Representative Tim Bishop (D-N.Y.) agreed to co-sponsor the bill, bringing the total number of co-sponsors to 31 – including eight co-sponsors from the T&I Committee. Last week, NACWA staff met with the offices of Representatives Harry Mitchell (D-Ariz.), Tom Boswell (D-Iowa), Chris Carney (D-Pa.), Phil Hare (D-Ill.), Bob Filner (D-Calif.), Mazie Hirono (D-Hawaii), John Hall (D-N.Y.), Nick Rahall (D-W.V.), Tim Walz (D-Minn.) and Laura Richardson (D-Calif.) to discuss the legislation and gain their support. As we continue to work to build support for this legislation, we encourage your state/regional organization and your utility members to touch base with your congressional delegations to urge them to co-sponsor the bill. Should you have any questions regarding NACWA's efforts, or on how to most effectively engage your congressional delegation, please don't hesitate to contact John Krohn at [jkrohn@nacwa.org](mailto:jkrohn@nacwa.org).

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## **Large Number of Great Waters Bills Shows Need for National Watershed Approach**

Recent weeks have witnessed a large number of bills advancing in Congress which authorize restoration programs at a number of "great waters" throughout the United States. Lawmakers representing Districts representing these ecologically significant watersheds are tackling water quality issues through regional approaches in part due to a lack of a comprehensive program at the national level. In just the past two months, bills have been introduced seeking to remove toxic chemicals from the Columbia River basin (H.R. 4652/S. 3025), combat invasive species in Lake Tahoe (S. 2724) and continue restoration activities in the Puget Sound (S. 2739), among other. Other waterbodies that have seen recent congressional attention include the Great

Lakes, the Long Island Sound and the Chesapeake Bay. NACWA will continue to track these efforts and provide comment where necessary – but is also pointing to this plethora of bills in its advocacy on the need for a new 21st century watershed approach that NACWA is working on with key stakeholders. (The complete text of legislation referenced in the Current is available at [www.thomas.loc.gov](http://www.thomas.loc.gov)).

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