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Election Dramatically Reshapes Power in DC; Infrastructure Poised as Top Priority

A tumultuous election season came to a close this month with the election of Donald Trump as the next President and Republicans maintaining majorities in both the House and the Senate. While Republican control of the Executive and Legislative branches, could bring some sweeping changes to the political landscape in Washington, DC, it could also provide some important opportunities to advance key NACWA advocacy priorities – with infrastructure investment likely to top the list.

During his election night acceptance speech, President-elect Trump referred to the need for investment in the nation's infrastructure; it was the only major policy initiative mentioned at the time. This follows multiple commitments Mr. Trump has made on the campaign trail about the need for a "new national infrastructure program," as well as a [commitment](#) from his campaign to triple investment in the Drinking Water and Clean Water State Revolving Loan Funds. It is also in line with a [letter](#) NACWA sent to the Trump campaign in August declaring the importance of water infrastructure investments. Although the specifics of such a program are still unclear, infrastructure is generally seen as a bipartisan issue that Trump could work on with both Republicans and Democrats early in his administration. NACWA will work aggressively in the

coming weeks to meet with both the Trump transition team and members of Congress to ensure that any infrastructure program includes a significant focus on clean water.

NACWA Opposes EPA Nutrient Removal Survey

NACWA filed [comments](#) on November 18, opposing the U.S. Environmental Protection Agency's (EPA's) reliance on Clean Water Act Section 308 to distribute and compel responses to a screener questionnaire, which is the first phase of EPA's multi-year study on nutrient removal performance at secondary treatment plants.

As designed, the initial screener questionnaire would be distributed to all publicly owned treatment works (POTWs) nationwide, regardless of size of treatment technology. NACWA has been tracking this issue carefully since learning of the Agency's efforts to develop the survey in May, raising concerns that the use of Section 308 would be problematic; and also questioning whether a massive nationwide study was the best way to evaluate opportunities for improvement in nutrient removal using only secondary treatment processes.

The NACWA Board of Directors voted during its November 18 meeting to oppose the screener questionnaire, given its reliance on Section 308, but stressed that it remained committed to working with EPA to better understand the goals of the study. The Board also committed to working with EPA, the water sector and the states to collect any needed information—on a voluntary basis only—to make progress in this area.

Utilities Invited to Sign Wipes Position Statement; DC Wipes Bill Takes Major Step Forward

The City Council of the District of Columbia is considering the [Nonwoven Disposable Products Act of 2016](#) legislation which would require wipes labeled "flushable" to meet flushability requirements, and non-flushable wipes to be clearly labeled with "Do not flush." The Council's Committee on Transportation & the Environment, chaired by Councilmember Mary Cheh, approved the draft legislation on November 7, 2016. NACWA and utility member, DC Water, testified in favor of the bill.

The current draft of the legislation uses the same principles for a flushability standard that are outlined in the international water industry [position statement](#) on wipes, which has been endorsed by NACWA, its member agencies, and state organizations clean water organizations in California and Oregon. If any other state groups would like to sign on, send [Cynthia Finley](#) an email. In October 24 [testimony](#), NACWA recommended this approach, as did DC Water. The legislation will next be considered by the full Council.

Watershed RDA Stormwater Petitions Denied by EPA Regions

EPA Regions 9 and 3 have denied the [2015 petitions](#) filed by the Natural Resources Defense Council (NRDC), American Rivers, the Clean Air Council, and local Waterkeeper groups. The petitions demanded that EPA exercise its residual designation authority (RDA) to permit private commercial, industrial, and institutional (CII) sites whose unpermitted stormwater discharges are contributing to violations of water quality standards in the [Dominguez Channel](#) and [Los Cerritos](#) watersheds in Los Angeles, and the [Back River](#) and [Amy Creek](#) Watersheds in the mid-Atlantic.

In denying the petition, EPA Region 9 referenced existing programs, such as the current NPDES MS4 permits in Los Angeles County and the City of Long Beach, that advance efforts to curb stormwater discharges. The response also concedes that separate permits for the Ports of Long Beach and Los Angeles may be necessary. Officials from EPA Region 3 specifically pointed to the Chesapeake Bay total maximum daily load (TMDL) in their justification for denying the [petitions](#) filed concurrently in Delaware and Maryland. EPA's response noted there are already programs in place that address the majority of CII stormwater discharges.

While the response to these denials from the petitioners is not yet clear, these petitions are indicative of the multiple approaches being taken by stakeholder groups to address urban stormwater runoff. Litigation over the petitions denials is possible.

[NACWA Concerns Addressed in Newly-Released EPA Phase II Stormwater Rule](#)

EPA Administrator Gina McCarthy signed the final [Municipal Separate Storm Sewer System \(MS4\) General Permit Remand Rule](#) on November 17 to modify the national small MS4 program, and NACWA is pleased that many of the concerns raised by the Association over the proposed rule were addressed in the final regulation. EPA anticipates the rule will be published in the Federal Register during the week of November 28, and become effective 30 days after publication.

The final rule satisfactorily addresses many of the issues NACWA, its members, and the Stormwater Committee raised in [comments](#) on the proposed rule earlier this year. The National Stormwater Advocacy Coalition, which is coordinated by NACWA, also submitted [comments](#). Most notably, the final rule only makes procedural changes to the Phase II MS4 program and endorses a "Permitting Authority Choice" option for issuing MS4 general permits. This will allow an NPDES permitting authority to choose between two alternative means of establishing permit requirements in general MS4 permits, which is similar to the "State Choice" option from the proposal.

New Stormwater Legal Whitepaper Released

NACWA is pleased to release the 2016 Edition of [Legal Considerations for Enacting, Implementing, and Funding Municipal Stormwater Programs: Navigating Litigation Floodwaters](#). This invaluable resource provides analysis on the types of legal issues impacting stormwater programs and presents an overview of trends that are emerging based on the outcomes of key cases.

When opposition to a fee program reaches the courts, there is always the potential that a program or fee could be struck down, leaving a utility in the position of being legally responsible to comply with the Clean Water Act yet unable to administer or fund the program. As such, it is imperative that stormwater utilities do their "legal homework" – including all relevant laws and previous cases on point in their respective state – to ensure the best chance of success for a fee program.

EPA Argues Narrative Criteria are Substantive Permit Terms in *Fola* Litigation

On October 6, [EPA](#) and the [State of West Virginia](#) filed briefs at the request of the court in [Ohio Valley Environmental Coalition v. Fola Coal Co.](#), which is currently pending before the United States Court of Appeals for the Fourth Circuit. The appeal before the Fourth Circuit arose from a [decision](#) by a federal district court that an NPDES permit provision incorporating water quality standards by reference actually created an independently enforceable effluent limitation, compliance with which is a prerequisite for protection under Clean Water Act (CWA) §402(k). Section 402(k) establishes that compliance with a NPDES permit is compliance with the CWA and provides a shield from citizen suits (the permit shield). In reviewing the decision, the Fourth Circuit requested that EPA and West Virginia file briefs to inform the court regarding the breadth of the permit shield's reach and application.

EPA argues in its brief that the court need not even address the question of application of the permit shield, but that instead the question "will be rendered moot" by the court's finding that the water quality standards incorporated into the permit constituted effluent limitations. The Agency further asserts that because the district court found that Fola Coal Company was in violation of those limits, the permit shield does not apply.

By contrast, West Virginia urged reversal of the district court's decision, arguing that cooperative federalism establishes a system whereby the federal government relies on state level experts to make determinations about how best to protect local water quality, and that the court should not substitute its judgment for the state. West Virginia further explains that a sweeping requirement to comply with state water quality standards cannot reasonably be interpreted to impose a substantive requirement given the specific effluent limitations in the permit, and argues that it instead is an instruction to the state to impose requirements necessary to meet water quality standards.

Upcoming Events and Deadlines

- [Apply today](#) for the Urban Waters program Five Star and Urban Waters Restoration Grant program. This grant program seeks to develop community capacity to sustain local natural resources for future generations by providing modest financial assistance to diverse local partnerships. Proposals are due by January 31, 2017.
 - [Register today](#) for NACWA's next *Legal Hot Topics Web Seminar* on December 7, which will address the legal impacts of EPA's recently released Phase II MS4 Remand Rule.
 - **Save the Date!** Plan now to attend NACWA's 2017 Winter Conference, February 4 – 7, 2017, in Tampa, Florida. *Next Generation Compliance ... Where Affordability & Innovation Intersect* will examine the intersection of increasingly stringent regulatory requirements with efforts to innovate – and the overarching challenge of affordability. NACWA's 2017 Winter Conference will be co-located with the AWWAWEF Utility Management Conference – with both taking place during the same week at the [Tampa Marriott Waterside Hotel](#).
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