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Senate Advances Water Bill with Key Clean Water Priorities

On a nearly unanimous 95-3 vote, U.S. Senate passed the [Water Resources Development Act \(WRDA\) of 2016 \(S. 2848\)](#) on September 15 and accomplished a milestone legislative achievement that puts Senators on record in favor of providing significant new investment tools and common sense regulatory reforms to help all Americans afford investments in clean and safe water. The bill's overwhelming support demonstrates that water is a broad bipartisan issue and acknowledges the nation's growing water infrastructure needs.

The bill contains a host of measures that will directly benefit clean water utilities all across the country. Among the legislation's key provisions are:

- Establishing a Water Infrastructure Trust Fund funded by a voluntary consumer goods label to spur additional investment in the Clean Water and Drinking Water State Revolving Funds, and authorizing a study of the feasibility of establishing a federal low-income ratepayer assistance program;
- Codifying EPA's Integrated Planning Framework, providing communities more time to meet regulatory obligations, and establishing an Office of Municipal Ombudsman to provide a voice for municipalities struggling to afford the cost of federal regulatory

requirements;

- Authorizing \$1.8 billion to help communities deal with extreme wet weather;
- Requiring EPA to revise its 1997 Combined Sewer Overflows Affordability guidelines; and
- Permanently authorizing the Water Infrastructure Financing & Innovation Act (WIFIA) program to provide additional federal clean water funding assistance by removing its "pilot" program designation.

The Senate WRDA package also includes a number of other key [clean water priorities](#), including language advocated by the Association to direct the U.S. Army Corps of Engineers to coordinate with local governments where local water resource plans, such as stormwater management or aquifer recharge, may be impacted by Corps' activities.

While passage of WRDA by the Senate is an important step, focus now shifts to the House of Representatives where debate on the House package, [H.R. 5303](#), has not yet occurred. House leaders have indicated a desire to move their WRDA bill before recessing for election year campaigning, and could advance the legislation this week or early next week. If the House is able to pass its measure, House and Senate committee staff could work on reconciling their respective packages and produce a WRDA conference report for enactment by the full Congress in December.

EPA Renews Call to Action on Nutrients, Sets Goal for Monitoring at All Major POTWs

EPA renewed its call to action on nutrients in a September 22 [memorandum](#) outlining new and ongoing efforts to make incremental progress on nutrients. The document "highlights the continued need for action to address this challenge" and calls upon states and stakeholders to "renew our commitment and accelerate our efforts" to address nutrient pollution. Of particular note, EPA states it will continue to strongly encourage and support the development by states of numeric nutrient criteria (NNC) and numeric translators for narrative standards, an issue on which NACWA has raised significant concerns.

The new memo recommitments the Agency to the approach it first laid out in a [March 2011 memorandum](#), which emphasizes making progress to address nutrient on all fronts while states continue to develop NNC for nitrogen and phosphorus. The September 22 memo is just the latest action from this EPA on the nutrient front. NACWA has also been actively engaged in the Agency's plans to conduct a [study](#) of the nutrient performance of secondary treatment (see article below), which is now cited in the new memo as a way to "support states and their communities" as they look for cost-effective ways to reduce nutrient loads.

NACWA plans to convene a Nutrient Summit in Spring 2017 to further develop an appropriate advocacy strategy on nutrient issues moving forward.

Study on Secondary Treatment, Nutrients Moves Forward

EPA is moving forward with plans to conduct a multi-year study of the nutrient removal performance of secondary treatment facilities, publishing a [Federal Register notice](#) to officially propose a screener survey for public review and comment. The Agency will send the screener survey to every clean water utility in the country, most likely in early 2017. EPA believes it needs the screener survey to establish a statistical baseline and to help identify which subset of utilities should receive a more detailed survey and be required to provide information on influent and effluent nutrient levels.

EPA shared a preliminary draft of the screener survey with NACWA in July, and the Association outlined several concerns in an August 1 [comment letter](#). A top concern is the Agency's planned use of its authority under Section 308 of the Clean Water Act to conduct the survey. Section 308 letters often proceed enforcement actions and NACWA's letter encouraged EPA to avoid using Section 308 to collect the information.

NACWA and the Agency met several times to discuss the issue, and while EPA believes it must use Section 308 to ensure a sufficient response rate, it agreed to include language indicating that the information it was collecting would only be used for research or statistical purposes. EPA's [response](#) to NACWA's August 1 letter outlines the Agency's rationale for using Section 308 and discusses how the screener survey would be updated to address many of the Association's comments.

NACWA is now reviewing the [revised screener questionnaire](#) and plans to provide comments, in addition to working directly with EPA staff as the Agency proceeds with the study.

NACWA Urges Flexibility in Great Lakes CSO Requirement

NACWA submitted [comments](#) September 23 regarding [EPA's development](#) of public notification standards for combined sewer overflow (CSO) discharges into the Great Lakes. In its comments, the Association requests that EPA establish flexibility in the requirements to allow utilities to determine the approach that works best for their infrastructure and their communities. NACWA also asked that the Agency not use the word "immediate" to describe the notification, since Congress did not require "immediate" notice in the Fiscal Year 2016 appropriations package that directed EPA to develop the public notification requirements.

Additionally, NACWA addressed how utilities should collect information about CSOs and when this information should be reported. To best protect public health, advance notice that CSOs might occur is most important, either through appropriate signs at recreation areas or through announcements when rainfall is expected that would cause a CSO. Other information, such as the volume of the CSO, can be reported later, and utilities should be given enough time to fully

analyze their data. Data obtained from models and real-time monitoring should be equally valid for the notification requirements.

EPA expects to release a proposal on the notification standards in December for public comment. NACWA will work closely with EPA as it develops the document, communicate its contents to Great Lakes utilities and organizations, and will provide additional comments on the proposal to ensure that the requirements are reasonable for utilities.

NACWA Signs International Wipes Position Statement

NACWA and a number of major utilities around the country have signed on to an ["International water industry position statement on non-flushable and 'flushable' labeled products."](#) The statement resulted from work on an International Organization for Standardization (ISO) technical specification for flushability, in which NACWA is participating. The statement emphasizes that only the "3 Ps" – pee, poop, and toilet paper – should be flushed, that wastewater utilities currently do not accept any flushability guidance for wipes, and that all wipes should be clearly labeled "Do Not Flush." If your utility is interested in signing the statement please contact [Cynthia Finley](#).

Legal Challenges Mount to Massachusetts Small Stormwater Permit

Around the country, stormwater permits and their underlying regulatory requirements are more and more frequently finding themselves in the courtroom. For example, a number of legal challenges have been filed recently to EPA's [2016 Massachusetts Small Municipal Separate Storm Sewer System \(MS4\) General Permit](#), raising the likelihood that the permit will force federal court consideration of a number of key elements of EPA's stormwater program.

There are currently at least three different challenges to the permit from the regulated community:

- The Center for Regulatory Reasonableness (CRR) [filed](#) a challenge in the U.S. Court of Appeals for the District of Columbia Circuit, arguing in part that the permit is illegal because it assumes any discharge into an impaired waterbody is a water quality violation.
- The National Association of Home Builders [filed](#) a challenge in the U.S. Court of Appeals for the First Circuit, claiming EPA has exceeded its authority in a number of ways, including an attempt to regulate stormwater based on flow instead of based on pollutants.
- The [Massachusetts Coalition for Water Resources Stewardship](#) (MCWRS,) a group representing municipal clean water interests in Massachusetts, has [jointly filed](#) a challenge with the Town of Franklin in the First Circuit. Among other issues, MCWRS argues that the permit goes beyond what Congress authorized EPA to do when regulating municipal stormwater discharges.

A challenge has also been filed to the permit by the environmental activist community. It is likely all the various cases will eventually be consolidated into one challenge in the D.C. Circuit, although the procedural specifics still need to be worked out. NACWA is closely monitoring developments and will likely get involved in the litigation at the appropriate time to represent the national municipal stormwater perspective.

NACWA Comments Outline Consequences of Proposed Changes to NPDES Program

NACWA submitted [comments](#) in August on EPA's proposed rulemaking regarding updates to the National Pollutant Discharge Elimination System (NPDES) program, expressing both support for and opposition to various elements of the proposal.

The bulk of the comment letter stresses the deep concern of NACWA and its members regarding EPA's intent to designate certain expired NPDES permits that are deemed "environmentally significant" as "proposed permits," at which point EPA could step in and federalize the permit. NACWA notes the many issues with this approach, including the potential for additional legal liabilities for utilities operating under a federal NPDES permit.

A key theme of the Association's comments is that the proposed rule's intent seems at odds with its likely consequences. The proposal touches a variety of components of the program: water quality based permitting, permit fact sheets, and administratively continued permits. Utility feedback indicated that while some of the information reporting and electronic reporting elements of the rule are practical, many utilities had concerns with the water quality based permitting language.

NACWA's comments reflect these concerns, stress the importance of dilution and mixing zones, design flows in setting permit limits, and underscore that antidegradation is a policy to be implemented by the water quality standards program, not to be used in a permitting context. NACWA will work closely with EPA moving forward as it seeks to finalize this rulemaking.

National Perspective Presented at State Meetings Across the Country

NACWA has been busy the past two months discussing important clean water issues with state & regional utilities across the country. The topics of discussion differed as much as the geography, ranging from regulatory insights to affordability challenges.

At the Kansas Water Environment Association and American Water Works Association 8th [Annual Joint Water and Wastewater Conference](#) in Topeka, Kansas, NACWA's Chief Technical Officer, Chris Hornback, highlighted the continued pressure being applied by EPA on states to make progress in controlling nitrogen and phosphorus discharges. Similarly, NACWA's Chief Executive Officer, Adam Krantz, presented on the challenge of rate setting at the 2016 [Water](#)

[Finance Conference](#) in Denver, Colorado. It was clear from a number of utility speakers at the conference, especially those from Western states, that rate setting is becoming a bigger and bigger challenge as water conservation efforts are decreasing revenue.

Cynthia Finley, NACWA's Director of Regulatory Affairs, presented at [Pacific Northwest Pretreatment Workshop](#) on the Association's advocacy work related to pretreatment and pollution prevention and NACWA's advocacy work on wipes, including the efforts to develop improved flushability guidelines and labeling practices

On the East coast, NACWA staff participated in a number of utility discussions and local government meetings. At the New Jersey Water Environment Association's [2016 Fall Technology Transfer Seminar](#), NACWA General Counsel, Amanda Waters, gave a [presentation](#) outlining litigation in [West Virginia](#) and [Illinois](#) that threaten to undermine the Clean Water Act (CWA) Section 402(k) Permit Shield and the potential impacts on NPDES permittees. In Washington, DC, NACWA members and staff attended the Joint Meeting of the Chesapeake Bay Water Resources Policy and Climate, Energy & Environment Committees to discuss water quality and energy issues.

NACWA is always happy to provide speakers for state and regional meetings to address clean water topics. Please contact [Brenna Mannion](#) for more information.

State/Regional Call Addresses Key Legal Topics

NACWA hosted a conference call August 31 with the Association's *State & Regional Exchange Network*, where representatives from 20 state and regional clean water organizations received an update on a number of critical ongoing clean water legal issues. Amanda Waters and Erica Spitzig, NACWA's General Counsel and Deputy General Counsel, outlined litigation in [West Virginia](#) and [Illinois](#) undermining the Clean Water Act permit shield. An environmental activist group challenge to the [Montana](#) nutrient variance and how the groundwater conduit theory is having its day in court in [Hawaii](#) were also discussed (*see slides from the call [here](#)*).

The Hawaii groundwater case, in particular, struck a chord with the call participants who supported a vigorous defense against hydrologic connectivity determinations and a possible extension to sewer system exfiltration – as similar cases have come up in other states, as well. NACWA's legal team is involved in cases coast to coast, and it is critical to have state and regional partners as they provide vital information pipeline for emerging legal issues at the local level.

The Association regularly convenes its *Exchange Network* of state and regional clean water and stormwater organizations, providing an opportunity for these groups to inform NACWA's efforts while also boosting national advocacy efforts through more local engagement.