



January 20, 2011

President Obama Signs Key NACWA-Backed Stormwater Fee Legislation into Law

Recently President Obama signed into law legislation (S.3481) that reinforces the federal government's responsibility to pay reasonable service charges to state and local governments to address stormwater pollution originating from federal properties. The legislation clarifies that federal agencies are responsible for paying all reasonable charges associated with implementing the Clean Water Act's requirements for stormwater management by local authorities. It also specifies that as long as these charges are non-discriminatory, based on a fair approximation of the proportionate share of stormwater pollution contributed by the federal property and are used to pay for costs associated with any stormwater management program, then these fees must be paid by federal agencies. This is the case regardless of whether the services are denominated as assessments, charges, fees, or taxes. NACWA sent an Exchange Alert on the new law recently highlighting NACWA's leadership role in the bill's passage as well as next steps. The first of these key steps will be interagency guidance expected to be issued soon by the Department of Justice (DOJ) outlining how federal agencies should implement the law and to what extent it will apply to current outstanding bills. NACWA will continue to keep your state organization updated on this issue.

EPA Still Considering Regulatory Action on SSO, Collection System Issues

NACWA recently learned that EPA continues to evaluate the possibility of pursuing a comprehensive national policy addressing sanitary sewer collection system issues and sanitary sewer overflows (SSOs) and is now expected to make a determination on whether to proceed with such a policy in early 2011. The Agency announced in July 2010 through a [Federal Register notice](#) that it was requesting public input on whether to pursue additional regulatory proposals regarding sanitary sewer collection systems and SSOs, and subsequently informed NACWA in October 2010 that a decision on the matter was expected to be made by the end of the calendar year. However, at a meeting in late December, EPA staff informed NACWA that internal deliberations regarding a potential national SSO rule were continuing and that a determination regarding possible next steps on the issue would not be made until after the New Year.

NACWA submitted comments to EPA in August encouraging the Agency to pursue a comprehensive, holistic policy addressing SSO and sanitary sewer collection systems issues. The Association continues to assert that in order to provide clean water utilities with much-needed regulatory predictability and consistency, especially regarding the issue of peak wet weather flow blending, such a policy is critical. This view has been bolstered by the recent U.S. Eighth Circuit Court of Appeals decision affirming the dismissal of a lawsuit filed by the Iowa League of Cities regarding blending issues. NACWA will continue to advocate with EPA and is prepared to take legal action when appropriate on these very important issues and will report any new developments to your state/regional organization as they occur.

EPA Makes Key Staff Changes: Silva to Leave EPA, Stoner to Serve as Acting AA for Water

EPA Administrator Lisa Jackson announced that effective February 12, Pete Silva will be leaving EPA and his position as Assistant Administrator (AA) for the Office of Water and plans to return to California. Upon Silva's departure, Nancy Stoner will be named acting AA for Water. NACWA worked closely with Silva on a suite of issues, always found him approachable and knowledgeable and wishes him well in his future endeavors. NACWA has enjoyed a long working relationship with Nancy Stoner and will continue to work closely with her in her new role as acting AA for Water. In other staffing moves at the Agency, Bicky Corman has been appointed to the position of deputy associate administrator for the Office of Policy while Joel Beauvais will join the EPA as senior advisor in the Office of General Counsel.

Court Grants Brief Extension to Provide Additional Time for Ruling on Incineration

On Wednesday, the U.S. District Court for the District of Columbia issued an interim order granting a five day, temporary extension of the January 16 deadline for EPA's signature of final Clean Air Act (CAA) standards for sewage sludge incinerators (SSIs). The purpose of the new January 21 deadline is to give the Court a little more time to make its final decision on whether EPA should be granted its request for additional time to finalize several CAA rules, including an additional six months to finalize the proposed maximum achievable control technology (MACT) standards for SSIs. EPA's request for a new deadline of July 15, 2011 for signing the final SSI rule would provide the Agency with more time to review the numerous substantive comments it received on the proposal, from NACWA, many of its members, and other clean water community stakeholders.

The deadline for signing the SSI rule, as well as rules for boilers and certain incinerators, has been extended several times and the Sierra Club, whose original lawsuit is driving the development of the rules, has raised objections to extending the deadline again. NACWA has supported EPA's request for an extension, filing a [motion](#) with the Court that outlines the significant errors that must be corrected in the proposed standards and the extensive new information provided by NACWA and others that EPA must now consider before it finalizes the rule. Concurrent with its efforts to develop CAA rules for SSIs, EPA is also developing a related rule defining whether a list of secondary materials, including sewage sludge, are solid wastes when combusted. That rule, though not subject to the court-ordered deadline, will continue to follow the same track as the air rules and be finalized as a package. In the meantime, NACWA continues its advocacy efforts to persuade EPA that it lacks the authority to promulgated MACT standards for SSIs under Section 129 of the CAA, and that instead EPA should work to develop standards for SSIs under the more flexible provisions of Section 112 of the CAA.

Greenhouse Gas Tailoring Rule Changes Should Benefit POTWs

EPA announced that it is deferring Clean Air Act (CAA) greenhouse gas (GHG) permitting requirements for biogenic carbon dioxide (CO₂) emissions for three years and will use this time to study these emissions and develop a rulemaking on how they should be treated under the CAA. The announcement was made by EPA Administrator Lisa Jackson in [letters](#) to Sens. Stabenow (D-Mich.), Baucus (D-Mont.), Merkley (D-Ore.), and Rep. DeFazio (D-Ore.) and through a [press release](#). The letters state that EPA will complete a rulemaking by July 1 "to defer for three years the application of the pre-construction permitting requirement to biomass and other biogenic CO₂ emissions." The letters do not refer to the Title V operating permits under the CAA that many publicly owned treatment works (POTWs) already have, and NACWA has contacted EPA to find out if the Agency intends for biogenic emissions to also be deferred for Title V permits.

Regulation of GHGs under the CAA took effect on January 2, and the prevention of significant deterioration (PSD) and Title V permitting programs of the CAA are being phased in incrementally for GHG emissions under the GHG Tailoring Rule. EPA used this incremental basis so that only the largest emitters would be affected for

the first two years of the program. There was, however, insufficient guidance on how emissions should be calculated and several NACWA members had already been contacted by their state permitting authorities who believed that the GHG emissions from the wastewater utilities would exceed current thresholds in the GHG Tailoring Rule. Exemption of biogenic emissions – such as CO₂ emissions from the combustion of biosolids and biogas and the wastewater treatment process – will likely keep wastewater utilities under the current thresholds. GHG emissions from non-biogenic sources – such as those from combustion of fossil fuels, anaerobic digesters, and the nitrification/denitrification process – will still be subject to current requirements. States may also have more stringent permitting requirements than EPA and may still include biogenic emissions in their requirements.

NACWA asks that you contact Cynthia Finley at cfinley@nacwa.org if you have received notification from their air quality regulator that they may be subject to CAA requirements due to GHG emissions.

EPA Releases Controversial Memo on Stormwater TMDLs and Permits, NACWA to Respond

EPA recently issued a [memorandum](#) to state and federal clean water authorities calling for a change in the way total maximum daily load (TMDL) wasteload allocations (WLAs) are established for stormwater discharges and calling for the inclusion of numeric effluent limits in municipal stormwater permits. The memo, which updates a previous 2002 directive from EPA regarding TMDL WLAs for stormwater, has prompted significant concern in the municipal stormwater community and NACWA is currently evaluating a number of possible responses. The memo directs TMDL authorities to create more “useful” WLAs for stormwater discharges that take into account the true impact of stormwater on water quality. It also suggests that TMDL writers should use surrogate parameters such as stormwater flow volume or impervious cover when developing WLAs for stormwater.

Movement toward Numeric Effluent Limits Clear

Additionally, the memo directs municipal separate storm sewer system (MS4) permit writers to include numeric water quality-based effluent limitations (WQBELs) in NPDES permits for stormwater discharges using numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as stormwater flow volume or percentage of impervious surface cover. The memo also strongly suggests that WQBELs for MS4 discharges in the form of best management practices (BMP) may no longer be appropriate in certain circumstances. Taken together with other recent documents published by EPA regarding stormwater permitting, as well as recent draft permits issued by the Agency, this memo provides additional evidence that EPA is moving away from a traditional BMP approach to stormwater management and towards the use of numeric effluent limits and aggressive green infrastructure/low impact development requirements in stormwater permits.

NACWA has significant concerns with the memo, including the fact that it ignores over ten years of case law clearly establishing the fact that numeric effluent limits are not required for stormwater permits under the Clean Water Act. The memo also distorts the U. S. Ninth Circuit Court of Appeal's seminal decision in *Defenders of Wildlife v. Browner* regarding the requirements for MS4 permits and misinterprets the clear language of Section 402(p) of the Clean Water Act with regard to the required controls in MS4 permits. Additionally, NACWA is concerned with the manner in which the memo was developed and released by EPA without any consultation with the states or the regulated community. NACWA's Stormwater Management Committee will be holding a conference call on December 17 to discuss the memo and an appropriate response. Agencies not represented on the Stormwater Management Committee but interested in participating in the call should contact Nathan Gardner-Andrews at ngardner-andrews@nacwa.org. NACWA will also be meeting with municipal and state groups soon to evaluate a possible joint response effort.

Mark Your Calendar and Register Today for these NACWA Offerings!

NACWA's 2011 Winter Conference is almost here! Join us in Ft. Lauderdale February 1-4 for [Understanding the New Paradigm for Wet Weather & Collection System Management](#). This year's agenda focuses on how utilities can best adapt to the substantial changes to wet weather regulations that are on the horizon. The Conference

will emphasize smarter investment under both current and future regulations and explore how prioritized investment in infrastructure will become more and more important as new regulatory requirements further strain tight budgets. Speakers and panelists will also explore creative solutions to the challenges of collection system management – as well as privately-owned systems and laterals – regardless of whether they are located in a wet or arid region. With a hotel deadline of Monday, January 17, [make your plans today!](#)

Join clean water utility executives in Washington, DC, March 1-2, for the [Money Matters Summit and Fly-In](#), a unique opportunity that will bring together clean water agency leaders and top EPA and Congressional policymakers to discuss real-world financial and affordability challenges. There is no registration fee for this important *Summit & Fly-In*. Clean water utilities throughout the country continue to make sound investments in their systems, but face a regulatory landscape where everything has become a priority and economics have become an afterthought. Make your plans today to ensure our community's voice is heard on national issues that may impact clean water utilities now and in the future.

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Please feel free to contact Thea Graybill, Government Affairs Assistant with any questions or concerns at tgraybill@nacwa.org.

