

# CLEAN WATER ADVOCATE

Led by U.S. Representative Tom Bishop, key bipartisan members of the House Transportation & Infrastructure Committee have introduced *The Water Quality Protection and Job Creation Act of 2011 (H.R. 3145)*.



A Clear Commitment to America's Waters

OCTOBER/NOVEMBER 2011

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## NACWA

National Association of Clean Water Agencies  
1816 Jefferson Place, NW  
Washington DC 20036-2505

p 202.833.2672 f 202.833.4657  
info@nacwa.org · www.nacwa.org

## NACWA Receives Commitment on Integrated Permitting/Regulatory Prioritization from EPA

Building on the momentum generated through its recent high-level meetings with the U.S. Environmental Protection Agency (EPA) as part of the Association's *Money Matters™* campaign, NACWA staff and member agency leaders, and representatives from the Water Environment Federation (WEF) and American Public Works Association (APWA) met October 3 with senior EPA water and enforcement officials on the need for a new, more flexible approach to meeting the mandates of the Clean Water Act (CWA).

At the meeting, EPA committed to craft an integrated planning framework that would address many of the elements of NACWA's *Money Matters™* campaign. The Agency was particularly interested in helping utilities use new and innovative approaches, including green infrastructure, and in providing a better way to integrate the

planning and permitting of all utility CWA obligations.

Utility representatives at the meeting provided recommendations on a wide range of issues EPA should address, as well as examples of where innovation and integration is already occurring.

It was clear that the clean water community has made strides to leverage existing flexibility – and that these efforts could serve as a foundation for this new work.



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### Regional Memo Planned, Draft Framework Underway

During the meeting EPA reported that it has already begun work to scope out the effort. Next steps include a review of all CWA obligations, including stormwater. The Agency will stop short of including most drinking water obligations (beyond source water protection-related efforts) and any non-water related obligations.

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## NACWA Ramps Up Legal, Legislative Pressure on SSI Rule

NACWA increased the tempo of its advocacy efforts on the U.S. Environmental Protection Agency's (EPA) final air emission rule for sewage sludge incinerators (SSIs). The Association is strongly pursuing both legal and legislative avenues to secure a repeal of the rule and the promulgation of revised SSI regulations under the appropriate section of the Clean Air Act (CAA). These efforts come after NACWA learned, in late August, that EPA was planning to deny significant portions of the Association's administrative *Petition for Reconsideration and Stay* of the final rule, including NACWA's request that EPA properly regulate SSIs under section 112 of the CAA, as directed by Congress, instead of under the inflexible standards of CAA section 129.

In response, NACWA aggressively moved forward with its existing lawsuit against EPA and filed an *Emergency Motion for Judicial Stay* of the final rule with the federal appeals court in Washington, DC in early September. The motion asks the court to judicially place implementation of the rule on hold until such time as the merits of NACWA's lawsuit are resolved. It outlines legal arguments against the rule and highlights the significant operational, financial, and environmental harm facing utilities that rely on SSIs for safe and effective biosolids management if the rule is not stayed. The motion also requests that the court make a decision on whether to issue a stay as soon as possible.

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## NACWA Joins Municipal Coalition in U.S. Supreme Court Case

NACWA, and a number of other key municipal organizations, filed a [brief](#) ↗ Sept. 29 with the U.S. Supreme Court in the case of *Sackett v. U.S. Environmental Protection Agency* (EPA). The case addresses the critical question of whether the federal Clean Water Act (CWA) allows for pre-enforcement judicial review of administrative orders (AOs) issued by EPA. This issue has grown in importance for clean water agencies across the country as EPA continues to increase its use of AOs against municipal utilities.

The joint municipal brief urges the Supreme Court to overturn a lower court decision prohibiting review of AOs. It argues that nothing in the language or history of the CWA indicates a Congressional intent to prohibit pre-enforcement review of these orders. The brief provides examples of how EPA has abused its power in issuing AOs to public clean water agencies and how the

Agency has used AOs to circumvent the protections in the National Pollutant Discharge Elimination System (NPDES) program that shield permittees from unreasonable enforcement actions. It encourages the Supreme Court to curb these abuses by allowing for pre-enforcement judicial review of AOs, and argues that the denial of pre-enforcement review of AOs violates the due process clause of the U.S. Constitution.

Other municipal clean water organizations joined with NACWA on the brief include the Wet Weather Partnership, state municipal wastewater associations from Virginia, Maryland, North Carolina and South Carolina, and the City of New York. Additional information on the case is available on NACWA's [Litigation Tracking page](#) ↗. Oral arguments in the case are not expected until early 2012, with a decision likely sometime next spring. 💧

## Congress Urged to Support Direct Funding for Clean Water Infrastructure

As Congress continues to debate measures to increase jobs and decrease spending, NACWA has maintained its presence on Capitol Hill with one key message: Congress must include at least \$10 billion in direct funding for investments in clean water infrastructure in any jobs package. In a [letter](#) sent to all Capitol Hill offices, NACWA states that, like investments in the country's transportation systems and schools, investments in clean water infrastructure are equally important. These investments improve the country's aging water infrastructure and potentially create hundreds of thousands of jobs.

### Jobs Bill Rejected by Senate

On October 11, the Senate voted down *The American Jobs Act of 2011*, President Obama's jobs proposal that would provide direct spending in several infrastructure sectors and create a national infrastructure bank for transportation, water/wastewater, and energy projects. The bill's rejection was anticipated, and Senate Democrats are now likely to disassemble the package and push for votes on various provisions. NACWA remains hopeful that one of those provisions will include an infrastructure investment component. The Association will continue to work with members of Congress to ensure \$10 billion in direct funding for clean water infrastructure is part of any legislation moving forward.

### House Legislation Support Infrastructure Investment

Leaders of the House Transportation & Infrastructure Committee introduced *The Water Quality Protection and Job Creation Act of 2011* (H.R.

3145), bipartisan legislation that proposes two complementary initiatives for the long-term financing of wastewater infrastructure – the establishment of direct loan and loan guarantee programs, and a Clean Water Infrastructure Trust Fund.

These proposals, when implemented together, would leverage billions of additional dollars to meet local wastewater infrastructure needs. This bill is cosponsored by Representatives Tim Bishop (D-NY), Nick J. Rahall (D-WV), Tom Petri (R-WI), and Steven LaTourette (R-OH). NACWA was instrumental in gaining their support, and plans to work closely with them to help develop further support for this legislation. 💧



## Hot Topics Breakfast Draws Crowd, EPA Discusses SSO Rule



NACWA's annual Hot Topics Breakfast during WEFTEC 2011 in Los Angeles, Calif. drew over 70 participants and featured U.S. Environmental Protection Agency's (EPA) James Hanlon, director of the Office of Wastewater Management; Ephraim King, director, Office of Science & Technology; and, Loren Denton, acting chief, Municipal Enforcement Branch. During the breakfast, Hanlon and Denton discussed the wet weather permitting approach that EPA is pursuing, inspired by NACWA's Money Matters™ Campaign. Hanlon also reiterated the Agency's commitment to pursuing a comprehensive sanitary sewer overflow (SSO) rule but could not give a timeline on when progress could be made. Hanlon noted that as we approach the 40th anniversary of the Clean Water Act, in order to make continued improvement to our water quality, we must have a discussion on water priorities, cost for improvement, and the regulation of nonpoint sources.

## Law Seminar to Address Cutting-Edge Legal, Regulatory Issues

NACWA's 2011 *Developments in Clean Water Seminar* is just around the corner and promises to deliver an engaging and timely agenda covering critical legal topics directly affecting the operations of municipal clean water utilities. Scheduled for November 16-18 at the Francis Marion Hotel in historic Charleston, SC, the Seminar will feature top clean water attorneys as speakers and provide an excellent opportunity to network with leading clean water professionals. Registration is still available and Continuing Legal Education (CLE) credits will be offered.

### Consent Decree Reopeners Examined

Among the topics to be addressed at the conference will be a panel discussion, *Every Utility Needs a Do-over: Pursuing Reopeners in Wet Weather Consent Decrees*. The panel will explore the opportunities and hurdles agencies face when attempting to reopen existing consent decrees. Case studies of utilities that have successfully secured a reopener will be featured. More and more clean water agencies are interested in altering their existing decrees due to changed economic circumstances and the emergence of new technologies, such as green infrastructure and low impact development, but there are substantial legal challenges to successfully completing a reopener. This panel will provide both practical tips and potential legal strategies for accomplishing this goal.

### Wet Weather Issues a Focus

Wet weather issues will also receive substantial attention during the Seminar. A panel, *Don't Forget Your Umbrella: The Growing Legal*

*Challenges of Wet Weather Management*, will focus on sanitary sewer overflows (SSOs) and municipal stormwater issues. As EPA continues to move in the direction of a national SSO rule, the legal and regulatory questions for clean water agencies over how to deal with SSOs continue to mount. Speakers on this panel will address these issues and provide an update on what utilities need to know involving SSOs. The panel will also examine legal developments impacting municipal stormwater, including EPA forthcoming post-construction stormwater rule and the re-emergence of litigation over federal payment of municipal stormwater fees.

Other topics to be covered at the seminar include nutrients, water quality issues, biosolids management, and clean water enforcement actions. Additionally, Alexandra Dunn, Executive Director and General Counsel of the Association of Clean Water Administrators (ACWA, formerly ASIWPCA), will provide the keynote address at the opening day luncheon and discuss how clean water utilities and their state regulators can improve communication and collaboration in the face of growing mutual clean water legal challenges.

### CLEs Offered

Additional information on the Seminar is available on [NACWA's website](#), including an agenda, complete list of CLE offering, and hotel and conference registration information. This November 16-18 *Seminar* is the only one of its kind to address the wide array of legal issues impacting clean water attorneys and professionals. 📌

## Integrated Permitting/Regulatory Prioritization

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All options within current authorities under the CWA will be explored.

A memorandum to Regional Offices is planned for release in October. EPA has already begun work on a draft framework of an integrated planning approach for clean water utilities. With the draft framework in hand, EPA will then seek stakeholder feedback, and a continued discussion with NACWA and its members to refine

the concept further.

NACWA continues to maintain an aggressive effort on Capitol Hill to boost support for its legislation and to encourage Members of Congress to weigh in with EPA regarding the importance of advancing with this initiative in a timely manner. NACWA plans to maintain pressure on all fronts to provide the relief the clean water community needs. 🌊

## NACWA's Clean Water Careers: Your Online Recruitment Resource

**H**ave you been looking for a new place to advertise for your agency or company's job openings? Public agencies and consulting firms across the United States have discovered the value of NACWA's *Clean Water Careers* employment resource. The page features employment opportunities at clean water, stormwater and drinking water agencies – as well as openings at consulting firms nationwide. Just listed postings include:

- Engineer, for Orange County Sanitation District in Fountain Valley, Calif.
- Water Production Superintendent, for the City of Olathe, Kansas

The *Clean Water Career's* page has historically been one of NACWA's most-visited, with over 2,000 page views a month. Advertise employment openings for only \$250 per 30 days of posting with the certainty that your ad targets water sector professionals. Visit NACWA's [Clean Water Careers page](#) to place your advertisement today! 🌊



## Legal, Legislative Pressure on SSI Rule

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### Capitol Hill Engaged on Issue

At the same time, NACWA stepped up efforts on Capitol Hill to focus attention on the SSI issue. In late September, the Association met with congressional staff to seek a potential legislative solution. These meetings resulted in agreement from key congressional offices to weigh in with EPA Administrator Lisa Jackson and her staff urging that the Agency revisit its plan to deny NACWA's administrative reconsideration request. Additionally, NACWA forwarded a [letter](#) to Administrator Jackson on Sept. 30 asking her to re-evaluate EPA's planned denial of the reconsideration request. The letter highlights the significant negative impacts that the rule will have on urban communities, all across the nation, during a time

of economic distress. It further notes that NACWA is not seeking to avoid regulation of SSIs, but instead is seeking to ensure that SSIs are regulated under the appropriate section of the CAA, as Congress intended.

Additional information on NACWA's SSI advocacy efforts can be found on the [Biosolids Management/Incineration](#) and [Litigation Tracking](#) sections of the Association's website. NACWA's ongoing work on SSI issues is supported through the Association's Sewage Sludge Incineration Advocacy Coalition (SSIAC). NACWA is extremely grateful to all the SSIAC members for their continued support. 🌊

# Granted Intervention in Chesapeake Bay Daily Loads Case, NACWA Defends Holistic Watershed Approach

**N**ACWA was granted intervention Oct. 13 in critical litigation over the final total maximum daily load (TMDL) for the Chesapeake Bay. This action cleared the way for the Association, and its municipal coalition partners, to participate in the case and defend the holistic watershed approach that was outlined in the TMDL from assault by nonpoint source agricultural interests. The [order](#) granting intervention issued by the U.S. District Court for the Middle District of Pennsylvania found that NACWA and its municipal partners have a legally protectable interest to justify intervention in the case, including both an “interest in the amount of nutrients and sediment their members are authorized to discharge” as well as “economic interests of preserving their capital investments in treatment upgrades.”

### Important Legal Precedent Established

The court also noted that given complexity of the issues involved in the case, allowing NACWA and the other intervenors into the case can “serve to clarify issues and...contribute to resolution of this matter.” The court granted NACWA’s intervention in the liti-

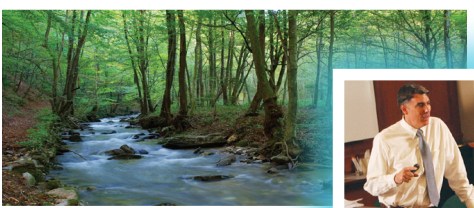
gation under the “as of right” legal test, establishing an important legal precedent that will be very helpful to the Association – and individual clean water utilities that may seek to intervene in other TMDL-related cases in the future.

NACWA filed a [Motion to Intervene](#) in the case in May as an intervenor defendant on the side of EPA. By doing so, NACWA sought to protect the interests of its municipal clean water agency members in the litigation and defend EPA’s ability to address all sources of water quality impairment. NACWA was joined in the motion by the Maryland Association of Metropolitan Wastewater Agencies (MAMWA) and the Virginia Association of Metropolitan Wastewater Agencies (VAMWA). The litigation stems from an attempt by the American Farm Bureau, and a host of other agriculture groups, to challenge the final TMDL and limit EPA’s ability to regulate non-point agricultural dischargers as part of the TMDL implementation. NACWA anticipates participating in the summary judgment phase of the litigation in the coming months. ●

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