



EXECUTIVE COMMITTEE
PRESIDENT

Jeff Theerman
Executive Director
Metropolitan St. Louis
Sewer District
Saint Louis, MO

VICE PRESIDENT
David R. Williams
Director of Wastewater
East Bay Municipal
Utility District
Oakland, CA

TREASURER
Suzanne E. Goss
Government Relations Specialist
JEA (Electric, Water & Sewer)
Jacksonville, FL

SECRETARY
Julius Ciaccia, Jr.
Executive Director
Northeast Ohio Regional
Sewer District
Cleveland, OH

PAST PRESIDENT
Kevin L. Shafer
Executive Director
Milwaukee Metropolitan
Sewerage District
Milwaukee, WI

EXECUTIVE DIRECTOR
Ken Kirk

January 21, 2011

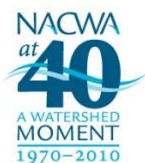
Ms. Connie Bosma
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code 4203M
Washington, DC 20460

Dear Ms. Bosma:

The National Association of Clean Water Agencies (NACWA) submits these comments in response to the federalism consultation held by the U.S. Environmental Protection Agency (EPA) with NACWA and a number of other municipal and state organizations on December 9, 2010 regarding EPA's ongoing efforts to develop a new national post-construction stormwater rule. NACWA very much appreciates EPA's invitation to participate in the federalism consultation on this rulemaking effort that will have significant impacts on NACWA's stormwater and clean water utility members. The comments outlined in this correspondence are in response to the issues discussed at the December 9 meeting as well as the PowerPoint presentation regarding the rulemaking effort provided by EPA. This comment letter will provide some general thoughts on the rulemaking process, as well as comments on three specific areas that EPA is considering for inclusion in the rule. Additionally, NACWA has previously provided comments to EPA regarding the stormwater rule on February 26, 2010 and December 7, 2010. NACWA attaches those comments to this letter and requests that they be incorporated into the record as well.

General Comments:

As true environmentalists working on the front lines of environmental protection to improve the health of our nation's waters, NACWA members recognize the important need to address the growing water quality impairment caused by urban stormwater runoff across the nation. NACWA understands that in order to meet the challenges presented by urban stormwater, it is necessary to re-examine the traditional methods of stormwater management and consider the use of new, innovative solution to reduce the impacts of water quality impairment. We are supportive of efforts to improve stormwater management.



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

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



Among the new approaches to stormwater management that show great promise are the use of green infrastructure and other low impact development techniques. NACWA as an organization has been very supportive of green infrastructure, serving with EPA as one of the original signatory organizations to the 2007 Green Infrastructure Statement of Intent, and many NACWA utility members have actively embraced green infrastructure as a way to improve water quality and provide other environmental benefits to their local communities. NACWA is pleased that EPA has recognized the important benefits of green infrastructure in this context and believes the Agency should appropriately encourage the use of green infrastructure in the eventual stormwater rule proposal.

At the same time, NACWA would also like to remind EPA as it develops the new stormwater rule that Congress's 1987 amendments to the Clean Water Act addressing municipal stormwater runoff created a unique standard for municipalities to reduce pollutants in stormwater, known as the "maximum extent practicable" or MEP standard. This standard was different from the technology-based standard required of industrial stormwater dischargers and recognized the unique challenges faced by municipal dischargers in controlling urban runoff, particularly with regard to cost. In creating a separate MEP standard for municipal stormwater permits, Congress clearly intended for cost considerations to be part of the process in determining what kind of requirements are appropriate for permits issued to municipal separate storm sewer system (MS4) dischargers. The MEP standard is still the law of the land with regard to MS4 permit requirements until such time as Congress may change it, and thus any new requirements for municipal dischargers proposed by EPA in the forthcoming rule must adhere to the MEP standard and be developed with consideration of the cost for municipalities to meet new standards.

The following are comments on three specific ideas presented by EPA during the federalism consultation regarding specific options currently under consideration by the Agency for inclusion in the stormwater rule. NACWA notes that without a specific rule proposal to review at this time, the Association cannot take any firm position on what we may or may not be able to support. But the following comments reflect NACWA's current thinking on a number of items under consideration by EPA for inclusion in the rule.

Expanding the Area Subject to MS4 Jurisdiction:

As previously stated in our February 26, 2010 comment letter (attached), NACWA is generally supportive of efforts to bring previously unregulated discharges within the National Pollutant Discharge Elimination System (NPDES) permitting structure. Such an approach is consistent with NACWA's position regarding the benefits of looking at all sources of pollution within a watershed and allocating responsibility to reduce that pollution to the appropriate dischargers rather than placing all of the burden on existing point sources. NACWA believes that EPA should continue to study the possibility of expanding the areas subject to MS4 jurisdiction as part of the rulemaking process and looks forward to seeing how EPA addresses this issue in the rule proposal. NACWA is particularly supportive of expanding the NPDES stormwater program to currently unregulated sources if it is done as part of an overall watershed approach to permitting that looks at all sources of water quality impairment, including agricultural runoff.

EPA presented a number of different options during the federalism meeting as to how MS4 jurisdiction could be expanded in the proposed rule. NACWA has no additional position at this time regarding the various options on the table other than the previous comments submitted in our February 26 letter. However, one additional proposal discussed by EPA at the federalism meeting involves the potential to craft a rule that allows

EPA (or a delegated state permitting authority) to identify specific dischargers outside of an MS4 jurisdiction that should be regulated due to their impact on water quality. NACWA believes this concept is worthy of additional consideration by EPA for inclusion in the rule proposal because it will address the growing issue of dischargers such as large residential subdivisions or large commercial properties located outside of a regulated MS4 area but still significantly contributing to water quality issues, creating water quality complications for downstream regulated MS4s and other point sources. Additionally, regulation of such discharges located outside the MS4 will address the significant concern that more stringent regulations within a defined MS4 area will simply encourage developers to go outside an MS4 boundary and develop previously undeveloped areas (or “green fields”) in an effort to avoid stormwater regulation.

New Development/Redevelopment Standards:

NACWA believes that new development and redevelopment requirements designed to reduce stormwater runoff can play a very important role in addressing urban water quality issues, and NACWA would be supportive of such an approach in the stormwater rule proposal depending on how the requirements are structured. As discussed in our previous comments to EPA, managing stormwater on-site and preventing excess stormwater flows from running off impervious surfaces is a key step towards improving water quality in many of the nation’s watersheds, and green infrastructure and low impact development techniques in new development and redevelopment projects can play a critical role in addressing urban stormwater concerns. However, any new development and redevelopment requirements included in the stormwater rule proposal must take into consideration the varying geographic, climactic, and hydrologic condition found in different regions of the country and allow for the development of new development/redevelopment standards that account for these regional variations. It is critical that these performance standards be flexible enough to allow communities to create new development/redevelopment requirements appropriate for their unique stormwater needs. The rule should allow states to develop specific performance criteria that work for their local communities, and even allow for differing standards based on specific regional or local characteristics and needs.

Additionally, NACWA strongly supports the approach suggested by EPA at the federalism meeting that the rule allow exceptions to the new development/redevelopment criteria if the proposed standards cannot be met, such as where there is concern with groundwater pollution of source water, conflict with water rights, or site constraints. Permitting authorities should be given the ability to develop alternative standards or other mitigation measures as necessary. As stated above, NACWA would also support applying new development/redevelopment requirements as necessary to sites discharging outside the regulated MS4.

With specific regard to redevelopment requirements, NACWA recognizes that redevelopment standards in highly urbanized areas can play a critical role in reducing stormwater and its associated pollutants, and is supportive of a redevelopment requirement as part of the stormwater rule. However, as outlined in our February 26, 2010 comment letter, NACWA encourages EPA to be sensitive to the unique challenges facing redevelopment projects in economically depressed urban areas, including the need for cities to revitalize these neighborhoods, attract new business and residents, and increase the tax base. Redevelopment requirements should not discourage much needed urban revitalization by making it economically infeasible. Instead, redevelopment standards related to stormwater must not only encourage environmental improvements, but also support economic and social improvements in the nation’s urban core. For these reasons, NACWA supports the options presented by EPA at the federalism meeting which would allow for redevelopment

performance standards that are different from those for new development, including the opportunity to receive credit for redeveloping in certain areas or a standard that focused on a percent reduction of impervious surface as part of the redevelopment project instead of an on-site stormwater retention performance standard. EPA's redevelopment standard should focus on how to encourage much needed urban redevelopment in a way that is environmentally responsible and economically viable.

Retrofit Requirements:

NACWA has significant concerns with the retrofit plan EPA is considering for inclusion in the stormwater rule proposal. As stated in our previous comments filed last year, such an approach would be extraordinarily expensive and would place a tremendous economic burden on local communities at a time when many municipalities are dealing with a period of severe economic distress. Many cities are already engaged in expensive infrastructure improvement projects to address sewer overflows and improve nutrient controls, causing significant increases in the water and sewer rates paid by local residents. Imposing a massive, mandatory retrofit requirement for stormwater on top of these existing mandates may prove more expensive than many communities can afford. While NACWA recognizes the need to address existing impervious area as part the effort to reduce stormwater pollution, we believe this is best done through a redevelopment standard that addresses these issues through each redevelopment project rather than through a wholesale change to existing stormwater controls.

If EPA chooses to include a retrofit requirement in the rule proposal, NACWA strongly encourages the Agency to provide a significant time period for municipalities to develop and implement a retrofit plan. NACWA believes that if a retrofit requirement is included, EPA should provide a minimum of five years for municipalities to develop a retrofit plan, and an additional minimum of thirty years to implement the plan, with the possibility for a longer period of time to implement the retrofits based on a municipality's unique needs and considerations. Additionally, EPA should provide funding to local communities to undertake retrofit requirements due to the significant cost that will be involved. NACWA is also supportive of an option discussed by EPA at the federalism meeting that would only require retrofits where MS4s discharge to waters impaired for stormwater, instead of making it a requirement for all MS4 permittees. If retrofits requirements are to be included in the rule, NACWA supports applying them only where there is a demonstrated water quality need.

NACWA appreciates the opportunity to provide these comments and for the invitation to participate in the federalism consultation. Please do not hesitate to contact me at ngardner-andrews@nacwa.org or 202/833-3692 if you would like to discuss any of these comments further. NACWA looks forward to continued engagement with EPA over the coming months as the Agency works to develop a stormwater rule proposal.

Sincerely,



Nathan Gardner-Andrews
General Counsel

EXECUTIVE COMMITTEE

PRESIDENT

Kevin L. Shafer

Executive Director

Milwaukee Metropolitan

Sewerage District

Milwaukee, WI

VICE PRESIDENT

Jeff Theerman

Executive Director

Metropolitan St. Louis

Sewer District

Saint Louis, MO

TREASURER

David R. Williams

Director of Wastewater

East Bay Municipal

Utility District

Oakland, CA

SECRETARY

Suzanne E. Goss

Government Relations Specialist

JEA (Electric, Water & Sewer)

Jacksonville, FL

PAST PRESIDENT

Marian A. Orfeo

Director of Planning

& Coordination

Massachusetts Water

Resources Authority

Boston, MA

EXECUTIVE DIRECTOR

Ken Kirk

February 26, 2010

Water Docket

U.S. Environmental Protection Agency

Mail Code: 4203M

1200 Pennsylvania Avenue NW

Washington, DC 20460

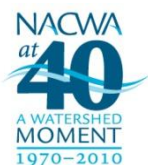
Attention: Docket ID No. EPA-HQ-OW-2009-0817

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA's) December 28, 2009, Federal Register notice announcing the Agency's intent to initiate a national rulemaking process related to stormwater discharges from new development and redevelopment. NACWA is the leading advocacy organization on behalf of the nation's clean water and stormwater utilities. Our members are on the front lines of environmental protection working every day to improve the quality of our nation's waters. NACWA recognizes the need to address the growing water quality problems created by urban stormwater and is supportive of innovative efforts to confront these issues. We look forward to working with EPA over the next two years to develop a stormwater rule that improves water quality but is also sensitive to the financial, regulatory, and political realities currently facing the nation's stormwater and clean water utilities.

NACWA's comments have been compiled by the Association's member utilities, including members of our Stormwater Management Committee. We have divided our comments into three sections: the first section contains a few general comments on EPA's effort, the second section addresses information on existing stormwater control practices, and the third section contains comments on EPA's preliminary considerations for modifying and/or supplementing current federal stormwater regulations.

General Comments

While NACWA is supportive of innovative efforts to improve the national stormwater program, we believe the success of this rulemaking effort will ultimately depend in large part on how involved the municipal stormwater community is in helping to craft it. Municipal separate stormwater sewer system (MS4) utilities all across the country have a wealth of information and knowledge on the effectiveness



of various stormwater management practices, how these practices could be improved, and the real issues and necessary conditions involved in implementing innovative stormwater management at the local level. These utilities also have valuable ideas on how future stormwater regulations should best be structured to improve water quality and minimize future issues from redevelopment and new development. It is critical that these professionals have the opportunity to share their insights with EPA during the development process and that EPA be willing to listen.

It is also critical that any new stormwater rule be structured to account for varying types of geography, climate conditions, and soil conditions across the country that will impact the effectiveness of stormwater management practices. Utilities are well aware of these issues. Many NACWA members have developed and are implementing innovative local stormwater management codes today. We urge EPA to understand what makes these local efforts successful and what steps the Agency can take to facilitate other communities in implementing such programs. NACWA was pleased to hear during the recent “listening sessions” that EPA will account for regional and local variability to develop a federal program that truly advances stormwater management. Essential to this is understanding existing state and local laws related to land use, planning, zoning, building, and stormwater management and a concerted effort on the part of EPA to craft a program that avoids conflicts with these laws. It is particularly important that EPA’s efforts not undercut the advances that some state and local governments have made in controlling stormwater runoff through innovative approaches. Many NACWA members have made investments based on their local and state stormwater regulations and believe that any new federal regulations must be able to accommodate similar, existing state and local efforts.

Another key component is looking at stormwater permitting issues within the larger context of a watershed approach. NACWA believes that choices about the scope and type of stormwater regulations, including stormwater design standards, criteria for new and redevelopment, treatment of sensitive areas, prioritization of pollutants, and similar issues are best handled in the context of watershed permits that look at all the sources of pollution within a given watershed. It is only by taking this “wide-angle view” of permitting and by looking at the entire watershed that water quality improvements can be achieved in the most efficient and effective manner and with the greatest benefit to watershed residents. The ability to engage in water quality trading is an important element of a watershed approach and can be a valuable tool in stormwater management. NACWA encourages EPA to incorporate a watershed approach and water quality trading in any future stormwater rule proposal.

Information on Stormwater Control Practices

NACWA believes it is critical that EPA have accurate and complete data on the effectiveness of existing stormwater management practices before developing changes or additions to municipal stormwater requirements. The proposed Information Collection Request (ICR) EPA will be circulating to stormwater utilities should help gather some of this information. However, as NACWA has previously commented, we believe the ICR should include additional questions to gather more information on the effectiveness of current stormwater control efforts.

Some NACWA members are troubled that EPA is proceeding with significant revisions to stormwater regulations without first conducting the enhanced research effort and comprehensive evaluation of the federal MS4 stormwater program called for in existing stormwater regulations at 40 CFR 122.37. There is also concern

that EPA's current efforts are being driven by a 2008 National Research Council report on urban stormwater that lacked meaningful stakeholder input from municipalities and MS4 permit holders. A comprehensive set of data on existing municipal stormwater techniques provided by those utilities which manage stormwater on a daily basis is critical to the success of any new rulemaking effort.

While NACWA believes distributed stormwater management systems such as on-site retention can play a key role in handling wet weather flows, we are also concerned by much of the uncertainty surrounding their use. Distributed systems installed on private lots cannot practicably be maintained by municipalities -- even inspections and enforcement can be problematic if the systems are widely distributed across the landscape. This lack of control means municipalities cannot be sure that such systems will either be maintained to preserve their functionality, or even be kept on-site -- e.g. rain gardens could be filled in, dispersion paths paved, or rain barrels discarded -- even organic matter tilled into topsoil has a limited life and must be regularly replenished, something municipalities cannot guarantee will be done by property owners. To have a chance of being effective, the use of distributed systems on private lots will require a vigorous and sustained education program. However, such programs are currently being targeted for budget cuts in many municipalities during these tough economic times. NACWA is also concerned that to date there seems to have been little consideration and insufficient studies about the impact of widespread infiltration technologies on groundwater and the hydrologic system as a whole. These are all issues on which EPA needs to gather additional information before proceeding with its planned revisions to the existing stormwater regulations.

Comments on EPA Preliminary Considerations

NACWA has the following comments on EPA's five preliminary considerations for modifying or supplementing EPA's stormwater regulations.

Expand the area subject to federal stormwater regulations – As a general statement, NACWA is supportive of efforts to bring previously unregulated discharges within the permitting structure of the National Pollutant Discharge Elimination System (NPDES) permitting program. Such an approach is necessary to effectively manage any watershed and would help to level the playing field by making currently exempt dischargers responsible for the quality of their stormwater rather than placing all the burden on existing Phase I and Phase II communities and construction sites. Better regulation of currently unpermitted discharges is an important step towards controlling all sources of pollution within a given watershed and improving water quality. NACWA is particularly supportive of expanding the NPDES program to currently unregulated sources if it is done as part of an overall watershed approach to permitting.

One of the key issues related to expanding the area subject to federal MS4 regulation is determining the appropriate jurisdictional boundaries for such an expansion. NACWA would encourage EPA to consider using existing township or city boundaries to determine such jurisdiction or, in the situation where a sewerage district already has existing MS4 program responsibilities, the boundaries of the sewer district. Jurisdictional boundaries based on existing township or sewer district boundaries may ultimately prove more workable, encounter less political opposition, and allow for permits that are more narrowly tailored to specific, local water quality concerns. In the event there are areas outside these boundaries, such as large areas of new development, EPA could develop a regulation that looks at the amount of impervious surface to be created as part of the development and require that any large development with a ratio of impervious surface to pervious surface above a certain threshold be required to obtain a post-construction MS4 permit. It is also important to work within jurisdictional boundaries because if EPA is going to require any additional local codes – such as

the ordinances required under the current Phase II rule – communities can only adopt and implement these across their whole jurisdiction.

While NACWA is generally supportive of the idea of expanding the areas subject to federal stormwater regulations, we are concerned about the increased regulatory and financial burden that such an approach would place on MS4 utilities. Existing utilities would be required to expand their regulatory oversight at a time when many municipal budgets are shrinking, and in some cases local municipalities may have to create entire new stormwater utilities to oversee an expanded federal regulatory program. Any efforts by EPA to increase the area subject to federal MS4 regulation must also come with increased federal regulatory and financial assistance to stormwater utilities to help them respond to an increased federal mandate. An increase of the federal stormwater regulations without additional federal support will only further burden municipal utilities when local resources are already stretched to the breaking point. Furthermore, NACWA is opposed to any regulatory changes that would obligate sewer districts or publicly owned treatment works to take MS4 responsibility. The decision about what local government entity will oversee the stormwater program must be left up to local communities to decide and in many cases mandating a local sewer district to assume MS4 responsibility may run counter to applicable local and state laws.

Establish specific requirements to control stormwater discharges from new development and redevelopment – NACWA is in favor of requirements for new development or redevelopment that would call for a certain percentage of stormwater to be retained on-site, provided that there are alternative options available due to site-specific constraints. Managing stormwater on-site and preventing excess stormwater flows from running off impervious surfaces is a key step towards improving water quality in many of the nation's watersheds, particularly in urbanized areas. The use of green infrastructure can play a critical role in on-site management of precipitation by allowing for infiltration, evapotranspiration, and beneficial reuse of stormwater. As one of the original signatories with EPA to the Green Infrastructure Statement of Intent, NACWA believes green infrastructure solutions can play a major role in reducing wet weather and stormwater flows. We believe EPA should explore ways to encourage developers and communities to use green infrastructure as an on-site stormwater control practice for new development and redevelopment when appropriate.

However, in formulating an on-site stormwater requirement, NACWA cautions EPA against creating a structure for the use of green infrastructure that limits the ability of local utilities to choose the management practices that work best for their communities. Any on-site management standard must take into account varying types of soil conditions, climate conditions, and geography across the country, recognizes that a standard which works in one part of the country will not be practical in another part. This is particularly true with the use of green infrastructure, whose effectiveness varies widely depending on local conditions. Many communities and clean water utilities are interesting in exploring how green infrastructure and low impact development can be used to improve water quality but are concerned about possible federal mandates requiring the use of specific green infrastructure technologies that are inappropriate for a given region. EPA should develop stormwater regulations for new and redevelopment that support the use of green infrastructure but do not result in inappropriate stormwater management practices being implemented as a response respond to federal mandates without consideration of real watershed and land use conditions.

In developing on-site stormwater retention standards, NACWA encourages EPA to be sensitive to the unique challenges facing redevelopment projects, particularly in economically depressed urban areas. Many large cities rely on redevelopment projects in industrial or economically depressed areas to revitalize neighborhoods, attract new business and residents, and increase the tax base. Overly restrictive stormwater requirements for

redevelopment that ultimately deter investors and developers from pursuing urban redevelopment projects will be counterproductive economically, socially, and environmentally. It is imperative that federal environmental mandates not unnecessarily impede the redevelopment so desperately needed by many of the nation's urban centers. This sensitivity may speak to the need for different standards between urban redevelopment, with all its attendant social and economic implications, and new development in previously undisturbed suburban and exurban areas. EPA must also recognize that there are often competing priorities when designing urban landscapes, such as creating bike or walking paths that might compete for space with infiltration technologies such as rain gardens.

Additionally, NACWA believes that responsibility for maintaining on-site stormwater management control measures such as green infrastructure must remain with the property owner. NACWA is opposed to any requirements that would assign maintenance responsibilities to stormwater utilities for stormwater control practices located on private property without associated funding streams. Beyond the obvious legal impediments that such an arrangement would face, municipal stormwater utilities simply do not have the resources to take charge of maintenance and upkeep for control measures on private property. Private property owners must carry this responsibility, possibly with a set of incentives and/or penalties to encourage compliance. However, EPA must also recognize the inability of utilities to guarantee the performance of control measures on private property and account for this in stormwater regulations.

Develop a single set of consistent requirements for Phase I and Phase II MS4s – NACWA believes there is value in developing a single, overarching set of requirements for all stormwater utilities, such as including a set of minimum measures for both Phase I and Phase II utilities. Many of the challenges to improving stormwater quality are common to all communities large and small, so the existence of criteria based merely on population no longer makes sense. A set of broad standards and regulations would ensure a base level of consistency in permitting stormwater discharges in all parts of the country, which NACWA believes would ultimately benefit the stormwater community. As an example, one item that NACWA members believe should be available to all MS4s is the ability to regulate and inspect industrial facilities.

However, NACWA believes that standardized regulations must also be flexible enough to allow each MS4 permit to be tailored to the specific water quality, environmental, and economic needs of local communities, with stormwater control practices based on what makes sense for each community, and its environmental needs. Any broad regulations must take into account the varying differences in urbanization, climate, and soil type between Phase I and Phase II communities in different parts of the country. Additionally, some NACWA Phase I communities question the continued value of wet weather monitoring requirements that are not required of Phase II permit holders. For congruency with Phase II communities, regulations should be changed to no longer require Phase I communities to annually monitor wet weather discharges. While wet weather monitoring may have served a purpose for discharge characterization during the Phase I permit application process, it is very resource intensive and has yielded little tangible benefits toward improving water quality.

Require MS4s to address stormwater discharges in areas of existing development through retrofitting of the sewer system, drainage area, or individual structures with improved stormwater control measures – NACWA is strongly opposed to any new regulations that would require MS4 utilities to retrofit existing areas of development within the stormwater sewer system. Such an approach would be very expensive and place a tremendous financial burden on local communities at a time of severe economic crisis. As an example, EPA's own estimates for stormwater retrofits in the Chesapeake Bay watershed, as outlined in the Agency's draft Bay strategy document, approach \$8 billion. Simply put, municipalities do not have the resources to meet these costs. Any new stormwater

requirements promulgated by EPA that include a mandate for retrofitting of existing development will be met with strong municipal opposition. If mandatory retrofits are required, federal funding for such retrofits is a necessity as unfunded requirements will only result in increased stormwater fees on municipal customers who have already been burdened by significant sewer rate increases required for EPA-mandated combined sewer overflow and sanitary sewer overflow reduction projects. We understand the need to address existing impervious area that has no stormwater control but this is best done through each redevelopment project and not a wholesale change to existing impervious surface.

Need for additional changes to stormwater regulations in sensitive areas – NACWA has no specific position on this issue, but generally believes that protection of waterbodies in sensitive areas from all sources of water impairment is a key component to an effective watershed approach. However, we believe the term “sensitive area” needs to be clearly defined. Additionally, many sensitive areas already receive additional protection under existing state and local regulation and EPA should avoid conflict with these existing rules.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact me at kjones@nacwa.org or 202/533-1803 if you have any questions or would like to discuss these comments further. NACWA looks forward to continued dialogue with EPA over the coming months during the development process of a new stormwater rule.

Sincerely,

A handwritten signature in black ink that reads "Keith J. Jones". The signature is written in a cursive, flowing style.

Keith J. Jones
General Counsel

EXECUTIVE COMMITTEE

PRESIDENT

Jeff Theerman

Executive Director

Metropolitan St. Louis

Sewer District

Saint Louis, MO

VICE PRESIDENT

David R. Williams

Director of Wastewater

East Bay Municipal

Utility District

Oakland, CA

TREASURER

Suzanne E. Goss

Government Relations Specialist

JEA (Electric, Water & Sewer)

Jacksonville, FL

SECRETARY

Julius Caccia, Jr.

Executive Director

Northeast Ohio Regional

Sewer District

Cleveland, OH

PAST PRESIDENT

Kevin L. Shafer

Executive Director

Milwaukee Metropolitan

Sewerage District

Milwaukee, WI

EXECUTIVE DIRECTOR

Ken Kirk

December 7, 2010

Water Docket

U.S. Environmental Protection Agency

Mail Code: 4203M

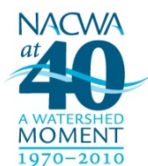
1200 Pennsylvania Avenue, NW

Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2009-0817

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA) October 8, 2010, Federal Register notice announcing the Agency's intent to include Chesapeake Bay-specific provisions as part of its new national post-construction stormwater rule currently under development. NACWA is the leading advocacy organization on behalf of the nation's clean water and stormwater utilities and we have many member utilities located within the Chesapeake Bay watershed. Our members are on the front lines of environmental protection working every day to improve the quality of our nation's waters. NACWA members are proud of the significant investments that have been made over the past three decades by the municipal clean water community within the Chesapeake Bay watershed, investments that have helped to protect the Chesapeake Bay and its unique ecosystem. At the same time, we recognize that urban stormwater continues to present water quality challenges for the Chesapeake Bay and we are committed to reducing this source of water quality impairment. We look forward to working with EPA to develop a stormwater rule that improves water quality but is also sensitive to the financial, regulatory, and political realities currently facing the Bay region's stormwater and clean water utilities.

NACWA's comments are divided into three sections: the first section contains a few general comments on EPA's rulemaking effort; the second section contains comments on EPA's preliminary considerations for modifying and/or supplementing EPA's stormwater regulations in the Chesapeake Bay watershed, and the third address environmental justice considerations.



General Comments

As EPA explores the possibility of additional, even more stringent requirements for municipal separate storm sewer system (MS4) utilities located in the Chesapeake Bay watershed as part of a national stormwater rule, NACWA encourages the Agency to bear in mind that almost all municipalities which would be directly impacted by these new regulations are currently facing significant affordability concerns with regard to meeting their existing Clean Water Act mandates. Many clean water agencies are already facing significant economic pressures to meet the requirements of the forthcoming Chesapeake Bay total maximum daily load (TMDL), not to mention the investments being made under existing wet weather consent decrees for combined sewer overflows or sanitary sewer overflows.

Another key component that EPA should consider is looking at stormwater permitting within the larger context of a watershed approach, particularly in the Chesapeake Bay watershed where runoff from non-point agriculture sources is a major source of impairment. NACWA believes that choices about the scope and type of stormwater regulations, including stormwater design standards, criteria for new and redevelopment, treatment of sensitive areas, prioritization of pollutants, and similar issues are best handled in the context of watershed permits that look at all the sources of pollution within a given watershed. It is only by taking this "wide-angle view" of permitting and by looking at the entire watershed that water quality improvements can be achieved in the most efficient and effective manner and with the greatest benefit to watershed residents. The ability to engage in water quality trading is an important element of a watershed approach and can be a valuable tool in stormwater management. NACWA encourages EPA to incorporate a watershed approach and water quality trading both in the national stormwater rule as well as in any Chesapeake Bay-specific provisions.

NACWA would also like to point out that even with significant efforts on the part of municipalities within the Chesapeake Bay watershed to address urban stormwater runoff, agriculture will continue to be the largest source of water quality impairment to the Chesapeake Bay. Until such time as all stakeholders come together to reduce agricultural runoff, we will continue to struggle to achieve the water quality improvements that we all desire for the Chesapeake Bay.

Comments on EPA Preliminary Considerations

NACWA has the following comments on EPA's four preliminary considerations for Chesapeake Bay-specific provisions of a national stormwater rule.

Option 1: Designate Additional Discharges to be Regulated

As a general statement, NACWA is supportive of efforts to regulate additional sources of unregulated discharges within the structure of the National Pollutant Discharge Elimination System (NPDES) permitting program to the extent such discharges contribute to water quality impairment. Such an approach is necessary to effectively manage any watershed and would help to level the playing field by making currently exempt dischargers responsible for the quality of their stormwater discharges rather than placing all the burden on existing Phase I and Phase II communities and construction sites. In particular, NACWA believes that the idea of regulating stormwater discharges from specific types or sizes of development that are not currently covered by an MS4 permit deserves further study. The

concept of additional regulation of discharges outside the MS4 jurisdiction that are contributing to water quality problems has the potential to reduce overall water quality impairment and take some of the burden off of permitted MS4 utilities.

However, NACWA does have concerns related to expanding the area subject to federal MS4 regulation to the extent it would increase the regulatory and financial burden on MS4 utilities. NACWA is opposed to efforts that would require MS4 utilities to expand their regulatory oversight at a time when many municipal budgets are shrinking and under significant pressure. Any efforts by EPA to increase the area subject to federal MS4 regulation must also come with increased federal regulatory and financial assistance to stormwater utilities to help them respond to an increased federal mandate. An increase of the federal stormwater regulations on MS4s without additional federal support will only further burden municipal utilities when local resources are already stretched to the breaking point. Furthermore, NACWA is opposed to any regulatory changes that would obligate sewer districts or publicly owned treatment works to take MS4 responsibility. The decision about what local government entity will oversee the stormwater program must be left up to local communities to decide and in many cases mandating a local sewer district to assume MS4 responsibility may run counter to applicable local and state laws.

Option 2: Require Additional Chesapeake Bay-only MS4 Provisions

As stated above, NACWA is concerned that additional Chesapeake Bay-only MS4 provisions will place a very difficult regulatory and financial burden on utilities within the Bay watershed that are already struggling with affordability concerns and the requirements of the Chesapeake Bay TMDL. NACWA would also like to point out that some of the additional minimum control measures for the Bay watershed that EPA is considering related to turf management, pesticide usage, fertilizer usage, and buffer widths run the risk of establishing federal control over local land management choices. This in turn could create significant political backlash at the local level and place MS4 utilities in a very difficult position to try and enforce these potential new requirements. There is also a question as to EPA's legal authority to create such restrictions on local land use.

NACWA also believes that any Chesapeake Bay-only provisions impacting local land use decisions must be accompanied by a substantial public education program. The public must understand the impacts of their daily activities on receiving waters, and if there is not an active and ongoing public education program, any stormwater rule that is published will be less effective. For this reason, funding to help MS4 utilities educate the public should be included with any new stormwater requirements.

Option 3: Require Retrofitting of Stormwater Management Controls with Improved Stormwater Control Measures

NACWA has significant concerns with new regulations that would require MS4 utilities located in the Chesapeake Bay watershed to retrofit existing areas of development within the stormwater sewer system. Such an approach would be very expensive and place a tremendous financial burden on local communities at a time of severe economic crisis. EPA's own estimates for stormwater retrofits in the Chesapeake Bay watershed, as outlined in the Agency's draft Bay strategy document, approach \$8 billion. Simply put, municipalities do not have the resources to meet these costs. Any new stormwater requirements in the Chesapeake Bay watershed promulgated by EPA that include a mandate for

retrofitting of existing development will likely be met with strong municipal opposition. If mandatory retrofits are required, federal funding for such retrofits is a necessity, as unfunded requirements will only result in increased stormwater fees on municipal customers who have already been burdened by significant sewer rate increases required for EPA-mandated combined sewer overflow and sanitary sewer overflow reduction projects. NACWA understands the need to address existing impervious areas but this is best done through each redevelopment project and not a wholesale change to existing impervious surface.

NACWA also believes it is extremely problematic for EPA to be considering the imposition of significantly higher stormwater costs on municipalities around the Chesapeake Bay watershed at a time when many federal government facilities within the watershed are refusing to pay stormwater management fees to their local clean water utilities. The lack of federal leadership regarding payment of stormwater fees, most recently exemplified by the decision of the U.S. Government Accountability Office not to pay stormwater fees to the District of Columbia, significantly undercuts EPA's efforts to address stormwater issues within the Chesapeake Bay watershed. NACWA strongly encourages EPA to work with other federal agencies to ensure all federal government facilities within the Chesapeake Bay watershed pay their fair share of local stormwater fees.

Option 4: Establish New and Redevelopment Standards

NACWA is concerned with some of the Chesapeake Bay-specific stormwater requirements currently under consideration by EPA with respect to the establishment of new development and redevelopment standards within the watershed. Although NACWA agrees that these approaches and other green infrastructure-based solutions can play an important role in reducing water quality impairments, there should not be a mandate for their use. Instead, we suggest EPA take an incentives based-approach to encourage the use of these practices until there is a better understanding of the actual environmental benefits that would be achieved by their use as compared to the significant financial costs that they could impose on communities.

When creating new development and redevelopment standards, NACWA encourages EPA to be sensitive to the unique challenges facing redevelopment projects, particularly in economically depressed urban areas within the Bay watershed. Many large cities rely on redevelopment projects in industrial or economically depressed areas to revitalize neighborhoods, attract new business and residents, and increase the tax base. Overly restrictive stormwater requirements for redevelopment that ultimately deter investors and developers from pursuing urban redevelopment projects will be counterproductive economically, socially, and environmentally. It is imperative that federal environmental mandates not unnecessarily impede the redevelopment so desperately needed by many of urban centers in the Chesapeake Bay region. This sensitivity may speak to the need for different standards between urban redevelopment, with all its attendant social and economic implications, and new development in previously undisturbed suburban and exurban areas.

Environmental Justice Considerations

NACWA is supportive of EPA's recent efforts to increase the focus on environmental justice (EJ) issues as part of the Agency's consideration of Chesapeake Bay-specific stormwater controls. NACWA further believes that true environmental progress cannot be achieved in this country unless it is shared

December 7, 2010

Page 5 of 5

in equitably by all. However, NACWA is concerned that EPA has not sufficiently considered the affordability challenges facing many urban communities around the Bay watershed as the Agency elevates EJ considerations as a key policy focus. This is particular true in the context of low-income populations, specifically identified as part of the EJ consideration, that are already finding it difficult under the current economic climate to afford the increased water and sewer rates that come with new environmental mandates. These rates will only rise as local governments within the Chesapeake Bay region must find additional funds to cover the cost of increased stormwater requirements. These affordability concerns facing low-income populations are real, will only continue to grow, and demand serious attention from EPA if the Agency is committed to making EJ considerations part of the rulemaking effort. Please feel free to visit NACWA's [Money Matters – Smarter Investment to Advance Clean Water webpage](#) to learn more about these important affordability issues.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact me at ngardner-andrews@nacwa.org or 202/833-3692 if you have any questions or would like to discuss these comments further. NACWA looks forward to continued dialogue with EPA during the development process of Chesapeake Bay watershed stormwater regulations.

Sincerely,

A handwritten signature in black ink that reads "Nathan Gardner-Andrews". The signature is written in a cursive, flowing style.

Nathan Gardner-Andrews
General Counsel