

TAF Project Overview & Status Report Current to May 25, 2016

NACWA's Targeted Action Fund (TAF) provides critical financial support to the Association's regulatory, legislative and legal advocacy efforts and related initiatives. It is funded exclusively through NACWA membership dues. This document provides a brief description and status report on current TAF projects. The items described here provide an excellent overview of the breadth of NACWA's advocacy efforts and how they work together to advance the Association's overall advocacy goals and objectives. Any members with questions about any of the projects listed here are encouraged to contact [Chris Hornback](#) for additional information.

Regulatory/Legislative Advocacy Projects

Innovative Permitting Workshop and Framework

In July 2014, the NACWA Board approved \$15,000 from the FY 2014 TAF budget to support a collaborative project exploring current water regulatory models, focused on the control of nitrogen and phosphorus, outside of the U.S. As the U.S. has continued to develop and adopt innovative technologies to control nutrients, it has become increasingly clear that existing permitting practices are hindering innovation. Experts have begun to explore the possibility of stochastic permitting and other approaches to better reflect the operational patterns of nutrient control technology, but U.S. EPA and state regulators have to date not embraced these techniques. Outside of the U.S., however, regulatory agencies are looking to new models for permitting nutrients that better account for variation in discharge levels and that will allow for broader adoption of lower-energy nutrient removal technologies.

The project consists of a literature review and survey followed by an expert workshop intended to refine the information collected by the project team, as well as better structure the information to evaluate the differences in the regulations and assess the effects on innovation. Following these activities, the project will conduct treatment process and surface water quality modeling to evaluate the impact of the novel regulatory approaches on treatment plant design and operation and on water quality, as compared to traditional NPDES permitting approaches. Finally, based on a detailed analysis of current permit structures, the project will result in a list of potential modifications to the U.S. regulatory framework, which are expected to stimulate more rapid adoption of innovative technologies.

All funding is being funneled through WERF so that the project can be funded under the existing WERF Nutrient Challenge. The literature review was completed in 2015 and an initial expert workshop was held in October 2015. Several activities are planned for 2016 including submittal of a summary paper for journal publication and initial work on Phase II, which will include the modelling simulations that will inform potential modifications to the U.S. regulatory framework.

Meetings with EPA on Nutrient Permitting Report

In November 2014, the NACWA Board approved \$33,000 in FY 2015 funding to support a series of in-depth meetings with EPA to discuss the Association's report, *Review of USEPA Methods for Setting Water*

Quality-Based Effluent Limits for Nutrients. In 2013, the NACWA Board approved TAF funding to conduct a review of the training materials from EPA's course on writing permit limits for nutrients. The training course, first administered in July 2013, aims to provide state permit writers with new tools and information on how to develop nutrient permit limits based on numeric or narrative state water quality criteria. NACWA identified a number of concerns with the training material and commissioned the report to examine where EPA methodologies were correct, incorrect or needed modification.

The final report was released in June 2014 and NACWA has had several productive discussions with EPA and state water regulators. At a September 2014 meeting with EPA Headquarters officials, EPA identified several issues from the report that it would like to explore in more detail. EPA requested that NACWA convene a series of meetings between the report's authors, NACWA members and key EPA staff to discuss the issues in more detail. The funding is being used to cover time and travel expenses for the report's authors to prepare for and participate in up to five (5) meetings at EPA in Washington, DC. The first meeting took place in February 2015. NACWA met with EPA throughout 2015 in an effort to set up a more in-depth look at the training materials. EPA conducted a compressed training course for NACWA's team on February 2, 2016. NACWA sent written feedback based on the February 2 meeting to the Agency on March 9. The full \$33,000 may not be expended if all five meetings are not necessary.

Flushability Guidelines Development and Product Stewardship Initiative for Flushable Wipes

The NACWA Board approved \$12,500 from the FY 2015 TAF to continue NACWA's work with other associations to address the problems caused by flushable wipes and other non-dispersible products. This project consists of two components:

- Flushability Guidelines Development – The nonwoven fabrics industry and wastewater utilities are developing new flushability guidelines to ensure that wipes labeled “flushable” are safe for sewer systems. The \$6,175 in TAF funding for this component covers the travel expenses to the meetings of the flushability guidelines drafting committee for NACWA's representative on the committee. Work on the guidelines is expected to be completed in September 2016.
- Product Stewardship Initiative – This initiative will explore opportunities for the nonwoven fabrics industry to exert greater responsibility over downstream impacts of wipes through improved product labeling and public education. The \$6,325 in TAF funding for this component paid for Ross Strategic (NACWA's contribution to total contract cost) to serve as a facilitator for the initiative. An initial meeting of the initiative participants was held on March 26 and the first action of the initiative, revising the Code of Practice for labeling non-flushable wipes, is expected to be completed in September 2016.

Both of these components result from a previous TAF project that supported a Technical Workgroup to address issues related to flushability of wipes and are an important component of NACWA's ongoing *Toilets Are Not Trashcans* campaign.

Revisiting the EUM Attributes & Embracing the Utility of the Future

The NACWA Board approved \$8,000 from the FY 2015 TAF to support a collaborative effort to revisit and potentially refresh the *Attributes of Effectively Managed Utilities and Keys to Management Success*. Since the signing in 2008 of the Statement of Support by six major associations (NACWA, WEF, AMWA, AWWA, NAWC and APWA) and EPA to promote the use the attributes and keys to management success,

the EUM framework has been widely embraced and implemented across the clean water sector – including in NACWA’s *Excellence in Management Recognition Program*. The EUM attributes and keys are used by a growing number of water and wastewater utilities to help guide their path toward improving their effectiveness and becoming truly sustainable over time.

At the same time, a number of important challenges and opportunities have emerged in the years since the EUM framework was developed. These include resource recovery, economic and affordability challenges, resilience, and others. Many of these new challenges and opportunities are embodied by the *Water Resources Utility of the Future Blueprint* (UOTF), developed by NACWA, WEF and WERF, and complementary efforts have also emerged from the drinking water community.

In light of these developments, EPA and the original EUM partners convened a group of water and wastewater utility leaders to examine the current EUM framework and determine if any adjustments, modifications, or other revisions were necessary to improve its overall usefulness to utilities and others. Subsequent to the Board’s action, it was determined that the six collaborating organizations would each contribute \$5,000 to the effort, for a total of \$30,000. EPA contributed approximately \$30,000. The funds were used to retain contractor support to facilitate the process of identifying utility representatives, convening and running the meetings to discuss the framework, and overseeing the revisions to the EUM attributes and keys to management success. After a series of meetings and conference calls, a final report containing the recommended revisions to the attributes and keys to management success was released in February 2016.

Coliphage Expert Review

The NACWA Board approved \$10,000 from the FY 2015 TAF to conduct this project with WE&RF (at the time WERF), which also contributed \$10,000. This project entailed an independent expert review of EPA’s April 17, 2015 literature review and assessment of coliphages as possible indicators of fecal contamination for ambient water quality. In 2014, NACWA learned that EPA was working to develop new water quality criteria for pathogens, focused for the first time on viruses. Coliphages, a subset of bacteriophages, have been identified by EPA as the most promising viral indicator. NACWA and WE&RF remain concerned that EPA has not established a sufficient link between the presence of coliphage and public health risk.

Establishing this link is essential given the potential consequences of a new virus-based criterion. Every aspect of wastewater operations is designed around meeting bacterial-based indicators (such as *E. coli* or enterococci). NACWA has highlighted the policy consequences of making this change with EPA, but the Agency continues to move forward. Without a clear link to human health risk, these new criteria could result in massive utility investment with no commensurate benefit.

The combined funding of \$20,000 was used to retain an expert in the field – Dr. Samuel Dorevitch – to conduct the review. NACWA and WE&RF released Dr. Dorevitch’s report in February 2016, providing a copy of the report to EPA in advance of Agency’s expert workshop in early March. The report found that the science linking coliphage to public health risk was limited and that the studies available produce conflicting results on whether coliphage was an effective indicator for viral pathogens. The report will continue to prove useful over the next year as NACWA continues to work with WE&RF and WEF to influence EPA’s criteria development process.

Development of Field Study Protocol for Wipes

The NACWA Board approved \$16,000 from FY 2015 TAF to develop a protocol that can be used by utilities for conducting field tests to determine the types of wipes and other non-dispersible products that are being flushed into the sewer system. The data collected with this protocol will help to guide NACWA's ongoing work with other associations to address the problems caused by wipes and other products (see Flushability Guidelines and Product Stewardship Initiative for Flushable Wipes, above). Classification of these products in a consistent manner will provide a baseline measurement for gauging the success of consumer education programs; allow consumer education programs to be tailored according to different demographics and product types; and measure the success of the new flushability guidelines for flushable wipes once they are completed. The data will assist with NACWA's *Toilets Are Not Trashcans* campaign by further defining the types of products that are causing problems for utilities and directing NACWA's advocacy work appropriately. The project is underway and is expected to be completed in June 2016.

Environmental Utility Project

The NACWA board approved \$10,000 from the FY 2016 TAF to contribute to a white paper examining the viability of establishing an "Environmental Utility" (EU) in Illinois (IL) and Ohio (OH). The US Water Alliance will manage the project. As envisioned, the EU would be a new entity charged with raising capital and making investments in best management practices on private and public lands that reduce nutrient loadings in IL and OH tributaries flowing to the Gulf of Mexico, as called for in the IL and OH Nutrient Reduction Strategies. The EU would focus on investments that support and develop environmental markets that lead to multiple environmental, social and economic benefits. If successful, an EU could potentially demonstrate an alternative pathway to tackling nutrient challenges in a way that traditional statewide, regulatory-driven models do not. In so doing, it would provide a model approach that could be replicated elsewhere and drive policy decisions at the Federal level in support thereof. Interviews are underway with key stakeholders in Ohio and Illinois and a preliminary draft white paper is expected to be completed in Fall of 2016.

Low Income Water Assistance Programs Report

The NACWA Board approved a contribution of up to \$25,000 from the FY 2016 TAF for an effort that NACWA, along with several associations representing public and private wastewater and drinking water utilities, is undertaking to conduct an information gathering effort and examination of subsidy program models in use today with a specific focus on the statutory, regulatory, constitutional and policy underpinnings of barriers to customer assistance and variable rate programs at the state and local levels. The examination would provide a state by state analysis of different subsidy programs available, the legal frameworks that support them, and the specific legal or regulatory barriers to the use of these types of programs. The findings will be published as a resource guide for the national associations and their members interested in pursuing programs at the local, state or federal level.

Seven trade associations are participating and contributing to the project including NACWA, the Association of Metropolitan Water Agencies, the American Water Works Association, the Water Environment Federation, the National Association of Water Companies, the Water Research Foundation and the Water Environment & Reuse Foundation. All but WE&RF are contributing up to \$25,000 to the project. The RFP submittal deadline was February 15 and four proposals were received. The project

steering committee, which consists of representatives from each of the contributing partners, awarded the project in early March, and held a kick off call with the project team on May 12. The targeted publication date is March 2017.

Strategic Review of NACWA Financial Survey

In February 2016, the NACWA Board approved \$15,000 from the FY 2016 TAF to conduct a strategic review of NACWA's triennial Financial Survey. The Financial Survey is the only comprehensive examination of clean water utility management and financing and it remains a valuable resource for NACWA's advocacy efforts and for its members. The objective of the project is to ensure that the value of NACWA's investment in the Survey is maximized and that the Survey includes the most relevant and frequently used data and benchmarks to support these and other uses of the Survey. NACWA secured the services of Amawalk Consulting Group for a total of \$13,000 and the remaining \$2,000 will be provided to NACWA's Financial Survey consultant, Mark Hoeke, as he supports the Amawalk team. A survey for NACWA members will be distributed by the end of May. The final analysis, with recommended revisions to the Financial Survey, is expected by the end of August.

Water Resources Development Act (WRDA) Stormwater Initiative

In February 2016, the NACWA Board approved \$30,000 in FY 2016 TAF to work with John Anderson, former Staff Director for the House Water Resources & Environment Subcommittee and an expert on ACOE policy, for a six-month period to assist the Association in developing and implementing a legislative strategy. Federal policies related to stormwater management and water reuse/recycling are playing a greater role in NACWA's advocacy agenda, whether in the context of regulatory changes to EPA's stormwater management program or in funding requests for federal water reuse programs. Increasingly, NACWA members are working within their communities to better integrate regional flood control projects with local stormwater management needs, such as groundwater recharge and water quality improvement, to ensure that these systems are effectively working together. The 2016 reauthorization of the Water Resources Development Act (WRDA) offers an opportunity to strengthen the links between regional flood control projects and municipal stormwater management goals, such as aquifer recharge and water quality improvement, with respect to projects undertaken by the Army Corps of Engineers (ACOE).

Our strategic goal is to strengthen the links between regional flood control projects, municipal stormwater management goals, and water reuse/recycling with respect to projects undertaken by the ACOE. It will also allow NACWA to increase its advocacy presence on stormwater and reuse issues, and build an important and lasting relationship with the ACOE.

Litigation/Legal Advocacy Projects

Chesapeake Bay TMDL Case

\$5,000 from the FY 2015 General Legal Fund was used to support NACWA's participation in litigation before the U.S. Court of Appeals for the Third Circuit to defend an important legal victory in *American Farm Bureau v. EPA*, which is a challenge to EPA's final TMDL for the Chesapeake Bay. This is in addition to \$10,000 in FY 2014 funds, \$15,000 in FY 2012 TAF resources, and \$10,000 from the FY 2011 TAF previously spent to support NACWA's involvement.

A lower federal court issued a resounding legal victory for NACWA and its municipal partners in September 2013 when it rejected all challenges to the TMDL by the agricultural plaintiffs and upheld EPA's use of a holistic watershed approach in identifying both point and nonpoint source allocations. NACWA filed a brief with the Third Circuit in April 2014 seeking to defend that ruling on appeal. In July 2015, the Third Circuit upheld the final total maximum daily load (TMDL) for the Chesapeake Bay, including its use of a watershed approach requiring nutrient reductions from nonpoint sources. The ruling from the U.S. Court of Appeals for the Third Circuit in [*American Farm Bureau, et al. v. EPA*](#) dismissed challenges to the final TMDL from agricultural and nonpoint dischargers and affirmed a lower court ruling upholding the TMDL. The Farm Bureau has asked the U.S. Supreme Court to review the Third Circuit ruling; if the Supreme Court accepts the case, additional funds will be necessary for NACWA to help defend the lower court decision.

NACWA has participated in this case in collaboration with the Virginia Association of Municipal Wastewater Agencies (VAMWA) and the Maryland Association of Municipal Wastewater Agencies (MAMWA) to defend EPA's use of a holistic watershed approach in creating the TMDL, including the assignment of allocations to nonpoint agricultural dischargers. By making nonpoint sources more responsible for their share of water quality impairment, NACWA is seeking to save its members significant money by avoiding more stringent POTW permit limits for pollutants such as nutrients.

Intervention in Mississippi River and Other Nutrients Lawsuits

NACWA's Board of Directors approved \$70,000 from the FY 2012 TAF for the Association to participate in two critical nutrient cases that could have profound impacts on every clean water utility in the country. The Board approved a total of \$95,000 from the FY 2013 TAF to continue NACWA's involvement in these two important legal issues. The first case, *Natural Resources Defense Council v. EPA*, demands an EPA response to a 2007 petition requesting that the Agency's secondary treatment regulations be changed to require nutrient removal for every wastewater treatment plant nationwide. The second lawsuit, *Gulf Restoration Network v. EPA*, seeks federal numeric nutrient criteria (NNC) for all necessary waters in the country, including the Mississippi River Basin (MRB). In November 2015, the Board approved an additional \$35,000 for briefing in the remand of the *Gulf Restoration Network v. EPA* case to the district court.

NACWA won a critical advocacy victory in December 2012 when EPA issued a denial to the NRDC secondary treatment petition. Consistent with NACWA's recommendations, and citing the technical constraints and costs associated with uniform national limits, EPA's denial letter reaffirmed the Agency's preference for controlling nutrient discharges from POTWs through the water quality-based provisions of the CWA. The decision was a major win that resulted in significant avoided costs for public agencies and ensured that an unworkable, one-size-fits-all approach is not the solution to the nutrient challenge. While dismissal of the underlying lawsuit ended this chapter in the legal battle over secondary treatment, there is still the possibility that activist groups could file a future legal challenge to the substance of EPA's petition denial.

In the *Gulf Restoration* case, NACWA successfully intervened in May 2012 and filed briefs in the case in March and May 2013. NACWA's briefs support EPA's denial of a request to promulgate federal NNC for the MRB and argue that meaningful progress on nutrients can only be made through a holistic

watershed approach addressing all sources of impairment. The briefs further argue that federal NNC are an insufficient tool to solve a problem that demands a comprehensive solution, and instead suggest that states should take the lead in developing nutrient criteria and control programs that will result in more equitable reduction efforts across all sources. The court issued a partial legal victory for NACWA in the case in September 2013, ordering EPA to provide a clear “yes” or “no” answer to the need for federal NNC in the MRB within six months but also providing EPA with wide discretion regarding the factors it can consider when making the determination.

EPA appealed the district court decision to the Fifth Circuit on the question of whether the Agency has discretion to decline to make a decision on federal NNC in the first place. The April 2015 ruling from the Fifth Circuit overturned the district court’s decision on this issue, finding that EPA can decline to make a determination as long as the Agency provides sufficient justification. The Fifth Circuit remanded the case back to the district court to decide whether EPA’s explanation for why it declined to make a determination on federal NNC was legally sufficient. The district court ordered a new round of briefing on the remand. Accordingly, the Board approved additional TAF resources as set forth above in November 2015 to ensure that the Association can participate during the remand and help defend the positive elements of the earlier district court and appellate court rulings. On January 14, NACWA filed a brief in the remanded case. Briefing in the case was completed in April 2016, and a decision from the court could come at any time.

Wet Weather Consent Decree Handbook

In April 2016, \$20,000 from FY 2016 TAF was approved by the Board to provide significant updates to NACWA’s *Wet Weather Consent Decree Handbook*. This resource has the potential to save NACWA members substantial time and money in preparing for and conducting wet weather enforcement negotiations.

As with prior editions, the updated *Handbook* will provide unparalleled information and analysis to assist utilities in negotiating or renegotiating a wet weather consent decree. A comprehensive update to the *Handbook* is needed to analyze trends, describe new developments and decrees, and offer enhanced strategies and recommendations in the consent decree arena. The 2016 edition will offer additional case studies and tips to foster partnership-based negotiations that achieve sustainable and cost-effective environmental and public health improvements.

Both internal and external resources will be used to develop the 2016 edition of the *Handbook*. Staff will engage a NACWA Legal Affiliate based on responses to a request for proposals. The Association plans to release the new edition of the *Handbook* during the *Wet Weather Workshop*, which will be held in conjunction with the *National Clean Water Law Seminar* (November 1-4, 2016). The *Handbook* will be free for NACWA members.

White Paper on Citizen Suit Issues

A total of \$20,000 in TAF resources – including \$10,000 in FY 2014 and \$10,000 in FY 2015 – was allocated to provide financial support for a research project and white paper exploring the impacts of CWA citizen suits on municipal clean water utilities. The concept of the white paper originated in discussions among independent third-party researchers and the California Association of Sanitation Agencies (CASA). Citizen suits can present significant challenges and financial cost to municipal clean

water utilities. In order to help confront this issue, CASA spearheaded this independent research project and white paper by a respected academic institution to examine the impacts of citizen suits on the municipal clean water community.

NACWA and several wastewater agencies and associations provided funding for the project and report but had no control over the questions asked, the analysis or conclusions, or the writing of the report. In April 2016, the researchers released a final report entitled "[Citizen Enforcement and Sanitary Sewer Overflows in California](#)." This project is now complete.

Whole Effluent Toxicity Testing Litigation


An allocation of \$15,000 from FY 2016 TAF was approved by the Board in November 2015 for an *amicus* brief in *Southern California Alliance of Publicly Owned Treatment Works v. EPA*. This case involves application of certain testing requirements for whole effluent toxicity ("WET") and the ability of EPA to indirectly impose requirements on dischargers by pressuring state agencies to adopt EPA's desired policies without going through the rulemaking process required by the Administrative Procedures Act. In November 2015, NACWA filed an *amicus* brief in the case supporting a challenge to EPA's use of the Test of Significant Toxicity (TST). NACWA's brief outlines the significant scientific, regulatory, and legal concerns with the use of TST, with particular attention on EPA's attempts to impose this test method without going through the required public notice-and-comment procedures.

EPA's efforts to pressure the state into using the TST approach without the benefit of proper public review is a prime example of federal regulatory overreach, and this litigation has provided an opportunity for NACWA to respond in a legal context. NACWA's brief also provides a national perspective on the concerns over use of the TST method and the implications this case could have on clean water utilities nationwide.

Briefing is complete and the case remains pending in the Eastern District of California awaiting a final decision.

Groundwater Conduit Theory Litigation

An allocation of \$5,000 from FY 2016 TAF was approved by the Board in February 2016 for *amicus curiae* participation in an appeal of a federal district court decision holding that a release of pollutants into groundwater that migrates to hydrologically-connected navigable waters violates the CWA. Although the case deals with injection wells permitted under the Safe Drinking Water Act, the court's decision has far reaching implications, potentially requiring an NPDES permit for any source that may release pollutants to groundwater that is hydrologically-connected to navigable waters.

On March 28, NACWA joined a coalition [amicus brief](#)  before the U.S. Court of Appeals for the Ninth Circuit in this litigation. A decision in the case is not expected until late 2016 at the earliest.

Advocacy Support

Communications Audit

An allocation of \$100,000 in FY 2016 TAF resources was approved by the Board of Directors in November 2015 for a comprehensive communications audit to be conducted by Stratacomm and DHMResearch. The audit was completed and a final report was issued in March 2015. The audit included thorough internal and external research that assessed NACWA's communications, marketing and outreach tools and initiatives. The audit also evaluated the Association's effectiveness in using digital and social media, and provided vitally important information on how NACWA can refocus its efforts to obtain strategic earned media on its advocacy issues and utility successes. The final report and appendices offer extensive recommendations on strategic communications including the need to develop a comprehensive program and adequately staff that program.