NACWA
A Clear Commitment to America's Waters

January 8, 2010

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Submitted via *www.regulations.gov*

Re: Docket ID No. EPA-HQ-OW-2009-0761

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the *Draft Strategy for Protecting and Restoring the Chesapeake Bay* (*Draft Strategy*) and the Section 202a report, *The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay*, issued in response to Executive Order 13508. NACWA's public wastewater treatment agency members treat and reclaim a majority of the wastewater generated each day nationwide, including many facilities within the Chesapeake Bay. In addition to wastewater treatment, many NACWA members have responsibility for implementing municipal separate stormwater sewer system (MS4) programs and are permitted under the MS4 National Pollutant Discharge Elimination System (NPDES) program. NACWA members recognize the contribution of discharges from wastewater treatment and MS4s to the existing water quality problems in the Chesapeake Bay and are committed to addressing our relative contributions to the Bay equitably with the other sources.

The publicly owned treatment works (POTWs) and MS4s in the Chesapeake Bay watershed will be directly affected by the actions outlined in the *Draft Strategy* and by the Chesapeake Bay Total Maximum Daily Load (Bay TMDL) that EPA plans to establish by December 2010. EPA has provided the Chesapeake Bay watershed states with draft load reduction targets, and when the states have subdivided the needed reductions among the point and nonpoint sources, EPA will establish wasteload allocations (WLAs) and load allocations for these sources in the Bay TMDL. States will then be required to develop Watershed Implementation Plans (WIPs) that identify how the necessary load reductions will be achieved. NACWA supports the division of load reductions between point and nonpoint sources, and allowing the states to determine the subdivision of needed reductions, to the extent that these are accomplished in an equitable manner. However, NACWA has some concerns with EPA's planned implementation and enforcement of the TMDL and its planned actions for stormwater control, which are detailed below.

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Chesapeake Bay TMDL

Allocations for POTWs

From NACWA's perspective, the WLAs for POTWs that will be established in the Bay TMDL must consider current allocations, progress already made by POTWs in reducing nutrient discharges, population growth, affordability/financial capability, and the impacts of treatment technologies on carbon footprint and climate change. Under the current tributary strategies for reducing nutrient loads to the Bay, POTWs have already made significant investments to upgrade treatment facilities to meet these load reduction requirements. As stated in the Section 202a report, "Over 90 percent of nutrient reductions needed to reach the wastewater treatment facilities' basinwide loading caps are expected to be achieved by 2010." The report also acknowledges that "it would be very expensive to further reduce loadings from municipal and industrial wastewater dischargers below the established facility-specific cap loads in the tributary strategies." If the WLAs established in the TMDL are lower than current allocations, an unreasonable financial burden would be placed on POTWs and their communities to add additional nutrient controls to facilities that were recently upgraded, with little water quality benefit. In addition, these nutrient controls are energy-intensive and will increase the carbon footprint of utilities.

Furthermore, population growth is expected to continue in the Bay watershed, and POTWs must treat the wastewater produced by the growing population. The Bay TMDL must recognize that POTWs have no control over population growth and can only respond to it. Therefore, total loads from POTWs should be afforded some flexibility that accounts for these population increases.

Loading Reductions for Nonpoint Sources

EPA has specified in the Section 202a report that the Chesapeake Bay watershed states should "provide EPA with documented *reasonable assurance* that nonpoint source loading reductions will be achieved as a condition for reflecting such reductions in the Bay TMDL" by developing WIPs. NACWA agrees that controlling nonpoint sources is an essential part of restoring and protecting the Bay. Although EPA has created a list of elements that it expects WIPs to include, it has not clearly defined what constitutes "reasonable assurance" for nonpoint source controls. For states that signed the *Chesapeake 2000* agreement, EPA expects nutrient reductions "based on regulations, permits, or otherwise enforceable agreements that apply to all major sources of these pollutants, including nonpoint sources." For other states, EPA only encourages these types of agreements. To avoid confusion, EPA should clarify what it means by "reasonable assurance" and provide guidelines for states to follow in determining how they can plan for, and enforce, loading reductions for nonpoint sources. For the states that did not sign the *Chesapeake 2000* agreement, this is especially important, and will help these states meet their milestones in the future.

Atmospheric Deposition Reductions

In the Section 202a report, EPA states that "about 21-28 percent of nitrogen loading to the Bay comes from non-agricultural atmospheric deposition, more than from all municipal and industrial wastewater treatment plants." EPA plans to reduce the contribution of atmospheric deposition to nitrogen levels in the Bay through the development and implementation of regulations and programs for a variety of stationary and mobile sources. Although EPA lists a number of these regulations and programs in the Section 202a report, it does not give a timeframe for their implementation. Since EPA plans to hold the states accountable to their WIPs and

their two-year milestones, it should also set a timeline for establishing and implementing its own programs to control atmospheric deposition.

Enforcement of WIPs and Milestones

EPA has identified a list of consequences if states do not submit adequate WIPs or fail to meet established two-year milestones. Three of the four potential consequences apply specifically to point sources: revising the Bay TMDL to impose more stringent requirements, objecting to state-issued NPDES permits, and denying or limiting new or increased discharges. In addition, EPA has proposed a new enforcement strategy which would also target point sources disproportionately to their contributions to Bay pollution. For both the consequences and enforcement strategy, actions aimed at point sources will likely force POTWs to meet impractical requirements that will do little to improve the overall water quality of the Bay.

Instead of targeting consequences toward point sources, EPA should impose consequences on all specific sources that are not meeting their obligations to reduce nutrient loadings. For example, if agricultural sources – the largest source of nutrient and sediment to the Bay – are not meeting their load allocations, then EPA should take measures to force the states to specifically address the failures of this sector. If POTWs are meeting their WLAs under the Bay TMDL, further reducing the POTW WLAs is unlikely to balance out the larger nutrient contributions of other sources. Also, the enormous amount of money being ill-spent on meeting such low WLAs would be more effectively spent on controlling other sources.

Stormwater Load Reductions

NACWA and its members are committed to reducing the impact of stormwater on the Bay, and the Association is particularly supportive of green infrastructure as a method to improve water quality and has encouraged its use to help control wet weather and stormwater flows. NACWA was an original signatory with EPA on the Green Infrastructure Statement of Intent in 2007 and views the use of green infrastructure as an important element in improving the water quality of the Chesapeake Bay. However, NACWA has concerns with the three action items presented by EPA in the Section 202a report as possible elements of a rule for stormwater discharges to the Chesapeake Bay.

Additional Requirements to Address Stormwater from New Development and Redevelopment

NACWA supports the use of green infrastructure but is concerned about establishing any kind of specific "mandate" that would require the use of green infrastructure in new development or redevelopment. NACWA is also concerned about a set performance standard – such as a 95th percentile storm volume – which would be applicable throughout the Chesapeake Bay watershed. There are varying types of topography, geology, and soil conditions in the Bay watershed that make a "one size fits all" performance standard inappropriate. Additionally, NACWA is strongly opposed to any stormwater rule that would make MS4 utilities responsible for ensuring the compliance by developers with a performance standard or green infrastructure mandate. In many cases stormwater utilities are not equipped and do not have the political power to change or enforce local land use or development ordinances.

Requiring Retrofits in Areas Served by MS4s to Reduce Loads from Existing Stormwater Discharges

NACWA is strongly opposed to any retrofit requirement that would be imposed on MS4 utilities. EPA's own costs estimates suggest that such a retrofit policy within the Chesapeake Bay watershed would cost $7.9 billion. This is an impossible financial burden for stormwater utilities and their service communities to bear during an

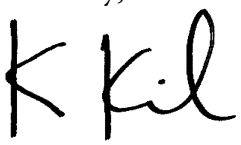
economic time when they are already struggling financially. Furthermore, any retrofit schedules developed using EPA's existing financial capability guidance will place unreasonable requirements on stormwater utilities since the EPA guidance is outdated and in need of significant revision. NACWA also questions the cost-effectiveness of spending money on MS4 retrofits when the same amount of money applied to reducing runoff from agricultural sources within the Chesapeake Bay watershed could have a much more beneficial impact on water quality.

Expanding the Universe of Areas Regulated under the MS4 Program.

While NACWA is supportive of efforts to bring currently unregulated dischargers under regulation through the NPDES permitting program, we have questions about EPA's legal ability to extend MS4 regulation under the Agency's residual designation authority as proposed in the draft report. We encourage EPA to review their residual designation authority in this regard. Additionally, NACWA is opposed to any efforts to impose numeric effluent limits in MS4 permits. Such an effort would be counter to settled jurisprudence that the "maximum extent practicable" standard for pollution control under the Clean Water Act's requirements for stormwater permits to control pollutants does not include the use of numeric effluent limits.

Thank you for your consideration of NACWA's comments on the *Draft Strategy* and the Section 202a report on water quality. Please contact Cynthia Finley at 202/296-9836 or *cfinley@nacwa.org* if you have any questions.

Sincerely,



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