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From: [NACWA](#)

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CLEAN WATER EXCHANGE

March 4, 2019

The *Clean Water Exchange (Exchange)* is a communication from the National Association of Clean Water Agencies (NACWA) that highlights key clean water issues and opportunities for your state and regional groups to engage on these important national issues. **We encourage you to forward the Exchange to your members and ask them to add their voice and comments to issues that are playing out nationally but may have significant effects locally. The more we can speak with one voice the more we can lift up the entire sector.** This is not a comprehensive list of NACWA's activities – please visit the [NACWA website](#) to learn more about the range of issues NACWA is tracking.

Please feel free to contact [Kelly Brocato](#) with any questions or feedback. We hope you find this information helpful!

Key Topics

- [Become a Water Week 2019 Supporting Organization](#)
- [EPA Releases Federal PFAS Action Plan – Tell Us What's Happening in Your State](#)
- [Federal Integrated Planning Legislation Passes – State Implementation Now Critical](#)
- [NACWA Seeks State/Regional Partners for Critical Groundwater Litigation Headed to the Supreme Court](#)

Become a Water Week 2019 Supporting Organization!

Water Week 2019 is March 31–April 6, and its anchor event, the *National Water Policy Fly-In*, will convene April 3-4 in Washington, DC. As a new Congress takes control and infrastructure issues take center stage, your attendance and engagement are more critical than ever. Make plans now to participate!

Your state and regional group is also invited and encouraged to participate by serving as a Water Week Supporting Organization. Supporting Organizations, like you, represent the vast spectrum of issues impacting the water sector. There is no cost involved in becoming a Supporting Organization, and your organization's logo will be displayed with other supporters on the *Water Week 2019 website*.

If you cannot join us in Washington for this important week but would still like to mark **Water Week** through events in your local community, please contact us and let us know how you plan to celebrate and raise the awareness of water. Together, we can all help elevate water as a national priority!

Contact [Toby Watkins](#), NACWA's Manager, Government Affairs, for more information on how to become a Supporting Organization or to let us know what you are doing locally to mark the week. This promises to be the largest and most important Water Week yet – don't miss it!

EPA Releases Federal PFAS Action Plan – Tell Us What's Happening in Your State

EPA unveiled its much anticipated [Per- and Polyfluoroalkyl Substance \(PFAS\) Action Plan](#) on February 14, which highlights how the Agency will tackle growing concerns over these contaminants. The Plan provides valuable insights on how this issue may play out at a national level, but many of the most important PFAS developments are occurring at the state and local level. If you are witnessing PFAS concerns at the state or regional level, we want to know! Please contact [Emily Remmel](#), NACWA's Director of Regulatory Affairs.

Under the Action Plan, EPA will initiate steps to evaluate the need for a maximum contaminant level (MCL) for two PFAS constituents, Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS). The Agency is gathering the necessary data and expects to release a proposed rule for a national drinking water determination for public comment later this year.

The Agency is also beginning the regulatory steps to designate PFOA/PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in an effort to leverage funding for the clean-up of known contaminated sites.

In designating these contaminants as hazardous substances, there may be unintended consequences and potential liability for the land application of biosolids containing trace amounts of PFOA/PFOS. **This is an issue that NACWA is closely focused on in its advocacy with both EPA and Congress, and input from our state and regional partners is critical.**

Other parts of the Action Plan that could impact the municipal clean water community include a subtle acknowledgement to strengthen the pretreatment program. EPA has identified several industries that are likely discharging PFAS in their wastewater and will begin a more detailed study to evaluate PFAS presence in industrial wastewater discharges. Also, EPA is evaluating whether there is available data and research to support the development of ambient water quality standards in order to control point-source PFAS discharges into receiving waters.

EPA is developing groundwater clean-up recommendations and is moving forward with [toxicity values](#) for GenX and Perfluorobutanesulfonic Acid (PFBS). Additionally, the Action Plan identifies the need for new treatment and remediation techniques, the cost to remove these contaminants, and unintended consequences of specific technologies as important considerations for future actions.

NACWA will continue to engage with EPA as the Action Plan evolves and will count on its state and regional partners to keep us informed of developments at the state level.

Federal Integrated Planning Legislation Passes – State Implementation Now Critical

President Trump [signed](#) the *Water Infrastructure Improvement Act of 2018* ([H.R. 7279](#)) on January 14, officially making it part of the Clean Water Act (CWA). While this is a great

achievement, implementation of integrated planning concepts at the state level will be critical to ensuring the bill's success, and NACWA stands ready to work with our state and regional partners on this important effort.

The bill, which includes codification of integrated planning concepts into the CWA, creates an Office of Municipal Ombudsman at EPA, provides more flexibility for use of compliance schedules, and advances the use of green infrastructure solutions. It has long been a key legislative priority for NACWA and our municipal and clean water sector partners, and it is a significant advancement in CWA policy. The final bill enjoyed overwhelming bipartisan support, passing the House by a vote of 351-10, and the Senate by unanimous consent.

While NACWA will continue to work with EPA on the implementation of the bill, we need help at the grassroots level to make it a true success. If your organization knows of communities that are implementing integrated planning strategies, we'd love to hear how this process is going – both the good and the bad. We also would like to know about support – or opposition – your state regulatory agencies are expressing towards integrated planning.

Information regarding the successes and challenges of initiating these new approaches will inform our work with EPA and support the clean water sector as a whole. Share your stories or learn more about the legislation by contacting [Kristina Surfus](#) or [Jason Isakovic](#), NACWA's Legislative Directors.

NACWA Seeks State/Regional Partners for Critical Groundwater Litigation Headed to the Supreme Court

On February 19, 2019, the US Supreme Court announced that it will [review](#) the question of whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. There have been conflicting decisions in several federal circuit courts on this issue; the Ninth Circuit decision in *Maui v. Hawaii Wildlife Fund* – which held there was CWA liability – will be the vehicle used for the Supreme Court's review.

This announcement sets up one of the most significant CWA arguments before the High Court in years, with significant potential impact on public clean water utilities. If the Supreme Court agrees with the lower court ruling, wastewater and stormwater utilities across the nation could find themselves with CWA liability for underground exfiltration from collection systems and facilities – even small underground leaks – that reach groundwater and eventually end up in nearby surface waters. A negative decision could also potentially impede the implementation of beneficial reuse projects by requiring duplicative and costly NPDES permits in addition to other federal/state permits in cases where the recycled water may be connected to jurisdictional surface waters via groundwater. Green infrastructure – intended to treat stormwater to further the water quality protection goals of the CWA – is also at risk of being regulated as point sources of pollutants subject to CWA jurisdiction. This could expose utilities to unnecessary citizen suit enforcement for alleged regulatory noncompliance, and attorneys' fees awards, potentially diverting limited resources from projects and programs that do far more to improve water quality and protect human health.

A strong public clean water voice in this litigation is critical. NACWA is taking the lead on filing a public sector *amicus brief* in this litigation. Should your organization want to join the brief or coordinate with NACWA as you plan your own brief, please contact [Amanda Waters](#), NACWA General Counsel. Although the court's order did not set a hearing date, *amicus briefs* in support of Maui will be due in early April with oral argument expected in the Fall.

For more information on this issue, see [NACWA Summary: CWA Point Source Liability for Discharge of Pollutants Via Groundwater](#) and NACWA's [brief](#) supporting Maui's cert petition.

Comment Period Now Open on WOTUS Definition – Consider Filing Comments!

EPA and the Department of the Army's [proposed](#) rule narrowing the definition of Waters of the United States (WOTUS) was finally published in the *Federal Register* on February 14.

This begins a 60-day public comment period that will close April 15, but it is likely the comment period will be extended. Both the [House](#) and [Senate](#) sent letters to EPA and the US Army Corps of Engineers seeking an extended comment period.

After discussions during NACWA's recent Winter Conference, the Association will be submitting comments on the proposal. State and Regional Groups should review the rule and weigh in as per their members' interest in this issue.

Publication of the proposed rule is step two in a process that first repealed the 2015 Obama Administration Clean Water Rule. The Trump Administration's new definition is intended to increase predictability and consistency of Clean Water Act permitting.

The proposed definition makes several revisions including omission of the significant nexus theory. It also redefines navigable waters, tributaries, adjacent wetlands, lakes and ponds, ditches, and adds "a typical year" and "upland" definitions to help clarify stream flows as well as man-made excavations. To see some of the definitional revisions to WOTUS pertinent to the municipal clean water community, see [this comparison](#) of the 2015 Clean Water Rule and the new proposed definition.

NACWA [provided initial feedback](#) in 2017 on EPA's effort to redefine WOTUS. The Association is pleased to see important exclusions carry over from the 2015 Clean Water Rule to the new proposed rulemaking for wastewater treatment systems and stormwater control features. It is longstanding Agency practice to consider both of these as non-jurisdictional waters.

For more information regarding the rule or the comment process, please contact [Emily Remmel](#), NACWA's Director of Regulatory Affairs.

Inform Your Members on Water Quality Trading

Learn more about the market-based options available in the pursuit of improved water quality. EPA is hosting a webinar on March 5, 2019, to discuss its work on programs designed to assist in addressing nutrient-related and other types of water pollution across the country. To participate, send an email to nutrients@epa.gov.

On February 6, David Ross, Assistant Administrator for the Office of Water, issued a [memorandum](#) to the Regional Administrators for the Agency's ten regional offices "updating" EPA policy on water quality trading, and outlining six "Market-Based Principles" that are intended to facilitate broader adoption of such programs.

According to the memo, the Agency's original Water Quality Trading Policy, issued in 2003, "has not facilitated the widespread adoption of water quality trading...[and] the Agency now believes that the 2003 Policy may be too prescriptive to be widely effective and implementable."

While the Agency stopped short of repealing and replacing the 2003 Policy, the memo is intended to "clarify and expand the range of policy options available for states, tribes and stakeholders to consider," and provides more flexibility in key areas, including banking of credits and implementation of baselines.

Though still focused on trading, the memo also encourages market-based programs more broadly, as well as "other collaborative approaches to achieving water quality improvements, including... coordinated point/nonpoint pollution reduction or offset projects," an area that NACWA continues to pursue with EPA, USDA and national

agriculture groups.

For more information, contact [Chris Hornback](#), NACWA's Deputy CEO.

EPA Shifts Priorities in Proposed National Compliance Initiatives

State and Regional Organizations are encouraged to weigh in with EPA regarding the Agency's recently released [pre-publication version](#) of its proposed Fiscal Year 2020 – 2023 National Compliance Initiatives.

This proposal includes some important positive developments for the public clean water utility sector. Most notably, the proposal moves away from a focus on addressing sewer overflows via enforcement and encourages them to be addressed via the Clean Water Act permitting process.

Previously referred to as National Compliance Priorities, EPA has [changed the name](#) to National Compliance Initiatives (NCIs). The document outlines the key areas EPA will focus on from an enforcement perspective.

NACWA has long advocated that sewer overflows are better addressed through core EPA program offices rather than through enforcement mechanisms. The proposed FY 2020 – 2023 NCI acknowledges this, noting

"97 percent of large combined sewer systems, 92 percent of large sanitary sewer systems and 79 percent of Phase 1 municipal separate stormwater systems are now either in compliance or are on an agreed-upon schedule to come into compliance. Accordingly, the Agency believes that this NCI no longer presents a significant opportunity to correct water quality impairment nationwide. The EPA proposes to return work in this area to the core program in FY 2020. EPA and states will continue to monitor implementation of these long-term agreements, and to adapt them to changing circumstances and new information, such as the increasing commitment of cities to implement green infrastructure, changes in financial capability, or technological advances."

NACWA is pleased its advocacy has helped reorient EPA to address sewer overflows in the most environmentally protective and cost-effective manner. Anyone with questions about the new NCIs can contact [Amanda Waters](#), NACWA's General Counsel.

What You Need to Know About the NPDES Updates Rule

EPA published a final [National Pollutant Discharge Elimination System \(NPDES\) Updates Rule](#) on February 12, deferring action, for now, on the more controversial items that the Agency was exploring in early proposals.

The final rule makes mostly "minor, generally clarifying revisions" to the NPDES regulations.

The provision with the most relevance for clean water utilities is a change to how different types of industrial users are reported on a permit application (40 CFR 122.21(j)(6)(i)). The revision is consistent with NACWA's comments pointing out that the change would align the permit application with the pretreatment regulations. For new municipal discharges, EPA finalized a 24-month window for collecting data after commencement of a discharge – consistent with NACWA's comments.

The most problematic provision from the May 2016 proposal would have given EPA regional offices the ability to take over administratively-continued permits for discharges they deemed to be environmentally significant. NACWA and other stakeholders objected to this proposal, raising questions over whether EPA had the authority to give the regions this power.

While EPA heeded the call not to include this controversial provision in the final rule, it and other deferred provisions may get picked up in another rulemaking. NACWA will continue to track EPA's work on this and garner the support of its state and regional partners if needed.

Rule revisions deferred (not finalized) at this time include:

1. Definition of Proposed Permit
2. Definition of Whole Effluent Toxicity (WET)
3. Application Requirements—Latitude and Longitude
4. Reasonable Potential Determinations for New Discharges
5. Dilution Allowances
6. Antidegradation Reference
7. Anti-backsliding
8. Design Flows for POTWs
9. Objection to Administratively Continued Permits
10. CWA Section 401 Certification Process
11. Fact Sheet Requirements

For additional information, please contact [Chris Hornback](#), NACWA's Deputy CEO.

Upcoming NACWA Events

- **Water Week**
Washington, DC
March 31 – April 6, 2019
- **National Water Policy Fly-In**
Washington, DC
April 3 – 4, 2019
- **National Pretreatment & Pollution Prevention Workshop + Training**
Tacoma, WA
May 13 – 16, 2019
- **StratComm: H2O**
Cleveland, OH
June 3 – 4, 2019

[Not a Member? Join Today!](#)

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