

Status of Technical Action Fund Projects August 2002

AMSA's Technical Action Fund is currently supporting numerous projects that were approved by the Board of Directors during 2001 - 2002. A list of these projects and their current status follows:

Regulatory Initiatives

Continued Support for Whole Effluent Toxicity Efforts

AMSA's Board of Directors approved \$5000 in February 2002 for continued contractual support for AMSA's activities in relation to the proposed whole effluent toxicity (WET) methods. For the past few years, AMSA has retained the services of Risk Sciences, Inc. to provide ongoing support for the Association's WET activities. This year Risk Sciences provided support for AMSA's efforts to comment on the proposed WET methods and conduct a training course for AMSA members.

- AMSA TAF Budget Expenditure: \$5,000

Review of Risk Assessment for Dioxin in Land Applied Biosolids

AMSA's Board of Directors approved \$30,000 in February 2002 to retain a consultant to review the risk assessment and associated documentation for EPA's Part 503, Round II revisions for dioxin in land applied biosolids. The review will be used to formulate the Association's comments on an EPA Notice of Data Availability which released the new dioxin risk assessment and information obtained during the Agency's dioxin survey. The conservative aspects of the risk assessment suggest that the level of risk may be overestimated. The consultant's review will ensure the risk assessment is consistent with EPA's own risk characterization procedures and ensure that the assumptions made in the assessment are valid.

- AMSA TAF Budget Expenditure: \$30,000

Update of Radioactivity Dose Model and Continued Support for Biosolids Committee

In February of 2001, AMSA's Board of Directors approved \$40,000 for contractor support of AMSA's continuing activities regarding radioactive materials in biosolids, including revising the Association's dose model to be consistent with the model developed by the Interagency Steering Committee on Radiation Standards (ISCORS) Sewage Sludge Sub-Committee. Activities in 2002 were conducted with money carried over from 2001 (\$15,392). The Association's dose model has been updated. However, AMSA will continue to monitor the activities of the ISCORS Sub-Committee to determine whether further updates are mandated. AMSA may also direct the contractor to conduct on-site exposure assessments for radon, if it is deemed necessary for completion of the dose model.

- AMSA TAF Budget Expenditure: \$15,392

AMSA 2002 Wet Weather Survey Assesses Collection System Capacity Procedures

In July 2001, AMSA's Board of Directors authorized the use of \$30,000 in TAF funds for the Wet Weather Committee to survey the membership on peak flow capacity and blending procedures and to offer general recommendations on capacity-setting within the context of the sanitary sewer overflow (SSO) rule. The objective of the project is to provide EPA with collection system data and recommendations to influence the SSO rulemaking process. AMSA's SSO Workgroup developed the 2002 Wet Weather Survey and pilot-tested the questionnaire. A total of 85 members responded to the survey. A report summarizing the data and drawing pertinent conclusions will be issued in the next few months.

- AMSA TAF Budget Expenditure: \$ 30,000

TMDL Cost Study Analysis

In August 2001, EPA issued a draft report estimating costs to implement the Total Maximum Daily Load (TMDL) program. EPA determined costs for three different implementation scenarios, which varied in their flexibility and cost-effectiveness. The final annual costs presented in the draft report for NPDES dischargers ranged from \$625 million to \$2.18 billion, depending on the scope of the TMDL program and the cost effectiveness of the implementation scenario used. AMSA used TAF funds to retain the ADVENT Group, Inc. (ADVENT), in partnership with Federal Water Quality Coalition, to review EPA's cost approach. ADVENT identified a number of significant concerns regarding the EPA's assumptions and methodology, which lead to substantial underestimation by EPA of the costs to implement TMDLs for POTWs. AMSA used this information in December 7, 2001 comments to EPA on the draft report.

- AMSA TAF Budget Expenditure: \$ 4,000 (1/2 of total project cost)

TMDL Listing Guidance

On March 11, 2002, AMSA, the American Farm Bureau Federation, and the Federal Water Quality Coalition released a joint report on how to improve state CWA TMDL listing processes (CWA §303(d)) and state comprehensive water quality reports (CWA §305(b)). The report contains examples of sound state listing methodologies and extensive references to listing processes. AMSA and the co-sponsoring organizations released the report, entitled *Preparation of Integrated Water Quality Monitoring and Assessment Reports: Recommendations for State Methodologies and Reporting (Integrated Report Recommendations)*, before attendees at the mid-winter meeting of the Association of State & Interstate Water Pollution Control Authorities (ASIWPCA), in Alexandria, VA. *Integrated Report Recommendations* was well-received by state and EPA officials, who clearly appreciated the effort required for a diverse group of stakeholders (publicly owned treatment works, agriculture, and industry) to develop joint recommendations.

- AMSA TAF Budget Expenditure: \$ 8,300 (1/3 of total project cost)

Legal Issues in Times of Crisis Checklist

In February 2002, AMSA provided each member agency with a complimentary copy of *Protecting Wastewater Infrastructure Assets . . . Legal Issues in a Time of Crisis Checklist*. The publication was one of the first elements of a series of tools that AMSA developed in the wake of the tragic terrorist attacks of September 11, 2001. The *Legal Checklist* assists POTWs in identifying the range of legal considerations public utility attorneys and managers should consider relative to potential acts of terrorism or other crisis situations. Unique in format and approach, the *Legal Checklist* is cited by the federal government as one of the best resources available on crisis-related legal challenges. The *Legal Checklist* accompanies AMSA's *Protecting Wastewater Infrastructure Assets . . . Asset-Based Vulnerability Checklist* and *VSATwastewater*TM.

- AMSA TAF Budget Expenditure: \$15,459

Legislative Initiatives

National Biosolids Partnership – Advocacy Assistance

AMSA and the Water Environment Federation (WEF) are requesting \$1.5 million from Congress to provide continued financial support for the National Biosolids Partnership (NBP) in fiscal year (FY) 2003. As in past years, funds would be made available for the NBP through the VA-HUD-Independent Agencies appropriations bill that funds U.S. Environmental Protection Agency programs. AMSA and WEF each contribute \$15,000 for the services of a lobbyist to provide assistance in securing financial support for the NBP. Most of the participants in the NBP program are AMSA members. As was the case last year, the Senate has not included funds for the NBP in the Senate VA-HUD appropriations bill. The House, however, is expected to include a line item to fund the Partnership when it considers its version of the bill in September. TAF resources will be expended by the end of the year, when the FY 2003 appropriations process is complete.

- AMSA TAF Budget: \$15,000
- WEF Commitment: \$15,000
- Total Project Cost: \$30,000

Legislative Advocacy Support

A lobbyist has been retained to assist AMSA's work in the areas of infrastructure funding, biosolids, security, and other issues. This effort includes initiatives to secure funding for AMSA wastewater security measures, expand the water quality improvement programs in the 2002 Farm Bill, track any proposed changes to the Clean Water Act, and identify any legislative language that could be detrimental to AMSA and its member utilities. Regarding security issues, authorizing legislation has been introduced and approved by a House committee. Efforts are focused on sending the bill to the House floor for a vote, getting a companion bill written and approved in the Senate and securing the necessary appropriations.

- AMSA TAF Budget: \$48,000

Water Infrastructure Network

AMSA is a founding member and the administrator of the Water Infrastructure Network (WIN). AMSA's TAF financial contribution is used for the lobbying and communications activities in support of WIN's goal to gain

significant new federal funding for wastewater and water infrastructure projects. Bills that would amend the Clean Water Act state revolving loan fund program have been introduced and approved by the relevant authorizing committees in both the House and the Senate.

- AMSA TAF Budget: \$25,000

Litigation

The Scope of the Permit Shield: Piney Run Preservation Assoc. v. Carroll County

In December 2000, AMSA and the Water Environment Federation filed a joint *amicus curiae* brief with the Fourth Circuit Court of Appeals, drafted by outside legal counsel using TAF funds, in this case raising questions about the scope of EPA's National Pollutant Discharge Elimination System (NPDES) "permit shield." On October 10, 2001, the Fourth Circuit favorably found that NPDES permits offer protection from enforcement for the discharge of pollutants listed in the permit, as well as those unlisted pollutants whose discharge is contemplated by the permitting authority when the permit is issued. *Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001). On February 5, 2002, the citizens sought U.S. Supreme Court review of the case. The High Court denied their request on May 20, 2002. The Fourth Circuit's opinion now stands as solid law for POTWs nationwide. No costs were incurred in this case in 2002.

- AMSA TAF Budget Expenditure: \$21,000 (2000 - 2001); \$0 (2002)
- WEF Contributions: \$10,000 (2000 - 2001)

Including Nonpoint Sources in TMDLs: Pronsolino v. Marcus

Pronsolino v. Marcus continues to be an important and active CWA case. *Pronsolino* raises the question of whether impaired waters should be listed and subject to total maximum daily loads (TMDLs) under CWA §303(d), even if they are impaired only by nonpoint sources. In 2000 and 2001, AMSA invested \$104,500 in TAF funds to have outside counsel file briefs and present oral argument in the U.S. District Court for the Northern District of California, and when the case was appealed by nonpoint source groups, to file a brief in the U.S. Court of Appeals for the Ninth Circuit. In July 2002, AMSA expended \$2,400 from the general legal support TAF account for outside counsel to assist the Department of Justice in preparation for oral argument before the Ninth Circuit. In May 2002, the Ninth Circuit upheld the District Court's decision, making crystal clear that nonpoint sources are a part of the TMDL program and part of the solution to improving our nation's water quality. *Pronsolino v. Nastro*, 291 F.3d 1123 (9th Cir. 2002). Nonpoint source groups filed a petition for rehearing of the Ninth Circuit's decision in July 2002.

Using funds from the general legal support TAF account, AMSA retained outside counsel to prepare AMSA's opposition to a rehearing in August 2002 for \$5,000. Should the Ninth Circuit grant a rehearing, it is possible that additional funds will be required for this case in 2002.

- AMSA TAF Budget Expenditure: \$2,400 (2001); \$5,000 (2002)

Translating Narrative Standards to Numerics: City of Anderson v. South Carolina

On February 4, 2002, the South Carolina Court of Common Pleas issued its opinion in a case involving the City of Anderson, South Carolina's (City's) challenge to the state Department of Health and Environmental Control's (DHEC's) adoption of a Trophic State Index (TSI) without public notice or comment. *City of Anderson v. State of South Carolina Board of Health and Environmental Control* (Docket No. 00-CP-40-1255, Feb. 4, 2002). DHEC used the TSI to determine whether waterbodies were impaired by nutrients under South Carolina's narrative water quality standard for aquatic life use, and then to place waters on the state's CWA §303(d) list. In April 2001, AMSA filed an *amicus* brief supporting the City's challenge to the TSI. AMSA's brief argued that notice and comment procedures for the TSI were essential because listing a water as impaired under §303(d) can result in more stringent effluent limits in individual NPDES permits. Therefore, the participation of permittees like POTWs in the development of tools such as the TSI is critical.

Although the court found the City's TSI challenge moot due to several events that transpired as the case progressed, it still rendered opinions on the merits of the City's challenge. The court asserted that in its view, the proper time for a permittee to challenge a §303(d) listing is when the permittee receives effluent limitations based on a TMDL for that waterbody. The court also found that the TSI was not a rule because it was one of several factors used in §303(d) listings. While the court's statements are non-binding "dicta," this case will remain important as additional TMDLs are developed and as the body of judicial opinion grows around §303(d) listing issues.

- AMSA TAF Budget Expenditure: \$6,500 (2001); \$0 (2002)

Legal Challenge to July 2000 TMDL Rule: American Farm Bureau Federation v. Whitman

This case has been on hold since October 2001 while EPA prepares to repropose the controversial July 2000 TMDL rule as a "watershed rule" this fall. AMSA is an intervenor in the case. EPA recently announced it remains committed to proposing a new rule later in 2002, and to removing the July 2000 rule from the books. AMSA expended \$2,000 in 2001 to pay outstanding year 2000 LeBoeuf, Lamb invoices. Since early 2001, AMSA has managed this case using our in-house General Counsel to file motions and necessary papers, incurring no further costs.

- AMSA TAF Budget Expenditure: \$2,000 (2001); \$0 (2002)

Antidegradation: Ohio Valley Environmental Coalition v. Whitman

On April 11, 2002, the U.S. District Court for the Southern District of West Virginia granted AMSA's motion to intervene in *Ohio Valley Environmental Coalition, et al., v. Whitman*, Civ. No. 3:02-CV-59 (S.D. WV, Jan. 23, 2002). AMSA filed its motion jointly with the West Virginia Municipal Water Quality Association (WVMWQA) and the West Virginia Municipal League, and continues to leverage TAF resources by managing this case using our in-house legal counsel and WVMWQA's counsel. In *Ohio Valley*, citizen organizations are challenging EPA's approval of West Virginia's antidegradation implementation as a violation of the CWA and federal water quality standards

regulations. West Virginia's procedures contain antidegradation exemptions important to POTWs, including: 1) for *de minimis* activities resulting in less than a 10 percent reduction in the receiving water's assimilative capacity; 2) for proposed new or expanded discharges from POTWs to alleviate public health concerns associated with failing septic systems, or untreated or inadequately treated sewage (including combined sewer overflow elimination or reduction projects); and 3) for POTW expansions or improvements. Since West Virginia based its procedures on those developed by other states, a successful challenge to West Virginia's procedures could raise questions regarding antidegradation practices in other states.

The administrative record was filed in early July, and discovery will be complete by August 30. Cross-motions for summary judgment are due November 1, and all summary judgment activity should be complete by February 28, 2003. A ruling from the court should come in Summer 2003.

- AMSA TAF Budget Expenditure: \$15,000 (2002)

Blending and SSOs: Pennsylvania Municipal Authorities Association v. Whitman

In August 2002, working with outside counsel, AMSA sought permission from the District of Columbia District Court to join a new wet weather case, *Pennsylvania Municipal Authorities Association, et al. v. Whitman, et al.*, which seeks answers to several pivotal sanitary sewer overflow (SSO) issues. While AMSA continues to press for a workable proposed regulation for SSOs, it is essential for AMSA to be present in this case due to the critical nature of the issues raised to AMSA's membership. In the case, several regional publicly owned treatment work groups are challenging EPA Headquarters' and EPA Regions' III, IV, and VI's prohibition on blending, permitting of SSO points, and the lack of an appropriate technology-based standard for SSOs. AMSA's August *Motion to Intervene*, prepared in partnership with outside legal counsel using AMSA's Technical Action Fund, requests that the court declare that (1) blending is not prohibited under the CWA and applicable regulations; (2) EPA lacks authority under the CWA to direct plant design or use of specific processes to achieve effluent limitations; (3) emergency outfalls in the municipal collection system are appropriately subject to permitting; and (4) that, as a matter of law, the BAT/BCT [best achievable technology/best available control technology] standards, not secondary treatment, are applicable to SSO discharges. Given that the unpredictable nature of legal battles, AMSA will continue efforts to achieve wet weather objectives through regulatory advocacy.

- AMSA TAF Budget Expenditure: \$15,000 (2002)

Flexibility in Expressing TMDLs: Friends of the Earth v. EPA

On July 5, 2002, the U.S. Court of Appeals for the D.C. Circuit granted AMSA permission to file a joint *amicus* brief with the District of Columbia Water and Sewer Authority (DC WASA) in *Friends of the Earth v. EPA*, Nos. 02-1123, 02-1124. Activists are asserting in this suit that TMDLs can be expressed only in daily load form. If their interpretation prevails, unfavorable precedent would be set for POTWs and their ability to meet TMDLs for many pollutants. AMSA's position is that TMDLs have been, and must be, allowed to be set in the form appropriate to the pollutant of concern – such as monthly, seasonal, or annual loads. EPA has motioned to dismiss the case on the basis that it was improperly filed in the court of appeals rather than district court. The court has not yet ruled on EPA's motion. AMSA and WASA's *amicus* brief is due January 16, 2003, and will be prepared by WASA's outside

counsel, working with AMSA's in-house counsel.

- AMSA TAF Budget Expenditure: \$10,000 (2002)

Three Clean Air Act Sewage Sludge Suits: Sierra Club v. Whitman

AMSA successfully intervened in three of six suits filed by the Sierra Club in 2001 alleging EPA's failure to implement provisions of the Clean Air Act (CAA), because the suits sought regulations for sewage sludge incinerators (SSIs) among other industrial sources. AMSA intervened in three of the six suits because they involve sewage sludge incineration (SSI). The first case seeks CAA § 129 rules for "other solid waste incinerators" (OSWI), including SSIs. The second case seeks technology-based maximum achievable control technology (MACT) standards under CAA § 112(d) for several industrial categories of hazardous air pollutants (HAPs), including SSIs. The third case seeks technology-based standards for urban area HAP sources including SSIs under CAA § 112(k). In June 2002, these cases were consolidated into one case before one judge. In July 2002, the court stayed activity in the case until September 30 while EPA and Sierra Club draft settlement documents and separate some issues out for litigation. AMSA is working to ensure that SSIs are removed from the scope of all three lawsuits through a variety of strategies and advocacy efforts.

- AMSA TAF Budget Expenditure: \$4,722

SSO/Blending Lawsuit

In August 2002, AMSA sought permission from the District of Columbia District Court to join a new wet weather case, *Pennsylvania Municipal Authorities Association, et al. v. Whitman, et al.*, which seeks answers to pivotal sanitary sewer overflow (SSO) issues. While AMSA continues to press for a workable proposed regulation for SSOs, AMSA must be present in this case due to the critical nature of the issues. Several regional POTW groups challenge in the case EPA Headquarters' and EPA Regions' III, IV, and VI's prohibition on blending, refusal to permit SSO points, and the lack of a technology-based standard for SSOs. Developed with outside legal counsel using the TAF, AMSA's court filing endorses the groups' request that the court declare that (1) blending is not prohibited under the CWA and applicable regulations; (2) EPA lacks authority under the CWA to direct plant design or use of specific processes to achieve effluent limitations; (3) SSO emergency outfalls in the collection system can be permitted; and

(4) that the BAT/BCT [best available technology/best conventional technology] standards, not secondary treatment, apply to SSO discharges.

- AMSA TAF Budget Expenditure: \$15,000

General Legal Support

In the 2002 TAF budget, AMSA set aside \$54,000 for general legal support. These funds are used to obtain strategic advice and input on legal and regulatory issues from outside counsel on a variety of AMSA matters and to retain local counsel when needed. AMSA anticipates using only \$20,000 of these funds through the end of 2002.

- AMSA TAF Budget Expenditure: \$20,000

Management & Operations Initiatives

2002 Financial Survey

In the 2002 TAF budget, \$37,500 was allocated to a consultant to develop the *2002 Financial Survey* and prepare a detailed summary report. Published every 3 years, the *Financial Survey* has consistently proven itself to be a valuable resource for AMSA member agencies as they evaluate financing options and consider rate adjustments.

In March 2002, the *Survey* was administered to AMSA's public agency membership, and to date, data has been collected from 130 member agencies. The data quality assurance process is well underway, and the compilation of the Survey findings will begin in early Fall. It is anticipated that the report will be completed by the end of 2002, and the publication is slated for release at AMSA's 2003 Winter Conference in Santa Fe, New Mexico.

- AMSA TAF Budget Expenditure: \$37,500

Privatization Projects

AMSA retained the services of a technical consultant to perform analytical work on merits of public vs private ownership/operations/financing of publicly owned treatment works and public water supply agencies. This project includes an update *Evaluating Privatization: An AMSA Checklist*, focusing on both water and wastewater issues and the preparation of financial comparisons. It is substantially completed and publication of these two documents is anticipated in September 2002.

- AMSA TAF Budget Expenditure \$12,500
- Association of Metropolitan Water Agencies Contribution \$12,500

Clean Water Central Database

The Association of Metropolitan Sewerage Agencies (AMSA) and the Water Environment Research Foundation (WERF) formed a partnership to develop a centralized database, *Clean Water Central*, to house detailed technical and research information relevant to wastewater facilities. AMSA and WERF have recognized that additional funding and staff resources are needed maintain *Clean Water Central* on an ongoing basis. It is anticipated that a contractor will undertake the following tasks to maintain operation of the *Clean Water Central* database: provide ongoing management and technical support for *Clean Water Central*; populate *Clean Water Central* with basic agency and facility level data; and, perform future membership surveys using *Clean Water Central*.

- AMSA TAF Budget Expenditure \$29,000
- Water Environment Research Federation: \$21,250

Other Initiatives

Support for the "Year of Clean Water"

AMSA's Board of Directors approved \$5,000 in July 2002 for AMSA to contribute to the Clean Water Foundation's Year of Clean Water (YOCW) Campaign in celebration of the 30th Anniversary of the Clean Water Act (CWA). As part of our interaction with the YOCW, AMSA is participating in the planning of a watershed conference, which will include a panel on urban sewer infrastructure issues, and a CWA awards dinner, which will acknowledge AMSA's historic work on CWA issues. Numerous federal agencies, such as EPA, the Department of Agriculture, NOAA, USGS, and the Department of the Interior, and relevant Congressional committees, also are contributors and partners in the YOCW planning activity.

- AMSA TAF Budget Expenditure: \$5,000

Support for the WERF Paul L. Busch Award

In September 2001, AMSA's Board of Directors approved \$10,000 (\$2,000 a year for 5 years) to become a "benefactor" of the Paul L. Busch Award Endowment. This Award will be presented annually to those outstanding and innovative individuals or teams who contribute significantly to research in water quality and the practical application of research in the water environment.

- AMSA TAF Budget Expenditure: \$2,000 (per year for 5 years; total \$10,000)