

To: Francoise Brasier, EPA
John Goodin, EPA
From: Alexandra Dunn
NACWA General Counsel
Date: July 27, 2006
Subject: INPUT ON DRAFT "DAILY LOAD" MEMORANDUM

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide this informal input to the U.S. Environmental Protection Agency (EPA or Agency) on its draft July 11, 2006 memorandum (draft memorandum) on the issue of total maximum daily loads (TMDLs) and how load allocations and wasteload allocations are addressed in such documents, as well as in permits for point source dischargers.

NACWA participated as an *amicus curiae* in *Friends of the Earth, Inc. v. EPA et al.*, No.05-5015 (D.C. Cir., April 25, 2006). On July 24, the District of Columbia Water and Sewer Authority, one of NACWA's member agencies and a party to the case, filed a *petition for certiorari* to the U.S. Supreme Court of the D.C. Circuit's decision. NACWA plans to support DC WASA and to file an *amicus curiae* in support of the Court accepting the case for review.

NACWA continues to strongly believe that the D.C. Circuit's decision presents many challenges to regulated parties and to regulators, and we believe that the decision is worthy of the High Court's review. For this reason, the following comments on the draft memorandum rest on the possibility that the Court provides no further relief on this matter.

- As a general matter, NACWA believes EPA's memorandum takes a moderated approach to a very difficult legal decision. NACWA supports EPA's efforts to minimize disruption to the existing TMDL program and to TMDLs across the nation.
- Under EPA's memorandum, National Pollutant Discharge Elimination System (NPDES) permits will contain non-daily limits based upon the daily allocations in a TMDL. While we support this outcome (where appropriate for the pollutant of concern), we believe that the approach will leave permits vulnerable to appeal by groups believing that this approach short circuits the D.C. Circuit decision. For example, EPA's position expressed in the draft memorandum that permits must be "consistent with" TMDLs but not "identical to" TMDLs likely would be challenged.
- The memorandum expresses EPA's determination that all TMDLs nationwide need to be expressed as daily limits. In short, the Agency has accepted the D.C. Circuit's view as the law of the nation. NACWA believes it is still possible to limit this decision and its wide ranging effects to TMDLs in the District of Columbia. We recommend that EPA more fully explore ways to limit the decision's impact before abandoning the position that "daily" viewed in context of the entire statute (and particularly the Clean Water Act (CWA) § 402(p) and (q) amendments) is ambiguous and that EPA has deference in interpreting the law. Full exploration of this option is supported by the fact that

the U.S. Court of Appeals for the Second Circuit reached the opposite conclusion of the D.C. Circuit. Other courts could follow the Second Circuit in the future, but EPA’s draft memorandum would eliminate this possibility.

- NACWA is concerned that EPA’s memorandum glosses over many challenging issues – such as the reality that many pollutants cannot be meaningfully addressed in a daily manner. This includes nutrients, bioaccumulative toxics, solids, and dissolved oxygen, to name a few. In addition, in many waterbodies’ rapidly changing receiving water conditions in wet weather and extreme storms create situations where daily limits are not relevant. Existing TMDLs recognize this reality and support non-daily limits. We believe EPA must delve into these issues in detail and recommend that EPA’s memorandum discuss these issues explicitly. Accordingly, we support EPA’s statement in the draft memorandum that it will provide “specific information regarding the establishment of daily loads for specific pollutants that will take into consideration the averaging period of the pollutant, the type of water body, and the type of sources the TMDL needs to address.” NACWA believes such information is critical.
- The D.C. Circuit suggested that EPA revisit its 1978 determination that all pollutants are "suitable" for calculation as TMDLs. NACWA believes that there is great possibility in this invitation from the court to address bioaccumulative and legacy pollutants, as well as nutrients. If EPA does not intend to implement the D.C. Circuit’s suggestion, NACWA believes the Agency should explain why.
- The draft memorandum clarifies EPA’s “expectations” in light of the D.C. Circuit’s decision. However, it will be important for the regulated community to know EPA’s view of its own regulations in light of the D.C. Circuit’s ruling, rather than EPA’s expectations of how the regulated community should act. The memorandum would be much stronger if it clearly stated that EPA is providing guidance on the regulatory obligations of facilities in light of the D.C. Circuit’s decision.

NACWA is a member of the Federal Water Quality Coalition, and as such, would plan to attend any meetings you may set up with this group to discuss these challenging issues further. Again, thank you for the opportunity to provide input to the Agency on these essential issues.