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Water Docket  
Environmental Protection Agency  
Mail Code 4203M  
1200 Pennsylvania Ave, NW  
Washington, D.C. 20460  
Via e-mail: OW-Docket@epa.gov

*Attn: Docket No. EPA—HQ—OW—2006—0141*

Dear Sir or Madam:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on Environmental Protection Agency's (EPA or agency) *National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule* (71 Fed. Reg. 32,887 (June 7, 2006); deadline extended 71 Fed. Reg. 41,752 (July 24, 2006)). NACWA represents the interests of over 300 public agencies and organizations that constantly pursue scientifically based, technically sound, and cost effective laws and regulations. NACWA members serve the majority of the sewered population in the United States and collectively treat and reclaim more than 18 billion gallons of wastewater daily.

While serving the country's most basic needs, NACWA's publicly owned wastewater treatment (POTW) agency members operate many both simple and complex water transfers. Such transfers and diversions of water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply and safety needs. Countless water management systems throughout the country transfer water to areas that need water, or away from areas in danger of flooding.

NACWA commends EPA's effort to clarify the applicability of the NPDES program (CWA § 402) to such transfers. NACWA supports the proposed rule conditioned on the Agency's addressing our important concerns, discussed below.

## I. NACWA’s *Amicus Curiae* Briefs on this Issue

NACWA has supported EPA’s historic position of exempting water transfers from the NPDES program through amicus curiae briefs in two federal court cases – *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004) and *Catskill Mountains Chapter of Trout Unlimited v. City of New York* (2d. Cir. 2006). In both cases, NACWA’s briefs highlighted the difficulty of adding thousands of new structures to the already backlogged NPDES permit program, and the importance of preserving local government autonomy over water management. Our briefs emphasized that as local governments and clean water public utilities, NACWA’s member agencies have a direct role in ensuring clean and safe water in our country. We also noted our interest in ensuring that suitable laws and regulations apply to our activities. EPA’s proposed rule properly recognizes that to require such water transfer structures to obtain NPDES permits would dramatically change a three decade old regulatory structure for these activities.

## II. Water Quality Impacts of Water Transfers Must be Addressed

In supporting EPA’s past position in amicus curiae briefs, and in these comments, we must highlight that NACWA does not assent to exempting water transfers from meaningful regulation – particularly where these transfers are contributing to an impairment of water quality. In fact, we believe EPA’s final rule must clearly state that the water quality impacts of water transfers must be aggressively managed under provisions of both federal and state law designed so that their water quality impacts are minimized.

On the federal level, such provisions and programs include the total maximum daily load program (TMDL) (CWA § 303(d)). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources when wasteload allocations (WLAs) are subsequently incorporated into NPDES permits, and for nonpoint sources when load allocations (LAs) are implemented through state best management practices. In an impaired waterbody – where both point sources and water transfers are the source of the pollutant causing the impairment – EPA must state that the point sources’ WLAs cannot be disproportionately reduced as compared to the LAs.

EPA’s final rule also must emphasize the role that state Water Quality Management (WQM) Plans play in waterbodies where water quality standards cannot be attained or maintained without the control of nonpoint sources. 33 U.S.C. § 1329(a)(1)(A). A WQM Plan “identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution ... in amounts which contribute” to the failure to meet water quality standards. 33 U.S.C. § 1329(a)(1)(B). A WQM Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been implemented to control pollution from those sources. 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii). Moreover, the TMDLs that are established under 33 U.S.C. § 1313 are incorporated into a state’s WQM Plan. 40 C.F.R. § 130.7(a). The WQM Plan is another tool to ensure that point source dischargers are not disproportionately impacted by a water transfer in an impaired waterbody.

In addition to these important steps, NACWA also urges EPA, in its final rule, to:

- emphasize the importance of state laws and regulations designed to address and control pollutants in the context of municipal water management and water transfers; and
- commit to a firm schedule for undertaking the important activities outlined in CWA 33 U.S.C. §§ 1314(f)(F) – the issuance of guidelines and processes to control pollution resulting from changes in the movement, flow, or circulation of any navigable waters caused by flow diversion and related facilities.

### III. Conclusion

While NACWA supports EPA's proposal to codify its long-standing approach to addressing water transfers outside the NPDES permitting program, NACWA and the Agency are well aware of the potential adverse impact on water quality of water transfers. In many cases, where a waterbody is impaired and cannot come into attainment, point source WLAs become the tool to achieve further reductions. Thus, NACWA's support for EPA's proposed rule is expressly tied to EPA's making clear in the final rule the importance of monitoring and assessing the impact on water quality of water transfers. And, EPA must state that if a water transfer is contributing to a violation of water quality standards, the transfer must be controlled so that other dischargers in the watershed are not treated inequitably. Finally, EPA must commit in the final rule to a firm schedule for the development and issuance of guidelines for processes to control the pollution that results from flow diversion and related facilities under CWA 33 U.S.C. §§ 1314(f)(F).

Please feel free to contact me with any questions concerning NACWA's comments on the proposed rule at 202/833-2672 or [adunn@nacwa.org](mailto:adunn@nacwa.org).

Sincerely,



Alexandra Dapolito Dunn  
General Counsel