To: Members and Affiliates
From: Brenna Mannion
Date: July 7, 2016
Subject: Feedback needed on CWA 404 Nationwide Permit 27 modification for TMDL and CSO Implementation

When urban drainage sends sediment and nutrients downstream and causes severe channel incision, bank erosion and degraded habitat — **do we have the needed regulatory tools under Section 404 of the Clean Water Act (CWA) to facilitate permitting to enable timely repair and restoration?** A number of clean water utilities' programs – including CSO mitigation and TMDL implementation in the urban and suburban environment — to address non-point source sediment and nutrient loading can require reduction of impervious surfaces up watershed and restoration of streams that receive stormwater.

CWA 404 regulates discharge of dredged or fill material into all waters of the U.S., including jurisdictional wetlands. The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under CWA 404 and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. There are currently 50 NWPs. Stream restoration triggers the requirement to obtain a CWA 404 permit for waterway changes and adjacent wetland impacts. However, CWA 404 was not drafted with restoration type activities in mind, particularly with regard to the "avoid, minimize and mitigate" requirements when a project impacts a stream or wetland.

NWP 27 covers restoration, enhancement and establishment of wetlands and riparian areas, including stream restoration and enhancement. It requires that activities result in a net increase in aquatic function and value at the site. If a stream restoration project causes adverse impacts to adjacent wetlands or other jurisdictional waters, mitigation or payment of an in-lieu fee will likely be required under CWA 404. NWP 27 does **not** authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands, which unfortunately often occurs with restoration projects. Should a conversion be necessary to accomplish the goals of the project, the entity would need to seek an individual CWA 404 permit, which often entails a lengthy and burdensome process.

Make sense? Not really. In fact, to deal with the shortcomings of NWP 27, the Corps response in MD/VA/PA to the Chesapeake Bay TMDL was to issue the Chesapeake Bay TMDL Regional General Permit (RGP). However, while the Bay TMDL RGP expedites the permitting process, it doesn't solve all the issues. For example, the Bay TMDL RGP contains restrictions with regard to project size. Total impacts under the RGP cannot exceed 1 acre or 2,000 linear feet of stream.

The Corps has proposed a revised draft Nationwide Permit 27 for public comment. The deadline for comment is August 1.

NACWA is soliciting feedback from the committee on whether the Association should comment (or join a collaborative comment effort with other state/county groups) on the NWP 27 and/or reach out to EPA, the Corps, and OMB in advance of August 1. Your responses to the following questions are critical to making this determination:

- States without the equivalent of the Bay TMDL RGP have little/nothing to help expedite the permitting of these types of projects – and we have heard from members that 404 coordination is a constant struggle. In the absence of region-specific TMDL RGPs, could NWP 27 be improved and provide a mechanism to better facilitate the permitting of many of these projects nationally? How? Could there be a better tool to allow for consistency and larger projects? If so, what?
- Communities in the Ches. Bay with significant restoration projects want to comment on NWP 27 with regard to the need for changes (e.g., allow conversions). Do other states/regions have similar RGPs? If so, provide details.

Any feedback is appreciated by July 11. Additionally, the stormwater committee will be discussing this issue at the NACWA Utility Leadership Conference in Denver.