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Ken Kirk

September 29, 2008

Stephen Johnson

Administrator

U.S. Environmental Protection Agency

Arial Rios Building

1200 Pennsylvania Avenue, NW (MC 1101A)

Washington, DC 20406

Dear Administrator Johnson:

I write on behalf of the National Association of Clean Water Agencies (NACWA) to express serious concern over a new nutrient standard development methodology recently employed by EPA Region III in the total maximum daily load (TMDL) process. NACWA represents the interests of the nation's publicly owned treatment works (POTWs), with over 300 municipal clean water utility members. We understand that on August 25, 2008, a coalition of Pennsylvania municipal entities requested that EPA arrange for an objective and independent peer review of the new nutrient standards. Unlike EPA's other published nutrient criteria derivation methods, the new methodology does not consider whether nutrients are causing excessive plant growth but assumes nutrients directly impact sensitive aquatic life (e.g., invertebrates). It is our understanding that the approach employed by Region III was actually disseminated by EPA Headquarters to Regional Technical Advisory Groups (RTAGs) in late 2007 as a new recommended methodology for developing stream nutrient standards, suggesting that EPA Headquarters intends this method to be used on a nationwide basis. For the past twenty years, it has been standard agency practice to subject new criteria development methods to either a Science Advisory Board or National Academy of Sciences review to ensure that the methods are well founded. For the reasons set forth below, NACWA asks that EPA conduct an independent peer review as requested by the Pennsylvania coalition and defer further application of this new methodology until such review is completed and confirms the scientific validity of the approach.

As the coalition documented in its request, this new approach abandons all state and federally published guidance (including EPA's 304(a) guidance) on the subject. Specifically, the approach (1) abandoned consideration of whether nutrients were stimulating excessive plant growth in the receiving waters, (2) created new invertebrate impairment thresholds that must be met in streams, (3) evaluated

nutrients by assuming they were directly toxic to the macroinvertebrate community, (4) relied heavily on a new and untested data evaluation procedure known as conditional probability theory that has yet to demonstrate the ability to generate a meaningful standard, and (5) used confounded field data to justify the invertebrate/nutrient relationship. Lastly, where site-specific data confirmed that the assumed relationship did not actually exist, those data were ignored in the "weight of evidence" evaluation. Collectively, and individually, the various aspects of this new approach differ radically from EPA's published, peer reviewed methodologies for nutrient standard development.

The new methodology generates instream standards at or below background conditions, which are virtually unattainable by wastewater facilities and certainly cannot be achieved by municipal stormwater discharges. Due to the staggering widespread financial impacts of this approach, NACWA would support a peer review even if the science appeared valid and sound. However, based on our review of the coalition's request there is substantial uncertainty over the technical sufficiency of the new methodology. In particular, two internationally renowned scientists in the field of nutrient control voluntarily reviewed the new approach and concluded it was not scientifically defensible and would likely misdirect local resources. Both individuals recommended that the methodology be peer reviewed. Moreover, peer review of this issue is supported by both Office of Management and Budget (OMB) and EPA policies. Under the 2005 OMB Bulletin, Final Information Quality Bulletin for Peer Review, January 14, 2005 and 2006 EPA Peer Review Handbook, EPA is required to peer review all influential scientific information it disseminates. Although the extent of the peer review is discretionary, the duty to conduct a peer review is not discretionary where precedent setting procedures are being employed or where a new approach alters prevailing practices and substantial regulatory costs will be incurred based on application of the new methods. In light of the highly questionable scientific methods employed and the extreme costs of compliance, it is even more imperative that a peer review be conducted.

Based on the aforementioned reasons, we request that a peer review be promptly scheduled and that any further application of this methodology be deferred pending completion of that review. If you have any questions you may contact Keith Jones, NACWA's General Counsel, at 202/533-1803. We look forward to your response to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is fluid and cursive, with the first letter "K" being large and prominent.

Ken Kirk
Executive Director

CC: Benjamin Grumbles
Craig Hooks