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September 2, 2010

Water Docket

Attention: Docket ID No. EPA-HQ-OW-2009-0596

U.S. Environmental Protection Agency, Mail Code 2822T

1200 Pennsylvania Ave, NW

Washington, DC 20460

Via Electronic Mail: ow-docket@epa.gov

Dear Sir or Madam,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the supplemental notice of data availability and request for comment related to EPA's January 26, 2010 rulemaking proposing numeric nutrient criteria for Florida (*Notice*) (August 3, 2010; 75 *Fed. Reg.* 45579). NACWA submitted extensive comments on April 28, 2010, regarding the January proposal and continues to believe that EPA's approach to developing nutrient criteria in Florida is flawed and will have major consequences for clean water agencies in that state. NACWA is most concerned about the speed with which EPA is developing this initial round of criteria for Florida's lakes and flowing waters. With the Agency presumably still reviewing and responding to the thousands of substantive comments it received on the January proposal, this new *Notice*, which proposes changes to the criteria values, was released with a comment period that ends only a few weeks before the final criteria are to be issued. NACWA is concerned that this overly aggressive schedule, not sound science, is driving the development of these criteria and believes EPA should seek relief from the October consent decree deadline for finalizing the first round of criteria.

In the August 3 *Notice*, EPA outlines two changes to its approach for deriving the stream criteria for Florida relating to delineation of the stream regions for which EPA has developed reference condition criteria and the potential application of a 'benchmark distribution approach' for certain stream regions within the state. While EPA sought comment in the January 2010 proposal on the benchmark distribution approach, which had been used by the Florida Department of Environmental Protection (DEP) in developing draft nutrient criteria in 2009,



EPA relied on its standard reference condition approach when establishing the proposed criteria values. Now, in the *Notice*, EPA states that it is considering using the benchmark method to establish criteria for certain waters, and sets forth proposed numeric criteria that the Agency derived using that method.

The benchmark method, however, is merely a ‘modified reference condition approach’ and suffers from the same fundamental problem – it is not based on a cause-and-effect relationship. NACWA has been a vocal critic of the reference condition approach to nutrient criteria development since the late 1990s for this reason. The statistical percentiles employed can only represent the properties of a data distribution. Without further analysis of any associated in-stream effects, it is impossible to determine whether the environmental conditions associated with meeting a reference condition-based criterion would actually protect designated uses. NACWA and other stakeholders, including the Florida DEP, have suggested that bioassessments be done before applying such nutrient criteria to a particular waterbody to ensure that the statistics are relevant to the waterbody in question. Florida DEP actually included this as an element of its proposed use of the benchmark distribution approach. NACWA believes that including such a biological confirmatory step in the Florida criteria would be consistent with other state approaches and would help prevent unnecessary expenditures where biological conditions are not impacted and ensure that controls are put in place when there is an impact.

The *Notice* also seeks comment on the appropriateness of using a particular model for assessing downstream protection of lakes. Though EPA is seeking Science Advisory Board (SAB) review of its methodology for evaluating downstream impacts on estuaries, the *Notice* makes it clear that EPA intends to finalize its downstream protection analysis for lakes. As NACWA expressed in its April 28 comments on EPA’s proposed criteria for Florida’s flowing waters, downstream protection is already achieved via the existing total maximum daily load (TMDL) program. If further reductions are needed to protect downstream waters, those reductions should be based on a complete loading analysis with an allocation of nutrient loads via the TMDL process. The BATHTUB and WASP models, while providing improvements over the Vollenweider equation for evaluating downstream impacts, each have their own limitations. Application of these models, however, would be essentially equivalent to conducting a TMDL. EPA should also avoid limiting the use of models to these examples. Other more appropriate models may exist but would be precluded from use based on the proposal.

The *Notice* proposes some adjustments, not the wholesale changes that NACWA and other stakeholders have requested, clearly signaling that EPA is still moving forward at breakneck speed to finalize these criteria. What remains a major unanswered question at this point, however, is how EPA’s new criteria will be implemented and how it will integrate with existing Clean Water Act programs. NACWA remains concerned that EPA has not adequately addressed the impact of its new criteria on current, EPA-approved TMDLs in Florida. NACWA believes that clarifying language is needed to indicate that the new criteria will not be applied to waters governed by current TMDLs until the state finds that the TMDL needs to be updated.

In addition, in comments EPA has made in various meetings, a significant amount of weight is being placed on ‘implementation flexibility’. Discharger concerns about the new criteria being applied at the ‘end-of-pipe’, requiring treatment beyond the limit of technology, are being met with EPA assurances of reasonable implementation approaches by state regulators.

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NACWA believes that if EPA continues on its aggressive schedule to finalize the criteria by October, then it should delay the effective date of the criteria to allow for the development of the necessary implementation policies and regulations by the state.

Again, NACWA appreciates the opportunity to comment on the *Notice*. Please contact me at chornback@nacwa.org or 202/833-9106 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Hornback", written in a cursive style.

Chris Hornback

Senior Director, Regulatory Affairs