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A Clear Commitment to America's Waters

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September 22, 2010

Thomas J. Gardner
Office of Science and Technology (Mail Code 4305T)
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Via Electronic Mail: *SHPDcomments@epa.gov*

Dear Tom,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) potential revisions to the water quality standards (WQS) regulations announced in a July 30, 2010 *Federal Register* (75 *Fed. Reg.* 44930) Notice (*Notice*). NACWA's public wastewater agency members own and operate treatment plants with National Pollutant Discharge Elimination System (NPDES) permits, which often contain effluent limitations based on WQS established by the states or EPA. NACWA understands EPA's desire to clarify and include more specificity in its WQS regulations in an effort to provide states with more certainty regarding the Agency's review and approval process and to ensure greater consistency in implementation, but has concerns with the revisions EPA is currently considering.

As evidenced by the response EPA received to its July 7, 1998, Advanced Notice of Proposed Rulemaking (ANPRM) on the WQS program, including extensive comments from NACWA, this issue is critically important as well as extremely complex and technical. NACWA believes that EPA should only revise the WQS regulations when there is a clear need to modify or clarify existing requirements. EPA's 1998 ANPRM explored the possibility of making more substantial changes to the WQS regulations than the current *Notice*. At that time, NACWA recognized that revisions to the WQS regulations could be controversial and suggested that EPA convene a formal stakeholder process to resolve the more difficult issues. No additional Agency action, however, was taken on the issues raised in the ANPRM. Now, NACWA understands that EPA has used the list of more than 100 issues identified in the ANPRM process as a starting point for this new effort, culminating

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in the selection of the six issues outlined in the *Notice*. This selection was based on the implementation of the WQS program over the last decade.

While NACWA agrees with some of the changes EPA is proposing, the Association generally believes that they do not warrant significant revisions to the WQS regulations at this time. For most of the areas the Agency is targeting, additional guidance to the states, instead of new regulatory provisions, would suffice. NACWA's comments on the six areas highlighted in the *Notice* are outlined below.

Antidegradation Implementation Methods

The *Notice* indicates that EPA is considering modifying the WQS regulations to require that antidegradation implementation plans meet specific minimum requirements and be adopted into state WQS, thereby subjecting those plans to EPA review and approval. EPA, in the *Notice* and in subsequent meetings with stakeholders, has expressed concern that certain states have insufficient procedures for ensuring their antidegradation policies are implemented. NACWA understands EPA's desire to ensure the states implement their antidegradation programs, but NACWA believes such issues can and should be addressed without making any regulatory changes. NACWA believes that EPA should focus its efforts on those states that the Agency has identified as having insufficient implementation procedures in place, rather than changing the rules for all states.

NACWA members have expressed concern over the proposed changes, fearing that they will lead to less flexibility in their states, not necessarily more consistent implementation. If EPA does pursue regulatory changes in this area, NACWA believes that any Agency requirements must not interfere with the ability of states to make their own decisions as to how to structure their antidegradation programs. Those states that have established antidegradation policies and robust implementation must be allowed to continue these programs, including any special provisions they may have developed. For example, many states have adopted "de minimis" levels or antidegradation exceptions that exempt insignificant new or increased discharges from antidegradation review. These types of provisions are crucial given the time-consuming, resource-intensive nature of the technical and economic analyses involved in a full antidegradation review. States must have the flexibility to develop and incorporate these types of provisions as appropriate.

Administrator's "Determination"

As EPA describes in the *Notice*, the Clean Water Act (CWA) provides the EPA Administrator the authority to determine whether a new or revised WQS is necessary in a particular state or states to meet the requirements of the CWA (Section 303(c)(4)(B)). If such a determination is made, EPA must adopt a new standard to replace the state standard. EPA is considering clarifying that such a determination must be signed by the Administrator or his/her duly authorized designee, and must include a statement that the document constitutes a determination under section 303(c)(4)(B) of the CWA. NACWA supports this clarification. It is important that general statements in EPA guidance or policy memoranda are not misinterpreted or misconstrued as official Agency determinations under Section 303(c)(4)(B) triggering EPA's duty to take over a state's responsibilities and adopt new water quality standards.

Designated Uses

NACWA understands that EPA's proposed regulatory changes regarding designated uses are intended to codify the Agency's long-established policy that the CWA's 'fishable/swimmable' goals are presumed attainable unless otherwise demonstrated. The key to demonstrating that 'fishable/swimmable' goals are not attainable is the use attainability analysis (UAA). Currently, however, UAAs are underutilized due to the resources they demand

and the negative perceptions they elicit from the environmental NGO community. This has led many states to treat waters as fishable/swimmable and develop standards, TMDLs and permit limits, even though those waters are incapable of achieving those uses. EPA must do more to ensure that states can use UAAs to ensure a use is appropriate before resources are committed to develop water quality standards, TMDLs, and permit limits.

EPA is also considering clarifying that the 'highest attainable use' closest to the 'fishable/swimmable' goal be adopted if fishable/swimmable is unattainable. EPA has explained that one of its top concerns here is that many states have removed uses that they have deemed unattainable, without replacing them with uses that are attainable. In meetings with stakeholders, EPA has indicated that they want to encourage the utilization of tiered uses, so that, for example, if a waterbody cannot meet a "cold water fishery" use, it might still be able to meet a "warm water fishery" use, rather than declaring the aquatic life use as unattainable. NACWA believes EPA should encourage this type of use refinement or sub-categorization and should clarify when states can make such changes in their designated uses without having to conduct a full UAA. There remains significant uncertainty regarding the concept of 'highest attainable use' and NACWA believes EPA should collect more input from stakeholders before pursuing any regulatory changes.

The issue of designated uses is at the foundation of EPA's entire CWA program. For water quality standards, TMDLs, and water quality-based effluent limits to work, the entire system must be based on accurate and attainable uses. Otherwise, resources are wasted trying to meet standards that cannot be attained. If EPA is to codify the 'fishable/swimmable' use presumption, then it is essential that EPA also take the necessary steps to ensure that the UAA program will function effectively to help states adopt the right uses for each waterbody.

Variances

EPA's *Notice* indicates that it is proposing changes to address concerns from the states regarding the appropriate use of variances. These changes are intended to ensure that sources subject to a variance make progress toward reducing loadings during the term of the variance and that variances have an identified end date. EPA has also stated that its proposal to establish regulatory requirements will increase the use of variances by reducing uncertainty among the states over how they can be appropriately approved.

Again, NACWA believes that EPA's concerns regarding variances can be best addressed via guidance, not regulatory changes. Variances are very situation-specific and attempting to overlay minimum federal requirements will likely inhibit their use. Instead, EPA should look for ways to ensure states know when and how to use variances and provide guidance, not strict regulatory conditions or limits, on how to best demonstrate continued progress or determine an appropriate expiration date.

Triennial Reviews

Under current federal regulation, states are required to review their water quality standards at least every three years, and modify standards or adopt new standards as appropriate. NACWA agrees with EPA's proposal to clarify that states must solicit and consider public comments in determining the scope of each triennial review. Furthermore, NACWA believes that it is appropriate during the triennial reviews to evaluate whether existing water quality criteria continue to be protective of, or are more stringent than, necessary to protect designated and existing uses. This evaluation should be conducted as part of a comprehensive review that carefully examines, based on sound science, whether existing criteria are either inadequate or overly conservative. At the same time, very real state resource limitations must be considered in determining how to best use these resources.

Updates Based on Court Decisions

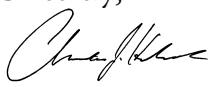
EPA has indicated that it may make changes to the WQS regulations to reflect what it believes are needed updates based on past legal decisions. With regard to possible changes regarding the definition of "water quality standards" based on the 11th Circuit Court of Appeals decision in *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070 (11th Cir. 2004), NACWA takes no position at this time on this possible change but will reserve judgment until actual language outlining the proposed change is put forth by EPA. Additionally, NACWA has no objections at this time to the proposed change suggested by EPA based on the 10th Circuit Court of Appeals decision in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), regarding submission of state public participation records related to reviewing and revising state water quality standards. We would also note that such a change would not absolve EPA of its own responsibility to seek and consider public comments when reviewing and making decisions about state water quality standards.

However, NACWA does have significant concerns with EPA's proposed change to require federal approval of state compliance schedules for implementing water quality-based effluent limits in NPDES permits and would strongly object to any efforts by EPA to make such a change. Furthermore, NACWA believes that EPA's reliance on the *Star-Kist Caribe* (*In the Matter of Star-Kist Caribe, Inc.*, 3 EAD 172) to justify federal review of these compliance schedules is misplaced. In fact, the *Star-Kist Caribe* decision clearly found that compliance schedules are to be dealt with solely by the states and not the federal government, holding that these schedules are "purely matters of state law, which EPA has no authority to override," *Star-Kist*, 3 EAD 172. It is NACWA's position that EPA does not have the authority to require states to submit compliance schedule provisions to the Agency for approval.

* * *

Again, NACWA appreciates the opportunity to comment on EPA's potential revisions to the water quality standards regulations. Please contact me at 202/833-9106 or chornback@nacwa.org if you have any questions or would like to discuss further.

Sincerely,



Chris Hornback
Senior Director, Regulatory Affairs