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February 1, 2013

Attn: Docket ID No. EPA-HQ-OW-2009-0596 and Docket ID No. EPA-HQ-OW-2010-0222

Water Docket

U.S. Environmental Protection Agency, MC 2822T

1200 Pennsylvania Avenue, 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 U.S. Environmental Protection Agency's (EPA) proposed rule to address the remanded portions of its water quality standards for Florida's inland flowing waters and downstream protection values for lakes (December 18, 2012; 77 *Fed. Reg.* 74985) as well as EPA's proposed rule to promulgate water quality standards for Florida's estuaries, coastal waters, and South Florida inland flowing waters (December 18, 2012; 77 *Fed. Reg.* 74924). NACWA represents the interests of the nation's publicly owned wastewater treatment agencies, including 11 utilities in Florida, and has closely followed developments in Florida since EPA's initial determination in 2009 that it would develop federal nutrient criteria for the state.

NACWA filed comments on April 28, 2010, on EPA's *Water Quality Standards for the State of Florida's Lakes and Flowing Rivers Notice of Proposed Rulemaking* (January 26, 2010; 75 *Fed. Reg.* 4174) and filed a brief as *amicus curiae* in *Florida Wildlife Federation v. EPA*, arguing, among other things, that EPA's promulgation of federal numeric nutrient criteria for Florida (December 6, 2010; 75 *Fed. Reg.* 75762) had usurped the state's primary role under the Clean Water Act (CWA) to establish water quality standards consistent with federal guidance. EPA's efforts in Florida garnered significant attention as stakeholders saw the rule as the first in what could become a long list of federal criteria for nutrients. While this heavy-handed federal program has not materialized, recent developments in Florida are still relevant for the nation.

EPA's actions on November 30, 2012, including its approval of the Florida Department of Environmental Protection's (FDEP) nutrient criteria proposal,

revision of EPA's 2009 determination that federal criteria were necessary for Florida, and signature of two proposals to address the remanded provisions of the December 2010 inland waters rule and Florida's estuaries, coastal waters and South Florida inland flowing waters, reflect a positive shift in EPA's thinking. NACWA is encouraged that EPA appears to be taking the necessary steps to give FDEP full control over the state's waters. Though EPA was compelled to sign the two proposed rules outlining federal criteria for the state, EPA's planned actions over the coming months, as detailed in both proposals, set out a clear path forward to restoring Florida as the primary authority for developing water quality standards for its waters. Important issues that will no doubt be raised by NACWA members and other stakeholders in Florida include whether the federal criteria will still be necessary to fill gaps in the FDEP criteria. The Agency's exit strategy, however, now seems clear.

EPA Approval of FDEP Criteria, Proposed Rules Signal a More Rational Approach

In its April 2010 comments on the proposed inland waters rule, NACWA offered a number of recommendations for moving forward with a more reasonable and science-based program for addressing nutrient enrichment in Florida, as well as the rest of the nation:

1. Nationally, EPA must change its existing framework that necessitates the establishment of numeric criteria for total nitrogen (TN) and total phosphorus (TP), which may not be appropriate for all waters;
2. EPA should better recognize and approve new and innovative approaches for expressing nutrient water quality goals currently being considered by some states;
3. Future water quality criteria development work must be supported by information on biological response to ensure criteria will actually protect designated uses;
4. Additional flexibility, both in criteria development and in permitting (e.g., averaging periods), to account for the unique behavior of nutrients must be provided;
5. Ultimately, EPA, the states and remaining stakeholders must work to establish a new, more holistic approach to addressing water quality problems that includes meaningful and equitable controls and implementation requirements for all nutrient sources.

While EPA remains steadfast on the need for numeric TN and TP criteria for all waters, the Agency's recent actions regarding its nutrient criteria for Florida show an increasing willingness to recognize innovative approaches that can better account for the varying responses to different nutrient levels among waterbodies. One of NACWA's top concerns with EPA's policies regarding nutrient criteria development at the time of the January 2010 Florida criteria proposal, was the Agency's rigid adherence to the principle that TN and TP criteria be applied regardless of other information concerning the health of the waterbody. This independent applicability meant that an otherwise healthy waterbody could be deemed impaired simply for exceeding one of the numeric thresholds. In the case of Florida, where EPA acknowledged that it could not find a meaningful link between nutrient concentration and in-stream impact and instead used a statistical method to set the criteria, significant concerns were raised in the comment period as to whether the criteria could adequately protect the designated uses of Florida's waters, as required by the CWA.

Throughout 2010 and 2011, NACWA and other stakeholders pressed EPA to acknowledge that independent applicability was simply not appropriate for nutrients. In an August 2, 2011 letter to EPA Administrator Lisa Jackson, signed by more than 30 municipal water quality organizations from around the country, NACWA underscored that states must be able to look beyond simple numeric values for nitrogen and phosphorus and use different approaches and strategies as needed to address the unique needs of a particular waterbody. At

that time, states were exploring a range of new approaches and the letter urged EPA to embrace and support these types of approaches and ensure that other states have the flexibility to undertake similar efforts.

EPA's November 30, 2012 approval of FDEP's nutrient criteria proposal, which incorporates the use of biological information to augment numeric thresholds, is a positive step that sends a strong message to other states. FDEP's hierarchical approach, as described by EPA, gives preference to site-specific information and emphasizes the importance of establishing a quantifiable stressor-response relationship. Only when these approaches are unable to accurately characterize local conditions or data are insufficient, do the reference-based nutrient thresholds, which are similar to those developed by EPA, come into play. And where biological information is available, that information is used together with the numeric thresholds in a weight of evidence approach – an approach for which NACWA has consistently advocated. EPA also underscores FDEP's extensive experience and technical expertise and acknowledges that FDEP's approach will address the inherent variability in response to nutrient levels among streams – a key concern when developing criteria for nutrients.

In the January 2010 inland waters rule proposal, EPA introduced the concept of a downstream protection value (DPV) for the first time. EPA's water quality standards regulations have always referenced the need to ensure that criteria protect downstream uses, but EPA's proposal to use numeric DPVs in Florida went too far. In its comments on the January 2010 proposal NACWA expressed its concerns with EPA's approach:

NACWA believes that what has been proposed was not sufficiently evaluated and oversimplifies the complex watershed dynamics that determine how nutrients are actually processed and delivered to downstream waters. NACWA has identified significant issues with the assumptions EPA has made in its approach to estimating downstream protective values and believes that the entire approach should be put on hold until an in-depth analysis of the issue can be conducted. NACWA is concerned that this approach, as contemplated in the proposal, would supersede any watershed-specific process that might better be used to develop appropriate goals based on site-specific information and mechanistic modeling and create a conflict between Section 303(c) and 303(d) of the CWA. Downstream protection is already achieved through the existing TMDL program – loadings from upstream discharges to impaired downstream waters are addressed through wasteload allocations.

FDEP's approach to ensuring downstream uses are protected is anchored by the state's total maximum daily load (TMDL) program and evaluates trends to determine which waters may be threatened due to upstream discharges. Here again, EPA's recent actions are sending a strong signal that alternative approaches can work. EPA's December 18, 2012 proposed remand rule notes that FDEP's approach to protecting downstream uses will ensure the attainment and maintenance of downstream waters and that the approach is "sufficient to meet" the requirements of the CWA. NACWA commends EPA for acknowledging that other approaches can achieve the protection of downstream uses and for taking steps to modify its 2009 determination and seek a modification of the Consent Decree driving EPA's rulemaking efforts so the Agency is not forced to finalize its DPVs and can let the Florida program go into place.

In addition to supporting alternative or innovative state approaches to developing nutrient criteria, EPA must also ensure that the full suite of CWA tools currently available, including variances, site-specific criteria, use attainability analyses and compliance schedules, are used to their full extent. Where numeric criteria are developed and imposed clean water agencies will likely face permit limits that approach or surpass the limits of technology. EPA's discussion in the preambles to the January 2010 inland waters proposal and the December

2012 estuaries and coastal waters proposal include discussions of these tools that could help to ease implementation of nutrient limits for clean water agencies and other dischargers. EPA, in its public statements about the cost of the Florida criteria, has consistently disputed that extremely low nutrient criteria could be imposed as end of pipe limits on clean water agencies, which would dictate the use of reverse osmosis or other advance treatment technology to ensure compliance. EPA has instead focused on reasonable implementation, using the tools it outlines in the preambles to the rules. This is another good step in the right direction, but EPA has yet done little to ensure that these tools are actually put to use.

Taken together, EPA's recent actions relating to its nutrient criteria for Florida are positive steps in the right direction toward restoring Florida as the primary authority for developing water quality standards for its waters. EPA's actions also send a positive signal to other states exploring similar approaches to addressing nutrients.

NACWA Concerns with Proposed Remand Rule

The proposed remand rule attempts to address the February 18, 2012 U.S. District Court for the Northern District of Florida ruling that found that EPA had either "aimed for the wrong target" or had not sufficiently explained what the Agency did in aiming for the right target. At issue was whether EPA had properly interpreted Florida's narrative criteria that "nutrient concentrations of a body of water [must not] be altered so as to cause an imbalance in natural populations of aquatic flora or fauna" when it set its numeric criteria for flowing waters. The court found that EPA had developed its flowing waters criteria to prevent any increase in nutrient levels, but that the correct approach would be to avoid any harmful increase in nutrient levels.

In the December 18, 2012 remand rule proposal, EPA re-proposes the same numeric nutrient criteria for TN and TP that were finalized in December 2010 with "further explanation on how the proposed stream criteria will ensure the protection" of Florida's waters and how they are "an appropriate translation of Florida's narrative nutrient criterion. But EPA's "further explanation" fails to provide any further evidence that the criteria will be protective of designated uses, a flaw inherent to EPA's reference condition approach.

As it did in proposing the flowing waters criteria in January 2010, EPA acknowledges that sufficient data do not exist and that in responding to the Court's ruling it was not able to pinpoint the level of nutrients at which harmful change or imbalance in aquatic flora and fauna takes place. EPA invites commenters to provide data and/or information to dispute its decision to re-propose the same numeric criteria, but states that its use of the upper percentile of reference streams is appropriate. EPA notes that FDEP's numeric criteria also employ the reference condition approach and set the criteria at the upper percentile of the reference condition data distribution.

EPA provides extensive discussion of additional studies and information to argue that its proposed criteria are, "in general,"... "consistent with the range of thresholds of harmful adverse effects documented in the peer-reviewed scientific literature." Section III. C. 3. of the preamble notes that "[a]dditional lines of evidence from empirical stressor-response analyses and the peer-reviewed scientific literature support EPA's conclusion that the upper percentile of the reference condition data distribution is the appropriate nutrient criterion-magnitude for Florida's streams." EPA has done an admirable job at amassing an impressive amount of information in an effort to show that harmful impacts are "likely to occur" when the criteria values are exceeded. But by EPA's own admission it could not identify the tipping point between healthy and unhealthy waters, underscoring the flaws in the reference condition approach. Though FDEP has decided to use similar

numeric criteria based on the reference condition, it does so with the knowledge that its extensive biological monitoring efforts will provide it with information to use together with the numeric thresholds to determine if a water is impaired. There is little EPA can do to address this flaw in its criteria short of abandoning the reference condition approach or adding a biological confirmation step to all of its criteria in the inland waters rule and the estuaries and coastal waters rule.

Important Work Remains on Key Issues

NACWA understands that EPA and FDEP are working to reconcile the last differences between the state and federal rules. EPA has carefully crafted its rules to provide time for this dialogue to proceed. It is important that EPA and FDEP continue to seek the input of stakeholders in Florida throughout this process.

- EPA hopes that its rules will serve to fill the gaps in Florida's program, in particular where EPA and FDEP have different definitions for 'streams' and for coastal waters. FDEP continues to believe that numeric criteria are not appropriate for certain waters, including stormwater ditches and conveyances. It is important that EPA only evaluate whether Florida's program will protect its waters and meet the goals of the CWA. EPA should not allow a conservative reading of its Consent Decree obligations to dictate how it proceeds.
- The impact of the so-called 'poison pill' provision of the state rule – which EPA believes may prevent any of the FDEP criteria from going into effect – is being overstated and key stakeholders in Florida believe that this issue can be easily addressed over the coming months.
- NACWA understands that a package of TMDLs was submitted by Florida to EPA for approval as site-specific alternative criteria (SSAC). This was an important provision in the inland waters rule to ensure the important work involved in developing these TMDLs was not overridden by EPA's federal criteria. EPA should ensure this package is reviewed in a timely fashion.

EPA is looking for final assurances that the FDEP rules will protect Florida's waters and meet the objectives of the CWA. NACWA's members in Florida are confident that the remaining issues and discrepancies between the EPA and FDEP rules can be addressed, and NACWA urges EPA to continue on the path it has laid out in its December 2012 proposals to put Florida back in control of addressing the nutrient impacts on its waterbodies.

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

Sincerely,



Chris Hornback
Senior Director, Regulatory Affairs

cc: Nancy Stoner, EPA
Elizabeth Southerland, EPA