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Water Docket, U.S. Environmental Protection Agency

Mail Code 2822T

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Via electronic mail: ow-docket@epa.gov

Re: Water Quality Standards Regulatory Clarifications

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the proposed *Water Quality Standards Regulatory Clarifications* (78 Fed. Reg. 54518; September 4, 2013). NACWA's public wastewater agency members own and operate treatment plants with National Pollutant Discharge Elimination System (NPDES) permits containing effluent limits and other requirements based on water quality standards (WQS). As such, NACWA members will be impacted by the changes being proposed and while we recognize EPA's desire to clarify elements of its WQS regulations to ensure greater consistency in implementation, there are some concerns with the revisions EPA is currently considering.

NACWA has actively tracked efforts in this area since EPA first contemplated WQS regulation changes in a July 1998 Advanced Notice of Proposed Rulemaking. NACWA provided extensive comments on that proposal and weighed in on the Agency's July 30, 2010 notice soliciting initial stakeholder input on the issues addressed in the current proposal. Consistent with its September 22, 2010 comments on the July 2010 notice, NACWA does not see an urgent need for regulatory changes to address the issues EPA has laid out in the proposal. NACWA understands that many of the changes are intended to facilitate more consistent implementation among the states, but EPA should instead work to address those implementation issues directly with its state partners rather than attempting to achieve more consistency through additional regulatory requirements.

To the extent that EPA proceeds to finalize these provisions, NACWA offers the following comments on the six areas addressed in the Agency's proposal. NACWA also suggests one additional element be added on water quality trading.

Administrator's Determination

NACWA supports EPA's proposed amendments to 40 CFR §131.22(b) to clarify the process by which the EPA Administrator determines that new or revised water quality standards are necessary. This determination comes with important consequences, not the least of which is EPA's obligation to promptly propose replacement federal standards, so it is imperative that the process is clear and transparent.

Designated Uses

NACWA supports EPA's focus on designated uses, which serve as the cornerstone of the WQS program, and use attainability analyses, which provide an essential tool for assessing the factors that may affect use attainment. EPA should further clarify certain key themes and concepts underlying designated uses as described below.

Highest Attainable Use

NACWA agrees that where a state revises its WQS based on a determination that a current designated use is not attainable, it would be appropriate for the state, using its best professional judgment and the best available data and information, as determined by the state, to adopt the "next best" or "highest attainable use." Combined with using more refined designated use structures, as EPA contemplates in the proposal, this provision could help correct the recurring misperception that use attainability analyses (UAAs) inevitably lead to the complete removal of a use, as opposed to a more properly refined, or accurately defined, use that is, in fact, attainable.

NACWA understands that EPA intended the proposed highest attainable use provisions to clarify the flexibility available to states in establishing designated uses. Unfortunately, many states may not have the more refined uses or sub-categories EPA envisions. In the absence of these refined uses, NACWA is aware that some states are interpreting the proposed clarification as in fact limiting their flexibility to remove an unattainable use and/or as mandating additional controls to make incremental improvements toward a §101(a)(2) use, even though it is not attainable. Any final rule should clearly state that this is not EPA's intent. EPA suggests that these states consider revising their designated use frameworks to include more refined uses, but this is unlikely to happen given the current budget realities for many states. Accordingly, any final rule must also clearly call out and preserve state authority and flexibility to choose how best to articulate its designated uses and determine attainability.

EPA should use its regulatory clarifications to refocus states and stakeholders on UAAs themselves. Despite increased attention on the value and importance of UAAs, they remain largely underutilized as a tool. In 2001, The National Research Council published a landmark report entitled, *Assessing the TMDL Approach to Water Quality Management*. Although the Council was tasked with assessing the scientific basis of EPA's TMDL program, it focused considerable attention on the underlying standards program. According to the Council:

Water quality standards are the benchmark for establishing whether a waterbody is impaired; if the standards are flawed (as many are), all subsequent steps in the TMDL process will be affected. Although there is a need to make designated use and criteria decisions on a waterbody and watershed-specific basis, most states have adopted highly general use designations commensurate with the federal statutory definitions. However, an appropriate water quality standard must be defined before a TMDL is developed. Within the framework of the Clean Water Act (CWA), there is an opportunity for such analysis, termed use attainability analysis (UAA).

The Council provided explicit recommendations that UAAs “be considered for all waterbodies before a TMDL plan is developed.”

A year after this landmark report, EPA released its own self-critical assessment entitled, *The Twenty Needs Report: How Research Can Improve the TMDL Program*. In that assessment, EPA specifically acknowledged the need to revisit the scientific basis of use designations (focusing on tiered uses as an essential step) and “take a fresh look at UAA methods development.” And in 2003, the then-Government Accounting Office released a report to Congress entitled, *Improved EPA Guidance and Support Can Help States Develop Standards That Better Target Cleanup Efforts*. In that report, GAO concluded:

The accuracy of designated uses is critically important, given their central role in determining whether or not waters are to be targeted for cleanup. Inaccurately identified uses may result in either wasted resources caused by the “overprotecting” of some waters, or unacceptable environmental consequences caused by the “underprotecting” of others.

Drawing on these reports, recommendations and conclusions, NACWA recommends that EPA amend 40 CFR §131.10 by adding a new subsection (l) to clarify that:

A State may conduct a use attainability analysis under this regulation whenever the attainability of a designated use is called into question, whether before, during or after a TMDL has been established under 40 CFR §130.7(c).

NACWA also believes that this proceeding gives EPA the perfect opportunity to reconsider the current restrictions against the removal of “existing uses.” While we certainly support the concept of protecting such uses, the practice for doing so is anything but clear. EPA has long acknowledged that the designation of “existing uses” is a difficult and often flawed process. *See, e.g.,* 63 Fed. Reg. 36742, 36751 (July 7, 1998) (“Determining whether or not an existing use has occurred in the past or is currently in place is not always a straightforward task, ... and over the years, a number of questions have been raised about exactly what the ‘existing use’ provisions in [40 CFR §] 131.10 require.”). This difficulty is compounded by the arbitrary November 28, 1975 look-back date; the reality that following the Water Quality Act of 1965, many states designated uses without regard to their attainability; and perhaps most importantly, the fact that reliable records from which to gauge whether uses were “actually attained” are commonly incomplete or unavailable. Given the acknowledged problems with determining “existing uses,” we believe that EPA should use the proposed regulatory clarifications to encourage states to evaluate whether their “existing uses” are realistic and, if not, to correct them so that the “existing use” floor does not serve as an impediment to otherwise appropriate “right-grades” of uses.

Triennial Reviews

NACWA supports EPA’s overriding interest in greater public transparency, better stakeholder information, and more effective implementation of the WQS program, including as part of the required triennial review process. However, requiring states to re-examine their criteria in light of any new or updated CWA §304(a) criteria recommendations goes too far.

The triennial review process provides a critical opportunity for states and stakeholders to come together to review the existing suite of standards and determine whether new or modified standards are needed. Since each triennial review represents the build-up of at least three years of experience and practice, it often begins with a lengthy list of issues to be addressed. For example, the last triennial review in Virginia kicked off with a notice identifying close to one hundred different issues. And in many states, the public process associated with the triennial review takes up to two years, with extensive public outreach, stakeholder advisory meetings, public hearings and associated regulatory notices and actions.

Whether and how a state conducts its triennial review process is properly and entirely within the state's discretion. It may be perfectly appropriate for a state to consider, or re-examine, EPA's §304(a) criteria recommendations as part of the triennial review. But doing so should not be based on a mandate from EPA, particularly one that is not well defined. What does it mean for a state to "re-examine" its criteria in this context? On what basis would EPA disapprove a state's action for failure to examine, or inadequate examination of, EPA's criteria recommendations? What happens if a state has too many other issues to consider and, as a matter of state primacy and discretion, elects to defer consideration of EPA's criteria recommendations to the next triennial review cycle?

EPA's §304(a) criteria recommendations serve as guidance to states. They are not binding, and as a consequence, states have no obligation to adopt them. States are free to consider them, and there are many good reasons to do so. However, NACWA does not believe that it would be appropriate for EPA to compel states to re-examine their criteria on the basis of EPA's guidance, and thereafter subject the states to the threat of EPA disapproval if EPA does not like the way in which the states conducted this re-examination.

Antidegradation Implementation

The principle against degradation is well-established and necessarily inferred from the goals and mandates of the Clean Water Act. But the practice of preventing degradation is squarely reserved to the states as part of their primary authority to develop, implement and thereafter enforce water quality-based requirements. EPA grounds its proposal in the view that antidegradation is not being used as effectively as it could be, that it is an underused component of water quality protection, and that proof of this lies in the fact that the number of waters that are identified as impaired continues to grow. NACWA understands and shares EPA's interest in adequate and effective implementation of state water quality standards, including state antidegradation policies. But NACWA questions whether a national rule is needed in order to address EPA's perceived deficiencies.

If particular states are falling short of their antidegradation responsibilities, then other administrative tools are available to EPA to bring these states up to par. For example, EPA and states may choose to work collaboratively on a shared "vision" or "framework" for antidegradation implementation, as they have recently done with TMDLs and nutrient criteria, respectively. In addition, or alternatively, EPA may choose to use its grant funding and technical assistance resources to target particular state programs or implementation practices.

NACWA respectfully submits that it is not appropriate for EPA to point to a growing list of impaired waters as grounds to conclude that states are not adequately preventing degradation. New monitoring tools, better data,

more sophisticated modeling and broader assessment coverage are much more likely to serve as explanations for the growing list of impaired waters than any actual worsening of water quality.

Identification of High Quality Waters

As EPA properly recognizes, states have the authority and discretion to identify high quality waters on either a parameter-by-parameter or waterbody-by-waterbody basis. EPA's proposal generally tracks the rationale of the federal courts that have addressed and affirmed the waterbody-by-waterbody option on the basis of an overall holistic assessment of the chemical, biological and physical characteristics of any particular waterbody. However, the proposal would set an entirely new limitation on state authority by specifying that a state may not exclude a waterbody from high quality protection "solely because not all of the uses specified in CWA section 101(a)(2) are attained." If EPA believes that a state has done so, then EPA could disapprove the state's action under the auspices of reviewing the state's standards submittal. This does not appear to be the best or most appropriate mechanism for EPA to contest a state decision to list a waterbody as Tier 1 as opposed to Tier 2 under the state's antidegradation policy. Instead, NACWA believes that if a state denies Tier 2 antidegradation review in a particular permit proceeding involving a waterbody that should be – but is not – listed as high quality, then EPA or an interested third party would have immediate recourse to challenge the state's permit decision. NACWA believes that this is a better and more direct option than setting a new nationally-applicable limitation as part of the water quality standards regulation, because it respects state discretion in listing waters, while at the same time protecting against error at the point when those listings are in fact applied.

Alternatives Analysis

EPA's proposal contains a new requirement for states to conduct an "alternatives analysis" as part of their antidegradation Tier 2 review, and obligates the states to reject a project that is the subject of such review if there is a "non-degrading or minimally degrading practicable alternative." For these purposes, EPA has defined "practicable" to mean that the alternative is "technologically possible, able to be done or put into practice successfully at the site in question, and economically viable."

NACWA respectfully submits that how a state conducts its antidegradation Tier 2 review, and what it requires as part of any successful Tier 2 demonstration, are squarely within the state's discretion as part of its primary authority over the water quality standards program. Imposing new, substantive requirements as a matter of federal law intrudes on state primacy, and subjects states to wholly new and burdensome administrative requirements that will be both costly and time consuming to implement.

In addition, EPA's proposal calls into question, and seems to reject, state authority to establish *de minimis* thresholds and other legitimate exemptions from antidegradation Tier 2 review, which have proven to be highly effective in enabling states to focus their resources on projects with the greatest potential to adversely impact water quality. These state-based "tailoring" decisions are critical to the administration of functioning – and functional – antidegradation programs, and we urge EPA not to undermine them by superimposing new federal requirements.

Finally, we note that EPA's definition of "practicable" for purposes of its proposed alternatives analysis is different than, and potentially inconsistent with, other definitions of the same term that EPA has used in other Clean Water Act rules. For example, in the wetlands context, EPA defines "practicable" to mean "available and

capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 CFR §230.3(q) (emphasis added). At a minimum, we believe that EPA needs to add "in light of overall project purposes" at the end of its proposed definition of "practicable" in the standards proposal, since the overall purposes of a project need to be taken into account as part of an alternatives analysis under a state's antidegradation Tier 2 review (in other words, it would be inappropriate not to consider the overall purposes of a project when evaluating whether there are practicable alternatives).

Implementation Methods

NACWA wholeheartedly agrees with EPA that state antidegradation implementation methods should be open and available to the public, including, of course, to permittees who are required to undergo antidegradation review. However, NACWA does not believe that these methods should be – or need to be – incorporated into a state's WQS regulation and thereby subject to EPA review and approval (or disapproval).

Of course, states must have policies that meet minimum federal requirements, but States should have exclusive authority to decide how best to implement these policies, recognizing that each state has a different set of administrative rules and procedures, not to mention unique water environments, goals and approaches. Across the country today, there are many examples of excellent state antidegradation policies and implementation procedures, but few are the same, and the differences in process and approach are fundamental to the differences between and among states generally. For this reason, we believe it would more appropriate for EPA to allow states to develop procedures that best match their state process and law, than to dictate this process as a matter of federal law. NACWA strongly supports EPA's "may, but not required" option as presented at 78 Fed. Reg. at 54529 col. 2.

In its analysis, EPA properly identifies the tension between requiring and not requiring implementation procedures to be part of a state's water quality standards regulation. However, some of EPA's considerations in favor of requiring them actually cut against doing so. For example, EPA notes that state approaches to implementing antidegradation requirements may have direct implications for NPDES permits, as well as other federal permits and licenses. But the fact that antidegradation is a key factor in permitting decisions gives states, EPA and interested stakeholders a more direct and immediate process safeguard against deficient or defective implementation – they can simply challenge the permits themselves. Thus, there is no reason to require more from the states in their standards regulations, or to extend EPA disapproval authority to the states' implementation methods.

WQS Variances

NACWA strongly supports EPA's clarifications regarding when and how water quality variances may be used. In particular, we support the concept of 10-year variances with the opportunity for renewal. However, recognizing that legitimate factors may prevent EPA or a state from acting on a renewal application before the expiration of the original variance term, we urge EPA to add an "administrative continuance" mechanism similar to the one for expiring, administratively continued NPDES permits under 40 CFR §122.6. As long as a renewal application is timely and complete, then the discharger should continue to enjoy the protections of the variance pending a state's or EPA's action on the application.

We also support the concept of discharger-specific, multi-discharger, and watershed-wide variances. However, we do not believe that EPA needs to – or should – impose new substantive requirements on states in terms of what must be submitted in order to justify a variance. The existing regulations make clear that “states may, at their discretion, include in their state standards, policies generally affecting their application and implementation, such as ... variances.” 40 CFR §131.13. We support that minimum level of detail, recognizing that whatever states put in their standards will simply set the floor for what states decide to do in the context of any particular variance decision. For the latter, each variance record will need to stand on its own and, of course, will be subject to public review and comment, as well as EPA review through the permitting process. How a state demonstrates the need for a variance, and what a state elects to consider as part of that demonstration, are squarely matters of state law, policy and procedure, and should not be dictated or overridden by a federal rule.

Also, inasmuch as NACWA supports the concept of 10-year variances, we question why and how these longer authorizations would be reviewed on a triennial basis, as EPA proposes in the preamble at 78 Fed. Reg. 54532 col. 2. NACWA thinks EPA should clarify that if such a review is required, it would be limited to confirming the existence of the variance authorization, together with an acknowledgement of any interim requirements or milestones associated with that authorization.

Finally, we question EPA’s decision to limit the applicability of water quality variances to CWA §401 certifications and §402 permits. NACWA believes that variances have broader relevance throughout the water quality continuum, including impairment listings and TMDLs.

Compliance Schedules

As EPA properly acknowledges, compliance schedules are one of several tools that have proven to be critical in driving – and accommodating – incremental progress toward our shared water quality goals. And with the exponential increase in approved TMDLs over the past decade, compliance schedules serve a vital and growing role in TMDL implementation. For example, many TMDLs contain aggressive point source reduction requirements that cannot be achieved overnight and may in fact take multiple permit terms to achieve. In those circumstances, compliance schedules can be used to implement those reductions in an achievable, step-wise fashion. EPA’s willingness to allow compliance schedules that extend beyond a particular permit term has proven to be both necessary and welcome.

NACWA does not, however, believe that revisions to EPA’s WQS regulation are needed in order to achieve full and effective use of compliance schedules. If and when a state chooses to allow a compliance schedule in a particular permit proceeding, EPA will have review and objection authority. If EPA believes that a state lacks the basis for such a schedule or has derived it in the wrong way, then EPA has direct recourse to object and thereafter work with the state to reconcile the problem. Thus, there is no reason to add new requirements and limitations on the use or availability of compliance schedules in EPA’s WQS regulation.

Water Quality Trading

NACWA supports water quality trading as an essential compliance option for NPDES permittees to achieve new or revised water quality-based effluent limits (in whole or in part), as well as to accelerate the pace and scope of water quality restoration efforts across the country.

In the preamble to this proposal, EPA notes that “[t]here are a variety of tools available to states, tribes and dischargers that can provide time to meet regulatory requirements” and “the most common regulatory tools considered are variances and permit compliance schedules” (78 Fed. Reg. at 54532 col. 1), both of which are specifically addressed in EPA’s proposal. Noticeably absent is any reference to water quality trading, which is another regulatory tool with the singular advantage of not just “providing time to meet regulatory requirements” but also accelerating progress at lower cost with the potential for ancillary environmental benefits.

In recent years, the availability of trading as a regulatory tool has come under attack, most recently in the now dismissed Food & Water Watch lawsuit against EPA over the trading provisions of the Agency’s Chesapeake Bay TMDL. NACWA does not believe that these lawsuits have merit but fear that they will recur until the defensibility of trading is affirmed as a matter of decisional law or rulemaking. We believe the current proposal presents EPA with an immediate opportunity to reinforce the value and appropriateness of trading as a regulatory tool to facilitate implementation of water quality standards through the NPDES permitting process. To the extent EPA proceeds to finalize the proposed provisions, we ask EPA to amend 40 CFR 131.13 as follows (new text set off in bold):

§ 131.13 General policies.

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. **In addition, States may implement water quality trading programs between and among point and non-point sources on a local, state or interstate basis to attain water quality standards. Trading is permitted for water quality-based effluent limitations so long as adequate data and ecological modeling exist to confirm that trading would not result in adverse localized impacts or contribute to an exceedance of any applicable water quality standard.** Such policies are subject to EPA review and approval.

NACWA appreciates the opportunity to comment on the proposed revisions to the water quality standards regulations. Please contact me at chornback@nacwa.org if you have any questions.

Sincerely,



Chris Hornback
Senior Director, Regulatory Affairs