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April 2, 2018

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Dear Administrators Dunn and Lopez,

The National Association of Clean Water Agencies (NACWA) would like to express its concerns with how the US Environmental Protection Agency (EPA or Agency) is currently addressing Long Island Sound water quality issues, both from a process standpoint and from a scientific perspective. NACWA represents over 300 public clean water utilities across the country, including more than 40 utilities in EPA Regions 1 and 2. NACWA's members treat and reclaim the majority of the wastewater generated each day nationwide, providing an essential service that protects human health and the environment.

This letter is intended to outline the Association's concerns, and to suggest a better way for EPA and all stakeholders to move forward to improve water quality in the Sound. We look forward to meeting with the Agency to discuss these issues.

BACKGROUND

As you know, the Clean Water Act specifies that if a waterbody is not meeting water quality standards, the State is required to include the waterbody on its "impaired waters" list under CWA Section 303(d), and then develop a Total Maximum Daily Load (TMDL) to address the impairment. And that is exactly what happened for Long Island Sound. EPA worked with the states in the Long Island Sound watershed to develop a TMDL for the eutrophication issues in the Sound.

That TMDL was issued in 2000 by the States of New York and Connecticut and approved by EPA. Since then, the states have worked to implement the TMDL. Due to those efforts, there has been significant progress in improving water quality in the Sound. As EPA itself

has recognized,¹ the reductions in nutrient loadings have been significant – due in large part to the work of clean water utilities. Moreover, many of the plant improvements have only recently been completed, so it is expected that additional improvements in water quality will be occurring. Nevertheless, challenges no doubt remain, both in the Sound and in other areas of the watershed, including embayments and rivers that lead to the Sound. The issue now is how to address those challenges.

When the TMDL was issued, it was anticipated – and stated at the time – that the TMDL would periodically be reevaluated. That process is fully consistent with the key concepts in the TMDL program, which call for review and, if necessary, revision of TMDLs every five years. That process, if properly conducted, would involve collecting new data and conducting a transparent process, involving all stakeholders, to assess the current condition of the watershed and the expected condition after implementation of planned controls. This would inform what changes need to be made to the TMDL and to the control requirements that follow from the TMDL. Unfortunately, no such review and revision process has occurred.

The Long Island Sound Study (LISS) office is conducting a technical assessment as to water quality issues in the watershed. This assessment is being conducted in a manner that (perhaps in part due to lack of sufficient resources) is not allowing for the appropriate level of dialogue with stakeholders and is not providing opportunities for most stakeholders to provide effective input into the process. Moreover, there is no indication that EPA has adequately considered the comments of the few parties that are allowed to provide detailed input, even though those parties have raised substantial concerns about the scientific basis for the work that EPA and its contractor are doing. Further, the work products from this nontransparent process will apparently be used, ultimately, in determining binding control requirements in NPDES permits for dischargers, with the only limited opportunity for comment – on individual draft permits – coming well after all of the scientific assessments have been completed.

The process currently being followed by the LISS office is the wrong way for EPA to proceed. Perhaps most fundamentally, it is proceeding despite a weak technical basis and inadequate stakeholder input. As a result, it is likely to result in billions of dollars being spent on pollutant controls, without any way of knowing whether those enormous expenditures – to be borne by the clean water ratepayers of communities throughout the watershed – will actually yield water quality benefits.

CONCERNS WITH STRUCTURE OF CURRENT PROCESS

In assessing how the remaining water quality issues in Long Island Sound should be addressed, NACWA believes it is important to review the structure of the current LISS process and compare it to the way that a TMDL review/revision procedure would ordinarily be conducted.

Currently, the work being done by EPA for the LISS program is being done in phases or subtasks. There have been seven subtasks worked on to date; the most recent work products are for Subtasks F and G, which involve empirical modeling and setting of nitrogen thresholds. As technical materials are drafted

¹ The Agency stated the following in 2015: “As you know, implementation of the *Total Maximum Daily Load to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* (2000 TMDL) has resulted in significant progress toward reducing dissolved oxygen (DO) impairments in the open waters of the Sound. EPA commends the states for their collective efforts to implement the measures necessary to meet the load reductions specified in the 2000 TMDL. Upgrades to 106 wastewater treatment facilities in Connecticut and New York have resulted in the discharge of 40 million fewer pounds of nitrogen in calendar year 2014 compared to baseline levels, a 51.5 percent reduction. Annual monitoring has documented a 40 percent reduction in the area of hypoxia compared to pre-TMDL levels.” December 23, 2015, Letter from Regional Administrators Spalding (Region 1) and Enck (Region 2) to Commissioners Freise (NH), Klee (CT), Schuren (VT), Seggos, (NY), and Suuberg (MA).

for each phase, they are provided to EPA staff, and then given to a Technical Advisory Committee (TAC) for review. The TAC consists primarily of EPA and representatives from the affected states, as well as a few NGO and academic representatives that have long ties with LIS scientific issues. As far as we know, there is only one representative of a specific municipality on any of the groups, even though it is expected that municipal clean water utilities would be substantially affected by any new control requirements imposed due to the LISS work.

For each phase of work, the representatives on the TAC are given the opportunity to provide detailed comments on draft technical work products and discuss the comments in general terms on a conference call. Thereafter, the contractor prepares a 'response to comments summary' and makes changes to the Draft Report for EPA approval. However, there is no formal process for reviewing and commenting on the final changes to technical materials prior to the final report being issued. The comment response summary is issued by EPA's contractor, rather than more formally by EPA. Moreover, the TAC representatives have been told that they cannot share the draft materials with any stakeholders who are not included in the TAC.

As for actual opportunity for public comment by stakeholders who do not have representation on the TAC, outside stakeholders are not given any formal chance to comment on specific draft documents. If they are signed up to receive e-mails from LISS, then they are informed when a final document is put on the LISS website. But there is no specific comment period provided – they are simply free to submit comments if they choose, but with no guarantee that the comments will be read, and no commitment for any kind of response to the comments at any point in the process.

Ultimately, we understand that the work products generated by EPA may be used to set binding limits in discharge permits for regulated parties. However, those parties, or any other members of the public, will not be given any formal opportunity to review and comment, or to have their comments considered and addressed, until the actual permits have been drafted and issued as proposals. Then, the final work products will be referenced as support for the effluent limits included in those permits. That will put the stakeholders in the position of having to monitor the issuance of each individual permit to see what limits are included, to assess how those limits fit with the limits that were included in other permits, and to raise scientific concerns. Of course, since each permit is addressed individually, by the State (or EPA Region) that issues the permit, there is no guarantee that those scientific concerns will be addressed in a consistent way from permit to permit. The result could easily be a patchwork of inconsistent permitting decisions.

An additional process concern is that EPA's new nitrogen strategy remains undefined. The work of EPA's contractor was originally supposed to generate nitrogen load reductions and load allocations as part of the Subtask H & I reports. However, it is our understanding that EPA has cancelled this part of the contract.

CONCERNS WITH SCIENTIFIC BASIS OF CURRENT EFFORTS

Perhaps more concerning than the lack of transparency and stakeholder engagement in the process is the fact that based on experience to date, it appears likely that any permitting decisions related to the LISS will be based on an extremely weak scientific basis (again, NACWA believes, due in part to lack of sufficient financial resources to do the needed work). Throughout the process that has been followed, the parties that do have representation on the work groups, including the State agencies and the New York City Department of Environmental Protection (NYC DEP), have raised substantial concerns on scientific issues. Here are some examples of statements made in comments submitted on the most recent EPA contractor work products:

- “RIDEM is concerned that the proposed nitrogen endpoint may be too stringent for areas in the Pawcatuck River where eelgrass has not historically grown, but not be stringent enough for the Little Narragansett Bay, where eelgrass has historically grown.” (Rhode Island Department of Environmental Management (RIDEM))
- “There are multiple biological and physical processes (grazing, phytoplankton species selection, flushing rate) that complicate the TN-water column chlorophyll model and the impact of water column chlorophyll on light attenuation and eelgrass growth. Given this, it is not surprising that the TN-CHL relationship presented in figure G-2 and similar figures for other estuaries is weak.” (RI DEM)
- “[T]he empirical approach used in this exercise is quite simplistic, lacks consideration of site-specific conditions, and is not consistent with Connecticut Water Quality Standards (WQS).” (Connecticut Department of Energy and Environmental Protection (CT DEEP))
- “The approach is based on developing correlations between nitrogen concentrations and chlorophyll a. The resulting R^2 correlations were not strong.” (CT DEEP)
- “DEC has significant concerns about the process by which these TN endpoints were developed.” (New York State Department of Environmental Conservation (NYS DEC))
- “While DEC is supportive of developing water quality endpoints protective of eelgrass, we are concerned that using eelgrass as the sole basis for all TN endpoints may not be appropriate for all embayments.” (NYS DEC)
- “The data and analysis are inadequate at this time to determine additional nitrogen thresholds for the open waters of Long Island Sound.” (NYS DEC)
- “The data and empirical modeling approaches used by [EPA’s contractor] are inadequate at this time to determine additional nitrogen thresholds for the open waters.” (NYC DEP)
- “The approach used for the establishing TN thresholds in the open waters is particularly problematic relying only upon a literature survey and TN distribution analysis and lacking any stressor-response modeling information.” (NYC DEP)
- “The report is not truly reflective of current conditions.” (NYC DEP)
- “[S]ome of the nitrogen control measures implemented to date are very recent and it will take some time for the sediments to respond and for reduced levels of sediment oxygen demand and nutrient fluxes for all the water quality improvements to take hold....[I]mplementing additional control measures is premature without first understanding the connections that link water quality parameters to what is believed to be the cause of the water quality impairment.” (NYC DEP)

It is clear, then, that there are significant concerns about the scientific basis of the work that EPA is currently performing for the LISS program. Because of the lack of up-to-date, consistent, and statistically meaningful data to inform the models (which themselves need to be updated), the permit limits ultimately based on that work could require communities in the watershed to spend billions of dollars on new control systems that may not result in any net environmental improvement. Many of these communities have already invested heavily in control equipment to meet the allocations

contained in the original Long Island Sound TMDL and the numerous other EPA/State regulatory requirements that apply to their operations.

Also, many of these communities are under severe economic stress, and the burdens imposed on their ratepayers are already large, particularly for those people at the lower end of the economic spectrum. Given those circumstances, it is incumbent upon all concerned to ensure that any new mandates imposed in the name of further improvements in Long Island Sound have been developed based on a strong scientific basis, so all stakeholders can have a reasonable level of confidence that the reductions required (and the associated costs) are necessary, and will actually lead to attainment of the cleaner Sound all stakeholders desire.

LEGAL CONCERNS WITH USE OF NARRATIVE STANDARDS

In addition to the process and scientific issues set forth above, NACWA has concerns about the legal basis that EPA appears to be using in implementing the LISS work products. Rather than working with states to determine the appropriate numeric water quality standards for relevant eutrophication-related parameters (which are developed through State rulemaking processes, with full involvement by affected parties), NACWA believes that EPA intends to develop water quality targets that will then be considered to be numeric interpretations of State narrative criteria – without any of the procedural protections that are provided when numeric standards are developed.

NACWA recognizes that EPA's regulations include provisions for developing permit limits when a state has not yet developed a water quality criterion for a particular pollutant. However, these provisions were intended to ensure that water quality was protected while numeric standards are being developed. It was never intended that EPA and states could dispense with developing numeric standards and instead use "numeric interpretations of narratives" as a permanent regulatory tool to use in deriving permit limits – especially not for long-term, broad-scale issues such as nutrients. Translating generic narrative nutrient criteria directly into numeric permit limits simply does not allow for the thoughtful deliberation that is needed, and which will be provided in the process of setting numeric standards. Moreover, because use of narratives leads to inconsistent "translations" in individual circumstances, this approach will only lead to more delay in addressing nutrients, as permits are challenged on a case-by-case basis. Instead of continuing reliance on narratives, EPA should work with the states to determine how numeric standards can be developed to ensure that Long Island Sound water quality is protected, with a strong scientific basis, through a careful process that provides effective opportunities for input by all involved.

CONCLUSION

All parties involved with the Long Island Sound have the same basic goal: to achieve attainment of a cleaner Sound, in a process that ensures that controls required are necessary and will lead to real improvement. In order to attain that goal, it is critical that EPA, with the states and all involved stakeholders, address these Long Island Sound issues in a fully transparent process that pays adequate attention to the challenging scientific issues that are presented. NACWA believes that the right way to do that – and the way called for in the Clean Water Act – is to perform a reevaluation, and revision if necessary, of the Long Island Sound TMDL, pursuant to the established TMDL process. That TMDL process is designed to provide adequate public involvement, and to ensure that scientific issues are fully reviewed, and then addressed in responses to comments. NACWA and its members are ready to engage productively as stakeholders in that process, and are willing to discuss with EPA and the states how to ensure that adequate financial resources are devoted to collecting the needed data, performing the necessary analyses, and ultimately developing the allocations – and the consequent control actions - that will bring the Sound, and its tributaries, into compliance with water quality standards.

NACWA Letter on Long Island Sound Strategy

April 2, 2018

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NACWA looks forward to meeting with personnel from Region 1 and Region 2, in a joint meeting, to review these issues further, and to discuss how we can best move forward together.

Sincerely,

A handwritten signature in black ink that reads "Adam Krantz". The signature is fluid and cursive, with a long horizontal stroke at the end.

Adam Krantz
Chief Executive Officer

cc: John Goodin, Acting Director, Office of Wetlands, Oceans and Watersheds, Office of Water, EPA HQ
Deborah Nagle, Acting Director, Office of Science and Technology, Office of Water, EPA HQ
Andrew Sawyers, Director, Office of Wastewater Management, Office of Water, EPA HQ