NACWA
A Clear Commitment to America's Waters

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Nancy Stoner
Acting Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW, MC 4101M
Washington, DC 20460
Via Electronic Mail: *stoner.nancy@epa.gov*

Dear Nancy:

As you know, NACWA remains actively engaged in the U.S. Environmental Protection Agency's (EPA) efforts to address the growing challenge of nutrient over-enrichment in our nation's waterways. NACWA's members are committed to doing their fair share to address nutrients and are working to ensure that science-based and effective controls are put in place to address *all* sources of nutrient pollution. Making meaningful progress toward our common water quality goals is important, but permit limits and controls on point sources must be carefully considered before being imposed. NACWA is particularly troubled by recent efforts by EPA to use state narrative nutrient criteria to establish numeric permit limits for clean water agencies while states continue to develop numeric nutrient criteria.

NACWA understands that EPA and many environmental NGOs are frustrated over the delay in development of numeric nutrient criteria by the states. These delays underscore the complexities inherent in trying to establish water quality goals and permit limits for nutrients. Nutrients behave differently than other Clean Water Act (CWA) pollutants and establishing criteria, permit limits and other controls to address nutrient discharges deserves thoughtful deliberation to ensure the appropriate level of protection for designated uses. Translating generic narrative nutrient criteria directly into numeric permit limits – effectively short-circuiting any thoughtful deliberation – is not the way to make progress. EPA's water quality standards regulations include provisions for developing permit limits when a state has not yet developed a water quality criterion for a particular pollutant (40 CFR §122.44(d)(1)(vi)), but these provisions were intended as an interim measure to

National Association of Clean Water Agencies
1816 Jefferson Place, NW
Washington DC 20036-2505

p 202.833.2672 **f** 202.833.4657
www.nacwa.org · info@nacwa.org

address priority pollutants until a numeric criterion could be developed. It is hard to imagine that these regulations were intended for use on the scale that would be necessary to address nutrients.

The push to utilize 40 CFR §122.44(d)(1)(vi) to address nutrients began in earnest at the regional level, but NACWA understands that EPA Headquarters is also working to develop information and training to encourage state permitting authorities to translate narrative nutrient criteria into numeric permit limits. This Agency-wide effort – whether consistent with EPA regulation or not – which effectively bypasses the state nutrient criteria development process, is bad policy. Based on the inconsistent implementation of the provisions in §122.44(d)(1)(vi) so far, it is clear that this approach will only lead to more delay in addressing nutrients as permits are challenged on a case-by-case basis.

Push for Narrative to Numeric Translation Begins at Regional Level

The first effort NACWA is aware of to leverage §122.44(d)(1)(vi) to address nutrients began with a January 2011 letter from EPA Region 5 to Illinois. The letter stressed that Illinois, in the absence of numeric nutrient criteria, should conduct reasonable potential determinations based on the state's narrative nutrient criteria and that where a discharger has the potential to cause or contribute to an exceedance of the narrative criteria, that the state should develop a permit limit using one of the options in §122.44(d)(1)(vi). Since that time NACWA has been following this issue closely.

Most of the recent activity on this issue has been in Region 1, specifically in New Hampshire and Massachusetts where EPA is responsible for issuing CWA permits. In both states, efforts by Region 1 to impose permit requirements for nutrients have stemmed from an interpretation of the states' narrative nutrient criteria using the provisions in §122.44(d)(1)(vi). And, in both states, permits incorporating these requirements are now being challenged. How the §122.44(d)(1)(vi) provisions have been used in Massachusetts and New Hampshire has differed and the specific situations[1] leading to the challenges are complicated and troubling for a number of reasons, but the key issue is the underlying 'translation' of the state's narrative criteria and the precedent it sets.

The term translation is loosely applied here, especially in the case of the recent permits in Region 1. In Massachusetts, EPA Region 1 relied on literature values from the 1980's – at the limit of technology for phosphorus – to establish a permit limit for one utility. In New Hampshire, Region 1 used a translation to evaluate reasonable potential and then imposed limit of technology requirements on several clean water agencies discharging to Great Bay.

NACWA has taken a keen interest in Region 1 given EPA's direct role in issuing permits and the potential implications for EPA national policy, but EPA Headquarters has also been signaling for some time its interest in broader use of the provisions of §122.44(d)(1)(vi) nationwide. Shortly after the Region 5 letter to Illinois, EPA Headquarters issued a memorandum on March 16, 2011, urging states to make "meaningful near-term reductions" in nutrients in return for a more flexible timetable to develop numeric criteria. Later that year, EPA

[1] NACWA understands that in at least one instance, EPA has used a §122.44(d)(1)(vi) translated value to determine whether a discharge would cause or contribute to an exceedance of the state's narrative criterion, inconsistent with the instructions it provided when §122.44(d)(1)(vi) was added to its regulations: "The requirements of paragraphs [§122.44(d)(1)] (iii), (iv), (v) or (vi) apply ***after*** the permitting authority has determined that water quality-based effluent limits are necessary under paragraph (ii)" (54 *Fed. Reg.* 23868, at 23873; June 2, 1989) (emphasis added).

Headquarters indicated that it would begin to develop guidance to help states better implement the provisions of §122.44(d)(1)(vi) to help them make progress on controlling nutrients. While EPA has abandoned its plans to develop a formal guidance document, NACWA understands that the Agency still plans training and other information for state permit writers to push continued use of these provisions.

NACWA Concerned About Increased Reliance on §122.44(d)(1)(vi) to Address Nutrients

EPA's regulations at §122.44(d)(1)(vi) were finalized in 1989 and were intended to provide an "interim measure" to address priority pollutants until a numeric criterion for the pollutant of concern could be developed. Many of the same concerns NACWA is raising here were also raised when EPA proposed to add these provisions to §122.44, including that such approaches do no provide adequate opportunity for public participation and that these provisions "circumvented the state's role in developing water quality standards" (54 *Fed. Reg.* 23868, at 23876; June 2, 1989).

The §122.44(d)(1)(vi) regulations were developed at a time when the focus of EPA's water quality programs – as a complement to its technology-based programs to address conventional pollutants like biochemical oxygen demand and total suspended solids – was the control of toxic pollutants. With toxic pollutants, acute water quality impacts were a real concern and the need to develop permit limits to address generic, catch-all "no toxics in toxic amounts" narrative criteria before pollutant-specific criteria were in place was paramount. Developing water quality criteria and permit limits for toxic pollutants, however, has rarely presented the same challenges that are encountered with nutrients. Unlike toxic pollutants, nutrients do not have clear toxic and non-toxic thresholds that universally apply to most waterbodies. Establishing meaningful nutrient criteria and permit limits that are protective of designated uses has proven challenging even with the significant resources states have dedicated to their statewide efforts. To now presume that narrative nutrient criteria can simply be translated into numeric limits simply does not make sense, from either a policy or scientific standpoint.

Making progress is important, but these early actions in Region 1 and the potential precedent they set for the rest of the nation is troubling. Translating a narrative nutrient criterion into limit of technology requirements for a clean water utility is inconsistent with the intent of this provision – to provide protection, in the interim, while pollutant-specific numeric criteria are developed – and does not represent progress. The situation in New Hampshire is even more disturbing considering that the point source contribution is less than 20 percent. Even with permit limits being set at limits of technology, some of the dischargers in New Hampshire are being asked to accept potentially onerous commitments to address nonpoint source contributions to avoid more stringent discharge limits. This is not an attempt to make progress, but an effort to zero out the point source contribution and use the threat of backstop limits on clean water utilities to address the nonpoint source contribution.

The specifics in Region 1 are complicated, and while not the sole focus of our concerns they do serve as disconcerting examples that could influence how these provisions are implemented elsewhere. NACWA's broader concerns are with the process and how these efforts to implement §122.44(d)(1)(vi) on a permit-by-permit basis will short-circuit the important dialogue and public comment opportunities that accompany statewide nutrient control program development. These state level efforts allow for open dialogue with all stakeholders throughout the process. Individual permittees then have the opportunity to review and comment on any related draft permit conditions before any requirements are imposed. Boiling down what has been a very complicated discussion about linking numbers and limits to designated uses and aquatic life impacts into

a permit-by-permit process will simply not provide sufficient opportunity for all stakeholders to evaluate and comment on the permitting authorities' methodologies.

NACWA Urges EPA to Stay the Course in Assisting States to Develop Meaningful Criteria and Nutrient Control Programs

Unlike the situation for many of the toxic pollutants that §122.44(d)(1)(vi) was originally intended to address, most states are already working to develop numeric nutrient criteria and/or broader nutrient control programs. Meaningful dialogues have been established, data collected and models run. In other words, progress is being made. NACWA encourages EPA to continue its efforts to assist the states in this work, rather than pursuing a piecemeal approach based upon translation of narrative criteria. Statewide dialogues including all stakeholders, with recent successes in Wisconsin for example, will be more productive in developing nutrient control programs that are more widely accepted by the discharger community, ultimately leading to more meaningful progress.

If EPA intends to pursue its plans to push broader implementation of §122.44(d)(1)(vi), NACWA urges EPA to initiate a formal guidance development process through which the clean water community can more fully engage in a dialogue with the Agency and state permitting authorities on its concerns with the approach.

NACWA has already discussed some of these concerns with your staff, but we welcome the opportunity to discuss them further with you. Please contact me at chornback@nacwa.org or 202/833-9106 if you have any questions.

Sincerely,

Chris Hornback
Senior Director, Regulatory Affairs

cc: Ellen Gilinsky, EPA
Randy Hill, EPA
Deborah Nagle, EPA
Alexandra Dunn, Association of Clean Water Administrators