NACWA
A Clear Commitment to America's Waters

May 13, 2015

Dennis McLerran
Administrator
U.S. Environmental Protection Agency (EPA) Region 10
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Via Electronic Mail: mclerran.dennis@epa.gov

Dear Administrator McLerran,

The National Association of Clean Water Agencies (NACWA) is writing to express its concerns with recent actions by the U.S. Environmental Protection Agency's (EPA) Region 10 office to influence the outcome of the Washington Department of Ecology's proposed human health criteria and implementation provisions, issued on January 12, 2015. NACWA represents the interests of more than 280 public wastewater treatment agencies across the country, including 10 in Washington.

The outcome of Washington's rulemaking process will have significant and long-term impacts for the clean water community and other dischargers across Washington and throughout Region 10. In addition, the Region's actions reflect a broader, nationally relevant concern for NACWA and its members over the increasingly coercive approach EPA uses during the state water quality standards development process.

At issue in Washington is the state's ability, as authorized under the Clean Water Act (CWA), to develop what it believes is a sound and balanced approach, which has been carefully evaluated and vetted with the state's stakeholders, to dealing with toxic pollutants. In response to Washington's January proposed rule, your office issued a strongly worded letter, dated March 23, 2015, outlining how the state's package does not "fully reflect" EPA policies, guidance and legal requirements. While we understand that it is standard practice for EPA to comment on proposed state water quality standards rules, the tone of this letter suggests that Washington has no other choice but to make their rule consistent not only with existing federal criteria and guidance, but also with EPA's policy preferences, as well as draft documents still undergoing revision at the federal level. EPA also does not indicate where the state failed to use the best scientific data to defend its proposal, choosing instead to roundly condemn the entire approach.

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Section 303 of the Clean Water Act (CWA) outlines the authority and responsibility of the states to develop and regularly review and revise water quality standards. The responsibility of EPA is to review those standards once they are submitted to the Agency. EPA's regulations at 40 CFR 131.4 set forth the state requirements for standards development and 40 CFR 131.5 outlines EPA's authority to review those standards to determine whether the state has adopted uses "consistent with the requirements" of the CWA and criteria that "protect the designated water uses". However, the language in the CWA and the implementing regulations was not intended to give EPA authority to disapprove standards because the state's science and policy decisions are not identical to the Agency's preference, policies and guidance. Furthermore, the regulations provide no direction on how the Agency engages with the state during draft rule development prior to state final rule submittal. Instead, 40 CFR 131.21 outlines the process for EPA review once the state makes its formal submittal to the Agency and 131.22 lays out the process for EPA to develop standards for the state if the state fails to do so.

In practice, however, EPA routinely engages with the states before the formal submittal and significantly influences the content of state proposals, seeking to ensure full approval and obviate the need for formal EPA disapproval or promulgation of federal standards. Whether due to a lack of resources or political will, states often succumb to this "informal" pressure from EPA and make revisions to their rules to address EPA's preferences to ensure approval even if these changes may be counter to the state's policy, science, and risk choice position.

Even more concerning to NACWA is that, by coercing the state to promulgate standards that conform to EPA's approach, EPA is essentially eliminating judicial review. NACWA is concerned that this behavior by EPA violates the spirit and letter of the Administrative Procedures Act, and is contrary to the Agency's stated commitment to work more cooperatively and transparently with states and the regulated community.

This process of influence by EPA has reached concerning new levels with the development, review, and approval of Oregon's human health criteria and EPA's March 23, 2015 comments on the Washington proposal. In both cases EPA Region 10 has employed coercive pressure to ensure that the states only submit approvable programs that are effectively identical to federal preferences, guidelines, and policies. In the case of Washington's proposed rule, which in fact was consistent with the range of values and approaches included in existing federal guidance, EPA appears to ignore the flexibility afforded to states in its own guidance by insisting that the state's program conform to EPA's preferred approach. These tactics are inconsistent with the CWA's cooperative federalism foundation and history that provides the states the responsibility for developing and approving water quality standards. EPA has long used these strategies at the permitting stage - issuing 'interim objections' to signal to the state that changes must be made - to avoid EPA overfilling on permits and facing direct legal challenge to its policies. EPA's decision to use such tactics in its role in helping states develop state water quality standards is cause for great concern among NACWA's members.

It is reasonable to expect EPA to engage with the state during its standards development process and to provide input and guidance to assist the state in developing robust science, policy and risk decisions at the state level that satisfy the requirements of the CWA. But your office's March 23 letter to Washington is framed as a formal objection, rather than a discussion of the policy and science options and choices

available to the state. State standards must, by law and regulation, reflect the best available science, but the standards development process also incorporates numerous state policy, science, and risk decisions including determining the level of acceptable risk. In performing its CWA-required review function – whether during the rule development process or during its official standards review – EPA must not overstep its authority and substitute its policy preferences over legitimate state policy, science, and risk decisions that are "consistent with the applicable requirements" of the CWA. The structure established by the CWA – where EPA provides criteria recommendations and guidance and the states develop water quality standards based on that information as well as state policy and risk decisions (where a range of acceptable CWA options exist) – must be preserved to ensure that federal preference and the criteria recommendations do not become de facto regulations.

In developing water quality criteria recommendations at the federal level EPA consistently points to its duty to develop scientifically-sound criteria that, by CWA mandate, are based solely on scientific and risk policy factors and do not account for cost impacts on the regulated community or other state-specific factors. In its interactions with the regulated community EPA asserts that its criteria recommendations are not directly enforceable and therefore have no cost impact. EPA's actions in Region 10 and elsewhere across the country – essentially requiring that state standards be identical to federal preference, criteria, and guidance – have the effect of applying those federal criteria recommendations, preference, and guidance as the law of the land.

In the case of Washington, the state must be allowed to exercise its CWA-delegated responsibilities in standards development without undue influence from EPA. If the state chooses to submit a package that EPA believes it cannot approve it must be allowed to do so. If EPA dislikes the standards submitted by the state the Agency can follow the appropriate procedures to disapprove the state standards and/or promulgate federal standards and then be prepared to defend either of those actions in federal court if any party chooses to challenge them.

Thank you for considering NACWA's concerns.

Sincerely,

Ken Kirk
Executive Director

cc:
Gina McCarthy, EPA
Ken Kopocis, EPA
Maia Bellon, Washington Department of Ecology
Robert Duff, Senior Policy Advisor, Governor Inslee's Office
Daniel Opalski, Director, Office of Water and Watersheds, EPA Region 10