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**Julia Anastasio**

1634 I Street, NW, Ste. # 750,  
Washington, DC 20006

TEL: 202-756-0600

WWW.ACWA-US.ORG

November 3, 2022

Ms. Radhika Fox  
Assistant Administrator, Office of Water  
Environmental Protection Agency  
Washington, DC 20460  
[fox.radhika@epa.gov](mailto:fox.radhika@epa.gov)

Dear Assistant Administrator Fox:

On behalf of the Association of Clean Water Administrators (ACWA), we want to commend you on your April 5, 2022, memorandum outlining your Administration's intentions to address nutrient pollution and accelerate load reductions into the Nation's waters. Furthermore, we would like to use that memorandum as an opportunity for States to further engage with EPA on national nutrient policy. Much like the memoranda from your predecessors, Ms. Stoner and Mr. Beauvais, we read your memorandum as a renewed commitment to collaborative actions between EPA and the States to address nutrients.

Coincidentally, your memorandum came out as ACWA was hosting a nutrient permitting workshop in Kansas City focused on arriving at pragmatic policy recommendations for nutrient reduction. We are encouraged that the memorandum included many of the recommendations that State co-regulators and EPA staff identified at the workshop. We see your call for fostering partnerships, particularly with the agricultural sector, as absolutely critical to achieving significant and enduring nutrient reductions. As so much loading of nutrients emanates from runoff from rurally productive lands, true reduction will only be realized with focused efforts from the agricultural community, and it will be critical for States and EPA to work together to identify effective solutions.

Additionally, emphasis on source water protection, using the State Revolving Fund program for non-point source pollution abatement, utilizing flexible market-based approaches and directing resources to support training, optimization and lagoon management resonate with our States as beneficial and are fully supported.

Since the issuance of the memorandum, we have become somewhat concerned that EPA is selectively focusing on certain portions of its recommendations, often without coordination with the co-regulating States. In the time since the memorandum came out, we have been aware of:

- One Region establishing numeric nutrient criteria for a tribe located within a State with only cursory notice to the state and potential implications for non-tribal communities located upstream of the tribal lands and waters.
- A Region objecting to a State-issued permit for a municipal POTW and proposing an unrealistic phosphorus limit on the POTW permit and then attempting to negotiate a resolution to the objection directly with the permittee without advance notice to the affected state.
- Discussions with headquarters and Region staff have left States with the impression EPA has run out of patience on State efforts to reduce nutrients and the time has come to develop numeric nutrient criteria or quantitative translations of narrative nutrient criteria that will be implemented in discharge permits. For example, the memorandum indicates that all permits will require an analysis of reasonable potential for nutrients to cause or contribute to a water quality standard exceedance.; regardless of the magnitude of their design flows. This apparent attitude is despite documented progress by states and is contrary to the main collaborative partnership theme of the memo.

Pursuant to this memorandum, EPA regions are also being asked to negotiate commitments from States in Performance Partnership Agreements to establish numeric nutrient criteria and for States to evaluate, update and submit for EPA review, their Nutrient Reduction Strategies. As the primary implementors of the Clean Water Act, States retain flexibility in how they develop and adopt water quality criteria, including choosing not to adopt numeric criteria in the near term for a variety of reasons. States are currently required to report on the progress of their triennial reviews to EPA and must review nationally recommended criteria and provide an explanation to EPA as to why they are not adopting nationally recommended criteria during a triennial review.

Alternatively, many States believe their Nutrient Reduction Strategies have been successful in accomplishing reductions, often without utilizing numeric criteria. We think it is appropriate for States to update their Nutrient Reduction Strategies to reflect those current successes and their future plans and initiatives for further reduction and to share those strategies with EPA. Consistent with the memo's theme, these Strategies are often created in partnership with other state agencies, non-governmental organizations and universities. However, we question whether EPA has authority to formally review and approve State Nutrient Reduction Strategies. Performance Partnership Agreements, Memoranda of Agreement, and Annual Work Plans all provide opportunities for collaboration with EPA over nutrient reduction. They are not appropriate vehicles, however, for EPA to impose its priorities over those of the States, particularly the quest to establish numeric nutrient criteria.

This is not to say States are discounting the role that numeric nutrient criteria can play in reduction strategies. Many States have adopted some form of numeric criteria corresponding

to causal or response parameters associated with nutrient enrichment. ACWA's September 6, 2022, letter regarding the development of the Technical Support Document for Lake and Reservoir Numeric Nutrient Criteria verifies the interest and support of States in considering numeric criteria within the context of the Co-Regulator Review process. The Technical Support Document will enjoy large backing by States because it largely provides guidance rather than prescriptive expectations.

We worry that EPA believes that numeric criteria represent the best, fastest means of restoring waters impacted by nutrients, to the exclusion of other approaches. The memorandum creates such expectations, stating that, States either adopt numeric nutrient criteria into water quality standards or commit to using numeric targets to implement narrative criteria. But it is the States' responsibility to identify priorities for Water Quality Standards and 303(d) assessment methodologies, with due consideration of the feasibility of their implementation.

Many of the same constraining factors that limited the adoption of numeric nutrient criteria at the beginning of the millennium continue to be in place today. Limited local and site-specific data, uncertainty in the relationship between causal and response parameters, effects of mitigating or aggravating local conditions, e.g., hydrology, light limitation, temperature, residence time, etc. and the marginal applicability of water quality criteria to legacy and non-point sources of nutrients will stymie the development and implementation of the criteria. Even the newly developed Technical Support Document for Lake Numeric Criteria acknowledges the possibility of subsequent fine tuning of criteria as experience and more data are brought to light. The ability of States to nimbly adjust Water Quality Standards in the face of such evidence is tenuous given EPA scrutiny to prevent backsliding and the States' own administrative procedures for regulation change.

A quick review of various states' 303d lists of impaired waters shows that many nutrient impaired waters continue to exist, even for states with or without adopted numeric nutrient criteria. A principal cause of many of those impairments stem from non-point sources of nutrient pollution which, for most states and EPA, are not bound to comply with numeric criteria.

We think the call for States to update and renew their respective Nutrient Reduction Strategies is well founded, given the experience States have had in reduction efforts over the past two decades, increasing data, innovative technologies, financial opportunities such as the Infrastructure Investment and Jobs Act, emerging concepts in market-based approaches, and purpose-driven permitting. Updated documents from the States on the topic can display successes to date, challenges encountered and intended approaches to build upon previous efforts. These strategies represent each State's diverse portfolio of institutional, technical, financial and legal programs, policies and procedures to bring to bear on its nutrient problem. The strategies will also recognize each State's distinct time and spatial constraints on realized water quality improvement even after controls are placed on the landscape. If ever the adage, one size does not fit all, applies, it is with nutrient reduction.

We are in full support of EPA's stated three strategies to drive reductions in nutrient pollution: deepen collaboration with agriculture, boost efforts to support states and tribes to reduce nutrients and utilize existing authorities to drive progress. Our concern is EPA appears to be emphasizing the last strategy, which includes adoption of numeric criteria, development of implementable TMDLs and implementation of technology controls via NPDES permitting. ACWA believes there is a place for all these strategies and tactics, but appropriate deference should be given to States to select the appropriate tools for nutrient reduction that makes sense for their unique hydrologic, geographic, ecological and demographic setting.

While we agree science has a leading role in framing approaches to reduce nutrients, merely following the science neglects many other aspects that influence the ability to implement that science. We have seen examples of excellent science deriving appropriate criteria, but the implementation of those criteria via NPDES permits resulted in widespread use of variances, indicating the criteria could not be feasibly achieved in the near term. Subsequent challenges to the variance process resulted in state legislation rendering the numeric criteria null and void, something that EPA views as inconsistent with the intent of the Clean Water Act. The resulting quagmire of legalities and uncertainty befuddles state agency staff, environmental advocates and the regulated communities and wastes financial and time resources that would be better directed toward actual environmental improvement. Hence, implementation feasibility is a hallmark of most State nutrient reduction strategies. Relying solely on science-based criteria that cannot be implemented through existing or near-term technology, necessitating other tools, such as widespread variances, blunt the efficacy of numeric nutrient criteria in improving the trophic state of our surface waters.

Therefore, we encourage EPA to view the April memorandum with equal weighting among all the recommended actions, a subset of which is tactically selected by States as their most pragmatic means of achieving real reduction of nutrients into waters of the State, and by extension, Waters of the United States. The States are committed to work with EPA and the myriad of public and private interests with the goal of steady, progressive reduction in those nutrients, and we hope that EPA will work with states to identify ways that they can support permit development, rather than dictate expectations. We hope EPA, particularly the Regions, will open earnest talks with the States on what actions and reductions are realistically attainable over the next 2, 5 and 10 years. Timely coordination, communication, and clear and consistent expectations are essential to ensuring regulatory certainty in all CWA programs.

We look forward to ongoing discussions with you and your staff on this critical issue confronting the goals of the Clean Water Act. Please contact Jasper Hobbs at [jhobbs@acwa-us.org](mailto:jhobbs@acwa-us.org) or (202) 368-5940 with any questions regarding ACWA's comments.

Sincerely,

A handwritten signature in blue ink that reads "Mary Anne Nelson". The signature is written in a cursive style with a large initial "M".

Mary Anne Nelson  
ACWA President