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January 13, 2006

Ephraim S. King, Director
Office of Science and Technology
Office of Water
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 4301T
1200 Pennsylvania Ave, NW
Washington, DC 20460
VIA FACSIMILE

Re: NACWA Concerns Regarding Performance-Based Measurement Systems

Dear Ephraim,

On December 7, 2005, representatives of the National Association of Clean Water Agencies (NACWA) along with members of the Inter-Industry Analytical Group (IIAG) met with Mary Smith and other members of your staff on the issue of Performance-Based Measurement Systems (PBMS). NACWA appreciates the opportunity to provide its thoughts on PBMS and to clearly express some of the concerns raised in the December 7 meeting for you and your staff. NACWA understands that EPA may revive the methods streamlining effort initiated in 1997, which included a performance-based approach to Clean Water Act test methods, and we hope you will consider these comments as you continue to explore PBMS.

All of NACWA's nearly 300 public agency members hold one or more National Pollutant Discharge Elimination System (NPDES) or state-equivalent permits for discharges from their treatment plants. Each member relies on EPA-approved test methods to demonstrate that, with a high degree of confidence, they are in compliance with their permit limits at all times. Unlike other EPA programs where PBMS has been employed, the Clean Water Act (CWA) is a strict-liability statute under which dischargers must regularly demonstrate compliance using the results from analytical test methods. Violations often are based on a single data point resulting in civil and/or criminal penalties. Without robust data quality objectives that accurately reflect the risk associated with erroneous conclusions of violation and a shift away from the use of single data points for assessing compliance, NACWA does not believe that PBMS can work for CWA programs.

While NACWA believes that performance-based approaches may have merit in encouraging innovation and improvement in analytical methods, NACWA also feels strongly that U.S. EPA retains the primary responsibility for developing and validating new test methods for use in CWA programs. The perception of many NACWA members is that EPA is decreasing its involvement in the analytical method arena by limiting its support for a national lab accreditation program and privatizing its proficiency testing program (DMR QA). Implementation of a PBMS-type approach would only further this perceived trend and do little to address some of the existing problems. NACWA believes that there are better ways to improve and streamline existing approval procedures through, for example, the creation of more formal and robust protocols for both method development/validation and for determining if the methods meet their intended uses (i.e., establishing and enforcing data quality objectives (DQOs) for methods prior to promulgation and the strict application of the DQOs to data acceptability). In addition, there are existing procedures (Alternate Test Procedure) for quickly approving new, more advanced methods that could be used now, without developing a new program.

NACWA Concerns with PBMS

NACWA agrees with the IIAG that the compliance status of a permittee that has properly used an EPA-approved 40 CFR Part 136 test method must not be subject to challenge from regulators or third-parties using PBMS methods. Though under the current system a citizen for example can challenge a discharger's compliance using any method they see fit, a formal PBMS program lends additional credibility to any test methods that have been developed or modified within the parameters of PBMS and makes such third party challenges easier to sustain. By design, PBMS methods must be as good as or better than Part 136 methods. Unfortunately, this suggests that a PBMS method is 'superior' to the Part 136 method used by the permittee to determine compliance and ultimately may make it harder for a permittee to prove they are in compliance.

EPA's current approval process for Part 136 methods allows all stakeholders, especially those who will be responsible for using and interpreting the results from analytical methods under CWA programs, to review and comment on the procedures, how they were validated, and how they will be implemented. A PBMS approach, however, does not provide the stakeholders, whose compliance status relies on the performance of the method, adequate opportunity to understand, comment on, or question that performance.

During the meeting with Mary Smith, NACWA also expressed concern with the level of sophistication required of end users, including public wastewater utilities, to adequately comprehend laboratory results from a PBMS method. While many of the largest wastewater utilities have state-of-the-art laboratories with some of the best and brightest in analytical chemistry on staff, there are more smaller utilities with only a handful of staff responsible for running the entire plant. Staff at these smaller facilities do not have the analytical expertise needed to review laboratory data or proposals to ensure that only data meeting method standards are used for permit compliance. While your staff has indicated that PBMS would be implemented on a voluntary basis, it is not hard to imagine state agencies requiring PBMS methods in discharge permits for these small dischargers. NPDES permittees must be able to consistently rely on the analytical test results provided to them by a laboratory without a significant amount of interpretation to determine if the laboratory submissions meet acceptable standards for data quality

NACWA Letter on PBMS

January 13, 2006

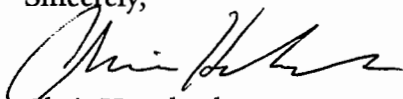
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Next Steps

NACWA understands that EPA intends to seek additional public comment if the Agency decides to pursue PBMS further. NACWA strongly encourages EPA to also consider and respond to the comments received on the 1997 method streamlining effort before publishing a new notice for public review and comment.

NACWA appreciates the opportunity to meet with your staff on this issue and looks forward to a continuing dialogue with EPA in the coming months. If you have any questions or would like to discuss these concerns further, please contact me at 202/833-9106.

Sincerely,



Chris Hornback

Director, Regulatory Affairs

cc:

Mary Smith, Director, Engineering and Analysis Division