



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD

October 25, 2010

MEMORANDUM

SUBJECT: Formation of Science Advisory Board Panel for Review of Numeric Nutrient Criteria Approaches for Florida Estuarine and Coastal Waters and Southern Canals

FROM: Stephanie Sanzone /signed/
Designated Federal Officer (DFO)
EPA Science Advisory Board Staff Office (1400R)

THRU: Wanda Bright /signed/
SAB Ethics Officer
EPA Science Advisory Board Staff Office (1400R)

TO: Vanessa Vu, Ph.D.
Director
EPA Science Advisory Board Staff Office (1400R)

EPA's Office of Water (OW) is developing a draft document, *Methods and Approaches for Developing Numeric Nutrient Criteria for Florida's Estuarine and Coastal Waters and Southern Canals*, to provide technical support in developing numeric water quality criteria for nutrients under Clean Water Act section 303(c)(4). OW has asked the Science Advisory Board (SAB) to review the draft technical support document (TSD) and comment on the technical soundness of the approaches and analyses being considered for derivation of numeric nutrient criteria for Florida estuaries, coastal waters, and southern canals.

This memorandum addresses the set of determinations that were necessary for forming the SAB Nutrient Criteria Review Panel, including:

- (A) The type of review body that will be used to conduct the review, and the nature of the review;
- (B) The list of candidates to be considered for the panel;
- (C) Financial conflict of interest considerations, including identification of parties who are potentially interested in or may be affected by the topic to be reviewed;

(D) How regulations concerning “appearance of a lack of impartiality,” pursuant to 5 C.F.R. § 2635.502, apply to members of the Panel; and

(E) The selection of Panel members.

DETERMINATIONS:

(A) The type of review body that will be used to conduct the review, and the nature of this review.

An *ad hoc* panel, composed of subject matter experts, will be formed under the auspices of the Science Advisory Board to provide advice and recommendations to EPA on the technical soundness of the approaches and analyses being considered for derivation of numeric nutrient criteria in Florida estuaries, coastal waters, and southern canals. The Panel, referred to as the SAB Nutrient Criteria Review Panel, will review EPA’s draft technical support document, *Methods and Approaches for Developing Numeric Nutrient Criteria for Florida’s Estuarine and Coastal Waters and Southern Canals*.

(B) The list of candidates to be considered for the Panel.

The SAB Staff Office announced to the public through a *Federal Register* notice published on June 21, 2010 (75 FR 35026) that it was soliciting nominations of nationally and internationally recognized scientists in fields such as biology, chemistry, biogeochemistry, ecology, limnology, oceanography, modeling, and statistics to serve on the Panel. The *Federal Register* notice further stated that, in particular, the SAB Staff Office sought nominees with specialized knowledge and expertise in assessing nutrient effects in freshwater, estuarine and coastal ecosystems; ecosystem dynamics; hydrodynamic modeling; and numerical approaches for deriving nutrient criteria for the protection of aquatic life.

The SAB Staff Office identified 38 experts to be considered for the Panel. These candidates were identified through the public nomination process or by SAB staff, have relevant expertise, and are willing to serve on the Panel. On August 11, 2010, the SAB Staff Office posted a notice on the SAB Web site inviting public comments on the List of Candidates for the Panel, including biographical sketches, by September 3, 2010. The SAB Staff Office received comments on the candidate list from the following members of the public:

- Fredric P. Andes, Barnes & Thornburg LLP, for Federal Water Quality Coalition
- Sarah Bellmund, Biscayne National Park, FL
- Joseph Boyer, Southeast Environmental Research Center, FL
- Staci Braswell, Florida Farm Bureau Federation, FL
- Kevin Carter, South Florida Water Management District, FL
- Ronald Crone, Lake Worth Drainage District, FL
- Gwen Ecklund, Air & Waste Management Association, PA
- Ray Hodge, Florida Water Quality Coalition, FL
- Chris Hornback, National Association of Clean Water Agencies, Washington, DC
- Craig A. Kovach, CF Industries, Inc.

- C.V. Mathai, Phoenix, AZ
- Joe Rudek, Environmental Defense Fund, NC
- Clete J. Saunier, Florida Association of Special Districts, FL
- David Still, Suwannee River Water Management District, FL
- Ford B. West, The Fertilizer Institute, Washington, DC

(C) Financial conflict of interest considerations, including identification of parties who are potentially interested in or may be affected by the topic to be reviewed.

(a) Identification of parties who are potentially interested in or may be affected by the topic to be reviewed: The principal interested and affected parties for this topic are: (1) federal, state, and local government agencies, elected officials, and non-government organizations involved in the development or implementation of water quality criteria for nutrients; and (2) those involved with the interests of private or public organizations that may be affected by policies or regulations developed on the basis of EPA’s draft technical support document, *Methods and Approaches for Developing Numeric Nutrient Criteria for Florida’s Estuarine and Coastal Waters and Southern Canals*.

(b) Conflict of interest considerations: For Financial Conflict of Interest (COI) issues, the basic 18 U.S.C. § 208 provision states that: “An employee is prohibited from participating *personally or substantially* in an official capacity in any *particular matter* in which he, to his knowledge, or any person whose interests are imputed to him under this statute has a *financial interest*, if the particular matter will have a direct and predictable effect on that interest [emphasis added].” For a conflict of interest to be present, all elements in the above provision must be present. If an element is missing the issue does not involve a formal conflict of interest; however, the general provisions in the appearance of impartiality guidelines must still apply and need to be considered.

(i) Does the general charge to the SAB Nutrient Criteria Review Panel involve a particular matter? A “particular matter” refers to matters that “...will involve deliberation, decision, or action that is focused upon the interest of specific people, or a discrete and identifiable class of people.” It does not refer to “...consideration or adoption of broad policy options directed to the interests of a large and diverse group of people.” [5 C.F.R. § 2640.103 (a)(1)]. A particular matter of general applicability means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties [5 C.F.R. § 2640.102(m)].

The activity of the Nutrient Criteria Review Panel in addressing the charge for peer review of the draft document, *Methods and Approaches for Developing Numeric Nutrient Criteria for Florida’s Estuarine and Coastal Waters and Southern Canals*, will qualify as a *particular matter of general applicability* because the resulting advice will be part of a deliberation, and under certain circumstances the advice could involve the interests of a discrete and identifiable class of people but does not involve specific parties. That group of people constitutes those who are involved with private or public organizations facing regulatory decisions related to water quality criteria for nutrients in Florida waters.

(ii) Will there be personal and substantial participation on the part of the Panel members? Participating personally means direct participation in this review. Participating substantially refers to involvement that is of significance to the matter under consideration. [5 C.F.R. § 2640.103(a)(2)]. For this review, the SAB Staff Office has determined that the *SAB Panel members will be participating personally in the matter*. Panel members will be providing the Agency with advice and recommendations on development of the EPA document, *Methods and Approaches for Developing Numeric Nutrient Criteria for Florida's Estuarine and Coastal Waters and Southern Canals*, and such advice is expected to directly influence the Agency's approach for developing water quality criteria for nutrients in Florida waters. *Therefore, participation in this review also will be substantial.*

(iii) Will there be a direct and predictable effect on a Panel member's financial interest? A direct effect on a participant's financial interest exists if "...a close causal link exists between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. ...A particular matter does not have a direct effect ...if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy is not considered to have a direct effect." [5 C.F.R. § 2640.103(a)(i)] A predictable effect exists if, "...there is an actual, as opposed to speculative, possibility that the matter will affect the financial interest." [[5 C.F.R. § 2640.103(a)(ii)]

Candidates for the Panel were evaluated against the requirements of 5 C.F.R. § 2640.101(a), using each candidate's confidential financial disclosure form (EPA Form 3110-48), to determine whether the work of the Panel will have a direct and predictable effect on his or her financial interests.

(D) How regulations concerning "appearance of a lack of impartiality," pursuant to 5 C.F.R. § 2635.502, apply to members of the Panel

The Code of Federal Regulations at 5 C.F.R. § 2635.502(a) states that: "Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the person determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and has received authorization from the agency designee." Further, § 2635.502(a)(2) states that, "An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter."

Candidates for the Panel were evaluated against the 5 C.F.R. 2635(a)(2) general requirements for considering an appearance of a lack of impartiality. Information used in this evaluation has come from information provided by potential advisory committee members

(including, but not limited to, EPA 3110-48 confidential financial disclosure forms) and public comment as well as their responses to the following supplemental questions (included on the EPA 3110-48 confidential financial disclosure form):

1. Do you know of any reason that you might be unable to provide impartial advice on the matter to come before the panel/committee/subcommittee or any reason that your impartiality in the matter might be questioned?
2. Have you had any previous involvement with the review document(s) under consideration including authorship, collaboration with the authors, or previous peer review functions? If so, please identify and describe that involvement.
3. Have you served on previous advisory panels, committees or subcommittees that have addressed the topic under consideration? If so, please identify those activities.
4. Have you made any public statements (written or oral) on the issue that would indicate to an observer that you have taken a position on the issue under consideration? If so, please identify those statements.

(E) The selection of Panel members

The SAB Staff Office Director makes the final decision about who serves on the Nutrient Criteria Review Panel, based on all relevant information. This includes a review of the member's confidential financial disclosure form (EPA Form 3110-48) and an evaluation of an appearance of a lack of impartiality, and application of criteria to ensure a balanced panel.

As a result of a review of all relevant information including each candidate's confidential financial disclosure form (EPA Form 3110-48), the responses to the four questions above, and public comments, the SAB Staff Office has determined that there are no conflicts of interest or appearances of a lack of impartiality for the members of this Panel.

For the SAB Staff Office, a balanced committee or panel is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the general charge. Specific criteria to be used in evaluating an individual committee member include: (a) scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; (e) skills working in committees, subcommittees and advisory panels; and, for the committee as a whole, (f) diversity of scientific expertise, and viewpoints.

On the basis of the above-specified criteria, the members of the Nutrient Criteria Review Panel are as follows:

SAB Members

- Dr. Judith Meyer**, University of Georgia (GA), Chair
- Dr. Robert Diaz**, Virginia Institute of Marine Science (VA)
- Dr. James Sanders**, Skidaway Institute of Oceanography (GA)

Consultants

- Dr. Walter Boynton**, University of Maryland (MD)
- Dr. Deborah Bronk**, Virginia Institute of Marine Science (VA)
- Dr. Piers Chapman**, Texas A&M University (TX)
- Dr. Mark David**, University of Illinois (IL)
- Dr. Anne Giblin**, Marine Biological Laboratory (MA)
- Dr. Kenneth Heck, Jr.**, Dauphin Island Sea Lab (AL)
- Dr. Mark Noll**, State University of New York (NY)
- Dr. Peter Ortner**, University of Miami (FL)
- Dr. Hans Paerl**, University of North Carolina (NC)
- Dr. Kenneth Reckhow**, Duke University (NC)
- Dr. David Schneider**, Ocean Sciences Centre (Canada)
- Dr. Andrew Sharpley**, University of Arkansas (AR)
- Dr. Andrew Solow**, Woods Hole Oceanographic Institution (MA)
- Dr. Alan Steinman**, Grand Valley State University (MI)
- Dr. Joseph Zieman**, University of Virginia (VA)

Concurred,

/signed/

October 25, 2010

Vanessa Vu, Ph.D.
Staff Director
EPA Science Advisory Board (1400F)

Date