

Drowning in a Sea of Clean Water Act Regulation

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In 1999 President Clinton announced that after 25 years of government enforcement of the Clean Water Act (Act) against factories, sewage treatment plants and other easily identifiable individual “point sources” of pollution, it was time for a change. Soon thereafter, the Environmental Protection Agency (EPA) proposed revisions to its little-used Total Maximum Daily Load (TMDL) program in an effort to dramatically expand the reach of the Act to include the “non-point sources of pollution” associated with agriculture, silviculture, urban areas and municipal facilities.

If the EPA’s TMDL proposal (Proposal) is fully implemented, the states would have to determine how much of a given pollutant each of 20,000 water bodies in the United States could absorb, and then determine what total discharge reductions must take place for each water body to fall within that limit. This initial step, daunting as it may seem, is “the easy part.” Upon making such difficult, resource-intensive determinations, states would then have to allocate the amount of reductions that should come from each of the various point and non-point sources discharging to a given water body.

This regulatory development is likely to cause considerable concern among all parties that are discharging pollutants into water bodies in the Delmarva Peninsula. Because of heightened concern regarding water quality in the Chesapeake Bay, the presence of large farming and livestock operations that have been more or less exempt from regulation, and the continued presence of large industrial dischargers that do not want to see their pollution-control obligations made more stringent, development of TMDLs for that region will be among the more contentious environmental issues in the coming year.

The Proposal would place a heavy burden on Maryland, Virginia and Delaware because it would pose significant financial hardships for hog, poultry and other livestock operations and related industries on the Delmarva Peninsula. The Proposal also threatens to divide farmers and growers from the corporate owners whose livestock they raise, as responsibility is assigned for pollution that has no identifiable source. Moreover, the EPA’s TMDL focus raises the specter of industrial dischargers pitted against agricultural dischargers—

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the inevitable ratcheting of discharge limits will lead each group to seek to impose the greater burden on the other. This “zero-sum” game highlights the need for both industrial and agricultural interests to become involved in the TMDL-establishment process.

The EPA’s TMDL Proposal

The Act requires states to develop lists of water bodies that fail to attain water quality standards with the existing minimum required pollution controls. States must then rank the listed water bodies from worst to best to prioritize them for the establishment of TMDLs (standards reflecting the maximum amount of pollutant a water body can hold while still meeting the water quality standards).

As originally conceived and enforced, the TMDL program focussed on the obvious, so-called point sources of pollution such as wastewater pipes from industrial operations. Once a TMDL had been established for a particular water body, the state used the TMDL as a cap on the total pollutant discharges authorized by the National Pollutant Discharge Elimination System permits awarded to point sources. In practice, the TMDL program was largely a “paper tiger,” as states tended to be very slow in implementing and enforcing TMDL limits. A recent spate of lawsuits related to inadequate state and federal regulatory resources, however, caused the EPA to try to reinvigorate the program, resulting in the August Proposal. In the Proposal, the EPA extends the TMDL scope to cover non-point source discharges, and broadens the interpretation of “impairment” to include heat and atmospheric deposition.

Perhaps the largest amplification under the Proposal, however, can be found in the role the EPA gives itself. EPA Administrator Carol Browner, while extolling the virtues of state involvement to craft local solutions tailored to fit the needs of individual rivers, lakes and beaches, proclaimed that if a state did not develop an acceptable cleanup plan for a water body, “[w]e would write the plans and we would essentially take over the process, we would work with the local communities, with the local businesses, with the local farmers to develop the site specific plans and then to implement those plans.”

Not surprisingly, the Proposal has encountered a great deal of criticism. Sen. Robert Smith (R-NH), chairman of the Senate Environment and Public Works Committee, disputes two general premises of the rulemaking: TMDLs for non-point source-impaired waters and an augmented role for the EPA. According to Sen. Smith, “To move entities from a point source to a nonpoint source is a problem. ... States need to address the problem, and we need to see that that happens.” In fact, some timber and farming interests in California have made similar arguments in a federal court challenge to the EPA’s authority to regulate non-point sources under the Act. The case, *Pronsolino v. Marcus*, No. 99-1828 (N.D. Cal., filed April 12, 1999), came in response to the EPA decision to add California’s Garcia River to the state’s impaired water bodies list and to establish TMDLs for the river when the state declined to do so.

Effects of the Plan

Both states and the entities they regulate appear likely to face heightened costs and compliance burdens under the proposed regulations. Administrator Browner indicated that developing and implementing the TMDL plans would cost from \$1 to \$2 million per state, and the EPA cost estimate for developing a single TMDL under the plan is \$25,000. California authorities, however, predict investments of \$350,000 for each “medium complexity” TMDL and \$1.1 million for more intricate TMDLs. As usually happens with EPA cost estimates, the reality will likely be much worse. For example, when a TMDL was prepared to mitigate nitrogen pollution in the Long Island Sound, costs over a four-year period exceeded \$20 million!

State groups have long argued that states do not have the resources to administer their current TMDL obligations, a gap that will only widen under the plan. “The costs for water quality monitoring, assessment, TMDL development and implementation will experience a tremendous increase at every stage of the process,” according to comments filed by state regulatory agencies in response to the August 1999 Proposal.

The largest cost questions arise, however, with respect to the rulemaking’s impact on individual farmers and the livestock industry. Secretary of Agriculture Dan Glickman recently testified before the Senate Agriculture Committee that the EPA needs to analyze how much the extended TMDL program would cost landowners. Concerns are centered on the idea that a regulatory scheme based on non-point sources of pollution will require farmers to expend resources to improve the quality of a nearby water body, regardless of whether the farmer contributed to the pollution of that water body.

The problem appears particularly acute for regional industries—such as poultry processing—that cannot afford new costs and already face the prospect of increasing the millions of dollars they spend on compliance with environmental laws in response to recent state legislation. Maryland’s Water Quality Improvement Act of 1998, for example, will require individual farmers to begin testing their soils in 2004 in an effort to prohibit them from applying more fertilizer than is necessary. Stringent limits on the amount of phosphorous present in the ground will force farmers to turn from using chicken manure toward using more expensive commercial fertilizers, leaving them economically worse off and without a suitable option for disposing of a growing chicken manure surplus. More important, however, is that Maryland’s tough stance may have emboldened Delaware and Virginia to enact more stringent regulations on their own poultry industries.

According to James A. Purdue, “[t]his is an industry that measures its profitability in the tenths of pennies. ... If our costs go up, we simply can’t survive.” The average poultry grower in Maryland operates three chicken houses mortgaged at \$300,000 and earns less than \$30,000 annually. Considering the conclusion of a University of Maryland study that even a 4 percent drop in poultry production would cost Maryland’s economy 4,000 jobs and \$74 million

in output, the poultry industry must act now to fight the costly expansion of the federal government's reach through the TMDL initiative.

A Strategy for Monitoring Developments

This year, Maryland plans to submit 17 TMDLs for nutrients or chlordane for EPA approval, including one for Baltimore Harbor. Maryland's Department of the Environment will add to this list as it receives refined or supplemented data, public comment and participation, refined or supplemented technical information, or in response to changing federal priorities, guidance, regulations and laws. Delaware has proposed TMDLs for three of its major water bodies for zinc, nutrients and bacteria, as part of a settlement among the state's Department of Natural Resources and Environmental Control, the EPA, and citizens groups that require establishment of TMDLs for all 1996-listed waters by 2006. The Commonwealth of Virginia published on March 13, 2000, a request for comment on a draft TMDL for fecal coliform bacteria on segments of Dry River, Mill Creek and Pleasant Run. The comment period closes April 11, 2000, two weeks after a public hearing on the TMDL development, at which time the draft TMDL will be presented.

These developments provide important opportunities for regional companies to get involved and to protect their interests. Once a TMDL has been drafted, a formal public notice and comment period will commence. Additionally, when a state prepares to implement a TMDL, interested parties are involved in the process of determining which pollution sources will need to be treated or controlled. Well-drafted comments could go a long way toward protecting a company at the state level, and could serve as even more powerful tools when used in conjunction with lobbying efforts both in Congress and in relevant state legislatures. This year, members of Congress are likely to draft riders to fiscal year 2001 appropriations bills that will weaken or eliminate the Proposal. There may not be a better opportunity for individual companies to help determine how much they will pay for the regulatory expansion planned by the Clinton administration.