

EPA Delays TMDL Rule

The U.S. EPA (EPA) has issued a notice stating that its final rule revising the total maximum daily loads (TMDL) program under the Clean Water Act (CWA) will not become effective until April 30, 2003. 66 Fed. Reg. 53,044 (Oct. 18, 2001). The delay also gives states more time to submit their lists of impaired waters, required under Section 303(d) of the CWA and known as 303(d) lists. Those lists now must be submitted by October 1, 2002, instead of April 1, 2002.

The TMDL rule requires states to identify waters that are not meeting water quality standards and to establish pollution budgets, called TMDLs, to help restore the quality of those waters. The rule also imposes specific time frames within which EPA must ensure that states' 303(d) lists and TMDLs for impaired waters are completed, and that necessary point and nonpoint source controls are implemented to meet the TMDLs.

The TMDL rule, which significantly revised EPA's existing TMDL regulations at 40 C.F.R. Part 130, has been controversial even before it was issued on July 13, 2000 (65 Fed. Reg. 43,586) with an initial effective date of October 1, 2001. The initial effective date was set at that date because Congress barred EPA from spending any fiscal year 2001 funds to implement the rule.

Nonpoint source dischargers, such as ranchers and farmers, have challenged the rule's attempt to regulate their activities, arguing that the CWA does not authorize such regulation and that compliance would be prohibitively expensive. Point source dischargers have argued that the rule will unfairly put the burden on them, as easy targets, to improve water quality when much pollution comes from nonpoint sources, including air deposition. Others have pointed out gaps in data, research and monitoring which undermine the goals EPA has set for the TMDL program. The TMDL rule has been challenged in court by nonpoint source dischargers and, in a separate case, by environmental groups who claim that the TMDL rule is not stringent enough.

In delaying the effective date of the TMDL rule, EPA is giving itself time to consider recommendations to change the TMDL rule made by the National Research Council (NRC). Those recommendations were issued on June 15, 2001. In its notice about the delay, EPA states that, in view of the NRC's suggestions, "it is important at this time to re-consider some of the choices made in the July

2000 rule, while continuing to operate the program under the 1985 TMDL regulations, as amended in 1992.”

In its notice, EPA also expresses its hope that the extra time will enable it “to solicit and carefully consider suggestions on how to structure the TMDL program to be effective and flexible and to ensure that it leads to workable solutions that will meet the Clean Water Act goals of restoring impaired waters.” EPA also hopes that these efforts will resolve the issues currently being litigated before the federal District of Columbia Circuit Court of Appeals.

Despite EPA’s delay of the effective date of its TMDL rule, a knowledgeable Michigan Department of Environmental Quality (MDEQ) official has informed the Michigan Environmental Compliance Update that MDEQ intends to submit its CWA 303(d) list to EPA by the old deadline, April 1, 2002. The MDEQ official advises that the list will be issued for public notice in January or February 2002. In addition, MDEQ continues to draft TMDLs for impaired Michigan waters. To date, MDEQ has issued approximately 15 TMDLs.

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