NATURAL RESOURCE AND ENVIRONMENTAL NOTES
Environmental Law

EPA’S Final TMDL Rule: A Load of Trouble for Agriculture and Industry

by Scott H. Reisch and Catherine M. van Heuven

The U.S. Environmental Protection Agency (“EPA”) is working to revitalize its Total Maximum Daily Load ("TMDL") program through controversial new regulations that could have a major impact on facilities that discharge wastewaters, directly or indirectly, into any stream, river, or other water body that does not meet ambient water quality standards. In Colorado alone, there are seventy-nine such “impaired” water bodies, totaling almost 2,200 miles, including sections of the Arkansas, Colorado, Gunnison, and South Platte Rivers.

Through the TMDL program, EPA and states can impose water-quality-based discharge limits where technology-based limits have not been effective in achieving ambient water quality standards. Technology-based limits require a facility to meet discharge limits based on a determination of pollutant levels through “best available technologies.” However, under water-quality-based discharge limits used in the TMDL program, the same facility would be allocated a specific pollutant discharge limit based on the total load that a water body can receive while still supporting designated uses, such as fishing or swimming. Thus, under the TMDL program, a facility’s discharge limits depend on the quality of the receiving waters, their designated uses, and the level of pollutants to be contributed by other sources.

Congress enacted the TMDL program as part of the 1972 Amendments to the Federal Water Pollution Control Act, but the program essentially has been dormant for two decades. TMDLs received new attention in the 1990s when environmental organizations initiated dozens of lawsuits geared toward forcing EPA and states, including Colorado, to meet obligations established under the Clean Water Act ("CWA") § 303(d) and the existing TMDL regulations. In response to these lawsuits and concerns that existing effluent limits were no longer effective in improving the water quality of the nation’s surface waters, EPA promulgated a major rulemaking in July 2000 that significantly expands the reach of the TMDL program ("Final Rule").

Numerous parties, including representatives of the timber industry; utility companies; and various agricultural groups representing, among others, corn, poultry, cotton, and livestock interests, immediately challenged the Final Rule in the courts. Environmentalists sued as well, claiming that EPA had not gone far enough. These cases have been consolidated in the U.S. Court of Appeals for the District of Columbia Circuit, and the parties expect to brief the case later this year. This article identifies the legal issues at stake in the rulemaking and the pending litigation. It also provides practical suggestions for counsel advising clients that are potentially subject to the Final Rule.

TMDL Allocations

A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards ("WQS"). CWA § 303(d) requires states to identify water bodies or water segments for which existing discharge controls are not stringent enough to achieve the applicable WQS. These “impaired waters” must be enumerated in a “303(d) list,” which each state must biennially. CWA § 303(d)(1)(A) requires each state to prioritize the waters on its 303(d) list, taking into account “the severity of the pollution and the uses to be made of such waters” and to determine the maximum amount of each pollutant that the impaired water segment can accommodate without breaching the applicable WQS.

From this analysis, each state develops two types of allocations for the TMDL: (1) individual “wasteload allocations” for point sources (for example, sources that discharge wastewater through pipes or ditches), and (2) “load allocations” for nonpoint sources (such as runoff from row crop farming) and natural background sources of pollutants. Once the allocations in each TMDL have been determined, they are implemented through effluent limits in discharge permits for point sources and voluntary or locally enacted controls for nonpoint sources.

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Under CWA § 303(d), EPA is required to review each state’s 303(d) list and approve the list if it (1) identifies and establishes priorities for impaired water bodies still needing TMDLs; (2) identifies those water bodies requiring thermal TMDLs; (3) evaluates all “readily available” water-quality-related data, and (4) provides appropriate documentation and support to EPA. If a state list is approved, the state must incorporate the list and the nonpoint source load allocations in its “continuing planning process” pursuant to CWA § 303(e). If EPA disapproves of the state’s 303(d) list, it will then identify impaired waters and TMDLs that the state must incorporate into its continuing planning process. It is through the TMDL approval process that EPA exerts influence and control over state TMDL programs.

TMDL Rulemaking

In 1996, EPA established a federal advisory committee to provide recommendations for improving the TMDL program. Based in large part on the committee’s recommendations, EPA proposed significant revisions to the current TMDL program and associated permitting regulations. Although EPA published the Final Rule on July 13, 2000, it is not slated to go into effect until October 1, 2001, because Congress refused to appropriate funds for implementing the Final Rule during fiscal year 2001. Once in place, the Final Rule will require states to: (1) develop more comprehensive lists of water bodies that do not “attain and maintain” water quality standards; (2) schedule, based on priority factors, the establishment of TMDLs over the next ten years; and (3) incorporate eleven specific elements in each TMDL, including implementation plans, which require an ambitious schedule of actions to reduce pollutant loadings.

TMDL Litigation

Industry groups have focused their criticisms on three particular aspects of the Final Rule. Specifically, they oppose the scope of the listing requirement, TMDL development, and EPA’s authority to intervene in the state TMDL programs. Each issue is discussed below.

Scope of the Listing Requirement

Under the Final Rule, states are required to make their 303(d) lists more comprehensive. The most dramatic change is an explicit requirement that states identify and establish TMDLs for water bodies impaired solely by nonpoint sources. Under the Final Rule, EPA requires that pollutants from nonpoint sources be included in the “loading” calculations for impaired waters. It also expects states to implement management measures for waters impaired solely as a result of nonpoint sources of pollution. This aspect of the Final Rule is controversial because, according to industry groups, the CWA provides no direct authority for EPA to include on their 303(d) lists waters impaired only by nonpoint sources. In fact, industry groups contend that the statute specifically restricts the listing requirement to those waters for which the effluent limitations on point sources are not stringent enough to meet WQSs.

In the ongoing litigation, industry groups have challenged several additional changes to the CWA § 303(d) listing process. For example, they argue that EPA does not have authority to require states to list and establish TMDLs for water bodies that are impaired by unknown causes. In addition, petitioners object to provisions in the Final Rule requiring states to list and develop TMDLs for water bodies impaired by heat. Their concern is that a state or EPA could require riparian landowners to take certain measures to address cases where thermal water quality standards are exceeded, even where no actual discharge occurs. For example, landowners could be required to plant vegetation to generate shade.

Finally, industry groups object to a new requirement that states list and create TMDLs for water bodies impaired by aerial and atmospheric deposition. Given the technical uncertainties inherent in linking atmospheric deposition to water quality, industry groups fear that the calculations used to support listing will be arbitrary. In addition, due to the lack of Clean Air Act authority to control atmospheric loadings, industry groups worry that load allocations will be difficult to calculate and implement.

Affected dischargers have a great deal at stake in the CWA § 303(d) listing process. Once a water body is on a state’s 303(d) list, sources discharging into the water body are likely to face more stringent discharge limits than they have in the past. This includes not only point and nonpoint sources that discharge directly into surface waters, but also “indirect dischargers” that discharge into publicly owned treatment works (“POTWs”). Indirect dischargers are affected because POTWs can be expected to pass along to their customers the more stringent limits to which they are subject, as well as the additional costs they will face complying with the new requirements.

TMDL Development

Industry groups also disapprove of several of the Final Rule’s provisions relating to the development and approval of TMDLs. Most significantly, they object to the requirement that TMDLs include an “implementation plan” containing, among other components, a description of the legal and regulatory controls under which implementation will occur; a timeline; and “reasonable assurances” that the implementation activities will occur. Under the Final Rule, reasonable assurances could include evidence of regulatory, contractual, incentive-based, or voluntary programs that show TMDLs will be implemented under an expeditious schedule and will be supported by “reasonable delivery mechanisms” and adequate funding.

The inclusion of mandatory implementation plans as part of the TMDL may represent the most important issue for nonpoint-source interests. Under the Final Rule, states must prove that nonpoint source loading will be adequately addressed through control actions or management measures that are, inter alia, specific to the pollutant and water body for which the TMDL is being established and accomplished through “reasonable delivery mechanisms.” This may include existing programs, procedures, or authorities that have achieved success in delivering water quality improvements or new programs that can achieve the same results. Because TMDLs are subject to EPA approval, including federal authority to develop the TMDL if the state’s effort is disapproved, the Final Rule would allow EPA to develop and enforce implementation plans. Thus, nonpoint sources will be subject to new state and federal oversight that could include both voluntary measures and state or federal regulation of nonpoint sources.

By way of example, EPA suggests that to address the impact of grazing on water quality, states can reduce livestock access to the water body by implementing management measures that require: (1) establishing alternative supplies of water; shade, and salt away from the stream; (2) hardening the limited access points to the stream; (3) installing fencing; and (4) implementing grazing rotation strategies. For urban areas, EPA states that typical measures would include erosion and sediment con-
trol in new developments, implementation of urban best management practices, protection and restoration of riparian areas, and treatment of runoff in developed areas. If industry groups in the pending litigation are not successful in challenging this aspect of the Final Rule, nonpoint sources will be subject to sweeping new controls similar to these as states strive to meet the "reasonable assurances" requirements.

EPA Authority to Intervene
The third major industry concern is that the Final Rule allows EPA to intervene in the state's TMDL process even before the state has submitted its 303(d) list. Under the new regulation, EPA may develop 303(d) lists, accompanying TMDLs, and implementation plans if a state asks EPA to do so or if EPA determines that a state has not made substantial progress in establishing the TMDL. Industry groups argue that Congress clearly envisioned that states would be given an initial opportunity to implement the 303(d) program. Therefore, they object to EPA's interpretation that it can intervene even before state deadlines are missed. If this provision of the Final Rule survives legal challenge, it will greatly enhance EPA's influence over state TMDL programs, and likely will result in more stringent standards for both point and nonpoint sources.

Effect of the Final Rule
Regardless of whether the Final Rule survives in its current form, the TMDL program undoubtedly will be enforced to a greater extent than it has been in the past. Accordingly, Colorado practitioners would be well advised to become familiar with the Final Rule and to consider the various ways in which particular clients may be affected.

Counsel for hog farms, ranches, and other agricultural interests, as well as those advising more traditional manufacturing facilities, should determine whether a particular client is currently discharging (either directly or indirectly through a POTW) into a water body that has been proposed for inclusion on Colorado's 303(d) list. If so, the client may wish to become involved in the CWA § 303(d) listing process to assure that the water bodies into which it discharges are not added to the state's 303(d) list based on inadequate science or other inappropriate grounds. The Colorado Water Quality Control Division is in the process of setting final TMDLs, reviewing listing methodology, and beginning work toward the 303(d) list for 2002. The Colorado Department of Public Health and Environment maintains a website that identifies the water bodies being examined, pollutants of concern, current data collection efforts, the public comment period, and the projected completion date for TMDLs.

From a business perspective, counsel may wish to advise clients that they should take the status of the receiving waters into account as they develop expansion plans, recognizing that particular operations may face more stringent discharge limits in the near future. This is critical because discharge permits under the CWA must be renewed every five years. The TMDL program also may be of particular concern to a client that discharges into impaired waters but whose competitors do not—as their competitors may not face additional and more stringent water quality-based effluent limits and the additional expenses associated therewith.

Further, counsel advising clients involved in mergers and acquisitions should, in the course of their due diligence, evaluate the potential impact of the TMDL program on the proposed transactions.
program on the facilities to be acquired. No client wants to buy a business and find out later that the business cannot operate at current or future production levels without investing in new pollution control technologies or making other unanticipated capital expenditures. Counsel also should consider adjusting contractual provisions to include a representation concerning the TMDL status of any waters into which the target company discharges, much in the same way that sellers often are now asked to provide representations as to whether the property they own is listed on the National Priorities List under the Superfund statute.33

Finally, counsel in Superfund cases should be aware that TMDLs may be considered “applicable” or “relevant and appropriate” requirements (“ARARs”).34 Therefore, they could be used as cleanup standards for contaminated facilities. It may be to a client’s advantage to come to an agreement with EPA as to the ARARs for a site before TMDLs are finalized.

Every client’s situation is unique. The best advice for counsel right now is to work closely with clients to determine whether they are or will be affected by the TMDL program. It is not too early for clients to focus on the steps they can take to respond to EPAs new initiatives in this area.

Conclusion

The Final Rule has the potential to impact any facility that discharges wastewaters, through point or nonpoint sources, directly into surface waters or indirectly to a POTW. The fate of the Final Rule will depend not only on the courts, but also on the Bush Administration and Congress. New EPA Administrator Christine Whitman stated in her confirmation hearings that addressing nonpoint source pollution was one of her top priorities and that she would “seek to work with states under their own water protection laws and the TMDL program” to address the problem.35 However, when Whitman was asked whether she would reexamine or revise the Final Rule, she only committed to reviewing EPAs cost study and the ongoing National Academy of Sciences Study.36

On the legislative side of the issue, it is possible that lawmakers will try to over-ride the Final Rule. The Final Rule has never been popular in Congress, and it is possible that Congress could extend the appropriations ban into Fiscal Year 2002 or beyond.

A decision in the D.C. Circuit litigation is not expected before fall 2001. In the interim, with the fate of the Final Rule in question, counsel should keep a close eye on developments at EPA, in Congress, and in the courts.

NOTES

6. The D.C. Circuit consolidated Western Coalition of Arid States v. Whitman, No. 00-71506 (Nov. 21, 2000) and State of Montana v. EPA, No. 00-71610 (Nov. 24, 2000), with Am. Farm Bureau Fed’n, supra.
7. The Northwest Environmental Advocates, Center for Marine Conservation, National Wildlife Federation, Southern Environmental Law Center, and Trout Unlimited successfully petitioned to intervene in the litigation, and the Coast Action Group, Lake Michigan Federation, American Canoe Association, and American Littoral Society have been granted leave to appear as amicus curiae (Dec. 19, 2000 Order; D.C. Cir. 1999). The court has not yet ruled on the petition to intervene filed by the Texas Natural Resource Conservation Commission (filed Dec. 21, 2000) or the petition to appear as amicus curiae filed by the state of California (filed March 19, 2001).
9. State WQS must (1) designate the use or uses to be made of the water and (2) set criteria necessary to protect those uses. For example, a state might declare a certain water segment fit for agricultural use, industrial purposes, recreation, or public water supply, and then express criteria as specific numerical concentrations for specific pollutants at levels to protect the designated use(s). See 33 U.S.C. § 1314(c); 40 C.F.R. pt. 131.
11. 40 C.F.R. §§ 130.1 and 130.7(b).
12. See 33 U.S.C. § 1313(e); 40 C.F.R. § 130.5.
13. Under the continued planning procedure requirements of CWA § 303(e), states must establish state-wide plans that include processes for TMDL development and adequate implementation of new and revised WQS, among other components.
17. Supra, note 3.
18. Id. at 43,590. EPA cites to Pronsolino v. Marcus, 91 FSupp.2d 1337 (N.D.Ca. 2000) as its authority to regulate nonpoint sources under CWA § 303(d). This decision has been appealed in the 9th Circuit (D.C.Cir.App., Nos. 00-16028 and 00-16027, filed May 24, 2000).
19. Supra, note 3 at 43,593 and 43,695.
22. Supra, note 3 at 43,596-7; 40 C.F.R. § 130.2(b) and supra, note 3 at 43,608-11; 40 C.F.R. § 130.27.
23. Supra, note 3 at 43,597; 40 C.F.R. § 130.2(b).
24. Supra, note 3 at 43,594 and 43,605; 40 C.F.R. §§ 130.2(b) and supra, note 3 at 43,620-7.
25. Supra, note 3 at 43,594.
26. Supra, note 3 at 43,625-27; 40 C.F.R. § 130.32.
27. Supra, note 3 at 43,500; 40 C.F.R. §§ 130.2(d) and 130.32(c).
28. Supra, note 3 at 43,599.
29. Id. at 43,626-7.
30. Supra, note 3 at 43,632-34; 40 C.F.R. § 130.35.
31. Supra, note 3 at 43,606 to 43,611.
32. See www.cdph.state.co.us/wq/tmdl_status.htm.
36. Id. [ ]