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**COMMENTS OF
THE AMERICAN SOCIETY OF CIVIL ENGINEERS
ON THE
NOTICE OF PROPOSED RULEMAKING
WITHDRAWAL OF REVISIONS TO THE WATER QUALITY PLANNING AND
MANAGEMENT REGULATION
AND REVISIONS TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM PROGRAM IN SUPPORT OF REVISIONS TO THE WATER QUALITY
PLANNING AND MANAGEMENT REGULATION
DOCKET ID NO. OW-2002-0037**

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Water Docket
Environmental Protection Agency
Mail code 4101T
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Attention: Docket ID No. OW-2002-0037

I. Introduction

The American Society of Civil Engineers (ASCE) is pleased to offer these comments on the proposal to withdraw the July 2000 regulation issued under the Clean Water Act to implement the “total maximum daily load” program. Environmental Protection Agency (EPA), Notice of Proposed Rulemaking, *Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation*, 67 Fed. Reg. 79,020 (Dec. 27, 2002) (to be codified at 40 C.F.R. parts 9, 122, 123, 124, and 130).

ASCE was founded in 1852 and is the country’s oldest national civil engineering organization. It represents 130,000 civil engineers in private practice, government, industry, and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a non-profit educational and professional society organized under the Internal Revenue Service rules.

The Society's members are directly and materially affected by the proposed changes to the water-quality planning and management regulations in their professional practice areas, including environmental engineering, water resources engineering and water resources planning and management.

II. Summary of Comments

The EPA has concluded that the total maximum daily load (TMDL) rule of July 2000 cannot serve “as the blueprint for an efficient and effective TMDL Program” without significant changes. *Id.* ASCE does not agree. The July 2000 rule is necessary to ensure that progress continues to be made to implement the TMDL program, to preserve the nation’s endangered watersheds, and to aid in the control of nonpoint source pollutants. Therefore the Society encourages the EPA to retain the July 2000 regulation.

III. Statutory Background

The history of the Act and the TMDL program are well known and can be quickly summarized. The Federal Water Pollution Control Act, or Clean Water Act, 33 U.S.C.A. 1251-1387 (West 2002), is the principal law governing pollution in the nation's streams, lakes, and estuaries.

The Act has three major elements. First, states must set water quality standards to protect “designated uses” of certain bodies of water; the standards then are used to effluent limits for individual sources. Next, the federal government is required to set industrywide, technology-based effluent standards for dischargers. Finally, all dischargers must obtain a permit issued by the federal government or authorized states that specifies discharge limits under the National Pollutant Discharge Elimination System (NPDES) program. The discharge limits essentially are the stricter of the water-quality-based limit and the technology-based limit.

Section 303(d) of the Clean Water Act, *id.* 1313(d), requires states to identify pollutant-impaired water segments and develop “total maximum daily loads” (TMDLs) that set the maximum amount of pollution that a water body can receive without violating water-quality standards.¹ If a state fails to identify its impaired waters or establish the required TMDLs, the EPA must do so. The first listed waters and TMDLs were due to the EPA in mid-1979, or 180 days after the Agency published the first list of pollutants regulated under section 303(d).²

Section 303(d) and the TMDL program were included in the Act as a second-string safeguard against failure of the primary water quality improvement mechanism, the NPDES program. As a result of its backup status, the TMDL program was not aggressively or broadly pursued until the late 1980s and early 1990s when it became clear that the NPDES program alone could not solve the country's water quality problems.

Jim Vergura and Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 DRAKE J. AGRIC. L. 317, 320 (2001) (citations omitted).

A TMDL includes a quantitative assessment of water quality problems, pollution sources, and pollution reductions needed to restore and protect a river, stream, or lake. TMDLs may address all pollution sources, including point sources such as sewage or industrial plant discharges, nonpoint sources, such as runoff from roads, farm fields, and forests, and naturally occurring sources, such as runoff from undisturbed lands.

Because the Clean Water Act does not directly regulate nonpoint sources of pollution, the TMDL program was designed to control environmental contamination and the degradation of water quality from nonpoint sources, including agricultural operations.

In addition to originating from point sources, pollution also comes from non-point sources, such as runoff from farmlands, mining activity, housing construction projects, roads, and so on. Non-point sources cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point. Therefore, to

1 The states have generally failed to carry out their section 303(d) duties. *See* U.S. GENERAL ACCOUNTING OFFICE, CLEAN WATER ACT: PROPOSED REVISIONS TO EPA REGULATIONS TO CLEAN UP POLLUTED WATERS (2000). (“[State] compliance with existing TMDL regulations has been problematic, and future compliance in the absence of the proposed regulation is uncertain ...”).

2 For a detailed description of the TMDL program, see *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002).

regulate non-point pollution, the Act requires states to establish water quality standards.

Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002).

If a state fails to set TMDLs for its impaired water bodies, EPA is required to develop a priority list for the state and make its own TMDL determination. This is *not* a discretionary duty. *See, e.g., Scott v. Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (holding that the Clean Water Act “undoubtedly imposes mandatory duties on both the states and the EPA”); *Alaska Center for the Environment v. Reilly*, 762 F. Supp. 1422, 1429 (1991) (“Section 303(d) expressly requires the EPA to step into the states’ shoes if their TMDL submissions or lists of water quality limited segments are inadequate.”) *aff’d sub nom. Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994); *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342 (1995) (same); *Natural Resources Defense Council v. Fox*, 909 F. Supp. 153 (1995) (same); *Sierra Club v. Hankinson*, 939 F. Supp. 865 (1996) (same); *Raymond Profit Foundation v. EPA*, 930 F. Supp. 1088 (1996) (same); *Idaho Conservation League v. Browner*, 968 F. Supp. 546 (1997) (same).³

Despite the clear mandate in the Act, however, most states claim to lack the resources to do TMDL analyses, which involve complex assessment of point and nonpoint sources and mathematical modeling, and EPA has been reluctant to override states. To be sure, the EPA itself also has lacked resources to do the analyses, but this does not relieve the agency (or the states, for that matter) of the unmistakable duty to develop TMDLs for each impaired body of water.

TMDLs are to be fairly stringent, with any ambiguity about their levels to be decided in favor of greater protection. States must set their TMDLs “at levels necessary to meet water quality standards[,] with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between pollutant loads and water quality.” EPA, *Proposed Revisions to the Water Quality Planning and Management Regulation*, 64 Fed. Reg. 46,012, 46,030 (1999); 40 C.F.R. Part 130.2(h) (hereinafter *EPA Proposed Revisions*, 1999).

After 30 years, there are still more than 22,000 impaired waters nationwide, with a total of 42,193 individual impairments in these water bodies, according to the EPA.⁴ *See* http://oaspub.epa.gov/waters/national_rept.control (last visited Dec. 27, 2002). Only 6,976 separate TMDLs nationally covering the more than 22,000 impaired water bodies – about 32 percent of the total – have been completed since 1972. Indeed, most of them have been completed only since 1996. *Id.*

3 EPA also has been dilatory in carrying out its duties under the program. *See Idaho Sportsmen’s Coalition v. Browner*, 951 F. Supp. 962 (1996) (concluding that the “extreme slowness” of the EPA’s proposed 25-year schedule for implementing TMDLs in Idaho violated the Clean Water Act).

4 Neither EPA nor the states are quite sure how many impaired water bodies exist in the United States today. *See* U.S. GENERAL ACCOUNTING OFFICE, WATER QUALITY: INCONSISTENT STATE APPROACHES COMPLICATE NATION’S EFFORTS TO IDENTIFY ITS MOST POLLUTED WATERS (2002) (“Because of inconsistencies in states’ approaches to identifying impaired waters, the information in EPA’s database of impaired waters is of questionable reliability. The number of impaired waters cannot be compared from one state to the next, and EPA cannot reliably tally the number of TMDLs that must be completed nationwide.”)

IV. Regulatory Background

EPA adopted the first TMDL regulations in 1985, 13 years after section 303(d) was enacted and six years after the first TMDLs were to be completed. *See* 50 Fed. Reg. 1775 (1985); 40 C.F.R. 130. The rules were amended seven years later. *See* 57 Fed. Reg. 33,040 (1992).

Because the EPA and the states had done relatively little to implement the TMDL provision since it was enacted 30 years ago, environmental groups have filed more than 40 lawsuits in 38 states against EPA and states for failure to fulfill requirements of the Act. As of late December 2002, of the suits tried or settled to date, slightly more than half – 22 of 40 cases – have resulted in court orders requiring expeditious development of TMDLs. *See* <http://www.epa.gov/owow/tmdl/lawsuit1.html> (last visited Dec. 30, 2002).

To defuse the developing TMDL litigation bomb, which was implementing the program in an ad hoc manner regionally through judicial analyses of the Act's language rather than the objective needs of the environment, the EPA proposed in August 1999 to revise the program to achieve national consistency. *EPA Proposed Revisions*, 64 Fed. Reg. 46,012.

The final rule was issued 11 months later (21 years after the 1979 deadline for the first TMDLs set by Congress in 1972). EPA, *Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation*, 65 Fed. Reg. 43,586 (Jul. 13, 2000) (hereinafter *EPA Final Revisions, 2000*). The *Final Revisions* anticipated that all TMDLs would be completed 15 years after the rule was adopted, or 36 years after the original congressional deadline.

The *Final Revisions*, however, were strongly criticized by industry, in particular by major logging and agribusiness interests, both of which are significant contributors of nonpoint source pollution of rivers, lakes and streams and which faced for the first time the prospect of stringent regulation of their polluted runoff under the beefed-up federal program.⁵ Under pressure from these interests, Congress declined to fund the rule, and EPA postponed its effective date. It is this rule, which has never gone into effect, that the agency now proposes to withdraw.

V. Why the July 2000 Regulation Should Remain In Effect

A. Withdrawal of the 2000 Regulation Will Damage the Agency's Ability to Carry Out the TMDL Program in a Timely Manner

⁵ *See, e.g., Hearing on EPA's Total Maximum Daily Load (TMDL) Program: Impacts on Agriculture and Silviculture Before the Subcomm. on Agriculture, Department Operations, Oversight, Nutrition and Forestry of the House Comm. on Agriculture*, 106th Cong. (June 19, 2000) (Statement of David Hillman, President, the Arkansas Farm Bureau Federation) (2000 WL 868027) ("The proposed regulation has the potential to allow EPA to take over state land use and economic growth decisions under the pretext of reducing nonpoint [source] pollution."). *See also* Mary E. Christopher, *Time to Bite the Bullet: A Look at State Implementation of Total Maximum Daily Loads (TMDLs) under Section 303(D) of the Clean Water Act*, 40 WASHBURN L.J. 480, 486 (2001). ("The parties who traditionally enjoyed exemption from regulation strongly oppose the new program. Additionally, property rights advocates fear the imposition of new social responsibilities in an area traditionally free of federal regulation.")

As we have seen, the execution of the TMDL directive enacted more than 30 years ago is decades behind schedule. To withdraw the regulation in favor of the 1985 regulations or another protracted round of rulemaking will postpone the TMDL program for several more years in violation of the Act's clear mandate. The agency may not ignore the commands of Congress, regardless of the reasons. "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

Even if EPA keeps to the current schedule, the final round of TMDLs will be completed nearly 40 years after they were required. Withdrawal of the *Final Revisions* will only make the problem worse. Because nothing in the Clean Water Act supports the proposition that Congress intended for the EPA or the states to postpone the implementation of the TMDL program for three or four decades, the EPA should not withdraw the July 2000 *Final Revisions*.

B. Any Delay in Carrying Out the TMDL Program Would Harm the Environment and Shift the Cost of Pollution Abatement

The longer the delay, the greater the burden on the environment. The agency itself recognized the need for more rapid implementation three years ago. "EPA believes that these regulations are necessary because the TMDL program [that] Congress mandated in 1972 has brought about insufficient improvement in water quality." *EPA Final Revisions, 2000*, 65 Fed. Reg. at 43,586.

The 2000 regulation already postpones the final accounting by nearly four decades. Any further extension of the deadline serves no one but the affected industries, who may safely escape regulation indefinitely under the proposed withdrawal option. As things stand now, agribusiness remains the largest single industry to remain outside the Clean Water Act, and its byproducts are largely responsible for the degraded condition of many water bodies. The environment has become a "free" input in the agricultural production cycle. Because every environmental externality imposes a cost on society, the real cost of the contamination originating from unregulated agricultural pollutants is thus assumed by others.

In the absence of an aggressive TMDL program, there is no incentive on the part of the polluter to reduce the amount of pollution produced. This will result in additional pollution of the affected water bodies. In other words, without complete information on the type and source of pollutants, the market will fail to allocate scarce resources properly, creating an economic imbalance that favors more, not less, pollution.

Thank you for your consideration of ASCE's comments. If you have any questions, please do not hesitate to contact Michael Charles of our Washington Office at (202) 789-2200 or by e-mail at mcharles@asce.org.

Respectfully submitted,

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President