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Comment Clerk
Water Docket (W-98-31)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Re: PROPOSED REVISIONS TO THE WATER QUALITY PLANNING AND
MANAGEMENT REGULATIONS; 64 FR 46011 (23 AUGUST 1999), DOCKET NO. W-
98-31

Dear Sir/Madam:

Enclosed are consolidated Department of Defense (DoD) comments prepared by DoD's Clean Water Act Services Steering Committee (CWASSC) on the proposed revisions to the TMDL Program contained in the above-captioned rulemaking. The DoD CWASSC represents the Departments of the Navy, Air Force, and Army, as well as several other Defense components. The Navy is the executive agent for DoD on Clean Water Act issues and chair of the DoD CWASSC.

In general, the DoD supports EPA's proposed revisions to the Total Maximum Daily Load (TMDL) program as long as such revisions help ensure a logical, flexible, watershed-based approach to the development and implementation of TMDLs. We are concerned that the revisions may fall short of that goal in several ways: They may result in a TMDL program that exceeds the scope of that intended by Congress; they may limit State/Tribal flexibility in establishing TMDLs; and they do not include measures that help entities better comply with TMDLs. We believe that incorporating the attached recommendations will correct these shortcomings and provide a reasonable balance between cleaning up this nation's impaired surface waters and not unduly burdening the regulated community.

As you will note from our recommendations, DoD is particularly concerned that the proposed revision may allow the scope of the TMDL program to exceed that intended by Congress in enacting section 303(d) of the Clean Water Act. Among other issues, we urge that the final rule not extend TMDL development to threatened water bodies, and that EPA reconsider its proposal to require implementation plans as a minimum element of a TMDL.

DoD also urges EPA to enhance State/Tribal flexibility in establishing TMDLs for impaired surface waters. States and Tribes should be able to recognize alternative watershed-based programs as functionally equivalent to a TMDL where the State or Tribe deems this appropriate. They should also have the flexibility to accept voluntary cooperative programs as "reasonable assurance" that impaired waters will attain water quality standards. At the same

time, the TMDL final rule should incorporate a “weight of evidence” approach rather than single point assessments as the basis for listing impaired surface waters.

DoD also recommends that the Agency incorporate some measures into the final rule to help regulated entities better comply with TMDLs. Specifically, the final rule should: 1) create a new category of surface waters impaired by difficult-to-control sources, 2) require quantification of narrative criteria used in listing decisions and TMDL development, 3) replace the current two-year listing cycle with a five-year listing cycle, and 4) provide more time for public comment on proposed listings.

As you revise the TMDL regulation, please consider the enclosed recommendations. If you have any questions, my point of contact is Ms. Kathy Ellis, CWASSC Chairperson, at (703) 602-2568 or email ellis.kathy@hq.navy.mil.



FOR ELSIE L. MUNSELL
Deputy Assistant Secretary of the Navy
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CLEAN WATER ACT SERVICES STEERING COMMITTEE

Comments on the Proposed Revisions to the Water Quality Planning and Management Regulation; Proposed Rule

64 FR 46011 (23 August 1999)

Specific Comments

1. Clarify that listing and Total Maximum Daily Load (TMDL) development are not required for groundwater

Comment: TMDL development should not apply to groundwater.

Discussion: Because many State laws define groundwater bodies as waters of the State, States may believe that TMDL limitations should be applied to groundwater. Such State laws stand in contrast to the Clean Water Act, which covers only navigable waters, as that phrase has been interpreted under the Commerce Clause of the Constitution. Nothing in the proposed rule specifically excludes groundwater from TMDL coverage. However, the technical aspects of the TMDL regulation, such as determining the allowable pollutant loading to the waterbody, calculating wasteloads and load allocations, and developing control actions, are all designed to deal with surface waters. They do not translate well to the control of pollutant loadings to groundwater and are inappropriate for that purpose.

Recommendation: Modify the applicability section (40 CFR 130.1) to state that listing decisions and TMDL development are limited to surface waters, and that States are not required to list groundwater not meeting groundwater quality standards or to develop TMDLs for impaired groundwater. Modify the definition of "waterbody" at 130.2(q) to exclude groundwater specifically.

Reference: 40 CFR 130.1 et seq.

2. Implementation plans should not be included as a minimum element of a TMDL

Comment: The proposed definition of TMDL significantly expands the information required for approval of TMDLs by EPA. The process for TMDL approval, as proposed, is both burdensome and unnecessarily restrictive. The requirement for a concurrent submittal of implementation plans does not allow sufficient flexibility for States to work with stakeholders on difficult issues or with constituents where statutory or regulatory changes may be needed to support TMDL implementation.

Discussion: EPA is soliciting comments on the required minimum elements of TMDLs and whether implementation plans should be required as an element of a TMDL.

The preamble (FR page 46033) states that "a consequence of today's proposal to require an implementation plan as one of the minimum elements of a TMDL is that the plan itself is subject

to EPA approval or disapproval.” Proposed Section 130.33 states that EPA will not approve a TMDL, that does not contain each of the listed elements, including an implementation plan. The inclusion of an implementation plan as part of the TMDL approval expands EPA’s authority under section 303(d), which calls for States to submit only their identified waters and established loads; then, if approved, the State must incorporate this information into its current plan, as described in section 303(e).

While we agree that planning and implementation are fundamental to the success of the TMDL program, we do not agree that inclusion of an implementation plan as a required element of a TMDL will result in the development of “more successful implementation plans” (FR page 46035). Rather, this approach will undermine the process of implementation, because it does not leave States and local governments with flexible options to employ adaptive management strategies, a critical tool in the still-developing science of watershed restoration. The requirement for the implementation plan as a minimum element of a TMDL will result in a static document, and the resultant inflexibility of the plan will not support sound science-based decision making. Plans outside of an EPA approval process that can be refined to incorporate actual responses in the resource would foster continuing stakeholder involvement in adaptive planning and management strategies. The capacity to amend TMDL implementation plans, once approved, is not described in the proposed regulations, and presents an unnecessary regulatory hurdle for a process that is best practiced on a continuing, interactive basis.

Recommendation: Revise the definition of TMDLs (40 CFR 130.2(h)) to delete an implementation plan as a component of TMDL approval/disapproval. The implementation plan should be developed by the State/local government in cooperation with stakeholders. The implementation plan development schedule should be included by the State as part of the TMDL submittal, with the implementation plan itself submitted either concurrently or subsequently (in accordance with the schedule) as a means for EPA to monitor the TMDL process.

Reference: 40 CFR 130.2(h)

3. Require EPA comments earlier in the State listing process

Comment: EPA comments on a State's listing methodology occur too late in the process.

Discussion: EPA proposes to require States to document with some specificity how they will evaluate data and information for developing their listing and priority rankings and to consider certain minimum criteria. In addition, States must allow public review and comment on their draft methodology for no less than 60 days. Although States must provide a summary of all comments received when they submit their final methodology to EPA, EPA does not have to provide comments on or approve the draft methodology. Instead, as described in the preamble, EPA will consider the methodology when it reviews and approves the 303(d) list. However, because the methodology is the basis for all that follows (list of impaired waters, subsequent TMDLs, etc.), comments by EPA at the time States submit their draft methodology could avoid future problems and delays with list approval.

Recommendation: Require EPA to comment on the submitted draft methodology. States should not have to respond at the time of receipt of EPA comments, but could choose to address the EPA comments at the time they submit their final methodology.

Reference: 40 CFR 130.23

4. Guidance on factors States should consider and explain in evaluating data and information

Comment: States require guidance on the factors they must consider in listing impaired waters and developing TMDLs, including biological and habitat (aquatic and riparian) data, which are usually expressed in qualitative terms, and how to translate qualitative criteria into quantitative criteria.

Discussion: In the preamble to these proposed TMDL regulations and to the ANPRM for the WQS regulation, EPA recognized that States would need to develop methodologies to translate qualitative criteria into quantitative criteria before TMDLs could be developed. The preambles also discussed the probable need for EPA to provide more guidance. Under EPA's plan, such guidance would be provided in revisions to the WQS regulation. However, any final revisions to the WQS regulation would lag significantly behind final revisions to TMDL regulations, thereby creating delays in the development of TMDLs for impaired waterbodies where these factors play a role. This will adversely impact the approval of new and expanded discharges during an extended interim period, if, as proposed in the revisions to the "NPDES Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation," a minimum offset of 1.5 to 1 will be required until TMDL approval.

Recommendation: Provide interim guidance that addresses the factors necessary for States to list impaired waters and develop TMDLs. Accelerate revision of the WQS regulation and provision of final guidance and fund additional research to support development of quantitative criteria.

Reference: 40 CFR 130.23

5. Use weight-of-evidence approach in making listing decisions

Comment: The rule should require that State/Tribe listing decisions be based on a weight-of-evidence approach. If minimum criteria are required, no single criteria should be used to justify a listing decision.

Discussion: We strongly recommend State/Tribe use of a weight-of-evidence approach when evaluating all available data and making listing decisions. This approach does not result in one piece of data negating another. Rather, all valid information is considered, but given varying weights of importance, depending on the relative confidence or uncertainty associated with the data, the strengths and weaknesses inherent in the assessment methods, and the overall integrity of the information. The Water Environment Federation, in its response to comments on the

Advanced Notice of Proposed Rulemaking (ANPRM), supported this position for the Water Quality Standards Regulation (January 9, 1999). EPA's current position is that a weight-of-evidence approach may be used in 305(b) assessments (Water Quality Inventory), but not for 303(d) listing decisions. EPA's position, however, fails to recognize the current thinking within the scientific community that single-point assessments do not provide sufficient information to predict the full range of responses expected from a complex biological community. Integration of information from a variety of sources (i.e., chemical tests, biological assessments, toxicity tests, and physical characteristics) would provide a much more comprehensive evaluation of water quality.

Recommendation: EPA guidance and regulations should require a weight-of-evidence approach when evaluating all relevant and valid data. Modify 40 CFR 130.25 to reflect that the preponderance of all existing and readily available evidence should be considered using a weight-of-evidence approach in a listing decision.

Reference: 40 CFR 130.22 and 130.23

6. Provide a new listing category for waters impaired by difficult-to-control sources

Comment: The proposed rule fails to recognize the roadblocks to attainment for waters impaired by difficult-to-control pollutant sources. Difficult-to-control sources fall under two broad groups: sources that are under the jurisdiction of environmental statutes other than the Clean Water Act, and sources where control of the source is not feasible. The proposed rule does not distinguish between these sources and those where a TMDL can be readily developed because the impairment is easily identified and controlled through existing Clean Water Act mechanisms. A new category should be added to the 303(d) list for waters impaired by these difficult-to-control sources.

Discussion: The first group of difficult-to-control sources are those under the jurisdiction of environmental statutes other than the Clean Water Act. Examples of sources in this group are: contaminated sediments (including contaminated sediments where a decision was made under CERCLA or RCRA to leave the contaminated sediments in place); contamination in soils and groundwater from waste disposal sites where remedial actions under CERCLA or RCRA are considered complete; and air deposition. Application of the TMDL process to this group of sources would be inappropriate because the authority to control pollutants from these sources resides in other environmental laws. In the case of air deposition, the State held accountable for the control of the source through the TMDL may not have jurisdiction over the impairing source if it is located in another State or country. Another problem relates to the differing goals of the other statutes. For example, a risk-based decision made under CERCLA may have a different remediation endpoint than would be required to meet a TMDL.

The second group of difficult-to-solve problems are for sources where control of the source is not feasible. Examples include: dams or other physical structures such as culverts which divert/modify stream flow; urban runoff from impervious areas; contaminants such as pesticides and nutrients that reside in soils from past farming and pest control practices; runoff from

roadways and railways; and loss of riparian habitat. For these sources, it may be impractical or infeasible to remove or significantly modify the source.

Recommendation: Add a new category to the 303(d) list for difficult-to-control sources that are addressed under other statutes. Waterbodies in this new category should be listed for the impairment, but a TMDL would not be required if control of the difficult source is necessary in order to bring the waterbody into attainment. If, however, a difficult source is contributing to an impairment, but reasonable controls on other contributing pollutant sources can be implemented to achieve attainment, then a TMDL should be developed for these waterbodies, with a background load allocation assigned to the difficult source(s). In addition, for sources where control is not feasible, and control of the source is needed for attainment, the designated use for the waterbody should be changed.

Reference: 40 CFR 130.27

7. Require quantification of narrative criteria in listing decisions and TMDL development

Comment: The proposed rule is not sufficiently specific with regard to the need for States to quantify narrative criteria in listing decisions and TMDL development.

Discussion: EPA has recognized the need to quantify how narrative water quality criteria relate to specific pollutant concentrations or loads, and that States will need to identify the procedures they intend to use to interpret and implement narrative criteria as they pertain to point source discharges of toxics (64 FR Page 46019).

The 7 July 1998, Advance Notice of Proposed Rulemaking (ANPRM) for the Water Quality Standards Regulation discusses establishment of biocriteria and sediment criteria as a subset of water quality criteria. The development of future biocriteria and sediment criteria will need to be quantitatively related to pollutant concentrations and loading, if they are to be relevant to TMDL development. EPA should specifically state in the regulations that TMDL development is not required in response to exceedance of any narrative criterion that cannot be quantitatively related to pollutant concentrations or loading, even if "pollutants" rather than general "pollution" are responsible for failure to meet the narrative criteria.

Recommendation: Change the proposed 40 CFR 130.27(a)(2) to clarify that TMDL development is not required in response to the exceedance of any narrative criterion that cannot be quantitatively related to pollutant concentrations or loading, as follows:

"Part 2- Waterbodies impaired or threatened by pollution as defined by 40 CFR 130.2(c), or impaired or threatened under a narrative water quality criterion that cannot be quantitatively related to pollutant concentrations or loading. A TMDL is not required for waterbodies on Part 2 of the list."

References:

40 CFR 130.27(a)(2)

40 CFR 130.32

64 FR Pages 46019 and 46022

63 FR 36741 (July 7, 1998) Water Quality Standards Regulation Advance Notice of Proposed Rulemaking

8. Limit TMDL development to impaired waters

Comment: TMDLs should be reserved for the most severe water quality problems and not applied to waters identified as threatened.

Discussion: EPA has subjected threatened waterbodies to an immediate requirement to develop TMDLs by identifying threatened waterbodies under Clean Water Act (CWA) Section 303(d) authority and by grouping threatened waterbodies together with impaired waterbodies in 40 CFR 130.27(a)(1) "Part I".

Development of TMDLs is required for, and should be reserved for, addressing the most severe water quality problems. States should be allowed to apply antidegradation provisions as the primary means of arresting degradation and preserving water quality for waterbodies identified as threatened. Threatened waterbodies for which efforts are being taken to arrest degradation should either be listed and addressed under a mechanism other than CWA Section 303(d), or should be grouped in 40 CFR 130.27(a)(4) "Part 4" and the TMDL development requirement delayed until the next listing cycle.

Recommendation: Limit TMDL development to impaired waters. Identify and list threatened waterbodies only as "candidates for future CWA 303(d) listing."

References:

40 CFR 130.27

40 CFR 130.32

9. Clarify violation of MCL as basis for prioritizing listed waterbodies

Comment: Some of the language in the Preamble, referring to proposed 40 CFR 130.28(b)(1), is unclear with regard to the relationship of maximum contaminant level (MCL) violations to the prioritization of the list of impaired waterbodies.

Discussion: EPA's proposal is unclear as to whether MCL violations (i.e., actual exceedances of drinking water standards at the point of consumption) will be the basis for prioritizing impaired waterbodies that are sources of drinking water. Some of the language in the Preamble, however, appears to imply that the MCL should be applied in the waterbody itself, which seems unduly stringent. Rather than relying strictly on MCL violations as a prioritization criterion, the State's drinking water source water quality assessment (SDWA Sec. 1453) would be a better guide to prioritization of impaired waterbodies when evaluating drinking water source concerns.

Recommendation: If the language about MCL violations is retained, clarify the definition of “violation of an MCL” by stating that EPA is referring to an exceedance of the MCL at the tap, not in the source waters at the point of intake. Refer to the State’s drinking water source water quality assessment (SDWA Sec. 1453) as the proper mechanism for assigning priority when addressing impairment from the standpoint of drinking water source waters.

Reference: Proposed 40 CFR 130.28(b)(1)

10. Require States to submit schedules for establishing TMDLs

Comment: Replacing the current requirement for States to identify which TMDLs are planned for development within the next 2-year period with a requirement for States to develop schedules for all foreseeable TMDL development would benefit the regulated community.

Discussion: The proposal for an actual schedule for all TMDLs planned within a 15-year period will benefit stakeholders by allowing them to effectively plan and prioritize resources for review and actions required for anticipated TMDL impacts.

Recommendation: Require the schedule as proposed.

Reference: 40 CFR 130.31

11. Change the listing cycle to every five years

Comment: A five-year cycle is appropriate for submission of 303(d) lists.

Discussion: EPA solicited comment (64 FR 46029) on whether it should lengthen the current 303(d) listing cycle of once every two years. We support a five-year listing cycle. A five-year listing cycle would coincide with the cycle most States use for conducting watershed-based assessments. In addition, five years provides more time to gather data on a waterbody to determine if there have been changes in water quality. This in turn allows more efficient listing decisions (i.e., whether to add or remove a waterbody, or judge effectiveness of TMDL implementation).

EPA, in the preamble to the rule and in the Advanced Notice of Proposed Rulemaking (ANPRM) for the Water Quality Standards Regulation (July 7, 1998), recognized that State/Tribal ambient water quality monitoring programs are hampered by limited State/Tribal resources. Extending the listing cycle to five years would allow more data to be compiled for making listing decisions and modifying TMDL implementation measures. The five-year listing cycle also coincides with the NPDES permitting cycle, allowing better orchestration between water quality management decision tools, such as the 303(d) lists and TMDL development, and an important water quality implementation tool, NPDES permits.

Recommendation: Change the listing cycle from two years to five years.

Reference: 40 CFR 130.31

12. Recognize alternative watershed-based programs as equivalent to TMDLs

Comment: States/Tribes should be allowed to use watershed-based programs, such as the Tributary Strategies developed under the Chesapeake Bay Program for nutrient control, in place of TMDLs.

Discussion: Just as EPA should allow some flexibility in the factors States/Tribes consider in listing decisions, it should allow flexibility in other parts of the TMDL program. For example, States, EPA, also the regulated community, land owners, and public interest organizations in the Chesapeake Bay region have expended a considerable amount of time and resources to develop Tributary Strategies for nutrient control within the Chesapeake Bay watershed. These Tributary Strategies provide a written plan for control of nutrients from point and nonpoint sources, and include both regulatory and volunteer mechanisms for nutrient control. States that have invested in such a program should have the option to continue utilizing these programs in lieu of TMDL development. Such States should be required to demonstrate that these programs address the minimum elements of a TMDL (40 CFR 130.33). Submission of such documentation should be on the same schedule as the TMDL submission schedule.

Alternatively and as a minimum, 40 CFR 130.27(a)(4) should be expanded to recognize such programs and delay TMDL development requirements where it is anticipated that the programs will be effective.

Recommendation: Allow States/Tribes to use watershed-based programs to satisfy the requirements of TMDL development if States/Tribes can demonstrate that such programs address the minimum elements required of a TMDL (40 CFR 130.33). Alternatively, expand 40 CFR 130.27(a)(4) to recognize such programs and delay TMDL development requirements where it is anticipated that those programs will be effective.

Reference: 40 CFR 130.33

13. Clarify acceptance of voluntary programs as means to show reasonable assurance

Comment: The preamble, regulations, and fact sheets regarding reasonable assurance for nonpoint source programs should be consistent in their acceptance of voluntary programs as a means to show reasonable assurance.

Discussion: When a TMDL is required, but effective watershed management programs are in place, continued participation in these programs should be sufficient to provide assurance that the goals will be implemented in accordance with the TMDL schedule. Although the proposed regulations appear to accept voluntary programs as one means of reasonable assurance for implementation of nonpoint source reductions, EPA's fact sheet regarding reasonable assurance does not reflect the spirit of the preamble or regulations in this regard, and effectively encourages States to designate nonpoint sources as point sources as the means to provide reasonable

assurance. The EPA fact sheet “Ensuring That TMDLs Are Implemented: Reasonable Assurance” basically advocates: “States may not be able to provide reasonable assurance that certain nonpoint sources will meet their allocated amount of reductions. In these instances, States authorized to administer the NPDES program may designate these sources as point sources and require that they obtain an NPDES permit. Reasonable assurance is satisfied by designating these sources as point sources and issuing them an NPDES permit. A State may choose not to designate these sources as point sources. By not designating these sources, EPA may find that the State failed to provide reasonable assurance. Because reasonable assurance is a required element of a TMDL, EPA may then disapprove that State's TMDL. If EPA disapproves a TMDL, EPA must establish the TMDL.”

Recommendations: Amend the definition of reasonable assurance (40 CFR 130.2(p)) to increase flexibility for voluntary cooperative programs, incentive programs, grants, and revolving loans to serve as reasonable assurance for current and future implementation. Retract and rewrite the referenced fact sheet to reflect the proposed regulatory language.

Reference: 40 CFR 130.2(p)

14. Allot sufficient time for public comment on proposed lists of impaired waterbodies and TMDLs

Comment: The proposed 40 CFR Part 130.37 requires that States provide the public a minimum of 30 days to review and comment on the State's list of impaired waterbodies, priority rankings, schedules, and TMDLs. This is not an adequate amount of time for a discharger to review these documents and make comments.

Discussion: The average State will have spent substantial resources and months of preparation to develop its list of impaired waterbodies, priority rankings, schedules, and TMDLs, all of which will impact a discharger. Thirty days is insufficient time for a discharger to review the evidence gathered by the State and develop a response in the event of questionable measurements, calculations, or assumptions.

Recommendation: EPA should require the States to provide the public at least 120 days to review and comment on the State's list of impaired waterbodies, priority rankings, schedules, and TMDLs, and the supporting documents used in their development. Additionally, EPA should require that, prior to the 120-day comment period, States provide written notification of the opportunity to comment to those dischargers who hold current NPDES permits allowing discharge into the affected waterbodies.

Reference: 40 CFR 130.37