

2002 IMPAIRED WATERS LISTS THAT FORM FOUNDATION FOR TMDL PROGRAM IMPLEMENTATION ARE IN PLAY

Under section 303(d) of the Clean Water Act, states are required to prepare lists of water segments that do not meet water quality standards even after the application of technology-based effluent limitations through NPDES discharge permits issued to point source discharges. These lists then become the foundation for the implementation of the Total Maximum Daily Load (“TMDL”) program because a TMDL is required for each listed water. TMDLs are divided into individual wasteload allocations and then translated into effluent limitations in NPDES permits. In most cases, implementation of TMDLs will lead to more restrictive effluent limitations at the time of permit renewal for existing discharges into listed waters. Companies may also encounter restrictions on expanding or introducing new discharges into impaired waters.

The latest round of state impaired waters lists had to be submitted by the states to EPA regional offices on October 1, 2002. 65 Fed. Reg. 53044, 53048 (Oct. 18, 2001) (revising 40 C.F.R. § 130.7(d)). EPA must approve or disapprove the lists within 30 days. If EPA disapproves a list, it may add waters to or remove waters from a list.

The 2002 impaired waters lists are the first lists that may be prepared in accordance with EPA’s 2002 Integrated Water Quality Monitoring and Assessment Report Guidance issued in November 2001. This guidance calls for integrating the lists required under section 303(d) and 305(b) of the Clean Water Act and creating five different categories for classifying waters. The categories are waters that (1) attain all water quality standards; (2) attain some water quality standards and have insufficient data available to determine if other standards are met (3) have insufficient data or information to make a determination; (4) are impaired for one or more standards but do not need a TMDL; or (5) are impaired and require a TMDL.

In October 2001, EPA extended the deadline for this round of state impaired waters lists from April 1, 2002 until October 1, 2002 to give states time to develop lists that are consistent with EPA’s guidance document. 65 Fed. Reg. 53044. Most states will not have had the opportunity to prepare their lists based on another EPA guidance, the Consolidated Assessment and Listing Methodology (CALM), which was released on August 14, 2002. EPA issued the CALM guidance to help states determine whether waters are impaired and to improve water quality assessments and publicly-available information about decisions on impairment.

A listing of a water as impaired (category 5) triggers the requirement to prepare a TMDL and may lead to stricter effluent limitations and restrictions on new or expanded discharges to those waters. If a previously listed water is removed from a list, threatened regulatory restrictions could be eased.

Questionable listing decisions based on unreliable data may lead to undue burdens on businesses to eliminate or control pollutants in their wastewater or impede expansion of operations. Companies concerned about the listing of particular waters may currently have an opportunity to challenge state listing decisions under applicable state law or to ask EPA to intercede and overturn a state’s action.

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