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FEATURE ARTICLE

EPA'S LATEST TMDL GUIDANCE ON DAILY LOADS
MAY LIMIT THE IMPACT OF THE 'DAILY' ISSUE STEMMING
FROM *FRIENDS OF THE EARTH V. EPA*

By Jennifer A. Abdella and Karen M. Hansen

The Clean Water Act (CWA) requires states to establish a "total maximum daily load" (TMDL) for water bodies where traditional CWA controls prove insufficient to protect water quality. Developing a TMDL is an intricate, multi-step process that involves waste stream analysis, pollutant transport models, consideration of temporal factors such as seasonal precipitation, stakeholder input, allocation of pollution loads among sources, and, ultimately, approval by the U.S. Environmental Protection Agency (EPA). In the midst of this complexity, a 2006 decision by the D.C. Circuit Court of Appeals gave the meaning of the word "daily" in "total maximum daily load" a literal reading, and found that two EPA-approved TMDLs that contained only annual and seasonal maximum loads were unlawful. *Friends of the Earth v. U.S. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006). Contemplating the specific CWA language that created the TMDL requirement, the D.C. Circuit found "nothing ambiguous" in the act's requirement for a diurnal expression of load, despite EPA's longstanding interpretation and practice of establishing TMDLs using annual, seasonal and other non-daily temporal expressions of loading limits. Although the D.C. Circuit's opinion stood in direct contrast to the Second Circuit, EPA declined to support a petition for *certiorari* to the U.S. Supreme Court to resolve the dispute, instead indicating it would address any ambiguity stemming from the *Friends of the Earth* decision through guidance.

The *Friends of the Earth* holding created a potentially significant issue for EPA's TMDL program, because, despite Congress' word choice, meaningful

loading targets designed to restore impaired waters often necessitate consideration of longer-term, cumulative loading impacts not reflected in a daily expression. In the wake of *Friends of the Earth*, states have struggled to understand the reach and implications of the D.C. Circuit's decision on both TMDL development and how TMDL wasteload allocations are incorporated into enforceable discharge permits. Although EPA has consistently asserted that the decision has limited jurisdictional and practical effect, the agency simultaneously has endeavored to reconcile future TMDL development with the court's opinion. In EPA's most recent guidance on this issue, namely, a January 8, 2008 Office of Wetlands, Oceans, and Watershed "Webcast" on "Options for Expressing Daily Loads in TMDLs," the agency emphasized flexibility in the TMDL program, recommended that all future TMDLs include a daily expression of load, and again asserted that the D.C. Circuit's decision has no effect on enforceable effluent limits in discharge permits.

Background

The goal of the TMDL program is to reduce specific pollutant loadings to achieve water quality standards for a given water body. In short, a TMDL determines the maximum pollutant load a water body can accept without exceeding water quality standards, establishes a margin of safety, and then allocates the acceptable maximum load among point and non-point sources of the pollutant that are located within the watershed.

TMDLs have commonly employed seasonal or annual maximum loads, rather than per-diem targets.

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Such non-daily expressions are intended to accommodate the specific behavior and environmental effects of a particular pollutant along with natural seasonal or precipitation-related variations in pollution transport and delivery. For example, wet-weather events common in spring may deliver large, immediate loads of some pollutants, such as sediments and nutrients. While a daily wet-weather sediment load may be quite high under such circumstances, the cumulative impact of sediments over time may be the more important issue, according to EPA, as this cumulative impact may have a greater environmental effect than the quantity delivered in any single day.

Recognizing this practical reality, in its early program guidance EPA adopted the use of non-daily load expressions. In 1985, EPA promulgated regulations governing the TMDL process and expressed its approval of this approach, indicating that the agency was:

aware of the need for water-quality based effluent limitations which provide appropriate limits on the average mass of pollutant discharged per unit time period. Therefore, TMDLs and water quality-based effluent limitations may be expressed in terms of an appropriate averaging period, such as weekly or monthly, as long as compliance with the applicable [water quality standard] is assured.

50 Fed. Reg. 1774 (Jan. 11, 1985).

In 2001, the Second Circuit Court of Appeals upheld EPA's approach, observing that "for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2nd Cir 2001). NRDC had challenged EPA approval of several phosphorus TMDLs that included only annual load expressions. Rejecting NRDC's argument that the plain language of the CWA required a daily expression, the court stated its belief "that the term 'total maximum daily load' is susceptible to a broader range of meanings" and opined that an "overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA." *Id.* at 98. Reasoning that "the CWA's effective enforcement requires agency analysis and application of information concerning a broad range of pollutants" the court concluded it was:

not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis.

Id. at 98-99. Rather, TMDLs:

may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies.

Id. at 99.

As noted above, the D.C. Circuit Court of Appeals rejected this contextual approach in *Friends of the Earth*. The court found the plain language of the CWA unequivocally called for *daily* loads. EPA argued unsuccessfully that "the many ways in which pollutants damage the environment call for a more flexible understanding of 'daily.'" 446 F.3d at 145. The court held, however, that:

'[d]aily' connotes 'every day.' . . . Nothing in this language even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual loads.'

Id. at 144. The court concluded that if its interpretation resulted in "unintended consequences for water quality or municipal pocketbooks," the remedy lay with Congress or revision of an EPA regulation that declares that all pollutants are suitable for daily load calculations. The U.S. Supreme Court denied *certiorari* on the *Friends of the Earth* decision in January 2007; as noted, EPA opposed the cert. petition.

EPA first responded to *Friends of the Earth* in a November 2006 agency memorandum from EPA Assistant Administrator Benjamin Grumbles. Memorandum from B. Grumbles, "Establishing TMDL 'Daily' Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No. 05-5015 (April 25, 2006) and Implications for NPDES Permits," (November 15, 2006) (hereafter, Grumbles Memo). EPA's recommendations were expanded through a June 2007 technical document and a January 2008 Webcast. EPA, Webcast: "Options for Expressing Daily Loads in TMDLs," (Jan. 8, 2008) (hereafter, 2008 Webcast); EPA, "Options for Expressing Daily Loads in TMDLs" (2007).

Analysis of EPA's Guidance

EPA's response to *Friends of the Earth* includes many examples of and specific technical advice on the mechanics of TMDL development in the wake of the D.C. Circuit's decision. While the details of that guidance are surely of interest to TMDL developers, this article focuses on the legal implications of the agency's response and considers the technical components only where specifically relevant. The legal import of EPA's guidance is concentrated in two areas, namely, the development of TMDLs and the translation of TMDLs into enforceable NPDES permit limits. Each issue is discussed below.

Effect on TMDL Development

In its guidance, EPA indicated the agency:

continues to believe that the use of the word 'daily' in the term 'total maximum daily load' is not an unambiguous direction from Congress that TMDLs must be stated in the form of a uniformly applicable 24-hour load.

Grumbles Memo at 2; 2008 Webcast. Nevertheless, due to "significant legal uncertainty," EPA recommends inclusion of a daily expression in all TMDLs. Grumbles Memo at 2. At the same time, EPA has emphasized its commitment to maintaining a TMDL program that is sufficiently flexible to permit development of TMDLs that are apt to local conditions. Therefore, the agency further suggests inclusion of non-daily loads—e.g. monthly, seasonal, or annual loads—in addition to daily load expressions where necessary to "facilitate implementation of the applicable water quality standards." *Id.*

In some situations, estimates of daily loads will be readily available as an existing output from the development of some TMDLs. Frequently, however, a TMDL model results only in a non-daily load allocation that must be disaggregated. The latter situation is the focus of EPA's 2007 technical document and was discussed extensively during the 2008 Webcast. Here, EPA offers a three-step process to disaggregate the allocations into daily expressions: (1) evaluate the TMDL approach; (2) develop a daily load dataset; and (3) select the appropriate daily load expression.

In the interest of flexibility and the establishment of a meaningful load expression, EPA has empha-

sized that a daily load need not be expressed as a single number. Instead, EPA proposes three possible formats. First, a daily load expression can be static, where there is one value or set of values for all conditions. Next, the TMDL may use a variable expression, where the value changes as a function of time or a system characteristic such as flow. Finally, the TMDL can employ a dual expression that specifies more than one number to recognize expected variability in the system (e.g. median and 95th percentile loads). Data availability, critical loading conditions, pollutant sources and behavior, the time period addressed, and management implications should all inform the selection of the daily load expression.

Importantly, EPA's guidance does not create a regulatory prerequisite for TMDL approval and EPA does not suggest that already-established TMDLs must be revised. EPA has not amended its regulations that govern TMDL development. In response to a question by a Webcast participant, EPA declined to answer whether it would approve future TMDLs that lacked a daily load expression, simply noting that EPA "very strongly recommends" inclusion of daily loads in all TMDLs. By doing so, EPA seeks to avoid further litigation, which remains a risk for TMDLs that include only seasonal or annual load expressions. Finally, EPA's recommendations are directed towards future TMDLs and revisions. States are not required to revise existing TMDLs simply to include a daily load expression.

Effect on Effluent Limits in NPDES Permits

TMDLs do not independently create enforceable obligations. Rather, they inform effluent limits written into enforceable discharge permits. Therefore, an important secondary issue resulting from the D.C. Circuit's decision is the effect, if any, of the court's holding on the relationship between TMDLs and National Pollution Discharge Elimination System (NPDES) permits.

EPA maintains that the decision has no effect on how wasteload allocations are implemented through NPDES permits. Though NPDES effluent limits must be "consistent with the assumptions and requirements of TMDL wasteload allocations," 40 C.F.R. § 122.44 (2008), nothing requires effluent limitations and TMDL wasteload allocations to be identical. EPA has opined that *Friends of the Earth* does not "require any changes to EPA's existing policy and guidance

describing how a TMDL's wasteload allocations are implemented in NPDES permits" and has instead recommended the status quo, stating that:

NPDES permitting authorities continue to establish effluent limits that implement wasteload allocations established in approved TMDLs in accordance with existing regulation, policy, and guidance.

Grumbles Memo at 3. EPA reaffirmed during the January 2008 Webcast that all the flexibility NPDES permit writers had before *Friends of the Earth* remains intact. 2008 Webcast.

Conclusion and Implications

EPA's recent statements on the "daily" issue attempt to mitigate the uncertainty created by the *Friends of the Earth* decision by allowing for as much flexibility as possible for both TMDL developers and NPDES permit writers. EPA's guidance has the greatest implications for the TMDL development community, which must take additional steps to identify appropriate daily loads and include one or more daily load expressions within proposed TMDLs. However, EPA continues to promote a contextual approach that emphasizes setting maximum loads at a level necessary to achieve applicable water quality standards and allows flexibility in the expression of those loads. EPA's recommendations are intended to avoid further litigation over TMDLs that contain only seasonal or annual load expressions.

Importantly, EPA continues to assert that *Friends of the Earth* does not impact the implementation of the TMDL program through the NPDES permitting program. Because TMDLs are not themselves enforceable, and effluent limits in a NPDES permit need only be consistent with, not identical to, TMDL wasteload allocations, the inclusion of a daily load expression in a TMDL may have no practical effect on point sources regulated under the NPDES program. Therefore, if NPDES permit writers continue to use non-daily load allocations as the basis for enforceable effluent limits, as EPA suggests they can, it is not clear what effect, if any, the adoption of a daily load expression in a TMDL might have on the regulated community. Though NPDES permit writers certainly can incorporate a daily load expression into enforceable permit limits, they need not according to EPA's

guidance.

Although the CWA and EPA regulations do not require NPDES effluent limitations to mirror TMDL wasteload allocations, it is not clear that EPA's guidance will insulate the agency from further litigation regarding the daily issue. Specifically, inserting daily expressions of load in TMDLs, without translating those to permit limits also expressed in daily terms, may be subject to challenge as falling short of complying with the statutory requirements of the CWA as literally interpreted by the D.C. Circuit in *Friends of the Earth*. Arguably, the imperative that effluent limits be "consistent with the assumptions and requirements" of TMDL wasteload allocations compels consistency with the required terms—according to the D.C. Circuit, the *daily* load expression—not optional seasonal or annual load expressions. By advising permit writers and TMDL developers to proceed essentially according to the status quo, while incorporating a daily expression in all future TMDLs, one might argue that EPA is circumventing the intended connection between TMDLs and effluent limitations. According to the interpretation in *Friends of the Earth*, Congress' plain language manifests an intent for a daily expression of load. Because TMDLs are not themselves enforceable, EPA's guidance may not resolve the question of what purpose Congress might have intended for such a daily expression if permit writers are not required to employ them in setting permit limits for point sources. On the other hand, there may be many technical bases for translating a daily TMDL expression into enforceable permit limits, as EPA's guidance seeks to illustrate.

On balance, EPA may be unconcerned with this potential vulnerability—perhaps because the *Friends of the Earth* decision has limited jurisdictional reach. Concern over how the judiciary might resolve some of these questions may have even factored into EPA's decision to oppose the *certiorari* petition submitted to the U.S. Supreme Court. With the Second Circuit's support of EPA's position, the agency's strategy may be to treat the *Friends of the Earth* decision as an outlier, while guarding against its most obvious threat to the national TMDL program. Rather than overhauling its entire TMDL program, EPA has positioned itself to insulate future TMDLs from litigation by including daily load expressions and to otherwise proceed with the national TMDL and NPDES programs as they always have.

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