TMDLs: A Primer

Richard S. Davis
Beveridge & Diamond, P.C.

(This article first appeared in the Mid-Atlantic edition of *The Metropolitan Corporate Counsel*, June 2000.)

Embedded in the original 1972 text of the Clean Water Act is a provision of great simplicity that now, in the year 2000, is giving rise to a program of complexity and importance. Understanding that program, and by which level of government it is being implemented, is critical to any business that discharges pollutants of any kind into the nation's waters. In brief form (for a regulatory lawyer), this article charts the foundation of this new program, EPA's efforts to speed its implementation, and some of the issues that will be important to corporate counsel as they manage the risks that this new program poses to their companies' operations.

Background Of The TMDL Program

Section 303(d) directs each state to establish a list of waters that do not meet water quality standards and to identify the individual pollutants causing the impairment of each waterbody. Then, the section requires the state to develop a Total Maximum Daily Load, or "TMDL," for each waterbody and for each pollutant found to be causing impairment. A TMDL consists of two parts. First, it is a determination of the amount of each pollutant that the stream is capable of receiving without violating applicable water quality standards. Second, and closer to the pointed end of the stick, it is an allocation of that loading among point source dischargers (*e.g.*, industrial and municipal dischargers), nonpoint dischargers (*e.g.*, un-channeled runoff from agricultural lands), a set-aside for future growth, and a safety factor to account for the uncertainty of science in this complicated enterprise.

Thus, section 303(d), or the TMDL program as it has come to be known, may alter fundamentally the way in which discharge permits are written by re-allocating the right to discharge pollutants into the nation's waterways. Industrial facilities that rely upon existing allocations of the right to discharge are likely to find their permit limits reduced, sometimes dramatically, by this new program.

But is this news if the program has been a part of the statute for almost 30 years? The simple answer is that identifying streams that are impaired and then scientifically determining the discharge reductions necessary to bring them into compliance is a very difficult task. Data on stream quality are required, models of pollutant fate and transport must be created and validated, current information on discharge patterns must be compiled — each of which requires personnel and money. Short of both, the states were glacially slow to tackle the obligations imposed by section 303(d).

What finally forced them into action was a spate of citizen suits filed against EPA over

the last 5 years. Those suits claimed, more or less correctly, that the Agency had failed to take over the implementation of the TMDL program when the states failed to act. Consent decrees resulted, establishing deadlines by which EPA must perform the states' functions. In effect, the states have been given a second chance to implement the program, but this time they are under tight deadlines and are being overseen by the federal agency, itself under orders to ensure that state listing decisions and TMDLs are substantively correct.

EPA has attempted to organize this 50-state process somewhat by proposing extensive regulations that would systematize the listing of impaired streams and the allocation of discharge rights through TMDLs. Those proposals have been subjected to public comment and are expected to become final later this year.

In the meantime, however, states are moving forward -- impelled by court-ordered schedules -- developing lists of impaired waters and TMDLs without benefit of uniform federal regulations. Recognizing that the program is being implemented before its ground rules are in place, it is important to understand some of the different ways that states have chosen to proceed in conducting their work, as well as to be familiar with the more important case law that is growing up around the TMDL program. Within the confines of this space, we now turn to those important questions.

State Regulatory Responses

States have the primary responsibility to implement the TMDL program, but across the states TMDL programs are at various stages of development. While some states have developed statutory or regulatory programs to guide the preparation of impaired waters lists and the development of TMDLs, most have not. Nevertheless, the requirements of section 303(d) of the Clean Water Act provide an outline of the basic program elements that will be applied in each state. Within these broad parameters, and always conscious that EPA will take over as the author of a state's list of impaired waters and of the TMDLs themselves if the Agency disapproves of the state's effort, each state has been fashioning its own program at spear-point.

At the state level, there are no well-developed practices and standards to guide listing determinations or the development of TMDLs. The adoption of state program regulations will be important because they will establish 1) the extent of an individual's right to contest a listing decision or the content of a TMDL and 2) the standards and data requirements guiding these state agency decisions. Under EPA's proposed rules, states would be required to provide the public with 30 days to review and comment on lists of impaired waters, priority rankings, and schedules for TMDL development (proposed 40 C.F.R. § 130.37). It is not yet clear whether states will provide interested parties with a simple right to comment on these decisions or with more expansive rights to trigger review through an administrative or judicial hearing. Some states may not allow permit holders to contest TMDL decisions until they are implemented through the adoption of effluent limitations in an individual NPDES permit, while others may grant a right to review at each step along the way.

Where states have taken the initiative and adopted statutes or rules describing how the

TMDL process works, they have taken markedly different approaches. For example, New Jersey has a relatively extensive set of regulations applicable to impaired waters lists and TMDL development. However, New Jersey does not provide a right to review listing determinations and TMDLs. Florida recently passed legislation that assigns the Department of Environmental Protection (DEP) responsibility for developing lists of impaired waters and TMDLs and gives affected parties the right to challenge DEP's listing decisions and the content of TMDL's in an adjudicatory hearing before an administrative law judge. In some states, TMDLs and wasteloads are addressed very sparsely in the context of regulations on water quality planning regulations that do not directly impose regulatory requirements on individuals. How states address these seemingly ministerial issues will determine the quality of the TMDL initiative, and whether, (and at what point), in the process judicial review of TMDL actions is available to dischargers threatened by the new program.

Litigation Over Listing And The Content Of TMDL

To date, most litigation over the implementation of the TMDL program has been in the Federal Courts. In the main, these cases have addressed the merits of specific listing determinations and the content of TMDLs. The state-federal relationship of the TMDL program creates multiple points of contact at which state and federal decisions may be subject to administrative or judicial challenge by affected parties.

As states have gradually begun submitting lists and TMDLs to EPA for approval, there have been several cases in which EPA's decision to approve or disapprove state action was subject to review in Federal Court. Citizen's groups have pressed for the inclusion of more waters on impaired waters lists through challenges to EPA approval of state lists alleged to be inadequate. Regulated parties have attacked EPA from the oppositive perspective, asserting that specific waters should not be listed as impaired and challenging EPA's decision to approve or adopt such lists. *See e.g. American Canoe Ass'n v. EPA*, 30 F. Supp.2d 908, 918 (E.D. Va. 1998); *Pronsolino v. EPA*, C-99-1828 (N.D. Cal.) (waters may be listed solely as a result of nonpoint source pollution, even thought statute primarily controls point source discharges). Obviously, adding waters to a state's list multiplies the number of facilities whose discharge rights will be affected by the TMDL program.

Some states have completed TMDLs and submitted them to EPA for approval. In a few instances, courts have been asked to review EPA's approvals of these finished TMDLs. *See e.g. Sierra Club v. Hankinson*, 939 F.Supp. 865, 872 (N.D. Ga. 1996) (challenge to EPA approval of TMDL's promulgated by State of Georgia). There has also been one case challenging a multi-state TMDL that was developed by EPA. *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) (upheld EPA's TMDL for dioxin in Columbia River).

Litigation in state courts has been quite sparse. In most states, it is not yet clear what, if any, procedural rights interested parties have to obtain review before TMDLs are translated into effluent limitations in individual NPDES permits or nonpoint source controls. The extent of one's right to challenge such decisions in each individual state is still very much an open question. The first notable example of such a challenge is a South Carolina case where an

administrative law judge overturned the state's 1998 listing of waters impaired by phosphorous because the listing was based on an unpromulgated rule. *Western Carolina Regional Sewer Authority v. DHEC*, 98-ALJ-08-0267-CC (Sept. 22, 1999). It does not appear that there have been any cases in state forums involving a challenge to the content of a TMDL or the discharge limitations in a permit based on a TMDL wasteload allocation, but they inevitably will materialize as more TMDLs are established to the dissatisfaction of dischargers.

Conclusion

The TMDL program, created by section 303(d) of the Clean Water Act and energized by citizen litigation, promises to change the way that discharge rights are distributed in the United States. To date, much of the attention of industry has been focused (through trade associations) on the broad brush efforts of EPA to establish nationwide program regulations. In fact, however, the program is being implemented without those regulations by each of the 50 states. Corporate risk managers must recognize that there has been no hiatus in the state-based implementation of this program.

Corporate counsel can work within their own organizations to determine whether their facilities or other commercial interests are likely to be compromised by the unfolding TMDL program. Identification, now, of the states in which this program threatens to undermine existing discharge rights, coupled with the sophistication to become involved in shaping appropriate TMDLs in those states will distinguish successful management of the TMDL program from expensive, but ultimately ineffectual arm waving in the face of this reshuffling of rights under the Clean Water Act.

Richard S. Davis is a Principal in the Washington, DC office of Beveridge & Diamond, P.C.

Please e-mail the author at rdavis@bdlaw.com with questions about this article.