NATURAL
RESOURCES
DEFENSE
COUNCIL

207

Via Federal Express

May 17, 2000

USDA-Forest Service,
Content Analysis Enterprise Team
ATTN: UFP
Building 2, Suite 295
5500 Amelia Earhart Drive
Salt Lake City, UT 84116

Re: Supplemental Comments on Unified Watershed Policy

Dear Ms. Solari:

This letter is intended to supplement the comments filed on April 24 by the Natural Resources Defense Council addressing the Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management. NRDC applauds the effort by the Departments of Agriculture and Interior to ensure that federal land managers take the steps necessary to guarantee that their activities protect and restore water quality. As explained in our April 24 comments, NRDC recommends several changes to strengthen the proposed policy.

At a minimum, the Departments of Agriculture and Interior must ensure that all agency rulemakings are consistent with the commitments made in the Unified Federal Policy. The position taken by the Department of Agriculture (USDA) in a May 1 joint statement with the U.S. Environmental Protection Agency (EPA) regarding EPA Revisions to Total Maximum Daily Load (TMDL) and National Pollutant Discharge Elimination System (NPDES) Rules threatens to render the Unified Federal Policy meaningless before it is even released in final form. The joint agreement exempts federal lands from NPDES permit requirements that would apply to state and private lands. This exemption directly contradicts USDA's commitment in the Unified Federal Policy to "meet[] our Clean Water Act responsibility to adhere to Federal, State, Tribal, interstate, and local water quality requirements to the same extent as non-governmental entities." 65 Fed. Reg. 8834, 8837 (February 22, 2000). The exemption also blatantly contradicts USDA's commitment to achieving "consistent treatment of Federal and non-Federal entities as required by the Clean Water Act." Id.

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Existing federal laws do not justify exempting federal lands from permit requirements that would apply to state and private lands. While best management practices (BMPs) are working on some federal lands to protect water quality, in many places they are not. Numerous water bodies violate water quality standards at least in part due to logging and logging roads. In Montana, for example, 193 water bodies are listed by the state as impaired as a result of "silviculture." EPA TMDL/ 303(d) Database. An additional 33 water bodies are affected by logging roads and maintenance. Id. Still another 30 water bodies are listed because of harvesting. Id. Most of the logging in Montana occurs on federal, not state or private, lands.

Where water quality is impaired, compliance with BMPs either needs to be enhanced or the BMPs need to be improved. Permits can be an effective means to ensure that the operators of logging-related activities are implementing effective BMPs. The Clean Water Act (CWA) requires all point sources of pollutants to obtain NPDES permits. Some logging activities, such as skid trails, fall within the CWA's definition of point source. These activities should require permits regardless of whether they occur on private, state or federal land.

Rather than undercut EPA's efforts to ensure that logging is done in a way that adequately protects water quality, USDA should vigorously support EPA. As promised in the Unified Federal Policy, federal agencies should be willing to do at least as much, if not more, than they require of private and state entities to protect our nation's waters.

Sincerely,

Sharon Buccino
Senior Attorney

encl. Joint Statement of the Department of Agriculture and the Environmental Protection Agency Addressing Agricultural and Silvicultural Issues Within EPA Revisions to TMDL and NPDES Rules (May 1, 2000)

cc: James R. Lyons, Under Secretary for Natural Resources and Environment, USDA
Sylvia V. Baca, Asst. Secretary, Land and Minerals Management, DOI
Charles F. Fox, Asst. Admin., Office of Water, USEPA
George Frampton, Chair, Council on Environmental Quality

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Joint Statement of the Department of Agriculture and the Environmental Protection Agency Addressing Agricultural and Silvicultural Issues Within EPA Revisions to TMDL and NPDES Rules

May 1, 2000

ABSTRACT: The Environmental Protection Agency (EPA) has proposed revisions to existing regulations for administering the Total Maximum Daily Load (TMDL) provisions of the Clean Water Act (CWA). The Department of Agriculture (USDA) identified a range of issues with respect to the proposed TMDL rule. EPA and USDA convened a process to review and discuss these issues with the goal of resolving the issues prior to final issuance of the regulations. This paper, which has been prepared jointly by EPA and USDA, describes the agreement between the two agencies concerning development of final TMDL regulations.

Introduction

Under the TMDL program, States provide a comprehensive listing of all the Nation's polluted waters. The States then develop "pollution budgets," or TMDLs, for waters impaired by nonpoint and point sources of pollution. Pollution reductions called for by a TMDL budget are designed to meet certain safe levels of pollutants that allow beneficial uses, such as swimming or fishing, established in water quality standards adopted by States.

Congress established the TMDL program in the CWA of 1972. EPA's early work to implement the Act focused on establishing effluent limitations through National Pollutant Discharge Elimination System (NPDES) permits for point sources like factories and wastewater treatment plants. Lawsuits filed against the EPA in the late 1980's and 1990's, however, have compelled the development of TMDLs on specific schedules and for all impaired waters, including waters impaired by nonpoint sources of pollution (e.g. agriculture and forestry).

To improve implementation of the TMDL program, EPA convened a Federal Advisory Committee and proposed amendments to existing TMDL and NPDES regulations in the Federal Register on August 23, 1999.

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EPA/USDA Areas of Agreement

In response to concerns with the proposed TMDL rules at USDA, Under Secretary Jim Lyons of USDA and EPA Assistant Administrator Chuck Fox decided to form an interagency workgroup to review key issues. Working through the winter, this group reached agreement on the issues of interest to USDA and EPA has agreed to reflect these agreements in its final TMDL rule.

1) State and Local Governments Should Have the Lead –

The EPA and USDA agree that State governments and local citizens should take the lead in developing pollution budgets for impaired waterways. To enhance flexibility in State programs, the following revisions are expected to be included in the final TMDL rule:

(1) eliminate the requirement that States give top priority to development of TMDLs for certain types of impaired waters;

(2) eliminate the requirement that States identify "threatened" waters;

(3) lengthen the time period for States to develop periodic lists of impaired waters from two years to four years;

(4) grant States up to 15 years to develop TMDLs for their impaired waters;

(5) do not impose a deadline for attainment of water quality goals; and

(6) drop the proposal to require new discharges to polluted waters to obtain "offsets" for new pollution.

2) Reducing Agricultural Impacts on Water Quality –

Two general forms of agricultural runoff, "return flows from irrigated agriculture" and "agricultural stormwater discharges," are statutorily exempt from NPDES permit requirements and treatment as point sources. However, USDA and the agricultural community had concerns that the EPA proposal moved away from traditional notions of what is a nonpoint source of pollution and strategies for reducing impacts through voluntary efforts and Best Management Practices (BMPs). EPA and USDA agree that voluntary and incentive-based approaches are the best way to address nonpoint source pollution. Water quality improvements that farmers make through Federal conservation programs, or on their own initiative, will be given due credit in the development of TMDLs. If a farmer will invest in voluntary conservation practices to improve water quality the "pollution budget" will recognize those investments in developing a strategy for future cleanup.

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Under the EPA proposal, States have the flexibility to allocate pollution load reductions between nonpoint and point sources as they consider appropriate and are not required to allocate pollution reductions to specific categories (e.g. agriculture) in proportion to pollution contributions.

3) Controlling Water Quality Impacts of Forestry Operations –

USDA raised concerns with EPA's proposal to allow States, and in some cases EPA, to issue a Clean Water Act permit where needed to correct a water pollution problem caused by discharge of stormwater from forestry operations.

USDA and EPA have developed a modified approach that grants States flexibility in designing their TMDL program. Under this approach, no NPDES permits will be required for point sources of polluted stormwater from forestry operations for five years from publication of the final rule. During that time, EPA will work with the USDA and the public to develop guidance for States to follow in designing and adopting forestry BMP programs for the protection of water quality.

In States that develop and maintain forestry BMP programs that are recognized by EPA as adequate (i.e. generally consistent with this guidance) forest operations will have no exposure to NPDES permit requirements. States will be encouraged to grant forest operators that are implementing BMPs in good faith an exemption from any directly enforceable State water quality standards. Since existing Federal law requires forest operations on National Forest System lands to be conducted consistent with water quality requirements, operations conducted on these lands will be exempt from NPDES authority.

The idea is that forest operators in States with approved programs will know what is expected of them, what BMPs are effective in reducing pollution and need to be implemented. If for some reason the implementation of the core set of BMPs results in a pollution problem then the State must commit to refining or better tailoring the BMPs as necessary to attain water quality goals.

Only if a State does not have an approved forestry BMP program after five years, will the State or EPA have the discretion to issue NPDES permits in limited cases where the operation results in a discharge that causes water pollution problems. Any NPDES permits that are issued by EPA will call for implementation of BMPs, as opposed to attainment of numerical effluent limitations; EPA expects that State NPDES permit authorities will follow this approach. States will not be required to issue NPDES permits to forest operations discharging polluted stormwater; it will be a matter of their discretion. Dischargers that are not required to get a permit will not be subject to citizen or government enforcement action under the Clean Water Act.

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4) TMDL Program Funding –

States have identified a need for increased funding to support more complete assessment of the condition of waters and development of TMDLs for polluted waters. Adequate funding of the TMDL program is key to its implementation. The EPA is currently developing estimates of the overall cost of the TMDL program and the analysis will be available when the final rule is published. The President's FY 2001 budget increases funding for state administration of the TMDL program by $45 million. The budget also increases funding for State programs to reduce polluted runoff by $50 million. USDA agricultural conservation programs are dramatically enhanced by the FY 2001 budget. The Environmental Quality Incentives Program (EQIP) would be increased from $200 million to $325 million. Continuous sign up provisions of the Conservation Reserve Program (CRP) would be funded with $125 million in both FY 2001 and FY 2002. Finally, under the President's budget the acreage included in the Wetland Reserve Program (WRP) is increased by over 200,000 acres in the next several years. This kind of Federal budget response is necessary to provide State and local partners the tools to successfully build their TMDL programs.

Conclusion

The final TMDL regulations will provide an improved framework for restoring our polluted waters. Much work remains to be done to meet clean water goals. The EPA and USDA will continue to work with State and private partners in improving the communication and outreach essential for successfully implementing the TMDL program.

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