



THE TOTAL MAXIMUM DAILY LOAD PROGRAM FREQUENTLY ASKED QUESTIONS



AGC predicts that recent regulatory changes to the U.S. Environmental Protection Agency's (EPA) total maximum daily load (TMDL) program, which take effect April 30, 2003, will make obtaining storm water permit coverage more difficult and expensive for contractors. To this end, AGC is concerned that states will develop lists of impaired waters and TMDLs with inadequate or inaccurate data, which will place an undue burden on construction site owners/operators seeking storm water permit coverage. Already, EPA regions and environmental groups have threatened construction by seeking to impose severe restrictions on storm water discharges to impaired waters: Ranging from the imposition of numeric effluent limits to a ban on new or expanded discharges.

1. WHAT ARE SECTION 303(d) LISTS AND TMDLS?

Section 303(d) of the Clean Water Act (CWA) and related regulations require states to develop lists of waters that do not meet water quality standards. The lists are commonly called Section 303(d) lists of "impaired waters." Based on the 1998 list of impaired waters throughout the nation, sediment was found to be the most common impairment category. Specifically, out of 21,845 water bodies, approximately 6,133 are impaired for sediment, according to EPA. Under the federal rules governing the TMDL program, states are required to submit their next Section 303(d) lists of impaired waters to EPA by October 1, 2002. *For a complete list of impaired waters in your state, log on to EPA's TMDL website at www.epa.gov/OWOW/tmdl/index.html.*

The statute and regulations also require states to develop TMDLs for all listed waters. A TMDL sets strict discharge limits (essentially, pollution budgets) for those pollutants that are preventing a water body from meeting its water quality standards. TMDLs are developed in two steps by: 1) calculating the maximum amount of a pollutant that a waterbody can take in and still meet water quality standards and then 2) distributing that amount among all "point sources" (i.e., stormwater discharges from construction sites) and "nonpoint sources" (i.e., agricultural runoff) that discharge the pollutant. Using this framework, states will develop clean-up plans for each listed waterbody.

2. HOW ARE THE STORM WATER AND THE TMDL PROGRAMS LINKED?

EPA's new TMDL program gives states authorized to administer general permits under the National Pollutant Discharge Elimination System (NPDES) program the power to determine the best way to restrict the sources of pollutants into impaired waters. To satisfy the requirements of the TMDL rule, states may insert more stringent controls in appropriate NPDES discharge permits (e.g., general construction storm water permits). Or, in the alternative, states may require that all storm water discharges to impaired waters be covered by a more expensive and detailed individual permit, which may include numeric limits and stringent erosion and sediment controls. *For more information on the TMDL program and its relationship to the NPDES storm water permit program, check out AGC's Environmental Bulletin No. 2-00 on the Internet at www.constructionenvironment.org.*

Note: EPA published a final rule in the *Federal Register* on October 18, 2001 extending the effective date of the new TMDL rule by 18 months (from October 31, 2001 to April 30, 2003) AND the deadline by which states are required to submit the next Section 303(d) lists of impaired waters by 6 months (from April 1, 2002 to October 1, 2002).

3. WHAT ARE THE IMPACTS OF LISTING DECISIONS ON CONSTRUCTION?

Court-ordered deadlines have many states and EPA rushing to develop TMDLs—sometimes without adequate data. To date, in approximately 20 states, environmental groups have successfully forced EPA to commit to developing thousands of TMDLs (if the state fails to do so pursuant to specified schedules) in the next 18 to 24 months under consent decrees and court orders. The result may be a decline in the quality and accuracy of data used to set TMDLs. Developing TMDLs with inadequate or inaccurate data may place an undue burden on construction site owners/operators seeking storm water permit coverage into waters impaired for sediment, solids, bacteria, and certain heavy metals (see sections below). *To find out more about the anticipated cost to the construction industry resulting from regulatory changes to the TMDL program, see AGC's regulatory comments at www.constructionenvironment.org.*

AGC chapters and members may want to work with their respective states as agencies rush to develop new Section 303(d) lists by the October 1, 2002 regulatory deadline. The goal is to ensure that the lists of impaired waters are based on sound science, careful evaluation of adequate data, and application of appropriate water quality standards. *For more information on how states can best implement the Section 303(d) requirements in a scientifically sound manner, contact AGC's Leah Wood at (703) 837-5332 or via e-mail at woodl@agc.org.*

4. MAY STATES IMPOSE NUMERIC EFFLUENT LIMITS ON STORM WATER DISCHARGES TO IMPAIRED WATERS?

A federal district court in Arizona ruled that EPA holds the authority to impose numeric effluent limits on storm water discharges, along with the discretion to initially impose best management practices (BMPs) rather than jumping directly to numeric limits (*Defenders of Wildlife v. Browner*, No. 9871080 (9th Cir., 9/15/1999)). Following the court's lead, EPA Region 3 recently imposed numeric limits for oil and grease in an NPDES permit for storm water discharges from the District of Columbia to a receiving water with a TMDL for oil and grease in effect. In this instance, EPA jumped right to the numeric permit limits. This move may signify a dramatic change in the focus of storm water control efforts (in order to meet TMDLs)—from relying on BMPs to imposing numeric storm water concentration and mass limits.

5. HOW WOULD A BAN ON DISCHARGES TO IMPAIRED WATERS AFFECT THE CONSTRUCTION INDUSTRY?

In September 2000, a federal district court judge in Montana ruled that neither EPA nor the state of Montana could issue any new permits for new or expanded discharges to impaired waters throughout Montana (*Friends of the Wild Swan Inc., et al. v. EPA, et al.*, No. 97-35-M-DWM (D.Mont., 9/21/2000)). The lawsuit, filed by a coalition of environmental groups, accused EPA

and the state of dragging their feet in drawing up a list of water bodies that do not meet water-quality standards and then devising TMDLs to clean up those waters. The court agreed, ruling that Montana has until May 2007 to complete the TMDL process. In addition, without the request from any party to do so, the judge banned the Montana Department of Environmental Quality from issuing water-discharge permits.

The state interpreted the order literally to preclude it from issuing new permits for storm water discharges associated with dozens of planned road construction projects. This halted approximately 38 ongoing road projects and jeopardized more than \$240 million worth of projects in 2001. In response to contractors' concerns voiced by AGC and other stakeholders, the court clarified its order to make an exception for Montana's general storm water permit. In a first-of-its-kind decision, the court held that the state's general storm water permit had been issued prior to its order and, therefore, the application of that permit to new road projects did not constitute a new permit. The court's order will be revisited when Montana's general storm water permit expires.

AGC is concerned about the impact of this court decision in Montana and nationwide. Environmental groups have filed similar lawsuits in thirteen states—Hawaii, Idaho, Iowa, Tennessee, Missouri, California, Maryland, New Jersey, Georgia, Louisiana, New York, Oklahoma, and Wyoming. In addition, as EPA and the states begin to issue new Phase II storm water permits for construction sites between one and five acres, this type of restriction will likely surface in many states and become a major issue of controversy.

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