

US EPA ARCHIVE DOCUMENT

**TESTIMONY OF
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BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, INVESTIGATIONS,
AND EMERGENCY MANAGEMENT
COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
JULY 27, 2000**

Good afternoon, Madame Chairman. I am Chuck Fox, Assistant Administrator for Water at the Environmental Protection Agency (EPA). I am pleased to have an opportunity to review the important work that EPA is doing with other federal, State and local governments and the public to restore the over 20,000 polluted waterbodies that States have identified around the country.

On July 11, Administrator Browner signed final revisions to the existing regulations under the Clean Water Act that guide the process for identifying polluted waters and restoring the health of these waters, commonly known as the TMDL or "Total Maximum Daily Load" program. I recognize that some Members of Congress have concerns about the substantive provisions of these regulations and the process that EPA followed in developing the regulations.

I am confident that the final regulations signed by the Administrator are a sound, common-sense framework to help States and local citizens make good decisions about how best to restore polluted waters in their communities. And, I am certain that the

process that EPA followed in developing these regulations was open, deliberative, balanced, and in full accord with all procedural requirements.

Unfortunately, Congress chose to delay the effect of these new regulations until late next year. The Congressional prohibition on spending FY 2000 or 2001 funding to implement the new regulations will delay work to restore thousands of polluted rivers, lakes, and coastal waters -- waters that are important to millions of Americans. I hope that, as a result of this hearing and a greater understanding of how we propose to go about restoring the Nation's polluted waters, the Congress will reconsider the funding prohibition and allow the timely implementation of these important new regulations.

In previous testimony to the Transportation and Infrastructure Committee, I have described in some detail the water pollution problems that we face and our general approach to restoring the health of these waters. Rather than review this information, today, I want to try to summarize the current state of the debate by making several key points. In a nutshell, these points are --

- 1) serious water pollution problems persist across the country;
- 2) the national requirement to identify and restore polluted waters is not new -- Congress, called for the program in the 1972 Clean Water Act;
- 3) the new TMDL regulation builds on the existing TMDL rules;
- 4) partially as a result of weaknesses in the existing rules, the federal courts now play a major role in the TMDL program;
- 5) the new TMDL regulations significantly improve on the existing rules;
- 6) the process for developing the TMDL rules was sound and EPA complied with all regulatory process requirements;

- 7) EPA listened to comments on the proposed rule and responded; and
- 8) EPA is committed to assuring that States have adequate resources for the development of TMDLs.

1) **Serious Water Pollution Problems Persist Across the Country**

In 1998, States submitted lists of polluted waters indicating that over 20,000 waterbodies across the country are not meeting water quality standards. The overwhelming majority of Americans -- 218 million -- live within 10 miles of a polluted waterbody. The pollutants most frequently identified as causing water quality impairment include sediments, excess nutrients, and harmful microorganisms. Metals, including toxics, also contribute to these impairments.

A key feature of the 1998 lists of polluted waters is that, for the first time, many States provided computer-based "geo-referencing" data that allow consistent mapping of these polluted waters. In order to better illustrate the extent and seriousness of water pollution problems around the country, EPA prepared an atlas of State maps that identify polluted waters. A copy of the Atlas is attached to my testimony.

These pollution problems can cause harm to local economies as well as to the environment. EPA recently issued a new report, *Liquid Assets 2000, America's Water Resources at a Turning Point*. This report highlights the importance of clean water to the Nation's economy. For example, a third of all Americans visit coastal waters each year, making a total of 910 million trips, while spending about \$44 billion. Water used for irrigating crops and livestock helps American farmers produce and sell \$197 billion

worth of food and fiber. And, manufacturers use about nine trillion gallons of fresh water every year. The soft drink manufacturing industry alone uses more than 12 billion gallons of water annually to produce products valued at almost \$58 billion.

Our economy depends on clean water; we all pay when it is polluted.

Contamination of drinking water means higher health risks and increased treatment costs. Closed beaches and contaminated rivers mean lost revenue for local businesses that serve tourists, anglers, and recreationists. Swimmers at polluted beaches and lakes face possible health threats from viruses and bacteria. Each year Americans pay a price for dirty water. Let me provide just one example. The toxic microbe *Pfiesteria piscicida* has killed millions of fish in North Carolina since 1995 and tens of thousands of fish in Maryland in 1997. Losses to the U.S. seafood and tourism industries from *Pfiesteria* are estimated at \$1 billion.

2) Congress Called for TMDL Program in 1972 Clean Water Act

Some of the criticism that I have heard of the TMDL program suggests that EPA has exceeded its authority in calling for a full accounting of the Nation's polluted waters and calling for clear steps to restore these waters.

In fact, the 1972 Clean Water Act specifically requires States to develop lists of polluted waters and to develop TMDLs to restore the health of these waters. And, the Act required EPA to backstop State development of TMDLs. Under the Clean Water Act, EPA has no option but to implement a TMDL program.

Congress debated and decided the questions of whether there should be a national commitment to restoring polluted waters back in 1972. Today, our debate should focus on how to get this job done, not whether to do the job at all.

3) New TMDL Regulations Build on Foundation of Existing Rules

I have heard the concern that EPA is using the new TMDL regulations to impose new requirements and new costs on States and pollution sources.

It is important to point out that EPA first issued detailed regulations for the TMDL program in 1985, during the Reagan Administration and again in 1992 during the Bush Administration. More importantly, the new regulations carry forward many of the key elements of the existing regulations.

For example, the 1992 regulations call for States to develop lists of polluted waters every 2 years. They call for TMDLs that consider pollution from both point sources and nonpoint sources. And, the regulations require EPA to backstop State development of TMDLs. As I will explain in a moment, the new regulations include important improvements to the existing regulations, but the core elements of the TMDL program have been in place for over 15 years.

4) Today, Federal Courts Make Many Key Clean Water Decisions

An essential fact of the TMDL program is that today, litigation is driving many of the key decisions about how States and EPA will go about restoring polluted waters.

This judicial supervision of clean water programs has come in response to over 40 suits filed in 35 States by citizens insisting that the government be held accountable for its responsibility, under the Clean Water Act, to identify and restore polluted waters.

In case after case and State after State, the result of citizen suits has been consent decrees or orders establishing detailed remedies including the number of TMDLs that are to be done, and the schedule for development of TMDLs. Essentially, the courts found that many States and EPA were not following either the law or the regulations. The general direction of these judicial actions is to put the Nation's clean water program increasingly in the hands of the federal courts.

Both EPA and the States bear some responsibility for allowing the TMDL program to drift. At the same time, Congress called on States and EPA, not the federal courts, to manage the process of restoring polluted waters. The courts have made an important contribution, but I think it is fair to say that they would prefer to see States and EPA get this job done. So far, some courts have not been convinced that we can or will do the job.

The regulations recently signed by the Administrator are an opportunity to demonstrate to the courts that we are taking this work seriously and are determined to get the job done. The regulations establish a clearer set of expectations against which to judge the performance of States and EPA. Congress' decision to delay implementation of the new regulations is a major setback to this effort.

5) New TMDL Rules Significantly Improve Existing Regulations

Although the new TMDL regulations are built on the foundation of the existing regulations, they greatly improve the program. These improvements will result in a TMDL program that meets both the letter and the spirit of the Clean Water Act. Let me give you a few examples. The new regulations:

- 1) provide for a more complete accounting of polluted waters and tracking of progress toward clean-up;
- 2) call for TMDLs that include specific plans and schedules for implementation of actions to restore the health of the polluted waterbody;
- 3) foster more diverse sharing of pollution control responsibilities among point and nonpoint sources because of the greater reliability of nonpoint controls that are documented to meet the "reasonable assurance" of implementation test;
- 4) provide for EPA backstop of State TMDL work that is predictable and disciplined, in contrast to the unpredictable result of litigation; and
- 5) expand and strengthen public involvement provisions.

I have provided as an attachment to my testimony a summary of a dozen of the key differences between the existing TMDL rules and the new TMDL rules.

In addition, EPA expects that, over the next decade, the new TMDL rules will result in adoption of more cost effective pollution control strategies. For example, the final TMDL rules enhance opportunities for States to allocate pollution control responsibility from costly point source controls to generally lower cost measures to reduce nonpoint source pollution. The new TMDL rules include a clear definition of "reasonable assurance" of implementation of nonpoint source controls, and the

enhanced reliability of these nonpoint control measures makes them a realistic alternative to point source controls.

6) The Process for Developing TMDL Rules Was Sound

The new TMDL regulations signed by the Administrator are the result of almost four years of work by EPA and a wide range of interested parties. Throughout this process, EPA complied with all regulation process requirements.

As a first step in revising the TMDL regulations, EPA formed a Federal Advisory Committee made up of representatives of a broad range of stakeholder groups, including States, Tribes, other federal agencies, industry, agriculture, environmental organizations, and the academic community.

This advisory committee spent almost two years developing a comprehensive report on the TMDL program including a number of consensus recommendations. EPA based many of the proposed revisions issued in August of 1999 on these consensus recommendations. The comments period on the proposal lasted a full 6 months and EPA received over 34,000 comments.

In November of 1999, EPA worked with States to organize a two day meeting at the Wye Island conference center in Maryland where State and EPA officials discussed the proposed regulation in some detail.

In addition, since the close of the comment period, EPA staff met with a wide range of interest groups. We met with State officials; with industry officials; with

municipal officials; and with environmental organizations. And, we met with Members of Congress and congressional staff and participated in numerous hearings organized by Congress for particularly interested constituent organizations. Throughout this process, EPA took great care to respond to all requests for information and discussion.

In addition, the Agency complied with the Regulatory Flexibility Act and the Unfunded Mandates Reform Act, as well as other guidelines established by OMB and within the Agency.

Some witnesses today have mentioned the report of the General Accounting Office (GAO). Although EPA does not agree with all the findings of the GAO report, it is important to note that the GAO found that EPA fully complied with the Regulatory Flexibility Act.

GAO also concluded that further analysis of the costs of the proposed rule might have indicated a greater range in impacts and that, based on such an analysis, the Agency would have found the range of costs to exceed \$100 million. As a result of a range of costs exceeding \$100 million, EPA would have been required to conduct additional analysis, such as a quantitative analysis of the benefits of the rule.

As indicated by EPA's letter to GAO, that I will submit for the record, EPA strongly disagrees with the GAO findings concerning cost analysis. EPA made a fair and reasonable cost analysis. Rather than debate the technical specifics of the GAO analysis, let me make three points.

- 1) OMB has declared the final TMDL rule signed by the Administrator to be a major rule under the Congressional Review Act and subject to the 60-day Congressional review period.

- 2) Much of the concern about costs was based on assertions by some economists that the rule would require forest operators to significantly increase spending to control pollution from forestry activities. This provision of the proposed rule is not included in the final rule.
- 3) Finally, much of the confusion about the economic analysis of the regulation is based on the incorrect idea that there is no TMDL program today and that the new rule would, alone, drive all the costs related to restoring polluted waters. EPA's assessed the incremental costs of the new rule above the costs of the existing regulatory requirements.

7) EPA Listened to Comments and Responded

EPA did not just meet with interested organizations, groups or individuals. We listened to what we were being told. In addition, we took the written comments on the proposed regulation very seriously.

As a result of this process, key provisions of the proposed regulations were revised or dropped in the final regulation signed by the Administrator. For example:

- 1) The proposal requiring new or significantly expanding dischargers to obtain offsets when discharging to a polluted waterbody was deleted.
- 2) The proposal allowing States to identify specific discharges from forestry operations that significantly contribute pollution to impaired waters and require these dischargers to have permits as part of a TMDL was deleted.
- 3) The proposal allowing EPA to identify animal feeding operations or aquaculture facilities that significantly contribute pollution to impaired waters and require these dischargers to have permits as part of a TMDL was deleted.
- 4) The existing requirement that States provide lists of polluted waters every two years was revised to provide for lists only every 4 years.
- 5) The proposed requirement that every State complete TMDLs within 15 years was revised to require that TMDLs be completed within 10 years,

unless completion within this period is not practicable, in which case the State may have up to 5 additional years to finish this work.

- 6) EPA's commitment to backstop State efforts to develop lists of polluted waters and TMDLs was clarified and schedules for EPA action were identified.

There have been suggestions that EPA responded only to some interest groups and not to others. In fact, as this list indicates, EPA made changes urged by industry, by States, by agriculture, by environmental organizations, as well as Members of Congress.

There have been suggestions that the changes that EPA made to the rule were so extensive that the entire rule should have been repropoed. In fact, EPA retained the essential structure of the proposal and improved on it in important ways. All the changes that EPA made were within the range of change indicated by the requests for comments in the proposed rule and a logical outgrowth of the proposal.

Finally, some have chosen to characterize the changes from the proposed regulation to the final regulation as a desperate attempt to please interest groups. This charge is unfair to both the Agency and the interest groups that worked very hard to provide substantive and meaningful comments on the regulations. Many of the comments we received were thoughtful, sound and persuasive. We accepted many of these comments, and revised the rule accordingly, because we were persuaded by the information provided by commenters. The combined effect of these changes has been to build the confidence of many interested parties in the rule and, thereby, improve the likelihood that it will be implemented successfully.

8) EPA is Committed to Assuring TMDL Program Funding

State officials have expressed concern over the workload and costs of the TMDL program. EPA is responding to this concern.

EPA recently issued a regulation eliminating the requirement that States submit lists of polluted waters this year; new lists will not be due until 2002. The decision to eliminate the 2000 listing process has saved States and others hours of work and has allowed us all to concentrate on the important job of developing TMDLs for the over 20,000 waterbodies already identified as polluted.

States are also concerned about the costs of administering the TMDL program. The annual federal appropriation available to States to administer and directly implement TMDLs and the broader clean water program has steadily increased from \$112 million in 1993 to a proposed \$410 million in the Administration's proposed FY2001 budget.

The President's FY 2001 Budget increases State grant funding for TMDLs by \$45 million in FY 2001 alone. When States match this new funding, about \$70 million in new funding will be available for implementing the TMDL program. The House Appropriations Committee recently reported legislation that would significantly increase funding for the water quality program, including the TMDL program.

In addition, EPA has provided States with the discretion to use up to 20% of funding under section 319 to develop TMDLs and for related work. The President's

request for 319 funding in FY 2001 is \$250 million and thus provides up to \$50 million in additional TMDL funding. Unfortunately, however, the House Appropriations Committee bill would only provide \$20 million of this increase.

And, the final rule supports more cost-effective development of TMDLs by specifically encouraging States to develop TMDLs for groups of polluted waterbodies on a watershed scale.

EPA has worked with States to develop detailed assessments of the costs of key elements of the clean water program. Based on this analysis, and in consultation with the Office of Management and Budget, EPA projects that the funding proposed in the President's budget would be sufficient for States to administer the TMDL program in 2001 under the final TMDL regulations recently signed by the Administrator.

Conclusion

In conclusion, Madame Chairperson, serious water pollution problems remain in every State -- over 20,000 polluted waters. Communities around the country want to get to work restoring these waters.

Yes, the existing TMDL regulations are still in place, but under these regulations, many States and EPA have failed to adequately respond to water pollution problems and citizen suits have brought us to the point where significant TMDL program decisions are in the hands of the federal courts.

The new TMDL regulations substantively improve and strengthen the current regulations, offering a balanced, common sense approach to fixing water pollution problems that leaves management of the program where Congress intended it -- in the hands of the States, with support and backup from EPA.

Not only that, the new regulations offer a new, more flexible approach to development of TMDLs that will allow States and local communities to make informed decisions about how best to reduce pollution. In many cases, we expect that these State and local decisions will get the needed pollution reductions for a reduced cost.

Yes, the regulations are the result of an intense and controversial process. But, the final regulation is a careful balance of the interests of many parties. This balanced process resulted in a rule that may not totally satisfy everyone, but is a big step forward in the national effort to assure fishable and swimmable waters for all Americans.

Sadly, Congress has chosen to block the new TMDL regulations. The prohibition on spending any FY 2000 or FY 2001 funds to implement the regulations was inserted at the last minute in a critical appropriations bill the President had no choice but to sign. Congress made this decision without even seeing the final regulation it was delaying. I want to urge members of this Committee, and of the Congress, to reconsider this prohibition and allow EPA to do the work needed to assure the effective implementation of the new TMDL rule.

Madame Chairperson, your letter indicated that this hearing is intended to address recent legislative proposals. I am aware of two types of new legislative proposals relating to the TMDL program. In the first instance, several Members of

Congress have introduced legislation calling for nullification of the TMDL regulations under the Congressional Review Act. The Administration is strongly opposed to these resolutions.

In addition, we have reviewed another piece of legislation (H.R. 4922) that would essentially require EPA and others to spend the next year reviewing and reanalyzing virtually all aspects of the new TMDL regulations. The core TMDL program has been in place for almost 20 years and we just spent almost 4 years developing the final TMDL rule, doing extensive analysis, and listening to and addressing numerous comments.

The challenge we now face is to get down to the job of actually getting polluted waters cleaned up, not debating the basic concepts all over again. We would be pleased to talk with Members of Congress concerning legislation that would help States and communities run more effective and efficient TMDL program, to design better monitoring programs, to develop menus of options that facilitate sound decision-making, and to carefully evaluate the effect of implementation of the new rules.

Unfortunately, this bill as drafted, combined with the prohibition on spending, is essentially a one-year holding pattern for the TMDL program. During this year, EPA will be retracing its steps on the new regulations rather than preparing to implement them, and many States may put the program on the back burner, and more of the program may be taken over by the federal courts. And, a year that might have been filled with critical progress toward restoring polluted waters will be lost.

Instead, let's agree that we have a good, balanced, common-sense TMDL rule and use it to move forward in restoring the health of the Nation's polluted waters.

Across America, States and communities want to get to work restoring over 20,000 polluted waterbodies. Let's let them get on with it.

Thank you Madame Chairperson. I will be happy to answer any questions.

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Top Dozen Reasons Why the New TMDL Regulations Will Be Better Than Current Regulations

1) TMDL Implementation Plans -- A Road Map for Restoring Polluted Waters:

New Rules: require that a TMDL include an implementation plan that defines specific steps to be taken to restore polluted waters on a specific schedule.

Current Rules: do not require implementation plans.

2) New Commitments to Reducing Nonpoint Pollution:

New Rules: require that implementation plans provide a demonstration, or "reasonable assurance," that measures to reduce pollution from nonpoint sources will be implemented.

Current Rules: do not require specific commitments to reduce nonpoint pollution and do not include requirement to demonstrate "reasonable assurance" of implementation.

3) Schedules for Attaining Water Quality Standards:

New Rules: implementation plans must identify a date by which the State expects that water quality standards will be attained and this date must reflect a goal of meeting water quality standards within 10 years of establishment of the TMDL whenever attainment within this period is practicable.

Current Rules: do not address schedules for attainment of water quality standards.

4) Schedules for Developing TMDLs:

New Rules: States must develop TMDLs as expeditiously as practicable, evenly paced over the duration of the schedule, but not later than 10 years after July 10, 2000, or 10 years after the date of listing for waters listed after that date; if establishment of TMDLs on this schedule is not practicable in a given State, this schedule may be extended by up to 5 years.

Current Rules: require that States set priorities and identify those TMDLs that they expect to develop over the next two years only.

5) **Schedules for Implementing Pollution Control Measures:**

New Rules: require that a schedule provide for implementing controls within 5 years when practicable.

Current Rules: do not address schedules for implementing nonpoint source controls.

6) **EPA Backstop of TMDLs:**

New Rules: EPA must develop TMDLs where a TMDL submitted to EPA is disapproved; EPA must develop a TMDL where a State fails to make substantial progress under an approved schedule; EPA must complete a TMDL within 2 years after State failure. EPA may extend this period by up to an additional 2 years if the Administrator determines there is a compelling need for more time. EPA will give public notice of any such extensions.

Current Rules: EPA must develop TMDLs only where a TMDL submitted to EPA is disapproved.

7) **Comprehensive Listing of Polluted Waters:**

New Rules: require a comprehensive listing of a State's polluted waters, including waters needing TMDLs, waters impaired by pollution, polluted waters with completed TMDLs, and polluted waters where existing controls will meet water quality standards before the next list is submitted (i.e. within 4 years).

Current Rules: lists include only waters impaired by pollutants and still needing a TMDL.

8) **Priority for Drinking Water and Threatened/Endangered Species:**

New Rules: require that States identify waters where the problem pollutant is causing, or threatens to cause a drinking water system to violate a drinking water standard or where the waterbody supports threatened or endangered species and requires that these waters be given a higher priority unless the State explains why a different priority is appropriate.

Current Rules: do not address drinking water problems or threatened or endangered species.

9) **EPA Backstop of State Lists of Polluted Waters and Schedules:**

New Rules: EPA is required to establish lists of polluted waters and schedules for TMDL development where EPA disapproves the list/schedule and where a State does not submit a list/schedule by April 1 of 2002 and every 4 years thereafter.

Current Rules: EPA is only required to establish a list of polluted waters where a State list (which does not include a schedule) is submitted to EPA and EPA disapproves the list.

10) **Expanded Public Involvement:**

New Rules: require for the first time that States provide the public with notice, and an opportunity for review and comment, on lists of polluted waters (including methodologies) and modifications to these lists; also requires notice and opportunity for comment on TMDLs.

Current Rules: only require States to provide notice on TMDLs in accordance with States procedures; require EPA to provide notice when EPA establishes lists and TMDLs.

11) **Improved Water Quality Information and Greater Consistency of Data**

New Rules: require States to develop a methodology for assessing the health of waters and listing polluted waters including involvement of public and EPA. Give States the flexibility to combine two existing reports of polluted waters [under sections 305(b) and 303(d) of the Clean Water Act] if they wish to do so.

Current Rules: information concerning methods is among other documentation to be submitted.

12) **New EPA Authority for Permit Issuance in Waters with TMDLs**

New Rules: Give EPA a new mechanism to object to and reissue expired State NPDES permits for waters not meeting water quality standards.

Current Rule: EPA has no procedural mechanism to assure that expired NPDES permits that need to be reissued in order to implement a TMDL are reissued.