

FEATURE ARTICLE

WHITHER WALLOP? WATER SUPPLY AND OTHER STATE LAW IMPLICATIONS OF CLEAN WATER ACT TMDL REGULATIONS

By Paul S. Simmons

Section 303(d) of the Clean Water Act (CWA) has come fully awake, and everyone is paying attention. Regulations recently proposed by the U.S. Environmental Protection Agency (EPA) to govern the listing of "impaired" waters and the development of Total Maximum Daily Loads (TMDL) for impaired waters, 64 Fed.Reg. 46012 (Aug. 23, 1999), drew voluminous comments from throughout the country. As the regulations are finalized and as TMDL litigation continues, interested parties will learn how large and powerful a creature section 303(d) actually turns out to be. At one end of the spectrum, it may simply be one more tool for defining ultimate permit requirements for "point sources" of pollution. At the other end of the spectrum, it may be, or result in, comprehensive programs addressing water quality and water use.

Most current controversy over 303(d) concerns the nature and scope of CWA authority with respect to discharges of pollutants, particularly nonpoint sources. This article focuses on issues of California law in the implementation of § 303(d) and TMDLs. In particular, it examines the potential implications of the TMDL program in California's system of water allocation and water rights. Section 101(g) of the CWA, commonly known (for its author) as the "Wallop Amendment" expresses the policy of Congress that: State authority to allocate water will not be superseded or impaired by the CWA; and the CWA will not be construed to abrogate rights to

quantities of water which have been established by states. 33 U.S.C. § 1251(g). There are substantial questions regarding how EPA's proposed regulations could affect this policy.

Water Quality: Legal Fundamentals

Both the CWA and California's Porter-Cologne Water Quality Control Act, Water Code § 13000 *et seq.* (Porter-Cologne), govern water quality regulation in California. Since 1972, the primary emphasis of CWA regulation has been the regulation of "point sources" of pollutants. See 33 U.S.C. § 1362(14) (defining point source). The discharge of pollutants from a point source is illegal unless the discharger has obtained a permit under the National Pollutant Discharge Elimination System (NPDES). *Id.* at §§ 1311(a), 1342(a). As in many states, the NPDES permit system in California is administered by the state. *Id.* at § 1342(b). NPDES permits contain effluent limitations restricting amounts of discharged constituents. *Id.* at § 1362(11). All NPDES permits contain "technology-based" effluent limitations, i.e., requirements based generally on available pollution control technologies. *Id.* at § 1311(b)(1)(A), (b)(1)(B).

The CWA amendments in 1972 also preserved previous requirements for the adoption of water quality standards by the states. A water quality standard designates the use or uses of a water body (e.g., swimming, or fish and wildlife) and the water

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quality criteria to protect the uses. *Id.* at § 1313(c) (2)(A); 40 C.F.R. § 130.2(d). EPA regulations describe the water quality standards as establishing the water quality goals of a water body and as providing the basis for regulation of point sources going beyond technology-based effluent limitations of point sources. 40 C.F.R. §§ 130.3, 131.2. CWA § 301(b) (1)(C) provides that, in addition to technology-based effluent limitations, NPDES permits must contain additional limits as necessary to meet water quality standards (water quality-based effluent limitations). 33 U.S.C. § 1311(b)(1)(C).

The CWA does not require permits or other direct regulation of nonpoint sources. See *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 849 (9th Cir. 1987). Section 208 of the CWA requires states to develop area-wide waste treatment management plans which identify nonpoint sources of pollution and identify measures to control such sources. 33 U.S.C. § 1288(b)(1). Section 319 of the CWA, enacted in 1987, directs states to prepare management programs for nonpoint sources consisting of best management practices (BMPs). *Id.* at § 1329. States are also required to have a continuous planning process (water quality management plan), which includes provisions for effluent limitation as well as the § 208 waste management plans. *Id.* at § 1313(e).

In California, Porter-Cologne provides the mechanism for implementation of the CWA, and creates additional authorities and obligations. The State Water Resources Control Board (SWRCB) is designated as the state agency for administration of the CWA. Water Code § 13160. Water quality planning and regulation occurs primarily through the nine Regional Water Quality Control Boards (Regional Boards) which typically issue NPDES permits and adopt water quality standards for their regions, subject to SWRCB review and approval. *Id.* at §§ 13240-13247, 13263. The U.S. Environmental Protection Agency (EPA) must also approve water quality standards adopted by the states. 33 U.S.C. § 1313(c) (3).

Porter-Cologne requires the Regional Boards to adopt Water Quality Control Plans (WQCPs or Basin Plans) consisting of: a) beneficial uses; b) water quality objectives; and c) a program of implementation to achieve the objectives. Water Code §§ 13050(j), 13240-13247. Through adoption of the

beneficial uses and water quality objectives, the state agencies also meet the CWA requirement for adopting water quality standards, i.e., uses and water quality criteria. A Basin Plan's program of implementation to achieve the water quality objectives must describe actions to be taken, a time schedule, and a description of surveillance to determine compliance. Water Code § 13242. Porter-Cologne also provides authority to issue waste discharge requirements (WDRs). Water Code § 13263. WDRs issued to a point source also function as the federal NPDES permit; however, as a matter of state law, WDRs may be issued to both point and nonpoint sources.

The Regional Boards have front-line responsibility for water quality regulation, including WQCPs and WDRs. The SWRCB typically sets broad policy in these areas and reviews Regional Boards' actions. The SWRCB itself may, however, adopt WQCPs. Water Code § 13170. It has done so most notoriously in the case of the Sacramento-San Joaquin River Delta, where salinity and other water quality objectives implicate water supply issues.

Clean Water Act § 303(d)/TMDLs

Section 303(d)(1)(A) of the CWA requires states to list those waters where water quality standards are not achieved even after the imposition of mandatory technology-based effluent limitations for point sources. 33 U.S.C. § 1313(d)(1)(A). The states must develop TMDLs, establishing loads "at a level necessary to implement the applicable water quality standards[.]" *Id.* at § 1313(d)(1)(C). Under current EPA regulations, the TMDL must identify allowable loadings from point sources (waste load allocations) and from other sources including nonpoint sources (load allocations). 40 C.F.R. §§ 130.7(c), 130.2(g), (h). Neither the statute nor the current regulations require implementation of the TMDL. It is generally perceived, however that the wasteload allocation to point sources will be self-implementing due to the requirement that point source NPDES permits contain effluent limitations necessary to achieve water quality standards. 33 U.S.C. § 1311(b)(1)(C).

The state's § 303(d) list, also known as the "impaired waters" list, is subject to approval by EPA, and if the state's list is deficient EPA will issue or modify the 303(d) list. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). Similarly, it has been held that EPA has both authority and an obligation to establish TMDLs

when a state has failed to do so. *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984); see also 64 F.R. 46037 (discussing EPA authority to establish TMDLs).

Section 303(d) received little attention until the late 1980s, as EPA and the states focused primarily on permit requirements for point sources. However, an avalanche of litigation has made § 303(d) a top priority. Lawsuits nationwide resulted in judgments and consent decrees requiring listing of impaired waters and preparation of TMDLs, and often required aggressive schedules for the completion of TMDLs. See *Overview of TMDL Cases*, <<http://www.epa.gov/owow/tmdl/lawsuit2.html>>; see also *id.* at [lawsuit1.html](http://www.epa.gov/owow/tmdl/lawsuit1.html) (litigation status).

The current TMDL regulations were published in 1985. 40 C.F.R. § 130.7. On August 23, 1999, EPA published a proposed regulation that would substantially revise the section 303(d)/TMDL program. The public comment period closed in January 2000. The TMDL program and the proposed rule raise a great number of legal and policy issues. The discussion below focuses on certain issues of particular interest in California, especially those that have potential water supply implications.

Section 303(d) and Water Quality

With few exceptions, the creation, regulation, and enforcement of water rights is an authority reserved to the states. Section 303(d) on its face deals with reducing loads of pollutants and not the allocation of water. But are there indications that the TMDL program and regulations could lead to federal incursions into state water allocation and water rights administration.

California law has long recognized the relationship between water quantity (flow, volume, etc.) and water quality. This is exemplified structurally by the assignment of both water rights and water quality responsibilities to the SWRCB. The Water Code thus ensures the "consideration of water quality and water pollution" in the context of water right applications. Water Code § 174. In the water rights process, the SWRCB considers water quality issues, including WQCPs, and may deny or condition rights in order to carry out the WQCPs. Water Code §§ 1258, 1257, 1243.5. In *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986), the Court of Appeal held that in a water rights proceeding, the

SWRCB may enforce a WQCP's water quality objectives by requiring the water right holders to change their diversion and use of water. The court identified three sources of authority for such action: reserved jurisdiction over permits under Water Code § 1394; the SWRCB's continuing authority to prevent waste and unreasonable use under Article X, § 2 of the State Constitution; and the SWRCB's continuing authority to protect public trust uses. *Id.* at §§ 127-130, 148-152. The cited legal principles have in common that state law, and particularly state water rights law, is the origin of the authority to condition, deny, or modify water rights in order to protect water quality. In essence, water quality is one of several public interest factors considered and balanced in the water rights process. See *U.S. v. SWRCB*, 182 Cal.App.3d at 103-106; Water Code §§ 1254-1259.

Several aspects of the 303(d)/TMDL program and EPA's proposed regulations create the specter of federally-directed water supply impacts that have little relationship to the state's existing water rights system. These include: (1) proposed requirements for § 303(d) listing based on hydrologic impairment; (2) § 303(d) listing based on "use" impairment irrespective of whether an adopted objective is violated; (3) proposed requirement for listing "threatened" waters; and (4) implementation requirements. These issues are discussed below.

Listing for Hydrologic Modification

EPA's proposed regulations would require that future lists of impaired waters contain more than one part. 64 Fed.Reg. 46049. The first part would consist of water impaired by "pollutants" (generally, "waste," see 33 U.S.C. § 1362(6)). The second part would consist of waters impaired only by "pollution" but not threatened by "pollutants." Pollution is defined to include human induced alteration of the chemical, physical, or biological integrity of water. *Id.* at § 1362(19). The proposed rule explains that low flow or degraded aquatic or riparian habitat is within the meaning of the term "pollution." 64 Fed.Reg. 46021. Changes in water temperature associated with flow conditions would also be within the requirement for listing based on pollution. 64 Fed.Reg. 46017.

Thus, a water body could be § 303(d)-listed solely due to low flow caused by a diversion, even if that diversion does not affect the quality of water (as

"quality" is commonly understood). The proposed rules would provide that waters impaired by pollution only would not require TMDLs. 62 Fed.Reg. 46049. Here, the agency's logic is that § 303(d) listing requirements require identification of the severity of "pollution," but requirements to prepare TMDLs refer only to reductions of "pollutants." 64 Fed.Reg. 46021; 33 U.S.C. §§ 1313(d)(1)(A), 1313(d)(2).

Several commenters have questioned the legitimacy of this distinction in the context of § 303(d). Obvious questions arise, such as: why have a list of impaired waters with no requirement to do anything with it; is the next step for EPA to require TMDL for flow-impaired water bodies, and are the requirements not likely to invite litigation? It is also noteworthy, as discussed below, that the proposed regulations apparently would require a TMDL when a water is impaired by both, or a combination of, pollutants and pollution (flow).

Naked Use Listing

Section 303(d) requires listing when water quality standards are not achieved. As discussed above, standards consist of "uses" and the water quality criteria (or state objectives) to protect the uses. Until fairly recently, it was considered that both the use and criterion/objective were necessary to create a standard; i.e., that the standard is the combination of these two components. See 40 C.F.R. § 131.11; *Natural Resources Defense Council v. Environmental Protection Agency*, 915 F.2d 1314, 1317 (9th Cir. 1990) (describing two steps for determining a water quality standard); see also *Scott v. City of Hammond*, 741 F.2d at 994, n. 5. More recently, regulatory agencies have regarded the use itself as a standard. In other words, in the § 303(d) context, waters have been listed based on use impairment even when there is no applicable criterion/objective that is exceeded. In *PUD No. 1 of Jefferson County v. Washington*, 511 U.S. 700 (1994), the Supreme Court held that it was proper for the state of Washington to find that a project that did not comply with a use alone did not comply with applicable state water quality standards, and thus upheld the interpretation of a use alone as being a water quality standard under the CWA. *Id.* at 715-716.

It is questionable whether California law intends that a use, by itself, be regarded as a CWA water quality standard. Basin Plans include three interre-

lated components: beneficial uses; objectives to protect the uses; and a program to implement the objectives. Water Code § 13050(j). The Basin Plans thus advance the expressed statutory policy to regulate water to attain the highest water quality that is reasonable. Water Code § 13000. The consideration of economics, attainability, and other public interest factors in the adoption of objectives is intended to achieve this goal. Water Code § 13241. If anything, it appears that the California Legislature considered the state water quality "objective" to be most equivalent to the federal "standard." See "Final Report of the Study Panel to the State Water Resources Control Board; Recommended Changes in Water Quality Control" at 27-28. The program of implementation in a Basin Plan is directed to achieve water quality objectives, not uses. Water Code § 13242. Listing or regulation based on an extra-WQCP determination of use impairment alone thus seems to eviscerate the overall structure and purpose of a Basin Plan. See also *U.S. v. SWRCB*, 182 Cal.App.3d at 109-110.

In any event, assuming 303(d) listing based on a determination of "use impairment" only is proper, the result is significant to water supply considerations in the § 303(d) context. Regional Board Basin Plans all identify beneficial uses; few, if any, identify water quantity or flow objectives associated with those uses. But if a use impairment alone can justify 303(d) listing and if listing can occur based on flow considerations alone (pollution), then a Regional Board, or EPA itself, may decide that any water in the state should be 303(d)-listed due to flow and its effect on the uses in the Basin Plan. This process could prove very subjective, and, unlike significant water rights proceedings, would not require an evidentiary hearing. See Cal. Code Regs. tit. 23, §§ 760, 648-648.5.1 (adjudicative rules applicable to water rights hearings). A minimum instream flow found by the SWRCB in a water right proceeding to be appropriate to protect the use may not be adequate to prevent an "impaired" listing under § 303(d).

Listing of "Threatened" Waters

EPA's proposed regulations would also require § 303(d) listing of "threatened" water bodies. See 64 Fed.Reg. 46022. A water body is defined as threatened if water quality standards are currently being attained, but information indicates that the standards will likely be exceeded by the time the next 303(d)

list is prepared. 64 Fed.Reg. 46047. The impaired waters list must include water bodies threatened by pollutants or pollution. *Id.* at 46049. This would appear to mean, for example, that if there were a proposed diversion project or water right application pending or foreseen, the water body could be listed as impaired due to the threat of hydrologic modification (pollution), if EPA believed that the proposed diversion of water would affect a use identified in a Basin Plan.

Implementation Requirements

Section 303(d) requires the identification in TMDLs of load reductions required to achieve standards, but creates no obligation or authority for implementation of TMDLs. As described above, load reductions for point sources identified in a TMDL probably will occur automatically as a result of other sections of the CWA. However, § 303(d) and the CWA identify no other requirement for implementation of TMDLs. This is of particular importance with respect to nonpoint sources, which are not subject to direct regulation under the CWA.

EPA's proposed regulations find that EPA has inherent power to fill this regulatory gap. The regulations would require that state-developed TMDLs include a plan of implementation to implement the TMDL. *See* 64 Fed.Reg. 46032. In general, the regulations would require that states give "reasonable assurances" that the TMDL load reductions will be implemented. *See* 64 Fed.Reg. 46047.

The proposed implementation requirement is controversial. In California, however, the debate over EPA's authority to require such plans may be moot. A March 1, 1999, Memorandum from the Chief Counsel of the SWRCB (Memorandum) concludes that, irrespective of whether EPA can require implementation plans, California law requires implementation plans for TMDLs. The Memorandum reasons that TMDLs must, under federal law, be incorporated into state's water quality management plans. 33 U.S.C. § 1313(d)(2), and that such plans include the Basin Plans. Memorandum at 7. It further explains that, because Basin Plans must include a program of implementation, Water Code § 1322, each TMDL in California must necessarily include a program of implementation. Memorandum at 5, 7. This conclusion applies whether the TMDL was developed by the state or EPA. Memorandum at 8.

Implications

With minimal speculation, one can foresee the potential for future argument regarding the effect of the "impaired waters" list on water rights and water supply. This is true even though (for now) the regulations would not actually require a TMDL for waters impaired by flow modification only. Assume, for example, that a Basin Plan identifies aesthetic enjoyment, or fisheries, as a beneficial use. Assume there is a proposed diversion or permit application pending before the SWRCB. EPA presumably could list the water as impaired due to threatened flow reduction (pollution). This could have implications for the water rights process, for determinations regarding fully appropriated streams (Water Code § 1205) or, at minimum, for analysis of the project under the California Environmental Quality Act. Further, it may be argued that the listing creates an obligation to disapprove projects that require federal permits under § 404 of the CWA or the Federal Power Act. As a prerequisite to those permits, the states must certify compliance with water quality standards. 33 U.S.C. § 1341. *See* PUD No. 1, 511 U.S. at 712. In these circumstances, would the state be required to deny certification or impose flow requirements due to the § 303(d) impairment listing?

Similarly, it may be argued in the future that a § 303(d) listing and TMDL necessarily require modifications of existing water rights. It appears that if a state or EPA lists a water body as impaired due to both, or a combination of, loadings and hydrologic modification, a TMDL is required. The proposed regulations do not require that a TMDL address hydrologic impairment; they speak only of the required reductions in pollutant loading. Silence on the subject of pollution (flow) in this context is unfortunate. As a simple example, the fishery "use" might be found to be impaired due to silting of spawning gravels caused by land use and a lack of adequate flow to flush the gravels. It is not farfetched to imagine that the TMDL prepared could identify, in some form, the need to increase flow as part of attaining the use. If approved by EPA, or if prepared by EPA itself, this TMDL would presumably become part of the applicable Basin Plan. Would the state then have an obligation to implement the TMDL by modifying water rights of the person or agency whose diversion affects flow? Such an outcome would give

