

## HUGE CHANGES TO EPA STORMWATER PERMIT PROGRAM: MEP AND TMDL

### *Stormwater News*

The Environmental Protection Agency restored \$3 million in program funding to the Pennsylvania DEP after the commonwealth recently unveiled a new plan to achieve its pollution reduction goals.

Officials with the Chesapeake Bay Foundation say the federal agency withheld the money because of Pennsylvania's lack of progress in reducing pollution. The restored funding will go to support conservation districts that are directed in the new plan to conduct more inspections of farms. The additional funding will also allow farmers to install more pollution reduction practices.

**The EPA found Franklin County, Kansas in violation of the Clean Water Act after performing an investigation in April 2015 at the county's Construction and Demolition Landfill and Transfer Station, just east of Ottawa.**

The EPA reported solid waste in storm drains, and the potential for contaminated stormwater runoff coming from scrap metal piles and other solid wastes. Annual self-inspections, site evaluations and the monitoring of stormwater quality were also not being conducted at the transfer station, according to an EPA news release.

An agreement was reached on a \$20,000 penalty to be paid by the county for its violations, the release said.

*Continued on page 3*

### **Maximum Extent Practical (MEP) & Total Maximum Daily Loads (TMDL)**

The Ninth Circuit Court of Appeals told EPA that the current small MS4 permit program violated the law in two ways: (1) there must be a review of MS4 permits to determine if the permits "require controls to reduce the discharge of pollutants to the maximum extent practicable," and (2) permits issued to small MS4 must have a adequate opportunity for public participation.

The court ordered EPA to revise the permit program to resolve these two issues. In response, EPA is expected to give the states the option to either issue permits that meet the MEP standard, the statutory or to have the municipal permittee decide what controls they will use to meet the legal standard and the state or EPA will review the permit to determine if the controls are adequate to meet the standard.

Missing is the definition of maximum extent practicable. EPA refuses to define MEP leaving everyone to question, is this is the way to run NPDES. There should be one national standard not 50 or more standards. See the courts order at <https://law.resource.org/pub/us/case/reporter/F3/344/344.F3d.832.00-70822.00-70734.00-70014.html>

EPA won the TMDL battle. The law requires state participation and allows EPA to set compliance schedules and administer penalties when states do not control discharges from agriculture runoff . \*

### **INSIDE THIS ISSUE**

Page 2 - Public Comments on Proposed Small MS4 Rule

Page 3 - National Stormwater Center Comments on Rule

Page 4 - TMDL is National Solution to Pollution

Page 5 - The Chesapeake Bay TMDL Final Court Decision

Page 7 - Legal Winners and Losers

## EPA's Proposal to Revise Small Municipal Stormwater Permit

# Public Comments

The Ninth Circuit Court of Appeals ordered EPA to revise the small municipal stormwater permit program. While public participation is an issue, the EPA proposal focused who decides permit “best management practices” (BMP) to control the discharge of pollutants the “maximum extent practical.” EPA offered either the state or the municipality. The most popular option according to the states is . . . both.

The Court said: “stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. We therefore remand this aspect of the Rule.”

The public comment period is closed. EPA must decide and promulgate the final regulation by November 16, 2016. There were at least 72 comments, primarily state agencies. Almost all liked the third option for states to decide to use either the traditional process for states to determine permit BMPs or the more complicated process for municipalities to submit their proposed BMPs for state approval.

One state, the Washington Department of Environment did not support Option 2. “It is time for states and the EPA to set clear, measureable, and enforceable requirements that bring all small MS4s to consistent standards of implementation. Flexibility of individual programs can still be provided for within this context.”

Many states already follow a process in their programs that aligns closely with either concept.

This examples was offered: “states like Virginia and Tennessee acknowledge that Option 1 is close to how their general permit functions now. But other states like Minnesota and Texas are using an approach similar to that outlined under Option 2.”

Several state associations did not select an option, but made lengthy and detailed recommendations to EPA. They would have preferred to comment on actual rule language rather than a concept. The Association of Clean Water Administrators made 19 recommendation, one is for EPA to work with states to identify implementation timeframes.

The Department of Defense (DoD) operates nontraditional municipalities. They made a recommendation to use the administrative record to explain the rationale for BMPs, giving the permittee to provide feedback during the public comment period. They said the iterative process should not penalize MS4s for meeting requirements ahead of schedule and should not necessarily require more stringent BMPs.

The Natural Resource Defense Council (NRDC) wants EPA to develop MEP. “EPA is well-equipped to establish nationwide regulatory performance standards implementing this statutory MEP standard, just as the agency routinely does with other technology-based statutory standards under the Clean Water Act.”

To read any of the public comments, go to: <https://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=EPA-HQ-OW-2015-0671> or contact the National Stormwater Center at [info@NPDES.com](mailto:info@NPDES.com) \*

## States Cannot Define Federal Standards

EPA must define the standard required by the Clean Water Act. The federal standard to be defined by EPA is: maximum extent practicable (MEP). A clear reading of the law does not give states the power to define MEP. EPA must define MEP to include *management practices, control techniques and system, design and engineering methods . . .* the states may add . . . *such other provisions as . . . the State determines appropriate for the control of such pollutants.*

Not only is this a clear reading of the law, it's consistent with other sections of the law that provide states the right to issue permits conditions that are more stringent than EPA standards. MEP is a standard like *effluent guideline standards* that states must include in NPDES permits, but may not be less stringent. The statutory construction is parallel.

So far, EPA has decided not to define MEP so as to provide maximum flexibility for municipalities. That was an EPA mistake. Congress listed three requirements for the definition: (1) management, (2) controls and methods, and (3) such other provisions.

Another EPA mistake not to recognize that MEP is a technology based standard and water quality is a consideration by states only under the clause "such other provisions." The first two statutory requirements are EPA's responsibility, the third allows the state to add additional controls which may include water quality requirements.

MEP can be a list of specific controls, methods or quantities under each of the minimum control methods (MCM).

The authority for state NPDES permit issuance and enforcement is subject to specific rules. State NPDES programs are regulated under 40CFR123. This regulation requires adequate legal authority to develop a standard. But states do not have authority to develop a federal standard. Can EPA surrender their authority by allowing states to decide federal policy?

The options offered in the proposal failed to list the most obvious, the federal government (EPA) has a responsibility to define federal standards.

By John Whitescarver

## Stormwater News

(Continued From Page 1)

**Six Maryland waterkeeping organizations allege the EPA violated the Clean Water Act when officials excused 53 river segments from "total maximum daily load" requirements in 2012, according to the lawsuit filed in federal district court in Washington, D.C.**

"Pollution doesn't just originate in the middle of the Chesapeake Bay," said Elizabeth Nicholas, executive director of Waterkeepers Chesapeake, in a statement. "We have to look at all the smaller creeks and streams that are suffering impaired water quality throughout the watershed."

"EPA's action affects creeks, wetlands, ponds, and rivers that run through nearly all of the watersheds in seventeen counties in Maryland and Baltimore City," the lawsuit states.

"The de-listed segments suffer localized water quality problems, including harmful algal blooms, excessive sediment plumes, oxygen depletion due to pollution from nitrogen and phosphorus and fish die-offs..."

The complainants are asking the court to declare the EPA's approval of the state's list "unlawful and arbitrary," and set it aside.

**Municipal permits issued by the Maryland Department of the Environment comply with the federal Clean Water Act, according to a ruling filed Friday by the Maryland Court of Appeals.**

The case, brought against MDE by several environmental and riverkeeping organizations, upheld lower court rulings that supported the legality of the municipal permits for Anne Arundel, Baltimore, Montgomery and Prince George's counties, as well as Baltimore City.

**EPA's TMDL for Malibu Creek in southern California was upheld and the case closed by a US District Judge.** Las Virgenes Municipal Water District claimed that compliance with the TMDL would cost \$180 million. The TMDL identified total maximum daily load amounts of nitrogen and phosphorous pollution allowed to prevent excessive algae in the creek.

The municipal water district said they had already spent millions of dollars eliminating pollution in the creek and protecting the benthic macroinvertebrates, small creatures living among rocks, logs and sediment at the bottom of the creek.

The district's lawsuit challenged the total daily maximum loads as invalid under the Clean Water Act, claiming the EPA did not have the authority to enforce the measures in California and that the water quality standards had been adopted without following required rules and procedures. But they lost. \*

## Third Circuit Decision Includes Schedules and Penalties

# TMDL is the National Solution To Pollution

The court approved TMDL program applies in all states and their impaired water bodies. A TMDL is more than a number. It now comes with state plans to regulate nonpoint runoff from agriculture. It comes with a compliance schedule and with penalties for noncompliance.

The Supreme Court decided not to hear the appeal of the Chesapeake Bay TMDL opponents and to let the Third Circuit Court of Appeals decision be the final word. Because the opponents appealed to the Supreme Court, the decision of the Third Circuit is not limited to the geographic jurisdiction of the Third Circuit Court. It is now a national decision.

The decision applies to 42,368 impaired waters in the United States and 69,279 TMDLs. See the entire TMDL program at: [https://iaspub.epa.gov/waters10/attains\\_nation\\_cy.control?p\\_report\\_type=T](https://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T)

### **The Chesapeake Bay**

The Chesapeake Bay will get better but will fail to meet the 2017 objectives. The reason for failure is that the plan did not fully consider population growth and resistance by affected groups.

### **Legal Impact**

Opponents of TMDL will need to argue the science, not the law. While the science will be challenged in courts, it will be about the calculation of the TMDL numbers and the compliance schedule, not penalties. The penalty issue is

resolved in the Chesapeake Bay decision. Expect legal challenges against EPA and the states by environmental groups for failure to administer TMDLs properly.

**The TMDL program is now much more than a number.**

Where several states contribute to the impairment, EPA can require each state to implement a plan to bring the impaired water into compliance with WQS by a certain date. Failure to do so could result in imposed “backstop adjustment,” meaning that it will require greater reductions from point sources such as municipal waste water treatment and stormwater discharges. EPA can withholding grant money if progress is unsatisfactory.

### **Mississippi River**

The next major battleground should be the Mississippi River... There are ten states discharging into the Mississippi River. Like the Chesapeake Bay, States develop TMDLs, for EPA approval and compliance schedules are created along with a clear memoranda to the states that EPA will impose penalties for state noncompliance. The pollutants of concerns are like the Bay: nitrogen, phosphorus and suspended solids. It’s time to end the litigation and start reducing pollutants. For more information, visit: <http://www.msrivercollab.org/04/04-07-2015-court-rules-epa-accountable/> \*

## Decision Applies to 42,368 Impaired Waters in the US

# Final Court Decision on the Chesapeake Bay TMDL

The decision of the 3<sup>rd</sup> Circuit is the final decision on implementing EPA TMDL program. While the decision applies to the Chesapeake Bay, because it was appealed to the Supreme Court, the decision is not limited to the geographic jurisdiction of the 3<sup>rd</sup> Circuit Court. It is a national decision. This article summarizes the court's decision using extracts of the court's decision.

The TMDL is a comprehensive plan for pollution reduction designed to “restore and maintain the chemical, physical, and biological integrity” of the Bay. In 2010, EPA published the “total maximum daily load” (“TMDL”) of nitrogen, phosphorous, and sediment that can be released into the Chesapeake Bay (Bay) to comply with the water quality standards under authority of the Clean Water Act.

The Bay watershed area not only has a rapidly growing population; it also supports a great deal of commerce, including fishing, shipping, farming, and tourism. All these activities contribute pollutants to the Bay. As a result, it is plagued by dead zones with opaque water and algae blooms that render significant parts of it unable to support aquatic life.

The law requires states set a total maximum daily load, and the EPA approves or disapproves it. If the EPA disapproves, it must create the TMDL itself. In this case, the Chesapeake Bay watershed jurisdictions agreed that they will accept EPA's developed to the TMDL.

The TMDL sets target dates, anticipating that 60% of its proposed actions will be complete by 2017, with all pollution control measures in place by 2025.

The opponents of the bay TMDL say that the TMDL program goes beyond an allowable sum of pollutants (*i.e.*, the most nitrogen, phosphorous, and sediment the Bay can safely absorb per day) exceeded the scope of the EPA's authority to regulate, largely because the agency may intrude on states' traditional role in regulating land use.

The opponents interpreted the words “total maximum daily load” in the Clean Water Act, as only a number representing the amount of a pollutant that can be discharged into a particular segment of water and nothing more.

The opponents objected to how EPA used the TMDL process. They claimed EPA went beyond the law by requiring more than discharge limitations by imposing conditions and incentives that are not in the law.

The three judges unanimously decided to reject the opponent's arguments. The court's opinion concludes by saying “The challenge is long on swagger but short on specificity.”

The Court said that EPA “would fall afoul of this requirement if it published only a number with no supporting information, as the public would be unable to comment on the number without knowing whether or how the EPA thought such a level of discharged pollutant could be achieved.”

The judges said, “ putting it another way it is illogical to assert the EPA usurps states' traditional land-use authority when it makes no actual, identifiable, land-use rule and (2) proposes regulatory actions that are specifically allowed under federal law.”

*see Beyond The Numbers on the next page*

# Beyond The TMDL Numbers

(Continued)

## The EPA laid out much more than number:

- (1) how and why it arrived at the numbers it chose;
- (2) how it thinks it and affected jurisdictions will be able to achieve the numbers;
- (3) why the numbers are “necessary to implement the applicable water quality standard when it expects the TMDL to achieve the applicable water quality standard; and
- (4) what it will do if the water quality standard is not met.

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**The TMDL requires annual reductions to the Bay of nitrogen - 25 percent, phosphorus - 24 percent and sediment - 20 percent.**

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## STATES REGULATE NONPOINT SOURCES

Because the TMDL accounts for both point and nonpoint sources, the program is a federal-state cooperation effort. EPA provides grants to states to implement nonpoint sources of pollution such a runoff from farms.

But EPA cannot regulate nonpoint sources. Only states can regulate nonpoint sources

Because TMDLs only relate to bodies of water for which point source limitations are insufficient, they must take into account pollution from both point and nonpoint sources.

Therefore the TMDL must incorporate nonpoint

source limitations. The word “total” means the sum of point source and nonpoint source. EPA used the words load allocation for non-point discharges and waste load allocations for point sources.

## INCENTIVIES vs DISINCENTIVIES

EPA must approve state implementation of Watershed Improvement Plans. “If progress is insufficient, EPA will utilize contingencies to place additional controls on federally permitted sources of pollution and . . . as well as target compliance and enforcement activities.”

EPA decided to exercise “reasoned judgment” in evaluating the states’ proposed standards.

EPA incentive for states include establishing waste load allocations and load allocations (i.e., more tightly overseeing states’ pollution control) and conditioning federal grants based on progress in implementing the Watershed Improvement Plans (i.e., withholding money if progress is unsatisfactory).

The allocations are not self-executing, and all the other enforcement actions concern administration of federal programs plainly within the EPA’s authority.

EPA TMDL program imposed a “backstop adjustment,” meaning that it will require greater reductions from point sources in Pennsylvania and West Virginia if those states cannot meet their projected load allocations. \*

## Who Lost and Who Won

# Chesapeake Bay TMDL Program Litigation

### **This the list of legal losers:**

American Farm Bureau Federation;  
    Pennsylvania Farm Bureau;  
The Fertilizer Institute;  
National Chicken Council;  
U.S. Poultry & Egg Association;  
National Pork Producers Council;  
National Corn Growers Association; National Turkey  
Federation;  
National Association of Home Builders,

The 21 states involved are: Alabama,

Alaska,

Arkansas,

Florida,

Georgia,

Indiana,

Kansas,

Kentucky,

Louisiana,

Michigan,

Missouri,

Montana,

Nebraska,

North Dakota,

Oklahoma,

South Carolina, South Dakota,

Texas,

Utah,

West Virginia, and

Wyoming.

### **This the list of legal winners:**

US Environmental Protection Agency;  
Chesapeake Bay Foundation Inc.;  
Citizens for Pennsylvania's Future; Defenders of  
    Wildlife;  
Jefferson County Public Service District; Midshore  
Riverkeeper Conservancy;  
National Wildlife Federation;  
Virginia Association of Municipal  
    Wastewater Agencies, Inc.;  
Maryland Association of Municipal Wastewater  
    Agencies;  
National Association of Clean Water Agencies;  
Pennsylvania Municipal Authorities Association;  
City of Annapolis, Maryland.

### **Beyond the legal winners are:**

Environmental groups, states that border the Bay,  
tourists, fishermen, and municipal wastewater  
treatment works.

The losers are rural counties with farming operations,  
nonpoint source polluters, and the agricultural  
industry. But the losers will become a major solution  
to pollution as they control runoff from their  
activities. Then there no losers, only winners!

Opponents to the Bay program brought a suit in the Federal District Court in Harrisburg PA. They lost the suit in a 99 page decision by the judge. The opponents appealed the District Court decision to the 3<sup>rd</sup> Circuit Court of Appeals. They lost that appeal in a unanimous 3 judge 60-page decision. They appealed to the Supreme Court and lost in a one page decision not to hear their appeal. Therefore, the decision of the 3th circuit stands. \*

**Paul Davis**  
**Instructor for the**  
**National Stormwater Center**



- ⇒ Retired from Tennessee Department of Environment & Conservation after 38 years of service
- ⇒ Served as Director of Water Pollution Control in TN
- ⇒ Licensed Engineer with a BS in Engineering Science and an MS in Water Resources
- ⇒ Life Member for the Water Environment Federation and serves on their Stormwater committee
- ⇒ Dedicated Environmentalist who understands the complexities of SW permitting and permit enforcement
- ⇒ Member of Association of Clean Water Administrators

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Apr 4-5	Little Rock, AR
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Apr 7-8	New Orleans, LA
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Apr 14-15	Kansas City, KS
Apr 18-19	Pittsburgh, PA
Apr 21-22	Charleston, WV
May 9-10	Ontario, CA
May 12-13	Las Vegas, NV
May 23-24	Detroit, MI
May 24-25	Annapolis, MD
May 24-25	Minneapolis, MN
May 26-27	Chicago, IL
June 6-7	Harrisburg, PA
June 9-10	Allentown, PA
June 13-14	San Diego, CA
June 15-16	LAX, CA
June 20-21	Myrtle Beach, SC
June 21-22	Cincinnati, OH
June 23-24	Hilton Head, SC

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