

RECENT DEVELOPMENTS IN WATER QUALITY REGULATION AND PERMITTING

Timothy P. Atkinson
Oertel, Fernandez, Bryant & Atkinson, P.A.
2060 Delta Way
Tallahassee, FL 32303
850-521-0700

WATER QUALITY STANDARDS

Water quality standards are the foundation of the water quality-based control program mandated by the Clean Water Act. A water quality standard consists of four basic elements:

- (1) *designated uses* of the water body (e.g., recreation, water supply, aquatic life, agriculture)
- (2) *water quality criteria* to protect designated uses (numeric pollutant concentrations and narrative requirements)
- (3) an *antidegradation policy* to maintain and protect existing uses and high quality waters, and
- (4) *general policies* addressing implementation issues (e.g., low flows, variances, mixing zones).

Water quality standards are important because they help to protect and restore the quality of the nation's surface waters, consistent with the requirements of the Clean Water Act. Standards help to identify water quality problems caused by, for example, improperly treated wastewater discharges, runoff or discharges from active or abandoned mining sites, sediment, fertilizers, and chemicals from agricultural areas, and erosion of stream banks caused by improper grazing practices. Standards also support efforts to achieve and maintain protective water quality conditions, including:

- (1) total maximum daily loads (TMDLs), waste load allocations (WLAs) for point sources of pollution, and load allocations (LAs) for non point sources of pollution,
- (2) water quality management plans which prescribe the regulatory, construction, and management activities necessary to meet the water body goals,
- (3) NPDES water quality-based effluent limitations for point source discharges,
- (4) water quality certifications under CWA §§ 401 for activities that may affect water quality and that require a federal license or permit,
- (5) reports, such as the reports required under CWA §§ 305(b), that document current water quality conditions, and
- (6) CWA §§ 319 management plans for the control of non point sources of pollution.

The Clean Water Act requires States and authorized Indian Tribes to review their standards from time to time, but at least once every three years, and revise them if appropriate. Updates may be needed, for example, due to changing water quality conditions or water body uses or new scientific information on the effects of pollutants in the environment. In preparing proposed revisions to their standards, States and Tribes consider request from industry, environmental groups, and the public, and review available information (e.g., CWA § 305(b) reports, EPA guidance).

Each State and authorized Tribe has its own legal and administrative procedures for adopting water quality standards. In general, standards are adopted following a process in which draft revisions are developed (this may include a work group process or informal public meetings) and formally proposed for public comment. A public hearing is then held to receive input from the public regarding the proposal. The proposed water quality standards and supporting information are made available to the public prior to the hearing. States and Tribes are required to prepare a summary of the public comments received and how each comment was addressed. New or revised water quality standards become effective for purposes of the Clean Water Act upon EPA approval.

EPA approval of a new or revised water quality standard is considered a federal action which may be subject to the Section 7 consultation requirements of the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies to protect endangered species and threatened species and prohibits actions “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical....” Accordingly, consultation with the U.S. Fish and Wildlife Service is an important part of EPA's water quality standards approval process.

The Clean Water Act also authorizes EPA to promulgate superseding Federal water quality standards in cases where new or revised State or Tribal standards are not consistent with applicable requirements of the Act or in situations where the EPA Administrator determines that Federal standards are necessary to meet the requirements of the Act. EPA promulgation of water quality standards requires a rule making process and opportunity for public review and comment.

RECENT DEVELOPMENTS

TRIENNIAL REVIEW STATE SURFACE WATER QUALITY STANDARDS

Under the Clean Water Act, all states and tribes are required to periodically conduct a comprehensive review of their surface water quality standards. Known as “Triennial Review” because the state must conduct a review at least once every 3 years. The FDEP has conducted numerous workshops over the past 4 years related to Chapters 62-302 (Surface Water Quality Standards), Chapter 62-303 (Identification of Impaired Surface Waters), Chapter 62-4 (permits), Human health-based criteria, dissolved oxygen, numeric nutrient criteria (implementation).

Currently, the FDEP expects to begin its next round of Triennial Review in early 2015 on Human health-based criteria, bacteria, updates to waterbody classifications (changing some Class III waters to Class I waters (drinking water sources); changing some Class III waters to Class II waters (shellfish harvesting)), and water quality trading rulemaking.

Human Health-Based Criteria

The Human health-based criteria has largely been deferred from adoption while the Department continues its work. At this time, the Department believes that its probabilistic approach is superior to the EPA's deterministic approach. The EPA is moving forward on adoptions of its approach and is actively soliciting 3d-party comments. The Department is preparing its comments to EPA on EPA's proposals. The Florida ERC requested a more regional-specific approach, but the Department (and the EPA) is awaiting additional fish consumption data from NHANES (National Health and Nutrition Examination Survey, which is a program undertaken by the Federal Centers for Disease Control and Prevention.

Bacterial Water Quality Criteria FDEP Initiative to Restore Bacteriologically Impaired Surface Waters

The Department's bacteria initiative to restore and protect beaches and other recreational waters, through new laboratory tools and assessment methods to identify and reduce the sources of pathogens in recreational waters is underway. The Department has initiated rule development in Chapters 62-302, 62-303, and 62-304, F.A.C., to develop new rules that refine water quality standards to take advantage of this new technology and the data that will be available to make beach and recreational waters safer, and has to-date held four Technical Advisory Committee (TAC) meetings. The Department plans a public workshop this fall, and will present draft language for review. One procedural issue under review is whether the Bacteria Restoration Process will allow interested parties to retain a point of entry in a process that could be largely automatic. Some key features:

Revise bacteria criteria in Chapter 62-302, F.A.C.: Change from fecal coliforms to E. coli in freshwater and to enterococci in marine waters.

Revise Impaired Waters Rule (Chapter 62-303, F.A.C.): Will revise assessment methodology to address new indicator, and will also include Study List option for waters where information indicates the exceedances may be due to non-anthropogenic sources. Will also reference bacteria TMDL.

Adopt Statewide Bacteria TMDL in Chapter 62-304, F.A.C.: Applies statewide, but waters covered under the TMDL will be specifically identified; Rule provides WLA (waste load allocations for continuous point sources) and LA (load allocations for non-point and background

sources), but not percent reduction.

Adopt Statewide Bacteria Restoration Plan by Rule or Final Order of the Secretary: Applies statewide, but waters covered under the Restoration Plan will be specifically identified; Plan will clarify responsibility to conduct a “Walk the WBID” (WTW) and provide restoration requirements, by source type, for sources identified in WTW.

Identify Waters covered under TMDL and Restoration Plan: As part of watershed management cycle, the Department will identify waters (in Basin Group assessed that year) that do not meet revised bacteria criteria and will provide public notice of identified waters at public meetings for the Draft and Verified Lists; The Final Order adopting the Verified List will specifically identify these waters as being covered under the TMDL for bacteria adopted in Rule 62-304.900, F.A.C., and the bacteria restoration plan, which will be adopted either by rule or final order.

Numeric Nutrient Update

In a ruling that ends a long battle over who gets to keep Florida water clean, U.S. District Judge Robert L. Hinkle ruled in early January 2014 in support of the U.S. Environmental Protection Agency’s (EPA) motion to modify the consent decree regarding numeric nutrient criteria for Florida’s waters. This means that federal rulemaking for nitrogen and phosphorus pollution in Florida’s waterways was discontinued in favor of the implementation of FDEP’s NNC rules, which the FDEP calls "the most comprehensive numeric nutrient criteria in the nation."

In 2010 the EPA imposed its own numeric nutrient criteria on Florida waters after a number of environmental groups sued the agency for not enforcing the Clean Water Act in Florida. Those groups included the Nature Conservancy of Southwest Florida, the Environmental Confederation of Southwest Florida, St. Johns Riverkeeper and the Sierra Club.

Opponents of the EPA's oppressively costly, untested criteria for fixing the pollution of Florida waters included agriculture, employers, local government and utilities. All put a high priority on clean water but they believed Florida -- not the federal government -- knows what's best for Florida and how to accomplish it.

In response to the federal government's stringent nutrient criteria solution, Florida DEP came up with a proposal to set numerical limits on nutrients that come from pollutants such as fertilizer, animal waste, and sewage. Those are the things that proliferate toxic, slimy algae blooms, kill fish and make people sick. After more than a year, the EPA agreed in 2012 that the state proposal is sound and workable.

In March 2013, the Florida Department of Environmental Protection and the U.S. Environmental Protection Agency reached an agreement to continue to protect Florida’s waterways from nitrogen and phosphorus pollution.

In June 2013, numeric nutrient criteria were approved for the final 18 estuaries along the Springs Coast, along with 448 miles of open coastal waters. This capped a series on comprehensive rulemaking efforts that previously adopted numeric nutrient criteria for the state's lakes, rivers, streams and springs, and the estuaries from Clearwater Harbor to Biscayne Bay, including the Florida Keys. EPA approved all these numeric nutrient criteria, which was also supplemented by the department's August 2013 report to the governor and Florida Legislature.

Five environmental groups appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit challenging the order of U.S. district court Judge Hinkle. Specifically, the Florida Wildlife Federation, the Sierra Club, the Conservancy of Southwest Florida, the Environmental Confederation of Southwest Florida, and St. Johns Riverkeeper are appealing the district court's January 7, 2014, order, which allowed the U.S. Environmental Protection Agency to modify a 2013 consent decree so that the State of Florida can set the nutrient criteria for all its waters. Without the modification, the consent decree requires EPA to adopt numeric nutrient standards for Florida's waters unless the State does so first. The appeal is ongoing.

Meanwhile, the FDEP is working on NNC for some remaining estuaries, will hold public workshops in late August 2014, and intends to complete its work and present the proposed rules to the ERC in November for adoption.

Water Quality Credit Trading

EPA has touted water quality trading for more than a decade as a viable tool for combating water pollution, particularly pollution due to excess nutrients and sediment. But the Clean Water Act contains no express authority for water quality trading or offsets, and some environmental groups view trading as a "license to pollute" that violates the Clean Water Act's promise to eliminate the discharge of pollutants into waters of the United States.

The Florida Legislature in 2008 adopted HB 547 to allow water quality credit trading in the Lower St. Johns River Basin. Water quality credit trading is a voluntary, market-based approach to promote the protection and restoration of Florida's rivers, lakes, streams and estuaries.

In December of 2013, a federal district court issued a final ruling in the first reported challenge to the legality of water quality trading. The court dismissed the action without reaching the legality of water quality trading. Instead, the court held that the plaintiff environmental groups (Food and Water Watch and Friends of the Earth) lacked standing and that EPA's "authorization" of trading in the Chesapeake Bay TMDL was not a final agency action. Food and Water Watch v. EPA, No. 1:12-cv-01639 (D.D.C. decided December 13, 2013).

In 2013, the Florida Legislature adopted CS/CS/HB 713 (Ch. 2013-146, Laws of Florida) which in Section 403.067(8) – (10), Florida Statutes, expanded the pilot St. Johns River water quality credit program to all of the surface waters of the State. The bill authorizes the Department to approve voluntary water quality credit trading in adopted basin management action plans (BMAPs).

Thus, CS/CS/HB 713 allows the FDEP to authorize a voluntary water quality trading credit program in adopted basin management action plans. Participants in the program must notify the DEP of the price for credits, how the price was determined, as well as any state funding received for the facilities/activities that generated the credits. The bill deletes a provision of law that limits water quality credit trading only to the Lower St. Johns River basin. The bill clarifies that the expansion of the water quality credit trading program may not be construed as altering any applicable state water quality standards or as restricting the authority to the water management districts or DEP.

Section 403.067(8) – (10), Florida Statutes, authorizes the Department to adopt rules allowing water quality credit trading among the pollutant sources to a water body or water body segment, that specifically must provide as follows:

1. The process to be used to determine how credits are generated, quantified, and validated.
2. A publicly accessible water quality credit trading registry that tracks water quality credits, trading activities, and prices paid for credits.
3. Limitations on the availability and use of water quality credits, including a list of eligible pollutants or parameters and minimum water quality requirements and, where appropriate, adjustments to reflect best management practice performance uncertainties and water-segment-specific location factors.
4. The timing and duration of credits and allowance for credit transferability.
5. Mechanisms for determining and ensuring compliance with trading procedures, including recordkeeping, monitoring, reporting, and inspections.

At the time of publication of the draft rules on water quality credit trading, the department shall submit a copy to the United States Environmental Protection Agency for review.

The Department plans to hold workshops on water quality trading in tandem with its workshops on NNC for estuaries. Once proposed rules have been developed, the Department intends to adopt the rules via Secretarial adoption (e.g., without ERC review).

TMDLs

A TMDL is a scientific determination of the maximum amount of a given pollutant that a surface water can absorb and still meet the water quality standards that protect human health and aquatic life. Water bodies that do not meet water quality standards are identified as "impaired" for the particular pollutants of concern--nutrients, bacteria, mercury, etc.--and TMDLs must be developed, adopted and implemented for those pollutants to reduce pollutants and clean up the

water body.

The threshold limits on pollutants in surface waters--Florida's surface water quality standards on which TMDLs are based--are set forth primarily in rule 62-302, Florida Administrative Code, and the associated table of water quality criteria.

What are the basic steps in the TMDL program? How does it work?

1. Assess the quality of surface waters--are they meeting water quality standards? (Surface Water Quality Standards - Chapter 62-302)
2. Determine which waters are impaired--that is, which ones are not meeting water quality standards for a particular pollutant or pollutants. (Impaired Waters Rule (IWR) - Chapter 62-303)
3. Establish and adopt, by rule, a TMDL for each impaired water for the pollutants of concern--the ones causing the water quality problems. (TMDLs - Chapter 62-304)
4. Develop, with extensive local stakeholder input, Basin Management Action Plans (BMAPs) that....
5. Implement the strategies and actions in the BMAP.
6. Measure the effectiveness of the BMAP, both continuously at the local level and through a formal re-evaluation every five years.
7. Adapt--change the plan and change the actions if things aren't working.
8. Reassess the quality of surface waters continuously.

The Department is working on a more comprehensive approach to protecting Florida water quality involving basin-wide assessments and the application of a full range of regulatory and non-regulatory strategies to reduce pollution. The Total Maximum Daily Load (TMDL) is the heart of this comprehensive approach.

FDEP's Two-Year TMDL Development Plan for State Fiscal Year 2014-2015 and 2015-2016 is now available online. The Department posted a detailed list of the specific waterbodies included in its two-year TMDL development plan. The regulatory development plan for the current state fiscal year (SFY), which runs from July 1, 2014 through June 30, 2015, includes 51 individual waterbodies which will be addressed through 13 TMDL rulemaking projects in the next year. The identified "business plan date" in the table is the anticipated date of developing a DRAFT TMDL and proposing TMDL rule language. The plan also includes the tentative waterbodies identified for development in SFY 2015-2016. While the plan is subject to change depending on overall Department priorities and directives, it represents the currently anticipated TMDL development work load and reflects feedback received from stakeholders during a series of public workshops. The Department held six public meetings in the spring of 2014 to obtain public comment in Live Oak, West Palm Beach, Fort Myers, Pensacola, Orlando and Bartow.

The Department announces the availability of amended Verified and Delist Lists of impaired waters for the Cycle 3 - Group 1 and Cycle 2 - Group 2, 3, and 5 Basins: The Department has published revised verified lists of impaired waters and delist lists by Secretarial Order (signed by DEP Secretary Herschel Vinyard, Jr. and filed by the Department clerk on January 27, 2014) for the Group 1 (Suwannee, Ocklawaha, and Tampa Bay); Group 2 (Middle St. Johns River and

Tampa Bay Tributaries); Group 3 (Choctawhatchee – St. Andrews); and Group 5 (Everglades, Indian River Lagoon, Springs Coast, and Upper East Coast) basins. These lists were revised to make necessary changes in response to additional information provided to and evaluated by the Department.

Now that these lists have been adopted by Secretarial Order, the Department staff will prioritize waters on the verified list for TMDL development. A Total Maximum Daily Load (TMDL) represents the maximum amount of pollutant loading that can be discharged to a waterbody and still attain its designated uses. After TMDL adoption, the next step in this process will be the development, by watershed stakeholders and the Department, of a Basin Management Action Plan (BMAP). The BMAP will specify the activities, schedule, and funding sources that point and nonpoint source dischargers will undertake to restore the waterbody.

2014 FDEP Strategic Monitoring Plans

These plans represent the water quality and biological monitoring being done by the Department in preparation for basin assessments as part of the watershed management approach. The Watershed Assessment, Strategic Monitoring Plans are developed to assist in assessing the health of surface waters by conducting hydrological and biological watershed-based monitoring activities. These activities are carried out by Regional Operation Center (ROC) staff located in each of the Department's six District offices and assessment staff in Tallahassee. For additional information and/or to download the 2014 Strategic Monitoring plans, please see the Strategic Monitoring Plans web page.

2014 Integrated Water Quality Assessment for Florida

The Department has announced the publication of the 2014 Integrated Water Quality Assessment Report for Florida. This report is a comprehensive data collection effort and includes information regarding the quality of Florida waters. This report includes contributions from monitoring efforts at all levels – by government, universities, volunteer groups, and individuals – resulting in substantially more monitoring stations and water quality data than any other state in the nation. More than 30% of the nutrient data for the nation comes from Florida waters. In fact, 25% of the nation's ambient water quality monitoring stations (more than 41,000) are located within Florida. This large amount of water quality data is used annually for the assessment of waterbody health by means of a comprehensive stepwise approach. Hundreds of assessments are conducted each year. Additionally, as part of this report, a statewide water quality condition is presented using an unbiased randomized monitoring design, and water quality trends are reported at 76 separate surface water and 49 ground water stations.

Site Specific Alternative Criteria (SSAC)

Site specific criteria replace the criteria applicable statewide in cases where site specific information supports different numeric criteria. Any SSAC must fully support and protect the designated use of the waterbody. SSACs fall into two types: Type I and Type II. Type I SSACs (Rule 62-302.800(1), FAC) are established to reflect natural background conditions, such as lower dissolved oxygen levels than the statewide default criteria. Type II SSACs (Rule 62-302.800(2), FAC) are established for situations other than natural background conditions. Both types of SSACs must still fully protect the designated use of the water body. Examples of site specific criteria include the Everglades phosphorus criterion (Rule 62-302.540, Florida Administrative Code) and the Site Specific Alternative Criteria described in Rule 62-302.800, FAC.

There is a SSAC proposal by Pace Water System, Inc. being developed for Environmental Regulation Commission (ERC) review and approval related to pH levels in Simpson River and adjacent wetlands (Pace Swamp) in Santa Rosa County, Florida. The water body is classified as Class III waters, with a designated use of “Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife.” The proposed rule amendment would revise the surface water quality criterion for pH in the Pace Water System wetlands discharge system (Pace Swamp) to 7.0 standard units. Other Florida utilities may follow with SSAC proposals for pH should the ERC approve this SSAC.

Revisions to the DEP Quality Assurance (QA) Rule (62-160, F.A.C.)

The FDEP has revised the Quality Assurance Rule, 62-160, F.A.C. These revisions generally update a reference to an EPA QA requirement, provide clarifications of existing policy, the addition of new exemptions, expansion of approved methods, expand accepted recordkeeping formats, and update documents incorporated by reference (including the DEP SOPs, “DEP Standard Operating Procedures for Field Activities” (DEP-SOP-001/01) and “DEP Standard Operating Procedures for Laboratory Activities” (DEP-SOP-002/01)). These revisions are the result of stakeholder comments and additional research which have been incorporated into the draft documents since the public workshops held in October 2011 and September 2012. The changes will be effective July 30, 2014.

EPA ANTIDegradation POLICY

Water quality standards include an antidegradation policy and implementation method. The water quality standards regulation requires States and Tribes to establish a three-tiered antidegradation program.

Tier 1 maintains and protects existing uses and water quality conditions necessary to support such uses. An existing use can be established by demonstrating that fishing, swimming, or other uses have actually occurred since November 28, 1975, or that the water quality is suitable to allow such uses to occur. Where an existing use is established, it must be protected even if it is

not listed in the water quality standards as a designated use. Tier 1 requirements are applicable to all surface waters.

Tier 2 maintains and protects "high quality" waters -- water bodies where existing conditions are better than necessary to support CWA § 101(a)(2) "fishable/swimmable" uses. Water quality can be lowered in such waters. However, State and Tribal Tier 2 programs identify procedures that must be followed and questions that must be answered before a reduction in water quality can be allowed. In no case may water quality be lowered to a level which would interfere with existing or designated uses.

Tier 3 maintains and protects water quality in outstanding national resource waters (ONRWs). Except for certain temporary changes, water quality cannot be lowered in such waters. ONRWs generally include the highest quality waters of the United States. However, the ONRW classification also offers special protection for waters of exceptional ecological significance, i.e., those which are important, unique, or sensitive ecologically. Decisions regarding which water bodies qualify to be ONRWs are made by States and authorized Indian Tribes.

Antidegradation implementation procedures identify the steps and questions that must be addressed when regulated activities are proposed that may affect water quality. The specific steps to be followed depend upon which tier or tiers of antidegradation apply.

On September 4, 2013, EPA published a proposed rule to modify its Water Quality Standards program. See 78 FR 54517 (September 4, 2013). The proposed rule addresses six key topics that have been the subject of litigation and past EPA guidance, and include EPA's antidegradation policies. The official comment period closed December 3, 2013. The proposed changes to EPA's antidegradation policy will likely result in more water bodies being classified as "high quality" waters, making it more difficult for states to allow for changes in pollutant loading in such water bodies.

EPA's antidegradation revisions propose to tighten state antidegradation policies. EPA has proposed revisions that will require water quality classifications to be made on a use-by-use basis, as opposed to a water body-by-water body basis. The likely result will be more waters classified as "high quality" waters subject to stricter antidegradation review since a waterbody can now be classified as "high quality" for some uses even when it has not fully attained all applicable use-based standards. Some jurisdictions already implement antidegradation review in this manner, but for entities in those jurisdictions that do not, sources could find themselves facing a more rigid and onerous process in justifying a change in discharge limits.

Further, EPA is proposing to require an alternatives analysis before a state allows added pollutant loading to a "high quality" water body. Under 40 C.F.R. § 131.12, states can permit additional discharges to a high quality water body if it determines "that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." Traditionally, states have been allowed to determine how best to make these findings, but EPA's proposed rule would mandate a specific framework, including an alternatives analysis "that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated

with the proposed activity” and a requirement that the state adopt any “practicable alternatives” the state can identify.

Finally, EPA is proposing to enhance its oversight of state antidegradation policies by, at a minimum, requiring states to develop “antidegradation implementation methods” that will be subject to EPA review. But, EPA has stated that is considering going further to require that these implementation methods be expressed as water quality standards themselves, which would enable EPA to impose its own determinations of proper management of high quality waters on state programs.

Antidegradation is a laudable component of the Clean Water Act, but its overuse can result in the ossification of outdated permit terms. It can also make it more difficult for state agencies to adapt their regulations to evolving knowledge about the complex chemical and biological forces at play in evaluating water body health. EPA’s current proposal, if adopted, could result in a significant new hurdle for both state authorities and permittees seeking to alter existing water quality-based discharge limits or develop permits for new sources.

Florida’s comment on the proposed rule notes that it has adopted its antidegradation policy and implementation method by rule. “However, we do not believe that states should be required to submit their implementation methods as part of their water quality standards.” The FDEP is also concerned that the EPA has not made it clear in the preamble to the proposal how it would evaluate implementation methods.

EPA’s proposal would make it more difficult for states to authorize the use of certain waters for economic development. Some states have voiced their opposition to the proposal, which they view as an attempt by the EPA to constrict their ability to determine water quality and authorize uses of waters as they believe necessary and appropriate in a state context. The antidegradation proposal has received support from environmental groups, but the EPA may find it difficult to follow through with a final rule that appears to veer dramatically from the state-federal cooperation contained in the federalism principle.

WATER QUALITY STANDARDS – CASES OF INTEREST

- **Mingo Logan Coal Co. v. EPA, No. 12-1550 (U.S. Ct. App. D.C. April 23, 2013).**

A three-judge panel of the D.C. Circuit Court of Appeals, reversing a lower court, held for the first time that EPA has express authority under the Clean Water Act to veto a Section 404 dredge and fill permit that the U.S. Army Corps of Engineers had issued years earlier. *Mingo Logan Coal Co. v. Environmental Protection Agency*. The appellate court held that Section 404 of the Act imposes no temporal limit on EPA’s authority to deny or restrict disposal sites “whenever” the EPA Administrator makes a determination that an “unacceptable adverse effect will result.” The practical effect of the decision is to create uncertainty and risk to a broad range of businesses – including those in the construction and mining industries – that EPA will veto a CWA Section 404 permit long after it has been issued by the Corps. The U.S. Supreme Court voted in March of 2014 to deny review.

- **Southern Appalachian Mtn Stewards v. A & G Coal Corp., App. No. 13-2050, slip op. at 10 (4th Cir. July 11, 2014).**

The Fourth Circuit held that applicants for new or reissued Clean Water Act (“CWA”) Section 402 individual permits – known as National Pollutant Discharge Elimination System (“NPDES”) permits – must consider the absence or presence of some 135 substances before the applicants can be shielded from liability for the presence of these substances in the permitted discharges. See *Southern Appalachian Mtn. Stewards, et al. v. A & G Coal Corp.* (“SAMS”), App. No. 13-2050, slip op. at 10 (4th Cir. July 11, 2014). The Fourth Circuit’s decision has ramifications for all CWA individual permit applicants.

The SAMS decision clarifies that a discharger must declare its belief that each pollutant listed in the application form is either present or absent, and may not rely on a lack of relevant knowledge and remain silent. In the past, some dischargers have declared ignorance and declined to opine whether a pollutant is present or absent. Under SAMS, those dischargers can no longer invoke the permit shield protection in agency enforcement or citizen suits if those pollutants are in fact present in discharge.

In SAMS, several environmental organizations sued A&G Coal Corp. (“A&G”) for discharging selenium from its surface runoff holding ponds. Selenium is one of the pollutants for which EPA’s regulations require an NPDES applicant to “indicate whether it knows or has reason to believe . . .” is present in its discharge. 40 C.F.R. § 122.21(g)(7)(vi) & (vii). The EPA permit application form, however, goes further, requiring that an applicant state either that it believes the pollutant to be present or absent from its discharge. A&G’s application left both of those questions blank, and the permit issued by the State of Virginia neither discussed selenium nor identified it as a regulated (or unregulated) parameter.

A&G argued that because it had no reason to believe selenium would be in its effluent, it had met its disclosure duty despite its failure to specifically flag selenium. The Fourth Circuit disagreed and held that not mentioning selenium, even where A&G had no reason to expect its presence, was an inadequate disclosure. Instead, the court said that A&G needed to state affirmatively whether selenium was “believed present” or “believed absent” in its permit application to invoke the permit shield. “Silence as to the existence of a referenced pollutant is not adequate.” SAMS, slip op. at 14-15.

- **Virginia DOT v. EPA, Slip Opinion, Civil Action No. 1:12-CV-775, U.S.D.C, E.D. Virginia (Jan. 3, 2013), 2013 WL 53741.**

The Federal District Court for the Eastern District of Virginia held that the EPA cannot regulate storm water flow in setting a total maximum daily load (TMDL) for impaired waters under the Clean Water Act. The court found that EPA can only issue TMDLs for actual pollutants.

The Virginia DOT filed a Motion for Judgment on the Pleadings raising a single issue: “Does the Clean Water Act authorize EPA to regulate the level of a pollutant in Accotink Creek by

establishing a TMDL for the flow of a nonpollutant into the creek?” The court reviewed EPA’s decision to set the TMDL under the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.* The first step under *Chevron* is to determine whether Congress addressed the “precise question at issue.” The second step under *Chevron* is – if necessary – to determine whether EPA’s interpretation of the CWA was “permissible.” Applying *Chevron*’s first step, the court analyzed whether Congress expressly authorized EPA to set a TMDL for stormwater, a nonpollutant. The court noted that the DC Circuit has considered and rejected a similar attempt by EPA “to take liberties with the way Congress intended it to express its TMDLs.” In that case, *Friends of the Earth, Inc. v. EPA*, the court found that EPA was not allowed to express a TMDL for the Anacostia River in terms of annual or seasonal maximums because the CWA granted EPA authority only for daily loads. In *Virginia DOT*, the court cited *Friends of the Earth, Inc. v. EPA*, for the proposition that “EPA may not regulate something over which it has no statutorily granted power – annual loads or nonpollutants – as a proxy for something over which it is granted power – daily loads or pollutants.” Analyzing the case under *Chevron* step one, the *Virginia DOT* court found under the plain language of the statute that sediment is a “pollutant” – as the term is defined by the CWA – but stormwater is not. The court expressly rejected EPA’s argument that the stormwater maximum load may be regulated as a surrogate for sediment. The court noted that even given deference, EPA’s position would also fail under *Chevron* step two because EPA was impermissibly attempting to increase the extent of its authority by setting flow TMDLs. The court held, therefore, that the CWA unambiguously does not authorize EPA to regulate stormwater runoff via TMDL because stormwater is not a pollutant, and granted Virginia DOT’s motion for judgment on the pleadings.

FEDERAL RULEMAKING AND POLICY UPDATE

EPA / USCOE Wetlands Rulemaking. The EPA and the U.S. Army Corps of Engineers have proposed a rule concerning their jurisdiction over wetlands and other ancillary waters. The agencies a joint proposed rule that would, if enacted, expand the agencies’ Clean Water Act jurisdiction over permits to dredge and fill wetlands and other waters under CWA §404 and to discharge pollutants to surface waters under CWA §402 (NPDES). The proposed rule relies on a 331-page draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* that the EPA’s Science Advisory Board released for public comment in September 2013. The agencies are using the draft Report as the scientific basis for the policy decisions expressed in the jurisdictional rule.

The proposed rule embodies the agencies’ current views on the reach of the CWA in light of the Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States*. The rule will supersede a 2003 “Joint Memorandum” providing clarifying guidance on *SWANCC*, and a 2008 Joint Guidance memo issued after the U.S. Supreme Court’s Decision in *Rapanos v. United States*. The proposed rule has the potential to expand categorical federal CWA jurisdiction over millions of acres of private property, and is certain to face legal challenges. If adopted, the rule will likely increase costs and regulatory burdens on business in the development, industrial, manufacturing, retail, energy, and mining sectors, and on private and public landowners, state and local government, and even federal government by expanding the types of water bodies that require CWA permits. The proposed rule would also increase the set of properties subject to risk of regulatory

enforcement by EPA, the Corps, their state counterparts, or – under the CWA’s robust citizen suit provisions – non-governmental organizations.

EPA Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities

EPA has finalized standards under the Clean Water Act to follow through on a “settlement agreement” with environmental groups whereby EPA agreed to issue regulations to reduce injury and death of fish and other aquatic life caused by cooling water intake structures at existing power plants and factories. These facilities pull in large volumes of cooling water from lakes, rivers, estuaries or oceans to cool their machinery. By setting flexible technology standards, EPA hopes its regulations will “greatly reduce” damage to ecosystems while accommodating site-specific circumstances and providing cost-effective options. This rule covers an estimated 1,065 existing facilities that each withdraw at least 2 million gallons per day of cooling water. EPA estimates that 521 of these facilities are manufacturers, and the other 544 are power plants. EPA states that the technologies required under the rule have been in use for several decades and have already been implemented at over 40 percent of facilities subject to this rule.

Background

Section 316(b) of the Clean Water Act requires that National Pollutant Discharge Elimination System (NPDES) permits for facilities with cooling water intake structures ensure that the location, design, construction, and capacity of the structures reflect the best technology available to minimize harmful impacts on the environment. The withdrawal of cooling water by facilities removes billions of aquatic organisms from waters of the United States each year, including fish, larvae and eggs, crustaceans, shellfish, sea turtles, marine mammals and other aquatic life. Most impacts are to early life stages of fish and shellfish through impingement (being pinned against cooling water intake structures) and entrainment (being drawn into cooling water systems and affected by heat, chemicals or physical stress).

Rulemaking History

Under a 1995 consent decree with environmental organizations, EPA divided the section 316(b) rulemaking into three phases. All new facilities except offshore oil and gas exploration facilities were addressed in Phase I in December 2001; all new offshore oil and gas exploration facilities were later addressed in June 2006 as part of Phase III. This final rule also removes a portion of the Phase I rule to comply with court rulings. Existing large electric-generating facilities were addressed in Phase II in February 2004. Existing small electric-generating and all manufacturing facilities were addressed in Phase III (June 2006). However, Phase II and the existing facility portion of Phase III were remanded to EPA for reconsideration as a result of legal proceedings. This final rule combines these remands into one rule, and provides a holistic approach to protecting aquatic life impacted by cooling water intakes. Any facility not covered by these national rules will continue to be subject to section 316(b) requirements set by the EPA, state or territorial NPDES Permitting Director on a case-by-case, best professional judgment basis.

Summary of the Rule

There are three main components to the final regulation. First, existing facilities that withdraw at least 25 percent of their water from an adjacent waterbody exclusively for cooling purposes and have a design intake flow of greater than 2 million gallons per day (MGD) are required to reduce fish impingement under the final regulations. To ensure flexibility, the owner or operator of the facility will be able to choose one of seven options for meeting best technology available requirements for reducing impingement.

Second, existing facilities that withdraw very large amounts of water—at least 125 million gallons per day—are required to conduct studies to help their permitting authority determine whether and what site-specific controls, if any, would be required to reduce the number of aquatic organisms entrained by cooling water systems. This decision process would include public input. Third, new units that add electrical generation capacity at an existing facility are required to add technology that achieves one of two alternatives under the national BTA standards for entrainment for new units at existing facilities. Under the first alternative new unit entrainment standard, the owner or operator of a facility must reduce actual intake flow (AIF) at the new unit, at a minimum, to a level commensurate with that which can be attained by the use of a closed-cycle recirculating system. Under the second alternative new units entrainment standard, the owner or operator of a facility must demonstrate to the Director that it has installed, and will operate and maintain, technological or other control measures for each intake at the new unit that achieves a prescribed reduction in entrainment mortality of all stages of fish and shellfish that pass through a sieve with a maximum opening dimension of 0.56 inches.

The EPA is planning to submit an information collection request (ICR), “Cooling Water Intake Structures at Existing Facilities (Final Rule)” to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection. This is a revision of an existing ICR. Comments must be submitted on or before July 28, 2014. 79 FR 30605 (May 28, 2014).

Extension of Public Comment Period on External Peer Review Draft Aquatic Life Criterion for Selenium in Freshwater

EPA is extending the public comment period on a draft updated national recommended aquatic life criterion for the pollutant selenium. See 79 FR 36319 (June 26, 2014) for the extension of time. The public will be able to provide scientific views on the draft document (79 FR 27601 May 14, 2014) until July 28, 2014. The draft document is an update to EPA’s 1999 chronic aquatic life criterion for selenium and reflects the latest scientific information, which indicates that selenium toxicity to aquatic life is primarily driven by organisms consuming selenium-contaminated food rather than by direct exposure to selenium dissolved in water. The external peer review draft criterion has four parts, including two fish tissue-based and two water column-based elements. EPA recommends that states and tribes adopt all four elements of the selenium criterion into water quality standards.

Following closure of the extended public comment period, the draft document will undergo an independent, contractor-led, external expert peer review. After considering public and expert peer review feedback, EPA will revise and publish the draft criterion document and subsequently again request public comment. Once finalized, EPA's water quality criterion for selenium will provide recommendations to states and tribes authorized to establish water quality standards under the Clean Water Act.

Improving Access to Environmental Data through EPA's ECHO

EPA's *Enforcement and Compliance History Online* website, known as **ECHO** provides information about environmental inspections, violations and enforcement actions for EPA-regulated facilities, like power plants and factories. ECHO houses information about more than 800,000 facilities nationwide, and is visited approximately 2 million times a year. See: <http://echo.epa.gov/>

ECHO has recently been updated for efficiency and accuracy, including

- Popular CWA features to make it easier to find data about water violations and inspections.
- It is easier to search for Clean Water Act dischargers based on type of pollutants discharged.
- Data to analyze violations at facilities is available and updated weekly.
- Web developers can build EPA's enforcement data directly into their own web pages and apps, because ECHO reports are now built on web services.

FROM THE EPA NEWS ROOM

FDA and EPA issue updated draft advice for fish consumption / Advice encourages pregnant women and breastfeeding mothers to eat more fish that are lower in mercury

Release Date: 06/09/2014

Contact Information: Julia Q. Ortiz, ortiz.julia@epa.gov, 202-564-1931

WASHINGTON - The U.S. Food and Drug Administration and the U.S. Environmental Protection Agency today issued updated draft advice on fish consumption. The two agencies have concluded pregnant and breastfeeding women, those who might become pregnant, and young children should eat more fish that is lower in mercury in order to gain important developmental and health benefits. The updated draft advice is consistent with recommendations in the [2010 Dietary Guidelines for Americans](#).

Previously, the FDA and the EPA recommended maximum amounts of fish that these population groups should consume, but did not promote a minimum amount. Over the past decade, however, emerging science has underscored the importance of appropriate amounts of fish in the diets of pregnant and breastfeeding women, and young children.

“For years many women have limited or avoided eating fish during pregnancy or feeding fish to their young children,” said Stephen Ostroff, M.D., the FDA’s acting chief scientist. “But emerging science now tells us that limiting or avoiding fish during pregnancy and early childhood can mean missing out on important nutrients that can have a positive impact on growth and development as well as on general health.”

An FDA analysis of seafood consumption data from over 1,000 pregnant women in the United States found that 21 percent of them ate no fish in the previous month, and those who ate fish ate far less than the Dietary Guidelines for Americans recommends—with 50 percent eating fewer than 2 ounces a week, and 75 percent eating fewer than 4 ounces a week. The updated draft advice recommends pregnant women eat at least 8 ounces and up to 12 ounces (2-3 servings) per week of a variety of fish that are lower in mercury to support fetal growth and development.

“Eating fish with lower levels of mercury provides numerous health and dietary benefits,” said Nancy Stoner, the EPA’s acting assistant administrator for the Office of Water. “This updated advice will help pregnant women and mothers make informed decisions about the right amount and right kinds of fish to eat during important times in their lives and their children’s lives.”

The updated draft advice cautions pregnant or breastfeeding women to avoid four types of fish that are associated with high mercury levels: tilefish from the Gulf of Mexico; shark; swordfish; and king mackerel. In addition, the updated draft advice recommends limiting consumption of white (albacore) tuna to 6 ounces a week.

Choices lower in mercury include some of the most commonly eaten fish, such as shrimp, pollock, salmon, canned light tuna, tilapia, catfish and cod.

When eating fish caught from local streams, rivers and lakes, follow fish advisories from local authorities. If advice isn’t available, limit your total intake of such fish to 6 ounces a week and 1-3 ounces for children.

Before issuing final advice, the agencies will consider public comments, and also intend to seek the advice of the FDA’s [Risk Communication Advisory Committee](#) and conduct a series of focus groups.

The public can provide comment on the draft advice and the supplemental questions and answers by submitting comments to the Federal Register docket or by participating in any public meetings that may be held. The comment period will be open until 30 days after the last transcript from the advisory committee meeting and any other public meetings becomes available. The dates of any public meetings, as well as when the public comment period will close, will be published in future Federal Register notices at www.federalregister.gov.

Other Water News

First-of-its-Kind Map Details Extent of Plastic in Five Ocean Gyres

By Anastasia Pantsios | July 16, 2014

<http://news.nationalgeographic.com/news/2014/07/140715-ocean-plastic-debris-trash-pacific-garbage-patch/>

When a research team set sail on a nine-month, worldwide expedition in 2010 to study the impact of global warming on Earth's oceans, one of their projects was to locate the accumulations of plastic.

They found plenty. They explored the five huge gyres, which collectively contain tens of thousands of tons of plastic. The result was the creation of a compelling, first-of-its-kind map of this debris.

These maps show the tens of thousands of tons of plastic garbage floating on the surface of the waters in the world's oceans. Map credit: National Geographic staff Jamie Hawk Source: Andrés Cozar, University of Cádiz, Spain

But in the process, they realized that the plastic in the gyres didn't begin to account for the enormous amount of plastic that's been manufactured since the mass production of plastic began in the mid 1940s.

In a National Geographic report, marine biologist Andres Cozar Cabañas, who was part of the Malaspina expedition led by the Spanish National Research Council, said:

"Our observations show that large loads of plastic fragments, with sizes from microns to some millimeters, are unaccounted for in the surface loads. But we don't know what this plastic is doing. The plastic is somewhere—in the ocean life, in the depths or broken down into fine particles undetectable by nets."

While there's been considerable alarm raised about these gyres of floating plastic, the missing plastic could be having negative impacts we don't yet know about. As National Geographic reports, the study of marine plastic debris is new, dating back only to 2004, when British marine biologist Richard Thompson concluded that most ocean debris is, in fact, plastic.

"Sadly, the accumulation of plastic in the deep ocean would be modifying this enigmatic ecosystem before we can really know it," said Cozar.

The discovery of the missing plastic raises a host of questions. Oceanographer Kara Lavender Law of the Cape Cod-based Sea Education Association, part of a team currently researching issues surrounding marine debris, told National Geographic:

"We are at the very early stages of understanding the accounting. If we think ten or a hundred times more plastic is entering the ocean than we can account for, then where is it? We still haven't answered that question. And if we don't know where it is or how it is impacting organisms, we can't tell the person on the street how big the problem is."

Among the possibilities: it's being consumed by small fish that are eaten by larger fish caught for human consumption, such as tuna and swordfish, and ending up in the human food system. Or it could be finding its way into the ecosystem of the world's least explored region, the deep ocean.