



Georgia Industry Environmental Coalition

January 10, 2000

TO: Water Resources Workgroup

cc: General Membership

FROM: Mike Wilder, Water Resources Workgroup Chair

SUBJECT: **DRAFT Comments to USEPA Proposed Revisions to:**

- **40 CFR Part 130 - Water Quality Planning and Management Regulation concerning the establishment of Total Maximum Daily Loads (TMDLs) (August 23, 1999)**
- **40 CFR Part 122 - National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy (August 23, 1999)**

The following information is being provided to you as GIEC prepares to submit comments to EPA's proposed revisions to the referenced regulations; these comments are due to EPA no later than January 20, 2000.

A "**Summary of the Proposed Regulations**" is provided below for your benefit (it will not be included in GIEC's comment submittal to EPA) since the revisions to the TMDL regulations are relatively extensive. This summary may provide an opportunity for you, as a GIEC member, to evaluate the potential impact with regard to your company's particular situation.

Following the summary is a set of "**Draft Comments on the Proposed Regulations**" to EPA's revisions. The issues identified and discussed (List Contents; Delisting and Listing Cycles; and Public Participation) are those which may potentially have the most impact on Georgia industry and GIEC member companies. For purposes of developing a draft set of GIEC comments, in addition to the referenced regulations, draft comments developed by other associations [Water Environment Federation, Georgia Water & Pollution Control Association, Inc., TMDL Coalition] were also reviewed and considered. It is important that you let the GIEC Office or Mike Wilder know of any other issues important to you and not already identified in the draft comments that follow.

"**Definitions**" that have been modified or added to the proposed regulations by EPA follow the draft comments section, but will not be included in GIEC's comment submittal to EPA.

SUMMARY OF THE PROPOSED REGULATIONS

(This section will not be included in GIEC's comment submittal to EPA.)

There are many key changes that are being proposed to the existing TMDL regulations, which include:

1. **Definitions** - Revised and new definitions of TMDL, wasteload allocation, load allocation, impaired waterbody, threatened waterbody, pollution, pollutant, reasonable assurance, thermal discharge and waterbody. (See "Definitions".)
2. **Revised 303(d) List Format and Contents** - EPA has proposed a revised format for a more comprehensive 303(d) list that would result in a list with four parts. It is EPA's intent to have the list contain all waterbodies impaired or threatened by point and nonpoint sources, regardless of whether the impairment or threat is the result of pollutants (single or multiple) or pollution, including atmospheric deposition. **Part 1** would include waterbodies impaired or threatened by one or more pollutants or unknown cause and would require a TMDL analyses. **Part 2** would include those waterbodies impaired or threatened by pollution (no TMDL required). **Part 3** is for waterbodies where EPA has approved or established a TMDL and water-quality standards have not been attained. **Part 4** is for impaired or threatened waterbodies where point source control (best practicable control technology or secondary treatment for POTWs) is expected to result in attainment of water quality standards.

As noted in the above descriptions, EPA is intending the State to include both impaired and threatened waterbodies on the 303(d) list. EPA has further broadened the scope of the list to include those waterbodies that are not presently, or will not by the next listing cycle be, attaining their designated use. This provision (40 CFR 130.26) cites a State's antidegradation policy as the authority for such a listing.

3. **TMDL Schedule** - EPA proposes a schedule be submitted with the 303(d) list when TMDLs for waterbodies impaired or threatened by pollutants will be developed (Part 1 of the list). EPA has proposed that all TMDLs be completed within fifteen years of initial listing and strongly recommends that the TMDLs for high priority waterbodies be conducted before those for medium and low priority waterbodies.
4. **Listing Methodology** - EPA is requiring that listing methodologies be more specific and subject to public review prior to submission to EPA and nine months before the 303(d) list is submitted to EPA. The EPA proposes that the State develop methodologies to list and prioritize waterbodies on the 303(d) list that uses all monitored data" and "evaluated data and information." All data would include the results of source-water assessments as required by Section 1453 of the Safe Drinking Water Act. It appears that EPA will provide the State with some latitude regarding the definition of impairment or threatened. For example, the methodologies may "explain how many exceedances of a numerical chemical criteria constitute an impairment or threat."

Each of the Part 1 impaired waterbodies must be ranked as low, medium or high priority by taking into account the severity of impairment and the designated uses of the waterbody. There is flexibility in this prioritization process with two exceptions. An impaired waterbody must be assigned a "high" priority if: 1) it is designated as a public drinking water source and "if the

pollutant for which the waterbody is listed as impaired is contributing to a violation of an MCL" or 2) it has threatened or endangered species that are being affected.

5. **Delisting an Impaired Waterbody** - Current guidance allows for a waterbody to be removed from the list if the water quality standards are being attained or the basis for the initial listing was inaccurate. EPA proposes a regulation that will allow a State to remove a waterbody if "new data or information indicates that the waterbody has attained water quality standards" or the waterbody is no longer threatened. This occurs only when you develop the next list (every two, four or five years).
6. **303(d) List Submittal Dates** - The proposed regulations modify the dates the 303(d) lists are submitted to EPA. The 303(d) lists are presently due April 1 of every even numbered year (every two years). EPA is considering submission of the lists on October 1 with two, four or five year cycles.
7. **TMDL Elements** - Requires the TMDLs include the following ten elements:
 - Waterbody Name and Geographic Location,
 - Identify the Pollutant Load,
 - Identify the Deviation from the Pollutant Load,
 - Source Categories,
 - Wasteload Allocation,
 - Load Allocation,
 - Margin of Safety,
 - Seasonal Variation,
 - Allowance for Future Loading, and
 - Implementation Plan.
8. **TMDL for a Thermal Discharge** - The proposed regulations require the State to develop TMDLs for thermally impaired waterbodies. A thermally impacted waterbody does not support a balanced indigenous population (BIP) of shellfish, fish and wildlife. The TMDL should ensure that the BIP standard will be attained by taking into account the nature, physical characteristics and dissipative capabilities of the receiving water. Thermal TMDLs are only applicable to waterbodies that are not attaining the BIP criteria because of point-source thermal loads. This does not apply to waterbodies that are not attaining water quality standards for other reasons (e.g., solar radiation).
9. **Implementation Plan** - The regulations require that an implementation plan be an element of a TMDL and that each plan include, at a minimum, the following elements:
 - Description of the control actions/measures to achieve the load and wasteload allocations;
 - Timeline with interim milestones;
 - Discussion of the reasonable assurances (see definition of reasonable assurances);
 - Description of the legal authority;
 - Estimate of the time required to attain water quality standards;
 - Monitoring/modeling plan to determine effectiveness;
 - Description of measurable incremental milestones; and

- Description of revising TMDL if milestones are not achieved.

Reasonable assurances for point sources can be demonstrated via the NPDES permitting process, while those for nonpoint sources are not as straight forward. Nonpoint source assurances include such procedures as local ordinances, performance bonds, memorandums of understanding, compliance audits of best management practices, etc.

10. **Public Participation** - New public participation requirements for the TMDL process have been incorporated into the proposed regulations. EPA proposes that the listing methodology, the list and the TMDL calculations all be subject to public review and comment.

The revisions to the **NPDES Regulations** and to the **Antidegradation Policy** were intended to support the revisions to the above summarized TMDL regulations. The three primary changes are:

- 1) The proposed regulations would require new and significantly expanding dischargers, located on impaired waters, to offset the new or increased load in compliance with antidegradation provisions. This regulation would apply to the discharge prior to the development of a TMDL for the waterbody. After the TMDL has been approved, the waste load allocations (WLAs) specified in the TMDL would apply.

Operative definitions are:

- a) **New Discharger** - In addition to the obvious, a new discharger includes "those dischargers who move an outfall(s) to another location not within the same body of water."
 - b) **Significant Expansion** - Significant expansion has been defined as an increase in the loadings above the current permit limit of 20 or greater percent. The pollutant load reductions (from one to two times the proposed increase/new discharge) must be those for which the waterbody is impaired and from a source (point or nonpoint) on the same waterbody.
 - c) **Same Body of Water** - The same body of water is determined by the permitting authority when considering whether (1) background concentrations at the old and new discharge points are similar; (2) there is a direct hydrologic connection between the two discharge points; and (3) water quality characteristics are similar at and between both outfall points.
- 2) The proposed regulations would allow EPA to designate additional sources of pollutants to the NPDES program. In particular, EPA will have the authority, on a case-by-case basis, to designate animal feeding operations and aquatic animal production facilities as concentrated operations/facilities and thus be subject to the NPDES program. These designations are limited to sources that are discharging into impaired waters and would be determined on a case-by-case basis. In addition, EPA is proposing to remove the categorical silviculture exclusion to the NPDES program.
 - 3) The proposed regulations allow EPA to review and object to NPDES permits when a State fails to revise an expired permit for a facility discharging into an impaired waterbody.

DRAFT COMMENTS ON THE PROPOSED REGULATIONS

List Contents

As the TMDL process has evolved over the years, GIEC continues to be concerned about the 303(d) listing and delisting processes. As we have recognized over the years, many of the listed water segments in Georgia were included on the list due to few, if any, exceedances of the water quality standards. EPA has addressed this listing issue in one regard by allowing the regulated community the opportunity to review and comment on the listing methodology; but on the other hand, is increasing the scope of the list, and in GIEC's opinion, the subjectivity of the list by requiring the State to include threatened waterbodies. An impaired waterbody is one where the water quality standards are not being attained. A threatened waterbody currently attains water quality standards, but based on a declining trend in the data, will likely not attain water quality standards by the next listing date. In addition, EPA proposes the impaired and threatened waterbodies be determined both by their ability to meet water quality standards and their ability to maintain the use classification. GIEC believes that the list should include only those waterbodies that are impaired (i.e., data indicate that the water quality standards are not being attained).

GIEC supports the proposed components of the list (Parts 1- 4) because it does allow for the list to include all of the State's impaired waterbodies and would provide a relatively rapid method to determine the status of the waterbody with regard to the TMDL process. Though GIEC supports the components of the list, we have questions concerning the priority ranking. As proposed in 40 CFR 130.28 each of the Part 1 impaired waterbodies must be ranked as low, medium or high priority by taking into account the severity of impairment and the designated uses of the waterbody. There is flexibility in this prioritization process with two exceptions. An impaired waterbody must be assigned a "high" priority if: 1) it is designated as a public drinking water source and "if the pollutant for which the waterbody is listed as impaired is contributing to a violation of an MCL" or 2) it has threatened or endangered species that are being affected. Though these two exceptions could constitute a high priority, we could envision other circumstances that would warrant a higher priority, and the priorities could change during the course of the listing cycle. We believe that a priority should be designated by the State, solely for the purpose of designating the perceived severity of impairment. The listing authority should have the latitude of developing TMDLs using a schedule that allows for attainment of water quality standards in a responsible manner.

By requiring a State to include "threatened" waterbodies, EPA is introducing a subjective element to the list and is requiring a state to expend up-front effort to predict the future of a waterbody. A waterbody can only be categorized as "threatened" if the State/EPA transposes data from a "similar" waterbody or extrapolates data, thus undermining the scientific processes that should be the foundation of the TMDL regulations. There has been no violation of the water quality standards, the point and nonpoint sources are in compliance with their permit limits, yet a costly and time consuming TMDL will have to be conducted on the waterbody. GIEC questions the authority of EPA to regulate a

waterbody that is supporting its designated use and no water quality violations have been documented.

In addition, the proposed regulations allow for the listing of a waterbody that potentially fails to meet a designated use. The Clean Water Act (CWA) defines that water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Therefore, by definition, a waterbody should only be classified as impaired because of a water quality criteria violation ~~instead of violation use water quality condition, or a violation may not represent a real problem~~. Each waterbody should have the proper water use designation and appropriate standards.

Delisting and Listing Cycles

EPA's current regulations do not directly address when a previously listed waterbody can be removed from the list; the regulations only state that the list contain "water quality-limited segments still requiring TMDLs." Thus by inference, an impaired waterbody can be removed from the list once a TMDL has been approved. The current TMDL guidance is more direct by identifying two circumstances that would warrant removal from the list. These circumstances are: (1) "if water quality standards are being attained or are expected to be attained within two years, or (2) if, upon re-examination, the original basis for listing the waterbodies is determined to be inaccurate." The proposed regulations (40 CFR 130.29) only allow for the impaired or threatened waterbody to be removed from the list at the next listing cycle (two, four or five years) if the waterbody has attained water quality standards. The proposed regulations, as printed in the Federal Register (Vol. 64, No. 162), are in conflict with the accompanying preamble which states "Today's proposal at 130.29 adopts the FACA Committee's recommendations that ..., and that a previously listed impaired waterbody may be removed from the list only when new data or information indicate that the waterbody has attained water quality standards or that the waterbody was incorrectly listed." GIEC believes that EPA should literally adopt the FACA Committee's recommendation (as stated in the preamble) and allow a previously listed waterbody to be removed if the waterbody was incorrectly listed.

The proposed regulations (40 CFR 130.30) are considering either two, four or five year cycles for submission of the impaired and threatened waterbody list. GIEC believes that the four and five year cycles are too long, particularly in light of the fact that the regulations are in their infancy and that many lessons will be learned during the first years of implementation. Also, if there is no other mechanism to delist an impaired waterbody that was incorrectly listed, four or five years is excessive. This also holds for "threatened" waterbodies that were improperly analyzed and have always attained the water quality standards. At this time, GIEC believes that the listing cycle should remain two years.

Public Participation

The current regulations only require the State to solicit public review and comment after the TMDL is completed. The proposed regulations expanded the scope to include public

participation for (1) the document describing the listing methodology, (2) the list of impaired or threatened waterbodies with the rankings and schedule, and (3) the TMDLs. Though GIEC believes that this proposed increase in stakeholder involvement will result in a more successful TMDL program, we also believe that additional involvement is necessary during development of the TMDL.

The TMDL results are primarily a WLA and a load allocation (LA) that will allow the waterbody to attain water quality standards. After TMDL approval, these WLAs and LAs become the basis of discharge permits for the affected sources. As EPA is aware, there are various scenarios for any waterbody that will result in the attainment of water-quality standards. The number of viable options increases as the number of point and nonpoint sources increases.

GIEC's experience is that TMDLs in Georgia were developed without the knowledge and participation of potentially affected dischargers. As a result, the TMDLs were developed without the benefit of potentially obtaining and using additional, relevant data or any knowledge of the financial consequences of each scenario. GIEC believes that discussions with stakeholders during the TMDL process would have resulted in the analyses of scenarios that would have been more palatable and cost-effective for affected dischargers. Therefore, GIEC recommends that the proposed regulations be modified to include additional public participation milestones during the TMDL development process.

Other Issues In Need of Comments:

- An impaired waterbody should not be listed as a "high priority" simply because it has threatened or endangered species that are being affected. There should be a direct correlation between detrimental impacts on the threatened or endangered species and the impairment.
- It is improper to have more than a one to one offset of pollutants for new or expanding dischargers. One discharger should not have to unreasonably bear the costs/impacts to correct existing conditions more than its actual impacts from new or expanding discharges.
- Significant expansion should be defined as at least 50%, not 20%. Twenty percent increases can commonly occur just from changing production due to market demands.
- CAFO/AFOs by current law are not allowed to discharge pollutants to waters of the United States, and it is therefore unreasonable to subject these operations to this program at all. How can they get a two to one or even one to one offset if they are not allowed to currently discharge to waters of the United States.
- How will this program impact General NPDES permit holders, i.e., stormwater discharges from impacted facilities? (What constitutes a significant expansion, and how will offsets be considered for expansions of facilities that only have stormwater discharges.)

DEFINITIONS

(Only those modified or added in the proposed regulations are presented below. Again, this "Definitions" section will not be included in GIEC's comment submittal to EPA.)

(c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water (See Clean Water Act section 502(19).)

(d) Pollutant. Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, and, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean : "sewage from vessels" within the meaning of section 312 of the Clean Water Act; or water, gas, or other material that is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that such injection or disposal will not result in the degradation of ground or surface water resources. (See Clean Water Act section 502(6).) This definition encompasses drinking water contaminants that are regulated under section 1412 of the Safe Drinking Water Act and may be discharged to waters of the U. S. that are source waters of one or more public water systems. For public water systems served by surface water, source water is any water reaching the intake. How does this impact septic tanks (Type V injection wells)?

(e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading of pollutants may be either man-caused or natural (natural background loading).

(f) Load allocation. The portions of a TMDL's pollutant load allocated to nonpoint sources of a pollutant, including atmospheric deposition or natural background sources.

(g) Wasteload allocation. The portions of a TMDL's pollutant load allocated to a point source of a pollutant.

(h) Total maximum daily load (TMDL). TMDLs are written plans and analyses established to ensure that the waterbody will attain and maintain water quality standards (as defined in 40 CFR 131) including consideration of reasonably foreseeable increases in pollutant loads. TMDLs must be established for waterbodies on Part 1 of your list of impaired and threatened waterbodies and must contain the following ten elements:

What does this mean? (too subjective)

- (1) The name and geographic location of the impaired or threatened waterbody for which the TMDL is being established;
- (2) Identification of the pollutant and quantification of the pollutant load that may be present in the waterbody and still allow attainment and maintenance of water quality standards;

- (3) Identification of the amount or degree by which the pollutant load in the waterbody deviates from the load representing attainment or maintenance of water quality standards;
- (4) Identification of source categories, source subcategories or individual sources of the pollutant for which wasteload and load allocations are being established;
- (5) Wasteload allocations for pollutants from point sources;
- (6) Load allocations for pollutants from nonpoint sources;
- (7) A margin of safety; ~~(Needs definition, otherwise, allows for too many subjective rulings.)~~
- (8) Consideration of seasonal variation;
- (9) An allowance for future growth which accounts for reasonably foreseeable increases in pollutant loads; ~~and (Again, needs definition for same reason)~~
- (10) An implementation plan.

(m) Impaired waterbody. Any waterbody of the United States that does not attain water quality standards (as defined in 40 CFR part 131) due to an individual pollutant, multiple pollutants, pollution, or an unknown cause of impairment. Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

(n) Threatened waterbody. Any waterbody of the United States that currently attains water quality standards, but for which existing and readily available data and information on adverse declining trends indicate that water quality standards will likely be exceeded by the time the next list of impaired or threatened waterbodies is required to be submitted to EPA. Where a waterbody is threatened by a thermal discharge. Threatened means that the waterbody has a balanced indigenous population of shellfish, fish, and wildlife, but adverse declining trends indicate that a balanced indigenous population of shellfish, fish, and wildlife will not be maintained by the time the next list of impaired or threatened waterbodies is required to be submitted to EPA.

(o) Thermal discharge. The discharge of the pollutant heat from a point source.

(p) Reasonable assurance. Reasonable assurance means that you demonstrate that each wasteload allocation and load allocation in a TMDL will be implemented. For point sources regulated under section 402 of the Clean Water Act you must demonstrate reasonable assurance by procedures that ensure that enforceable NPDES permits (including coverage to individual sources under a general NPDES permit) will be issued

expeditiously to implement applicable wasteload allocations for point sources. For nonpoint sources you must demonstrate reasonable assurance by specific procedures and mechanisms that ensure load allocations for nonpoint sources will be implemented for that waterbody. Specific procedures and mechanisms for nonpoint sources must apply to the pollutant for which the TMDL is being established, must be implemented expeditiously and must be supported by adequate funding. Examples of specific procedures and mechanisms which may provide reasonable assurance for nonpoint sources include State, Territorial, and authorized Tribal regulations, local ordinances, performance bonds, contracts, cost-share agreements, memorandums of understanding, site-specific or watershed-specific voluntary actions, and compliance audits of best management practices.

(q) Waterbody. A geographically defined portion of navigable waters, waters of the contiguous zone, and ocean waters under the jurisdiction of the United States, including segments of rivers, streams, lakes, wetlands, coastal waters and ocean waters.