

January 19, 2000

Comment Clerk
TMDL Program Rule
Water Docket (W-98-31)
Environmental Protection Agency
401 M Street SW
Washington, DC 20460

Subject: 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)**

Dear Sir or Madam:

The Georgia Industry Environmental Coalition¹ (GIEC) appreciates the opportunity to provide comments on the subject proposed revisions. Our comments are based on:

- (1) review of the proposed revisions;
- (2) attendance at public hearings and briefings concerning these proposed regulations;
- (3) review of a comment letter (dated January 3, 2000) submitted to EPA by the Georgia Environmental Protection Division (EPD) on the proposed regulations;
- (4) experience with the existing TMDL process/regulations; and
- (5) review of comments developed by various trade organizations on the same subject proposed revisions.

Generally speaking, GIEC has concerns about the subjectivity incorporated into the proposed regulations, the cost and timing of implementation, and the authority of EPA to promulgate aspects of the regulations. GIEC is in agreement with the

¹ GIEC is a not-for-profit membership organization of environmentally-regulated businesses in Georgia. Its members form a diverse group of industries, representing over 30 companies and 19 SIC codes, with the shared belief that environmental regulations should, and can, be both protective and cost efficient. The mission of GIEC is to serve as a technically-based advocate for Georgia industry by promoting environmental regulations and policies founded on the protection of human health and the environment, sound science and cost/benefit principles. It is not GIEC's purpose to engage in political advocacy at either the state or national level.

Georgia EPD in that we do not support the proposed regulations. Elements of the proposed regulations that represent the most significant concern of our membership as a whole are detailed below. Several additional concerns [e.g., atmospheric deposition, thermal TMDL, appropriateness of the standards (fecal coliform) and load offsets] exist among our members but are not detailed in our comments below as we understand these concerns will be addressed in other organizations' comment submittals.

List Contents

As the TMDL process has evolved, 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. However, on the other hand, EPA 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 in addition to impaired 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.

By requiring a State to include "threatened" waterbodies, EPA 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, extrapolates data, or uses the results of water quality assessments or modeling efforts to predict if a waterbody is likely to not meet water quality standards in the future. Thus, using the aforementioned methods to regulate threatened waterbodies undermines 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 opposes the inclusion of threatened waterbodies and questions the authority of EPA to regulate a waterbody that is supporting its designated use and no water quality violation has 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 it can not attain the designated water quality standards. Each waterbody should have the proper water-use designation and appropriate standards.

The proposed regulations require the State to prioritize the impaired or threatened waterbodies. GIEC questions the priority-ranking methodology being considered in the proposed regulations. 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 may 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 if a priority is mandated, the priority should be designated by the State, solely for the purpose of qualifying the perceived severity of impairment. The listing authority should have the latitude of developing TMDLs using a schedule that provides for attainment of water quality standards in a responsible manner.

In summary, 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) and that scheduling of TMDL development be at the discretion of the State. GIEC requests any reference to "threatened waterbodies" be removed from the proposed regulations and the prioritization requirements (40 CFR 130.28) be eliminated.

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 contains "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..., 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 in the first place, 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 expand 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 would 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 Waste Load Allocation (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.

It is GIEC's experience that TMDLs in Georgia were developed without the knowledge and participation of potentially effected 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.

Significant Expansion

The proposed regulations (40 CFR 122.4) specify that an "existing discharger undergoing a significant expansion" is prohibited from discharging an increased load into an impaired waterbody unless the "discharger complies with the antidegradation provisions of the State's water quality standards". A significant expansion is defined in 40 CFR 122.2 as a 20 percent or greater increase in the load. In the preamble to these regulations, EPA considered both a 20 and 50 percent increase as the threshold for "significant expansion." In addition, EPA considered requiring an offset of at least one to one and allowing the Director the discretion to determine the need for any additional offset requirements. GIEC recognizes that a 20 percent fluctuation can result from normal variations in production due to market demands. These fluctuations may not result in a permanent increase in loadings, but would necessitate the need to revise the permit limits. As a result, GIEC believes that 50 percent is a more appropriate increase to be used to define significant expansion and that the Director (or permitting authority) should have the latitude to determine the offset requirements. This is primarily due to the Director's knowledge of (1) the impaired waterbody, (2) the discharger, and (3) the progress being made to attain water quality standards.

In closing, it is GIEC's opinion that the proposed regulations are not founded on sound science nor cost/benefit principles. As a result, GIEC does not support the promulgation of the proposed regulations and recommends these regulations be withdrawn from consideration.

Sincerely,

Michael E. Wilder, Chair
Water Resources Workgroup

James R. Baker, Chair
GIEC

cc: H. Reheis, GA EPD
A. Hallum, GA EPD
GIEC Membership