# TMDL Requirements - The EPA's Federalization of Agriculture

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## Overview

Pollution from nonpoint agricultural sources (diffused surface runoff), particularly that originating from soil erosion, is more extensive than pollution resulting from feedlot operations. But, because nonpoint source pollution is largely dependent upon local topographical conditions, the Congress believed it was best left to the control of the states through the continuing planning process required by §303 (relating to water quality standards) and §208 (areawide waste management plans) of the Clean Water Act (CWA). However, by virtue of Total Maximum Daily Load (TMDL) requirement, the U.S. Environmental Protection Agency (EPA) asserts that it has the final say on farming activities by dictating the amount of nitrogen, phosphorous and sediment that can come from a particular tract.

The TMDL requirement and the extent EPA can use it to control farming practices – it's the topic of today's post.

## Background

Section 303 of the CWA requires states to adopt water-quality standards, to the extent not previously done, and to carry forward those already adopted subject to EPA approval. Standards are to be set for both interstate and intrastate waters, and the standards must be updated periodically and submitted to EPA for review and approval. The standards are to take into account the unique needs of each waterway including "propagation of fish and wildlife" as well as "agricultural...and other purposes." Any state that fails to set water quality standards is subject to the EPA imposing its own standards on the state. Section 303 does not exempt any rivers or waters, but covers all waters to the full extent of federal authority over navigable waters.

The states are to establish total maximum daily loads (TMDLs) for watercourses that fail to meet water quality standards after the application of controls on point sources. But, a state must engage in the formal rulemaking process before a TMDL can be used as the basis for a CWA discharge permit. *See, e.g., Fairfield County Board of Commissioners v. Nally, 143 Ohio St. 3d 93 (Ohio Sup. Ct. 2015).* A TMDL establishes the maximum amount of a pollutant that can be discharged or "loaded" into the water at issue from all combined sources on a *daily* basis and still permit that water to meet water quality standards. *See, e.g., Anacostia Riverkeeper, Inc., et al. v. Jackson, 713 F. Supp. 2d. 50 (D. D.C. 2010).* A TMDL must be set "at a level necessary to implement water quality standards." *33 U.S.C. § 1313(d)(1)(C).* The calculation must be on a daily basis. *Friends of the Earth v. United States Environmental Protection Agency, 446 F.3d 140 (D.C. Cir. 2006)*

The Congress did not define TMDL in the CWA, but the EPA's regulations break it into a "waste load allocation" for point sources and a "load allocation" for nonpoint sources. A TMDL's purpose is to limit the amount of pollutants in a watercourse on any particular date.

**Federal Control of Nonpoint Source Pollutants?**

**The big issue.** A significant question is whether the EPA has the authority to regulate nonpoint source pollutants under §303 of the CWA through the TMDL process and require reductions in nonpoint source discharges. This is an important issue for agriculture because the primary source of agricultural pollution is nonpoint source. Indeed, the TMDL requirements were challenged in early 2000 by farm interests as being inapplicable to nonpoint source pollution. In *Pronsolino v. Marcus,* 91 F. Supp. 2d 1337 (N.D. Cal. 2000), *aff'd, sub. nom., Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002), cert. den., 539 U.S. 926 (2003),* the plaintiffs had obtained a permit to harvest timber and became subject to restrictions designed to reduce soil erosion. The state (California) submitted its § 303(d) list to EPA in 1992 and EPA disapproved the list because it excluded 17 water segments that failed to meet water quality standards. Sixteen of those water segments were impaired solely by nonpoint source pollution. EPA, pursuant to § 303(d)(2), established a new list including these waters. The state failed to develop TMDLs for these waters, environmental groups sued EPA to compel development of TMDLs, and EPA entered into a consent decree requiring it to complete TMDLs for these waters if the state failed to do so by March 18, 1998. The state missed the deadline and EPA established the TMDLs.

The plaintiffs theorized that the restrictions were a by-product of the TMDL criterion and challenged the EPA's authority to impose TMDL requirements on rivers polluted only by timber-harvesting and other nonpoint sources. The court, however, held that the TMDL requirements, as a comprehensive water-quality standard under the CWA, were designed to apply *to every navigable river and water in the country – that is, every navigable water of the United States or "WOTUS.".* Although the court noted that the CWA applied TMDL to point and nonpoint sources differently, it stressed that TMDL was clearly authorized for nonpoint sources. Thus, according to the court, any polluted waterway – whether the source of pollution is point or nonpoint – is subject to TMDL requirements. The case was affirmed on appeal, but the appellate court, in dictum, noted that the statute did not require states to actually reduce nonpoint source pollution flowing into these waters. The appellate court made clear that TMDL implementation of nonpoint source pollution is a matter reserved to the states. Thus, the court appeared to substantially limit the EPA's ability to require nonpoint source pollution reduction - the EPA can develop TMDLs that highlight the need for aggressive control of nonpoint source pollution, but cannot address nonpoint source pollution by itself. Where a state fails to establish TMDLs, the EPA has the power to implement them. *See also American Farm Bureau Federation, et al. v. United States Environmental Protection Agency, et al., 984 F. Supp. 2d 289 (M.D. Pa. 2013).*

**Chesapeake Bay.** In 2010, the EPA published a TMDL of nitrogen, phosphorous and sediment that can be released into the Chesapeake Bay watershed. The TMDL set forth a timetable for compliance by the affected states. In addition, states were required to determine how much agriculture had to reduce runoff by adopting new technology and conservation practices. The new rules were legally challenged in 2011 on the basis that the EPA lacked the authority to regulate individual pollutants from farmland and other specific sources. In 2014, attorneys general from 21 states joined the lawsuit. In mid-2015, the court held that likely economic injury in the form of higher compliance costs was sufficient to confer standing to challenge the TMDL, and that the EPA had acted within its authority under 33 U.S.C. §1251(d) in developing the TMDL. The court deferred to the EPA's judgment on the basis that the statutory definition of TMDL was ambiguous – it could reasonably be interpreted to apply to allocations from various sources and geographic areas, etc. *American Farm Bureau, et al. v. United States Environmental Protection Agency, et al.*, *792 F.3d 281 (3d Cir. 2015).* The U.S. Supreme Court declined to hear the case. *Id. cert. den., 136 S. Ct. 1246 (2016).*

Presently, the litigation over the Chesapeake Bay TMDL is ongoing on the claim that New York and Pennsylvania are not within the standards of the TMDL.

### Other TMDL Details

**Citizen suits?** Traditionally, the courts have not allowed disaffected persons to bring lawsuits claiming an alleged violation of a state water quality standard established in accordance with CWA §303. The standards are generally believed to be too ambiguous and nonspecific. Only specific effluent limitations set forth in an NPDES permit have historically been subject to legal challenge. However, in 1996, the Ninth Circuit Court of Appeals allowed a challenge to an alleged violation of a state water quality standard. *Northwest Environmental Advocates v. Portland, 74 F.3d 945 (9th Cir. 1996), cert. den., 518 U.S. 1018 (1996).*

### Conclusion

Clearly, the Congress did not write language into the CWA that allows the EPA to regulate nonpoint sources of pollution such as run-off from farm fields. The Congress left that matter up to the states. But, through the TMDL process, the EPA is able to get around that Congressional barricade. Via TMDL requirements, the EPA has grabbed the power to say where farming will occur by establishing limits for sediments and nutrients for individual farms. These are essentially land use decisions that are traditionally within the domain of local governmental bodies, and not a federal government agency. The EPA's approach is also incredibly costly. The Maryland School of Public Policy has estimated that the implementation of the Chesapeake Bay TMDL from 2010-2025 could be as much as $80 billion.

https://www.chesapeakebay.net/channel_files/19062/660_--_environmental_workshop_report,_final,_spring_2012.pdf

TMDLs – yet another reason why the definition of a WOTUS matters.