



Nutrients and Secondary Treatment: Response to NRDC Petition to EPA

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NRDC Petition

- Seeks EPA action to modify secondary treatment regulations to include effluent limitations for nitrogen and phosphorus
 - Preferred limits of 3 mg/L TN, 0.3 mg/L TP
- Based on widespread nutrient pollution conditions in waterways across the U.S.
- Two legal grounds asserted
 - Duty to publish: CWA 304(d)(1)
 - Duty to regulate: CWA 301(b)(1)(B)
- Asserts EPA's water quality program too slow

NRDC Petition

- Duty to Publish Claim:
 - CWA 304(d)(1) EPA publish “from time to time” information “on the degree of effluent reduction attainable *through the application of secondary treatment*” (emphasis added)
- Duty to Regulate Claim:
 - CWA 301(b)(1)(B) POTWs required to meet effluent limitations “*based upon*” secondary treatment as defined by the Administrator pursuant to [304(d)(1)]” (emphasis added)

Shortcomings of NRDC's Claims

- Duty to Publish Claim:
 - 304(d)(1) does not apply because nutrient removal is not attainable “through application of” secondary treatment
 - EPA published information on nutrient removal technology for POTWs in September 2008
 - EPA determines nutrient removal based upon secondary treatment is “negligible”
 - Satisfies any duty to publish

Shortcomings of NRDC's Claims

- Duty to Regulate Claim:
 - 301(b)(1)(B) does not apply because any nitrogen or phosphorus effluent limitations that EPA might establish using the nutrient removal technologies advocated by NRDC would not be “based upon secondary treatment” but rather *based upon advanced wastewater treatment technology*
 - Technologies identified by NRDC to reduce nutrients are advanced treatment technologies
 - Secondary treatment and advanced wastewater treatment (Best Practicable Waste Treatment Technology or BPWTT) were separate requirements for POTWs under 1972 Act
 - Congress repealed BPWTT in 1981

Shortcomings of NRDC's Claims

- In addition, NRDC's claims contradict *Maier v. EPA* (10th Cir. 1997)
 - Court found considerable discretion vested in EPA
 - EPA is not required to regulate every pollutant that secondary treatment is capable of reducing
 - EPA is not required to revisit the definition of secondary treatment every time a new technology arises
 - EPA's duty to publish and duty to regulate are separate – publication of new information does not trigger a requirement to write new effluent limits
 - Think of implications of EPA's Sept. 2008 report
 - NRDC's position would require EPA to devote valuable resources writing rules for “negligible” nutrient limits

Other Factors for EPA to Consider

- Precedent: EPA's rejection of prior petitions
 - Bases, reasoning still apply (*Maier* , Denial of CBF Petition 2005)
- EPA has never discussed the effect of repeal of BPWTT in 1981
 - *Maier* court thus did not consider this additional factor
- Early EPA rulemaking efforts re fecal coliform and disinfection technology provide analogous basis for rejecting a “one size fits all” technology approach for a site-specific water quality approach
 - Looked at need based on water body specifics and unnecessary energy and chemical costs associated with uniform standard
- Rationality of response: granting NRDC's Petition does not solve the widespread nutrient problems described

EPA' Options and Next Steps

- Deny the Petition – NRDC has threatened to sue
- Grant the Petition – May also result in litigation
- As EPA considers options, NRDC may sue over delay in responding to Petition
- NACWA engaging EPA on the issues
- Stay tuned....



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