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IN THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Western Carolina Regional Sewer Authority,)
Laurens County Water and Sewer Commission,)
City of Anderson,)
Combined Utilities System of Easley, and)
Greenwood Metropolitan District,)
)
Co-Petitioners,)
v.)
)
South Carolina Department of Health and)
Environmental Control,)
Friends of the Reedy River, and)
The Catawba Riverkeeper)
)
Co-Respondents)

**BRIEF
OF AMICUS CURIAE
THE ASSOCIATION OF
METROPOLITAN SEWERAGE
AGENCIES (AMSA)
DOCKET NOS.
98-ALJ-07-0267-CC
and
98-ALJ-07-0585-CC**

In Re: Consolidated contested cases challenging Respondent's Section 303(d) Listings and
Nutrient Permitting Using the South Carolina Trophic State Index ("SCTSI")

FILED

MAY 28 1999

ADMIN. LAW JUDGE DIV.

SUMMARY OF ARGUMENT

The Association of Metropolitan Sewerage Agencies consists of some 210 member agencies whose sole job is to treat wastewater before discharging it into the surface waters of the United States. In doing so, our members are required to adhere to applicable state and federal laws. Our interest in filing this brief is to ensure that state agencies adhere to these same laws.

U.S. EPA and the state environmental agencies are under pressure to make up for two decades of noncompliance with Section 303(d) of the Clean Water Act. However, the failure to abide by the specific requirements of this section of the statute, and its implementing regulations, the failure to proceed based on law and science, will cost communities billions of dollars without any discernible improvement in the quality of our water.

Section 303(d) requires that:

- the State identify the standard that is the target for our efforts to enhance water quality, including the EPA-approved method and process used to “translate” narrative criteria into numeric (quantifiable) criteria;
- the State identify waters that are not currently meeting the water quality standard, despite the use of technology-based controls;
- the State identify the causes for this failure;
- the State use sound science in identifying waters and causes; and
- the State address nonpoint sources in its water quality planning generally and in establishing total maximum daily loads (TMDLs) for listed waters.

Other sections of the Clean Water Act and implementing regulations require that the State make “reasonable potential” analyses to determine whether water quality-based limits are necessary in individual NPDES permits and, if so, use these in calculating NPDES permit limits, and include these in Fact Sheets for these same NPDES permits.

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- In the Matter of: Boise Cascade Corp., Permit No. LA0007927* (EPA Env'tl. Appeals Bd., NPDES Appeal No. 91-20, Jan. 15, 1993), 1993 EPA App. LEXIS 26; 4 E.A.D. 474 14
- In the Matter of: Miami-Dade Water and Sewer Authority Department, Permit No. FL0032182* (EPA Env'tl. Appeals Bd., NPDES Appeal No. 91-14, July 27, 1992), 1992 EPA App. LEXIS 52; 4 E.A.D. 133 14
- In re: Broward County, Florida, Permit No. FL0031771* (EPA Env'tl. Appeal Bd., NPDES Appeal No. 95-7, Aug. 27, 1996), 1996 EPA App. LEXIS 15, 6 E.A.D. 535 15
- In re Las Virgenes Municipal Water Dist., Natural Resources Defense Council, et al.*, NPDES Permit No. CA0056014 (Calif. State Water Resources Control Bd., Order WQ 98-11, Nov. 19, 1998), 1998 Cal. ENV LEXIS 23 15

OTHER

- Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 Env't'l L. Rep. (Env't'l L. Inst.) 10391 7,8
- Memorandum from Robert H. Wayland, III, Director, Office of Wetlands, Oceans, and Watersheds, to Water Division Directors, Regions I-X, Directors, Great Water Body Programs, Water Quality Branch Chiefs, Regions I-X: *National Clarifying Guidance for 1998 State and Territory Clean Water Act Section 303(d) Listing Decisions* (Aug. 17, 1997) 11

STATEMENT OF INTEREST

The Association of Metropolitan Sewerage Agencies (“AMSA”) is an association of over 210 publicly-owned wastewater treatment agencies throughout the United States. These agencies treat 18 billion gallons of wastewater daily and provide service to the majority of the population of the United States. As such, AMSA’s members are on the forefront of protecting human health and the environment. AMSA and its members work with federal, State and local authorities to ensure that their actions are legal, based on sound science, and produce cost-effective and actual environmental benefits. AMSA and its members are active participants in two major federal Clean Water Act (“CWA”) programs, both of which are implicated in this case. AMSA participated in the activities of the Federal Advisory Committee on the Total Maximum Daily Load (“TMDL”) Water Quality Standards Program under Section 303(d) of the CWA, 33 U.S.C. § 1313. AMSA and its members are also active in U.S. EPA’s stakeholder meetings to help formulate approaches in implementing the *National Strategy for the Development of Regional Nutrient Criteria* (EPA, Office of Water, EPA 822-F-98-002, June 1998) (www.epa.gov/ostwater/Rules/nutsi.html)

ARGUMENT

I. THE STATE MUST COMPLY WITH SECTION 303(d) OF THE FEDERAL CLEAN WATER ACT.

These Contested Cases challenge decisions made by the South Carolina Department of Health and Environmental Control to list various waterbodies as impaired, based on the criteria specified in Section 303(d) of the Clean Water Act. This state agency is required to comply with the

specific requirements of the law, as set forth in Section 303(d)(1).¹ Section 303(d)(1) contains four subparagraphs. Subparagraphs (B) and (D) discuss waters affected by thermal discharges, a matter not at issue in the instant Contested Cases.

Subparagraph (A) requires the States to identify (in a biennial listing) waters that do not achieve the State's water quality standards after the implementation of technology-based controls on point sources. It provides as follows:

(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) [33 U.S.C. § 1311(b)(1)(A)] and section 301(b)(1)(B) [33 U.S.C. § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. § 1313(d)(1)(A). Sections 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A), and 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B), set forth certain effluent limitations based on technology, rather than water quality. The phrase, "effluent limitations required by section 1311(b)(1)(A)," refers to limitations requiring "best practicable control technology currently available" (or "BPT") for point sources other than publicly-owned treatment works ("POTWs"). The phrase, "effluent limitations required by section ... 1311(b)(1)(B)," refers to "secondary treatment" required of POTWs.

Section 303(d)(1)(A) is not a catchall provision. The Clean Water Act utilizes other lists, so not all environmentally impaired waters must be on this particular list. EPA, Region X, *Guidance Document for Listing Waterbodies in the Region 10 Section 303(d) Program* (EPA

¹ South Carolina is free, of course, to do more or require more than what is mandated by the Clean Water Act. If it does so, however, it must still comply with the minimum requirements of the Clean Water Act and it must comply with the requirements of South Carolina law.

910/R-95-003, Nov. 1995) (§ 3(c) (Relationship of the § 303(d) List to Other Clean Water Act Lists); App. A (Other Clean Water Act Lists)).

Assuming a determination is made under 303(d)(1)(A) that a water quality standard is not being met, the CWA provides further that:

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection [(d)], and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). The total maximum daily loads (“TMDLs”) are then used to calculate wasteload allocations for point source effluent limits and load allocations for non-point sources. Wasteload allocations are converted into effluent limitations in NPDES permits, 40 C.F.R. § 122.44, may require the imposition of moratoriums on new sources pursuant to 40 C.F.R. § 122.4(i), and may subject sources to Tier 1 antidegradation limitations pursuant to 40 C.F.R. § 131.12(a)(1). Section 303(d)(1)(A) listings, thus, have a direct regulatory impact on waste water treatment facilities.

TMDLs were first due to be submitted to EPA by the States within 180 days of EPA’s identification of pollutants suitable for TMDL calculations -- June 26, 1979.² However, the TMDL Program lay dormant until an avalanche of successful lawsuits were brought by environmental organizations across the country in the late 1980s and early 1990s to force the

² See Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 Env’t’l L. Rep. (Env’t’l L. Inst.) 10391, 10393, n. 28 (Aug. 1997) (citing 43 Fed. Reg. 42,303 (Sept. 20, 1978) (“*Houck II*” because it is the second of a four-part series)).

States and EPA to begin implementation of the TMDL program in earnest.³ The 303(d) suits have caused a “rush-to-judgment” by many States to fend off the threat of court orders mandating unachievable deadlines. The implementation of TMDLs without firm legal or scientific footing, however, could become an economic and environmental nightmare, costing communities across the country untold millions of dollars without reaping any discernible improvement to water quality.

A. The State Must Meet the Specific Requirements of Section 303(d)(1)(A) of the Federal Clean Water Act.

To avoid the imposition of unwarranted additional control requirements on waste water treatment facilities, it is critical that the Section 303(d)(1)(A) listing authority be exercised by the State strictly within the bounds contemplated for such listings. Section 303(d)(1)(A) identifies three separate elements that must be present to support such listings. Specifically, Section 303(d) requires States to list waters for which:

- the effluent limits required by §§ 301(b)(1)(A) and 301(b)(1)(B)
- are not stringent enough
- to implement any water quality standard applicable to such waters.

This brief will discuss these requirements in reverse order.

1. The State Must List Only Those Waters Where the “Water Quality Standard Applicable to Such Waters” Is Specified by Law

³ See *Houck II*, at 10395-7 (citing cases). EPA maintains a list of all litigation concerning TMDLs at <www.epa.gov/OWOW/tmdl/lawsuit1.html>.

Under Section 303(d)(1)(C), a TMDL must be established for every water listed under Section 303(d)(1)(A). 33 U.S.C. § 1313(d)(1)(C). TMDLs must be established at levels necessary to attain and maintain narrative as well as numerical water quality standards. 40 C.F.R. § 130.7(c)(1). *See also American Paper Institute v. U.S. EPA*, 996 F.2d 346, U.S. App. LEXIS 14832 (D.C. Cir. 1993) (upholding as reasonable EPA's interpretation that "applicable standard," as used under Section 304(l) regulation, includes narrative water quality standards). These Contested Cases concern the implementation of Section 303(d)(1) in the context of South Carolina's narrative water quality standards for aquatic life use impairment due to nutrients and pH.

Assessments of whether a water is impaired for the purposes of Section 303(d)(1)(A) listings and the establishment of TMDLs under Section 303(d)(1)(C) use the same water quality standards as targets and endpoints. Without an endpoint, the State can only make subjective and arbitrary decisions. The endpoint is crystal clear, of course, in the case of numeric criteria. With respect to narrative criteria, Federal law requires that a State "translate" narrative water quality standards into numeric values in order to comply with Section 303(d). 40 C.F.R. § 130.7(b)(3); *see* 57 Fed. Reg. 33,040, 33,045-6 (July 24, 1992). Federal law further requires that these "translations" be properly enacted under the State's rulemaking procedures, 40 C.F.R. § 25.10(b), utilizing a procedure for translating narrative standards that has been approved by EPA, 40 C.F.R. §§ 122.4(d)(1)(vi), 130.10(d)(4).

In sum, a State agency that lists waters under 303(d) based on narrative criteria, without translation into numeric criteria, is acting unlawfully. Where the State agency lists waters based on a narrative criteria that it has translated into a numeric criteria, but the translation has not been

the subject of rulemaking, the State has still acted unlawfully -- contrary to the Clean Water Act and contrary to EPA's implementing regulations.

Where, as in the instant Contested Cases, the issue is alleged aquatic life use impairment of a water body by point source phosphorus loadings many miles upstream of that water body, it is all the more important that the State translate the narrative standards to include scientifically sound numeric criteria and clear translator methodologies and procedures. Properly defined narrative criteria will protect and enhance living resources. Properly defined narrative criteria in the case of phosphorus loading will also distinguish between waters that are impaired and those nutrient-rich waters that fully support all of their designated uses. The State, thus, needs to:

- Define and quantify living resource goals with properly established biologic criteria to protect flora and fauna (including algae, macroinvertebrates, and fish) that are attainable, giving regard to the irreversible impacts of urbanization and the cost that people are willing to pay; and
- Determine the relationship between phosphorus and these biological endpoints.

2. The State Must List Only Those Waters for Which Effluent Limits on the Point Sources "Are Not Stringent Enough".

The statutory phrase "are not stringent enough to implement" is, notably, in the present tense. The State must list only those waters for which effluent limits on point sources are not stringent enough to achieve the water quality standard. Section 303(d) was never meant to address actions necessary to prevent impairments from occurring in the future. Issues related to growth are best dealt with under the Continuing Planning Process, Section 303(e), 33 U.S.C. § 1313(e), 40 C.F.R. § 130.5, and antidegradation requirements, Section 303(d)(4)(B), 33 U.S.C. §

1313(d)(4)(B); 40 C.F.R. § 131.12.

Furthermore, given the direct regulatory impact of listing a water under Section 303(d), such listings should be based on objective and reliable data. Attempts to determine whether waters may or may not be impaired in the future are even more subjective than attempts to determine whether waters may or may not be currently impaired.⁴

3. The State Must List Only Those Waters for Which the Cause(s) of Impairment Have Been Identified.

As noted above, the phrase in Section 303(d)(1)(A), “effluent limitations required by section 1311(b)(1)(A),” refers to limitations requiring “best practicable control technology currently available” (or “BPT”) for point sources other than POTWs. The phrase “effluent limitations required by section ... 1311(b)(1)(B)” refers to “secondary treatment” required of POTWs. Both of these types of effluent limitations are “technology-based,” rather than “water quality-based.” Thus, the causes of impairment must be other than the failure of point sources subject to such effluent limitations to comply with such limitations.⁵

Waters may be environmentally impaired for a variety of reasons other than point sources. These may include causes related to:

⁴ Even though EPA interprets this statutory “are” (in guidance, not by rule) to include threatened waters, EPA limits this to objective threats by limiting it to two years. Memorandum from Robert H. Wayland, III, Director, Office of Wetlands, Oceans, and Watersheds, to Water Division Directors, Regions I-X, Directors, Great Water Body Programs, Water Quality Branch Chiefs, Regions I-X: *National Clarifying Guidance for 1998 State and Territory Clean Water Act Section 303(d) Listing Decisions* (Aug. 17, 1997) (<www.epa.gov/owow/tmdl/lisgid.html>) (“‘near future’ in this context should normally be viewed as prior to the required date for the next section 303(d) list”).

⁵ If, for example, the sole cause of impairment was a point source out of compliance with technology based limits, the water would not be listed under 303(d).

- water quantity (e.g., reduced stream flows due to diversion)
- physical habitat (e.g., stream channelization)
- atmospheric deposition
- contaminated sediments, and
- nonpoint sources.

B. The State Is Required by Law to Address Nonpoint Sources in Its Planning and in Establishing Individual TMDLs.

These Contested Cases also involve the State's violation of the regulations concerning the development of water quality-based WLAs, LAs, and TMDLs. A TMDL for an individual waterbody must address nonpoint sources.

Assuming a waterbody is lawfully listed under Section 303(d), the State must establish a TMDL for the waterbody. A TMDL consists of both a wasteload allocation (WLA) and a load allocation (LA). 40 C.F.R. § 130.2(i). EPA regulations define a load allocation and a wasteload allocation as follows:

Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Whenever possible, natural and nonpoint source loads should be distinguished.

Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

40 C.F.R. § 130.2(g), (h). And, the information for WLAs and LAs must be site specific. 40 C.F.R. § 130.7(c)(1)(i).

Moreover, before a State can establish a TMDL in a particular case, it must first allocate

between point sources and nonpoint sources. These allocations must be made pursuant to legally prescribed procedures, including water quality planning procedures set out in 40 C.F.R. Part 130, that discuss these issues more generally. Among other things, the State must set out in these processes:

- how the State is allocating the assimilative capacity of the waters of the State;
- the assumptions, and the bases for the assumptions, it makes about the effectiveness of reductions from nonpoint sources using Best Management Practices (BMPs), 40 C.F.R. § 130.6(c)(4) (reporting on nonregulatory and regulatory approaches to control nonpoint sources); and
- the reserve it sets for margins of safety and of growth, and the bases for these margins.

Through TMDLs, the State is dispensing an extremely valuable and rare commodity -- the assimilative capacity of a water. This is every bit as precious as distributing, for example, grant dollars or radio frequencies. Yet, no governmental body would distribute these without carefully crafted regulations. Therefore, TMDLs should always be established in accordance with properly enacted regulations in which the public had an opportunity to comment. Federal requirements for public participation are codified in 40 C.F.R. Part 25.

Furthermore, a State should not be permitted to claim that it does not have the wherewithal to control nonpoint sources even if the NPDES permitting program itself does not extend to such sources. States do have such powers -- with or without the federal Clean Water Act. *See* Sections 208(b)(2)(F)-(K) of the CWA, 33 U.S.C. § 1288(b)(2)(F)-(K) (requiring States to report on procedures and methods to control to the extent feasible nonpoint sources of pollution); 40 C.F.R. §§ 130.6(c)(4) (nonpoint source management and control by States),

130.8(b)(4) (305(b) reporting on nonpoint sources by States); McElfish, *State Enforcement Authorities for Polluted Runoff*, 28 Env't'l L. Rep. (Env't'l L. Inst.) 10181 (April. 1998); EPA, Office of Water, *Section 319 Success Stories* (EPA 841-S-94-004) (Nov. 1994).

C. In Converting the TMDLs Into NPDES Permit Limits, the State Must Comply with the Law.

Assuming a waterbody has been properly listed under Section 303(d), and assuming a TMDL has been properly established, the state agency responsible for issuing NPDES permits must still conduct a "reasonable potential" analysis to determine whether an effluent limit based on water quality standards must be included in a particular permit. 40 C.F.R. § 122.44(d)(1)(i), (ii). If a discharger is found to have the reasonable potential to cause or contribute to an excursion of water quality standards, then, based on the same quantitative analysis, the agency calculates the approximate effluent limits. This analysis must be carried out by the State regardless of whether the receiving waters are or are not "impaired."

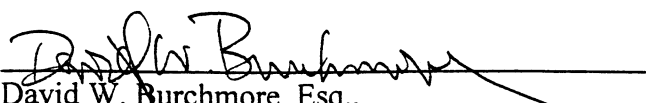
The documentation supporting a permit, usually a Fact Sheet, must contain the State permitting authority's reasonable potential analysis, or an evidentiary hearing will be ordered. *City & County of San. Francisco* (Calif. State Water Resources Control Bd., Sept. 21, 1995), 1995 Cal. Env. LEXIS 25 (the analysis must be in the Fact Sheet); *In the Matter of: Boise Cascade Corp., Permit No. LA0007927* (EPA Env'tl. Appeals Bd., NPDES Appeal No. 91-20, Jan. 15, 1993), 1993 EPA App. LEXIS 26; 4 E.A.D. 474 (without an administrative record showing the reasonable potential analysis, a hearing must be ordered); *In the Matter of: Miami-Dade Water and Sewer Authority Department, Permit No. FL0032182* (EPA Env'tl. Appeals Bd., NPDES Appeal No. 91-14, July 27, 1992), 1992 EPA App. LEXIS 52; 4 E.A.D.

133 (same); *In re: Broward County, Florida, Permit No. FL0031771* (EPA Env'tl. Appeal Bd., NPDES Appeal No. 95-7, Aug. 27, 1996), 1996 EPA App. LEXIS 15, 6 E.A.D. 535 (Fact Sheet contained the reasonable potential analysis that supported the limits); *In re Las Virgenes Municipal Water Dist., Natural Resources Defense Council, et al.*, NPDES Permit No. CA0056014 (Calif. State Water Resources Control Bd., Order WQ 98-11, Nov. 19, 1998), 1998 Cal. ENV LEXIS 23 (the administrative record supported reasonable potential).

CONCLUSION

The state agencies responsible for implementing Section 303(d) of the Federal Clean Water Act must adhere to the specific requirements of the statute and to EPA's implementing regulations. DHEC is therefore urged to place waters on the Section 303(d) list only if they are currently impaired as determined by properly promulgated numeric criteria or narrative criteria translator methodologies; establish a procedure and methodology for calculating site-specific numerical phosphorus criteria using a scientifically sound standard methodology that has been approved by the South Carolina rule making process after public notice and comment; and require water quality-based effluent limits only for those waters that cannot meet water quality standards after the implementation of effective voluntary programs.

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Western Carolina Regional Sewer
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Co-Petitioners,

v.

State of South Carolina Department of
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Co-Respondents.

DOCKET NO. 98-ALJ-07-0267-CC

CERTIFICATE OF SERVICE

This is to certify that I have on this the 28th day of May, 1999 served
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