

Nutrients: Change is Here *and* On the Way

NACWA Law Seminar 2009

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Nutrients are a Key Priority

- According to EPA...
 - Nutrients are a leading cause of significant water quality impairments across the country
 - Nutrients from non-point sources and from storm water run-off are the primary sources
 - Nutrients require new approaches if water quality is going to be significantly improved
- Real focus on nutrients at highest levels
- Many avenues for changed approaches

Avenues for Change

- Nutrient Water Quality Criteria
 - SAB Review Process
 - Inspector General's Report
 - EPA Development of Criteria for Florida
- Chesapeake Bay Developments
 - E.O. 13508
 - Legislation
- Secondary Treatment Petition
- “Call to Action” by State-EPA Nutrient Innovations Task Force

Nutrient Water Quality Criteria

- SAB Review Process
 - Ongoing; hearings in Sept. report due in December 2009
 - Issues and Potential Outcomes
 - EPA's 1998 Plan and Strategy for State lead on nutrient criteria development per CWA
 - Published draft "*Empirical Approaches for Nutrient Criteria Development*"
 - Effort to speed state development of numeric nutrient criteria
 - Statistical correlation vs. causal link is sufficient basis for limits
 - Scope of SAB's charge – "improve utility of" v. peer review draft
 - Technical approach also being seen with other constituents – efforts not before SAB
 - What happens next?
 - SAB Conf. Call 12/3/09 (74 FR 56836)

Nutrient Water Quality Criteria

- Inspector General's Report (August 2009)
 - Critique of EPA's State-reliant approach
 - Focus instead on significant waters of national value
 - Highlight Mississippi River and Gulf of Mexico as priority for establishment of numeric nutrient water quality standards
 - Tighten accountability by States and EPA with establishment of milestones, deadlines and metrics to measure progress
 - EPA's Response -- need to develop strategy for leveraging resources to speed setting of numeric standards
 - Possibly in 2010
 - Possibly focused on Mississippi, Gulf, Chesapeake Bay
 - Official Response due 90 days from report
 - Comments on IG Report and how EPA should respond?

Nutrient Water Quality Criteria

- EPA Development of Criteria for Florida
 - *Florida Wildlife Federation v. EPA*, (N.D. Fla.)
 - Nondiscretionary duty to establish numeric nutrient criteria under CWA 303(c)(4) because State narrative standards inadequate to meet CWA
 - Claims rely upon statements by EPA in 1998 *Clean Water Action Plan* and in 1998 *National Strategy for the Development of Regional Nutrient Criteria*
 - These statements not limited to Florida
 - These documents are not rules
 - EPA Determination Jan. 14, 2009 triggered federal action
 - Complete in 12-24 months
 - Controversial technical, legal and policy issues
 - Implications if basis of EPA determination for Florida is indistinguishable for other states; national impact of new federal criteria

Chesapeake Bay Developments

- E.O. 13508
 - Major Elements
 - Draft Strategy Nov. 9, 2009
 - Major sources of nitrogen: agriculture (32%), urban and suburban runoff (14%), industrial and municipal wastewater (19%), airborne contaminants (33%)
 - Major sources of phosphorus: agriculture (45%), urban and suburban runoff + in-stream sediment (31%), wastewater (21%), natural sources (3%)
 - Draft TMDL 2010
 - State Responses (so far)

Chesapeake Bay Developments

- Legislation
 - S. 1816 (Cardin Bill)
 - Includes “watershed improvement plan” or SIP-like concept with analogous penalties for States if fail to achieve goals and deadlines
 - EPA needs “new tools” (testimony at Senate EPW Subcommittee on Water and Wildlife 11/9/09)
 - H.R. 3265 (Connelly Bill)
 - Focus on runoff, CWA 402(p) permits for all storm water systems regardless of size
 - S. 1311 (Wicker Bill)
 - Focus on Gulf of Mexico, elevate program office like Ches. Bay

Secondary Treatment

- NRDC Petition on Secondary Treatment
 - 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
 - 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 did not discuss 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's 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
- EPA expects to decide this in current FY

“Call to Action”

- State-EPA Nutrient Innovations Task Force (August 2009)
 - Composition and purpose of task force
 - Of 35 recommended tools, top 5 are:
 - Non-point source regulation
 - Federally required state water quality numeric nutrient criteria
 - Updated secondary treatment standards
 - Green labeling for farm products
 - Detergent phosphate ban
 - Other ideas seek to innovate uses of existing authorities – worth exploring?

Recap on Nutrients and Change

- EPA, States recognize nutrients as a key water quality priority
- Frustration with limits of existing law
- EPA looking at using existing authorities in innovative ways and seeking to implement new tools
- Support for this approach in pending legislation
- Pressure from many directions for EPA to “do more”
- Stage is set for change in approach to nutrients
- What happens “locally” is a laboratory for national roll-out of things that “work”
- NACWA and member advocacy is critical
- Science and technology issues are critical along with legal and policy arguments



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