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May 11, 2012

Mr. Michael Haire
Watershed Branch
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via e-mail to: haire.michael@epa.gov

Dear Mr. Haire:

The Association of Clean Water Administrators (hereinafter “the Association” or “states”) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency’s (EPA) draft memorandum, *Considerations for the Development of Multijurisdictional TMDLs* (hereinafter “draft memorandum”). The Association is a national, nonpartisan, professional organization, which represents state, interstate, and territorial water quality control officials who are responsible for the implementation of surface water protection programs throughout the nation.

We appreciate EPA’s draft memorandum and find that, generally, it provides useful and flexible guidance for the development of multijurisdictional TMDLs. As a global comment, we note that as a guidance document, this memorandum sets forth voluntary considerations and suggestions. Our experience is that guidance can sometimes be implemented as rule in the field. EPA Headquarters and Regions must be careful to not implement this memorandum as containing mandatory requirements.

We have several recommendations, which we believe will be of assistance as EPA develops a final memorandum. These recommendations are set forth below in section-by-section format.

Comments Regarding Section 2:

Section 2, bullet 3, refers to separate concepts: an upstream state ensuring that its water quality standards (WQS) provide for the attainment and maintenance of the WQS of downstream waters, and EPA’s authority to review and approve a state’s WQS. Thus far, EPA has not routinely assumed the role of checking for downstream

protection of other states' waters in the process of reviewing and approving WQS. Only recently have states been asked to do this type of internal checking for newly adopted criteria. Clarification should be provided of the Agency's intent in these references.

Section 2 discusses CWA Section 319(g), under which states may petition EPA to hold a conference between states when there is disagreement regarding nonpoint source pollution levels. The footnote references a conference held regarding mercury deposition. Given the complications that could arise from considering atmospheric deposition in the context of multijurisdictional TMDLs, the final memorandum should either not reference mercury or should provide clear guidance on the matter of atmospheric deposition.

Comments Regarding Section 3:

Section 3 discusses WQS considerations. Under the CWA, a TMDL must be "established at a level necessary to attain and maintain the applicable narrative and numeric water quality standards," which includes protection of downstream/adjacent WQS. In most instances, as noted in the memorandum, when there are varying WQS between states, a TMDL will be developed that protects the most stringent standard. The final memorandum should address whether, a situation in which one state has a particular designated use, but surrounding states do not, falls under the Section 3 scenario of using the more stringent WQS (or designated use).

Consideration of natural conditions should be suggested in Section 3. For example, highly tannic waters flowing from a wetland in one state may cause "violations" of criteria for pH and dissolved oxygen in the downstream state's waters, but there may not be a pollution source to reduce.

Section 3 notes that a situation may arise between a state with narrative criteria and another with numeric criteria. EPA's final memorandum must acknowledge the reality that it will be extremely challenging for a state with a TMDL to interpret another state's narrative criteria. The amount of data and depth of understanding required for a state to adopt TMDLs consistently is difficult even when adopting TMDLs for its own waters with internal guidance and practices. Thus the memorandum can suggest interstate cooperation as a goal, but recognize that the resources and timing to access those resources from the other state may not mesh with the TMDL development schedule.

Comments Regarding Section 4:

Section 4 pertains to allocation analysis considerations. We recommend that EPA note that in many cases, a downstream state will likely be able to set only a gross load allocation, combining all point and nonpoint sources, to the jurisdictional boundary as part of its TMDL. This gross load will be assigned to the adjoining state, to then allow it to determine the optimal approach to achieve that assigned load by having specific analyses done for its point sources and nonpoint sources.

Section 4's opening quotes 40 CFR 130.2(i) as: "states that the TMDL is the sum of the point sources and the nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments." This regulation is quoted more completely in Section 4.5 to include that the TMDL "is the sum of that point source *WLA plus the LAs* for any nonpoint sources..." Mention of "the *WLA plus the LAs* for any..." is absent from the earlier reference, and implies that detailed identification and assignment of allocations to specific point and nonpoint sources is necessary. The regulation

supports a more summed approach for load assignment and allocation. The final memorandum should reflect the exact regulatory text and avoid a misleading result.

We suggest that the final memorandum take into account what an appropriate distance threshold would be in determining whether a TMDL should be restricted to one state rather than multijurisdictional. A case could be made that a TMDL developed for a stream deep in the interior of a state would still impact a downstream state on a river, which has the TMDL stream as a tributary. This consideration might best be included in Section 4.1, which pertains to defining watershed scope.

Watershed-wide waste load allocations (WLAs) are briefly addressed in Section 4.3. Given the high burden of creating these, we recommend instead that EPA suggest setting gross allocations, and then working with States to establish common permit terms so that permits on either side of the state line are renewed in the same year.

Section 4.3 provides, “By considering a range of hypothetical loading reductions, the downstream jurisdiction can develop a range of boundary assumptions that will assist in developing its own WLAs and LAs necessary to meet applicable WQS.” EPA should clarify how this idea meshes with the reasonable assurance requirements described in Section 5.

In addition, with respect to Section 4.3, if the upstream state has a pollutant source linked to a human health issue, compliance and enforcement measures should be applied immediately, rather than having the state do a TMDL and adjusting the permit in the next cycle.

The draft memorandum does not reference the beneficial role that interstate commissions can take in multijurisdictional TMDLs and thus we suggest adding the following language under Section 4.3: “Many of our large rivers and geographic regions have river basin and/or interstate commissions with the mission of bringing multiple jurisdictions together to manage the water resources of the basin or region. Many of these Commissions^{1*} have played significant roles in building collaboration among the states and stakeholders, working with states, US EPA, and other federal agencies and institutions to build the scientific base (monitoring and modeling) necessary to develop a TMDL, and developing implementation strategies. There should be recognition of the important role interstate commissions do play in the development and implementation of multijurisdictional TMDLs.”

We recommend that the final memorandum place more emphasis on the reality that in many situations, problems will arise between jurisdictions due to differing WQS or designated beneficial uses. Another conflict that could arise among states would be due to differing priorities with respect to implementation needs. For instance, the downstream state might want the upstream state to work on their shared water, while the upstream state views its implementation priorities as placed elsewhere, e.g., waters that are used by a greater proportion of the state’s citizenry. We recommend EPA’s role as mediator in these situations be more fully fleshed out in the final memorandum. As stated earlier, CWA Section 319(g), which refers to a conference request with EPA when there is a

¹ Including the Delaware River Basin Commission (DRBC), Interstate Commission for the Potomac River Basin (ICPRB), New England Interstate Water Pollution Control Commission (NEIWPCC), Ohio River Valley Water Sanitation Commission (ORSANCO), and the Susquehanna River Basin Commission (SRBC).

lack of collaboration between states, is mentioned in Section 4.5 of the draft memorandum. The possibility of the states' inability to collaborate and the need for EPA to step in should be addressed earlier in the final memorandum, as it is a likely scenario. More discussion is needed to describe past cases of multijurisdictional TMDLs, how difficulties between states have been resolved, and what can happen if states cannot cooperate.

Section 4.5 provides that "distinguishing loadings from adjacent jurisdictions usually necessitates the use of mechanistic models that contain some capability of tracing advective and diffusive mixing of pollutant loads." The final memorandum should note that models can estimate loads being delivered from each jurisdiction's area of responsibility and assess where impacts may occur in the receiving waterbody, but cannot track specific "pounds" of a pollutant from a particular source, nor is that needed.

We also believe that, in Section 4.5, when providing the TMDL definition/equation, it would be useful to further define "WLA," "nonpoint," and "LA."

Four scenarios for considering boundary loadings in the development of multijurisdictional TMDLs are set forth in Section 4.5. In the first scenario, the downstream jurisdiction is developing the TMDL and the load from the upstream jurisdiction does not contribute to the downstream impairment. In this situation, the established "good" load at the state line becomes the baseline to assess future conditions and determine whether there is cause to revisit the TMDL and its allocations within the downstream state. There is little value in predicting the certainty and stability of currently "good" loads. Deterioration from the baseline is cause for discussion for the two states, with the upstream responsibility not to cause nonattainment of the downstream WQS the focus.

The first bullet under Scenario 2 states that the adjacent or upstream state would "provide documentation that would describe how they would implement point and nonpoint source controls that result in loads at the shared boundary that meet State A's standards." It is unclear to whom the documentation would be submitted and when? Under the discussion in Section 5 on reasonable assurance, it could be difficult to provide documentation in a timely manner to support the downstream state's TMDL allocation decisions.

The second bullet under Scenario 2 provides that "If the TMDL does not include sufficient documentation that State C can reduce their boundary load to meet State A's WQS, there may be less loading capacity for State A. Depending on the level of uncertainty for reducing loadings in State C, it may be necessary for State A to further reduce its own pollutant sources." This seems flawed. Each jurisdiction should be responsible for its own pollutant reductions. If the entire excessive load is coming from State C, no further reductions can come from State A. At the next level, the loads coming from State C may be more than what State A can handle, either due to technological or resource limitations. Analogous to the findings in *Arkansas v. Oklahoma*, State A should only be obligated to treat its own excessive contribution from point and nonpoint sources. Modeling can help make these types of demonstrations.

Also, in Section 4.5, the memorandum implies that EPA would like to see the detail and resolution of shared water TMDLs extend beyond the borders of the State actually developing the TMDL. States

would likely prefer to set an expected, desired load at the state line and leave it to the upstream state to determine what it would need to do to achieve the state line target.

Additional scenarios that may be worth mentioning in the final memorandum include tidally impacted multijurisdictional waters (e.g., estuaries) or coastal waters with longshore currents. Considerations for the development of multijurisdictional TMDLs where you have an adjacent foreign watershed should also be noted.

Comments Regarding Section 5:

Section 5 discusses reasonable assurance considerations and provides: “Clearly a downstream State/Tribe should provide documentation that the allocations to point sources in the watershed within its boundaries have been based on an assessment of the probability that proposed nonpoint source allocations will be achieved.” There is actually ambiguity here which should be acknowledged. For example, many states have addressed the problem of permitting point sources by doing water quality based effluent limitations (WQBELs) or applying technology based effluent limitations (TBELs). Nonpoint sources have only recently been more thoughtfully included. For many NPSs, there may not be an adopted best management practice (BMP), or the BMP may not be able to achieve the reductions assigned under the TMDL. While there are cases where point source dischargers may need to get out of the receiving waterbody, there are also many cases where once they are out (or there are no point source discharges), WQS will not be achieved with current BMPs. In addition, in some cases, the mere presence of the treated wastewater discharge may improve the overall condition of the receiving waterbody. Examples of this are seen in the arid west, where continuous flow of highly treated effluent may provide an aquatic habitat that otherwise would not be present, or the added flow reduces the residence time in the receiving waterbody, lowering the likelihood or extent of algal blooms.

Since reasonable assurance is a concept that, on its own, needs further discussion among EPA and states, we recommend this section be removed. Extending reasonable assurance beyond a state’s jurisdiction invites tremendous conflict and uncertainty in implementation.

Additional General Comments

Throughout the document, EPA should emphasize that the responsibility of the downstream state is to establish the desired baseline loading at the state line and the responsibility of the upstream state is to implement practices (both NPDES and NPS) to attain that baseline at the state line.

In addition, we recommend that the final memorandum emphasize the need and utility of state line monitoring, as the information that drives assessment and evaluation of the TMDL in its development and post-development implementation phases.

We also recommend that the final memorandum reference tribes and the potential impacts that multijurisdictional TMDLs could have on tribes.

We suggest that EPA consider whether “multijurisdictional” is the proper term for these TMDLs. It might be more appropriate refer to these as “interstate” TMDLs, as states, technically, conduct “multijurisdictional” TMDLs regularly (e.g., among different cities, counties, etc.).

Conclusion

Again, the states welcome EPA's draft memorandum setting forth considerations for the development of multijurisdictional TMDLs. As a general matter, we believe it provides states the necessary flexibility, while also providing sufficient detail. However, we believe additional clarity and revisions are warranted. We offer the above comments and recommendations in an effort to ensure the final memorandum is most meaningful states, EPA, and other stakeholders.

We thank EPA again for the opportunity to comment on this memorandum and look forward to the final memorandum. Should you have further questions, please contact our Executive Director and General Counsel, Alexandra Dunn, at 202/756-0600 or at adunn@acwa-us.org.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Walter L. Baker".

Walter L. Baker, P.E.
Director, Utah Division of Water Quality
ACWA President