

**CENTRAL GULF COAST SAFETY  
& HEALTH SEMINAR AND EXPOSITION**

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**CURRENT ENVIRONMENTAL ISSUES  
AFFECTING EPA -- UPDATE**

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Current Environmental Issues Affecting EPA Update

A. **Jurisdiction:**

- (1) **OSHA:**      Agency:  
Occupational Safety and Health Administration
- Law:  
Occupational Safety and Health Act of 1970  
29 U.S.C. § 653  
29 C.F.R. § 1929
- (2) **EPA:**      Agency:  
Environmental Protection Agency
- Law:  
Clean Air Act  
Clean Water Act  
CERCLA  
RCRA  
TSCA  
Safe Drinking Water Act  
Asbestos Hazard Emergency Response Act  
FIFRA  
EPCRA

The agencies have overlapping jurisdictions on health and environmental matters.

In order to provide cooperation and avoid duplicative actions, several agreements, Memorandum of Understanding (MOU)s, have been developed between the two agencies to help define the rules and cooperative efforts of each for particular issues, primarily response and enforcement:

- (a) **Memorandum of Understanding Between EPA, Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Assurance and U.S. Department of Labor on Chemical Accident Investigation**, dated December 1, 1996: The purpose of the MOU is to set forth the principles of the working relationship between the EPA and the U.S. Department of Labor, and OSHA in the area of chemical accident investigation and the underlying causes of chemical accidents. This MOU implements OSHA's authority under the OSHA Act of 1970 (OSHA Act), and EPA's authority under Sections 103 and 112 of the Clean Air Act (CAA), and Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to enter into agreements with other federal agencies to further the objectives of Congress and the President.

- (b) **Memorandum of Understanding Between the U.S. Department of Labor, OSHA and the EPA Office of Enforcement**, dated February 13, 1991: The purpose of this interagency MOU is to establish and improve the working relationship between the Office of Enforcement of the EPA and the OSHA of the Department of Labor. This MOU establishes a process and framework for notification, consultation and coordination between EPA and OSHA to aid both agencies in identifying environmental and workplace health and safety problems and to more effectively implement enforcement of our national workplace and environmental statutes.
- (c) **Memorandum of Understanding Between the U.S. Department of Labor, OSHA, and the EPA Office of Enforcement**, dated November 23, 1990: The goals of the agencies are to improve the combined efforts to the agencies to achieve protection of workers, the public, and the environment at facilities subject to EPA and OSHA jurisdiction; to delineate the general areas of responsibility of each agency; to provide guidelines for coordination of interface activities between the two agencies with the overall goal of identifying and minimizing environmental or workplace hazards. This MOU establishes a process and framework for notification, consultation and coordination between EPA and OSHA to aid both agencies in identifying environmental and workplace health and safety problems and to more effectively implement enforcement of our national workplace and environmental statutes.
- (d) **Memorandum of Understanding between EPA and the Department of Labor**, dated February 6, 1986: The purpose of this MOU is to set forth the working relationship between the EPA and the Department of Labor, specifically the OSHA with respect to the requirements of Section 9(a) of the Toxic Substances Control Act (TSCA). The TSCA requires EPA to make a finding of unreasonable risk of injury to health or the environment in order to regulate a toxic substance, while the OSHA Act requires OSHA to demonstrate that there is a significant risk to employees from a toxic substance in the workplace in order to regulate that substance.

**B. With that in mind, what's new at EPA?**

**(1) Phase II Construction Site Stormwater Regulations**

(a) **Alabama:** The state environmental agency, the Alabama Department of Environmental Management (ADEM), on January 23, 2003, adopted new stormwater rules to replace the General Permit ALG610000 for construction sites. The new ADEM stormwater regulations are now ADEM ADMIN Code Reg. 335-6-12.

(b) **EPA:** EPA's Phase II stormwater regulations are found at 40 CFR 122.1. EPA issued a new proposed general permit on December 20, 2002. The prior general permit expired 3/13/03, and the replacement, which would include Phase II sites, is not yet in effect. The delay in approving the general permit has caused a number of states to miss the March 10, 2003 deadline for developing Phase II general permits. As of March 11, 2003, 14 states and EPA had not yet issued a general permit.

The environmental counsel for the AGC, Leah Wood, recently said the delay... "means any contractor, even those with very best management practices in place, will be vulnerable to a lawsuit." (as quoted in BNA Daily Env. Report, 3603 No. 44

In a recent decision by the 9<sup>th</sup> Circuit Court of Appeals in *Environmental Defense Center, Inc. v. EPA*, No. 00-70014 (Jan. 14, 2003), the Appeals Court ruled that the procedure of submitting a NOI or, in Alabama, a NOR, is subject to public notice and review. The decision is presently stayed while on remand for review by the full Appeals Court.

The Phase II regulations and general permits provide that permit holders must comply with all other federal and state regulations, which include OSHA requirements and standards, particularly those that apply to "trenching and shoring", "excavations" 29 CFR 1926p, and "site clearing" 29 CFR 1926.60

(c) **Phase II Construction Site Stormwater Requirements:**

Phase I of the NPDES program under the Clean Water Act was introduced by the EPA in 1990. The NPDES program relies on permit coverage to eliminate stormwater runoff. Phase I addressed stormwater runoff from “medium” and “large” municipal stormwater sewer systems (“MS4s”) generally serving populations of 100,000 or greater, construction activity disturbing 5 acres of real property or greater, and ten categories of industrial activity.

On December 8, 1999, the EPA promulgated the Stormwater Phase II final rule. 64 Fed. Reg. 68722 (1999). Phase II expanded the Phase I program by requiring smaller MS4 operators and construction site operators disturbing 1 acre of real property or greater to obtain NPDES permits by March 10, 2003. These permits require operators to implement programs and practices to control polluted stormwater runoff. Permitting authority has been delegated by EPA to state regulatory agencies except 5 states.

ADEM has adopted new rules to replace the previous general permit structure. The new rules are codified as ADEM Admin. Code Reg. 335-6-12. The effective date was January 23, 2003. Existing operators that held a general permit prior to March 1, 2003, were required to resubmit their request for coverage under the new rules as a notice of registration (NOR) prior to the March 1 deadline. There are many

similarities between ALG610000 and the new rules, but also many new standards, fees, and requirements.

Phase II requires permits for construction activity on property between one and five acres substantially increasing the number of regulated sites. Construction activity on property greater than five acres is covered by Phase I. Phase II also covers areas less than one acre if it is part of a larger common plan of development or sale with a planned disturbance of greater than 1 acre. Under Phase II, the operator of the construction site (a defined term) is charged with the duty to obtain the permit by filing a notice of registration (“NOR”) and complying with the requirements of the rules. An “operator” is defined as a person who either has “operational control of construction project plans and specifications, including the ability to make modifications to those plans and specifications” or a person who has “day-to-day operational control of those activities at a project which are necessary to ensure compliance with a stormwater pollution prevention plan” (“SPPP”), i.e. they are authorized to direct workers at a site to carry out activities required by the SWPPP or comply with other permit conditions. United States Environmental Protection Agency, Storm Water Phase II Compliance Assistance Guide 5-3, available at <http://www.epa.gov/npdes/pubs/comguide.pdf>.

Under proposed 335-6-12-.02(n), “Operator” is defined as:

“Operator” means any person, registrant, or other entity, that owns, operates, directs, conducts, controls, authorizes, approves, determines, or otherwise has responsibility for, or exerts financial

control over the commencement, continuation, or daily operation of activity regulated by this Chapter. An operator includes any person who treats and discharges stormwater or in the absence of treatment, the person who generates and/or discharges stormwater, or pollutants. An operator includes but is not limited to, property owners, agents, general partners, LLP partners, LLC members, leaseholders, developers, builders, contractors, or other responsible or controlling entities. An operator does not include passive financial investors that do not have control over activities regulated by this Chapter.

Under EPA's final Phase II rule, the NPDES permitting authority (in Alabama, ADEM) may provide waivers from Phase II coverage to operators of small construction in two situations. These waivers are intended only for sites which are not likely to have a negative effect on water quality. First, if an operator can determine that the low predicted rainfall potential, where the rainfall erosivity factor would be less than five during the period of construction activity then he qualifies for a waiver. EPA Compliance Guide at 5-5. This waiver is given when there is low predicted rainfall, and therefore, there is little chance of having stormwater discharge. "This waiver is time-sensitive and is dependent on when during the year a construction activity takes place, how long it lasts, and the expected rainfall and intensity during that time. It creates an incentive for construction site operators to build during the dry part of the year." Id.

Second, if an operator can determine that stormwater controls are not warranted based on either a total maximum daily load ("TMDL")

assessment for an impaired waterbody, or for unimpaired waterbodies, an equivalent analysis, then he or she qualifies for a waiver. Id. With respect to TMDLs, EPA has provided as follows:

A TMDL process establishes the maximum amount of pollutants a waterbody can assimilate before water quality is impaired, then requires that this maximum level not be exceeded. A TMDL assessment determines the source or sources of a pollutant for the waterbody, then allocates to each source or category of sources a set level of the pollutant that it is allowed to discharge into the waterbody.

Id. at 5-6.

The EPA requires that, for a state to meet the NPDES permitting authority requirements, the state must require construction site operators to (i) implement erosion and sediment control BMPs; (ii) control waste such as discarded building materials, concrete truck washout, chemicals, litter, etc. that may have an adverse impact to water quality; (iii) submit a site plan for review that includes consideration of water quality impacts; and (iv) develop and implement a SPPP similar to those required under Phase I. Id. at 5-3. Under Phase II, the EPA gave the permitting authorities the choice of whether to require a NOI under a general permit for small construction sites. However, the EPA recommended the use of NOIs “for tracking permit coverage and prioritizing inspections and enforcement.” Id. at 5-9. ADEM now requires the use of registration by submission of a Notice of Registration.



EPA required permitting authorities to create and issue Phase II permits no later than December 2, 2002, and required operators of affected sites to obtain a NPDES permit coverage by March 10, 2003. This schedule has not been met by all states, and has been delayed by litigation. The alternative remaining is for operators to apply for an individual permit.

ADEM's early estimates are that approximately 20,000 Phase II regulated construction sites exist at any given time in Alabama.

(d) **MS4s:** Under Phase II of the NPDES, operators of small MS4s are also required to obtain permits. In order to obtain these permits, these operators are required to design programs that reduce the discharge of pollutants to the maximum extent practicable, protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act. United States Environmental Protection Agency, Storm Water Phase II Final Rule Overview at <http://www.epa.gov/npdes/pubs/fact1-0.pdf>. One of the requirements of the Phase II rule is that the operating authority "develop, implement, and enforce a program to reduce pollutants in stormwater runoff to their MS4 from construction activities that result in a land disturbance of greater than or equal to one acre" during and after construction. Id.

There is often confusion about the difference between the NPDES Stormwater Program for construction and the regulations implemented by the NPDES-regulated MS4s. These are wholly different programs, and an

operator is subject to requirements under both if located in an area with a regulated MS4 such as the City of Mobile. However, to help operators of regulated construction sites meet compliance standards, the Phase II Final Rule includes a provision that allows the NPDES permitting authority to reference a “qualifying State, Tribal or local program” in the NPDES general permit for construction. “This means that if a construction site is located in an area covered by a qualifying local program, [i.e., regulated MS4s,] then the construction site operator’s compliance with the local program would constitute compliance with their NPDES permit.” EPA Compliance Guide, supra at 4-32.

Additionally, when dealing with those small construction sites which are given waivers by the permitting authority, regulated MS4s are not required to enforce a regulatory program on those sites. Id. at 4-33. Under the MS4 permits, the MS4 operator must:

- (1) Have an ordinance or other regulatory mechanism requiring the implementation of proper erosion and sediment controls, and controls for other wastes, on applicable construction sites (the EPA intends to develop a model ordinance but has not yet done so);
- (2) Have procedures for site plan review of construction plans that consider potential water quality impacts;

- (3) Have sanctions to ensure compliance (established in the ordinance or other regulatory mechanism);
- (4) Establish procedures for the receipt and consideration of information submitted by the public (the MS4 operator must only consider the information, not necessarily follow-up and respond); and
- (5) Determine the appropriate BMPs and measurable goals for this minimum control measure.

Id. at 4-29 and 4-32.

(e) **Best Management Practices:** BMPs are climate-specific and often vary among geographical regions. For that reason, the EPA delegated the responsibility of identifying required BMPs to the NPDES permitting authority. Id. at 4-34. Currently, ADEM requires operators to use the 2002 revised version of the Alabama Handbook For Erosion Control, and has contracted with the Alabama Soil and Water Conservation Society to develop a 2003 BMP manual, which will probably be required once the new Rule is amended in the Fall.

The EPA has developed sample BMPs, which are divided into two categories: non-structural and structural. Non-structural BMPs include planning and procedures as well as site-based local controls. EPA Compliance Guide, supra at 4-34. Under planning and procedures, runoff can be addressed with zoning ordinances and Master Plans that promote water quality by “guiding growth of a community away from sensitive

areas and by restricting certain types of growth (industrial, for example) to areas that can support it without compromising water quality.” Id. Site-based local controls include “buffer strip and riparian zone preservation, minimization of disturbance and imperviousness, and maximization of open space.” Id.

Structural BMPs include storage, infiltration, and vegetative practices. Id. at 4-35. “Storage and detention BMPs control stormwater by gathering runoff in wet ponds, dry basins, or multichamber catch basins and slowly releasing it to receiving waters or drainage systems.” Id. Infiltration practices include infiltration basins, dry wells, and porous pavement, all of which promote percolation of stormwater runoff through the soil to the groundwater. This results in a reduced quantity of stormwater runoff. Vegetative BMPs include “grassy swales, filter strips, artificial wetlands, and rain gardens,” which “are landscaping features that...enhance pollutant removal, maintain/improve natural site hydrology, promote healthier habitats, and increase aesthetic appeal.” Id.

The new ADEM Rule 335-6-12-.21 requires effective BMPs as described in the Alabama Handbook and as described in the BMP plan.

There are many questions still remaining concerning the mechanics of the new ADEM stormwater rules:

- (i) Effective date of ADEM Rules 1 23 03.
- (ii) NOR must be submitted.
- (iii) New fee schedule now fully in effect.

- (iv) New Alabama Handbook must be used (currently 2002) - Rules to be amended in fall to address revisions by Alabama Soil and Water Conservation Society.
- (v) Registration Now Handled by Field Offices.
- (vi) QCP/QCIP designations explained.
- (vii) Precipitation provisions now require recordkeeping.
- (viii) Registrant/operator status still confusing

(f) **Enforcement:** EPA and delegated state agencies like ADEM will focus on enforcement of the new requirements.

At the U. S. Dept. of Justice, Attorney General John Ashcroft on March 11, 2003, stated that the Justice Department will combine protection of the environment and safeguarding the country from terrorist attack. Top priorities will be enforcement of laws regulating water supplies and water systems, pipeline safety, chemical plants, and the transport and storage of hazardous materials.

Another top priority is to ensure safety of pipelines, storage tanks, industrial plants and transportation networks.

Enforcement will be a top priority with ADEM as well. Funding from fees and penalties will finance the additional personnel needed to administer the new program.

(2) **Current Wetlands Issues:** EPA and the U. S. Army Corps of Engineers (“Corps”) have jurisdiction over certain sections of the Clean Water Act, especially Section 404, which prohibits the discharge of dredged and fill material without a permit.

(a) **Implications from SWANCC decision:** The SWANCC decision has been argued by some courts to be a very narrow interpretation of the Clean Water Act Section 404 jurisdiction. The Section 404 regulations apply to wetlands with a hydrologic connection to non-navigable or intermittent tributaries of navigable waters. United States v. Interstate General Co., 152 F. Supp. 2d 843 (D. Md. 2001) *aff’d* 39 Fed. Appx. 870 (4<sup>th</sup> Cir. 2002); Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9<sup>th</sup> Cir. 2001). Other courts have given SWANCC a broader interpretation, stating that the Corps’ Section 404 jurisdiction extends only to wetlands that are “adjacent” to navigable waters. Rice v. Harken Exploration Co., 250 F.3d 246 (5<sup>th</sup> Cir. 2001); United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002).

In general, the evolution of the Clean Water Act jurisdiction for the last twenty years expanded to all waters of the United States (33 C.F.R. 328, Corps regulation; 40 C.F.R. § 122, EPA regulation), including navigable waters, tributaries, adjacent wetlands (United States v. Riverside Bayview Homes, 474 U.S. 121, 16 E.L.R. 20086 (1985)) and isolated intrastate wetlands and waters. The expansion of jurisdiction over isolated wetlands and waters was justified under the Commerce Clause of the United States Constitution (U.S. CONST. art. I cl. VIII) by the so-called “Migratory Bird Rule.” In other words, waters that are, should, or would be used as habitat for migratory birds which cross state lines are

waters of the United States (or were pre-SWANCC) subject to the Clean Water Act Section 404 jurisdiction.

The Migratory Bird Rule found its way into the Corps' regulations in 1986 with the following language:

“Waters of the United States...also include the following waters:

- a. waters which are or would be used as habitat for birds protected by Migratory Bird Treaties; or
- b. which are or would be used as habitat by other migratory birds which cross state lines; or
- c. which or would be used as habitat for endangered species; or
- d. used to irrigate crops sold in interstate commerce.”

51 Fed. Reg. 41208, 41217 (Nov. 13, 1986)

The Rule was rejected in the Fourth Circuit in Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va 1988) aff'd 885 F.2d 866, (4<sup>th</sup> Cir. 1989), and the Seventh Circuit in Hoffman Homes, Inc. v. EPA, 975 F.2d 1554 (7<sup>th</sup> Cir. 1992), and Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7<sup>th</sup> Cir. 1993). However, the Seventh Circuit, in 1999, upheld the Rule (Solid Waste Agency of No. Cooke County v. Corps of Engineers, 191 F.3d 845 (7<sup>th</sup> Cir. 1999), as did the Ninth Circuit in 1990 and 1995. See Leslie Salt Co. v. United States, 55 F.3d 1388 (9<sup>th</sup> Cir. 1995); and Leslie Salt Co. v. United States, 896 F.2d 354 (9<sup>th</sup> Cir. 1990).

Finally, the United States Supreme Court, during the appeal from the Seventh Circuit court opinion in Solid Waste Agency of No. Cooke County v. Corps of Engineers, 531 U.S. 159 (2001), the *SWANCC* decision, held that the

Corps of Engineers overextended Section 404 jurisdiction beyond the Congressional authority. The Migratory Bird Rule was, therefore, invalidated.

A consortium of twenty-three suburban Chicago cities formed a corporation to handle their solid waste disposal. The group purchased 533 acres of an old gravel pit to develop a landfill. The pits held water seasonably and were visited from time to time by migratory birds. The site was also in close proximity to another wetland area, which was in close proximity to a navigable water. The Corps of Engineers denied, after several years, the Section 404 permit application. The cities claimed that the Clean Water Act extended only to traditional navigable waters and that the Migratory Bird Rule was not authorized under this traditional definition. In addition, the cities argued that the expanded jurisdiction exceeded Congress' broadest constitutional authority. The Supreme Court found that the Clean Water Act grants jurisdiction only over navigable waters, and in its traditional sense, waters that were or had been navigable in fact or could reasonably be navigable in fact. The Migratory Bird Rule was justified by the Corps with reference to a broad power of Congress to regulate activities substantially affecting interstate commerce rather than Congress' commerce power over navigation and thereby exceeded the scope of the Clean Water Act.

Isolated wetlands may, but do not necessarily affect interstate commerce. The Clean Water Act jurisdiction, arguably, only extends to those waters, navigable waters, that clearly have been indicated by Congress.

In U.S.V. Rapanos, the Fifth Circuit rejected the Corps jurisdiction over wetlands stating that the Supreme Court in *SWANCC* established a new mode of



analysis which must be utilized. 190 F. Supp 2d 1011 (E.D. Mich. 2002). In Rice v. Harken Exploration Co., 250 F.3d 264 (5<sup>th</sup> Cir. 2001), the Court held that the Clean Water Act jurisdiction extends only to a body of water that is actually navigable and adjacent to an open body of water.

An excellent article you should review is “Can *SWANCC* be Right For a New Look at the Legislative History of the Clean Water Act,” by Virginia S. Albrecht and Stephen M. Nickelsburg, 32 E.L.R. 11042, Sept. 2002.

(3) **TMDL:**

(a) **Generally:** Total maximum daily loads (“TMDL”) of pollutants must be established by each state for impaired waters within the state’s boundaries necessary to implement the state water quality standards. 33 U.S.C. § 1313(d). This is § 303(d) of the Clean Water Act, originally enacted as part of the 1972 Federal Water Pollution Control Act amendments.

Though dormant for many years, litigation in recent years has focused on the obligations of EPA and the states to (1) identify those waterbodies that do not meet the state’s water quality standards and water use classifications, (2) prioritize those waters, (3) determine the TMDL for pollutants that allow the state to meet those standards, and (4) implement a program to utilize the load allocations in the permitting process. These were matters largely ignored until cases of significance including:

- (i) Scott v. City of Hammond, 530 F. Supp. 288 (N.D. Ill. 1981) aff’d in part, rev’d in part, 741 F.2d 992 (7<sup>th</sup> Cir. 1984). The court held that the failure of the state to act or provide TMDLs for impaired waters (in this case, neither Indiana nor Illinois submitted anything to EPA) to EPA could be a

constructive submission of no TMDLs requiring EPA to then act to determine the TMDLs.

- (ii) Northwest Environmental Defense Center v. Thomas, No. 86-1578BU (D. Ore., Consent Decree filed June 3, 1987). Timetable established for EPA action if Oregon did not submit its list of impaired waters.
- (iii) Alaska Center for the Environment v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991), EPA required to determine TMDLs for Alaska state waters since Alaska has submitted none and had not attempted to submit any.
- (iv) Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996). The Sierra Club filed a citizen's suit objecting to all aspects of the Georgia program including the listings of impaired waters, prioritization of the number of TMDLs proposed, and the timetables proposed. The court ordered a shorter timetable for determination of TMDLs, within five (5) years, among other things.
- (v) Edward W. Mudd, II et al. v. John Hankinson, et al., CV-97-5-0714-M and Alabama Rivers Alliance, Inc. v. John Hankinson, et al., CV 97-5-2518-M. Consent degree entered establishing a schedule for establishing TMDLs in Alabama to be prepared by EPA.
- (vi) Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). Northern District of California held that § 303 authorized EPA to establish TMDLs for waters impaired by non-point source pollution.

Alabama, through ADEM, like other states under consent orders, has listed and identified impaired waters, proposed and will propose TMDLs for listed waters, or if

unable or unwilling to do so, EPA will have one year in which to do so. ADEM has a five-year schedule from 1998 to submit the TMDLs. Currently, ADEM is working with EPA on Mobile Bay studies.

(b) **Statutory Authority:** 33 U.S.C. § 1313(d) (§ 303(d) of the Clean Water Act) provides the procedures for identifying waters which remain polluted even after technological standards have been applied and to establish limits or waste loads within which water quality standards can be met.

(i) **EPA Regulations:** 40 C.F.R. Part 130 were first issued in 1985, revised in 1992, and again in 2000, effective October, 2001.

(ii) **ADEM Regulations:** ADEM Admin. Code Reg. § 335-6-10, Water Quality Criteria; § 335-6-11, Water Use Clarification.

(c) **40 C.F.R. § 130.2 Definitions:**

(i) **Total maximum daily load (TMDL):** A TMDL is a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. TMDLs must be established for waterbodies on Part 1 of the list of impaired waterbodies and must include the following eleven elements:

1. The name and geographic location of the impaired waterbody;
2. Identification of the pollutant and the applicable water quality standard;

3. Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;
4. Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards;
5. Identification of source categories, source subcategories or individual sources of the pollutant;
6. Wasteload allocation;
7. Load allocations;
8. A margin of safety;
9. Consideration of seasonable variations;
10. Allowance for reasonably foreseeable increases in pollutant loads including future growth; and
11. An implementation plan.

(ii) **Waste Load Allocation:** The portion of a TMDL's pollutant load allocated to a point source of a pollutant for which an NPDES permit is required. For waterbodies impaired by both point and nonpoint sources, wasteload allocations may reflect anticipated or expected reductions of

pollutants from other sources if those anticipated or expected reductions are supported by reasonable assurance that they will occur.

(iii) **Load Allocation:** The portion of a TMDL's pollutant load allocated to a nonpoint source, stormwater source for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, groundwater, or background source of pollutants.

(iv) **Pollutant:** Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et. seq.)), heat, wrecked or discharged equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean: "sewage from vessels" within the meaning of Section 312 of the Clean Water Act; or water, gas, or other material that is injected into a well to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that such injection or disposal will not result in the degradation of ground or surface water resources. (See Clean Water Act Section 502(6)).

(v) **Impaired Waterbody:** Any waterbody of the United States that does not attain and maintain water quality standards (as defined in 40 C.F.R. Part 131) throughout the waterbody due to an individual pollutant, multiple pollutants, or other causes of pollution, including any waterbody for which biological information indicates that it does not attain and

maintain water quality standards. Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

**(d) Effects on Land Use:** For existing industries, the establishment of TMDLs following the identification of specific polluted waters where existing water quality standards, water use classification and NPDES limits have not been successful means more stringent permit limits, additional costs to meet the new standards, and limits.

Monitoring is a component of the water quality standards that would be required to insure compliance with the new standards and loads.

A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits for upgrading public drinking water systems until the state complied with § 303(d) as a water quality limited segment, the geographic description of an area to be designated as a listed water. Friends of Wild Swan v. EPA (D. Mont. CV-97-35-M-DWM, 10-13-00)

In Headwaters, Inc. v. Talent Irrigation District, 52 ERC 1001 (9<sup>th</sup> Cir. 2001), a citizen suit was filed alleging discharges to an irrigation ditch without an NPDES permit. Defendant had applied an aquatic herbicide to the irrigation canals. The court found that, although the herbicide was discharged without a permit, the canals were “waters of the United States” subject to Clean Water Act jurisdiction, which includes § 303(d).

Nonpoint source pollution and construction (NPDES) Stormwater permits could likely see more stringent limits in permits and regulations. As TMDLs for pollutants such as siltation and sediment are developed, activities affecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDLs must address all pollution including nonpoint source pollution according to the court in Pronsolino v. Marcus, 91 F. Supp. 29 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are discussed, and have a costly effect on municipal sewage treatment and stormwater drainage systems.

(4) **Mold:** Another health and environmental issue of interest to both EPA and OSHA concerns mold. Exposure to mold and fungus has caught the attention of EPA and OSHA. Each agency has issued recommendations on mold remediation, cleanup, and the prevention of growth.

OSHA directs employees and managers of schools or commercial buildings to ask contractors to follow EPA's recommendations in the publication "*Mold Remediation in Schools and Commercial Buildings.*"

Attention has been given to mold through a number of recent cases involving property damage and personal injury claims alleging damage caused by mold.