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Comment Clerk  
Water Docket (W-99-04)  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, DC 20460

Re: REVISIONS TO THE NATIONAL POLLUTANT ELIMINATION SYSTEM PROGRAM  
AND FEDERAL ANTIDegradation POLICY IN SUPPORT OF REVISIONS TO THE  
WATER QUALITY PLANNING AND MANAGEMENT REGULATION; PROPOSED  
RULE, 64 FR 46058, (23 AUGUST 1999), DOCKET NO. W-99-04

Dear Sir/Madam:

Enclosed are consolidated Department of Defense (DoD) comments prepared by the DoD's Clean Water Act Services Steering Committee (CWASSC) on the proposed revisions to Federal Antidegradation Policy contained in the above-captioned proposed rule. The DoD CWASSC represents the Departments of the Navy, Air Force, and Army, as well as several other Defense components. The Navy is the executive agent for Clean Water Act issues for DoD and chair of the DoD CWASSC.

The DoD supports the Federal Antidegradation Policy as an important tool in protecting our nation's water resources. However, there are two major issues that are programmatic in scope.

The first concern is that EPA's proposal to impose an offset ratio of 1.5 to 1 for selected discharges as a means of achieving further reasonable progress places the burden on a limited category of dischargers. Furthermore, the proposed offset plan closely resembles a Total Maximum Daily Load (TMDL) in that it is a means of making progress in water quality improvement while allowing additional, lawful discharges to occur. We believe, therefore, that this approach is inconsistent with Congressional intent regarding the attainment of water quality standards and exceeds the Agency's existing statutory authority.

Secondly, DoD recommends that EPA expand the number of interim actions that are available to new and significantly expanded dischargers to impaired waters for which a TMDL has not yet been developed. In particular, the interim actions should include participation in cooperative watershed management programs as an additional means for dischargers to listed waters to work cooperatively with States and Tribes. Where such programs are shown effective, participation therein should allow: 1) dischargers to continue to work in that cooperative framework while TMDLs are being developed and 2) States to move those waters for which watershed programs are in effect to a lower priority on the TMDL list.

In addition to these general comments, we have provided comments on specific issues pertaining to the proposed rule. Please keep in mind the impact of the regulation on our unique mission and infrastructure and consider the enclosed recommendations as you revise the NPDES/WQS regulation. If you have any questions, my point of contact is Ms. Kathy Ellis, CWASSC Chairperson, at (703) 602-2568 or email [ellis.kathy@hq.navy.mil](mailto:ellis.kathy@hq.navy.mil).



FOR ELSIE L. MUNSELL

Deputy Assistant Secretary of the Navy  
(Environment and Safety)

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# CLEAN WATER ACT SERVICES STEERING COMMITTEE

## Comments on the Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management; Proposed Rule

64 FR 46057 (23 August 1999)

### General Comments

#### 1. Antidegradation Policy

**Comment:** EPA does not have authority to impose an offset ratio requirement of 1.5 to 1.

**Discussion:** The Preamble to the rule includes a lengthy discussion of EPA's authority to require "further reasonable progress" in meeting water quality standards and to impose an offset ratio requirement of 1.5 to 1 for selected dischargers as a means of achieving further reasonable progress. EPA cites language in section 101 of the Clean Water Act ("Congressional declaration of goals and policy") as statutory authority for these requirements, buttressed by some language in a 1971 Senate Report on the Act. Neither of these citations is persuasive with regard to EPA's authority to impose the requirements proposed in this rule. The statement of Congressional policy found in most statutes or a statute's legislative history may be helpful in interpreting a specific provision in that statute; however, it rarely provides statutory authority or standards, definitions, or other grants of power that confine an agency within the limits necessary for a delegation of legislative power, such as rulemaking. In the case of the Clean Water Act, section 303 (d) provides a specific mechanism for achieving water quality standards. When effluent limitations are not stringent enough to implement any applicable water quality standards, States must establish total maximum daily loads (TMDLs). This specific provision does not envisage, nor permit, a separate regulatory scheme under which EPA is able to invoke additional requirements in the interim between a State's conclusion that a specific body of water cannot meet water quality standards and the State's establishment of TMDLs. This position is further buttressed by the fact that Congress expressly provided EPA authority to address impaired waterbodies in lieu of the States in instances in which EPA disapproves a State's TMDL. See 33 U.S.C. § 1313(d)(2). The lack of a similar express provision of authority over waterbodies for which no TMDL has been established demonstrates Congressional intent to limit EPA authority to those instances in which EPA has disapproved a State's TMDL.

Another of our concerns with EPA's proposed offset policy is that the policy will place a disproportionate burden for water restoration on those point sources that happen to have a significant expansion or new discharge during the interim period before States establish TMDLs. In contrast, the TMDL program, which is based only on the maximum daily load of identified pollutants, would allow load allocation reduction among all dischargers, including existing point and nonpoint sources, or even anticipated future dischargers. Hence, an offset plan for the interim period that places the burden on a limited category of dischargers is inconsistent with the Congressional scheme for attaining water quality standards.

We also believe it is a misnomer to refer to a 1.5 to 1 offset as an anti-degradation policy. As EPA admits, it is really a means of making further reasonable progress in improving water quality while allowing additional, lawful discharges to occur. As noted above, however, the Clean Water Act provides that further reasonable progress in attaining water quality is to be achieved through the imposition of TMDLs, not ad hoc, extra-statutory mechanisms. Even in the case of the Clean Air Act, which EPA cites as precedent for a policy requiring further reasonable progress, Congress felt the need to specifically authorize EPA's policy through further statutory enactments. This is the appropriate course for EPA to pursue if the TMDL process is unsatisfactory in achieving further reasonable progress and meeting the goals of the Clean Water Act.

**Recommendation:** Do not expand anti-degradation policy into a de facto alternative to section 303(d) of the Clean Water Act. If an offset policy is established, require only a 1:1 offset to prevent degradation, which is a more appropriate ratio in light of EPA's existing statutory authority.

**2. Expand available interim actions to allow continuing issuance of NPDES permits for waters listed as impaired for which a TMDL has not yet been developed**

**Comment:** EPA should expand the interim actions that are available to new and significantly expanding dischargers in impaired waters for which a TMDL has not yet been developed. The proposed regulations present one interim action, the offset program, as a means for new and significantly expanding dischargers to achieve "reasonable progress" toward attaining water quality standards prior to development of the TMDL. Other alternatives, in particular the participation in effective cooperative watershed management programs, should be included as additional means for dischargers to listed waters to work cooperatively with States for issuance of NPDES permits.

**Discussion:** Certain complications associated with the offset program (aside from the ratio issue, discussed separately in these comments) may discourage participation by dischargers in offset programs, and could effectively:

1. Drive new and expanding users to alternative waterways that have not yet been listed as impaired, resulting in unintended sprawl and potential degradation of existing quality waters.
2. Undermine the voluntary discharge reduction/BMP implementation process by removing incentives for land managers and dischargers to continue voluntary programs if they know that they may now get paid by other dischargers for the same work.

Where offset provisions may be difficult to achieve for a given waterway or where detrimental effects of offsets (such as the above) may delay actual action toward clean water, alternatives should be available to help achieve clean water goals while still allowing reasonable growth. For example, effective cooperative quality watershed management programs establish frameworks

for overall reduction of pollutants in waters through a combined effort of major and minor point and nonpoint users. Where States and stakeholders are effectively working together to achieve attainment and maintenance of water quality standards, participation in these cooperative programs should be sufficient to allow: 1) dischargers to continue to work in that cooperative framework while TMDLs are being developed, and 2) States to move those waters for which watershed programs are in effect to a lower priority for TMDL. As used here, an effective cooperative watershed management program is considered a collaboration between stakeholders and agencies that uses a mix of voluntary and State/local zoning and regulatory programs to achieve the cooperators' unified goals.

Examples of such effective cooperative watershed management programs are the nutrient and sediment reduction Tributary Strategies established by participating Chesapeake Bay Program States for major tributaries discharging to the Bay. Where cooperative watershed management program teams are working with the local and State governments to implement water quality improvements, and to the extent that the strategies will address the contaminant(s) for which the waterway is impaired, such cooperative frameworks supplant the need for duplicative and complicated offset programs. Formal recognition of this type of program in lieu of the offset program within the TMDL and NPDES regulations provides an incentive for early participation in cooperative programs, and reduces the burden on EPA to establish and monitor effluent offset trading programs.

**Recommendations:**

1. Amend proposed 40 CFR 131.12(a)(ii) to establish the alternative for participation in effective cooperative watershed management programs as reasonable further progress toward attainment of the water quality standards (in lieu of offset requirements). Reflect these changes in proposed 122.4(j)(2) et seq. to establish minimum criteria for demonstrating the components on an "effective cooperative watershed management program."
2. Amend 40 CFR section 130.32, "Must you establish TMDLs?" to include a scheduling provision that allows the deferral/lower prioritization of TMDL development for impaired waterways where a State can demonstrate that an effective cooperative watershed management program is being implemented.

Notwithstanding the general comments, the Clean Water Act Service Steering Committee has the following, more specific comments on the above, proposed rule:

## Specific Comments

### 1. Exclude discharges associated with environmental remediation projects from the definition of “new discharges”

**Comment :** It is not clear which “new discharges” and associated “offsets” are to be addressed by entities conducting remedial actions under the Comprehensive Environmental Response, Compensation Liability Act (CERCLA).

**Discussion:** EPA is proposing to modify the definition of “new discharger” so that the proposed 40 CFR Parts 122.4(j) and 131.12(a)(1)(ii) apply only to dischargers that propose to discharge new pollutant loads to a waterbody. While the proposed rule focuses on dischargers subject to NPDES permit regulations only, EPA should recognize that under CERCLA Section 121(e), response actions at NPL sites are required to meet only the substantive requirements of applicable regulations, not the procedural requirement of obtaining permits. If a selected remedy for a site subject to one of the above environmental statutes involves a determination that a discharge to a 303(d) listed water is appropriate, it would appear that the discharger would be obligated to find an offset prior to discharging. Furthermore, remediation efforts are not normally coordinated at a watershed level. This requirement would likely add additional constraints to remediation efforts.

**Recommendation:** Exclude from the definition of “new discharger” those discharges associated with environmental remediation projects conducted under the CERCLA. If EPA does not consider an exclusion feasible, we recommend that EPA consider carefully the impact of these proposed regulations on existing environmental programs. Furthermore, EPA should add guidance to the preamble or clarify how provisions of this proposed rulemaking are anticipated to be addressed during remedial actions.

**Reference:** Section IIA1

### 2. Clarify definition of “significant expansion”

**Comment:** Defining “significant expansion” as a twenty percent (20%) or greater increase in loadings above current permit limits is overly restrictive for small dischargers.

**Discussion:** EPA requested comment on whether a fifty percent (50%) increase or a twenty percent (20%) increase in loadings above the discharger's current permit limits should be used to define significant expansion (64 FR 46062). Given the fact that this is only an interim measure until TMDLs are established, applying it to major increases (i.e. 50% or greater) should be sufficiently protective.

**Recommendation:** Define “significant expansion” as a fifty percent (50%) increase in loadings above current permit limits.

**References:** Section IIA5

### 3. Appropriate measure of significant expansion

**Comment:** The Clean Water Act Services Steering Committee concurs that the term “loadings” should be used rather than “production or flow rates” as the appropriate measure of significant expansion. The term “long term average” should be defined or clarified for use with loadings.

**Discussion:** EPA solicited comment on how to measure a significant expansion and to calculate the corresponding offset requirements for those dischargers that increase the loadings of the pollutant for which the waterbody is impaired but for which there is no current permitted load. Defining average production rates would be difficult for many facilities that have several tenants or produce a combination of products, such as aircraft, engines, and components. To enable dischargers to measure when they have a significant expansion in loadings, it would be helpful to have a baseline, such as the "long term average."

**Recommendation:** Use the term an increase in “loadings” as the appropriate measure of significant expansion. Also use “long term average” as the baseline for measurement and define "long term average" in the regulation.

**Reference:** Section IIA5

### 4. Require new facilities to achieve reasonable further progress

**Comment:** The requirement that “large new and significantly expanding” dischargers achieve reasonable further progress toward attaining water quality standards before discharging additional loadings of the pollutant causing non-attainment may be problematic for “expanding” facilities.

**Discussion:** We agree with EPA that new dischargers should be subject to more stringent requirements than existing dischargers. Discharge limitations should be negotiated before construction begins to avoid the need for costly changes and delays. Federal facilities find it especially difficult to implement design changes because of the budgeting complexities and long lead times for major construction activities. Significantly expanding dischargers are likely to be in a weaker position than new sources to bargain for offsets because they may not have realistic options for locating on a different waterbody. Accordingly, significantly expanding dischargers should have the option of implementing pollution prevention requirements under their NPDES permits in lieu of investing in capital improvements.

**Recommendation:** Propose an offset requirement for new dischargers only. At most, apply an offset requirement to significantly expanding dischargers only when the expansion requires an investment in new equipment. Other significantly expanding dischargers may be required to implement pollution controls. To encourage all classes of dischargers to meet offset requirements, make incentives available to dischargers not otherwise subject to offset requirements.

**Reference:** Section IIB3ib.

**5. Clarify offset requirements**

**Comment:** The preamble to the rule states that offset requirements apply to new or expanded discharges in impaired waterbodies, but the rule at 40 CFR Part 122.4 does not clearly state this.

**Discussion:** In describing the waterbodies to which offset provisions apply, the proposed rule at §122.4 only references the antidegradation regulations, which infers that the offset provisions are not always applicable to all waterbodies. Clarification is needed so that the reader knows that only listed waterbodies are affected by this requirement.

**Recommendation:** Modify the proposed regulation at §122.4(j)(1) to read as follows:

(j)(1) To a new discharger, or existing discharger undergoing a significant expansion, *who is discharging to an impaired water segment identified pursuant to 40 CFR 130*, unless the discharger complies with the antidegradation provisions of State water quality standards applicable to such waters, including antidegradation provisions adopted pursuant to 40 CFR 131.12(a)(1)(ii).

**Reference:** Section IIB3ii

**6. Allow for a conditional permit in certain situations**

**Comment:** The proposed rule states that “pollutant load reductions must be achieved on or before the date the discharge commences.” This requirement would make it nearly impossible for all proposed new dischargers or significantly expanding dischargers to comply.

**Discussion:** The requirement assumes that pollutant control measures are in place and implemented before discharging, which is not always the case.

**Recommendation:** Allow for a conditional permit to be issued that allows the discharger to commence discharging based on pre-negotiated milestones laid out in the permit. This would allow dischargers sufficient time to not only obtain pollutant load reductions, but also determine the optimal reduction route.

**Reference:** Section IID

**7. State Program Directors should be responsible for ensuring offset point sources do not violate their new permit limitations**

**Comment:** A new or significantly expanding discharger should not be penalized in the event that there is a lack of reported reductions from the offsetting point source, including where the offsetting point source is out of compliance with its permit. It should be the responsibility of the State Program Director to take an enforcement action against the offsetting point source.



**Discussion:** An existing offsetting point source's permit should be modified to reflect the pollutant load reductions. This will permit the State Program Director to take an enforcement action should the offsetting point source violate its new permit limits. It should not be necessary to incorporate the offset requirements in the new or significantly expanding discharger's permit based on an approved modification of the existing discharger's permit.

**Recommendation:** Place enforcement responsibility for offsetting point sources with the State Program Director.

**Reference:** Section IID6

#### **8. Require permit applicants to provide additional information**

**Comment:** The general permit regulations in 40 CFR 122.28(b)(2)(ii) and 40 CFR 122.28(b)(2)(v) should require that general permit applicants provide the required additional information regarding offsets only after the permitting authority notifies the permit applicant that it will be discharging into an impaired waterbody.

**Discussion:** EPA solicited comment on what is the best way to obtain offset information that is not currently found in a notice of intent form. We agree with EPA's proposal to amend the general permit regulations in 40 CFR 122.28(b)(2)(ii) and 40 CFR 122.28(b)(2)(v) to require the general permit applicant to provide the required additional information as this option is more cost effective than requiring all applicants to obtain individual permits.

**Recommendation:** Require that general permit applicants provide the required additional information regarding offsets only after the permitting authority notifies the permit applicant that it will be discharging into an impaired waterbody.

**Reference:** Section IID8

#### **9. Permitting authority should determine if applicant for a general permit is discharging into an impaired water**

**Comment:** EPA solicited comments on how to provide the information necessary to allow appropriate review of general permit authorized new and expanding discharges into impaired waters waiting for a TMDL. EPA should not require the applicant to determine if the proposed discharge is into an impaired water. In addition, EPA should not require applicants for stormwater-related general permits to estimate the amount of pollutants in the proposed discharge.

**Discussion:** EPA is considering modifying language in general permits to obtain additional information necessary to determine if prescriptive BMPs and/or offsets are required. The proposed language states that: "New dischargers or existing dischargers undergoing a significant expansion must determine whether the receiving water meets water quality standards". EPA is

also considering requesting the applicant to estimate the amount of pollutants in the proposed discharge.

The proposed language is inappropriate because legally it is the permit authority's responsibility to determine if a water is impaired. The authority could however require that an applicant check an approved list/map of impaired waters and either certify that the discharge is not into the impaired water or provide additional information necessary for the authority to make the determination. In addition, requiring an applicant for a stormwater related general permit to estimate the quantity of discharged pollutants would be problematic. The science for determining these estimates is still developing and requiring them would be extremely burdensome and expensive to small general permit dischargers. It would be more appropriate for the permit authority to provide an approved table with factors to calculate the estimates or allow the applicant to choose a pre-approved and more restrictive BMP.

**Recommendation:** Recommend that EPA not amend general permit language to require that the applicant determine whether the receiving water meets water quality standards. Recommend that the permit authority provide (or otherwise make readily available) applicants approved lists/maps/tables. The use of these materials would then enable the applicant to automatically qualify for the general permit or would provide the information necessary for the permit authority to determine what, if any, additional restrictions of the general permit were appropriate.

**Reference:** Section IID8i

**10. States should amend stormwater general permits rather than pursue offsets through individual stormwater permits**

**Comment:** States should amend stormwater general permit requirements for land areas where discharges flow to impaired waterbodies. The alternative approach of attempting to quantify stormwater flows and pollutant loadings sufficiently to enforce offsets on individual facilities would greatly increase the regulatory and administrative burden associated with stormwater permitting without providing any corresponding benefits.

**Discussion:** EPA solicited comments on the use of more stringent and/or prescriptive BMPs in lieu of pound for pound offsets to address the difficult issue of dischargers covered under general permits or those regulated solely by BMPs (page 46073). We strongly support this option.

Most BMPs implemented through NPDES permits do not have quantified pollutant loading reduction estimates associated with them. In the case of a new or expanded discharger who is regulated through BMPs, calculating the increase in pollutant loading from the new or expanded activity will be burdensome and difficult, as would quantifying appropriate loading reductions (offsets) from implementation of more stringent BMPs. The option proposed by EPA avoids this problem, thereby greatly simplifying the permitting process for these discharges. Conceivably, cases could arise where additional stringent BMPs, such as a requirement to have a runoff detention basin at a construction site, would not be practical for all sites. The flexibility to accept offsets or mitigation, such as an erosion control project within the same watershed, in lieu of

following the stringent BMP, could allow a project to proceed. This flexibility will also considerably reduce the administrative burden on both regulators and permittees in regards to stormwater Phase 2 permit applications.

**Recommendation:** Provide for the use of more stringent and/or prescriptive BMPs in general permits and in individual permits that include BMP requirements in lieu of pound for pound offsets for dischargers to impaired waterbodies. Permitting authorities could establish separate general permit requirements for impaired waterbodies that include the more stringent BMPs. Allow States flexibility to accept offsets or mitigation on a case-by-case basis to allow an activity or project to proceed in cases where the stringent BMPs cannot be followed at the relevant site.

**References:** Section IID8i