The Aftermath of TMDL Litigation:
Consent Decrees and Settlement Agreements

By

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Citizens – individuals, companies, states – serve an enormously influential role in holding EPA accountable to the Clean Water Act’s objectives. The CWA allows citizens to sue EPA “to perform any act or duty . . . which is not discretionary. . . .” Such agency forcing actions reflect “a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced.” Agency forcing actions are often the driving force behind EPA implementation of federal environmental programs. Between 1995 and midway 2003, citizens sent EPA at least 430 notices of intent to sue to force the performance of mandatory duties, nearly one-third under the CWA. Although the frequency of agency forcing CWA cases has declined recently, between 1983 and 1998 (most recent information available), citizens sued EPA to force compliance with mandatory duties approximately 300 times, nearly one-half of which are CWA cases. During the 1990’s, citizens sued EPA 50 times to establish TMDLs in the states.

I. Agency-Forcing Actions and the National TMDL Program

The acceleration and ultimate ossification of the national TMDL program is a prime example of both the glory and the glum of agency forcing citizen suits. In the 1990’s, citizens sued EPA to implement the TMDL program in nearly every state in the Union. Most of the time, citizens argued state TMDL inaction triggered EPA’s duty to step in. Some sued EPA to make programmatic changes to state monitoring, water quality, and integrating “continuing planning process” (CPP) programs and to comply with the Endangered Species Act (ESA) along the way. Since 1992, citizens have filed nearly 40 suits in 38 states to force EPA to implement the TMDL
EPA settled 30 of these cases, 27 by consent decree, and 3 by settlement agreement. The central feature of EPA’s ongoing obligation is to backstop TMDL development over a period of time varying in length from 1 to 20 years for cases in Hawaii (1 year, partial), Nevada (3, one water), Ohio (4), Alabama (5), the District of Columbia, Georgia, and Montana (7 each), Delaware and Iowa (9), Arkansas, Louisiana, Mississippi, Missouri, Kansas, Oregon, Tennessee and West Virginia (10), Northern California (11), Pennsylvania and Virginia (12), Southern California and Florida (13), Washington (15), New Mexico (20), Alaska (no schedule). EPA also entered into settlement agreements in Colorado, Idaho, and North Carolina. EPA has completed consent decree obligations in Arizona and California (Newport Bay). Thus far, federal courts have rejected all collateral attacks on EPA TMDL settlements.

The results of TMDL settlements are mixed, least so where it matters most. The glory is that EPA has reviewed anew, or had the states review, readily existing and available water quality related data and information for 40,000 waters, finding 20,000 more ones impaired, bringing the national total to 60,000. EPA has agreed to “backstop” TMDL development for about 20,000 of these, and set or approved TMDLs for 10,000 impaired waters. EPA has for the first time reviewed and evaluated CPPs in six states. It has conducted dozens of associated ESA consultations. EPA’s Office of Watersheds and Wetlands now incorporates TMDL planning into all facets of its operations. Every EPA Region, state and territory now boasts at least one FTE TMDL coordinator and program. Congress and state legislators have dedicated millions of dollars to TMDLs. The legal, policy and scientific academies know the language of TMDLs.

The glum is that TMDLs have had little or no impact where they matter most: restoring over-polluted waters. The program is both administratively mature and practically irrelevant. Thirty years plus into the program and the CWA’s hope of an ambient-based response to the nation’s overly polluted waters is at best ossified and at worst over.

II. Case Study: TMDL Settlements in the Mid-Atlantic

Some of the earliest TMDL settlements, and perhaps the most comprehensive, occurred in the mid-1990’s in Pennsylvania, Delaware, and the Virginias. These served as national models to many later occurring agreements, and are explored in some detail below.

A. Importance of Clean Water to the Mid-Atlantic Region

Clean, safe, fresh water is important to the nation’s environment, economy, and security. If all of the water in the world were represented as 100 gallons, 97 would be undrinkable saltwater. Two gallons would be trapped in glaciers and icecaps. Two quarts would be groundwater. Less than one-half pint (size of elementary school milk) would be freshwater. Of that one-half pint, roughly one teaspoon exists in the Mid-Atlantic United States.