Rapanos’ Reach: Jurisdictional Effects on the TMDL Program

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How Rapanos shapes (CWA) jurisdiction will affect not only 404 permitting but other CWA programs as well. The Total Maximum Daily Load (TMDL) program has been the topic of a great deal of discussion in recent years. Proponents of the TMDL program argue that it is an important tool for improving water quality (a widely debated position) and that a narrowing of CWA jurisdiction will negatively affect the program’s effectiveness. In fact, this argument was included in an amicus brief filed in support of the government in Rapanos by the Chesapeake Bay Foundation. The TMDL program takes a holistic approach to improving water quality that often requires looking beyond navigable-in-fact waters and their adjacent wetlands. Without jurisdiction under the TMDL program, “discharges into upstream tributaries will be impossible to adequately control,” and water quality downstream will suffer. See Brief for Chesapeake Bay Foundation as Amici Curiae Supporting Respondents at 27, Rapanos et al. v. United States. While this concern was made in the context of the Chesapeake Bay, it applies to the TMDL program in general. But is this concern well founded? A greater concern may be that narrowing TMDL jurisdiction will increase the burden on parties that continue to be regulated under the program.

Although Section 303(d) of the CWA, which provides the statutory basis for the TMDL program, has been on the books since 1972, regulators did not implement it until relatively recently. 33 U.S.C. § 1313(d). Instead, over the years, the focus of federal efforts to improve surface-water quality had been structured through the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the CWA. The program makes a distinction between two types of sources from which pollutants enter surface waters: point source discharges and nonpoint source discharges. A point source discharge means a discharge from “any discernable, confined and discrete conveyance,” and is commonly understood as anything that comes out of the end of a pipe. A nonpoint discharge is commonly understood as anything that that is not a point source discharge. Id. § 1362(14). The NPDES program requires point sources to obtain permits for their discharges. Id. § 1342. These permits limit the amount of certain pollutants that can be discharged by the permittee, and discharge limits have been set primarily by technology standards. Section 420 has generally been successful in limiting the amount of pollutants reaching surface waters from point sources. However, under this regulatory approach, nonpoint sources were effectively left unregulated at the federal level.

As it became clear that water quality could only be improved up to a certain point through the traditional NPDES program, environmental groups turned to Section 303(d) to compel increased improvement. Since the early 1990s, these groups have sued the Environmental Protection Agency (EPA) in thirty-eight states to enforce the TMDL provisions of the CWA. From the perspective of these environmental groups, the suits have been very successful, often leading to consent decrees under which EPA has committed to implementing Section 303(d) over a certain period of time.

The TMDL Program

Section 303(d) takes a different approach to water pollution than the traditional NPDES permitting program. It focuses on the quality of receiving waters to set limits, and not just on limiting the pollutants in point source discharges through traditional Section 402 mechanisms. In practice, however, it relies strongly on the NPDES program to implement discharge reductions.

The process of creating TMDLs is a complex, and often litigious, affair. The first step is for states to determine which waterbodies are not meeting Water Quality Standards (WQS). WQS are the levels of particular constituents that are permissible in a waterbody and depend on the waterbody’s designated use (e.g., cold-water fishery, drinking-water supply). Impaired waters are designated in what is known as a 303(d) list and prioritized based on “the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313(d)(1)(A). The state, or in some cases EPA, must develop TMDLs for all of the waterbodies on a 303(d) list. Under the consent decrees and various other settlements of the environmental groups’ suits, EPA and the states are rushing to develop and implement many TMDLs each year.

A TMDL is essentially the maximum amount of a given pollutant that can be present in a waterbody that does not violate the applicable WQS. TMDLs address a single pollutant, so a waterbody that has multiple impairments will have multiple TMDLs. Regulators evaluate an impaired waterbody using modeling and other techniques to determine the maximum load of a pollutant that the waterbody can assimilate.