From: Ben Cope
To: Kim Owens
Subject: Re: Chesapeake Bay TMDL Language
Date: 12/16/2011 12:40 PM
Attachments: Pend Oreille TMDL defense option 1.docx

Kim - here's the one pager outlining my thought process. Thanks for discussion today.

-BC

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Kim Owens---12/16/2011 11:35:12 AM---FYI - On the issue of TMDL approval and other jurisdictions' WQS, here is what EPA said in response

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Date: 12/16/2011 11:35 AM
Subject: Chesapeake Bay TMDL Language

FYI - On the issue of TMDL approval and other jurisdictions' WQS, here is what EPA said in response to comments on the Chesapeake Bay TMDL:

> As a legal matter, EPA is authorized to consider downstream water quality standards (including those in other states), when establishing or approving a TMDL. The U.S. Supreme Court in Arkansas v. Oklahoma, 503 U.S. 91 (1992), held that EPA has the authority to impose NPDES permit limitations and conditions based on downstream water standards. At issue in that case was EPA's issuance of an NPDES permit to an Arkansas facility that imposed conditions derived from the downstream state's water quality standards. Noting that "the statute clearly does not limit the EPA's authority to mandate such compliance," the Court held, "The regulations relied on by the EPA were a perfectly reasonable exercise of the Agency's statutory discretion. The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose 'to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Moreover, as noted above, § 301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives.

The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal." The regulations considered by the court, 40 C.F.R. § 122.4(d), provide, "No permit shall be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

The principle articulated by the Supreme Court in the NPDES permitting context applies with equal force to TMDLs, which are an important tool for implementing section 301(b)(1)(C) with respect to point source discharges. As the Supreme Court held, EPA as the permitting authority is authorized to consider water quality standards in downstream segments (including those in other states) when establishing NPDES permit limitations and conditions for sources whose discharges ultimately flow to the downstream segments. For sources discharging to waters flowing into the Chesapeake Bay, those permit limitations would be derived from the TMDL for the Chesapeake Bay. See 40 C.F.R. § 122.44(d)(1)(vii)(B). Therefore, it follows that EPA is authorized to establish or approve TMDLs for impaired Bay waters with wasteload allocations and load allocations for upstream sources that take into account the downstream water quality standards that the TMDL is designed to meet.

Pend Oreille TMDL – option for defense against hypothetical tribal WQS challenge

1. Issue is not whether an upstream TMDL must meet a downstream state WQS – EPA policy is to foster a seamless TMDL across state/tribal boundaries and we have done that here (e.g., single model, MOU, etc.).

2. Issue is reasonable interpretation of tribal WQS. Does the WA TMDL reasonably interpret tribal WQS? Answer : Yes.

    a. Neither WA nor tribal WQS sets forth a specific technical method to interpret model estimates of natural vs existing condition, and/or what specific comparisons are to be made to determine if an exceedance is occurring.
    b. WA interpretation and technical approach are consistent with the language of both state and tribal WQS
    c. Since no part of the WA TMDL can be construed as "clearly erroneous" in light of either WA or tribal WQS, the TMDL is approvable.

3. Does this take away the tribe's authority to interpret its WQS? No. However, if a tribe cannot demonstrate that the state's methodology for evaluating the tribal standard is "clearly erroneous" under the plain language of the WQS, then EPA has no basis to disapprove a TMDL from the upstream/downstream state.

4. Precedent. This decision implies a limit to the deference afforded to downstream states/tribes in the context of a TMDL that affects jurisdictions of multiple states/tribes. The downstream state/tribe cannot dictate all the steps and details of a technical analysis by another state unless there is a clear connection between the disputed methodology and the plain language of the WQS. In this case, there is no language dictating the methodology to be used.

5. Option for the Tribe. The tribe can revise its WQS to define the acceptable methodology for modeling analysis, and then this could be incorporated into a new TMDL for river reaches affecting tribal waters. Albeni Dam is in Idaho, so the Idaho TMDL would be the key piece of work between Idaho and the Tribe.