

Methodology—Toward a Compendium of Best Practices”) was released in July 2002. EPA is continuing to work with States to clarify and strengthen their monitoring programs and to help improve the quality and credibility of their lists of waters that require a TMDL.

One commenter stated that withdrawing the July 2000 rule would continue “to make EPA and the States the target of numerous lawsuits—resulting in the courts driving environmental policy, rather than EPA and the States.” EPA does not agree with this comment. EPA does not agree that there are, in the commenter’s words, “weaknesses” with the currently-effective TMDL regulations that make the Agency any more vulnerable to litigation than if it did not withdraw the July 2000 rule. Indeed, we believe withdrawing the July 2000 rule will render moot the pending D.C. Circuit Court challenge to that rule. Before July 2000, EPA was named as defendant in over 30 lawsuits challenging State lists and the pace of State TMDL development. Since July 2000, only a few such lawsuits have been filed, even though the July 2000 rule never became effective. Clearly, the number of such suits has declined as the States and EPA have done a better job under the 1985/1992 TMDL rules to establish lists and TMDLs. In addition, to date only a handful of lawsuits have been filed challenging any of the more than 7,000 TMDLs that the States or EPA have established. Given these numbers, the Agency does not believe there is anything inherently litigation-provoking in the currently-effective TMDL rules and, based on this record, EPA does not believe that withdrawing the July 2000 rule will result in increased TMDL litigation.

One commenter objected to withdrawing the July 2000 rule because of concerns regarding the inconsistent implementation of the program under the currently-effective regulations and EPA guidance. EPA does not agree that inconsistent implementation of the TMDL program is a significant problem. Nor, for that matter, would implementation of the July 2000 rule remove all potential for divergent implementation approaches by the different States and EPA Regions. As discussed previously, since publication of the July 2000 rule, EPA has issued numerous detailed policy memoranda, national guidance documents, technical protocol documents, and information on best management practices so that States can improve their methods to monitor and list impaired waters, and develop and implement TMDLs in a consistent, yet flexible way. A complete list of these

guidance documents can be found at <http://www.epa.gov/edocket>. As noted previously, EPA has issued detailed national guidance to EPA Regions on reviewing and approving lists and TMDLs, (“EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992” (May 20, 2002)) and is working closely with all the EPA Regional Offices to ensure that their regional review and approval of lists and TMDLs correspond with this national policy. In addition, EPA has recently released a guidance on “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs” (November 22, 2002). This memorandum clarifies EPA’s policy on wasteload allocations, specifically that NPDES-regulated storm water discharges must be included in the wasteload allocation component of the TMDL (*see* 40 CFR 130.2(h)) and affirms EPA’s view that an iterative, adaptive management BMP approach is appropriate for permitting such discharges.

EPA has also sponsored numerous TMDL and TMDL-related training sessions and meetings to clarify and provide detailed technical support to the States and Regions to help ensure consistency in listing and TMDL development (*see* EPA’s website for a complete list of recent activities: <http://www.epa.gov/owow/tmdl/training>.) EPA also has made available to the public the “National TMDL Tracking System” (NTTS), which includes all State-specific data on approved 303(d) lists and approved TMDLs as well as a national summary of impaired waters and TMDLs that have been approved for these waters (<http://www.epa.gov/owow/tmdl/>.) In addition, since the Spring of 2001, EPA has held regular conference calls with EPA Regions and the States to discuss and answer any questions regarding the TMDL program, including technical and policy questions. EPA believes that these guidance documents, the National TMDL Tracking System, training, workshops, and close communication with States and EPA Regional Offices have improved the national consistency in how the TMDL program is implemented at both the Federal and State level, while accommodating the inherent variability in States’ water quality standards, land and water characteristics, and available resources.

As to the commenter’s point that “there are significant differences between the July 2000 rule and the 1985, 1992 rule * * * [that] cannot

adequately be addressed through EPA guidance,” EPA notes that its review of the currently-effective TMDL regulations in light of the July 2000 rule is ongoing. EPA has not yet decided what, if any, changes to propose to those regulations. As it continues to consider the need for regulatory changes, EPA will consider the commenter’s suggestions regarding which elements belong in regulation and which may be appropriately left to guidance. EPA will also consider the commenter’s suggestion that the Agency should allow the public to participate in the development of future program guidance.

One commenter said EPA had not provided enough information to allow it to make a “well-reasoned decision or provide meaningful comment on EPA’s proposal to withdraw the July 2000 rule.” Nevertheless, that commenter did oppose EPA’s proposed action. EPA disagrees with the claim that it did not provide enough information for the public to provide meaningful comment, and given the number of other comments to the proposal addressing EPA’s rationale, EPA believes that it adequately discussed its justification for withdrawing the July 2000 rule in the December 27, 2002, preamble.

One commenter opposed withdrawal of the July 2000 rule because it believed that the rule was “necessary” to “aid in the control of nonpoint source pollution.” EPA disagrees with this comment. EPA notes that there are numerous existing Clean Water Act authorities and programs, supplemented by other Federal and State programs and initiatives, that address nonpoint source pollution.

One commenter opposed withdrawal of the “TMDL program” because it believed “much time went into the planning of this program to protect waterways * * * [and] it needs to be tied into the NPDES permit program and should be customized to fit individual permits.” EPA is not sure it fully understands this comment. To the extent the commenter is opposed to withdrawal of the “TMDL program,” EPA notes that it is only withdrawing the July 2000 rule, which has never become effective, and not the TMDL program itself. EPA agrees that it took much planning to develop the July 2000 rule, but, for the reasons already discussed in this preamble and in the December 27, 2002, preamble, EPA has decided to withdraw that rule, regardless of the effort that went into its development. EPA also notes that the currently-effective TMDL program is “tied into the NPDES permit program” in that, among other things, permit