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EPA Issues New Guidance on Watershed-Based Discharge Permitting

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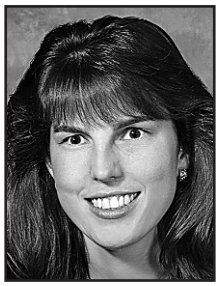
Special to the Legal

The U.S. Environmental Protection Agency has promoted the use of watershed-based approaches to water quality protection and permitting for more than a decade now.

However, implementation of watershed-focused permitting programs by federal, state and local agencies has often been sluggish and fractured, as policymakers and regulators struggle with the practical challenge of how to make the significant shift from the traditional individual discharger permitting approach to the more broad-based watershed approach.

In an effort to address the pace of program development and to re-energize regulatory efforts to address watersheds on a holistic level, the EPA has issued a new guidance document titled *Watershed-based National Pollutant Discharge Elimination System (NPDES) Permitting Technical Guidance*, which provides specific step-by-step instructions on how to identify opportunities for and implement programs that adopt a watershed-based approach. The new EPA document builds on existing guidance from the EPA, but serves as the first integrated how-to document directly addressing how various watershed-based approaches to discharge permitting can be incorporated into the existing legal framework of the Clean Water Act NPDES program.

In the traditional NPDES permitting context, a company wishing to discharge treated wastewater through a pipe to a nearby river (i.e., a point source) would, for example, apply to the permitting agency for an individual NPDES discharge permit. The permitting agency would prepare an individual permit containing technology-based effluent limitations and water-quality based effluent limitations, if appropriate. These effluent limitations would be developed by the agency on a permit-by-permit basis with the goal of ensuring the attainment of water quality standards in the river. The focus of the evaluation by the permitting agency in the traditional context is on the individual discharge for which an NPDES discharge permit is sought.



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According to the EPA, the primary difference between the analytical approaches in traditional NPDES permitting and in a watershed-based program is that a watershed approach to developing a point source permit would explicitly consider the impact of multiple pollutant sources and stressors on the defined watershed, including non-point-source contributions (i.e., runoff and other types of diffuse discharges to the watershed), in developing the permit limitations and other permit terms.

In addition, the watershed-based approach would also consider the watershed goals, similar to the analysis undertaken to develop a total maximum daily load (TMDL) for an impaired waterbody. Thus, a watershed approach considers the water-quality goals for an entire watershed in a given geographical area and how it is affected by multiple sources of pollution.

The new EPA guidance document provides recommendations to help permitting agencies evaluate opportunities for, and develop and implement, NPDES permit programs that operate within a watershed framework. The EPA suggests, in the new guidance, a series of specific steps to help those involved in the NPDES program identify appropriate watersheds for application of the watershed approach. The steps include actions to gather available data on watershed conditions and goals; conduct a targeted analysis of the gathered data to identify potential watershed-based implementation options for meeting water quality goals; and set priorities and develop an implementation strategy for an NPDES watershed framework.

The EPA has developed a decision-making tool to help regulators through this process, which is called the NPDES Watershed Navigator. The EPA emphasizes the importance of active stakeholder involvement in all stages of the process in order to strengthen the overall watershed framework and build support for ultimate implementation.

The EPA describes an array of potential watershed-based options that may be considered for an NPDES framework, includ-

ing, among others, permit synchronization, coordinated individual permits, multisource watershed-based permits, and water-quality trading. Permit synchronization, for example, involves coordinating expiration and reissuance dates for NPDES permits within a particular watershed. The EPA explains that the benefits of permit synchronization include coordination of NPDES support activities, such as water quality surveys and inspections, and the ability to ensure that watershed-based needs are reflected equitably in all individual permits because all permits are considered simultaneously.

According to the EPA, a coordinated approach to the issuance of individual permits, using a holistic analysis of watershed conditions, may present opportunities to strengthen efforts to achieve watershed-specific goals. Further, the EPA recommends such a coordinated approach even if permit synchronization is not an option for a particular permitting agency.

Different types of multisource watershed-based permits and their relative benefits are also described in the new EPA guidance. This type of permitting approach would allow several point sources in a watershed to apply for and obtain permit coverage under the same permit, which the EPA suggests might be appropriate for use in situations where a watershed plan or TMDL identifies the need to address a specific pollutant. The permit could be issued in addition to existing individual permits and address only the watershed-specific common pollutant(s), leaving other pollutants to be addressed by each facility's individual permit.

Alternatively, a multisource permit could address all pollutants of concern in the watershed for similar types of discharges having a single permit with each facility regulated as a co-permittee. General permits are another type of multisource permitting option, where point sources request coverage through the filing of a notice of intent. The EPA notes that multisource watershed-based permitting may also facilitate water quality trading and provide a vehicle for cooperation among various types of dischargers.

Water-pollutant trading programs, in particular, may offer opportunities to achieve watershed goals in a more efficient manner through the use of market-based incentives. For example, in a water-quality trading program, a discharger facing high pollution control costs could, in order to meet its permit limits, purchase pollutant reduction credits from another discharger in the watershed with lower pollution control costs, who has controlled its discharge beyond regulatory limits in order to generate credits for sale. This result is more cost-effective, flexible and efficient pollution control for a watershed. Baseline criteria are generally established for trading eligibility under such a program, but trades can occur between point source and non-point source dischargers.

The new EPA guidance also includes a series of watershed-based permitting case studies, which serve as concrete examples of the variety of NPDES watershed frameworks that have been implemented to date and illustrate the concepts discussed in the new guidance.

Locally, the Pennsylvania Department of Environmental Protection (DEP) is taking steps to integrate a watershed-based approach into many of its major regulatory programs affecting land development, waterways and wetlands, and stormwater control. The DEP views the integration of these core programs as establishing the basis for a coordinated watershed management permitting and planning process. And while the DEP recognizes that coordinated regulation on a watershed basis must necessarily be viewed as a long-term objective, it has been pursuing smaller, more manageable projects with the intent that they will, together, ultimately lead to achievement of the longer-term goal.

Among those more discrete efforts taken by the DEP, is the development of a general trading policy for nutrients and sediments and the implementation of a specific trading program based on that policy for nutrients and sediments in the Chesapeake Bay watershed. The intent of the program is to reduce the total mass of nitrogen, phosphorus and sediment being discharged anywhere in the watershed in order to improve water quality.

Developers and wastewater treatment facilities are expected to be the most likely purchasers of credits, with agricultural operations as the most likely generators of credits for sale. However, the DEP encourages parties to identify other potential trading opportunities. While, to date, the DEP trading policy has only been implemented through a specific trading program in the Chesapeake Bay watershed, the agency anticipates that trading programs will eventually expand statewide to other watersheds.

The new EPA guidance document does not, itself, change any existing laws, regulations or requirements. Rather, its purpose is to promote the development of watershed-based permitting programs at both the state and federal level within the existing legal framework of the Clean Water Act and the EPA's NPDES implementing regulations. However, to the extent that permitting agencies do move forward with the development and implementation of more watershed-based permitting programs, a host of practical implications can be expected.

For example, permitting agencies may require more data collection from permitted dischargers in order to assist the agency with its analysis of the watershed conditions. In addition, once the agencies complete their analyses, they may conclude that stricter permit limits are necessary to meet watershed-specific goals. Further, the permitting process may become more cumbersome, at least at the start, to the extent that permitting agencies elect to implement multi-source discharge permits, since many more parties will now be involved in the permitting process. Also, establishing a single discharge permit for multiple sources across a watershed may result in greater scrutiny by environmental advocacy groups, which may not otherwise commit the time and resources to review of a multitude of permits.

On the flip side, however, there may also be a range of positive implications for permitted dischargers. For example, the implementation of trading programs may result in more cost-effective and flexible pollution control for a variety of dischargers. In addition, the implementation of watershed-based programs may lead to the achievement of water quality goals in a shorter time period, which could potentially ease existing limitations on economic development in a watershed. Further, multisource permitting may ultimately become a more efficient method of permitting for individual dischargers than the current system.

The watershed-based approach to NPDES discharge permitting, advanced by the EPA in its new guidance, represents another step in the maturing state and federal water quality protection programs. We are likely to see significant new developments in this area over the coming decade. •