

November 2010

Contacts

James N. Christman

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8368
jchristman@hunton.com

Kristy A. Niehaus Bulleit

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1547
kbulleit@hunton.com

Craig A. Bromby

One Bank of America Plaza
Suite 1400
421 Fayetteville Street
Raleigh, North Carolina 27601
(919) 899-3032
cbromby@hunton.com

Kathy Robb

200 Park Avenue
New York, New York 10166-0091
(212) 309-1128
krobb@hunton.com

EPA Complies with Settlement Agreement by Publishing a Memorandum on Ocean Acidification

EPA has published a memorandum, dated November 15, 2010, advising States on how to deal with ocean acidification (which has been linked to rising carbon dioxide levels) when they decide whether to list marine waters as “impaired” under Clean Water Act 303(d). Listing a water as impaired triggers a process for setting a “total maximum daily load” (TMDL) and bringing the pollution load to the waterbody down to meet water quality control by controlling point sources of pollutants or nonpoint sources or both. EPA promised to write this memorandum in order to settle a lawsuit brought by the Center for Biological Diversity in federal district court in Washington State.

The new EPA memorandum does not make radical changes to the water regulatory program, but it does exert pressure on States to consider acidification when they make their listing decisions for marine waters. And it promises additional federal guidance in the future, as soon as EPA has enough information to write it.

For now, EPA acknowledges that data are lacking and declines to make changes in the regulatory program. Here are things that EPA decided NOT to do, at least for now:

1. EPA has decided, due to insufficient data, not to revise the national marine pH water quality criterion.
2. EPA does not elevate in priority the assessment and listing of waters for ocean acidification.
3. EPA says that not enough information is available to develop acidification-related TMDLs, and it defers development of TMDL guidance until more information becomes available “in the future.”
4. EPA recognizes that information is absent or limited for ocean acidification parameters and impacts and that, therefore, listings of waters as “impaired” because of acidification may be absent or limited in some States.

For the most part EPA’s memorandum does no more than urge States to be more vigorous in figuring out how to incorporate ocean acidification into their listing decisions and TMDL programs. EPA recommends that States address acidification during the 2012 listing cycle by using “key components” from the existing guidance. In particular:

1. EPA recommends that States solicit information about ocean acidification. In particular, EPA recommends that

States solicit “existing and readily available” data and information for marine pH and natural background conditions and biological data that could be used to make attainment decisions based on narrative or numeric biocriteria. EPA says States should also request data and information (not necessarily “existing and readily available”) on other acidification-related parameters like temperature, salinity, oxygen, nutrients critical to primary production, and at least two of the following four carbon parameters: dissolved inorganic carbon (DIC), partial pressure of carbon dioxide (pCO₂), total alkalinity (TA), and pH. Whether EPA has in mind that States will just gather information from universities and government monitoring programs or whether it has in mind they will require permittees to collect additional monitoring data is not entirely clear.

2. EPA encourages States to develop assessment methods to take acidification into account, using existing water quality criteria. EPA supports using predictive modeling and other non-site-specific data, like remote sensing data, land use analysis, and knowledge about pollutant sources and loadings, to make assessment decisions. EPA also supports using statewide advisories or the “presumption” that the pollutant source (especially atmospheric deposition) is uniformly affecting large geographic areas.
3. EPA recommends that States study up on ocean acidification by reviewing various websites, databases, and publications. In particular, States are supposed to track federal

programs, listed in the memorandum, that are developing “action plans” and a “strategic research plan” on ocean acidification.

4. EPA suggests States begin requesting information on and developing methods for interpreting marine pH water quality standards related to natural conditions. EPA is concerned that most coastal States do not have detailed monitoring protocols, assessment methods, or high-resolution equipment to quantify natural conditions.
5. EPA recommends that States describe in writing how they consider acidification data and information in deciding whether waters are impaired. EPA reminds the States that they cannot use the fact that they do not know what pollutant is impairing a waterbody as an excuse for not listing it as impaired. EPA recommends that States list whatever information they have about the impairment to aid in identifying the pollutant in the future.
6. EPA recommends the States consider using “Category 3” when there are not enough data to make a listing decision. Category 3 is for waters for which there are not enough data to make a designated use attainment determination.
7. EPA recommends that States consider having a separate assessment and listing section just for marine waters.
8. EPA encourages States to consider developing bioassessment methods or biocriteria or both to reflect acidification impacts on marine waters. About a third of the States


have written procedures for using biological information to make use attainment decisions, but most of these apply to freshwater, not marine systems. EPA lists data sources the States can use to help develop bioassessment methods.

9. Even though, as mentioned above, EPA is not requiring that acidification-threatened waters be given priority, EPA does say that States may want to use information about acidification when they set the priority ranking for TMDLs. EPA’s main recommendation on priorities, though, is that States should evaluate marine waters that are already listed for other pollutants (nutrient enrichment, for example) and that are vulnerable to acidification. States should focus their efforts on these acidification-vulnerable waters to promote ecological restoration.

Hunton & Williams Can Help

The Hunton & Williams water and natural resources practice has experience with virtually every aspect of the Clean Water Act. We routinely represent regulated businesses in legislative, regulatory, litigation and enforcement matters arising under the Act, including the NPDES permit program. Our attorneys have extensive experience with federal and state regulatory programs.

The firm routinely advises clients on all aspects of compliance with the Clean Water Act and permitting requirements. We have counseled clients and prepared comments in response to a number of significant technology-based and water quality-based rules the EPA has proposed. Our clients seek the most efficient way to evaluate and implement



compliance with increasingly complex water regulations.

Our team, composed of seasoned lawyers and former government officials, is well-versed in the laws and policies governing the listing of impaired waters and TMDL decisions. Our team works regularly with

some of the nation's best technical experts to promote TMDL decisions that reflect both sound science and sound law. And, most importantly, our team listens to the practical needs of our clients so that any TMDL-based requirements are, in fact, achievable and can help them meet their business needs. We can help you effectively

evaluate your TMDL exposure, formulate your strategy for TMDL development, and pursue creative solutions to your TMDL issues.

If you have questions about the developments discussed in this client alert, or other water and environmental issues, please contact us.

© 2010 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.

Atlanta • Austin • Bangkok • Beijing • Brussels • Charlotte • Dallas • Houston • London • Los Angeles • McLean • Miami • New York • Norfolk • Raleigh • Richmond • San Francisco • Washington