

DELAWARE RIVER BASIN COMMISSION

PROPOSED

Proposed Amendment to the Water Quality Regulations, Water Code and Comprehensive Plan to Establish Pollutant Minimization Plan Requirements for Point and Non-Point Source Discharges of Toxic Pollutants Following Issuance of a TMDL by either the U. S. Environmental Protection Agency or a Member State, or an Assimilative Capacity Determination by the Delaware River Basin Commission.

Agency: Delaware River Basin Commission

Summary: The Delaware River Basin Commission ("Commission" or "DRBC") will hold a public hearing to receive comments on a proposed amendment to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to establish pollutant minimization plan requirements for point and non-point source discharges of toxic pollutants following issuance of a total maximum daily load (TMDL) under Section 303(d) of the Clean Water Act (CWA) by either a member state or the U. S. Environmental Protection Agency (EPA), or issuance of an assimilative capacity determination by the Commission.

A TMDL establishes the maximum loading of a pollutant that a water body can receive without causing an impairment of the water quality standard, which includes designated uses, water quality criteria calculated to protect those uses and anti degradation requirements. When water quality standards are not attained, despite the technology-based control of industrial and municipal wastewater (point sources), the CWA requires that the impaired waters be identified on the state's Section 303(d) list and that a TMDL be developed for the pollutant or pollutants causing the impairment. A determination of the assimilative capacity of a water body for a given pollutant under Section 4.30.7 of the Commission's Water Quality Regulations is similar to the establishment of maximum total loading for a water body in a TMDL. The Commission may issue an assimilative capacity determination whenever a stream quality objective (the Commission's term for a numeric water quality criterion) is not being attained.

A TMDL or assimilative capacity determination does not in and of itself result in any improvement in water quality. Rather, the total loading or assimilative capacity must be allocated among the various sources contributing to the water quality impairment, and each discharger must reduce its discharge to achieve its allocated load. For point source discharges, the individual load allocation typically is converted to an effluent limitation in a National Pollutant Discharge Elimination System (NPDES) permit issued under Section 402 of the Clean Water Act. For non-point sources, the load allocation typically is achieved through Best Management Practices (BMPs).

For certain toxic pollutants in water bodies within the Delaware River Basin, ambient and/or effluent monitoring shows that loadings are many times higher than the levels required to ensure that water quality standards are met. Substantial reductions in loadings of such pollutants from all point and non-point sources are needed to protect the designated uses. However, the process of developing and allocating a total load or determining the assimilative capacity of the water body for the pollutant may take the regulatory agencies many years. As has become apparent in the case of the TMDLs for polychlorinated biphenyls (PCBs) in the Delaware Estuary, issued by EPA on December 15, 2003 on behalf of the states of Delaware, New Jersey and Pennsylvania, it may be many more years before the states are able to incorporate implementing provisions into NPDES permits for point sources and require implementing BMPs for non-point sources. For PCBs, and possibly for other persistent bioaccumulative toxic chemicals, still more time - in some cases decades - will be needed before dischargers achieve sufficient load reductions to achieve the water quality standards. The proposed rule is intended to accelerate real improvements in water quality by authorizing the Commission to require point and non-point source dischargers to initiate load reduction efforts sooner. No numeric targets are proposed. Rather, the rule is based on concepts of pollution prevention and sustainability and the recognition that dischargers that are familiar with their own operations may be best situated to identify opportunities for achieving prompt loading reductions in a cost-effective manner. To comply with the rule, dischargers must plan and implement measures for achieving the maximum practicable reduction of pollutant discharges to the air, soil and water.

The proposed rule is primarily a gap-filling measure. For point sources, it will cease to apply to any discharge upon the next issuance by the state or EPA of a NPDES permit or permit renewal with respect to that discharge. For non-point discharges, the Commission's intention is to apply the rule only where existing state and federal programs will not ensure implementation of the TMDL or assimilative capacity determination.

The rule has four principal parts. Section A addresses the scope of the rule - both the pollutants and the entities intended to be regulated. Section B sets forth procedures for submission, review, implementation and continuation of

Pollutant Minimization Plans ("PMPs" or "plans") required under the rule, including the relationship of the rule to the NPDES permit program. Section C lists the elements required to be included in a PMP, and Section D sets forth the requirement that dischargers submit a report annually, quantifying changes in pollutant loadings since initiation of the PMP and describing measures under way or completed to reduce loadings. Additional sections include a waiver provision and a provision for the development of guidance to assist dischargers in developing PMPs under the rule.

Scope of the Proposed Rule. The scope of the proposed rule is limited to toxic chemicals listed in Section A.1 of the rule. The proposed rule lists one pollutant - polychlorinated biphenyls or "PCBs," for which the EPA issued a TMDL for the Delaware Estuary on December 15, 2003. Additional pollutants may be added to the rule only through notice and comment rulemaking.

Classes of dischargers or individual dischargers proposed to be subject to the rule may be added by amendment or by a directive of the Commission's Executive Director, upon approval by the Commission. Two classes of PCB dischargers are initially proposed to be included: those listed in Group 1 of Tables 3-2 through 3-5 of Appendix 3 of the document, US. *Environmental Protection Agency Regions II and III, Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River* (December 15, 2003); and those listed in Group 2 of the same tables in the event that the presence of PCB congeners is confirmed through monitoring in accordance with the requirements set forth in Appendix 3 of the same document.

Procedures for Submission, Review, Implementation and Continuation of PMPs. The proposed rule requires dischargers to submit a PMP to the Commission and the permitting agency, if any, within three months of publication of a final rule or issuance of a directive by the Executive Director. The Commission staff, in consultation with the permitting agency staff (if applicable), will review each PMP for completeness, and the executive director will issue a completeness determination, confirming that a PMP contains all components required by the rule, or identifying deficiencies in the PMP. Where a deficiency is identified, a discharger has 30 days to submit a revised PMP reflecting a good faith effort to cure the deficiency. The rule sets forth procedures for subsequent revisions if necessary, and allows the executive director to seek penalties against a discharger for repeated failure to comply, or grant a waiver from a requirement of the rule for good cause shown. The discharger must commence implementation of its plan as submitted within 60 days of receipt of a determination of completeness.

Upon issuance of a final new or renewed NPDES permit by EPA or a member state after the imposition of a PMP requirement under the proposed rule, the permit supersedes any provisions of the PMP that relate to the NPDES-permitted discharge.

PMPs for point source discharges will receive a thorough substantive review at the time of NPDES permit issuance or reissuance. Due to limited agency resources, earlier substantive review of PMPs by the Commission or the member states is authorized but not required. The rule provides that if the Commission determines at any time that a PMP is not likely to achieve the maximum practicable reduction of pollutant discharges to the air, soil or water, it may require the discharger to submit a revised PMP to more aggressively reduce pollutant loading.

The initial term of the PMP is to be five years. The term of any PMP that is not superseded by a NPDES permit within five years may be extended by the Executive Director, following a review by the commission staff in consultation with the staff of the appropriate state environmental agency.

Plan Elements. Interested parties are referred to the text of the rule for the required elements of a PMP. Notably, these elements include strategies for tracking down unknown sources of the pollutant, as well as for minimizing releases of the pollutant where sources are found. Plans also must include a description of the procedures to be used to measure, demonstrate and report progress in reducing potential and actual discharges of the pollutant, including annual sampling and analysis of discharges using a prescribed analytical method if one is listed in the rule. In the case of PCBs, dischargers are required to measure loadings annually using EPA Method 1668, Revision A. Dischargers are encouraged to use less complex and expensive analytical methods where possible for purposes of screening or identifying pollutant sources.

Annual Report. Annual sampling and reporting using a uniform method are required in order for dischargers and regulators to determine the effectiveness of a PMP in reducing pollutant loadings to a waterway.

Dates: The public hearing will be held on October 27, 2004 at 11:00 A.M. as part of the Commission's regularly scheduled business meeting. The hearing will end 60 to 90 minutes later, at the discretion of the Commission chair. If

necessary, the hearing will be continued at a date and location announced by the Commission chair, until all those who wish to testify are afforded an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance with the Commission Secretary by phoning 609-883-9500, extension 224. Written comments will be accepted through Friday, November 19, 2004.

Addresses: The full text of the proposed rule will be posted no later than October 1, 2004 on the Commission's web site, <http://www.drbc.net>. The public hearing will be held in the Kirby Auditorium at the National Constitution Center, 525 Arch Street, Independence Mall, Philadelphia. Written comments should be addressed to the Commission Secretary as follows: by e-mail to paula.schmitt@drbc.state.nj.us; by fax to Commission Secretary - dial 609-8839522; by U.S. Mail to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 086280360; or by overnight mail to Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360.

Further Information, Contacts: Please contact Pamela Bush, 609-883-9500 ext. 203, with questions about the proposed rule or the rulemaking process.

Pamela M. Bush, Esquire, Commission Secretary
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