

*President*  
William L. Pugh  
Public Works Director  
City of Tacoma  
Public Works Department  
Tacoma, WA

*Vice President*  
Gurnie C. Gunter  
Director  
Kansas City Water  
Services Department  
Kansas City, MO

*Treasurer*  
Paul Pinault  
Executive Director  
Narragansett Bay Commission  
Providence, RI

*Secretary*  
Thomas R. "Buddy" Morgan  
General Manager  
Water Works & Sanitary  
Sewer Board  
Montgomery, AL

*Executive Director*  
Ken Kirk

September 22, 2000

Mr. J. Charles Fox  
Assistant Administration for Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
MC4101  
Washington, DC 20460

Re: Total Maximum Daily Loads Interim Permit Guidance

Dear Chuck:

Thank you for meeting with the Association of Metropolitan Sewerage Agency's (AMSA) leadership on September 11 to discuss the Environmental Protection Agency's (EPA) total maximum daily loads (TMDLs) interim permit guidance. In response to your request, this letter will memorialize AMSA's legal, scientific, economic and policy objections to the interim permitting approach being put forth both by Region IX and by EPA's headquarters staff.

As stated at AMSA's Fall Leadership Conference, publicly owned treatment works (POTWs) oppose EPA's interim permitting approach being put forth both in Region IX and at the national level. Accordingly, the next several pages articulate why this new approach is contrary to the Clean Water Act, arbitrary and capricious, and devoid of any rational scientific, economic or policy underpinnings.

AMSA has supported EPA's controversial TMDL regulations, in spite of the fact that we had many objections to them. The new TMDL regulations embody certain core principles fundamental to a true watershed-based approach to achieving national clean water goals. These core principles are inclusiveness, equity, and sound science/regulatory policy.

September 22, 2000

Page 2

Inclusiveness recognizes that TMDLs will only work if all contributors to an impaired water body have an obligation to reduce their loadings. Equity assures us that point sources will not be singled out to bear a disproportional burden. Sound science/regulatory policy ensures limits that are scientifically defensible and apportionment decisions that are both scientifically and economically rational.

The Interim Permitting Guidance, as put forth by Region IX and being considered by EPA's national office, defeats each and every one of these core principles. Inclusiveness is destroyed as only point sources are targeted during the interim period. Equity becomes a sham as point sources, and point sources alone, must fund, design and build treatment systems to a level which ignores the responsibilities of all other contributors to the impairment. Sound science/regulatory policy become nothing but hollow buzzwords. Apportionment determinations surrender scientific and economic common sense to pure administrative convenience. Implementation plans, so fundamental to the new regulations, are rendered superfluous as the Interim Guidance has already dictated the apportionment decision. Following are AMSA's specific legal and regulatory concerns.

The Clean Water Act (CWA) at §303(d)(1)(A) requires an identification of all impaired waters. Section 303(d)(1)(C) then states that for all waters identified, each state will develop total maximum daily loads. Thus, the development of a TMDL is a mandatory step in addressing impaired waters.

The statute does not elaborate on what precisely a TMDL encompasses. That has been done through regulation. Again, whether you operate under the existing regulations (40 CFR §§130.2(i); 130.7) or under the newly promulgated regulations, a TMDL, by definition, must evaluate loadings from all sources and then apportion the requisite loading reductions across all sources to ensure compliance with the water quality criteria. Therefore, as defined by EPA's own regulations, a TMDL is a comprehensive and inclusive assessment of both total loadings and loading reductions.

Taken together, Section 303(d), along with EPA's existing or newly proposed regulations interpreting §303(d), mandate that a comprehensive and inclusive assessment — otherwise known as a TMDL — must be done in order to generate the loading reductions (i.e. the wasteload allocations and water quality based effluent limits (WQBELs) for point sources and the load allocations for nonpoint sources) necessary to correct the impairment. Simply stated, Section 303(d) and its implementing regulations make the development of a TMDL an essential predicate to the establishment of WQBELs in impaired waters.

Not only does §303(d) and its implementing regulations compel this conclusion, but also the POTWs have stated time and time again that TMDLs are an essential element of the water quality based approach to water resource management. EPA, in its most recent *Draft Guidance for Water Quality-based Decisions: The TMDL Process (Second Edition) August 1999* at Section 3.1, states as follows:

“The TMDL process is an essential element of the water quality-based approach to watershed management. It develops the pollution reduction needed to meet water

September 22, 2000

Page 3

quality standards and then links the development and implementation of control measures to the attainment of water quality standards. Through the establishment and implementation of a TMDL, pollutant loadings from all sources are estimated; links are established between pollutants, sources and impacts on water quality; maximum pollutant loads are allocated to each source; and appropriate control mechanisms are established or modified so that water quality standards can be achieved.” (emphasis added)

Despite the rather straightforward mandate of §303(d) and its implementing regulations, EPA is assuming that the required TMDL process either can or must be ignored during the interim permitting timeframe. According to AMSA’s interpretation of EPA’s working paper on interim permitting, dated August 31, 2000, and the brief discussion at the meeting, it appears that EPA interprets 40 CFR §122.44(d)(1)(vii) (A) to require or allow the Agency to abandon the TMDL approach during the interim permitting timeframe. That section states:

(vii) When developing water quality based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from and complies with all applicable water quality standards:

First, such a reading is contrary to the statute. Second, it is contrary to EPA’s own water quality regulations specifically designed to implement the TMDL program. Lastly, it is not even an appropriate reading of that regulation. 40 CFR §122.44 (d)(1)(vii)(A) requires water quality based effluent limitations (WQBELs) to be “derived from” all applicable water quality standards. Therefore, the very precise legal question would be what does it mean to ensure that WQBELs are “derived from” all applicable water quality standards. To answer that we must ask how exactly are WQBELs “derived from” water quality standards—which are the designated uses and specific in stream criteria designed to protect the uses—in impaired water bodies?

Section 303(d), EPA’s TMDL regulations, and EPA’s long-standing guidance in this area have already answered that question. WQBELs in impaired waters are “derived from” water quality standards through the TMDL process.

It is a serious misreading of the regulations when interpreted to mean that individual dischargers can be considered in isolation and have criteria end-of-pipe or zero discharge inserted into their permits during the interim permitting period. The regulation simply states that WQBELs must be “derived from” or consistent with the process used to calculate such WQBELs in impaired water bodies – that being the TMDL process. The regulation tells the permit writer that the WQBEL placed in the permit must be consistent with the TMDL developed for that segment.

September 22, 2000

Page 4

Under a worst-case scenario, assume that §303(d) and its implementing regulations do not compel TMDLs as a predicate for developing WQBELs in impaired streams. Then further assume that the “derived from” language found in 40 CFR §122.44(d)(1)(vii)(A) does not require going through the TMDL process – even though that’s exactly how WQBELs are derived for impaired streams. What is left is a complete void. Neither the Act nor the regulations specifically address the interim permitting issue – that being what to do when the permit comes up for renewal but the mechanism used to calculate the WQBEL – that being the TMDL – has not yet been completed.

Again, if such were the case, EPA would then have considerable discretion in its interpretation. At that point regulators should be guided by basic principles of good regulatory policy, equity, sound science and, last but not least, common sense. EPA’s interpretation would be upheld absent a Court finding that it was arbitrary, capricious or manifestly contrary to the statute.

Even assuming such a worst-case legal analysis, AMSA believes the arguments rejecting a Region IX approach are legally sound. AMSA’s policy, equity, science and common sense arguments are equally compelling. Following are seven additional concerns.

**1. EPA Interim Permitting Approach is inherently contradictory to the TMDL Watershed-Based approach.**

EPA and the states have and will devote a huge amount of resources to perform TMDLs. States have and will be performing these TMDLs because they have been told unequivocally by EPA and various courts throughout the nation that TMDLs must be done in order to comply with the mandates of §303(d) of the Clean Water Act. Further, EPA tells the states that TMDLs must include a comprehensive assessment of load reduction alternatives.

At the same time, however, Region IX’s Interim Permitting Guidance tells the states that when a permit comes up for renewal in an impaired water the state is to ignore the TMDL process and must impose point source load reductions before the comprehensive assessment is complete.

Such approaches are completely contradictory. Region IX’s approach is the antithesis of a TMDL approach. It completely destroys the concept of the implementation plan that EPA fought so hard for in the new regulations.

**2. The Interim Permitting Guidance essentially eviscerates the entire TMDL program for point sources.**

Under the Region IX analysis, WQBELs in interim permits would be based on criteria end-of-pipe or no net loading, which is essentially zero. Obviously, this constitutes the worst possible TMDL outcome for point sources. Point sources would then be forced to fund, design, and build

treatment (assuming it's even possible to achieve the reductions) consistent with the worst possible outcome.

When the TMDL is ultimately completed, and all contributors to the impairment are required to reduce their loadings, this will result in a less stringent WQBEL for the point source subjected to the interim permitting policy. At this point, however, it is too late. To the party affected by the interim permitting policy the TMDL has become nothing more than a meaningless paper exercise since it has already been forced into the worst possible design and build outcome.

**3. The application of the Interim Permitting Approach results in the arbitrary and inequitable application of the TMDL and water quality standards programs.**

The arbitrariness and inequity of EPA's interim permitting approach can best be demonstrated by making the following three points.

First, only point sources have the threat of the interim permitting guidance hanging over their heads. All other contributors to the impairment are free to continue their loadings until such time that the TMDL is completed.

Why such draconian treatment for point sources and point sources alone? Are point sources the major cause of impairment throughout the country? No. By EPA's own estimation only 10% of the impairments are caused by point sources alone while 43% of the impairments result from nonpoint sources only. The remaining 47% result from a blend of point and nonpoint source contribution.

Does EPA guidance ensure that water quality standards will be achieved any sooner? No. This would be accomplished only after the implementation of the finalized TMDL.

Can we at least say that EPA Guidance, although still leaving the water body impaired, has now made it somewhat "less impaired"? We cannot say that for sure because the Guidance applies regardless of the water quality impact of the discharger to the water body.

The bottom line is that EPA Guidance is not supported by any rational scientific or regulatory policy underpinnings.

Secondly, the burden of the Interim Permitting Guidance falls on point source dischargers not because of any thing they have or have not done. Rather, the burden exists only where states fail in their obligation to perform TMDLs in a timely manner. Hence, the states commit the "crime" while the dischargers receive the punishment. The inequity of such an outcome is transparent.

Third, application of EPA's Interim Permitting Guidance would base WQBELs not on any uniform application of the water quality standards program but rather on pure fortune – or rather misfortune – depending on when a permit happens to expire. Consider two absolutely identical dischargers side-by-side on the same impaired waterbody. The first discharger has its permit expire prior to the completion of the TMDL. In accordance with EPA's Guidance it's WQBEL is then based on criteria end-of-pipe or zero. The TMDL is then completed. After its completion the second discharger has its permit expire. The second discharger now has the benefit of across-the-board loading reductions and finds that existing assimilative capacity now exists in the river. Therefore, Discharger #2's permit is now less stringent than Discharger #1's permit. Identical dischargers. Identical river. Two differing WQBELs.

**4. Application of EPA's interim permitting approach will result in expenditures of large sums of money without any corresponding water quality benefit.**

This is the inevitable outcome of EPA's interim permitting approach. One of the many things that a TMDL does is to develop an implementation plan. This implementation plan creates a scientific and economic nexus between WQBELs and improvements to water quality. Once the WQBEL permitting strategy is divorced from the TMDL/Implementation Plan strategy, the nexus is severed and the permitting strategy can require the expenditure of millions or even billions of dollars without any corresponding water quality benefit.

A perfect example of this is the mercury issue in San Francisco Bay where point sources represent only three percent of the total loadings. Implementation of EPA's policy would compel POTWs to spend billions of dollars for exotic treatment technologies which ultimately will not address the problem. This is the result when the permitting strategy is separated from the TMDL and the Implementation Plan Strategy.

**5. EPA's interim permitting approach contradicts what EPA has been saying all along about TMDLs.**

EPA has maintained for almost a decade that TMDLs represent the best possibility for implementing true watershed management. EPA has held that point sources, and POTWs in particular, would not be singled out to bear a disproportional burden. But that is exactly what the interim permitting approach does. The POTWs represented by AMSA believe that EPA guidance represents a violation of this historical policy.

**6. EPA's Interim Permitting Approach represents a fundamental policy change by the EPA and extends far beyond guidance into rulemaking.**

Section 303(d) and 305(b) reports have been listing certain waters as impaired for a number of years. States, working through their Continuing Planning Process (CPP), 40 CFR §130.5(b)(3), have been developing TMDLs/WQBELs to address these impairments. EPA reviews and approves each state's CPP.

It is doubtful that more than a handful of states have in their CPP an interim permitting strategy consistent with EPA's policy. It is likely that most, if not all, the states would simply require the development of a TMDL before WQBELs are issued to dischargers impacting impaired water bodies.

EPA has approved such CPPs as being consistent with the Act. States have issued many interim permits, with EPA's review and approval, that did not utilize this approach but rather waited until the TMDL was completed before WQBELs were issued. The ultimate point is that up until now EPA, the States and AMSA have accepted that a TMDL is a predicate to the issuance of a WQBEL in an impaired waterbody.

If EPA now adopts or authorizes a new approach this would represent a fundamental policy change in the Agency's approach to interim permitting. Such fundamental policy changes, with their enormous impacts, should not be made in this manner. At an absolute minimum, a new policy should be subject to vigorous national debate to discuss the legal, social and economic justifications underlying such an approach.

EPA's interim policy approach is more than just a policy decision or interpretation; it constitutes a fundamental change and amendment to the TMDL regulations. EPA's guidance goes far beyond interpreting an existing provision. Rather, it makes an entirely new law that dramatically impacts the entire TMDL program.

EPA should consider the recent case of Appalachian Power Company et. al v. EPA, U.S.C.A., DC Cir., Case No. 98-1512 (decided April 14, 2000). In that case the Court struck down an EPA guidance document allegedly "interpreting" the periodic monitoring regulation found in EPA's Title V Clean Air Act permitting regulations. The Court stated the well-established principle of law that an agency may not ignore formal rulemaking procedures by labeling a major substantive legal addition mere interpretation or guidance. If guidance puts forth a duty that is not already fairly encompassed within an existing regulation then it crosses the boundary into substantive rulemaking. EPA's Guidance crosses this boundary and thus constitutes a rulemaking rather than a guidance document.

September 22, 2000

Page 8

**7. POTWs need at least a reasonable degree of certainty if they are to operate effectively and efficiently.**

If POTWs are going to meet the requirements placed on them by the TMDL process they need to know the specific requirements. A specific target or endpoint is needed to make the ultimate design decisions, to determine overall costs, to reflect costs in rates, and to perform long term capital and operations budgeting. These steps take years and an enormous amount of time and effort.

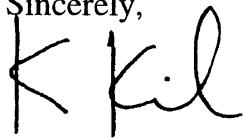
POTWs understand that going before the ratepayers and telling them that rate increases are needed due to an interim permit limit which may be significantly less stringent in a few years, will not be well-received. In fact, it would be almost impossible to explain to a lay person why money should be spent now when such expenditures may be unnecessary a few years after a TMDL is completed. Also, as a practical matter, by the time decisions are made on the technology, the preliminary design is completed, and bonds are floated to finance the improvement, the interim permit limits would have already been superceded by the final TMDL-based limits. From a practical perspective, POTWs cannot operate efficiently when the ultimate goals change so quickly and arbitrarily.

The question remains – what should EPA do during the interim permitting period?

AMSA recommends that EPA acknowledge that TMDLs take time and resources to do correctly. EPA should assist the states in completing these TMDLs as quickly as possible by obtaining additional funds and resources for the states. The Agency should encourage stakeholder group formation to assist the states in their difficult challenge. It should reaffirm its commitment to a TMDL process that includes an implementation plan allowing for a sensible scientific and economic nexus between WQBELs and water quality improvements. Once the TMDL is complete, EPA should encourage states to follow the process for reopening permits to include within them the properly derived WQBELs. In short, EPA should focus all of its efforts on implementing TMDLs rather than wasting resources to support a fundamentally flawed interim permitting guidance.

Thank you for the opportunity to express AMSA's concerns with the Agency's interim permitting approach. If you have any questions, please contact me at 202/833-4653.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is written in a cursive, somewhat stylized font.

Ken Kirk  
Executive Director