

Legacy Pollutants Session Follow-up Attachment: CWA § 303(d) Listing & TMDLs and Superfund

In follow-up to the April 2011 State-EPA-Tribe-Territory National Training Workshop on Clean Water Act § 303(d) Listing & Total Maximum Daily Loads (TMDLs), EPA researched the role that CWA section 303(d) Listing and TMDLs play for Superfund. Attached is the relevant excerpt from the *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites*¹ addressing water quality standards and TMDLs. For purposes of PCB TMDLs, in the current technical handbook EPA has drafted, the approach is summarized as follows:

In implementing a PCB TMDL, the EPA recommends coordinating with the Superfund Program. TMDLs established by states, territories or authorized Indian tribes may or may not be promulgated as rules. Therefore, TMDLs established by states, territories, or authorized Indian tribes, should be evaluated on a regulation-specific and site-specific basis. EPA-established TMDLs are not promulgated as rules, are not enforceable, and, therefore, are not appropriate or relevant and appropriate requirements (ARARs). Even if a TMDL is not an ARAR, it may aid in setting protective cleanup levels and may be appropriately a TBC [“to be considered”]. Project managers should work closely with regional EPA Water program and state personnel to coordinate matters relating to TMDLs. The project manager should remember that even when a TMDL or wasteload allocation is not enforceable, the water quality standards on which they are based may be ARARs. TMDLs can also be useful in helping project managers evaluate the impacts of continuing sources, contaminant transport, and fate and effects. Similarly, Superfund’s remedial investigation and feasibility study may provide useful information and analysis to the federal and state water programs charged with developing TMDLs.

¹ EPA’s *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites*, December 2005, available at <http://www.epa.gov/superfund/health/conmedia/sediment/pdfs/guidance.pdf>

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This criterion is discussed further with respect to contaminated sediment in Chapter 1, Section 1.5; and

- *Community Acceptance*: This criterion includes an evaluation of the concerns of the public regarding the alternatives. It determines which component of the alternatives interested persons in the community support, have reservations about, or oppose. This criterion is discussed further with respect to contaminated sediment in Chapter 1, Section 1.6.

Additional guidance about how to apply these criteria to sediment alternatives is found throughout the guidance, as indicated above. In addition, Chapter 7, Remedy Selection Considerations, summarizes general considerations of each of the nine criteria with respect to the three major approaches.

3.3 APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS

Pursuant to CERCLA §121(d)(4), all remedial actions at CERCLA sites must be protective of human health and the environment. In addition, on-site actions need to comply with the substantive portions of ARARs unless the ARAR is waived. ARARs may be waived only under limited circumstances. Compliance with administrative procedures, such as permits, is not required for on-site response actions. Off-site actions must comply with both substantive and administrative requirements of legally applicable laws and regulations.

Sediment cleanup levels for response actions under CERCLA are generally based on site-specific risk assessments, but are occasionally based on ARARs. Project managers may also consider non-promulgated advisories or guidance issued by federal, state, or tribal governments, frequently called TBC ("to be considered"). While TBCs may not be legally binding on their own, and, therefore, do not have the same status as ARARs, TBCs can be used as a basis for making cleanup decisions. The project manager should refer to *CERCLA Compliance with Other Laws Manual* (U.S. EPA 1988b). Also, the preamble to the final NCP (55 *Federal Register* (FR) 8741) states that, as a matter of policy, it is appropriate to treat Indian tribes as states for the purpose of identifying ARARs (see NCP at 40 CFR §300.515(b) for provisions dealing with tribal governments).

The process of identifying ARARs typically begins in the scoping phase of the RI/FS, continues until the ROD is finalized, and may be reexamined during the five-year review process. Identification of ARARs should be done on a site-specific basis and usually involves a two-part analysis. First, a determination of whether a given requirement is applicable should be made, and second, if it is not applicable, then a determination should be made as to whether it is relevant and appropriate. Highlight 3-2 lists some examples of potential federal, state, and tribal ARARs for sediment sites and actual and hypothetical examples of how remedial strategies have been adapted to comply with ARARs.

For more information about ARARs, the project manager should consult the *Compendium of CERCLA ARARs Fact Sheets and Directives* (U.S. EPA 1991b), and the *Assessment and Remediation of Contaminated Sediments (ARCS) Program Remediation Guidance Document* (U.S. EPA 1994d).

As part of the ARARs analysis, project managers, in consultation with the site attorney, should consider appropriate requirements promulgated under the Clean Water Act (CWA). As described in the examples in Highlight 3-2, federal water quality criteria as well as state-promulgated regulations

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including state water quality standards may be potential ARARs for surface water when water is discharged from dewatering or treatment areas or as effluent from confined disposal facilities (CDFs). Furthermore, some states may have their own promulgated sediment quality standards that may be potential ARARs for sediment.

Total maximum daily loads (TMDLs) established or approved by the EPA under the CWA are planning tools designed to reduce contributing point and nonpoint sources of pollutants in water quality limited segments (WQLS). TMDLs calculate the greatest amount of loading of a pollutant that a water body can receive without exceeding CWA water quality standards. TMDLs are usually established by the states, territories, or authorized tribes and approved by the EPA. Effluent limits in point source national pollutant discharge elimination system (NPDES) permits should be consistent with the assumptions and requirements in a wasteload allocation in an approved TMDL.

EPA-established TMDLs are not promulgated as rules, are not enforceable, and, therefore, are not ARARs. TMDLs established by states, territories or authorized Indian tribes may or may not be promulgated as rules. Therefore, TMDLs established by states, territories, or authorized Indian tribes, should be evaluated on a regulation-specific and site-specific basis. Even if a TMDL is not an ARAR, it may aid in setting protective cleanup levels and may be appropriately a TBC. Project managers should work closely with regional EPA Water program and state personnel to coordinate matters relating to TMDLs. The project manager should remember that even when a TMDL or wasteload allocation is not enforceable, the water quality standards on which they are based may be ARARs. TMDLs can also be useful in helping project managers evaluate the impacts of continuing sources, contaminant transport, and fate and effects. Similarly, Superfund's RI/FS may provide useful information and analysis to the federal and state water programs charged with developing TMDLs.

Project managers are also strongly encouraged to follow the consultation requirements of the Endangered Species Act. For on-site actions, the Endangered Species Act, Section 7, requires federal agencies to ensure that the actions they authorize, fund or carry out are not likely to jeopardize the continued existence of endangered or threatened species, or adversely modify or destroy their critical habitat. By policy, EPA consults with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (NMFS) where a threatened or endangered species or their habitat is or may be present. The Commencement Bay NPL (National Priorities List) site provides an example of how a remedial strategy has been adapted to comply with this act. Chinook salmon are threatened species that are found at this site during part of the year. After following EPA's policy of consulting with the NMFS, EPA decided that to avoid harming the species, some in-water remedial work would be conducted only during a window of time when juvenile salmon were not migrating through the area. Other in-water work would be performed outside of this window, using special conditions recommended by NMFS to minimize impacts to salmon.