ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, 124, and 130

[WH–FRL–7470–2]

RIN 2040–AD84

Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's action withdraws the final rule entitled ''Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation (''the July 2000 rule'') published in the **Federal Register** on July 13, 2000. The July 2000 rule amended and clarified existing regulations implementing a section of the Clean Water Act (CWA) that requires States to identify waters that are not meeting applicable water quality standards and to establish pollutant budgets, called Total Maximum Daily Loads (TMDLs), to restore the quality of those waters. The July 2000 rule also amended EPA's National Pollutant Discharge Elimination System (''NPDES'') regulations to include provisions addressing implementation of TMDLs through NPDES permits. The July 2000 rule has never become effective; it is currently scheduled to take effect on April 30, 2003. Today, EPA is withdrawing the July 2000 rule, rather than allow it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an efficient and effective TMDL program. Furthermore, EPA needs additional time beyond April 30, 2003, to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA. The withdrawal of the July 2000 rule will not impede ongoing implementation of the existing TMDL program. Regulations that EPA promulgated in 1985 and amended in 1992 remain in effect for the TMDL program. EPA has been working steadily to identify regulatory and nonregulatory options to improve the TMDL program and is reviewing its ongoing implementation of the existing program with a view toward continuous improvement and possible regulatory changes in light of stakeholder input and recommendations.

DATES: The July 2000 rule amending 40 CFR parts 9, 122, 123, 124 and 130, published on July 13, 2000, at 65 FR 43586, is withdrawn as of April 18, 2003. This rule is considered final for purposes of judicial review as of 1 p.m. eastern time, on April 2, 2003, as provided in 40 CFR 23.2.

ADDRESSES: The complete record for the final rule, Docket ID No. OW–2002–0037, is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B–102, 1301 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For information about today's final rule, contact: Francoise M. Brasier, U.S. EPA Office of Wetlands, Oceans and Watersheds (4503T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, phone (202) 566–2385.

SUPPLEMENTARY INFORMATION:

A. Authority

Clean Water Act sections 106, 205(g), 205(j), 208, 301, 302, 303, 305, 308, 319, 402, 501, 502, and 603; 33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1311, 1312, 1313, 1315, 1318, 1329, 1342, 1361, 1362, and 1373.

B. Entities Potentially Regulated by the Final Rule

TABLE OF POTENTIALLY REGULATED ENTITIES

Category	Examples of potentially regulated entities
Governments	States, Territories and Tribes with CWA responsibilites

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you may be regulated by this action, you should carefully examine the applicability criteria in § 130.20 of title 40 of the Code of Federal Regulations. If you have any questions regarding the applicability of this action to you, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

C. How Can I Get Copies of This Document and Other Related Information

EPA has established an official public docket for this action under Docket ID No. OW–2002–0037. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, EPA West, Room B–102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. For access to docket materials, please call ahead to schedule an appointment. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket* to view public comments, access the index listing of the contents of the official public docket and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility previously mentioned. Once in the electronic system, select ''search'' and then key in the appropriate docket identification number.

D. Explanation of Today's Action

I. Background

On December 27, 2002, EPA proposed to withdraw final regulations affecting the TMDL program (67 FR 79020) that were published in the **Federal Register** on July 13, 2000 (65 FR 43586). Among other things, the July 2000 rule was intended to resolve issues concerning the identification of impaired waterbodies by promoting more comprehensive inventories of impaired waters. The rule was also intended to improve implementation of TMDLs by requiring EPA to approve, as part of the TMDL, implementation plans containing lists of actions and expeditious schedules to reduce pollutant loadings. Finally, the rule included changes to the NPDES program to assist in implementing TMDLs and to better address point source discharges to waters not meeting water quality standards prior to establishment of a TMDL.

The July 2000 rule was controversial from the outset. Both the proposed and final rules generated considerable controversy, as expressed in Congressional action, letters, testimony and public meetings. Even before it was published in the **Federal Register** on July 13, 2000, Congress prohibited EPA from implementing the final rule through a spending prohibition attached to an FY2000 appropriations bill that prohibited EPA from using funds ''to make a final determination on or implement'' the July 2000 rule. This spending prohibition was scheduled to expire on September 30, 2001, and, barring further action by Congress or EPA, the rule would have gone into effect 30 days later on October 30, 2001. Because of the continuing controversy regarding the July 2000 rule, EPA proposed on August 9, 2001 (66 FR 41817), and promulgated on October 18, 2001 (66 FR 53044), a new effective date of April 30, 2003, for the July 2000 rule, to allow time for reconsideration of the rule.

Stakeholder concerns were also reflected in legal challenges to the July 2000 rule by a broad array of litigants. Ten petitions for review were filed by States, industrial and agricultural groups, and environmental organizations asserting that many of EPA's revisions to the TMDL regulations were either unlawful under the Administrative Procedure Act or exceeded the Agency's authority under the CWA. These petitions, which identified more than 50 alleged legal defects in the July 2000 rule, were ultimately consolidated in *American Farm Bureau Federation* et al. v. *Whitman* (No. 00–1320) in the United States Court of Appeals for the District of Columbia Circuit. In addition, several other stakeholders have intervened in these lawsuits. The litigation over the July 2000 rule is currently stayed pending EPA's determination regarding whether, and to what extent, that rule should be revised.

In the December 27, 2002, preamble to the proposed withdrawal rule, EPA explained why it had decided to withdraw the July 2000 rule. EPA said that by continuing to examine the regulatory needs of the TMDL and NPDES programs against the impending April 30, 2003, effective date for the July 2000 rule, the Agency was sending confusing signals to the States and other interested parties about which set of rules they should be prepared to implement. Further, because of the significant controversy, pending litigation and lack of stakeholder consensus on key aspects of the July 2000 rule, the Agency said that the July 2000 rule could not function as the blueprint for an efficient and effective TMDL program without significant revisions. Moreover, the Agency said it needed more time to consider whether and how to revise the currently-effective TMDL rules without concern that those efforts would be adversely affected and distracted by the July 2000 rule's impending effective date. In the preamble to the proposed rule, the Agency also explained why it believes that, given the significant progress States have made during the past four years in developing TMDLs, withdrawal of the July 2000 rule will not compromise continuing efforts to implement section 303(d) of the Clean Water Act. EPA's rationale for proposing the withdrawal of the July 2000 rule is more fully explained in the preamble accompanying the proposal (67 FR 79020).

II. Response to Comments and Final Decisions

EPA received approximately 90 separate written comments regarding its proposal to withdraw the July 2000 rule. These comments came from a broad cross-section of stakeholders, including agricultural and forestry groups, business and industry entities and trade associations, State agencies, environmental organizations, professional associations, academic groups and private citizens. An overwhelming majority of the commenters (more than 90 percent) supported EPA's proposed action to withdraw the July 2000 rule. These commenters generally agreed with the Agency's rationale for withdrawing the rule as discussed in the December 27, 2002, preamble. Commenters reiterated EPA's concerns about the potential distraction and confusion caused by the July 2000 rule's impending deadline, as well as the controversy surrounding various provisions of the rule and uncertainty caused by the pending DC Circuit Court litigation. Others stated that the July 2000 rule was no longer needed because of the increased technical guidance that EPA has provided to States to improve the quality of their lists of impaired waters, and the increased funding provided by EPA for developing TMDLs. Many commenters said that States have made significant strides in developing TMDLs since the rule was originally proposed and promulgated and, therefore, the July 2000 rule was not needed. Several commenters stated that allowing the July 2000 rule to go into effect would be disruptive to ongoing TMDL development efforts, and that withdrawing the July 2000 rule would give the Agency additional time to evaluate the need for new TMDL regulations. Some commenters offered additional reasons for supporting withdrawal of the July 2000 rule. Although most of these reasons are consistent with EPA's rationale for withdrawing the July 2000 rule, some are not. For example, some commenters, though supporting EPA's decision to withdraw the July 2000 rule, also questioned the legal soundness of certain provisions of that rule. EPA does not necessarily agree with those comments, and its decision today to withdraw the July 2000 rule should not be understood as an implicit endorsement of those views and comments.

A small minority of commenters (four) disagreed with EPA's proposal to withdraw the July 2000 rule. One commenter asserted that withdrawing the July 2000 rule would ''postpone the TMDL program for several more years'' and, by removing incentives to reduce pollution, would hinder progress ''to implement the TMDL program'' and ''only make the problem worse.'' Another commenter said that not going forward with the July 2000 rule would ''undermine the momentum of State programs'' that have been ''waiting to see Federal guidelines to develop programs of their own.'' EPA does not agree with these comments. Indeed, one State in its comments supporting withdrawal said that the July 2000 rule ''would undo much of the momentum and success'' of the State's ongoing and successful TMDL program. As described in more detail in the December 27, 2002, preamble, in recent years, EPA and the States have made great strides in implementing the existing 303(d) program to list impaired waters and develop and implement TMDLs to restore impaired waters. States have substantially improved their TMDL programs while the Agency has provided the States with significant increases in technical and financial support to expand and strengthen all elements of their programs. From FY 1999 to 2002, EPA has provided the States almost $30 million for TMDL-specific activities and allowed States to use a portion of State grants for water program administration (CWA section 106 grants) and nonpoint source programs (CWA sections 319 grants) for developing and implementing TMDLs. In addition, since 1998, EPA has spent more than $11 million to support development of technical guidance for developing TMDLs and identifying the most appropriate and efficient best management practices for nonpoint

sources. A complete list of these guidance documents can be found at: *http://www.epa.gov/edocket.*

Helped by these programmatic initiatives, States have made considerable progress in developing TMDLs despite the fact that the July 2000 rule never became effective. As stated in the December 27, 2002, proposal, between 1996 and 1999, EPA and the States established approximately 800 TMDLs. Since then, and despite the fact that the July 2000 rule never became effective, EPA and the States have established more than an additional 7,000 TMDLs; and States continue to improve the pace at which TMDLs are established. Given this progress and the States' adoption since 1998 of schedules for TMDL development, EPA anticipates no reduction in the pace of TMDLs being developed and the associated improvement in water quality, even if the July 2000 rule does not take effect.

One commenter objected to withdrawing the July 2000 rule because of provisions contained in the rule for expanded public involvement in the listing and TMDL development process. By not implementing the July 2000 rule, the commenter asserted that the public remains ''shut out'' of the listing and TMDL development process, which allows the States to develop impaired waters lists and establish TMDLs ''without adequate public scrutiny.'' EPA disagrees with this comment. While it is true that the July 2000 rule would have clarified, and, in some measure strengthened, the public participation components of EPA's currently-effective TMDL regulations, the current statutory and regulatory provisions (as supplemented by EPA guidance to the States and its Regional Offices) already allow for public scrutiny and participation in the listing and TMDL development process. EPA's existing regulations require that the process for involving the public in a State's listing and TMDL program ''shall be clearly described in the State Continuing Planning Process (CPP)'' (40 CFR 130.7(a)), and § 130.7(c)(1)(ii) requires that a State's calculations to establish TMDLs be subject to public review, as defined in the State CPP. Additionally, EPA regulations require that when EPA disapproves and establishes a list or a TMDL, EPA must seek public comment (40 CFR 130.7(d)).

EPA's policy has always been that there should be full and meaningful public participation in both the listing and TMDL development process, and EPA has issued guidance in addition to the regulations to support this effort. In EPA's ''Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992'' (May 20, 2002), EPA states that, in addition to the TMDL regulatory requirements, ''final TMDLs submitted to EPA for review and approval should describe the State's/tribe's public participation process, including a summary of significant comments and the State's/tribe's responses to those comments.'' The guidance also states that ''provision of inadequate public participation may be a basis for disapproving a TMDL. If EPA determines that a State/tribe has not provided adequate public participation, EPA may defer its approval action until adequate public participation has been provided for, either by the State/tribe or by EPA.''

EPA's ''Integrated Report'' guidance to States, tribes and EPA Regions (Integrated Water Quality Monitoring and Assessment Report (November 19, 2001)) states that ''States and territories should provide for full public participation in the development of their Integrated Report prior to its submission to EPA. EPA believes that public understanding of how standard attainment determinations are made for all A[sessement] U[nits]s is crucial to the success of water quality programs and encourages active stakeholder participation in the assessment and listing process.... EPA will consider how the State or territory addressed the comments...when approving or disapproving the 303(d) list of AUs (Category 5).''

Most recently, in May 2002, EPA issued guidance to its Regional Offices stating that when reviewing State 303(d) lists, EPA Regions should review how States provided for public participation to ensure that each State carried out its public participation process consistent with the State's public participation requirements (''Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List Submission.'') If the Region believes a State has not provided adequate public participation, the guidance provides steps the Region should take in working with a State to provide for additional public participation, and how the State or, if necessary, the Region, should consider and address public comments prior to EPA's approval or disapproval of the list. Finally, it is important to note that nearly all of the States already have public participation requirements under their own State laws for the listing and TMDL development processes, and also provide for public notice.

For all of these reasons, EPA believes that adequate public participation opportunities exist under the currently-effective regulations and that withdrawing the July 2000 rule will not limit meaningful public participation in the listing and TMDL development process.

One commenter stated that, by not implementing the July 2000 rule, States would continue to have inadequate monitoring programs and continue to develop lists of impaired waters based on inadequate data. EPA disagrees. EPA recognizes that no State has a perfect monitoring and listing program. Monitoring and assessment programs are expensive to assemble and implement. While the July 2000 rule would have clarified certain aspects of the existing TMDL regulations regarding listing methodologies, that rule, by itself, would not have provided the additional funding needed by many States to expand their monitoring and assessment programs. Moreover, many of the important listing clarifications and improvements contained in the July 2000 rule have already been provided to, and are currently being implemented by, States, even without the July 2000 rule having gone into effect.

To assist in implementation of the currently-effective TMDL rules, EPA issued the ''2002 Integrated Water Quality Monitoring and Assessment Report Guidance'' (November 19, 2001) to promote a more integrated and comprehensive system of accounting for the nation's impaired waters. The guidance recommends that States submit an ''Integrated Report'' that will satisfy CWA requirements for both section 305(b) water quality reports and section 303(d) lists. The objectives of this guidance are to strengthen State monitoring programs, encourage timely monitoring to support decision making, increase numbers of waters monitored, and provide a full accounting of all waters and uses. The guidance encourages a rotating basin approach and strengthened State assessment methodologies, and is intended to improve public confidence in water quality assessments and 303(d) lists. EPA extended the date for submission of 2002 lists by six months (66 FR 53044) to allow States and Territories time to incorporate some or all of the recommendations suggested by EPA in this guidance. Approximately half of the States and Territories have submitted a 2002 report which incorporates some or all of the elements of this guidance. In addition, EPA also held five stakeholder meetings in 2001 and 2002 to review and comment on a best practices guide that EPA was developing for States on consolidated assessment and listing methodologies. This guidance (''Consolidated Listing and Assessment

Methodology—Toward a Compendium of Best Practices'') was released in July 2002. EPA is continuing to work with States to clarify and strengthen their monitoring programs and to help improve the quality and credibility of their lists of waters that require a TMDL.

One commenter stated that withdrawing the July 2000 rule would continue ''to make EPA and the States the target of numerous lawsuits—resulting in the courts driving environmental policy, rather than EPA and the States.'' EPA does not agree with this comment. EPA does not agree that there are, in the commenter's words, ''weaknesses'' with the currently-effective TMDL regulations that make the Agency any more vulnerable to litigation than if it did not withdraw the July 2000 rule. Indeed, we believe withdrawing the July 2000 rule will render moot the pending D.C. Circuit Court challenge to that rule. Before July 2000, EPA was named as defendant in over 30 lawsuits challenging State lists and the pace of State TMDL development. Since July 2000, only a few such lawsuits have been filed, even though the July 2000 rule never became effective. Clearly, the number of such suits has declined as the States and EPA have done a better job under the 1985/1992 TMDL rules to establish lists and TMDLs. In addition, to date only a handful of lawsuits have been filed challenging any of the more than 7,000 TMDLs that the States or EPA have established. Given these numbers, the Agency does not believe there is anything inherently litigation-provoking in the currently-effective TMDL rules and, based on this record, EPA does not believe that withdrawing the July 2000 rule will result in increased TMDL litigation.

One commenter objected to withdrawing the July 2000 rule because of concerns regarding the inconsistent implementation of the program under the currently-effective regulations and EPA guidance. EPA does not agree that inconsistent implementation of the TMDL program is a significant problem. Nor, for that matter, would implementation of the July 2000 rule remove all potential for divergent implementation approaches by the different States and EPA Regions. As discussed previously, since publication of the July 2000 rule, EPA has issued numerous detailed policy memoranda, national guidance documents, technical protocol documents, and information on best management practices so that States can improve their methods to monitor and list impaired waters, and develop and implement TMDLs in a consistent, yet flexible way. A complete list of these guidance documents can be found at *http://www.epa.gov/edocket*. As noted previously, EPA has issued detailed national guidance to EPA Regions on reviewing and approving lists and TMDLs, (''EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992'' (May 20, 2002)) and is working closely with all the EPA Regional Offices to ensure that their regional review and approval of lists and TMDLs correspond with this national policy. In addition, EPA has recently released a guidance on ''Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'' (November 22, 2002). This memorandum clarifies EPA's policy on wasteload allocations, specifically that NPDES-regulated storm water discharges must be included in the wasteload allocation component of the TMDL (*see* 40 CFR 130.2(h)) and affirms EPA's view that an iterative, adaptive management BMP approach is appropriate for permitting such discharges.

EPA has also sponsored numerous TMDL and TMDL-related training sessions and meetings to clarify and provide detailed technical support to the States and Regions to help ensure consistency in listing and TMDL development (*see* EPA's website for a complete list of recent activities: *http://www.epa.gov/owow/tmdl/training*.) EPA also has made available to the public the ''National TMDL Tracking System'' (NTTS), which includes all State-specific data on approved 303(d) lists and approved TMDLs as well as a national summary of impaired waters and TMDLs that have been approved for these waters (*http://www.epa.gov/owow/tmdl/*.) In addition, since the Spring of 2001, EPA has held regular conference calls with EPA Regions and the States to discuss and answer any questions regarding the TMDL program, including technical and policy questions. EPA believes that these guidance documents, the National TMDL Tracking System, training, workshops, and close communication with States and EPA Regional Offices have improved the national consistency in how the TMDL program is implemented at both the Federal and State level, while accommodating the inherent variability in States' water quality standards, land and water characteristics, and available resources.

As to the commenter's point that ''there are significant differences between the July 2000 rule and the 1985, 1992 rule * * * [that] cannot adequately be addressed through EPA guidance,'' EPA notes that its review of the currently-effective TMDL regulations in light of the July 2000 rule is ongoing. EPA has not yet decided what, if any, changes to propose to those regulations. As it continues to consider the need for regulatory changes, EPA will consider the commenter's suggestions regarding which elements belong in regulation and which may be appropriately left to guidance. EPA will also consider the commenter's suggestion that the Agency should allow the public to participate in the development of future program guidance.

One commenter said EPA had not provided enough information to allow it to make a ''well-reasoned decision or provide meaningful comment on EPA's proposal to withdraw the July 2000 rule.'' Nevertheless, that commenter did oppose EPA's proposed action. EPA disagrees with the claim that it did not provide enough information for the public to provide meaningful comment, and given the number of other comments to the proposal addressing EPA's rationale, EPA believes that it adequately discussed its justification for withdrawing the July 2000 rule in the December 27, 2002, preamble.

One commenter opposed withdrawal of the July 2000 rule because it believed that the rule was ''necessary'' to ''aid in the control of nonpoint source pollution.'' EPA disagrees with this comment. EPA notes that there are numerous existing Clean Water Act authorities and programs, supplemented by other Federal and State programs and initiatives, that address nonpoint source pollution.

One commenter opposed withdrawal of the ''TMDL program'' because it believed ''much time went into the planning of this program to protect waterways * * * [and] it needs to be tied into the NPDES permit program and should be customized to fit individual permits.'' EPA is not sure it fully understands this comment. To the extent the commenter is opposed to withdrawal of the ''TMDL program,'' EPA notes that it is only withdrawing the July 2000 rule, which has never become effective, and not the TMDL program itself. EPA agrees that it took much planning to develop the July 2000 rule, but, for the reasons already discussed in this preamble and in the December 27, 2002, preamble, EPA has decided to withdraw that rule, regardless of the effort that went into its development. EPA also notes that the currently-effective TMDL program is ''tied into the NPDES permit program'' in that, among other things, permit

effluent limits must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7. *See* 40 CFR 122.44(d)(1)(vii)(B). Similarly, 40 CFR 122.4(i) addresses what requirements must be met for a permit to be issued to a new source or new discharger who proposes to discharge a pollutant for which a TMDL has been prepared.

One State commenter, while supporting withdrawal of the July 2000 rule, recommended that as part of this final rulemaking EPA immediately modify 40 CFR 130.7 to require State 303(d) lists every four (instead of every two) years. As EPA continues to consider whether and how to revise the TMDL program, EPA will consider the commenter's suggestion.

One commenter asked for ''an evaluation of potential changes from rule making, implementation and funding of Clean Water Act programs and enforcement relative to the Russian River [California] * * * [and an] assurance that this regulatory shift will not result in degradation of either the quality or quantity of our local resources.'' The commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

One electronic comment merely stated as follows: ''We strongly oppose any reduction of restrictions on wetland maintenance.'' Again, the commenter did not appear to take a position on the proposed withdrawal of the July 2000 rule, and EPA believes this comment is beyond the scope of the proposal and does not require a response.

More than half the commenters requested or encouraged EPA to pursue further rulemaking once the July 2000 rule was withdrawn. Many of these commenters submitted specific recommendations regarding how EPA should structure a new TMDL rule. Some commenters requested that this new rulemaking occur as quickly as possible. One commenter said it ''supports EPA's proposed withdrawal of the 2000 rule, assuming that EPA intends to replace that rule in a timely manner with an improved rule now known as the Watershed Rule.'' Another commenter said it ''will only support withdrawal of the July 2000 rule if EPA moves quickly to propose and promulgate a Watershed Rule that provides a comprehensive framework for the evolving TMDL program.'' Three commenters who supported withdrawal of the July 2000 rule advised against a new rulemaking saying that it ''would be disruptive and would only derail State momentum to clean up our waterways.'' Two other commenters cautioned that a new regulatory proposal ''could slow needed progress'' and strongly urged the Agency ''not to propose any regulatory or other changes that would cripple this vitally important water clean up program.''

In response to these comments regarding the future direction of the TMDL program, EPA restates that it has not yet completed its evaluation regarding whether and how to revise the currently-effective TMDL rules. Nor can EPA commit to how long it will take to complete that process. EPA is committed to structuring a flexible, effective TMDL program that States, territories and authorized tribes can support and implement. EPA will carefully consider all of the past and recently-provided commenters' recommendations as it continues to evaluate whether and how to revise the currently-effective TMDL regulations using new regulatory or non-regulatory approaches. EPA, to the best of its ability, will continue to meet and share information with stakeholders regarding this effort, and will provide an opportunity for public comment in a separate **Federal Register** notice if the Agency decides to move forward with a new rulemaking.

After carefully considering all the comments received in response to its December 27, 2002, proposal, EPA is today promulgating a final rule that withdraws the July 2000 rule. EPA is withdrawing the July 2000 rule, rather than allowing it to go into effect, because EPA believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an effective TMDL program. EPA needs additional time beyond April 2003 to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA, and EPA is not sure how long that effort will take. In light of the significant progress States have made in the past three years establishing TMDLs under the currently-effective rules, EPA does not believe that withdrawing the July 2000 rule will impede States' efforts to implement section 303(d) to work towards cleaning up the nation's waters and meeting water quality standards.

Today's final rule does not change any part of the currently effective TMDL regulations promulgated in 1985, as amended in 1992, at 40 CFR part 130 or the NPDES regulations at parts 122—124.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, (October 4, 1993)), EPA must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action.'' As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's final rule on small entities, I certify that this action, which withdraws the July 2000 rule that has not taken effect, will not have a significant economic impact on a substantial number of small entities. Like the July 2000 rule, this final rule will not impose any requirements on small entities. This action withdraws the July 2000 rule, which has never taken effect.

D. Unfunded Mandates Reform Act (UMRA) of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, tribal and local governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Like the July 2000 rule, today's final rule, which withdraws the July 2000 rule that has not taken effect, contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or Tribal government or the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA. For the same reason, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any requirement on any entity. There are no costs associated with this action. Therefore, today's rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in executive Order 13132. It finalizes the withdrawal of the July 2000 rule, which has never taken effect. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. It withdraws the July 2000 rule, which has never taken effect. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA. This final rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Energy Effects

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule simply finalizes the withdrawal of the July 2000 rule which has never taken effect. We have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not impose any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on April 18, 2003.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Air pollution control, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 130

Environmental protection, Grant programs—environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control, Water supply.

The authority citation for part 130 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

For the reasons stated in the preamble, EPA withdraws the final rule amending 40 CFR parts 9, 122, 123, 124 and 130 published July 13, 2000 (65 FR 43586).

Dated: March 13, 2003.

Christine T. Whitman,

Administrator.

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