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"ALEC" has long been a secretive collaboration between Big Business and "conservative" politicians. Behind closed doors, they ghostwrite "model" bills to be introduced in state capitols across the country. This agenda—underwritten by global corporations—includes major tax loopholes for big industries and the super rich, proposals to offshore U.S. jobs and gut minimum wage, and efforts to weaken public health, safety, and environmental protections. Although many of these bills have become law, until now, their origin has been largely unknown. With **ALEC EXPOSED**, the Center for Media and Democracy hopes more Americans will study the bills to understand the depth and breadth of how big corporations are changing the legal rules and undermining democracy across the nation.

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For more on these corporations, search at www.SourceWatch.org.

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State Implementation of Clean Water Act (TMDL) Requirements

Summary

This Act sets forth criteria and procedures for states to implement the mandate of the Clean Water Act to develop total maximum daily loads for impaired waters within the State's boundaries. The Act clarifies how states will implement the requirements of the Clean Water Act and EPA's implementing regulations.

Model Legislation

Section 1. {Title} This Act may be referred to as the Total Maximum Daily Load Implementation Act.

Section 2. {Purpose and Intent} It is the purpose of this legislation to establish procedures and criteria for complying with the mandates of Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d).

Section 3. {Definitions} As used in this Act:

(A) "Credible data" means scientifically valid chemical, physical, or biological monitoring data collected under a scientifically accepted sampling and analysis plan, including quality control and quality assurance procedures.

(B) "Department" means [insert name of state agency with authority to implement the mandates of the TMDL program].

(C) "Effluent dependent water" means a water of the United States, as defined in 33 U.S.C. § 1362, that consists primarily of discharges of treated wastewater.

(D) "Ephemeral water" means a water of the United States, as defined in 33 U.S.C. § 1362, that has a channel that is at all times above the water table, that flows only in response to precipitation, and that does not support a self-sustaining fish population.

(E) "Impaired water" means a water of the United States, as defined in 33 U.S.C. § 1362, for which credible scientific data satisfying the requirements of Section 4 of this Act exists demonstrating that the water should be identified pursuant to 33 U.S.C. § 303(d).

(F) "Intermittent water" means a water of the United States, as defined in 33 U.S.C. § 1362, other than an ephemeral water, in which flow normally occurs only on a seasonal or intermittent basis, for example as a result of snow melt.

(G) "Nonpoint source" means a source of pollutant loading to an impaired water that does not qualify as a point source.

(H) "Point source" shall have the same meaning as in 33 U.S.C. § 1362.

(I) "Professional designee" includes governmental agencies other than the department, a person hired by, or under contract for compensation with, the department to collect or study data or a qualified volunteer.

(J) "Surface water quality standard" means a standard adopted by this state to comply with the requirements of section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c).

(K) "Total maximum daily load" means an estimation of the total amount of a pollutant, from all sources, that may be added to a water while still allowing the water to achieve and maintain applicable surface water quality standards. Each total maximum daily load shall include wasteload allocations for point sources and load allocations for nonpoint sources contributing the pollutant to the water, as deemed necessary by the Department to achieve applicable surface water quality standards.

(L) "TMDL implementation plan" means a written strategy to implement a total maximum daily load developed for an impaired water. TMDL implementation plans may rely on any combination of the following components that the Department determines will result in achieving and maintaining compliance with applicable surface water quality standards in the most cost-effective and equitable fashion: permit limitations, best management practices, education and outreach efforts, technical assistance, cooperative agreements, voluntary measures and incentive-based programs, load reductions resulting from other legally required programs or activities, land management programs, pollution prevention planning, waste minimization, and pollutant trading agreements.

Did you know the trade group for the gas industry was a corporate co-chair in 2011?

Section 4. {Lists of Impaired Waters and Data Requirements}

(A) The Department shall prepare a list of impaired waters for the purpose of complying with section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), at least once every five years. The list shall be adopted by rule prior to its submission to the United States Environmental Protection Agency.

(B) In determining whether a water is impaired, the Department shall consider only reasonably current credible and scientifically defensible data that it has collected itself or received from an outside source. Results of water sampling or other assessments of water quality, including physical or biological health, shall be considered credible and scientifically defensible data only if the Department has determined that:

(1) appropriate quality assurance/quality control procedures were followed and documented in collecting and analyzing the data;

(2) the samples or analyses are representative of water quality conditions at the time the data was collected;

(3) the data is statistically significant; and

(4) the method of sampling and analysis (including analytical, statistical and modeling methods) is generally accepted and validated in the scientific community as appropriate for use in assessing the condition of the water.

(C) Data is not credible data unless the data originates from studies and samples collected by the department, or a professional designee of the department.

(1) The department shall adopt rules establishing requirements for a person to become a professional designee.

(2) All information submitted by a professional designee shall be reviewed and approved or disapproved by the department. The professional designee shall submit a site specific plan with data which includes information used to obtain the data, the sampling and analysis plan, and quality control and quality assurance procedures used in the monitoring process. The professional designee must provide proof to the department that the water monitoring plan was followed. The department shall review all data collected by a professional designee, verify the accuracy of the data collected by a professional designee, and determine that all components of the water monitoring plan were followed.

(3) The department shall retain all information submitted by a professional designee submitting the information for a period of not less than ten years from the date of receipt by the department. All information submitted shall be a public record.

(D) The department shall use credible data when doing any of the following:

(1) Developing and reviewing any water quality standard.

(2) Developing any statewide water quality inventory or other water assessment report.

(3) Determining whether any water of the state is to be placed on or removed from any section 303(d) list.

(4) Determining whether any water of the state is supporting its designated use or other classification.

(5) Determining any degradation of a water of the state.

(6) Establishing a total maximum daily load for any water of the state.

(E) The Department shall adopt by rule the methodology to be used in identifying waters as impaired. The rules shall specify:

(1) minimum data requirements and quality assurance and quality control parameters, consistent with subsection B of this section, that must be satisfied in order for data to serve as the basis for listing and de-listing decisions;

(2) appropriate sampling, analytical and scientific techniques that may be used in assessing whether a water is impaired;

(3) any statistical or modeling techniques that the Department plans to use to assess or interpret data;

(4) criteria for including and removing waters from the list of impaired waters, including any implementation procedures developed pursuant to subsection F of this section. The criteria for removing a water from the list of impaired waters shall not be any more stringent than the criteria for adding a water to that list; and

(5) data shall be consistent with the requirements of the federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.

(F) In assessing whether a water is impaired, the Department shall consider the data available in light of the nature of the water in question, including whether the water is an ephemeral water. A water where pollutant loadings from naturally occurring conditions alone are sufficient to cause an exceedance of applicable surface water quality standards shall not be listed as impaired.

(G) Numerical standards shall have a preference over narrative standards. If the Department has adopted a numeric criterion for a pollutant and that criterion is not being exceeded in a water, the Department shall not list the water as impaired based on a conclusion that the presence of that pollutant causes a violation of a narrative or biological criterion unless the Department has first identified specific reasons,

appropriate for the water in question and consistent with generally accepted scientific thought, why the numeric criterion is insufficient to protect water quality.

(H) Waters of the state shall not be placed on any section 303(d) list if the impairment is caused solely by violations of national pollutant discharge elimination system program permits or stormwater permits issued by the state and the enforcement of the pollution control measures is required.

(I) A water of the state shall not be placed on any section 303(d) list if the data shows an impairment, but existing technology-based effluent limits or other required pollution control measures are adequate to achieve applicable water quality standards.

(J) Before listing a water as impaired based on violation of a narrative or biological criterion, the Department shall adopt, after providing an opportunity for public notice and comment, implementation procedures specifically identifying the objective basis for determining that a violation of the narrative or biological criterion exists. No total maximum daily load designed to achieve compliance with a narrative or biological criterion shall be adopted until the implementation procedure for the narrative or biological criterion has been adopted.

(K) By _____, the Department shall develop and maintain a data quality assurance management system to assess the validity and reliability of the data used in the listing and priority ranking process set forth in this section and section 5. The Department shall make data from the data quality assurance management system available to the public upon request, and may charge a reasonable fee to persons requesting the data. The Department shall use this data quality assurance management system to review the data supporting the listing of waters as impaired on the state's list of impaired waters as of _____. If the data supporting a listing does not conform to the requirements of section 4(B) of this subsection, the listed water shall not be included on the next list submitted to the Environmental Protection Agency, unless in the interim data satisfying the requirements of section 4(B) has been collected or received by the Department.

(L) The Department shall add or remove a water from the list by rule, even outside of the normal listing cycle, if it collects or receives credible and scientifically defensible data satisfying the requirements of subsections B and C of this section and demonstrating that the current quality of the water is such that it should be removed from or added to the list. In addition to changes in water quality, a listed water may no longer warrant classification as impaired, or an unlisted water may be identified as impaired, if the applicable water quality standards or designated uses have changed.

Section 5. {Priority Ranking and Schedule}

(A) Each list developed by the Department pursuant to Section 4 shall contain a priority ranking of waters identified as impaired and for which total maximum daily loads will be required, as well as a schedule for the development of all required total maximum daily loads.

(B) In the first list submitted to the United States Environmental Protection Agency after the effective date of this Act, the schedule shall be sufficient to ensure that all required total maximum daily loads will be developed within 15 years of the date the list is approved by the Environmental Protection Agency. Total maximum daily loads required to be developed for waters included for the first time on subsequent lists must be developed within 15 years of the initial inclusion of the water on the list.

(C) As part of the rules developed pursuant to section 4, the Department shall identify the factors that it will use to prioritize waters requiring development of total maximum daily loads. At a minimum, the Department shall consider the following factors in prioritizing waters for development of total maximum daily loads:

- (1) The designated uses of the water.
- (2) The type and extent of risk from the impairment on human health or aquatic life.
- (3) The degree of public interest and support, or the lack thereof.
- (4) The nature of the water, including whether it is an ephemeral, intermittent or effluent-dependent water.
- (5) The pollutant or pollutants causing the impairment.
- (6) The severity, magnitude and duration of the exceedance of the applicable water quality standard.
- (7) The seasonal variation caused by natural events such as storms or weather patterns.
- (8) Existing treatment levels and management practices.
- (9) The availability of effective and economically feasible treatment techniques, management practices or other pollutant loading reduction measures.
- (10) The recreational, aesthetic, and economic importance of the water.
- (11) The extent to which the impairment is caused by discharges or activities that have ceased.
- (12) The extent to which natural sources contribute to the impairment.
- (13) Whether the water is accorded any special protection under federal or state water quality law.
- (14) Whether action that is being, or is likely to be, taken under other programs, including voluntary programs, is likely to make significant progress toward achieving

applicable standards even if a total maximum daily load is not developed.

(15) The time expected to be required to achieve compliance with applicable water quality standards.

(16) The availability of documented, effective analytical tools for developing a total maximum daily load for the water with reasonable accuracy.

(17) Department resources and programmatic needs.

Section 6. {Total Maximum Daily Loads and TMDL Implementation Plans}

(A) The Department shall develop total maximum daily loads only for those waters listed as impaired pursuant to this Act.

(B) The Department shall use only statistical and modeling techniques that are properly validated and broadly accepted by the scientific community to develop total maximum daily loads. The modeling technique may vary depending on the type of water in question and the quantity and quality of available data meeting the quality assurance and quality control requirements of this Act. The statistical and modeling techniques may be established in a rule of general applicability or in the rules establishing total maximum daily loads for specific waters.

(C) Each total maximum daily load must be based upon data and methodologies satisfying the requirements of section 4 of this Act and must be established at a level that will achieve and maintain compliance with applicable surface water quality standards, and must include a reasonable margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. The margin of safety shall not be used as a substitute for adequate data when developing the total maximum daily load. The total maximum daily load also must account for seasonal variations, which may include setting total maximum daily loads that apply on a seasonal basis.

(D) For each impaired water, the Department shall adopt by rule its estimate of the total amount of each pollutant causing the impairment, from all sources, that may be added to the water while still allowing the water to achieve and maintain applicable surface water quality standards. The Department may adopt more than one estimate in a single rule. After each estimate is adopted, the Department shall determine allocations, consistent with subsection E of this section, among the various contributing sources sufficient to result in achieving compliance with applicable surface water quality standards. The Department's proposed determination of allocations shall be subject to public notice and comment, and its final determination shall be deemed to be a final agency action.

(E) The Department shall make reasonable and equitable allocations among sources when developing total maximum daily loads. At a minimum, the Department shall consider the following factors in making allocations:

1. The environmental, economic and technological feasibility of achieving the allocation;
2. The cost and benefit associated with achieving the allocation; and
3. Any pollutant loading reductions reasonably expected to be achieved as a result of other legally required actions or voluntary measures.

(F) For each total maximum daily load, the Department shall establish a TMDL implementation plan explaining how the allocations, including any reductions in existing pollutant loadings, will be achieved. The Department shall allow for public notice and comment on each TMDL implementation plan. Any sampling or monitoring components of a TMDL implementation plan shall be consistent with the requirements of sections 4(B) and 4(C) of this Act.

(G) Each TMDL implementation plan shall set forth the time frame in which compliance with applicable standards is expected to be achieved. A phased process involving interim milestones and targets for load reductions may be set. Lengthier time frames are appropriate in cases involving: complex situations with multiple dischargers; technical, legal or economic barriers to achieving necessary load reductions; scientific uncertainty regarding data quality or modeling; significant loading from natural sources; and significant loading resulting from discharges or activities that have already ceased.

(H) For waters that are impaired due partially to historical situations that are difficult to address, including but not limited to contaminated sediments, the Department shall consider those situations in addressing existing point sources of the same pollutants. In developing total maximum daily loads for those waters, the Department shall use a phased approach, in which expected loading reductions from the historical sources over the long term are factored in when establishing allocations for the point sources over the short term. During the period before the total maximum daily loads and TMDL implementation plans are completed, any permits issued for the point sources shall be deemed consistent with the requirements of this Act if the permits require reasonable reductions in the discharges of the pollutants causing the impairment, and shall not impose extensive burdens on those sources where the reductions accomplished would not significantly contribute to attainment of the standards.

(I) Once a total maximum daily load and a TMDL implementation plan is adopted for a water, the Department shall review the status of the water at least once every five years to determine if compliance with applicable surface water quality standards has been achieved. If compliance with applicable surface water quality standards has not been achieved, the Department shall evaluate whether modification of the total maximum daily load or TMDL implementation plan is required.

Section 7. {Rules}

(A) The Department shall adopt rules necessary to implement this Act.

(B) The Department shall adopt rules necessary to establish a pollutant trading program designed to facilitate compliance with the requirements of this Act.

Section 8. {Report} Within five years of the effective date of this Act, the Department shall submit a report to the Governor, the Speaker of the House of Representatives, and the President of the Senate detailing progress made under this Act. At a minimum, the report shall: (1) evaluate the effectiveness of the program and identify any recommended statutory changes to make the program more efficient, effective and equitable; and (2) assess the extent to which water quality problems that cannot be effectively addressed under this program may be addressed under other federal or state laws.

Section 9. {Advisory Council} Within 6 months of the effective date of this Act, the Legislature shall appoint the __ member Total Maximum Daily Load Advisory Council. The council shall include representatives of industry, political subdivisions of the state, agriculture and environmental groups. The Council shall advise the Department on issues relating to the implementation of the program required by this Act, and shall provide input into the preparation of the report required by section 8 of this Act.

Section 10. {Severability Clause}

Section 11. {Repealer Clause}

Section 12. {Effective Date}

Adopted by ALEC's Natural Resources Task Force at the Fall Task Force Summit November 13, 1999; amended at the Annual Meeting August 1, 2003. Approved by full ALEC Board of Directors August, 2003.

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