

**FEATURE ARTICLE****TMDL PROGRAMS: STATE ACTION OR FEDERAL CONTROL?**

By Cameron Scott Kirk

In 1972 Congress passed the Clean Water Act (CWA) which in part required a full accounting of the polluted waters within the United States. The individual states were charged with the principal responsibility for this reporting, and Congress specifically recognized the primary rights of the states to plan for the development and use of the waters within the nation. Nevertheless, state governments have largely ignored this federal mandate. Accordingly, due to this neglect the federally empowered Environmental Protection Agency is prepared to wrest control over the nation's waters from the states.

This article discusses the procedures by which the states must identify their respective polluted waterways, and the threat states face in failing to do so. The subject matter further raises a variety of water law questions relating to the regulation of waterways and the contaminants flowing into them. The manner in which the states identify and manage their waters regarding these questions may have a dramatic impact on the states' retention of control not only of their waterways but their business and industry development.

**Water and the Economy**

Clean water is taken for granted in the United States, an increasingly grave mistake. A report recently issued by the U.S. Environmental Protection Agency (EPA), "Liquid Assets 2000, America's Water Resources at a Turning Point," estimates that 218 million Americans, a majority of our citizens, live within ten miles of a polluted lake, river, stream, or coastal area. More than 300,000 miles of rivers and

streams and more than 5 million acres of lakes do not meet water quality goals. Approximately one-third of the nation's beaches reporting to the EPA have experienced at least one health advisory warning or closing. In 1998 more than 2,500 fish consumption warnings or bans were issued where the fish were too contaminated to eat, and it is estimated that at least 500,000 people become ill each year due to the contamination of drinking water.

The impact of water pollution on the economy is obvious. Approximately one-third of all Americans visit coastal areas each year, spending approximately \$44 billion. Water for irrigation and raising livestock enables farmers to produce \$197 billion worth of food and fiber. The fisheries in the Great Lakes, Gulf of Mexico, and coastal areas produce more than 10 billion pounds of fish and shellfish annually. Manufacturers use approximately nine trillion gallons of water per year, while the soft drink industry alone appropriates more than 12 billion gallons of water to make products valued at nearly \$58 billion.

Meanwhile, the toxic microbe *Pfiesteria piscicida* has killed millions of fish in North Carolina and tens of thousands in Maryland. Losses to the nation's seafood and tourism industries as a result of *Pfiesteria* alone are estimated at \$1 billion. (Testimony of J. Charles Fox, Assistant Administrator for Water, U.S. Environmental Protection Agency, Before the Subcommittee on Oversight, Investigations, and Emergency Management, Committee on Transportation and Infrastructure, U.S. House of Representatives, July 27, 2000.)

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As the population continues to expand, and industry prospers, the clean water upon which our health and recreation thrives is being depleted. For nearly thirty years the procedures intended to identify and prevent these water problems have been law, but the law has not been enforced. For a variety of reasons, the most obvious of which may be lack of government funding, the regulatory framework pertinent to these concerns has been ignored. As a result of recent lawsuits, however, the EPA is being forced to address its legal obligations in enforcing the reporting on, and management of, our country's contaminated waters.

### The TMDL Program

The objective of the Federal Water Pollution Control Act of 1972 was, and is, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Congress set 1985 as the year by which the country was to eliminate the discharge of pollutants into its navigable waters. To meet this goal, Congress adopted a two-tiered plan whereby: (1) the federal government and EPA would provide for the regulation and enforcement of point source discharges through the NPDES permit process, while (2) the states would be responsible for water quality analyses and standards referred to as total maximum daily loads (TMDLs). TMDLs would establish the level, or mass, of maximum pollutants permissible in a particular watercourse which would "assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife." CWA § 303(d); 33 U.S.C. § 1313(d).

The individual states' responsibility in this regard is essentially to identify watercourses which do not meet applicable water quality standards even after point source discharges are identified and regulated by EPA. The CWA anticipated a cooperative approach by federal and state agencies to first control discharges coming from particular points and then to analyze the pollutants emanating from throughout a watershed which affect particular watercourses.

EPA had the easier of these tasks. Technology allows governmental agencies to identify, analyze and restrict point source pollutants far more readily than non-point source contaminants. Measuring discharges emanating from a pipe into a waterway is fairly

simple, whereas measuring the daily load of a particular contaminant which a watercourse may carry without harming its indigenous populations is far more complicated. Such an analysis requires a complex study of the complete watershed and all of the potential pollutants which may impact the water within the watershed.

Despite this imposing project, the CWA imposed strict deadlines on the states within which they were to identify the waterways that were impaired and then to set the TMDLs for those waters. Originally, Congress anticipated that the states would have until 1974 to establish TMDLs. That date was later extended to 1979, and then essentially forgotten until recently.

Only within the last five years have TMDLs regained recognition in the regulators' lexicon, primarily as a result of lawsuits brought by environmental groups seeking to re-establish focus on the protection of water under the provisions of the CWA. These lawsuits have demanded that EPA act to establish TMDLs, since the states have failed to do so, and the law is clear on this issue: the CWA specifically provides that EPA shall act as the states' backup if they fail to act on the mandates required by the federal law. Accordingly, EPA is now under court orders or bound by stipulated judgments in several jurisdictions to establish TMDLs consistent with the CWA.

### State TMDL Delay and Funding Frustrations

The delay in establishing TMDLs, while excessive, is not surprising. Nationwide, indeed worldwide, society and its economy have continued to outgrow our ability to manage wastewater. Since the CWA was enacted, both state and federal regulators have spent the vast majority of their time, energy, and money on point source contamination. The available technology has been best suited for such evaluations, and the more immediate need appeared to be properly focused on the more readily identified sources of pollutants. Indeed, identifying, regulating, and resolving point source issues has kept water regulators well-occupied over the last 30 years.

TMDL analyses for entire watersheds and all impaired watercourses, on the other hand, is extremely difficult. The technology and information necessary to establish the bases upon which TMDLs

must be set are complex and not well-established. Defining TMDLs for any significant watershed is immense, and the factors often innumerable. Accordingly, significant energy and resources must be committed to such projects. The immensity of the program is only compounded when one recognizes the many hundreds of impaired waterways in California alone.

During this same time period, funding for many governmental agencies has been restricted significantly, and agencies with water pollution responsibilities have been limited as a result of these economic realities. Accordingly, it is understandable that the TMDL program has taken a back seat to the point source analyses.

At this point, however, the more expansive considerations of TMDLs and the evaluations of watersheds and impaired waterways is more than due. Unfortunately, many of the practical issues which have impeded the establishment of TMDLs thus far remain of major concern. Government water agency personnel in California, at least, remain overworked and under-financed, with no additional funding readily available. Practically speaking, neither the money nor personnel presently exist to promptly begin, much less complete, the TMDL programs necessary to preclude federal involvement.

On the other hand, funding for EPA is also restricted severely. It is highly unlikely that the newly elected Republican Administration or Congress will increase EPA's funding. This leaves the EPA similarly unable to locate the resources necessary to establish TMDLs for waterways throughout the country.

### **The Crisis for Business and Utilities**

Unfortunately, this lack of progress by both state and federal agencies is causing a crisis in the business and public works arenas. Based on court orders requiring EPA to set TMDLs, and the present inability by government agencies to do so, EPA is making interim decisions to at least maintain the status quo. That is, EPA has determined to limit additional discharges into waters subject to TMDL requirements. EPA Region 9 has notified the San Francisco Bay Regional Water Quality Control Board that all re-issued NPDES permits may allow no discharge beyond what is currently allowed. Permits which exceed the present amount of discharge into impaired waters will be vetoed by the EPA.

Accordingly, new business developments which may require discharge permits may be unable to obtain them. Moreover, municipal water treatment plants (POTWs) which require NPDES permits to discharge reclaimed water may face the same limitations. Without the ability to increase discharges, POTWs must either prohibit any further connections to sewage systems or make additional improvements to their water treatment capacity to remove additional wastes. The first alternative precludes further development in the area serviced by the PTOW, and the second requires great expense and time.

### **The Economic Dilemma**

This constitutes an economic dilemma that neither government nor private industry is prepared to handle. Thirty years after the CWA became law, we are faced with a choice between curtailing economic growth or continuing to pollute already contaminated waterways.

This emergency applies to areas throughout the country where impaired waterways have been identified but not defined by TMDL limits; waters impaired by industrial wastes in urban areas as well as rural timber operations will be impacted by the TMDL deadlock. A quick visit to EPA's website shows graphically the many watersheds to be affected by the TMDL rules and thereby also indicates the large area of the country where this is either an immediate or imminent crisis.

Unfortunately, there appear to be no ready resolutions to the situation. Increased government funding is unlikely. The TMDL project is technologically difficult and extremely complicated due merely to the very size of the project. Furthermore, this crisis places states at risk of losing the ability to control their own water resources.

### **States' Dilemma**

The Clean Water Act states specifically that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States" to manage and develop their water resources. CWA § 101(b); 33 U.S.C. § 1251(b). Accordingly, the CWA specifically contemplated a cooperative effort encompassing the federal mandates included in the Act and the states' abilities to comply with the

standards set. Both parties to this codified water management cooperative have failed to meet its terms. As noted above, these failures are rife with legitimate excuses, but it is the states that will suffer most from their inability to meet TMDL Program requirements.

The states' economic development relies heavily on the water each has available for appropriation. Also, the sanctity of a state's desires and rights to manage its business development is inherent to our system of government. The states risk losing this control if the federal government is forced to take steps necessary to prevent the continuing degradation of water supplies.

States' inability to meet TMDL deadlines is the barometer of the states' several failures to manage their water systems adequately. While the final goal to be attained is clean water, the TMDL Project is the process by which Congress has set the nation's course toward that goal. EPA's ability to control that process as a result of the lawsuits referenced above takes significant power away from the states. As clean water grows more scarce, that control has the potential to increase exponentially, and the states' ability to manage their respective social and business communities is compromised significantly.

### State Action Imperative

To avoid EPA's ultimate control over water resources, the states must act quickly and decisively to protect their water resources consistent with the CWA. Meeting the TMDL requirements and pertinent deadlines is long past, but given the CWA's recognition of states' primary rights, prompt action by a state may still protect its interests.

State governments must act immediately to address these issues and bring them to the public's attention. Water issues must be made a priority at least equal to essential governmental purposes such as education and transportation. Without a concerted and well-funded approach to these problems, state rights and respective sovereignties will be threatened.

Immediate action must be taken to analyze and assimilate the information presently available regarding state water. Systems of data recording, whether already in place or only in the design phase, must be expanded upon and revised to allow for ongoing data accumulation and analyses for pertinent watersheds. With this background information, then, states must begin to take the next steps toward defining the TMDLs which will ensure continuing clean water.

State water agencies must also begin advising EPA as to the steps that are being taken to address the need for waste water analyses and TMDL's. Reinforcing the cooperative approach promulgated in the CWA will enable a state to reinforce its primary rights to manage and control waters within its jurisdiction.

Government representatives and officials must bring these issues to the attention of the public in ways that will educate and inform the private citizen and the business community. Public support must be garnered for the political action which is necessary to commence the work to resolve these problems.

### Conclusion

The TMDL Project was a process devised more than 25 years ago by Congress to ensure the continuing health of the nation's waterways. Government agencies and the public have overlooked this broad plan for most of the intervening period. Finally, however, the TMDL process is being forced upon the government and, hence, society and the industry. It is essential for all factions of society to recognize the essential nature of our water resources and their continued viability.

Even without the CWA deadlines or risks imposed by EPA action, states must act immediately and decisively to protect water resources. This priority must not be subject to political machination or social whim. The impact of continuing to contaminate waterways which are known to be impaired compromises not just state rights, or development plans, or economic gains, but the sustainability of our present system.