TMDLs at a Crossroads: Driven by Litigation, Derailed by Controversy?

Nina Bell
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I. INTRODUCTION

Good evening. I can’t believe, although I seem to live and breathe TMDLs, that anybody would give up their Friday evening to talk about them, or listen about them, but anyway, I think they are worthwhile. I want to talk tonight about some of the issues that are going to effect the likely outcome of all the TMDL litigation, and the expense of running the TMDL program in the states, across the United States. And really the issue is whether those results are going to be results that we see on paper, which is a lot of reports called TMDLs, or real results that are on the ground, that we can see and measure on the land and in the water.

I want to state at the outset that I am a firm believer in TMDL litigation, but I believe that there’s a dark side to it. And that will be a bit of the theme of what I talk about tonight. I think the dark side has something to do with the definition of “advocacy.” Advocacy means different things to different people. To many it means legal advocacy, and sometimes, even more narrowly, litigation. In fact, sometimes people interpret Northwest Environmental Advocates, my organization, as being a law firm for the environment, which I would not mind being, but that is not what we are.

One of the problems with litigation is that sometimes it is defined as its own end; and sometimes the people who engage in it, who are referred to as environmental litigators, are often considered superior beings; sometimes superior to the clients that they work for and sometimes superior to ordinary run-of-the-mill attorneys. As a consequence, they and the litigation that they bring are often put on a pedestal, an arrangement that I think can be deadly to achieving the goals of their clients. Deadly because it encourages a view that litigation is some sort of silver bullet which will solve the problems that it targets. This is not to say that I don’t have the utmost respect for litigators or that I don’t rely heavily upon them, because I do. As an environmentalist who happens to be trained in the law, I not only appreciate the importance of litigation, but I will admit sometimes to craving it.

* Executive director of Northwest Environmental Advocates of Portland, Oregon; J.D., 1991, Northwestern School of Law, Lewis and Clark College. Ms. Bell oversees the current lawsuits concerning Oregon and Washington TMDL programs, Oregon’s water quality standard, Portland’s combined sewer overflows and Columbia River channel’s deepening, for Northwest Environmental Advocates. Ms. Bell also serves on the United States Environmental Protection Agency’s Federal Advisory Committee on TMDLs, and as an expert panelist for the EPA’s advance notice of proposed rule making on water quality standards regulations. In addition, she is also active in oversight of state programs, including reviews of water quality standards, TMDL permits and nonpoint source pollution. Ms. Bell is a frequent speaker at legal and policy conferences, and a member of several state advisory committees.
I do reject the notion, however, that environmental advocacy can be merely litigation, or even the regulatory aftermath of litigation. Instead, advocacy to achieve environmental ends must be defined as everything in the proverbial toolbox, which will help do the job. Litigation may be the sledgehammer, and sometimes that is all that is needed to achieve the goal if it's trying to stop something that will be harmful. But other tools are needed to construct programs, and unfortunately for environmentalists working to clean up water pollution through TMDL programs, they are programs that require a lot of constructing. That said, we have the citizens' group litigation to thank for delivering the TMDL program to the United States, or at least those parts of the United States where it is happening.

II. Birth of the TMDL Program

The widespread litigation by citizens' groups to enforce the mandatory provisions of Section 303(d) of the Clean Water Act, known as TMDLs, was intended by those groups to improve the quality of waterbodies that currently violate water quality standards. In 1972, when the Clean Water Act ushered in the technology-based approach, which are essentially pollution prevention policies, it kept in place the water-quality based approach that is based on water quality standards established by the states or EPA if the states fail. Congress also significantly expanded the role of standards, in particular by establishing the TMDL program.

The citizen litigation that jump-started this TMDL program has sought to make sense of the good deal of energy and resources the EPA and the states invest in establishing and revising the safe or unsafe levels of pollution for waterbodies, and incorporating them into formal water quality standards. Likewise, it seeks to improve the NPDES [National Pollutant Discharge Elimination System] permits that allow states and EPA to allow industries and municipalities to discharge pollution in their effluent, as well as the efforts to establish so-called best management practices that are used to control the runoff from nonpoint sources. All of these investments in standards and NPDES permits, best management practices and monitoring and data collection, have been a dubious exercise, at best, in the absence of TMDLs.

The widespread failure of states to carry out the TMDL program has resulted in environmental groups having brought lawsuits in a total of 38 states, each seeking to compel EPA to take actions to remedy inadequate state programs. The first case to challenge a state's lack of a TMDL pro-

gram was brought in Oregon by my co-plaintiff organization, the Northwest Environmental Defense Center, which is located in the Northwestern School of Law at Lewis and Clark College. It was brought and settled in 1986, and unfortunately required subsequent litigation to actually force a TMDL program to be established in Oregon.

The next lawsuits were filed in Alaska and Washington before they began to spread across the country. I might add that our case in Washington, which we filed about ten years ago, also required subsequent dissolution of the original settlement and a renegotiation for a second settlement before the program was instituted.

To date, 20 actions have been taken in 18 states that have resulted in EPA's being under court order to establish TMDLs in different states. Eight actions have been brought but have not yet been resolved. Three notices of intent are outstanding, and eight cases covering 11 states have been dismissed or settled without EPA being under any kind of order to do the TMDLs.

Equally important have been the indirect results of litigation that are measured at both the state and federal level. In the early 1990s, some states began developing TMDLs, either because they were under court order or because they saw the handwriting on the wall, and they began to expand the base of knowledge about how to carry out this program. Ideas about how best to develop a TMDL continue to evolve.

EPA itself developed the Columbia River Basin Dioxin TMDL in

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4. Alabama (1998 consent decree); Alaska (1992 court order); Arkansas (2000 consent decree); Los Angeles, California (1999 consent decree); North Coast, California (1997 consent decree); Newport Bay, California (1997 consent decree); District of Columbia (2000 consent decree); Florida (1999 consent decree); Georgia (1997 consent decree); Kansas (1998 consent decree); Louisiana (1999 court order); Missouri (1998 consent decree); Montana (2000 court order); New Mexico (1997 consent decree); Oregon (2000 consent decree); Pennsylvania (1997 consent decree); Virginia (1999 consent decree); Washington (1998 consent decree); West Virginia (1997 consent decree).

5. California (complaint filed in 2000); Hawaii (complaint filed in 2000); Idaho (complaint filed in 2000); Iowa (complaint filed in 1998); Maryland (complaint filed in 1997); Missouri (complaint filed in 1998); New Jersey (complaint filed in 1998); Wyoming (complaint filed in 1996).

6. Arizona (notice of intent filed in 1999); Ohio (notice of intent filed in 1998); Tennessee (notice of intent filed in 1998).

7. Colorado (joint motion for administrative closure filed August 24, 1999; parties signed settlement agreement in which EPA agreed to establish TMDLs if State did not); Idaho (EPA motion to dismiss granted in 1997); Lake Michigan (Wisconsin, Illinois, Indiana, Michigan; see Scott v. City of Hammond, 530 F. Supp. 288 (N.D. Ill. 1981), aff'd in part, rev'd in part, 741 F.2d 992,996 (7th Cir. 1984); a related case challenging EPA action in response to the order in Scott was dismissed in 1991); Minnesota (case dismissed in 1993); New York (EPA motion to dismiss granted on all but one claim on May 2, 2000); North Carolina (joint stipulation of dismissal filed June 1998; EPA agreed by letter to ensure development of a TMDL for the Neuse River by a certain date); Oklahoma (EPA motion for summary judgment granted March 30, 2000); South Dakota (dismissed without prejudice on August 27, 1999).
1991, not because of the TMDL program and the litigation, but because of a short-term program that was in the 1987 Clean Water Act Amendments called 304(l),8 or the “Toxic Hot Spots” law. The Columbia Basin is big, and it was a multi-state effort, which included internal checkpoints and allowed the states to develop their own TMDLs aimed at appropriate targets.

This TMDL had dramatic environmental results despite the limitations that are inherent in it, of which there are many. The results were a 95 percent reduction of dioxin discharges by eight bleach kraft pulp and paper mills. The Columbia Basin TMDL moved the TMDL development process forward. It also proved a number of things. One was that EPA could develop a TMDL with a relatively small amount of data, so long as it clearly articulated the underlying scientific assumptions that it made. It also supported the efforts of those states that subsequently developed TMDLs for the targets that the EPA had created, and it proved that such a TMDL, based on a relatively small amount of information, could withstand litigation by both industry and environmental organizations. Today, some states have embraced the TMDL program while others have not, and some, of course, are meeting schedules, while others have not.

However, EPA is more under the gun when it comes to litigation because the mandatory duty claim is brought against the federal agency for failures in these states. And that is why EPA sort of slowly but surely began responding by requiring states to take certain actions, developing certain policies and guidance,9 and ultimately developing new comprehensive federal rules.

III. Revision of the TMDL Program

In 1996, EPA created, under the Federal Advisory Committee Act,10 a committee which we called the FACA, and we spent two years developing a report which included 150 recommendations, which EPA told us were more recommendations than they had ever gotten from a committee.11 The EPA then based its proposal for new rules on that report.

Although the committee’s report addresses a myriad of issues, it has one overarching theme, and that is, if the nation is going to embark on this long-term and expensive process of trying to meet the requirements of 303(d), that we better make sure that the program results in real change.

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9. See, e.g., Memorandum from Robert Perciasepe, Assistant Administrator [for water], U.S. Environmental Protection Agency, to Regional Administrators and Regional Water Division Directors (August 8, 1997) (Regarding new policies for establishing and implementing total maximum daily loads).
towards meeting water quality standards adopted by the states. Thus, despite the majority representation on the committee by industries, landowners, municipal and state governments, the committee underscored the critical nature of implementing pollution controls, not just generating paperwork called TMDLs.

In response to the FACA Report, EPA issued proposed regulations and guidance, most of which tracked the recommendations, some more than others, but on the whole, mirrored the committee's focus on developing TMDLs for a real world purpose, that is to take polluted waters and make them clean. During the public comment period, EPA received an overwhelmingly negative response, I think about 33,000 comments. But the vast majority of them were postcards from landowner groups, and a small number of them were comments and most of them were negative.

So that overwhelming negative response fueled a huge political firestorm which generated mass protest meetings of landowners in various states, field hearings by Congressional representatives, Congressional hearings on the hill, and despite all that, EPA finalized the rule more or less with its basic gist intact, that these rules should create clean water from the TMDL program.

The political outcry, though, continued in Congress, and a Congressional rider was attached to a military construction/supplemental appropriations bill, which prevented EPA from spending money on the new TMDL rule up until October of this year. One reason for the vast amount of outrage over the new rule, I think, is because the rule is based on two things: one, the legal definition of water quality standards, which is generally ignored across the states and by EPA, and two, the goals of the Clean Water Act. The new regulations mirrored the statute in that they require a listing of all waters with excess pollution, pollution being defined by EPA as the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. This requirement reflects the definition of water quality standards, which unlike what most people think, is not just a number; that number is actually just the numeric criteria in the standards. The standards are defined as protecting beneficial uses and meeting the numeric and narrative criteria, broad narrative criteria such as no toxics in toxic amounts, no scum, etcetera, as well as something called an an-

The standards, in turn, have been set to meet the Clean Water Act's goal to restore and maintain the chemical, physical and biological integrity of the nation's water. So we have a broad goal, broadly focused standards, and a rule that I think finally begins to give a little credibility to the legal definition of water quality standards.

In this way, both the statute and the new regulations call for a comprehensive listing policy that encompasses pollution from all sources and of all types. The new rules include waters impaired by the entire range of sources including nonpoint sources, atmospheric deposition, banned chemicals, hydroelectric facilities, and many others. They also require listing of waters suffering from "pollution," which is a very broad definition of impairment, but only calls for TMDLs to be developed for excess "pollutants," which is why the statute requires the listing to be broad and the TMDLs to be more narrow. However, when TMDLs are done for pollutants, it necessarily requires addressing a whole range of pollution issues.

Most significant about the new rules is the EPA's definition of TMDLs. The new regulations envision TMDLs that maintain the conventional quantitative underpinnings, but focus on getting from polluted to clean water. The current regulations, the old ones, define a TMDL as the sum of the waste load allocations to point sources, load allocations to nonpoint sources, and a margin of safety, and some allowance for seasonal variations. The new rules build upon that definition, and add that TMDLs are written plans and analyses to ensure that standards are not only attained, but are maintained.

There are a few other critical improvements that I think the definition of TMDLs in the new rule add. One is that the new rules require the identification of the deviation between the current loading conditions, that is the polluted water, and the loads that are needed, calculated by the TMDL to meet the water quality standards. The reason for adding this deviation into


the definition was to address nonpoint sources. Monitoring for this purpose is often the starting place for a TMDL. People go out and collect data on current conditions, but they do not do that necessarily to calculate the deviation to see how far we have to go. Rather, they do it to calibrate the models.

However, the purpose of identifying the deviation in the rules is to identify the level of reductions that are needed by nonpoint sources, because without knowing how far you have to go, you cannot define what kinds of control activities you need to place on the land in order to reduce the pollution runoff sufficiently to meet water quality standards.

In this way, the level of nonpoint source control management actions and restoration activities, such as planting trees, can take place. The rules’ identification of the deviation is necessary to ensure that the cookie-cutter approach for which many people unfairly criticize TMDLs, in fact does not take place, and the TMDLs are made specific to the waterbodies for which they are intended.

Another area where the definition of TMDLs has been improved is that the new rules require TMDLs to identify sources of pollutants. This is not something that is in the existing definition. It is critical, both for the purpose of achieving environmental results and ensuring equity between sources, primarily between point and nonpoint sources, that source identification be as complete as possible. Otherwise, the failure to ensure implementation of sufficient nonpoint source controls ultimately will lead to imposition of more controls on point sources regulated under NPDES permits.

Unfortunately, the rules—and there are many criticisms I have of the rules, but this is the only one I am mentioning tonight—do not require identification of all the out-of-stream water uses to assure that the TMDL adequately addresses today’s insufficient instream flows, both from the point of view of protecting beneficial uses that require instream flows, as well as protecting the amount of dilution of pollution that takes place and that is calculated to take place in the TMDL.

One additional source that the new rules require that the TMDLs evaluate and include, if warranted, is an allocation for future growth. The current regulations are relatively silent on the question of future growth, but by requiring TMDLs to include future growth, the issue of equity between present-day sources, which may and often do have insufficient pollution controls, and future sources, which are likely to have better pollution controls, will be on the table for discussion about what the community wants. The requirement also ensures that states do not ignore the impact of growth on water quality impairments, whether they are due to pollution from all sources, runoff, or increased withdrawals of water from streams.

Most important, the new definition of a TMDL includes the submis-
sion of an Implementation Plan under section 303(d) as part of the TMDL, when the state submits the TMDL to EPA for review and approval or disapproval. The Implementation Plan includes components that describe the control actions and management measures that are needed, and demonstrates how they are likely to succeed. It includes a time line with a schedule for revising NPDES permits, because without a time line, you do not have any idea of what pollution controls are necessary from nonpoint sources, because you do not have the time frame for achieving incremental improvements. The Implementation Plan requires reasonable assurances, legal or regulatory controls available to control the different point and nonpoint sources, a time frame for attainment, a monitoring plan, measurable milestones, and a process for revising the TMDL and the Implementation Plan.

The overall purpose of these elements—and no one of them would do the trick—is to make sure of two things: first, that the technical analysis laid out and established in the TMDL links the water quality standards with the control actions that need to be taken, rather than serving only as an analysis of what could be; and second, to ensure that adequate feedback loops exist so that nonpoint source controls that are implemented today are improved tomorrow, because undoubtedly, they will not be sufficient at the first iteration.

The Implementation Plan is an essential mechanism to link TMDLs with nonpoint source controls. I think that is the single most difficult aspect of TMDLs in terms of making sure that they lead to clean water. Because the Implementation Plans and the new rules would call for EPA to review and approve or disapprove them, which if there are endangered species involved would be subject to consultation under the Endangered Species Act, it significantly increases the likelihood that TMDLs under the new rule would result in sufficient nonpoint source controls that will lead to attainment of water quality standards.

One of the issues linked to implementation is that of reasonable assurance that allocations will actually be implemented to attain and maintain standards, including those waters impaired solely by nonpoint sources, which are not covered under the existing rule. For nonpoint sources, this reasonable assurance would be provided by recovery plans that are specific to the pollutant, expeditious Implementation Plans supported by reliable delivery mechanisms, and adequate funding. The demonstration of reasonable assurance is intended to provide a higher degree of confidence that the TMDLs will lead to the goal of cleaning up water.

Finally, in the event that aspects of the TMDL or the TMDL imple-

sentence plan fail to demonstrate progress towards meeting water quality standards, the new rules require TMDL revision. Because many things can go wrong, both with the TMDL development if there are insufficient data or the wrong models were chosen, and especially in the implementation of a TMDL, revision may be a necessary step. Data may show that the TMDLs were incorrectly calculated, the allocations would not be achieved, new sources have been identified, new sources of water withdrawals have been identified, voluntary actions have not been taken, and what have you. It is necessary in all those cases to have adequate monitoring and follow-up review with revisions as necessary. TMDL revision also needs to be part the current TMDL development the states and, theoretically, EPA must do; otherwise, these kinds of TMDL revisions will not take place.

In summary, the new rules address the barriers of TMDL success that are within the confines of two things: one, the fact that the Clean Water Act does not regulate nonpoint sources; and two, that states and EPA are now offering severely compressed time schedules in which to develop TMDLs. However, because the rules increase the likelihood that TMDLs may successfully cause controls on both point and nonpoint sources, and successfully lead to at least improvements in water quality, if not attainment of standards, the TMDL rule has also provided a basis for political assault on the entire TMDL program. The primary allegation is that there is a lack of science underpinning the TMDLs.

IV POLITICAL ATTACKS ON THE TMDL PROGRAM

There is no doubt that carrying out the TMDL program is going to present a formidable challenge in light of: first, the current and continuing decline in the funding of monitoring programs, including for example the Bush Administration’s projection of a 22 percent decrease in the budget for U.S. Geological Survey; second, our less than comprehensive understanding of the mechanisms by which pollution moves on land, in the air, in the water, and in between; third, the insufficient resources brought to bear on TMDL programs; and fourth, the inadequate understanding that we have about how to control pollution runoff from land. It is also formidable because EPA and the states have ignored this program, did not begin it when they were required to do so in 1972, and basically have stalled with inadequate pollution control mechanisms and programs, bringing us to a point where 40 percent of the waters in the United States now have unsafe levels of pollution or habitat damage.

However, TMDLs are not any different from any other aspect of the water quality-based approach embodied in the Clean Water Act, because as with all of those programs, science is in a constant state of development. So the argument that TMDLs are not warranted because we do not have
clear science is not motivated by reality as much as it is motivated primarily by vested interests in polluting. In fact, ever-changing science is embodied in all aspects of the water quality-based approach and the Clean Water Act, starting with standards and monitoring.

Water quality standards, which are the foundation of every aspect of the water quality-based approach, are subject to constant revision. The Clean Water Act recognizes that because Congress recognized it, and the Clean Water Act calls for a triennial review of water quality standards. While no state I know of actually engages in a review of standards every three years, that is what the law calls for. Review is required on a three-year basis because our scientific understanding of the effects of pollution on human health and fish and wildlife is undergoing such rapid change, and we cannot see a point in the future when this will not be so. In fact, the U.S. Supreme Court in the Jefferson County case underscores why the beneficial use support and narrative criteria component of water quality standards are essential.

The beneficial use and narrative criteria are essential as gap fillers. In other words, they fill the gaps in the level of technical knowledge that we have today when we develop the numeric criteria in our water quality standards. Therefore, any time the state or EPA develops a TMDL, issues a NPDES permit for discharge – a 401 certification allowing dredging activity to take place, for example – the state or EPA is required by law, although they do not do it, to apply these narrative expressions of safety to people, fish and wildlife, using existing information.

If the development of criteria by EPA has not kept pace with scientific knowledge, which I assure you it has not, the TMDL requires that the current level of knowledge be applied. While it is not a better solution than adopting our current level of knowledge into numeric criteria, it does ensure that the latest science is brought to bear on regulatory activities such as the development of TMDLs. The effect of new science on our understanding of what pollution levels are safe for water, alone and in combination with physical stream characteristics, mirrors the concerns expressed about the TMDL program, namely that we are constantly learning. However, just as having a less-than-perfect understanding is not a basis for eliminating the entire water quality standards program, it is not a basis for eliminating the TMDL program.

As with water quality standards, NPDES permits are also subject to frequent changes as they are issued for five-year periods, or not more than a five-year period, at least in theory. At the time of renewal, the permit

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holder and state or EPA, whichever is issuing the permit, must demonstrate to the public, among other things, that the discharge will not cause or contribute to violations of water quality standards. This water quality standards-based finding is very difficult when there is no TMDL—in fact, it is virtually impossible.

However, that has not stopped states from routinely issuing permits that do not comply with the law, thereby perpetuating excess pollution discharges and exposing permit holders to legal challenges from third parties, namely citizens’ groups. The changes in the science behind water quality standards and our understanding of pollution inputs from other sources, along with changes in treatment technologies and in our understanding of the impacts of individual sources, make NPDES permits—just like the standards and TMDLs—constantly subject to new understanding of science and new requirements.

Similarly, changing science alters the so-called best management practices, or BMPs, that are used to control nonpoint sources. Changes are embodied in the so-called iterative, or adaptive management approach that nonpoint sources specifically say that they want in order to control their pollution. The iterative approach, of course, is based on installing or use of pollution controls, post implementation monitoring, and feedback loops based on that monitoring. BMPs, in fact, are the quintessential embodiment of an approach that is based on a changing understanding of science and an evolving understanding of how pollution sources affect the beneficial uses of water. Yet ironically, nonpoint sources are the most outspoken about the alleged lack of science underpinning the TMDL program.

All these other programs, those that are intended to establish safety thresholds and standards and control pollution from all different sources, not only reflect the same inherent state of flux as the TMDL program, but also depend very much on TMDLs for their success. Therefore, if one concludes that there is insufficient information to go forward with TMDLs, that necessarily determines there is insufficient information to set and implement water quality standards, to evaluate the state of our waters, to establish NPDES permits for discharges, and to control nonpoint source runoff. In this situation, I would argue that the “perfect” becomes the enemy of the “good,” because the “good” is the TMDL waiting in the wings, and the “perfect” is the science that we can never have.

In the absence of a TMDL, however, a permit writer does not have the justification to reduce pollution inputs from a downstream urban source, because the quality of the water arriving at that urban source is so poor. In the absence of a TMDL, upstream farmers have no rationale for reducing their contributions that cause the water to be dirty at the urban source downstream because the water will just be made polluted if it arrives clean. A
TMDL, however initially flawed, based on lack of data and lack of understanding of science, can establish the basis for action by all parties, upstream and down, and be revisited as scientific and technical understanding is improved. But these are the political arguments.

V Legal Attacks on the TMDL Program

There are also legal arguments throughout the TMDL program, and we see them in two major places. In the first, there are challenges to the new TMDL rules. I say challenges because multiple parties have filed the lawsuits, but they are all now subsumed in the D.C. Circuit case called American Farm Bureau Federation v Whitman.24 These challenges attack everything, the specific elements of TMDLs and the new rules, the criteria for impairment determinations, calculations of TMDLs, deadlines, and procedural issues.

They raise issues about whether EPA had the authority to include Implementation Plans as part of the definition of TMDLs, and whether reasonable assurances could be part of the definition of a TMDL. They challenge the requirement that states submit a prioritized schedule that gives a higher priority to TMDL development where endangered species and drinking water are threatened. They allege that EPA does not have the legal authority to approve or disapprove the allocations that are a part of the TMDL calculations.

Many of the challenges are aimed at the listing process, including opposition to use of what is called evaluative data. In other words, they do not challenge data on pollution levels and waters, but other kinds of things like: habitat destruction; biological information being used for listing determinations; the requirement that states use maximum contaminant level standards set under the Safe Drinking Water Act as a basis for listing impairment; and the requirement that all waters impaired by pollution, but for which no pollutants have been identified, be included. That, of course, is all in the statute, but that does not stop them from attacking it.

They are attacking the fact that EPA is requiring listing based on narrative criteria, use impairment, and antidegradation policies – all the elements of water quality standards as defined by statute; as well as challenging the listing of waters impacted solely by nonpoint sources, groundwater, solar radiation, atmospheric deposition. They are also attacking processes for retention and removal from the list of waterbodies upon which TMDLs are to be developed.

The plaintiffs in those cases, all consolidated, also challenge the requirements that states include allowances for future growth, and that states

24. Nos. 00-1320, 001341, 00-1353 and 00-1384 (D.C. Cir., consolidated) (filed July 18, 2000).
include a margin of safety for any technical and scientific uncertainties. Further, they challenge the policy that TMDLs must be done in ten years with a possible extension of five. Finally, they challenge the provision that would allow EPA to object to states’ administratively continuing NPDES permits that have lapsed, and the rules’ failure to allow a functional equivalent of TMDLs in lieu of TMDLs. It is a big lawsuit, but it is not going anywhere right now because nobody knows what is happening with the new federal rules.

The other track of legal challenges are about EPA’s authority to extend TMDLs to nonpoint sources. You have in the materials a couple of things, a brief and a decision in the Pronsolino v. Marcus case out of northern California. That case is on appeal, but so far the federal court has upheld EPA’s longstanding interpretation and practice that EPA and the states have the authority to both identify waters impaired by nonpoint sources and to develop TMDLs for them.

A similar case brought by ranchers in Baker County, Oregon is challenging some similar issues and also challenging a Memorandum of Agreement that addresses nonpoint sources. That was part of a settlement in a case against EPA that I was involved with over Oregon’s TMDL program. It is a nonsensical case, so I will not bother to explain much more than that. Interestingly though, they are arguing that a Memorandum of Agreement, which is an unenforceable agreement between the state and EPA, was actually an order directed to us. Anyway, oral argument actually was held in this case and a decision will be forthcoming. I’ll leave you with that.

VI. THREATS TO THE TMDL PROGRAMS FROM LOOPHOLES

Another method of undermining the TMDL program that is at least as effective, probably more so than the litigation that is underway, is the attempt to create loopholes in the water quality program. These attempts include: keeping private monitoring data out of state hands; supporting decreases in the monitoring budgets at the state and federal levels; encouraging monitoring that produces data that does not correspond with the standards, so there is no way of measuring whether there are violations; challenging standards; challenging the application of standards to the data; and looking for states to conduct Use Attainability Analyses, which are basically a way of rolling back standards. So one key area is attacking standards in an attempt to create loopholes in the TMDL program.

25. 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000); see also Amici Curiae Brief of the States of California, Oregon, Washington, Delaware, Maine, Maryland, and New Jersey (Nos. 00-16026, 00-16027) (submitted to U.S. Court of Appeals for the Ninth Circuit April 23, 2001).

26. Hawes v. Oregon, No. CV 00-587-PA (Dist. Or.) (oral arguments on cross-motions for summary judgment were heard on April 1, 2001 before Judge Owen Panner).
As the development of TMDLs has increased the pressure on states to interpret standards and to include standards in NPDES permits, pressure is now mounting on the states to roll back water quality standards. This is an area that was controversial in the past, but certainly has never seen the level of controversy we are seeing today. Industry representatives know that in some states, if they create enough controversy, the proposed changes in the water quality standards will never get to a public hearing, let alone result in changed new standards and new criteria. These attempts could preclude adoption of new EPA criteria, for toxics for example, just because enough furor is raised.

Standards also include antidegradation policies and procedures, which one could spend enough time explaining and arguing about to fill an entire conference, so I won’t try to explain it. Basically it is a process by which you try to prevent polluted waters from getting more polluted and keep clean waters from getting polluted. In any case, antidegradation is part of the legal definition of the water quality standards, and EPA’s regulations also require that states adopt an antidegradation policy and implementation plan. Not only, of course, are states dragging their feet in doing this, which would prevent them from building up such a backlog of TMDLs that need to get done, but EPA was also signaling under the Clinton Administration its willingness to overlook what I call the creative approach that states are adopting to minimize the effect of antidegradation policies, if they are in fact forced to develop them. So now we are seeing antidegradation policies being issued that exclude application to current sources, limit their effect on new sources, adopt de minimis exceptions, and exclude nonpoint sources all together.

As states continue to use inaction as a way to address problems with standards and antidegradation policies, we are going to see increased litigation by environmental groups, simply intended to get triennial reviews of water quality standards going, and as well as to challenge the inadequate criteria and use descriptions of waters. In fact, I recently filed an action challenging Oregon’s water quality standards, primarily oriented toward threatened and endangered salmon, and primarily on the issue of temperature.

A related area, where agencies and polluters both have found significant opportunities to prevent listings of streams—the listings then generating the TMDLs—is by adjusting the methodology by which the standards are applied to data. These methodologies, often called listing criteria or


listing methodologies, are not part of the standards themselves, have not
been subject to approval or disapproval by EPA, and have been subject to
great abuse. Typical adjustments in methodology include: excluding data
because of its age; requiring multiple exceedances of criteria; ignoring the
aspects of water quality standards relating to beneficial use, protection and
narrative criteria; and ignoring existing data, much of which is collected by
numerous local, state and federal government agencies, including those that
do not focus on water quality. All of these issues will increasingly be the
subject of litigation by environmental organizations, and we are beginning
to see litigation by industry groups on this issue as well.

VII. Threats to the TMDL Program from State and
Federal Agencies

Just as effective at undermining the TMDL program as the direct at-
tacks by polluters on the regulatory infrastructure that supports the program,
are the states and EPA’s failure to use the program to drive on-the-ground
changes. I think the reasons for this are bureaucratic inertia, a desire to
avoid controversy, and lack of political will.

The result is manifested in many ways. The most obvious one is when
a state fails to adhere to a schedule that it has adopted, whether pursuant to
an agreement with EPA or litigation by citizens’ groups. But states are also
making lots of choices based on the problem of workloads that they are
facing, given that they have committed to a schedule or they’ve been forced
to commit to a schedule. Some of these choices include, for example, the
choice to develop TMDLs for very large geographic areas, not just waters-
sheds, but entire basins – a scale that often prevents meaningful application
of the TMDL to specific sources and individual tributaries.

Another method that states are using is trying to cobble together ex-
sting programs that appear to be relevant to water quality in some way, and
throwing them together and calling them TMDLs.

Then there are many other areas of abuse, including: states failing to
collect data in advance of TMDLs; states collecting data that do not corre-
spond to the models that they are going to use; and maybe most impor-
tantly, because it has been happening for years outside of the TMDL con-
text as well, is failure to identify the sources of pollution. If you know a lot
about what is wrong in the water body, it will not help you develop a
TMDL that is going to lead to changes in pollution controls that will result
in clean water, because you have not identified the sources.

Worse yet are the methods states are using to render TMDLs com-

29. For example, Montana requires “sufficient credible data” for a stream to be placed on or
pletely ineffective. Significant resources are being put into developing large, thick TMDLs, at least in the two states in which I work. In some cases, because of our settlements, those states are also developing TMDL Implementation Plans which are equally as thick, if not thicker. Yet the outcome of these processes may be little or no change at all in status quo. The reasons, of course, are many and varied. But for some reason, in some TMDLs, it is because the TMDL Implementation Plans bear no resemblance to the technical work that is in the TMDL itself.

One stark example is a TMDL that I reviewed recently, which is the most advanced level of temperature TMDL done by the State of Oregon. Each time they do one, they get better at it, and this one had full color 3-D pictures of what amount of shading, density, and height the trees needed along the streams to protect the streams from solar radiation that heats up the water. In Oregon, we are lucky enough to actually have a state law that ties TMDLs and agricultural planning, but not agricultural practices, together. But you turn to the implementation plan for agricultural, and it allows farmers to farm right up to the stream bank, so long as they use methods that will prevent erosion from taking place. I have to ask how trees, that are going to take at least 75 years to grow to the height needed, are going to grow if the farmers are continuing to farm right up to the stream bank. Yet these kinds of disconnects are overlooked by the state regulators that prepare them, and by EPA.

However, I have some hope that because EPA, at least in Region 10 — I think this is because of what’s happening in Montana — is going to be doing consultation with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, one of those two agencies will look over the shoulders of EPA and the state, and provide some interesting remedies to these kinds of problems.

The same kinds of problems can occur with point sources, which I would like to say are the most obvious ones. Of course nothing is that straightforward in environmental regulations. But one of the things that we are seeing now is a little trick where you measure the pollution load contributed by a point source at the edge of the mixing zone rather than at the pipe where it discharges. And in Oregon, you are allowed to make that mixing zone nearly as large as possible, so the sky is the limit. You can just define the point at which you are defining the load as any place you want on the stream. In other words, it negates any value that the TMDL might have in actually establishing appropriate restrictions on the discharges from a point source.

More often than not, we are finding that most of Oregon’s streams are listed for violating water quality standards for the toxic pollutants and the temperature discharges. We are also finding that the point sources do not
have effluent data corresponding to these parameters, and the state agency is reluctant to ask the point sources to gather this data to support the development of the TMDLs, even though it has complete authority to do so under Section 308 of the Clean Water Act.

So whether data are not being collected because of political problems, or because of lack of good project management, that in fact is what is taking place. I kind of think of this as death by a thousand cuts or ten-thousand cuts, a kind of death that presents the single greatest threat to the TMDL program.

This certainly brings us to a fork in the road. The TMDL program threatens to be derailed by political controversy at both the federal and state level, and at the level that each individual TMDL is developed. Its proponents are not – that is, the environmentalists – are not sufficiently organized, plentiful, or politically powerful to effectively fight at each of these levels of government. And they do not have the sophistication to be involved in each and every TMDL that is being developed. However, their opponents have those qualities – not necessarily the sophistication, but the money to buy it, and the political clout.

VIII. Who Needs the TMDL Program

There are, however, two sets of interests that need TMDLs to satisfy additional legal requirements, and these are areas where I hope that we will see some progress. Those two areas are point sources subject to NPDES permits, and species that are listed as threatened or endangered pursuant to the Endangered Species Act.

A. NPDES Permit Holders

While neither of these circumstances present themselves with each and every single TMDL that is being developed, they do effect many listed waters in many states. In the absence of TMDLs, point sources are going to find themselves increasingly under attack and increasingly vulnerable. The reason for this is that in addition to meeting the technology-based effluent limitations established by the Clean Water Act, NPDES permits, by statute and by regulation, also must include more stringent limitations that are necessary for point sources to meet water quality standards. Put another way, point sources are prohibited from causing or contributing to violations

Until recently, EPA did not acknowledge that the analysis of whether a point source caused or contributed to a violation of standards was something that had to take place in combination with pollution from other sources. In other words, they made that analysis of whether a point source was causing or contributing in a vacuum—sort of an academic perspective. But over the last few years EPA has begun to acknowledge that in fact they have been allowing states to issue NPDES permits across the board in this fashion. They cannot just evaluate the effect of dilution of a stream on that discharge, they also have to include all of the pollution from other point and nonpoint sources in the calculation. So times are changing, and this raises the specter of uncertainty for point sources, more than ever before. This is especially true where there are no TMDLs in place to guide a permit writer in how to make the determination of whether point sources are causing or contributing to violations.

While many NPDES permit holders still think TMDLs are mostly negative because they will have to increase their pollution controls at great costs, others know that TMDLs actually increase their future certainty, giving them the opportunity, perhaps, to do one retrofit rather than multiple retrofits over time. They also know that TMDLs provide protection from third-party lawsuits, because the point sources have the certainty of knowing whether they are causing or contributing to violations. These lawsuits can be based, for example, on the failure of a permit holder to meet the narrative conditions. NPDES permits state that notwithstanding the numeric effluent limits in the permit, that a permitted source is not allowed to cause or contribute to violations of water quality standards. I am proud to say that the case that established that was ours, against the City of Portland over its combined sewer overflows.

One area of vulnerability enters in when permits have been issued over the years, and permit writers have never taken into account the legal definition of water quality standards, including beneficial use support and narrative criteria. Particularly in the two states where I work, where we have threatened and endangered species all over the place, application of beneficial use support would pretty much override an awful lot of numeric criteria, because we now know that the temperature numeric criteria do not protect salmonids. We also know that levels of toxic contaminants that have in the past only been evaluated for their effect on human beings are now

34. 33 U.S.C. § 1312(a) (1994); see also 40 C.F.R. § 122.44(d) (1999) (requiring that effluent limitations incorporated in NPDES permits meet any additional standards and state requirements).

35. See, e.g., Northwest Environmental Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995), and 40 C.F.R. § 122.4 (1999).

36. Id.
shown to cause terrible effects on salmon at extremely low levels. So there are going to be increased pressures in the very near future, I think, on point sources, and that should make TMDLs look good to them, if they are smart.

The absence of a TMDL also has an impact on point sources that are either attempting to locate and discharge into waters already violating standards, or that are already located there and attempting to increase the loads of pollution that they discharge into the stream that is violating standards. While this has always been true in the law and regulations, we are increasingly seeing implementation of that long-standing regulation coming to bear on permits that seek to discharge increased amounts of pollution into streams that are violating standards.

This should do two things: it should bring point sources to the table to do TMDLs, because it is to their advantage to know whether they will be allowed to grow in the future, grow meaning discharge increased amounts of pollution in the future; it should also drive them to state legislatures, which can create laws that create greater controls on nonpoint sources, and reduce the suffering of point sources in an inequitable situation.

B. Threatened and Endangered Species

The other area where the law is putting pressure on TMDLs is the Endangered Species Act, or the ESA. There are two ways in which the ESA may effect the use of implementation of the TMDL program, noting that the overarching policy of the ESA is that all federal agencies must use their authorities to conserve species that have been listed as threatened or endangered.

Section 7 of the ESA lays out obligations for federal agencies with respect to listed species, both for consultation and to prohibit jeopardy to listed species. It relates to TMDLs in two ways. First, EPA is required to consult on TMDLs that affect threatened or endangered species. Presumably the outcome of this process will be the full application of the legal

38. 16 U.S.C. § 1531(c)(1) (1994). "Conserve" and "conservation" mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measure provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3) (1994). The ESA requires the Secretary of Interior or Commerce to list species that they believe may become extinct in the near future as either "threatened" or "endangered." 16 U.S.C. § 1533 (1994). A species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (1994). A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1994).
definition of water quality standards. Second, section 7 should increase emphasis on the effectiveness of the implementation measures that are taken.

But EPA also is going to have to rely on the TMDL program to comply with the mandatory duty to develop and implement a plan for recovery and conservation of threatened and endangered populations, as required under Section 7 (a)(1) of the ESA.\textsuperscript{41} I might add that a claim that EPA has not met that mandatory duty is included in a lawsuit that we just filed against National Marine Fisheries Service and EPA over Oregon’s water quality standards.

Clearly, the TMDL program is a critical tool for remedying water quality problems that contribute to endangerment of listed species. And if EPA does create these recovery plans as it is required to do, it will have to create plans that address each species, each individually listed population, with the intent of achieving recovery of the species, not just protecting it as it is today.

**IX. Non-Legal Avenues to Promote the TMDL Program**

But the other fork in the road is less legal. There is no doubt that citizens’ litigation is responsible for the fact that we have a TMDL program in the United States, and it has been an important and remarkable journey to this point. But it is equally true that the role of litigation has been oversold to citizens’ groups.

With a program as complex and as drawn-out as that for TMDLs, litigation can serve as no more than a catalyst, with the possibility, in some cases, of interim adjustments made by courts to keep the program on track. Litigation on TMDLs, like so many other environmental issues, does nothing more than start the ball rolling. It absolutely does not control where the ball goes, and it may not even influence its direction.

There is nothing about EPA’s or states’ commitment to developing TMDLs on an established schedule that provides guarantees, or even vague assurances, of the quality of the product. In fact, the necessity to move quickly — whether you define quickly as five years or fifteen, which is a raging debate in the environmental community — has to be seen as a significant constraint on the quality of the TMDLs that will be developed. One of the biggest constraints is the acceptance with which states and EPA currently treat what is manifestly an unacceptable status quo — farmers draining streams dry and denuding riparian areas, loggers triggering landslides and force-feeding sediment into channelized streams, unmitigated urban development, and barely regulated industrial and municipal discharges. This status quo has a one-to-one correspondence with the government’s accept-

ance of TMDLs that will not reduce pollution and attain water quality standards. This is an enormous barrier for citizens’ groups to overcome.

From the environmental standpoint, the sad news is that widespread litigation in so many states has not translated into broad political power. If anything, the sense of empowerment brought to those groups by their involvement in TMDL court battles has encouraged them to rely too heavily upon that catalyst, and too little on the classic tools of long-term regulatory and political advocacy.

As a whole, and there of course are exceptions, TMDL-promoting citizens’ groups have not organized to fight either agency malingering or industry malice that threatens to bring this program down by wholesale attack or atrophy. Groups often do not understand what the federal law does, and that it does not allow them sufficient participation to influence the development of new state legislation, new state regulation, or the failure of state implementation. On the whole, they do not wield the political clout that should come when a group knows that it represents the majority view of Americans, in this case the majority of the public, which consistently places clean water above all environmental issues, and for which clean water is a top priority overall.

In order to overcome the passive resistance by government agencies to this program, groups must first realize that litigation only gets you in the door. It does not direct the major policy decisions that are so crucial to making change. The attorneys that represent these groups would serve their clients well by adopting the same view.

X. Conclusion

In conclusion, I’ll state the obvious. Democracy requires more than a trip to the courthouse, no matter what issue we are trying to remedy. The clean up of polluted water and the TMDL program in particular, are no different in that regard. Lawyers have and will continue to play a significant role in jump-starting and directing the general direction of the TMDL program, but as the saying goes, the devil is in the details, and the details are not in the purview of federal judges.

Thank you.