

Shared appreciation litigation update

On June 29, 2001, a lawsuit challenging the Farm Service Agency (FSA) interpretation of Shared Appreciation Agreements (SAAs) was filed in the U.S. District Court for the District of North Dakota. *Stahl v. Veneman*, No. A-3-01-85, (D. N.D. filed June 29, 2001) (Complaint amended to add additional plaintiffs, Aug. 8, 2001). The plaintiffs in *Stahl* are over one hundred farmers from North Dakota, South Dakota, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, and Nebraska. Each signed an SAA with the Farmers Home Administration (now FSA) as part of the administrative debt restructuring offered to delinquent borrowers. The SAA was required of all borrowers who received a debt write down of FmHA/FSA debt. Each of the borrowers in *Stahl* continued to farm their property during the ten-year term of the SAA.

The primary issue in the case is whether there is an obligation owed at the end of the term of the SAAs. The plaintiffs argue that they are only liable under the SAA if they sold their farm property, paid off their debt, or ceased farming, and that the agreement "expires" without obligation at the end of the ten-year term. The USDA position is that the end of the SAA term is itself an event that triggers a recapture determination, and that up to fifty percent of any appreciation in value will be due at the end of the SAA term. A second, alternative, issue concerns the determination of the maximum amount that USDA can collect under the SAA, if an obligation is found. The plaintiffs moved for a preliminary injunction to enjoin the USDA from taking any collection actions during the pendency of the case.

On August 22, 2001, the government prevailed in the first round of this litigation when the court denied the plaintiffs' motion for a preliminary injunction. *Stahl v. Veneman*, No. A-3-01-85 (D. N.D. Aug. 22, 2001). In denying the motion, the court addressed the four-part standard for preliminary injunctions set forth in *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1098). These are 1) likelihood of success on the merits; 2) threat of irreparable harm to the movant; 3) balance of harms; and, 4) public interest. Most of the court's opinion discusses the merits of the case and the likelihood that the plaintiffs will succeed. The court concluded that the plaintiffs had not shown a likelihood of success on either of its claims, weighing heavily against the issuance of a preliminary injunction. *Stahl*, slip op. at 7-8.

Continued on page 3

History of Chapter 12 bankruptcy on again, off again

Chapter 12 is available once again. Recently signed Public Law 107-17 makes Chapter 12 effective until October 1, 2001. Both the Senate and House versions of bankruptcy reform legislation would make Chapter 12 a permanent part of the Code. Nevertheless, Chapter 12's "on again, off again" status has been difficult to follow. Consider the following historical review.

Chapter 12, *Adjustment of Debts of a Family Farmer with Regular Annual Income*, was first enacted in October 1986 as a response to the farm crisis of the 1980s. Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, tit. II, § 255, 100 Stat. 3088, 3105-3113 (1986) (codified at 11 U.S.C. §§ 1201 - 1231). Originally, it had a sunset provision that provided for repeal on October 1, 1993. Pub. L. No. 99-554, tit. III, § 302(f), 100 Stat. 3088, 3124 (1986).

On August 6, 1993, Chapter 12 was extended for another five years. *Farm Bankruptcies, Extension*, Pub. L. No. 103-65, 107 Stat. 311 (1993). Chapter 12 officially sunset at the end of this extension, on October 1, 1998.

Chapter 12, however, was resurrected with a six month retroactive extension as

Continued on page 2

INSIDE

- State GMO restrictions and the dormant commerce clause
- TMDLs: Are they dead letters?

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IN FUTURE ISSUES

- Using a Limited Liability Company to operate a Pennsylvania family farm business

part of an omnibus appropriations bill passed later in October. *Omnibus Consolidated and Emergency Supplemental Appropriations Act*, Pub. L. 105-277, div. C, tit. 1, § 149, 112 Stat. 2681, 2681-610-11 (1999). This extension was for six months, retroactive to the sunset date. Chapter 12 was thus set to expire again on April 1, 1999.

On March 30, 1999, Congress once again passed a short term extension to the provisions of Chapter 12. *Bankruptcy: Extension of Reenactment of Chapter 12, Family Farmers Indebtedness*, Pub. L. No. 106-5, 113 Stat. 9 (1999). This extension provided a six-month extension, allowing Chapter 12 to remain available to eligible family farmers until October 1, 1999.

Chapter 12 sunset on October 1, 1999, but was resurrected on October 9, 1999. *Bankruptcy - Extension of Family Farmer Debt Adjustment*, Pub.L. 106-70, S 1, 113 Stat. 1031 (1999) reenacted Chapter 12 for nine months, retroactive to October 1, 1999. The new sunset date became July 1, 2000.

Congress did not take action to stop the July 1, 2000 sunset. Chapter 12 was repealed as of that date and was not resurrected for almost a year.

On May 11, 2001, *Bankruptcy, Chapter 12- Reenactment*, Pub.L. 107-8, S 1, 115 Stat. 10 (2001) revived Chapter 12. It provided for an 11 month extension, although because the effective date applied retroactively back to the previous sunset, July 1, 2000, the bill only extended Chapter 12 to June 1, 2001. Chapter 12 was only available under this extension for twenty days.

Chapter 12 was again repealed according to its sunset terms as of June 1, 2001. On June 6, 2001, the House passed H.R. 1914, a bill that revives and extends Chapter 12 bankruptcy, this time until October 1, 2001. It passed 411-1. On June 8, the Senate passed the bill by unanimous consent. It was presented to President Bush on June 18 and signed on June 26, 2001. It took effect as Public Law 107-17.

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State GMO restrictions and the dormant commerce clause

Legislation that would enact a temporary moratorium or restriction on the sale of genetically modified organisms (GMOs) was recently introduced in some states. Opponents of the legislation claimed state restrictions on GMOs violate the dormant commerce clause of the U.S. Constitution. This article addresses those challenges and makes the argument that, if done correctly, GMO restrictions should not violate the dormant commerce clause.

The U.S. Constitution requires that "The Congress shall have power...To regulate commerce...among the several states." The negative or dormant aspect of this clause "...prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Dormant commerce clause cases usually entail a two-step approach. First, is the statute discriminatory or does it have an extraterritorial reach? If so, the law is usually declared invalid. Second, if the statute is not discriminatory or extraterritorial, does the statute impose burdens upon interstate commerce that outweigh the putative local benefits. If a statute survives these two tests, courts generally find it does not offend the dormant commerce clause.

The judicial review standard for the first prong is that "if the law in question overtly discriminates against interstate commerce, then [a court] will strike the law unless the state or locality can demonstrate 'under rigorous scrutiny that it has no other means to advance a legitimate local interest.'" So long as state law restrictions on GMOs impose similar restrictions upon both out-of-state and in-state seed suppliers and do not favor in-state interests, courts should find that the laws do not overtly discriminate against out-of-state suppliers. Even if state legislation restricting GMOs is

found to discriminate against interstate commerce, it could survive a constitutional challenge if the local interests served by the legislation are of sufficient importance and there are no other means to accomplish them.

Courts could find legitimate local interests to include: (1) safeguarding farmers from environmental contamination and potential liability as result of genetic drift from GMO products, and (2) protecting farmers and the state's grain handling industry from economic harms that may result from limited opportunities to market commodities that contain GMOs. The lack of alternatives to advance local interests may be especially prevalent where companies are introducing GMO products to new commodities that may permanently alter the environment and the marketplace. The combination of even-handed restrictions against in-state and out-of-state seed suppliers and legitimate local interests should be enough to make carefully drafted GMO legislation withstand a discriminatory challenge.

Next, state GMO restrictions must not control conduct of parties who are beyond a state's boundaries. "Under the Commerce Clause, a state regulation is per-se invalid when it has 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." If crafted correctly, legislation restricting GMOs that applies only to commodities grown and harvested in that particular state and that does not attempt to regulate seed sales in other states should satisfy this part of the constitutional test. If legislation is indifferent to sales occurring out-of-state, courts are likely to find that it will not have an unconstitutional extraterritorial reach.

The Eighth Circuit Court of Appeals

Cont. on p.3

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SAAs/Cont. from p.1

In reaching this finding, the court began with "the premise that the meaning of the SAA's depends on the statutes authorizing them, making this a case of statutory construction." *Stahl*, slip op. at 3 (citing *Maricopa-Stanfield Irrigation and Drainage District v. U.S.*, 158 F.3d 428, 435 (9th Cir. 1998)). In construing the statute, the court applied the *Chevron* standard, first considering whether Congressional intent is clear from the plain language of the statute, then considering the agency's interpretation in light of that intent. *Id.*, at 3-4, citing *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 937 (8th Cir. 2000).

The court reviewed the statute authorizing the SAA, quoting the section that provides, "[r]ecapture shall take place at the end of the term of the agreement, or sooner-(a) on the conveyance of the real property; (B) on the repayment of the loans; or (C) if the borrower ceases farming operations." *Stahl*, at 5 (citing 7 U.S.C. § 2001(e)(4)). Although the court stated that it "remains open" to the plaintiffs' argument that this provision only means that the USDA cannot collect beyond the ten-year term, it was, at least for now, "in general agreement" with the government's position. *Stahl*, at 5.

In support of this result, the court noted that three different courts have accepted the government's interpretation of the SAA obligation. *Id.* at 5-6 (citing *Israel v. USDA*, 135 F. Supp. 2d 945 (W.D. Wis. 2001); *In re Moncur*, No. 98-03213, 1999 WL 33287727, at *2 (Bankr. D. Ida. May 27, 1999); and, *In re Tunnisen*, 216 B.R. 834 (Bankr. D. S.D. 1996)). The court noted that these cases were "neither binding nor dispositive," but, nevertheless, found that at this early

stage of the proceeding, the weight of authority favored the government. *Stahl*, at 6.

The court "recognized" the plaintiff's arguments based on the language of the SAA and agreed that the SAA contracts are "generally confusing." *Id.* at 7. However, the court returned to the language in the statute, stating that "the arguably confusing words of a contract enacted pursuant to a clear statute must be construed in light of that statute." *Id.* (citing *Maricopa*, 158 F.3d at 435).

The court also discussed the instructions sent to the SAA borrowers as part of the debt restructuring process. The plaintiffs argued that these instructions were confusing, and the court concedes that they are "long and technical." Nevertheless, the court noted that the instructions "clearly state" that:

During this 10 years, FmHA will ask you to repay part of the debt it wrote down if you do one of the following things:

- (1) Sell or convey the real estate.
- (2) Stop farming.
- (3) Pay off the entire debt.

If you do not do one of these things during the 10 years, FmHA will ask you to repay part of the debt written down at the end of the 10 years.

Stahl, at 7 (quoting FmHA instructions sent to farmers). The court found that this paragraph "seriously undercuts the likelihood that plaintiffs can win on the merits." *Stahl*, at 7.

As to the second issue, the maximum amount due under an SAA, the court was "admittedly somewhat confused" by the arguments presented. The plaintiffs argue that the "Equity Recapture Account Amount" set forth on each SAA repre-

sents the maximum recapture value. The government argues that the amount of debt written down is the maximum amount that can be recaptured. The court stated that "it looks forward to the plaintiffs' response to USDA's pending motion to dismiss on this count." However, the court could not find that the plaintiffs met their burden of showing a likelihood of success on the issue for purposes of the preliminary injunction. *Stahl*, at 8.

The court then proceeded to discuss the other *Dataphase* factors. With regard to the threat of irreparable harm, the court stated that it was "highly sympathetic" to the plaintiffs' concerns about their loss of their farms and farm homes. Nevertheless, the court also found that the plaintiffs had not met their burden. The court seemed persuaded in part by the fact that the "foreclosure and acceleration are generally not occurring," a fact that the plaintiffs may not find particularly reassuring. The court also noted that an FSA suspension program protected some of the plaintiffs. *Id.* at 9-10.

The court found that the balance of harm weighed in favor of granting the preliminary injunction. *Id.* at 11. Finally, as to the public interest, the court found compelling arguments on both sides, with the result being that the plaintiffs had not met their burden. *Id.* at 12. As three of the *Dataphase* factors supported the denial of the motion for the preliminary, the court so ruled. *Id.*

The government's motion to dismiss is scheduled to be the next matter brought before the court.

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GMOs/Cont. from p.2

recently ruled that a Missouri law enacted to eliminate price discrimination in the purchase of Missouri livestock did not have an extraterritorial reach. The court held in *Hampton Feedlot v. Nixon* that, unlike a South Dakota price discrimination statute that imposed requirements on out-of-state commerce, "[t]he Missouri statute, on the other hand, only regulates the sale of livestock sold in Missouri." Citing *Cotto Waxo Co.* as an example, Judge Heaney wrote that "packers who do not wish to conduct business under the terms of [the Missouri price discrimination law] may purchase their livestock for slaughter from other states." The Eighth Circuit held that the Missouri statute affects the flow of interstate commerce "but it does not burden interstate commerce." Likewise, state GMO restrictions that impose requirements

only on transactions done in that state would not have an extraterritorial reach; while they may affect the flow of interstate commerce, namely the sale of certain seeds in a state, under the *Hampton Feedlot* holding they should not be found to burden interstate commerce.

Even if a new law is determined not discriminatory and not to have an extraterritorial reach, it would still be subject to scrutiny under the "balancing test" established by the Supreme Court in *Pike v. Bruce Church*. "If each act 'regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Under the *Pike* balancing test, a challenging party would have to prove

that an actual burden exists upon interstate commerce and that it outweighs any putative local benefits to state producers. While seed suppliers would be restricted from selling GMO seed, they would presumably not be barred from selling non-GMO seed or participating in other types of commerce within the state. It is likely that the putative benefits put forward on behalf of proponents of the legislation would appear to render incidental, and not excessive, any burdens upon interstate commerce imposed by such legislation. Local benefits could include farmers' ability to freely market commodities in foreign markets that ban, require labeling of, or limit GMO products; making the general public aware when GMO products are present; ensuring that organic and other identity-pre-

Cont. on p.7

TMDLs : Are they dead letters?

By Barclay Rogers and Anne Hazlett

In recent years, much attention has been paid by industry, private citizens, and environmental interests to the total maximum daily load ("TMDL") program as a foundation for achieving water quality standards across the country. Established in the 1972 Clean Water Act, the TMDL program provides a process for identifying waters that fail to satisfy state water quality standards, calculating the total maximum daily loads of a pollutant that a water body can assimilate while maintaining applicable water quality standards, and incorporating TMDLs into the state water quality planning process. Recently, the TMDL program has become one of the most debated environmental concepts in the country, largely due to a revised set of regulations drafted in July of 2000. See Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Programs in Support of Revisions to the Water Quality and Planning Management Regulations, 65 Fed. Reg. 43585 (2000). Those rules specifically provide that non-point sources of pollution such as agricultural operations are to be included in the TMDL process. *Id.* at 43588 (to be codified at 40 C.F.R. § 130.25(a)). They also establish a controversial timetable for states to develop TMDLs. *Id.* at 43666 (to be codified at 40 C.F.R. § 130.28(b)).

The purpose of this article is to provide a brief history of the TMDL program followed by an update on two recent events that will undoubtedly shape the future of TMDL implementation: (1) the results of a recent study completed by the National Academy of Sciences on the scientific basis for the TMDL approach to water pollution reduction, and (2) an announcement by the Bush Administration that it intends to delay implementation of the revised TMDL rules so that it may reconsider them in light of the recent controversy.

History of the TMDL program

Since enactment of the Clean Water Act almost thirty years ago, the Environmental Protection Agency ("EPA") has focused its water quality management efforts primarily on controlling point sources of pollution through the use of

mandated technological improvements. Under this framework, considerable success has been achieved in improving the quality of the nation's lakes, rivers and streams as point source discharges have been significantly restricted through permits issued under the National Pollutant Discharge Elimination System ("NPDES"). However, the NPDES program has proved insufficient to achieve the nation's goal of "fishable and swimmable" waters. Indeed, it is estimated that over 21,000 river segments, lakes, and estuaries have been identified by states as being in violation of one or more water quality standards. EPA, 1998 § 303(d) List Fact Sheet: National Picture of Impaired Waters, <http://www.epa.gov/owow/tmdl/states/national.html#N%202>.

With comprehensive point source limitations in place, the agency, as well as environmental interests and point source industry representatives, have shifted their focus from point source discharges to virtually unregulated non-point sources such as agriculture. In so doing, regulators and clean water advocates have turned to § 303(d) of the Clean Water Act, which embodies the TMDL program. Section 303(d) requires states to identify "those waters within their boundaries for which effluent limitations required by section [301](b)(1)(A) and section [301](b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Once identified, the states are required to prepare a TMDL for each of these waters. A TMDL is defined by regulation as "the sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and background."¹ 40 C.F.R. § 130.2(i) (1989).

While § 303(d) has been on the books since Congress enacted the Clean Water Act in the early 1970s, it has historically seen little use as states were focused primarily on regulating point source discharges through NPDES permits. This changed when citizens groups began to sue the agency to force implementation of § 303(d). In the early 1990s, environmental interests started filing lawsuits against EPA as a result of the agency's inaction. Such suits were motivated, at least in part, by the belief that the TMDL process was a viable means of addressing the issue of nonpoint source pollution. See generally *Pronsolino v. Marcus*, 91 F.Supp. 2d 1337 (N.D. Cal. 2000). To date, EPA has been involved in litigation relating to TMDLs in thirty-nine states. EPA, *TMDL Litigation by State*, [http://](http://www.epa.gov/OWOW/tmdl/lawsuit1.html)

www.epa.gov/OWOW/tmdl/lawsuit1.html.

In the face of persistent citizen suits and inconsistent court orders, EPA convened a committee in 1996 under the Federal Advisory Committee Act ("FACA") to address the TMDL issue directly. The FACA Committee was comprised of diverse groups including agricultural, industrial, and environmental interests. While its members were able to achieve considerable agreement on a number of important issues, the Committee split on the question of how the TMDL process should be used to address nonpoint source pollution. Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 *Env't. L. Rep.* 10415, 10422 (1998).

After receiving the FACA Committee's recommendations, EPA proceeded with notice and comment rulemaking to revise the existing TMDL regulations. While the rules were being developed, members of the Republican-controlled House Transportation Committee's Subcommittee on Water Resources and the Environment held hearings on the proposed changes to the TMDL regulations. Following the hearings, Congress directed the General Accounting Office ("GAO") to determine whether states had sufficient data to develop TMDLs and to estimate the economic impact of the revised regulations. In March of 2000, GAO issued its first report highlighting a substantial lack of data available to determine which waterbodies were impaired and to set appropriate TMDLs. GAO, *Water Quality, Key EPA and State Decisions Limited by Inconsistent and Incomplete Data*, GAO/RCED-00-54 (Mar. 2000). GAO published a second report in June of 2000 questioning the reasonableness of EPA's economic analysis of the proposed regulations.² GAO, *Review of Two EPA Proposed Regulations Regarding Water Quality Management*, GAO/RCED-00-206R (June 2000).

Nevertheless, EPA forged ahead with the rulemaking process and officially promulgated the proposed rule on July 13, 2000. In contrast to the FACA Committee members who were unable to reach a consensus regarding the relationship between TMDLs and nonpoint source control measures, EPA expressly stated that nonpoint sources were included in the TMDL process. 65 Fed. Reg. at 43588, 43655. In addition, the agency mandated that states schedule establishment of TMDLs no later than 10 years from July 10, 2000 or the date on

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which it is listed as impaired. *Id.* at 43666 (to be codified at 40 C.F.R. § 130.28(b)).

As a result of its specific inclusion of non-point sources in the TMDL process and the mandated schedule for development, the revised rules generated a substantial amount of controversy. Just five days after the final rule was published in the *Federal Register*, the American Farm Bureau Federation filed a petition in the D.C. Circuit Court of Appeals to challenge the amended regulations. *Water Pollution: Farm Bureau Asks U.S. Appeals Court to Review Final Rule on Impaired Waters*, National Environment Daily (ENA), July 21, 2000 (citing *Am. Farm Bureau Fed'n v. Browner*, D.C. Cir., No. 00-1320). Several other groups representing a wide range of interests have filed similar petitions.

Political recourse was also sought. These efforts ultimately resulted in Congress including language in an appropriations rider prohibiting EPA from using any fiscal years 2000 and 2001 funds to implement the revised rule. *Military Construction Appropriations Act, 2001*, Pub. L. No. 106-246, 114 Stat. 511 (2000). Beyond the appropriations limitation, Congress also directed EPA to contract with the National Academy of Sciences ("NAS") to analyze the scientific basis of the TMDL program. *Department of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act, 2001*, Pub. L. No. 106-377, 114 Stat. 1441, 1441A-3 (2000).

National Academy of Sciences Report

In requiring EPA to contract with NAS, Congress specifically instructed the agency to investigate: (1) the information required to identify sources of pollutant loadings and their respective contributions to water quality impairment; (2) the information required to allocate reductions in pollutant loadings among sources; (3) whether such information is available for use by the states and whether such information, if available, is reliable; and (4) if such information is not available or is not reliable, what methodologies should be used to obtain such information. *Assessing the TMDL Approach to Water Quality Management*, Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, National Research Council, at 2 (2001) (hereinafter "NAS Report"). An eight-member committee was assembled to complete this task. *Id.* The Committee met three times during a three-month period. *Id.* During these meetings, the Committee listened to testimony from over forty interested parties. *Id.*

At the conclusion of its fact gathering, the Committee ultimately determined that the data and science available to states are sufficient for the nation to follow an ambient-based approach to water quality management such as the TMDL program. *Id.* In reaching this conclusion, the Committee acknowledged that there is uncertainty in the science behind the TMDL approach to water quality management. *Id.* But it concluded that there are ways to accommodate this uncertainty while still moving forward in achieving the nation's water quality goals. *Id.* With this principle as a foundation, the Committee then set several goals for the TMDL program.

First, it stated that the TMDL program should focus initially on improving the condition of waterbodies as measured by attainment of water quality standards rather than administrative outcomes. *Id.* at 3. The existence of strict time demands and severe budget constraints could cause many regulators to lose sight of the ultimate goal, achieving water quality standards, and instead judge success strictly in terms of administrative progress. Cautioning against such an approach, the Committee emphasized that success should instead be deemed achieved when the condition of a waterbody supports its designated use. *Id.* The Committee acknowledged that this will require adequate monitoring and assessment both to improve the listing of impaired waterbodies and to characterize the effectiveness of the TMDL designed to meet the designated use. *Id.*

Second, the Committee concluded that the TMDL program should encompass all stressors that determine the condition of a waterbody. *Id.* While the new rule would focus only on those water quality conditions caused by chemical and physical pollutants, the TMDL process should include consideration of other activities that can improve the effects of pollution, such as habitat restoration. *Id.*

Third, the Committee determined that while scientific uncertainty cannot be entirely eliminated from the water quality improvement process, the states and EPA should make substantial efforts to reduce the unknown. *Id.* At present, attainment of designated uses is being limited by unreasonable expectations of predictive certainty held both by regulators and interested parties. *Id.*

Within this framework, the Committee turned to the question of how scientific data and information should be used in the TMDL development process. *Id.* It acknowledged that, although the state of science is sufficient to develop TMDLs in many situations, there are numerous

programmatic issues that prevent or hinder the use of the best available science. *Id.* In order to facilitate the use of the best available scientific information in the process, the Committee recommended several changes to the program. *Id.*

First, states should develop and refine appropriate use designations for waterbodies prior to the development of a TMDL. *Id.* In making this recommendation, the Committee suggested that, in many cases, the goals of fishable and swimmable waters are simply too broad to be functional. *Id.* Therefore, states should inject more detail into their standards to make them more useable in practice. *Id.*

Second, EPA should approve the use of both a preliminary list and an action list rather than one § 303(d) list. *Id.* at 4. As a part of this suggestion, the Committee recommended that in situations where waters were placed on a § 303(d) list without the benefit of adequate water quality standards, data, or waterbody assessments, states should be allowed to move those waters from the § 303(d) list back to a preliminary list. *Id.* In so doing, the Committee was responding to the contention that potentially erroneous listings are contributing to a large backlog of TMDL segments. *Id.*

Finally, the Committee concluded that TMDL plans should involve "adaptive implementation," indicating that they should be periodically assessed for their achievement of water quality standards. *Id.* Where implementation of the TMDL plan is not achieving attainment of the designated use, scientific data and information should be used to revise the plan. *Id.* Such a process will ensure that the TMDL program is not stalled simply because of a lack of data and information but goes forward while better data is collected to improve upon the initial TMDL plans. *Id.*

From these changes, the Committee then addressed the specific means by which science should be infused into the TMDL program. With respect to water quality standards, the Committee stated that biological criteria should be used in conjunction with physical and chemical criteria to determine whether a waterbody is meeting its designated use. *Id.* at 6. The Committee reasoned that biological criteria are generally more closely related to the designated uses of waterbodies than are chemical or physical measurements. *Id.* When used, all chemical and some biological criteria should be defined in terms of magnitude, frequency, and duration. *Id.* Further, water quality standards should be measurable by reasonably obtained monitor-

Continued on p. 6

ing data. *Id.*

Looking at waterbody assessment and listing, the Committee concluded that water quality monitoring and assessment programs should form the basis for determining whether waters are placed on the preliminary or action § 303(d) list. *Id.* at 7. With this in mind, EPA needs to develop a uniform, consistent approach to ambient monitoring and data collection across the states. *Id.* In situations where limited budgets are preventing particular states from adequately monitoring the condition of their waters, the Committee suggested that Congress should step in with aid such as matching grants to improve data collection and analysis. *Id.*

Moreover, the Committee advised that evaluated data and evidence of violation of narrative standards should not be used exclusively for placing waterbodies on the § 303(d) list. *Id.* In contrast to existing regulations, which specify that narrative standards are to be taken into account in the § 303(d) listing process, the Committee recommended that narrative standards instead should be translated into numeric criteria for purposes of making § 303(d) listings and calculating TMDLs. *Id.*

As to the actual development of TMDLs, the Committee first stated that while models can aid in the decision-making process, they do not eliminate the need for informed decisionmaking. *Id.* For many parameters of water quality, insufficient data exist to support the results generated by some of the complex models currently being used in practice. *Id.* at 8. Rather than advocate the use of models in data-poor situations, EPA should coordinate the monitoring and data collection programs with anticipated water quality requirements. *Id.* Where models are being used, the Committee recommended that EPA target some post-implementation TMDL compliance monitoring for verification data collection so that model prediction error can be assessed. *Id.* EPA should also place a high priority on selecting and developing TMDL models with minimal forecast error. *Id.* Further, EPA should foster the use of strategies that combine monitoring and modeling so as to expedite effective TMDL development. *Id.* Finally, the Committee concluded that EPA should end its current practice of arbitrarily selecting a margin of safety within the TMDL calculation and instead require an uncertainty analysis as a basis for a margin of safety determination. *Id.* at 7.

In sum, the Committee advised that the TMDL program will be capable of using the best available scientific information if EPA adopts a preliminary list/

action list approach to the § 303(d) list, uses sound selection of appropriate models, and facilitates an adaptive implementation process in which TMDLs are subsequently reviewed for their effectiveness. *Id.* at 8. In making this determination, it cautioned that the ultimate success of these recommendations will be directly related to the provision of adequate personnel and financial resources for data collection, management and analysis as well as the development of sufficient water quality standards. *Id.*

EPA reconsideration of the revised TMDL rules

In the wake of the release of the NAS report, EPA announced that it plans to delay implementation of the revised TMDL rules so that it may reconsider the rules in light of the report and the concerns raised by various stakeholders. See Delay of Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Programs in Support of Revisions to the Water Quality and Planning Management Regulations; and Revision of the Date for State Submission of the 2002 List of Impaired Waters, 66 Fed. Reg. 41817 (2001). In explaining this decision, EPA Administrator Christie Whitman stated: "I am asking for this additional time to listen carefully to all parties with a stake in restoring America's waters—states, cities, small towns and rural communities, plus industry, the environmental community and farmers—to find a better way to finish the important job of cleaning our great rivers, lakes, and streams." EPA, *Whitman Pledges to Improve Impaired Waters Rule* (July 16, 2001), <http://yosemite.epa.gov>.

Following this announcement, interested parties assumed familiar positions. Faith Burns, associate director for the National Cattlemen's Beef Association, stated that "[w]e believe the [revised TMDL] rule far extends the EPA's authority under the Clean Water Act." Eric Pianin, *EPA Seeks Clean Water Rule Delay*, Wash. Post, July 17, 2001, at A01. Similarly, David Salmons, an American Farm Bureau Federation spokesman, indicated his approval of the delayed implementation, announcing "[t]hat this gives everybody more time to keep working on it. Hopefully, we'll make changes we think will work for everybody." Elizabeth Shogren, *Bush to Delay Plan for Clean Waterways*, L.A. Times, July 17, 2001, at A9.

By contrast, environmental groups lamented the agency's decision, forecasting that "the Bush administration is setting in motion a process designed not

only to delay but also to weaken the Clean Water Act's primary tool for cleaning up lakes, beaches, rivers and streams." *Id.* (quoting Mike Lozeau, Earthjustice staff attorney). Howard Fox, an attorney for Earthjustice, further argued that "[t]his water quality program was supposed to be put in place over 20 years ago. Instead of dicker[ing] about the details, we ought to be getting on with it." Pianin, at A01.

EPA's decision, in conjunction with the NAS report, will almost certainly have a substantial impact on the future of the TMDL program. The Clean Water Act requires states to list waterbodies failing to meet water quality standards and develop TMDLs for these waters. Therefore, the TMDL program cannot be eliminated without amending the statute. Since such amendment is unlikely, the real question is whether the administration will weaken the regulations governing the program to such a degree as to render it nothing more than a paper work provision of the Act. As the TMDL debate reopens in full swing, several issues are likely to emerge.

First, opponents of the TMDL approach to water quality management will likely continue to assert that § 303(d) does not include nonpoint sources of pollution. Unless the Northern District of California's decision in *Pronsolino v. Marcus* is overturned on appeal, pollution from nonpoint sources must be considered in listing waters under § 303(d) and developing TMDLs. Further, given that EPA has requested permission to reconsider the revised TMDL rules in light of the NAS Report, it is unlikely that the agency will change its position on the applicability of § 303(d) to nonpoint sources as the NAS report unquestioningly assumes that nonpoint source pollution is included in the TMDL process. NAS Report at 1.

Second, much debate is likely to center around the NAS recommendation that two § 303(d) lists—a preliminary list and an action list—be developed. Proponents of this approach will argue that it is, at best, unnecessary and wasteful to prepare a TMDL for a water body when the state is unsure of its actual conditions and, at worst, a governmental disgrace to regulate individuals absent certainty regarding the underlying science. In contrast, opponents will argue that allowing states to forestall efforts under § 303(d) by placing waters on the preliminary list will delay the goal of achieving water quality across the country indefinitely.

Third, industry may contend that the Committee's recommendation encouraging states to reconsider their water qual-

TMDLs/Cont. from p.6

ity standards is an authorization for states to downgrade these standards. Others will counter that, if states revise their water quality standards, they must not be allowed to lower these standards. These interests will assert that states are free only to refine these standards and may not adopt less stringent standards.

Fourth, the timeline for TMDL development and implementation measures again will be hotly contested. Here, the central issue is the time necessary to develop adequate science before imposing actual restrictions on contributors. On this point, regulated interests will likely assert that "scientific certainty" is required before any imposition can be placed on an alleged polluter. By contrast, TMDL proponents will contend that uncertainty exists in every decision and that, if the government were obligated to wait until all uncertainty was resolved, it would never be able to make the final steps necessary to clean up the nation's waters. It is worth noting that the NAS report attempts to defuse this argument by suggesting that TMDLs be "adaptively implemented." *Id.* at 90. Under this system, the TMDL process

would require an iterative approach where control measures are based on the level of understanding of the water body in question. As the level of data and information improve, measures to control pollution entering the water should increase commensurately. *Id.*

These issues notwithstanding, the ultimate question is whether EPA will be able to satisfy all interest groups and create a feasible approach to ambient water quality based regulation. Importantly, the NAS recognized a need to move away from an effluent-based approach toward an ambient approach capable of addressing all forms of pollution threatening the nation's waters. Although the NAS did not condemn the program as unworkable, it did make several major substantive recommendations. To date, it remains to be seen whether EPA will be able to address these recommendations, satisfy stakeholder demands, and develop a program to achieve the nation's water quality goals within the confines of the Clean Water Act.

Conclusion

After years of regulatory efforts to address point sources of pollution, the coun-

try continues to aspire toward cleaner water. An attempt at a comprehensive ambient water quality based approach designed to achieve the nation's water quality goals was proposed in the revised TMDL rules, but a firestorm ensued in protest of this approach. This flurry of disapproval generated numerous reports and ultimately resulted in reconsideration of the proposed program. As the fate of the TMDL program lies at a crossroad, a substantial question looms: is it live or is it dead?

¹ The revised TMDL rules expand the definition of a TMDL to a "written quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant." 65 Fed. Reg. at 43662 (to be codified at 40 C.F.R. § 130.2(h)).

² EPA subsequently circulated a draft report on the total estimated costs of the TMDL program which reported the costs to industry to implement the TMDL program could range from under \$1 billion to \$4.3 billion annually. EPA, *The National Costs of the Total Maximum Daily Load Program (Draft Report)*, EPA 841-D-01-003 (Aug. 2001).

GMO restrictions/Cont. from p.3

served commodities meet required certifications; and ensuring that a state's commodities are free of any potential health and safety impacts. In some federal circuits, only putative benefits, not actual benefits, must be shown by a statute's proponents. While a case-by-case analysis is necessary, a strong argument can be made that many local benefits could outweigh any actual burdens.

Courts would also analyze whether the goal of the state statute is motivated to protect *bona fide* safety or health concerns. Examples where courts have cited *bona fide* safety or health concerns in upholding product restrictions over commerce clause challenges include the banning of items that spread pestilence; a statute banning the sale of retail milk in plastic, nonrefillable containers in order to conserve Minnesota resources; and a municipal ban on phosphates for the purpose of preventing nuisance algae.

Under the Supreme Court's holding in *Dean Milk Co. v. City of Madison*, even if a barrier to out-of-state goods is motivated by *bona fide* safety or health concerns, it will be struck down on Commerce Clause grounds if reasonable non-discriminatory alternatives are available. These alternatives must truly be "avail-

able" in the sense that the alternative already exists and a state would not be required to discover a new alternative.

In *Maine v. Taylor*, Maine imposed a total ban on the importation of live bait fish. The state supported its ban on health and safety grounds, principally arguing that its own population of wild fish would be placed at risk by certain parasites prevalent in out-of-state bait fish but not common to Maine's own wild fish. A fish importer attacked the statute on two grounds: (1) Maine was the only state to bar importation of all live bait fish; and (2) the state used sampling and inspection techniques in order to guard against a similar threat in the case of importation of other fresh water fish, rather than placing an outright ban on the fish, so there was no reason why it could not do the same for bait fish. The Supreme Court upheld Maine's ban. The Supreme Court pointed out that procedures for testing and inspecting live bait fish did not currently exist, therefore the commingling of live bait fish with Maine's wild fish was a distinct possibility based on expert testimony.

Likewise, for a state's farmers, segregation methods for GMO crops may be developed in the future, but under the

current grain handling system, as shown by the StarLink™ corn example, it is extremely difficult to segregate GMO commodities from non-GMO commodities. Therefore, the least discriminatory and perhaps only method to ensure the health and safety of a state's crop is to enact restrictions.

Until a state statute is enacted that restricts GMOs and that statute is challenged on the basis that it violates the dormant commerce clause, this article, like much that has been written about the legal implications of GMOs, is speculative at best. However, applicable federal case law does provide proponents of state GMO restrictions an argument that if legislation is done for legitimate local interests to protect the state's health and safety, a statute could withstand a dormant commerce clause challenge.

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