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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Refresher on the farm program eligibility and limitation rules

County feedlot regulations invalidated

The development of large swine production facilities has been highly controversial in Nebraska for the past several years. On November 1, 2000, the Nebraska Supreme Court issued its first decision dealing substantively with local government efforts to regulate large swine facilities. In *Enterprise Partners v. Perkins County*, 260 Neb. 650 (2000), the court ruled that county regulations requiring swine lagoons to be covered and regulating discharges from lagoons onto county roadways were zoning regulations, and in this case were invalid because no comprehensive plan had first been adopted. The court came to the correct conclusion but used an incorrect legal rationale that will cause needless confusion regarding livestock zoning by local governments.

Plaintiffs sought to construct swine production facilities in Perkins County, which at all times pertinent to the decision had not adopted county zoning regulations. Many rural Nebraska counties have raced to adopt county zoning regulations in an effort to keep out large swine facilities. In April 1998, the county notified the Nebraska Department of Environmental Quality (NDEQ), the state agency responsible for permitting livestock facilities, of the county's objection to plaintiff's proposed swine facilities. NDEQ replied, *inter alia*, that it had no legal authority to address two of the county's concerns, flies and odors and the impact on county roads. In response, the county board in December 1998 adopted the two ordinances at issue in an attempt to prevent the swine facilities from being developed. Plaintiffs sought to enjoin the regulations, arguing that they constituted invalid zoning regulations because no comprehensive development plan had first been prepared as required by Neb. Rev. Stat. section 23-114.03. The trial court ruled (correctly) that the regulations were not zoning regulations but (incorrectly) that the regulations were valid, enforceable police power regulations. The Nebraska Supreme Court reversed on appeal.

The supreme court noted that "zoning is 'the process that a community employs to legally control the use which may be made of the property and the physical configuration of development upon the tracts of land located within its jurisdiction,'" citing *Ford v. Converse Cty Com'rs*, 924 P.2d 91, 94 (Wyo. 1996). The court then, with no further analysis, concluded that the two Perkins County ordinances were zoning regulations. Since the county had conceded that it had not yet prepared a compre-

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Nebraska Supreme Court enforces hedge-to-arrive contracts

The Nebraska Supreme Court resolved the hedge-to-arrive controversy in Nebraska by ruling on September 1, 2000 that such contracts are enforceable. *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292 (2000). Eight HTA cases were consolidated in the *Sack Bros* appeal. In each case, the cooperative had sold grain futures contracts for the farmer-plaintiffs with the cash price to the producers to be determined pursuant to written HTA contracts. The farmer-plaintiffs all warranted in the HTA contract that they had possession of or would obtain the commodity to deliver on the futures contract. The contract terms for type and grade of grain, delivery information, destination, number of bushels, futures contract, futures price, final pricing date, cash basis, and cash price were written in the form contracts. The contracts required the producers to set the cash price for the contract prior to the first delivery day for the contract delivery or futures month in the contract. If the producer was unable to deliver, the producer could request the cooperative to extend the delivery date. Apparently producers incurred losses on the HTA contracts as they were rolled over.

At trial, the producers contended that parole evidence would prove that the parties' intent regarding rolling delivery dates forward converted the HTA contracts into futures contracts. The trial courts in all cases rejected the offer of parole evidence, ruled that the HTA contracts were not futures contracts and were

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hensive plan, the supreme court concluded that the ordinances were invalid zoning regulations.

In Nebraska, counties do not have general police power authority. However, Neb. Rev. Stat. section 23-174.10 authorizes counties to adopt police power regulations to protect the public health, safety, and welfare if the county has first adopted county zoning regulations. The *Enterprise* court should have characterized the two Perkins County regulations as police power regulations, and then invalidated those regulations because the county had not first adopted zoning regulations. Instead, the court mischaracterized the regulations as zoning regulations and invalidated them because of the absence of a comprehensive plan. The difficulty posed by this is that Nebraska communities are authorized to exercise police power authorities within their extraterritorial zoning jurisdiction even if the community has not adopted zoning. *Enterprise* will allow livestock operators

and other land developers to resist municipal extraterritorial police power regulations as being invalid zoning regulations, thus requiring communities to adopt zoning regulations in order to be able to implement their police power regulations (as zoning regulations). Hopefully the supreme court will clarify that

this result was not its intent when livestock zoning issues reach the court again (as they are likely to do in the near future).

-J. David Aiken, Professor of Water & Agricultural Law, University of Nebraska

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enforceable, and that the farmer-plaintiffs had breached the contract by failure to deliver.

The supreme court ruled that the trial courts properly excluded parole evidence regarding varying the delivery terms of the written HTA contracts. The court ruled that open delivery and destination terms did not make the contracts ambiguous. The court ruled that the HTA contracts were not futures contracts subject to federal regulation, but instead were cash forward contracts and exempted from Commodity Exchange Act regulation, citing *Salomon Forex Inc v. Tauber*, 8 F.3d 966 (4th Cir. 1993). The Nebraska Supreme Court ruled that the contracts were not illusory, and that pro-

ducers were merchants for purposes of the merchants exception to the statute of frauds. The court finally ruled that the defendants' costs in covering for the nondelivered grain were the proper measure of damages (which totaled over \$2 million).

Nebraska grain farmers have found out to their detriment that they will be legally held to their written promises to deliver grain in the future even when the market price goes against them. It is an expensive lesson that each generation of farmers seems destined to learn.

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Ag production contracts on the Internet

The Farm Division of the Iowa Attorney General's office now offers over thirty sample livestock, grain production, and marketing contracts free of charge on the Internet. Each contract is an actual contract from agribusiness companies and includes financial terms. The producers' names and any identifying information about them have been deleted. Some of the many contracts are from Cargill, IBP, Land O'Lakes, Pioneer, and Purina.

Some of the types of contracts available are:

- swine marketing contracts
- swine production contracts
- cattle production contracts
- cattle marketing contracts
- soybean and organic soybean production contracts, and
- corn production contracts.

There are currently no poultry contracts listed, although the list will be updated as contracts are received.

To view a contract, go to <http://www.IowaAttorneyGeneral.org> and select "Farm Advocacy."

Many production and marketing contracts contain a "confidentiality clause." A confidentiality clause in a production

contract prohibits a farmer from sharing information or terms of the contract. In 1999, the Iowa Legislature enacted legislation to protect Iowa farmers using production contracts. The legislation included a ban on the use of confidentiality provisions in future contracts and made the confidentiality provisions unenforceable in existing agreements. Iowa Code Ann. section 202.3 (West 2000). Without the confidentiality clause, Iowa farmers are free to shop around for the best contracts for their farms.

The Iowa Attorney General web site also contains production contract "checklists" for both livestock and grain farmers. Each list contains many points that farmers should consider before they enter into a production contract.

-Jeff Feirick, The Dickinson School of Law.

This publication is designed to provide accurate and timely information and is strictly educational in nature. It is not intended to be legal advice. For specific answers to an agricultural contracting question, you should consult your attorney.

—State Roundup—

SOUTH DAKOTA. *Plaintiff denied relief for trade secret misappropriation.* In *Weins v. Sporleder*, 605 N.W.2d (S.D. 2000), the South Dakota Supreme Court clarified the relationship between the state's Uniform Trade Secret Act and business tort claims in a case involving the formulation of livestock feed.

In *Weins*, the plaintiff sought relief for misappropriation of his feed supplement formula, which he considered to be a trade secret. Weins was employed with a feed company and began working on a fermentation idea. He talked to several people about further developing this product. Among these people were Sporleder and Meyer, who afterward, entered into a business arrangement with Weins. The three men began developing the supplement using basic feed ingredients. When they could not contrive an appropriate consistency, Sporleder suggested using phosphoric acid as a limiting agent to keep cattle from overeating. Although the formula was starting to show promise, Weins and Meyer terminated their relationship with Sporleder.

Sporleder then approached Van Liere with a proposed feed supplement idea that was supposedly different from Weins' formula. This supplement never materialized because of inconsistencies. Some time later, Van Liere's company began manufacturing its own supplement, and by 1989 Van Liere had a marketable product. In August 1991, Sporleder filed a complaint against Van Liere and his company claiming, *inter alia*, breach of fiduciary duty and fraud and deceit. In September 1991 Weins and Meyer filed a claim for trade secret violation against Van Liere and his company and a contract action against Sporleder. Their complaint was later amended to add various tort claims. These actions were consolidated for trial.

In the *Sporleder v. Van Liere* action, the jury awarded Sporleder \$420,000 in compensatory and punitive damages. In the *Weins and Meyer v. Sporleder and Van Liere* action, the jury awarded Weins and Meyer \$640,000 including punitive damages. The trial court then determined that the tort claims (including punitive damages) were displaced by South Dakota's Trade Secret Act, so the punitive damages were struck. All parties appealed, and the South Dakota Supreme Court was presented with the question of whether Weins had a valid trade secret.

The court recognized that the existence of a trade secret is a mixed question of fact and law. The law question pertains to the South Dakota statute S.D. Codified Laws section 37-29, which is a substantial adoption of the Uniform Trade Secrets Act. The first part of the statute defines a trade secret as "information, including a formula, pattern, compila-

tion, program, device, method, technique or process." The question of fact is assessed under the second part of the statute, which looks at the derivation of economic value, whether the secret can be readily ascertainable, and efforts to maintain secrecy. Even if Weins' product was considered a trade secret under the first part of the statute, it failed under the second part.

Weins has the burden of proving the existence of a trade secret, and he never clearly asserted what exactly was claimed to be his trade secret. His product is a combination of well-known feed materials. In the early development stages, he was denied a patent on this supplement because of ordinary skill of development. The combination of these materials cannot be considered a trade secret if the formula is in the realm of general skill and knowledge in the relevant industry. *Computer Care v. Service Sys. Enters., Inc.*, 982 F.2d 1063 (7th Cir. 1992). If the information can be readily duplicated without involving considerable time, effort, or expense, then it is not a secret. *Id.* An expert testified that the formula of a feed product can be established in twenty minutes using microscopy. Weins admitted that the ingredients were readily available in the market and that they were common knowledge.

Secrecy is fundamental to the existence of a trade secret. *Pioneer Hi-Bred Int'l v. Holden Found Seeds Inc.*, 35 F.3d 1226 (8th Cir. 1994). Reasonable precautions must be taken, including internal and external security, confidentiality agreements, and keeping information under lock and key. Weins failed to demonstrate that active measures were taken to insure secrecy. He discussed the product with several companies, no confidentiality agreements were signed, and the product testing sites were left unsecured. Furthermore, there was no evidence that proved the product ultimately mixed by Van Liere and Sporleder was the same as Weins'.

The South Dakota Supreme Court held that no trade secret existed and reversed the trial court's decision and remanded for a consistent judgment. On remand, the trial court rendered an amended judgment reinstating the award of \$640,000 (including the punitive damages) in favor of Weins and Meyer. This award was based on Weins' and Meyer's tort claims as opposed to the Trade Secret Act claims. The trial court found that since there was no trade secret, the damages found by the jury based on the tort causes of action were not displaced by the Trade Secret Act. Van Liere appealed the trial court's amended judgment.

The supreme court then had to consider whether the amended judgment

was correct. The court found that the tort claims were so inextricably linked to the trade secret claim that the tort claims are displaced as a matter of law. South Dakota's adoption of the Uniform Trade Secrets Act prevents a plaintiff from merely restating their trade secret claims as separate tort claims. A plaintiff may not rely on acts that constitute trade secret misappropriation to support other causes of action. *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wash.App. 350 (1997).

The supreme court again reversed and directed a judgment in favor of Sporleder and Van Liere.

—Leigh Ann Durham, LL.M. student,
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MICHIGAN. *Federal district court awards EAJA fees* After a hotly contested administrative appeal of an ASCS decision regarding 1992 disaster benefits, the Federal District Court for the Eastern District of Michigan awarded Equal Access to Justice Act (EAJA) legal fees to the prevailing farmer in the amount of \$99,500.00. Equal Access to Justice Act, 28 U.S.C. section 2412.

Producer, William P. Irwin, appealed the decision of ASCS to deny him benefits for disaster assistance. The ASCS had contended that the potato losses were not the result of the weather conditions in 1992, but rather were caused by decisions the producer made.

After losing both his appeal to the State Committee and to the National Appeals Division, Mr. Irwin sought judicial review of the agency decision. Because the administrative record was inadequate, the agency sought and obtained a remand of the appeal to the agency.

Mr. Irwin then again unsuccessfully appealed the decision through the National Appeals Division process and sought review of the administrative decision in federal district court. In 1999, the federal district court ruled that the producer was entitled to the requested benefits.

After unsuccessful attempts to resolve the amount due, Mr. Irwin sought attorney fees and costs under the EAJA, as well as judgment for the underlying benefit amount and interest. In March 2000, Judge Robert H. Cleland ruled that Mr. Irwin was entitled to all requested attorney fees and costs, as well as benefits in the amount of \$65,583.06.

In defending against the EAJA claim, the agency argued unsuccessfully that the NAD, as it existed at the time of its decision, was not engaged in "adjudication" under section 554 of the Administrative Procedures Act ("APA"). The court, following *Lane v. U.S. Department of Agriculture*, 120 F.3d 106, 108-109 (8th Cir. 1997), ruled that the NAD hearing

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New water quality regulations raise questions about EPA influence over agricultural practices

By Anne Hazlett and Barclay R. Rogers

Citizens groups, environmental interests, and various governments have been touting total maximum daily loads ("TMDLs") in recent months as the solution to improving water quality in the nation's rivers, lakes, and other navigable waters. In responding to the recent attention directed toward TMDL development, EPA promulgated revisions to its water quality planning and management regulation, 7 C.F.R. parts 122-24 and 130. Issued on July 13, 2000, these amendments revise and clarify the agency's regulatory requirements for establishing TMDLs under § 303(d) of the Clean Water Act. Given the scope of this program, these rules raise important questions about how it will be used to control water pollution attributed to agricultural activities.

Historical development of the TMDL program

In 1972, Congress enacted the modern water pollution control statute that is commonly known, together with its subsequent amendments, as the Clean Water Act. The stated objective of this legislation is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve this objective, Congress also declared that it is national policy that "programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7).

The regulatory framework designed to ensure that these goals are met reflects a dichotomy in control strategies. For point sources, which are defined as discrete conveyances such as pipes and ditches, § 301(a) prohibits any discharge into the nation's waters without a permit issued under the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. § 1311(a). Such permit may be issued only when the point source meets certain technological standards and the permit applicant verifies that the dis-

charge will not violate state water quality standards. 33 U.S.C. §§ 1342(a), 1311(b)(1)(A), 1312.

While the major thrust of the Clean Water Act is a performance standards approach designed to control point sources, Congress also included an ambient water-quality based system applicable to both point and nonpoint sources. Such a scheme was developed at the behest of the states that vehemently maintained that they could implement water-quality based regulation if only the federal government would allow them. Oliver A. Houck, *TMDLs IV: The Final Frontier*, 2 *Env't. L. Rep.* 10469 (1999). This system is embodied in § 303(d) of the Act, which requires states to identify "those waters within their boundaries for which effluent limitations required by section 1311(b)(1)(A) and section 1311(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 total maximum daily load for each of these waters. Until recently, neither the states nor EPA aggressively pursued programs under this provision. Such complacency led Professor Houck to describe the behavior of the states and EPA as a "joint venture in nonperformance." Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 *Env't. L. Rep.* 10415, 10416 (1998) (hereinafter Houck, *TMDLs III*).

Starting in the early 1990s and still continuing today, citizens groups began filing lawsuits against the agency in order to force the implementation of § 303(d). *Id.* at 10416-17. 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 Consent Decree, *Pacific Coast Federation of Fishermen's Associations v. Marcus, et al.*, No. 95-4474 MHP (Mar. 6, 1997). To date, EPA has entered consent decrees in eighteen states and faces impending litigation in eleven other states relating to TMDLs. EPA, *TMDL Litigation by State*, <http://www.epa.gov/OWOW/tmdl/lawsuit1.html> (last visited November 7, 2000).

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 composed of diverse groups including agri-

cultural, 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. Houck, *TMDLs III* at 10422.

After receiving the FACA Committee's recommendations, EPA proceeded with its notice and comment rule-making process to revise the existing TMDL regulations. 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 Regulation, 65 *Fed. Reg.* 43585 (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. *Id.* at 43588. More specifically, the agency provided that the requirement for states to identify and establish TMDLs for impaired waterbodies exists even where the waterbody is impaired solely by nonpoint source pollution. *Id.* (citing *Pronsolino v. Marcus*, 91 *F.Supp.2d* 1337 (N.D. Cal. 2000)).

The revised rules have generated a substantial amount of controversy in large part because of the agency's position on the treatment of nonpoint sources. Through an appropriations rider, Congress has ultimately prohibited EPA from spending any fiscal year 2000 or 2001 funds to implement the rule. Moreover, the Administration has designated the revised regulations as a "major rule." As such, the revisions are subject to congressional scrutiny under the Congressional Review Act, 5 U.S.C. §§ 801 *et seq.* At present, resolutions to disapprove the rule have been introduced in both the House and Senate by Rep. Marion Berry (D-AR) and Senator Mike Crapo (R-ID). H.J. Res. 105, 106th Cong. (2000); S. J. Res. 50, 106th Cong. (2000).

Specific provisions of the revised regulations

Several provisions in the revised TMDL regulations could have a notable impact on agriculture in light of their focus on nonpoint sources of pollution. Taken together, these provisions raise significant questions about EPA's authority to address water quality degradation attributed to agricultural activities.

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Definition of a TMDL

Prior to the revision, part 130.2(i) defined a TMDL as "the sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background." Under the revised regulation, the TMDL definition is expanded from a mathematical calculation 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. Part 130.2(h) specifies that a TMDL include the following eleven elements: "(1) the name and geographic location of the impaired waterbody, (2) identification of the pollutant and the applicable water quality standard, (3) quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards, (4) quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards, (5) identification of source categories, source subcategories or individual sources of the pollutant, (6) wasteload allocations, (7) load allocations, (8) a margin of safety, (9) consideration of seasonal variations, (10) allowance for reasonably foreseeable increases in pollutant loads including future growth, and (11) an implementation plan." *Id.* An implementation plan is required "to provide a description, in a level of detail appropriate to the circumstances, of actions necessary to implement the TMDL so that the waterbody attains and maintains water quality standards." 65 Fed. Reg. at 43668 (to be codified at 40 C.F.R. § 130.32(c)). Additionally, TMDLs must provide "reasonable assurance" that load allocations will be implemented. 65 Fed. Reg. at 43668 (to be codified at 40 C.F.R. § 130.32(c)(2)).

Certainly, this revision marks a clear departure from the concept of a TMDL as a mere water-quality engineering calculation to a plan that requires the states to show that measures will be implemented to ensure that water quality standards will be achieved. Thus, a key question arises as to whether this conceptual shift is authorized under the Clean Water Act. Interestingly, a TMDL is not defined anywhere in the Act. But, in imposing a requirement on states to establish a TMDL for waters that are identified as impaired, the statute refers to TMDLs as a "calculation" and a "load" that states are then directed to incorporate into their continuing planning process. See 33 U.S.C. §§ 1313(d)(1)(C), 1313(d)(2), 1313(e). Moreover, in *Pronsolino v.*

Marcus, the most recent decision addressing the TMDL issue, the district court described the concept of a TMDL as a piece of "engineering data" designed to assist states in implementing its water quality standards. 91 F.Supp.2d at 1355. Specifically, the court stated: "To assist the states in gathering information, the statutory role of the TMDL was to identify the load necessary, as a matter of engineering, to implement the water-quality standards. Without such engineering data, states would be left to guess what needs to be done to meet those standards." *Id.*

In the preamble to its final rule, EPA noted that several comments received in response to the proposed changes "interpreted the proposed definition as going beyond the statutory concept of a TMDL as simply a calculation of the total load necessary to attain and maintain water quality standards." 65 Fed. Reg. at 43596. In response, the agency maintained that its revised definition is consistent with the implementation language of § 303(d) because the additional elements in the final rule definition specify in appropriate detail the information that the agency considers necessary to quantify loadings and to determine whether the loadings, once implemented, would result in attainment of water quality standards in the waterbody. *Id.* And, with respect to the specific requirement of reasonable assurance, the agency also stated that without a demonstration of reasonable assurance that the TMDL will in fact be implemented by the states, the allocations presented in a TMDL "lack a necessary link to anticipated attainment of water quality standards." *Id.* at 43598.

Whether the agency is in fact correct in its assertion is important for two principal reasons. First, in the event that a TMDL does not meet all of the required elements, EPA is required under § 303(d)(2) of the statute and § 130.34 of the new regulations to establish a TMDL on behalf of the state. Once the agency develops its plan, the state must incorporate this TMDL into its water quality management plan under § 303(e). 65 Fed. Reg. at 43669. Second, the expanded concept of a TMDL will arguably impose a significant burden on states in terms of the resources required to develop a plan for submission to the agency and the risk that the established plan will be challenged by private interests as insufficient to meet each of these detailed requirements.

Demonstration of reasonable assurance

Under the revised regulation, the definition of a TMDL includes a new concept of "reasonable assurance" that the allocations reflected in the TMDL will be implemented. 65 Fed. Reg. at 43668 (to be codified at 40 C.F.R. § 130.32(c)(2)).

For waterbodies impaired only by nonpoint sources, as would be the case on many waterways impaired predominantly by agricultural runoff, the demonstration of reasonable assurance must show that management measures or other control actions to implement the allocations contained in the TMDL meet the following four-part test: (1) "they specifically apply to the pollutant(s) and the waterbody for which the TMDL is established," (2) "they will be implemented as expeditiously as practicable," (3) "they will be accomplished through reliable and effective delivery mechanisms," and (4) "they will be supported by adequate funding." 65 Fed. Reg. at 43663 (to be codified at 40 C.F.R. § 130.2(p)). In addition, the regulations provide that the TMDL must include an implementation plan that in turn includes "a description of specific regulatory or voluntary actions, including management measures or other controls, by Federal, state or local governments, authorized tribes or other individuals that provide reasonable assurance, consistent with § 130.2(p)." 65 Fed. Reg. at 43668 (to be codified at 40 C.F.R. § 130.32(c)(2)(ii)).

Two principal issues arise from these requirements. First, the definition of reasonable assurance raises the question of whether EPA will, in reality, be forcing states to adopt regulatory controls for nonpoint sources. Although limited regulatory authority exists in most states to control nonpoint source pollution, such control is generally sought through participation in various voluntary programs. Are these incentive-based measures sufficient to demonstrate reasonable assurance?

In its preamble to the final rule, EPA states that the test of reasonable assurance is not met simply by having incentive-based programs or other voluntary measures designed to address water pollution. 65 Fed. Reg. at 43600. Rather, EPA will review the TMDL information to determine whether the program meets the four-part test described above and whether there is a good track record of success. *Id.* If a state has failed to fully develop or to verify the success of voluntary programs, the agency's stance on reasonable assurance arguably may force, or at the very least coerce, a state to adopt regulatory controls on nonpoint sources in order to make its TMDLs approvable. In responding to this concern from commenters, EPA simply stated that it believes that it has the authority to require the demonstration of reasonable assurance as part of an implementation plan under § 303(d) because this element is necessary to ensure that water quality standards are met. 65 Fed. Reg. at 43598.

Second, an issue arises concerning EPA's authority to provide reasonable assurance in situations when it estab-

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lishes a TMDL for nonpoint sources. As previously stated, both the Act and the revised regulations require EPA to establish a TMDL on behalf of a state if it disapproves the plan submitted or if a state fails to make "substantial progress" in establishing the TMDL. 33 U.S.C. § 1313(d)(2); 65 Fed. Reg. at 43669 (to be codified at 40 C.F.R. § 130.35(a)(2)). Substantial progress is defined as "establishing a TMDL not later than the end of the one-year period during which it was scheduled to be established." 65 Fed. Reg. at 43669 (to be codified at 40 C.F.R. § 130.35(a)(2)).

Assuming that EPA must prepare TMDLs that are consistent with its own regulations, the four-part reasonable assurance test requires the agency to include an implementation plan that contains, at the very least, a description of the management measures and controls to be employed to achieve the load allocations. 65 Fed. Reg. at 43668 (to be codified at 40 C.F.R. § 130.32(c)(2)(ii)). Satisfying this requirement is problematic. Regulation over land use practices is generally essential to the control and ultimate reduction of nonpoint source pollution. Yet, EPA readily concedes that land use decisions are the exclusive province of the state. See *Pronsolino*, 91 F.Supp.2d at 1355 ("Congress did not...authorize EPA to regulate state land-use practices. The Court agrees. EPA agrees."). Without the authority to regulate state land use practices, it is certainly questionable whether EPA can "reasonably assure" that its TMDL will achieve the intended load allocations and, hence, whether it can comply with its own regulations.

Timeframe for establishment

Under the old regulations, the agency imposed no deadline on the states for establishment of a TMDL once a water was listed as impaired under § 303(d). However, § 130.28(b)(2) of the new regulations requires states to schedule establishment of TMDLs "no later than 10 years from July 10, 2000, if the waterbody and pollutant was listed on the part of the list before that date or 10 years from the due date of the first subsequent list after July 10, 2000 on which the waterbody and pollutant is initially included." 65 Fed. Reg. at 43666. Given the reported complexity of TMDL development, the impact of such a time limit could be arduous.

In many situations, there is little monitored data from which to track nonpoint source pollution impairments. Furthermore, with respect to what monitored data does exist, regulators face significant challenges in developing a realistic pollution load because there is little, if

any, baseline research to distinguish nonpoint source pollution from background sources. When applied in the midst of such uncertainty, the definite TMDL requirements coupled with the specified time limit may pressure state water quality agencies to default to protectionist policies and implement load reductions that may not be wholly supported in science. Further, these ambitions may be unattainable in practice and, yet, enforceable by private interests.

Answers to looming uncertainty

As the new TMDL regulations increase the potential for regulatory control over nonpoint pollution sources, what steps, if any, should agriculture take to shape its own destiny? Perhaps the answers to this question of policy can be viewed as a continuum. At one end, agriculture could lobby Congress to amend the Clean Water Act to exclude nonpoint sources from the TMDL process. At the other end, agriculture could adopt a proactive response by implementing its own programs designed to reduce nonpoint source pollution in the upcoming farm bill. And, somewhere in the middle, agriculture could challenge the new regulations.

Amend the statute

In the recent *Pronsolino* decision, the court concluded that Congress intended the TMDL process to apply to nonpoint sources, even in the context of a river that was impaired solely by timber and agricultural runoff. Nevertheless, much of the dispute underlying this litigation as well as the general controversy over the amended regulations arguably have arisen from the fact that the TMDL program, when applied in reality, may have difficulty addressing the intricacies of nonpoint source pollution control such as weather, large numbers of potential contributors, contributions from natural events, and lack of precision in discerning exact amounts. Thus, the central question remains: Did Congress really intend for the TMDL process to apply to nonpoint source contributors?

In seeking a favorable legislative response to this question, agriculture would face a stiff battle in light of several factors. First, support for any amendment to the statute in this regard would be labeled by many as a "dirty water vote." Second, the chief proponents of including nonpoint sources in the TMDL process as well as the amended regulations are industry and municipalities who, as point sources, will continue to bear the extraordinary burden and costs of additional discharge reductions if nonpoint sources are not controlled. These groups historically are well-funded or politically

powerful.

However, a recent piece of proposed legislation may shed some light on the future of the TMDL program. The Water Pollution Program Enhancement Act of 2000 (S. 2417), sponsored by Senators Mike Crapo (R-ID) and Bob Smith (R-NH), calls for a report by the National Academy of Sciences to analyze the scientific basis for the TMDL program. *Water Pollution: Senate Approves Legislation Calling for Two TMDL Studies, More Clean Water Act Funds*, National Environment Daily (ENA), October 13, 2000. In addition, the bill directs the National Academy of Public Administration to look at the costs of the TMDL program and the program's effectiveness. *Id.* The bill passed the Senate by unanimous consent on October 10, 2000. *Id.* A companion measure, H.R. 4502, has been introduced in the House by House Agriculture Committee Chairman Larry Combest (R-TX) and Rep. Charlie Stenholm (D-TX), the panel's ranking member. *Id.* The bill was the subject of a June hearing in the House Agriculture Committee. *Id.* Should the bill pass, the directed studies may arm agriculture with some objective, statistical evidence about the cost, burden, and relative efficiency of the TMDL process as a means of addressing pollution resulting from agricultural activities. Whether or not such information would ultimately lead to a statutory amendment, the results of these studies will arguably contribute to the debate concerning nonpoint source pollution control and the TMDL program.

Challenging the regulations

Just five days after the final rule was published in the Federal Register, the American Farm Bureau Foundation ("Farm Bureau") was the first of several groups to file a petition in the U.S. Court of Appeals for the District of Columbia 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 (*American Farm Bureau Federation v. Browner*, D.C. Cir., No. 00-1320). In a statement of issues filed with the court on August 21, 2000, Farm Bureau stated that it is challenging EPA's authority to list waters as impaired and require a TMDL to be developed if the sources of the impairment are nonpoint runoff, groundwater, atmospheric deposition, or solar input. *Id.* In addition, Farm Bureau is questioning whether the agency can place waters impaired by "pollution," not specific pollutants, on the § 303(d) list; whether the concept of a TMDL can include an implementation plan; and whether the requirement of reasonable assurance is authorized under the statute. *Id.* The National

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Corn Growers Association and National Chicken Council have also filed similar petitions. *Id.* (*National Corn Growers Association and National Chicken Council v. EPA*, D.C. Cir., No. 00-1384). In an August 1, 2000 statement, George Watts, president of the Chicken Council, stated: "EPA has gone beyond its legal authority in attempting to pull farms into the TMDL programs." *Id.*

In response to these petitions, numerous environmental advocacy groups have filed motions to intervene on the agency's behalf. *Id.* (*American Forest and Paper Association v. EPA*, D.C. Cir., No. 00-1353). Some of these organizations include Earthjustice Legal Defense Fund, Sierra Club, Water Keeper Alliance, Northwest Environmental Advocates, the Center for Marine Conservation, Coast Action Group, Lake Michigan Federation, National Wildlife Federation, Southern Environmental Law Center, and Trout Unlimited. *Id.* In seeking intervention, these groups are challenging the petitioners' assertions that EPA exceeded its authority in its revisions to the TMDL program. *Id.*

Proactive compliance

While certain alternatives have received much consideration, little attention has been drawn to yet a third option: proactive compliance. Clearly, the amendments raise many questions over which to do battle. But, as with any fight, it is worth considering the purpose and aim of the battle. Are the clean water goals of the amended regulations and viable agriculture mutually exclusive? Possibly not.

As previously stated, the new regulations require states to demonstrate reasonable assurance that the load allocations will be met. To meet this requirement for a waterbody impaired solely by nonpoint sources, the states must show that the management measures contained in the TMDL: (1) apply specifically to the pollutant(s) and to the waterbody for which the TMDL is being established, (2) be implemented expeditiously, (3) be accomplished through reliable and effective delivery mechanisms, and (4) be supported by adequate water quality funding. But nowhere in these requirements does EPA dictate the precise means by which the desired load allocations must be implemented. Indeed, a plausible reading of this definition suggests that the agency has left identification and selection of these mechanisms to the states.

If this reading is correct, there is a significant opportunity for agriculture to ward off future command-and-control regulation by developing policies that will reduce the environmental impacts of its activities. Consider the timing of such a challenge: The debate over the next

farm bill has begun and will soon intensify. While at this juncture it is difficult to determine the precise direction that this legislation will take, conservation measures have been an important component of previous bills in recent years. Accordingly, policymakers and agricultural interests might consider the extent to which agriculture could satisfy the TMDL requirements by conditioning farm program payments on the adoption of certain land management practices designed to reduce nonpoint source pollution and to ultimately achieve water quality standards. For example, lawmakers could require farmers to demonstrate reasonable assurance that the load allocations will be met by conditioning the receipt of benefits on the preparation of a site-specific farm conservation plan. Although similar suggestions have met great resistance from farmers in the past, countervailing concerns arising from the uncertainties associated with the freedom to farm construct as well as the threat of direct regulation may render this policy scheme more palatable.

Conclusion

Without question, the new TMDL regulations are an attempt by EPA to address the problem of nonpoint source pollution head on. In applying this directive to agriculture, some have labeled the initiative as "direct war on the farmer." Houck, *TMDLS III* at 10424 (quoting Linda Korn Levy, Louisiana Department of Environmental Quality, Tulane Law School (March 10, 1998)). In light of the potential impact of the new regulations on the industry, farm advocates must address the critical question of how agriculture will respond.

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was an adjudication, whether under the NAD statute in effect earlier or currently.

The agency also argued that its position was "substantially justified" and that no fees should be awarded. Finding the agency's position "muddled" and nearly "incomprehensible," the court disagreed with the agency. The court stated that even after a remand to clarify the administrative record, there was "evidence of the absence of substantial justification."

The court noted that substantial justification "can more easily be detected in a case presenting a close call, such as one favoring the plaintiff for technical reasons; or a case where there are sound arguments on each side, with the stronger one belonging to the plaintiff."

—Henry L. Knier, Jr., Lambert,
Leser, Cook, Giunta & Smith, P.C.,
Bay City, MI

Oops! Why did we create a web site?

Everybody's doing it—creating a web site. Why not? It is a way to add exposure to one's business or to tell about yourself and provide a method for persons to contact you.

All of that is well and good, but there are some potential legal exposures in creating and maintaining a web site.

A web site name is a trademark. If one uses a web site name that is the same as a well-known name used by another person, one may be facing a trademark violation or a charge of trademark dilution from the other person. Neither competition nor a likelihood of confusion is necessary to support a claim of trademark infringement.

While courts seem to be heading both ways, for a business with a web site on the Internet, it has been found that the fact the web site can be accessed from another state may constitute sufficient connection with that state to allow the person whose web site is accessed to be subject to suit in the other state. In this connection, an interactive web site is far more likely to have this result imposed on the web site owner than is a web site that only passively displays information.

Web sites can include links to other sites. "Metatags" (the hidden language search engines use to search the web) may be provided to assist customers to find a company. If permission has not been obtained for the linking of another site to your site and use of the other person's name in your metatag, you could be "looking for" litigation.

Use of materials on a web site can result in copyright violations. Even if you have permission of a manufacturer to use a photograph of a particular item on your web site, you may also need the permission of the photographer who took the picture and who may have only licensed its use to the manufacturer for the manufacturer's catalogue purposes and not for further distribution. This can also apply to professional models who have not consented for their photographs to be distributed generally.

Unfortunately, just as almost anything seems to be today, putting up a web site may not be as simple as it seems and this does not refer to technology. The preceding examples only touch some of the legal aspects of web site creation. As with many things today, it may require sound professional advice before the web site is placed on the web.

—James B. Dean, Denver, CO