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The Agricultural Perspective: TMDLs in the Context of a Clean and Healthful Environment

by

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The Agricultural Perspective: TMDLs in the Context of a Clean and Healthful Environment

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When I looked at the title of this conference, two distinct themes became readily apparent. The first theme focuses on Total Maximum Daily Loads (TMDLs).[1] The second theme focuses on the clean and healthful environment provision of the Montana Constitution and the supreme court's initial interpretation of this provision.[2] But how are these two themes tied together? How does water quality relate to the clean and healthful environment provision? More specifically, how do farmers and ranchers deal with and make sense of all of these government regulations in the everyday operation of a farm or a ranch which by its nature utilizes land resources? I am going to discuss case law, policy and regulations in an effort to tie these themes together and present the perspective of my clients.[3]

Of course, everybody has heard about the *MEIC v. DEQ* case, recently decided by the Montana Supreme Court.[4] Although the case is certainly a landmark decision, the meaning and implications of the case in terms of natural resource management is unclear. If you talk to five lawyers, you will get five different views of what the *MEIC* case means. Therefore, I am going to boil it down to the nuts and bolts.

My law firm was involved in the *MEIC* case from the perspective of looking at the district court case as it was initially filed. Originally, we thought that the environmental plaintiffs in *MEIC* were going for a big stroke in terms of getting some of the nondegradation exemptions thrown out.[5] However, as the case was amended, *MEIC* narrowed its focus on one particular exemption under nondegradation, and as a result I did not pay

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1. Federal Water Pollution Control Act, 33 U.S.C. § 1313(d)(1)(C) (1994); MONT. CODE ANN. §§ 75-5-701 to -703 (2001). The State defines a TMDL as the sum of the individual waste load allocations for point sources and load allocations for both nonpoint sources and natural background sources established at a level necessary to achieve compliance with applicable surface water quality standards. MONT. CODE ANN. § 75-5-101(32). The Department of Environmental Quality defines a TMDL as the total amount of a pollutant, per day, (including a margin of safety) that a water body may receive from any source (point, nonpoint, or natural background) without exceeding the state water quality standards. What is Total Maximum Daily Load (TMDL)? (2001), at http://www.deq.state.mt.us/ppa/mdm/TMDL/tmdl_definition.asp.

2. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 1999 MT 248 (*MEIC*), 988 P.2d 1236; MONT. CONST. art. II, § 3, art. IX, §§ 1(1), 3.

3. All viewpoints expressed are those of John Bloomquist, not those of his clients.

4. *MEIC*, 1999 MT 248, 988 P.2d 1236.

5. MONT. CODE ANN. §§ 75-5-303(3), 75-5-317.

much attention to the case at the district court level.[6] However, my interest was reignited when the case was appealed and issues of statewide importance arose which could have impacted a variety of activities, statutes and regulations. Like many other interested parties, I filed an amicus brief in order to provide the court with a perspective on the ramifications of the clean and healthful environment provision.

At this juncture, I am going to focus on what the *MEIC* court held, the limitations of the case, and the ramifications of the case in terms of its relationship to water quality and TMDL issues. In *MEIC*, the key issue centered on whether the right to a clean and healthful environment was a fundamental or inalienable right.[7] The court found that the right to a clean and healthful environment was a fundamental right since the provision appears in Article 2, Section 3 of the constitution, along with a host of other inalienable rights.[8] The court essentially tied two constitutional provisions together and found that the right to a clean and healthful environment should be treated as a fundamental right.[9] As such, the court held that strict scrutiny must be applied to any statute or rule that would implicate that fundamental right.[10]

The court's holding is significant from a legal perspective generally, as well as from the perspective of the Legislature when writing State statutes or regulations that involve natural resources or the environment. As a result of the *MEIC* decision, before the State can affect the fundamental right to a clean and healthful environment, the State must show a compelling interest and prove that the statute or regulation is narrowly tailored to meet this interest. The court's view of how the right to a clean and healthful environment is triggered, or how that fundamental right could be infringed upon, has ramifications for future activities in the State.

The *MEIC* case dealt with a project to test groundwater for a mine.[11] The project involved pumping significant quantities of groundwater into surface waters.[12] The water, as it was pumped out of the ground, had some pollutants in it.[13] One particular pollutant, arsenic, seems to be everybody's favorite parameter to attack. But in Montana, arsenic occurs in natural background levels in both ground and surface waters. Regardless of this

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6. *Id.* § 75-5-317(2)(j).

7. *MEIC*, 1999 MT 248, ¶ 39, 988 P.2d 1236, 1242.

8. *Id.* ¶ 70, 1247; MONT. CONST. art. II, § 3.

9. *MEIC*, 1999 MT 248, ¶ 67, 988 P.2d 1236, 1246; MONT. CONST. art. II, § 3, art. IX, §§ 1(1), 3.

10. *MEIC*, 1999 MT 248, ¶ 71, 988 P.2d 1236, 1247.

11. *Id.* ¶ 8, 1238.

12. *Id.*

13. *Id.* ¶ 9, 1238. The groundwater pumped into the surface waters contained no additional waste over background levels.

fact, arsenic was the parameter of concern. In reality, the amount of change in the surface water quality and the parameters related to these pump tests after the water went through the infiltration galleries and the mixing zones was minimal.[14]

The *MEIC* case involved an exemption to Montana's nondegradation water quality policy which is a very vague area of the law.[15] To boil it down to a nutshell, degradation, from a water quality perspective, is defined in Montana as a change in any parameter in the receiving water for high quality water.[16] In theory, just about anything that causes a change in the parameters of the receiving water will trigger degradation, such as somebody fishing or cows crossing a creek. However, since degradation is defined so strictly in Montana, the Legislature carved out some exemptions.[17] Due to these exemptions, not every human activity that impacts water quality is actually subject to the very involved nondegradation review process with the Department of Environmental Quality (DEQ).

The court in *MEIC* found that a change in the parameters of the receiving water occurred as a result of the pump tests.[18] The Plaintiffs did not have to show that this change adversely impacted public health or aquatic resources to bring the case forward.[19] However, I believe that in order to show that the right to a clean and healthful environment is implicated, the Plaintiffs should be required to show not only that degradation occurred, but that the degradation adversely impacted a resource, such as surface water. Moreover, the facts of the case and the analysis provided by both the supreme and district courts, clearly indicates that the supreme court established a very low threshold for when the clean and healthful environment right could be triggered, thereby requiring the court to apply strict scrutiny. Currently, one could read the *MEIC* decision and assume that by changing a parameter in the receiving water, the right to a clean and healthful environment is triggered or implicated.[20] Therefore, the *MEIC* holding may impact or curtail many routine activities which cause physical changes in water bodies. Depending on how degradation is viewed, and how the clean and healthful environment provision is applied, the potential ramifications of the case are quite significant. This evolving concept of degradation will be revisited as litigation continues surrounding the meaning of the clean and

14. *Id.* ¶ 11, 1238.

15. MONT. CODE ANN. § 75-5-303 (2001).

16. *Id.*

17. *Id.* § 75-5-317.

18. *MEIC*, 1999 MT 248, ¶ 69, 988 P.2d 1236, 1247.

19. *Id.* ¶¶ 67-68, 1246-47.

20. *Id.* ¶ 71, 1247.

healthful environment provision. At some point we will draw the line on what triggers that fundamental right.

As the clean and healthful environment provision is litigated in the future, two addition observations merit discussion. First, the majority of the court in *MEIC* found that the clean and healthful environment provision applies to both State and private actions.[21] This could have ramifications for TMDL development. Secondly, the difference between the majority and the concurrence in the application of the scope of the decision is significant. The majority was very specific, narrowing the holding to one provision of the nondegradation statute and one particular exemption.[22] Conversely, the concurrence found the blanket exemptions to be facially unconstitutional given the clean and healthful environment provision.[23] Based upon the opinion of the concurrence, if the Legislature wants to carve out nondegradation exemptions for water quality, every such exemption would have to be reviewed and approved by the State. Quite frankly, this is probably very unworkable.

However, it is important to point out that the majority was very careful in deciding the *MEIC* case because a lot of people pointed out the far ranging implications of declaring that these exemptions triggered the clean and healthful environment provision. It is impossible for humans to exist without degrading or lowering a parameter or adding a constituent to the environment, whether it involves air, water or land. As one of the amicus briefs noted, there is just no "go away." In other words, when we generate air, water or land pollutants, they just do not disappear. Therefore, the court was very cognizant of these concerns when it narrowed its ruling to the facts of the case and to this particular exemption which deals with groundwater pumping into surface water.[24]

I would now like to shift gears and turn to how the *MEIC* decision and the clean and healthful environment provision impacts TMDLs and water quality. By definition, TMDLs involve an improvement in water quality.[25] But how far can TMDLs go in terms of the Clean Water Act (CWA)?[26] Currently, EPA cannot come to Montana with a TMDL, go out to a particular water body that is impacted by nonpoint source pollutants and do anything about it. The question then becomes, under State law and the Mon-

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21. *Id.* ¶¶ 69, 71, 1247. However, the concurrence reserved this application to private actions to a future day. *Id.* ¶ 73, 1247.

22. *Id.* ¶ 70, 1247.

23. *Id.* ¶ 75, 1248.

24. *Id.* ¶ 70, 1247.

25. Federal Water Pollution Control Act, 33 U.S.C. § 1313(d)(1)(C) (1994); MONT. CODE ANN. §§ 75-5-701 to -703 (2001).

26. 33 U.S.C. §§ 1251-1387.

tana Constitution, could the State or a private individual impact water quality via TMDLs? This is open for debate. Hopefully, I can provide a sense of where the case law is likely to go on this issue since some of the pending litigation may advance or restrict EPA's role in TMDL development and implementation.[27]

But before we launch into a discussion of TMDLs, some background information is imperative. The Federal CWA has been an amazingly successful environmental law. No other environmental law has produced the same bang for the buck in terms of environmental improvement as the CWA. In late 1960s, the Cuyahoga River was burning. Point source pollutants were being dumped into the nation's waters from cities, municipalities and industry. In response to this problem, Congress passed the CWA in 1972.[28] The Act focused on technology-based controls in an effort to reduce the amount of chemicals emanating from point sources.[29] This was the era of implementing point source controls. States were charged with assessing water quality and developing plans to address water pollution from point sources.[30]

For point sources, the Montana Pollution Discharge Elimination System (MPDES) permit program is at the heart of the CWA.[31] Basically, Congress required point source dischargers to obtain permits to discharge into water bodies.[32] The permits were effluent-based in that the State took into account the type and amount of pollutant discharged.[33] The MPDES program required dischargers to treat their waste water.[34] Equally important, MPDES established water quality standards to ensure that beneficial uses of the water are maintained and protected.[35]

However, early on Congress recognized that nonpoint sources also contributed to water pollution and must be addressed along with point sources. Nonpoint sources of pollution include: logging, agricultural activ-

27. I do not advocate citizen suits on environmental protection. But given the court's interpretation of Montana's constitutional provisions, this issue will surely be litigated. However, we should ask ourselves whether all of this TMDL litigation does more harm or good for the environment.

28. 33 U.S.C. §§ 1251-1387.

29. *Id.* § 1342.

30. *Id.* § 1315.

31. MONT. CODE ANN. § 75-5-401 (2001). Several cases challenging such water quality standards have interpreted the CWA. These cases are usually brought by an environmental interest against EPA or the State. Generally, the agricultural and land use interests intervene because they are uncertain as to what EPA and the environmental plaintiffs are going to do in terms of cutting a deal or arguing the case. I often represent these agricultural interests.

32. 33 U.S.C. § 1341.

33. MONT. CODE ANN. § 75-5-304.

34. *Id.*

35. *Id.* § 75-5-301.

ities, land development, road building, subdivisions and parking lots. The best way to distinguish between the two is that point sources refer to pollutants coming from the end of a pipe whereas nonpoint sources come from diffuse land-based activities that generate runoff. This distinction between point and nonpoint sources was recognized and confirmed when Congress passed the 1972 and 1987 CWA amendments.[36]

In the 1987 amendments, Congress again noted that nonpoint source pollution was a problem. The point source program was clearly working well, yet water quality problems remained. So Congress enacted Section 319, which directed the states to develop nonpoint source management plans and control strategies.[37] Section 319 required the EPA to approve or disapprove these nonpoint source management plans.[38] Both Sections 208 and 319 provided federal monies to encourage the states to address the nonpoint-source situation.[39] But Congress stopped short of direct federal regulation of nonpoint source pollution under the CWA, essentially leaving it up to the states to deal with nonpoint source issues.

Although the CWA is a well drafted piece of legislation, some things are left open to interpretation. However, the Congressional history shows that the point versus nonpoint source distinction is not one of the items subject to such interpretation. The reason for this is pretty simple. Congress would never have passed the CWA if local or state governments or individuals thought Congress was giving EPA control over local land uses. This distinction between point and nonpoint sources is extremely important to understand because it is at the heart of future TMDL litigation.[40]

Moreover, when discussing TMDLs in Montana it is important to appreciate this distinction because of the 900 water bodies listed in 1996 as being impaired or water-quality limited, a vast majority of these waters were listed due to nonpoint source activities.[41] In other words, 900 water bodies needed TMDLs due to nonpoint source pollution. As previously discussed, in 1972 and in 1987, Congress dealt with the nonpoint source issue in Sections 208 and 319 of the CWA.[42] But the question then arises

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36. 33 U.S.C. §§ 1313, 1329, 1341.

37. *Id.* § 1329.

38. *Id.*

39. *Id.* §§ 1288(f), 1329(h).

40. The courts, including the Ninth Circuit, also recognize this distinction. *See* Trustees for Alaska v. EPA, 749 F.2d 549, 557-58 (9th Cir. 1984).

41. Montana 1996 303(d) List Information (2001), at http://www.deq.state.mt.us/ppa/mdm/303_d/1996303d.asp. The number of listed streams changes depending upon the year of publication. The 1996 list consisted of more than 900 water bodies or water body segments.

42. 33 U.S.C. at §§ 1288, 1329.

as to whether Congress also intended 303(d) to apply to nonpoint sources.[43] From my perspective, in Montana it does not much matter whether nonpoint source pollution is addressed in the context of the TMDLs or in the context of Sections 208 and 319. The distinction is mostly academic rather than practical.[44] However, in other states a great deal of litigation is being undertaken by parties claiming that 303(d) never incorporated nonpoint source pollution.

The controversy surrounding the application of 303(d) focuses on the potential scope of the statute. More specifically, based upon the language of Section 303, did Congress intend for TMDLs to apply only to point sources? Or did Congress intend to target both point and nonpoint sources? Examining the plain language of the statute and the context in which 303(d) appears, one could argue that the statute seems to apply only to point source activities.[45] Section 303(d) charges the states to assess their water bodies and identify those that exceed water quality standards.[46] Based upon 303(d), states would then be required to ratchet back the effluent requirements for point source permits so that water bodies would meet water quality standards based on the technology-based controls that were both the focal and starting points of the CWA.[47]

Conversely, it could be argued that Congress meant something different. In Section 303(d), Congress charged the states with listing those streams where technology-based controls were not stringent enough to meet water quality standards.[48] EPA interpreted this to mean that nonpoint sources could be dealt with under Section 303(d). EPA's regulations passed in 1985 reflect this view. In addition, EPA's interpretation has been largely followed by the courts.[49]

However, the controversy surrounding the scope of 303(d) may become a bit less academic with EPA's new TMDL rules which apply to both

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43. *Id.* §§ 1313(d)(1)(A), 1313(d)(1)(B) (states must identify all water bodies for which technology-based, point source NPDES permits are insufficient to implement applicable water quality standards, and place all such water bodies on the Water Quality Limited Segments list).

44. This controversy is academic because a State law passed in 1997 clearly states that Montana must deal with nonpoint source pollution in a TMDL context. MONT. CODE ANN. § 75-5-703 (2001).

45. 33 U.S.C. at § 1313(d).

46. *Id.* §§ 1313(d)(1)(A)-(B).

47. *Id.* § 1313(d)(1)(C).

48. *Id.* §§ 1313(d)(1)(A)-(B).

49. The courts have only recently focused directly on whether 303(d) applies only to point sources or to both point and nonpoint sources. *See* Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000) (case appealed to the Ninth Circuit may shed some light on this controversy); Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1207 (D. Mont. 2000) (case appealed to Ninth Circuit will likely analyze whether Section 303 applies to both point and nonpoint sources in addressing the challenge to EPA's new TMDL rules).

point and nonpoint sources.[50] The new rules feature some very significant changes. To boil it down, in its new rules EPA applied TMDLs to nonpoint sources more forcefully than was done in the 1985 regulations.[51] EPA changed the TMDL concept by requiring states to list all water bodies that are impaired or threatened from any source.[52] It can be argued that the extension of the TMDL concept is either an expansion of EPA's regulatory authority or an expansion on what 303(d) already said. Ultimately, it will fall to the courts to make this determination.[53]

Under EPA's old rules, the basic elements of TMDLs were fairly straightforward. First, the state listed the water bodies which did not meet water quality standards.[54] Then, the state prioritized the list based on how these water bodies could be restored.[55] Finally, the state developed TMDLs. Under the old regulations, TMDLs were applied literally. The state calculated the both the point and nonpoint sources discharging into the water body, plugged in a margin of safety, and the TMDL was completed.[56]

The new rules are quite a bit different. This difference is significant because EPA is going to require states to do more in order to comply with the TMDL requirements. Basically, the new rules look at TMDLs as water quality management plans. This is much different than a mathematic or numeric calculation regarding how much nitrogen the Clark Fork River can bear. Based upon the literal language of the old TMDL rules, the state only had to figure out what the Clark Fork River could assimilate. The new rules require the state to look at a TMDL as a broader plan, such as a nitrate or a nutrient management plan. This is a bigger animal which encompasses both point and nonpoint sources using a watershed approach. Although this landscape level approach is more labor intensive, it may be the only way to effectively implement TMDLs.

This issue of TMDL implementation, or lack thereof, has created the fairly recent phenomenon of TMDL litigation nationwide. In the early and mid-1980s, TMDL cases were only on the fringe in terms of delineating EPA's duty to implement TMDLs. Of course, once TMDLs became the subject of litigation, a floodgate opened and a variety of different legal theories emerged. I was involved in the Montana TMDL case, *Friends of the*

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50. Water Quality Planning and Management, 40 C.F.R. § 130 (2001); Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,012 (Aug. 23, 1999) (to be codified at 40 C.F.R. pt. 130).

51. 64 Fed. Reg. at 46,013.

52. *Id.* at 46,024.

53. *See Pronsolino,* 91 F. Supp. at 1337.

54. 40 C.F.R. § 130.8.

55. *Id.*

56. *Id.* § 130.7.

Wild Swan, working on behalf of two agricultural organizations which intervened in the case.[57] The State also intervened, as well as the wood products industry. The decision and the remedy that came out of that case is on appeal to the Ninth Circuit. Mandatory mediation is currently underway.

In *Friends of the Wild Swan*, Judge Molloy upheld the State TMDL program, as well EPA's approval of the State program, with the exception of the slow pace of TMDL development.[58] Judge Molloy sought to speed up the TMDL process by requiring the State to complete TMDLs for all water bodies on the 1996 list by 2007.[59] What is interesting about this remedy is that it mirrors the State law which already required that TMDLs be completed for all streams on the 1996 list by 2007.[60] However, the remedy differed from State law in that the 1996 list was effectively frozen in time. The CWA and the State law contemplated changes and modifications to the 1996 list over time.[61] For example, as more water quality monitoring and assessments were completed, the list would be amended every two years to reflect the new data. The new 2000 list removed about half the streams included on the 1996.[62] This difference in interpretation dramatically impacts the work load which will be borne by the State in carrying out the TMDL program, and explains why the State and EPA are at odds with the decision and decided to appeal the case.

However, it is important to note that the 2000 list is half as large as the 1996 list due in part to a State law passed in 1997 which required DEQ to examine the list of impaired water bodies and confirm that the data to justify the listing for each water body was available.[63] The State charged DEQ with justifying the list due to criticism regarding the 1992, 1994 and 1996 lists. Critics claimed DEQ lacked sufficient technical data to support the listing of many water bodies.[64] Some streams, particularly in central and eastern Montana, were subject to the TMDL process simply because somebody drove by and saw a head cut in the stream which automatically indicated that the water body was impaired. In numerous instances this was all it took for a water body to be added to the 303(d) list.

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57. Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1184 (D. Mont. 2000).

58. *Id.* at 1193-96.

59. *Id.* at 1196.

60. MONT. CODE ANN. § 75-5-703 (2001).

61. 40 C.F.R. § 130.8.

62. Montana 2000 303(d) List Information (2001), at http://www.deq.state.mt.us/ppa/mdm/303_d/303_d_list-draft.asp.

63. MONT. CODE ANN. § 75-5-702(2) (water bodies can only be listed if sufficient credible data exists).

64. Currently, environmentalists argue that many streams missing from the 2000 list are impaired and should be included on the 303(d) list.

From an agricultural perspective, two things are most important to the industry. First, the ability to utilize the land for cropping or grazing, which is at the heart of agriculture, must be protected. Second, the ability to utilize clean water, which is the lifeblood of agriculture, must be maintained. Obviously, the agricultural community has no interest in promoting policies or programs that degrade water bodies which support fish, aquatic life or is used for human consumption.

However, given the time and resource constraints facing the State and EPA, how can TMDLs be completed most efficiently? If the State has 900 water bodies listed, and are required to complete TMDLs for all of these water bodies by 2007, efficiency really becomes the $64 million question. The State has limited resources and the EPA gives the State a limited amount of money to do the job. To their credit, the State has finally come around to the concept of watershed planning rather than taking each individual water body or segment and trying to do a specific TMDL for that particular water body. In some instances, the State may have to take a more individualized approach for the significantly impaired water bodies, but generally speaking the watershed-type TMDLs are probably the only way to get the job done in a timely fashion.

Now that being said, how can a watershed TMDL actually improve water quality on the ground?[65] To actually improve the sediment load in the Clark Fork, we cannot simply do a watershed TMDL and call it good. The State's nonpoint source management program under Section 319 of the CWA and watershed TMDLS will both have to come together to actually improve each water body, thereby improving the watershed as a whole.[66]

Best management practices under Section 319 of the CWA, whether they relate to logging, grazing, or agricultural water management plans, should be developed based upon a watershed plan and then be applied to a particular source and eventually to a particular ranch.[67] Currently, efforts to do just this are occurring across Montana. The Big Hole, Blackfoot, Sun, and Musselshell Rivers, all have watershed groups that are working to address water quality from a watershed perspective, and are actually doing some good on the ground.

The question I posed at the start focused on whether TMDLs could ensure a clean and healthful environment. Unfortunately, that question cannot be answered with a simple yes or no due to the constitutional issues and the vagueness of the TMDL concept. However, based upon *MEIC*, the

65. For example, a watershed TMDL could calculate what the Clark Fork River can actually handle in terms of sediment.

66. MONT. CODE ANN. §§ 75-5-401, 75-5-702 to -703.

67. Federal Water Pollution Control Act, 33 U.S.C. at § 1329(b)(2)(A) (1994).

court recognized that the constitution allows for degradation or a lowering of a particular water quality parameter.[68] The decision recognized that to exist, to do everyday human activities, degradation will occur.

So for municipal and industrial point sources that actually have effluent limitations, TMDLs will probably ensure a clean and healthful environment. TMDLs envision where those water bodies or water quality standards are not being met, and they ratchet down the effluent requirements. The ratcheting down process permits the State to meet a nondegradation requirement under the clean and healthful environment provision in a TMDL context.

But can TMDLs be used for nonpoint sources to ensure a clean and healthful environment? Theoretically, yes, but practically, no. There is simply no way to ensure a clean and healthful environment in this context due to the diffuse nature of nonpoint source pollution. To suggest we can regulate or control nonpoint source pollution to prevent all degradation is overly optimistic. However, if we use the same rationale the court used in *MEIC*, which allows for some degradation, it will be easier to obtain the clean and healthful environment standard.[69]

68. *See* Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 1999 MT 248, ¶ 70, 988 P.2d 1236, 1247.

69. Of course, we will not know the answer until the issue is litigated or the Legislature or DEQ successfully grapples with this question.