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A Litigator's Perspective: The Montana TMDL Litigation

Jack R. Tuholske*

I was working on a brief last night and listening to my Napster collection, which included the Grateful Dead song *Trucking* by Jerry Garcia. The song has the line in it, "What a long strange trip it's been." And indeed, my involvement with the Total Maximum Daily Load (TMDL) litigation in Montana is the epitome of a long strange trip.¹ It is one that began in the winter of 1996 while I was having dinner in Bozeman, Montana with Steve Kelly, Director of Friends of the Wild Swan. Steve was discussing the TMDL litigation that had gone on in other states, as well as the importance of the relationship between water quality and fisheries protection. Steve asked me to look into undertaking TMDL litigation in Montana, and I agreed to research this issue.

As a result of this research, I embarked on a series of cases that have now resulted in four published decisions, and half a storage room in my office filled with administrative records, briefs, depositions and the like.² Currently, the case is up on appeal to the Ninth Circuit, and who knows where the case will go in the future.³ We are now about five years into this case with no end in sight.

I want to start by providing some background on Section 303(d) and some other parts of the Clean Water Act (CWA) because it is important to set the stage for the case.⁴ I am going to assume a basic working knowledge of the CWA and will discuss the structure of this statute as it pertains to *Friends of the Wild Swan*.⁵ Then, I will review the Montana TMDL

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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). DEQ 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. *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184 (D. Mont. 1999) (*Friends of the Wild Swan I*); *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1199 (D. Mont. 2000) (*Friends of the Wild Swan II*); *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1204 (D. Mont. 2000) (*Friends of the Wild Swan III*); *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1207 (D. Mont. 2000) (*Friends of the Wild Swan IV*).

3. *Friends of the Wild Swan IV*, 130 F. Supp. 2d at 1207.

4. 33 U.S.C. §§ 1251-1387.

5. *Friends of the Wild Swan I*, 130 F. Supp. 2d at 1184; *Friends of the Wild Swan II*, 130 F. Supp. 2d at 1199; *Friends of the Wild Swan III*, 130 F. Supp. 2d at 1204; *Friends of the Wild Swan IV*, 130 F. Supp. 2d at 1207.

litigation in some detail, and I will conclude with a discussion about some of the looming concerns on the horizon in terms of the Montana TMDLs, and the shape of things to come regarding litigation from the Plaintiffs' perspective.

The CWA, as we now know it, was passed by Congress in 1972 with the goal of restoring and maintaining the chemical, physical and biological integrity of the nation's water.⁶ The CWA features two basic types of pollution regulation and prevention strategies used to achieve this very lofty goal. The first strategy focuses on national technology-based standards which regulate point source discharges.⁷ Point sources are defined as any discernible, confined, discreet conveyance.⁸ Typically, we think of point sources as the pipe from the factory emitting pollutants into a river, but point sources also include ditches, conduits, vessels, and anything that rather broadly constitutes a point source.⁹ Point source pollution is subject to technology-based controls through the National Pollution Discharge Elimination System (NPDES) permit system which requires all parties seeking to discharge a pollutant from a point source into a navigable waterway to obtain a permit.¹⁰

Under the NPDES program, the Environmental Protection Agency (EPA) can delegate the authority to the state to manage the point source permit system once the state demonstrates that it has the resources and the commitment to meet the requirements of the program.¹¹ The dual responsibility between the state and the federal government is one of the cornerstones of the CWA. In Montana, as in most other states, the basic responsibility for the implementation of the NPDES program has been delegated to the State Department of Environmental Quality (DEQ), and is known as the Montana Pollution Discharge Elimination System (MPDES).¹²

The second pollution prevention strategy articulated in the CWA focuses on water quality-based standards. The CWA requires states to draft water quality standards which will protect public health and welfare, and enhance the quality of water, which includes the protection of aquatic ecosystems, fisheries and other species that depend upon certain levels of clean water in order to thrive.¹³ So states are charged with developing water quality standards relating to turbidity, sediment loads and a host of other

6. 33 U.S.C. § 1251.

7. *Id.* § 1342.

8. *Id.* § 1362(14).

9. *Id.*

10. *Id.* § 1342.

11. *Id.* § 1342(b).

12. MONT. CODE ANN. § 75-5-401 (2001).

13. 33 U.S.C. § 1313.

environmental parameters to protect the water quality which is unique to each state.

Both NPDES and the water quality-based program used to reduce water pollution under the CWA depend heavily upon a state-based program where the state develops the standards necessary to achieve compliance with the CWA, and then submits those standards to EPA for approval.¹⁴ Once the state standards are approved, the ball bounces back to the state to make sure the standards are implemented.¹⁵

More specifically, Section 303 of the CWA sets the TMDL program in motion. TMDLs focus on both point and nonpoint source pollution.¹⁶ However, the CWA draws a distinction between these sources of pollution. Nonpoint source pollution does not come from a single, discreet source, rather it comes from an undefinable point.¹⁷ Some notable types of nonpoint source pollution include pesticide runoff from agriculture practices, storm water runoff and sediment from logging practices.¹⁸ Nonetheless, nonpoint sources are a significant source of pollution. Indeed, by some accounts, it is the most significant form of pollution impairing our waters today. In order to combat nonpoint source pollution, Section 303 sets standards for both point and nonpoint source pollution through the TMDL process.¹⁹

So how does Section 303(d) of the CWA work? First, the state establishes its own water quality standards that are unique to the waters that are found within that state.²⁰ Obviously, differences will exist nationwide. For example, Montana focuses on cold water fisheries in order to protect native trout. The types of water quality standards needed to protect and enhance trout fisheries are totally different from standards for bass down in Louisiana. Therefore, Louisiana water quality standards for temperature, sediment and so forth will be different than the standards in Montana. Accounting for such regional differences is part of the structure of the CWA, and explains, in part, the focus on state implementation as states are expected to know what standards are best for the waters in their state.²¹

Section 303(d) commands the states and EPA to undertake four tasks. The first task requires the state to identify all waters for which technology-

14. *Id.* §§ 1313, 1342.

15. *Id.*

16. *Id.* §§ 1313(d), 1329, 1342.

17. *Id.* §§ 1288(b)(F), 1314(f).

18. *Id.* However, storm water runoff associated with construction activity is now regulated under the NPDES permit. MONT. CODE ANN. § 75-5-401(c) (2001).

19. 33 U.S.C. § 1313(d).

20. *Id.*

21. *Id.*

based NPDES permits alone are insufficient to meet water quality standards.²² In other words, the state must identify all of the waters that are still considered impaired because they are not meeting water quality standards, even after imposing the supposedly cleansing effect of NPDES permits which control the amount of pollution coming from point sources. For instance, certain water bodies in a state may not meet water quality standards if they lack a healthy population of native fish, or they have too much nutrient loading or heavy metals contamination.

Second, states must develop and publish a list of all impaired state waters.²³ This is known as Water Quality Limited Segment (WQLS) list or the 303(d) list. The third task requires states to prioritize the streams on the WQLS list in order to develop TMDLs.²⁴ Finally, states must actually develop TMDLs for all point and nonpoint pollutants.²⁵ The TMDL reflects the amount of pollution that a listed water body can handle while still maintaining state water quality standards, which typically includes the ability to support a healthy native aquatic ecosystem along with a variety of human uses.²⁶

Basically, the TMDL represents an allocation of various pollutants within a given water body.²⁷ For example, in calculating the TMDL for the Clark Fork River, the State will calculate how much sediment the river can handle while still being able to propagate native fisheries. The State will make some effort at quantifying the amount of permissible sediment, and will make an allocation among the various nonpoint sources. The State will then do the same for point sources. In theory, the TMDL should allocate the amount of point source phosphate and nitrate pollution among sewage plants located along the Clark Fork River. For instance, a Missoula plant could add a certain amount on a daily basis, the plant in Butte could add another amount, and the Thompson Falls facility could add yet another amount. Together, all of these point sources of pollution would go into the Clark Fork River under the TMDL, which should be an amount under which the aquatic invertebrates needed to support a fishery can survive. Although this process seems fairly straightforward, actually calculating a TMDL requires a fair bit of information and some professional judgment.

It is important to remember that TMDLs are only needed for each of

22. *Id.* § 1313(d)(1)(A).

23. *Id.*

24. *Id.*

25. *Id.* § 1313(d)(1)(C). A TMDL includes the best estimate of pollution from point and nonpoint sources and natural background sources, along with a margin of safety. Water Quality Planning and Management, 40 C.F.R. § 130.2(h) (2001).

26. 33 U.S.C. § 1313(d)(1)(D).

27. *Id.* § 1313(d)(1)(C); MONT. CODE ANN. §§ 75-5-701 to -703 (2001).

the different pollutants identified as being the cause of a particular stream's impairment.²⁸ For instance, the Clark Fork is plagued with many different pollutants which cause impairment. The River has heavy metals pollution stemming from mining in Butte and the Silver Bow Creek superfund site. Therefore, a heavy metals TMDL will be required. The Clark Fork also suffers from nutrient loading due to the entry of excessive amounts of phosphates and nitrates that cause algae blooms which harm both aquatic invertebrates and fish populations. So a TMDL will be required for both of these nutrients. In addition, portions of the Clark Fork contain too much sediment which reduces opportunities for spawning, and adversely impacts native fish propagation. A TMDL for nonpoint source sediment will also be required.

Therefore, a river like the Clark Fork may need several TMDLs before all of the standards are in place and water quality can be ensured. Conversely, other streams may only have one source of impairment, and will only need a single TMDL to address that impairment. It is important to make the distinction that states do not have to do a TMDL for every type of pollution entering a stream. States must only calculate a TMDL for the particular pollutant that is causing the stream to be impaired in terms of not meeting state water quality standards.²⁹

Another feature of Section 303(d) of the CWA is that it set tight deadlines.³⁰ Section 303(d) mandated that states complete their identification of impaired waters, publish their WQLS list, prioritize the listed water bodies and prepare TMDLs for all impaired watersheds by 1979.³¹ Once a state submits its WQLS list to the EPA, the Agency must either approve or disapprove the list.³² If EPA disapproves the list, the Agency must then step in and implement TMDLs on behalf of the recalcitrant state.³³ Since EPA is not keen on commencing such undertakings for states, the WQLS lists tend to get approved once they are submitted.

Section 303(d) was not an obscure provision of the CWA. The legislative history shows that Congress understood what it was doing, and was

28. See 33 U.S.C. § 1313(d)(1)(A).

29. *Id.*

30. *Id.* § 1313(d)(2). Each state must submit to the EPA for its review a list of WQLS lists and TMDLs, with the first submission not later than one hundred eighty days after the date of publication of the EPA's identification of pollutants suitable for TMDL calculation. *Id.* The EPA published this identification in December 1978. Therefore, the initial deadline for every state to submit their WQLS lists and TMDLs to the EPA was June 26, 1979.

31. *Id.* Based upon these Congressional deadlines, the TMDL process should have been officially implemented more than twenty years ago.

32. *Id.* EPA's duty to approve or disapprove the list is mandatory.

33. *Id.*

aware of the deadlines involved with the implementation process.³⁴ Congress purposely developed a program that required the states to do much of the work, an unfunded mandate so to speak. The states were not happy with this mandate, but it was clearly part of the CWA. However, even though the Congressional language commanding states to submit WQLS lists and develop TMDLs was clear and unambiguous, nothing happened for a long time. In fact, for at least five years no discernible activity on the part of the states or the EPA with regard to Section 303(d) occurred.

But all of that changed with *Scott v. City of Hammond*, the grandfather of TMDL litigation and the first of a long line of TMDL cases.³⁵ In *Scott*, neither the State of Illinois nor EPA had prepared a WQLS list or TMDLs.³⁶ Therefore, the Plaintiffs argued that because the State had done nothing, Section 303(d) imposed an affirmative duty on EPA to establish TMDLs in the face of State inaction.³⁷ The State was sued under the constructive submission theory which holds that because the State had not submitted a WQLS list, the State essentially submitted a list of no TMDLs which EPA was obliged to disapprove, thereby requiring EPA to implement the program on behalf of the State.³⁸ The Seventh Circuit found merit in this constructive submission theory even though it was not clear on the face of Section 303(d) that EPA had a responsibility to step in and fulfill the State's duty when the State did not act.³⁹

In deciding *Scott*, the court focused on the structure and the history of the CWA.⁴⁰ The court reasoned that if the State did nothing, and EPA took no responsibility to fulfill the State's role, the entire scheme mandated in Section 303(d) would go unaddressed.⁴¹ The Seventh Circuit understood that TMDLs were very important in solving the nation's water pollution problem.⁴² Therefore, in order to rectify this situation, the court required EPA to act in the face of inaction by the State.⁴³ Some may call the *Scott* decision judicial activism since the court stepped in and forced the EPA to act, even though arguably the plain language of the statute did not require

34. The legislative history clearly shows Congress discussing and showing concern about nonpoint source pollution. Professor Oliver Houck from Tulane University in New Orleans is one of the leading scholars on Section 303(d). See Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ENVTL. L. REP. 10069 (1999).

35. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984).

36. *Id.* at 994.

37. *Id.*

38. *Id.* at 996.

39. *Id.* at 997.

40. *Id.* at 997-98.

41. *Id.*

42. *Id.*

43. *Id.* at 992.

such a decision. Others would argue the court had the responsibility to step in and make sure that the spirit, as well as the letter of the law was followed. In our system of government, when one of the three branches of government fails to carry forth the words of the other branch, the court's proper role is to rectify the situation.

Scott touched off a firestorm of TMDL litigation as environmental groups realized they had a tool to force recalcitrant states and EPA to address the pervasive problem of water pollution. Following *Scott* in the late 1980s, EPA began entering consent decrees in order to avoid being sued under the constructive submission theory. EPA entered into legally binding settlement agreements with several environmental groups threatening suit, and agreed to establish schedules for the completion of the WQLS lists and TMDLs. These two trends, TMDL litigation and consent decrees, continue to the present.

Regardless of which path states have followed, the common thread that unites all of the successful TMDL suits has been the sloth-like pace of state compliance, coupled with EPA willingness to do nothing in the face of state inaction. As the District Court for Georgia found in *Hankinson*, the deadlines for submission of TMDLs written into the text of the statute demonstrated congressional intent to establish TMDLs promptly.⁴⁴ Remember, TMDLs were supposed to be completed by 1979.⁴⁵ Yet ten years later some states, including Montana, still had not done anything in terms of formal compliance with 303(d). Many states argued to the courts that the states did not have an affirmative duty to act. However, this argument did not fly well in the face of the very clear legislative history which showed that Congress meant for this job to be accomplished by either the states or EPA.⁴⁶

However, EPA and the states eventually figured out that the constructive submission theory could be defeated if states took some small actions towards TMDL implementation. If a state just did a few TMDLs, then the plaintiffs could not argue that the state essentially submitted a list of no TMDLs which EPA was obliged to disapprove, thereby requiring EPA to implement the program on behalf of the State. In other words, as long as the state and EPA could show they had completed a few TMDLs, they could defeat the CWA citizen suit provision.⁴⁷ However, in addition to finding liability under the citizen suit provision of the CWA, the courts

44. *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871 (N.D. Ga. 1996).

45. Federal Water Pollution Control Act, 33 U.S.C. § 1313(d)(2) (1994).

46. The Senate identified the states' failure to fulfill their responsibilities under the existing legislation was a major problem which the Senate hoped to overcome by passing the 1972 amendments. S. REP. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3669-3677.

47. 33 U.S.C. § 1365.

have also recognized a duty under the Administrative Procedure Act (APA).⁴⁸ Basically, the courts found that even if some TMDLs were completed, the action could still be overturned as arbitrary and capricious under the APA if the state had not acted promptly enough.⁴⁹ So attorneys now have two legal theories which can be used to protect water quality, the CWA and the APA.

Montana TMDL litigation is based on both of these legal theories. Montana, like many states, accomplished very little during the first ten years of the TMDL program. In fact, by early 1992, 13 years after the State was to have identified all of the impaired waters and published the 303(d) list, Montana still had no WQLS list and had not prepared a single TMDL.⁵⁰ During the later part of 1992, the State published its first list of impaired waters.⁵¹ The State list identified 322 stream or stream segments that it considered to be impaired because the streams were not meeting water quality standards.⁵² The State submitted the list to EPA and the Agency approved the list.⁵³ However, no TMDLs were developed although the State knew at least 322 polluted water bodies existed, and was aware that under the CWA the State was charged with developing TMDLs for each of those 322 water bodies.⁵⁴ Since the State did not develop any TMDLs, the State did not submit any TMDLs to EPA for approval (or disapproval) as the CWA requires.

In 1994, the State submitted a new WQLS list as required.⁵⁵ During the two year interim period between 1992 and 1994, the State identified more impaired waters and the WQLS list grew.⁵⁶ In fact, the list rose to 858 water bodies that were not meeting state water quality standards.⁵⁷ Yet no TMDLs had been developed by 1994.⁵⁸ In keeping with this trend, the 1996 list identified more than 900 impaired water bodies.⁵⁹ But still no TMDLs were established until the later part of 1996 when the State com-

48. *Hankinson*, 939 F. Supp. at 869. The APA governs actions by federal agencies including EPA. Federal Administrative Procedures Act, 5 U.S.C. § 500 (2001).

49. *Hankinson*, 939 F. Supp. at 871-72.

50. *Friends of the Wild Swan I*, 130 F. Supp. 2d 1184, 1188-89 (D. Mont. 1999).

51. *Id.* at 1189.

52. *Id.*

53. *Id.*

54. *Id.*

55. Water Quality Planning and Management, 40 C.F.R. § 130.8(a) (2001).

56. The regulations require states to submit a new list every two years. *Id.*

57. *Friends of the Wild Swan I*, 130 F. Supp. 2d at 1189.

58. *Id.*

59. *Id.*

pleted the famous Deep Creek TMDL which was fairly well done.⁶⁰ Unfortunately, one out of 900 is not a good batting average. And it was at this point that I was having dinner with one of my clients and he said, "you ought to look into this TMDL situation in Montana," and this is when I became involved.

My initial research on the TMDL situation in Montana indicated that EPA would be found liable under the CWA for failing to step in and establish TMDLs where the State had not done so. Based upon this research, we sent EPA a 60-day notice of intent to sue under the Federal CWA. We did not obtain a response to the notice, which is not particularly unusual. In 1997, we filed suit in Federal District Court in Missoula, Montana.⁶¹ However, between the time we filed the notice and the time we filed suit, the State discovered they had a problem and started preparing TMDLs. The State developed 129 "instant" TMDLs in the space of a couple of months.⁶² These TMDLs were simply based on the renewal of the MPDES permits.⁶³ Basically, the State decided to call MPDES permits TMDLs because the permits contained some pollution limits. EPA agreed to this scheme because it made their numbers look better in court since the Agency could effectively argue that the State went from one to 129 TMDLs, and petition the court to dismiss the suit as it lacked merit.

And this is exactly what happened. EPA filed a motion to dismiss based upon their newfound TMDL religion. However, the court declined to dismiss the suit, finding that even 129 TMDLs was not sufficient when the State had 900 impaired water bodies on the WQLS list.⁶⁴ Furthermore, the court recognized that the State had a total of approximately 3,000 TMDLs to prepare, and noted that the justices would all be long past the point of gray hairs before the TMDLs in Montana would be complete.⁶⁵ Therefore, the court let the Plaintiffs put on their proof of the merits.

The court's ruling sent us into the litigation process for a couple of years. During this period, the State came out with a new WQLS list, and we amended our complaint. We took many depositions and wrote more briefs than I will ever care to write again, and finally submitted the case for judgment to the court. Then we waited for a few months while the court issued its decision. In November of 1999, the court published the first of

60. *Id.* at n.6.

61. *Id.* at 1184.

62. *Id.* at 1189, n.7.

63. *Id.* Since every sewage treatment plant and factory must obtain a MPDES permit every five years, a portion of these permits come up for renewal each year. MONT. ADMIN. R. 17.30.1341(6) (1996).

64. *See Friends of the Wild Swan I*, 130 F. Supp. 2d at 1194-95.

65. *Id.* at 1195; *see Friends of the Wild Swan IV*, 130 F. Supp. 2d 1207, 1210 (D. Mont. 2000).

what would be four rulings.⁶⁶

By and large, we did not prevail on our claims and lost this first case. First, we challenged the use of MPDES permits as part of the TMDL concept.⁶⁷ However, the court let that stand since it did not seem unreasonable.⁶⁸ Second, the court found we did not have a mandatory duty claim under the CWA.⁶⁹ Third, we requested special priority be given to native aquatic species like Cutthroat trout and Bull trout when implementing the TMDL program.⁷⁰ We argued that since these species were on the brink of extinction, the State and EPA should have a special responsibility to establish TMDLs in the watersheds where these species are found.⁷¹ Unfortunately, the court did not rule in our favor, finding that the CWA does not require such prioritization.⁷² Rather, the court held that the Act leaves a great deal of discretion to EPA and the State to prioritize their TMDLs.⁷³

But buried in two paragraphs of the decision, Judge Molloy found that EPA's continued approval of the WQLS lists in the face of the failure of the State and the EPA to make significant progress in establishing TMDLs was arbitrary and capricious.⁷⁴ The evidence showed that other courts had ordered TMDLs be completed in five to seven years. In addition, EPA was entering into consent decrees agreeing to complete TMDLs in ten years. Moreover, the State of Montana had passed legislation mandating full compliance on the part of the State by 2007.⁷⁵ Based upon these facts, the court found the pace of TMDL development inadequate, and held that EPA was arbitrary and capricious for continuing to approve of Montana's slow pace.⁷⁶

The court then asked us to write a brief on the remedy. In our brief, we recommended that the court appoint a special master to oversee the process, thereby ensuring TMDLs were developed in a timely fashion.⁷⁷ EPA's remedy was to simply get rid of the judgment against them and send

66. *Friends of the Wild Swan I*, 130 F. Supp. 2d at 1184.

67. *Id.* at 1194-95.

68. *Id.*

69. *Id.* at 1190.

70. *Id.* at 1193-94. Bull trout were listed as an endangered species and the Cutthroat were petitioned for listing at that time.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1195.

75. *Id.* at n.9.

76. *Id.* at 1195. At this point, the State and EPA have missed the TMDL deadlines by more than 20 years as the State had only prepared one nonpoint source TMDL (the Deep Creek TMDL) and a handful of other TMDLs that were really regurgitated MPDES permits.

77. *Friends of the Wild Swan II*, 130 F. Supp. 2d 1199, 1200-01 (D. Mont. 2000).

it back to the Agency to make another attempt at implementing the TMDL program.⁷⁸ EPA did not admit any liability or responsibility.⁷⁹ The State argued that because Montana passed a State law which required all TMDLs to be completed by 2007, the court did not need to order that the TMDLs be done by a specific date.

Ultimately, the court weighed and balanced the remedies. In June of 2000, the court issued its ruling on the remedy.⁸⁰ The court found that EPA's proposed remedy was ridiculous since the Agency's track record was horrific. In fact, 20 years after Congress mandated the TMDL program, the job was still not done.⁸¹ As to the State's proposed remedy, the court noted that the State had not been all too quick in developing TMDLs.⁸² Therefore, the court was unwilling to leave TMDL development solely to State law, and ordered that the TMDLs be completed by the year 2007.⁸³ The court also ordered that if the State did not comply with the 2007 deadline, EPA had a mandatory duty to step in and get the job done.⁸⁴ Therefore, both EPA and the State were under the gun as the court clearly stated that the 2007 schedule was now a matter of Federal law.

Equally important, the court prohibited the State from issuing new MPDES permits on impaired water bodies in order to protect existing water quality while accelerating the pace of TMDL compliance.⁸⁵ In other words, the court prohibited the State from issuing MPDES permits for new factories until the State completed the TMDL(s) for the water body in question. This prohibition ensured that the total pollution budget for each water body was established prior to new permits being issued. However, this prohibition was controversial because no other court had specifically required this of a state. In fact, this was the first time a court had ordered such a prohibition as a means of protecting water quality while accelerating TMDL development, which, after all, is the purpose of the law.

EPA and the State fought the prohibition on new MPDES permits. Both Defendants filed motions in an effort to convince the court to amend its judgment and get rid of this onerous provision.⁸⁶ The third ruling on the

78. *Id.* at 1201.

79. Every time the court issued an order, EPA would file a motion to reconsider, claiming the Agency did not have responsibility for the State's TMDL program. But the court consistently dismissed this claim, indicating that the court was serious about the Congressional mandate under the CWA.

80. *Friends of the Wild Swan II*, 130 F. Supp. 2d at 1199.

81. *Id.* at 1202.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1203.

86. *Friends of the Wild Swan III*, 130 F. Supp. 2d 1204, 1204 (D. Mont. 2000).

motions of the Defendants came on September 21, 2000.⁸⁷ The court upheld its original remedy which prohibited the State from issuing new MPDES permits until the State completed the TMDL for the water body in question.⁸⁸ The court also ordered EPA and the State to submit a schedule by November 1, 2000, describing the order of priority for establishing TMDLs throughout the entire State.⁸⁹ The court indicated that if the State and EPA failed to meet their own deadlines, they would be liable to suit again. This was the court's final judgment on this issue and the stringent remedy stood.

In September of 2000, the State applied the court's prohibition on issuing new MPDES permits to general storm water authorizations needed for all highway construction projects.⁹⁰ Previously, general storm water authorizations consisted of a one page sheet sent to the DEQ. The authorizations would request permission to discharge under DEQ's general permit which covers the whole state.⁹¹ EPA had already approved DEQ's statewide authorization for storm water, and the State had routinely provided such authorizations for highway contractors. These authorizations were never discussed in any of the previous litigation. But for some reason the State latched onto this issue and attempted to shut down all highway construction in Montana. The State claimed DEQ could not complete TMDLs for all of the potentially impacted water bodies, and therefore could not issue authorizations under the general storm water permit.⁹² The State stopped \$28 million in highway construction and told the court, Max Baucus and Conrad Burns that the \$250 million of highway money allocated to Montana the following year could not be used.⁹³ This created quite a stink.

Personally, I believe that DEQ's actions were politically motivated because then Candidate Governor Martz gave a press release about the State's position on this issue before the State had even filed their brief in court. As a result of this political maneuver, the environmental community was castigated as shutting down western civilization, grinding highway construction to a halt and, causing thousands of accidents due to poor road conditions. But the lawsuit brought by environmentalists had nothing to do with highway construction, and it was never our intent to stop federally funded highway projects.

At this point, the State filed a motion to stay the court's judgment

87. *Id.*

88. *Id.* at 1206.

89. *Friends of the Wild Swan II*, 130 F. Supp. 2d at 1202.

90. *Friends of the Wild Swan IV*, 130 F. Supp. 2d 1207, 1207 (D. Mont. 2000).

91. MONT. CODE ANN. § 75-5-401 (2001).

92. *Friends of the Wild Swan IV*, 130 F. Supp. 2d at 1209.

93. *Id.*

claiming that it would cause the end of western civilization as we know it.⁹⁴ In the meantime, the State took the matter up to the Ninth Circuit to appeal the lower court's decision. So we went back to taking depositions, and lo and behold, discovered that DEQ was lax in bringing this motion to the court. In the November 7, 2000 opinion, the court found that the State suspended projects in drainages that were not affected by the TMDL lawsuit.⁹⁵ For example, the State suspended projects on reservations that were not under the court's jurisdiction.⁹⁶ Moreover, the State had made no effort to figure out if it could actually do the TMDLs.⁹⁷ In fact, the State had completed no more than a handful of TMDLs since the court had entered judgment a year earlier ordering the State to get all of the TMDLs completed by the year 2007.⁹⁸ The clock was ticking, and the State was charged with preparing 3,000 TMDLs, yet had made virtually no progress towards this goal.

Needless to say, the court was not pleased with this scenario and issued a very strongly-worded opinion.⁹⁹ The judge was criticized severely in the press, as were environmental groups, by various candidates that were running for office at that time. However, the judge's opinion is very near and dear to my heart. The judge stated, "Some have even characterized this catastrophe as being precipitated by 'radical environmentalists'. In my view citizens who have watched the degradation of precious resources for 28 years are not radical in temperament or policy when they seek to make government agencies comply with the law enacted by Congress."¹⁰⁰ These strong words coming from a federal judge reflect the tenor of this case. In the first judgment issued, we lost five or six claims. But later, because of what I perceive as EPA's and the State's intransigence and refusal to accept the court's decision by constantly filing motions to reconsider and amend judgments, the court really put its foot down.

Since this last decision, the case has been appealed by EPA, DEQ, the timber industry, and agricultural groups represented by John Bloomquist. Currently, the parties are engaged in mandatory mediation at the Ninth Circuit.¹⁰¹ So we will just have to wait and see where it goes from here.

I want to make a couple of remarks about where I see this whole

94. *Id.* at 1207.

95. *Id.* at 1209.

96. *Id.*

97. *Id.* at 1211.

98. *Id.*

99. *Id.* at 1210-12.

100. *Id.* at 1209.

101. Before any party can proceed with an appeal, the parties must engage in mediation to ascertain whether any grounds for settlement exist.

TMDL process going. It is fair to say that the State has found some TMDL religion. State funding and personnel for TMDL development now exist. We can attribute whatever cause we want to that new found religion. But the fact of the matter is that DEQ now has taken notice of its responsibilities and seems to want to do TMDLs on a state basis rather than have EPA step in and develop TMDLs for the State. The schedule approved by the court was a seven-year schedule that specifies by individual drainages when the TMDLs must be completed.¹⁰² The first deadline is coming up at the end of 2001, and we will see whether the State is up to this task.

The State and EPA have also approved a new WQLS list, as they are required to do every two years.¹⁰³ This new list is interesting as it contains 400 WQLSs, whereas the 1996 list contained approximately 900 segments.¹⁰⁴ In other words, about half of the 1996 list was removed from the WQLS list and placed in this other category which is not set out anywhere in the law. The State now claims they do not have enough data to include all 900 streams on the list, even though many of these same streams were listed as polluted on the three previous lists.¹⁰⁵ EPA agrees with the State on this issue. Since the State does not have enough data to classify streams, these segments can be conveniently removed from the list. Once a water body is off the WQLS list, the State is not obligated to complete a TMDL for that water body.

From my perspective, this looks like an effort to play with the numbers. The State figures if they can remove the streams from the list, they can avoid having to develop the TMDLs. This dramatically reduces the State's burden as DEQ can now get the job done with much less expense. Well, I say let's go out and look at the east fork of Lolo Creek where I used to fish. I know that stream is polluted by any definition. And if we assessed any number of the streams removed from the list, I am confident that we would find many of them to be polluted. This issue of whether to use the 1996 or 2000 list will likely be resolved in another forum because as it now stands the State's list is half of what it was two years ago.

Another issue on the horizon is what is an adequate TMDL? Currently, the states are all busy preparing TMDLs. But what the TMDLs are going to mean is anybody's guess. What components need to go into an EPA approved TMDL to assure that water quality standards are met? Are

102. *Friends of the Wild Swan IV*, 130 F. Supp. 2d at 1210.

103. Montana 1996 303(d) List Information (2001), at http://www.deq.state.mt.us/ppa/mdm/303_d/303_d_list-draft.asp.

104. Montana 1996 303(d) List Information (2001), at http://www.deq.state.mt.us/ppa/mdm/303_d/1996303d.asp.

105. In Montana, water bodies can only be placed on the 303(d) list if the sufficient and credible data test is met. MONT CODE ANN. § 75-5-103(30) (2001).

specific numbers required? Are specific habitat components required? Is a sediment budget based on what a stream can handle in terms of a specific number of tons of sediment per year required, or can a TMDL be a general target or goal? If the goal is to reduce sediment in the stream by 30 or 50 percent, who has responsibility for enforcing and implementing the TMDL, EPA or the State? I do not know the answers to these questions. But these are the questions that will arise, not just in Montana, but in at least 38 states where court settlements or lawsuits are pending.

I want to conclude by saying I am a strong advocate for clean water, and the folks that I represent are strong advocates for clean water. I do not think that this particular environmental law is going to be the end of western civilization. In fact, if people take a look at our society, they would see that we live in a country that is, by any measure, incredibly prosperous, and we are very fortunate to be able to live in this country and to enjoy this level of economic prosperity.

Before this country was settled our waters were largely pristine, clean and teeming with fish and other aquatic life. People could go and drink the water from practically every stream and river. Are any of us willing to take a drink out of the Clark Fork River today? How many places do you know where the native fisheries have been impaired? Cleaning up our waters is not too big a price for our society to pay. It is something we owe to our children and grandchildren.

