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Down by the Rivers - Local Governments and Water Rights, Allocations and Protections
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North American Local Government Lawyers: Connecting Our Networks
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Introduction

Municipal governments in the United States and Mexico can play a significant role in developing, refining and enforcing environmental standards for the protection of their communities’ water supplies. Water is the most limited natural resource in the mostly arid border region and is directly related to that region’s future development. The potential role of local government in environmental regulation and enforcement has been heightened by the decade-old NAFTA and its environmental side agreement, NAAEC. Long before Congress enacted the Clean Water Act (CWA) in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” the first environmental laws in the United States consisted of local government ordinances that regulated water pollution, sewage, garbage, and air pollution. Environmental regulation was primarily a matter of federal supremacy under the Mexican Constitution prior to the 1987 Amendments which led to passage of the Ecology Law, which has in turn led to recognition of overlapping federal, state and local competency in this field. It would

1. 33 U.S.C. §1251(a)

2. P. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 *Stan. Envtl. L. J.* 50, 54 (1993)(hereinafter *Act Locally*). Many states have long recognized, for example, the right of a successor landowner to pursue a claim for public nuisance against a predecessor responsible for groundwater pollution. *Tosco Corp. vs. Koch Industries*, 216 F. 3rd 886, 895-896 (10th Cir. 2000). See also *Moore vs. Texaco, Inc.*, 244 F. 3rd 1229, 1232n3 (10th Cir. 2001)(“Texaco could also have been liable for a public nuisance if it knew of subsurface and groundwater pollution caused by a third person prior to its sale of the property and failed to take reasonable measures to abate it.” See Restatement (2d) of Torts §839, 840A cmt. “d” (1979)).
seem most problematic that our nations could even contemplate a unified approach to enhancing the protection of the North American environment in general and water quality in particular when we factor in the divergent legal systems of our two nations, one with a common law system heavily emphasizing the role of the judiciary and the precedential weight of caselaw and the other with a civil law system that gives paramount weight to positive legislative enactments and a correspondingly diminished judicial role. Problematic or not, we do not have the luxury of pursuing separate and independent avenues of environmental protection, particularly with respect to fundamental water quality issues that face our shared border of 2000 miles, almost 12 million people, ten states, and fourteen paired, interdependent sister cities.

Beyond participation as target defendants in environmental enforcement actions, municipal governments in the United States have strong incentives to participate proactively with state and federal government agencies in the enforcement of such environmental laws as the Clean Water Act, an expansive scheme of statutory federalism3 grounded on a division of power between the federal government and “more local levels of government.”4 That role is increasingly visible in the over 82,000 local government entities that make up what we broadly classify as “municipal government” in the United States. More than half of these are special districts, over 3140 are counties, and 19,000 are municipal

3The United States Supreme Court has an “established practice, rooted in federalism, of allowing the States wide discretion ... to experiment with solutions to difficult problems of policy.” Smith v. Robbins, 120 S. Ct. 746, 757 (2000). As the Court recognized in Alden v. Maine, 527 U.S. 706, 748 (1999), “[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”

4R. Craig, Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation, 15 Envtl. L. & Litig. 179,180 (2000)(hereinafter Local or National). A comparable division of power between the federal and state governments and, to some extent, municipal governments, is evident under Mexico’s environmental protection system which is based on constitutional law and is much more advanced and comprehensive than it was prior to 1988 when the Ecology Law was passed. Cf. S. Walker, General Overview of Mexican Environmental Law (1997), http://www.mtnforum.org./resources/library/walkr97b.htm (For example, “[s]tate and municipal authorities are primarily responsible for controlling wastewater discharges into drainage and
corporations, most with populations under 5000.

I. “Think Globally; Act Locally”

Municipal governments have no time to waste in undertaking their proper role in environmental enforcement. The incentives for such enforcement are strong. Municipalities are close to the issue and can realize immediate environmental and health benefits through local enforcement actions. As one commentator put it, “city officials have frequent interactions with the residents affected by local environmental problems; citizens, elected officials and judges drink the water and breathe the air that is being contaminated.” Municipal governments, in short, should heed the axiom “think globally; act locally.” As has already been alluded to above, one important area for such global environmental thinking involves our neighbors to the north and south of our borders, Mexico and Canada. Conscious as we are of the fact that this conference is being held in what many consider the most Mexican of cities, beautiful Guadalajara, capital of the state of Jalisco and the second largest city in Mexico, the focus for the rest of this paper will be on the United States and Mexico.

II. North American Agreement on Environmental Cooperation

On December 17, 1992, President Bill Clinton signed NAFTA, establishing a free trade-zone encompassing the United States, Canada and Mexico. Upon submission to Congress it was enacted into law as the North American Free Trade Agreement Implementation Act. NAFTA, described by some as sewage systems.

5 Act Locally, supra at 55. Beginning with the 1983 La Paz Agreement and continuing with the Border 2012 Agreement, local governments have played an increasingly participatory role in the U.S.-Mexican Border Programs, all of which have been based on an increasingly interdependent, functional and cooperative framework for reducing, eliminating or preventing sources of water, air and land pollution, including groundwater and surface water pollution. U.S.-Mexico Border XXI Program: Progress Report 1996-2000, at 3. It comes as no surprise that one of the most serious environmental challenges in the border region is maintaining and protecting a predictably adequate supply of quality water for a population that is projected to be almost 20 million people by 2020. Border 2012, infra at 5.

the “greenest” trade agreement in history, removed most of the barriers to trade an investment among the United States, Mexico and Canada.

Legitimate environmental concerns were expressed by different sectors of the three North American societies, and increased development and trade activity linked to NAFTA “caused new and intensified environmental pressures on both U.S. borders.”7 These pressures and concerns appointed to the need for some mechanism for resolving environmental disputes within the trade context. The North American Agreement on Environmental Cooperation (NAAEC) was negotiated in conjunction with NAFTA and recognizes the right of each NAFTA party to “establish its own levels of domestic environmental protection and environmental development policies and priorities” while simultaneously ensuring that each party’s “laws and regulations provide for high levels of environmental protection.”8

III. Citizen Submission Process

The unique trilateral character of NAAEC entails a citizen submission process, the role of which has been described as “to embarrass governments into compliance” with their own environmental laws.9 In exchange for their political support of NAFTA, major environmental groups in the United States, Mexico and Canada demanded a tri-national institutional structure with the power to supervise NAFTA 3473) (effective Jan. 1, 1994).


9 Green Expectations, supra at 1614.
parties to ensure that they properly implemented and enforced their domestic environmental laws. This new international institution, the NAAEC, guarantees the NAFTA parties the right to alter or amend those domestic environmental laws, its ultimate goal being to enhance the protection of the North American Environment. Weak implementation and enforcement of domestic environmental laws in both the United States and Mexico, however, have long been recognized as major concerns that led to the creation of the International Commission for Environmental Cooperation (CEC) under the NAAEC and NAFTA. The CEC is a unique decision-making body composed of three environmental ministers, to receive and address submissions by non-governmental organizations or persons “asserting a party is failing to effectively enforce its environmental law.” The Administrator of the U.S. Environmental Protection Agency represents the United States on this body, the primary purpose of which is to address regional environmental concerns. The first few petitions filed under the NAAEC dealt with claims that the United States had failed to enforce U.S. Environmental Law when Congress in 1995 suspended enforcement of the Endangered Species Act, that Canada’s efforts to protect wetlands were inadequate,

10 Id. at 724.

11 Id. at 757. The CEC was established by the NAFTA partners to build cooperation implementing the NAAEC, the environmental side agreement to NAFTA. “CEC addresses environmental issues of continental concern, with particular attention to the environmental challenges and opportunities presented by continent-wide free trade. North American Commission for Environmental Cooperation, “Three Countries Working Together to Protect Our Shared Environment,” http://cec.org/news/details/index.cfm.

12 Id. at 730-731.

13 Id. at 730; Border 2012 at 11 n.3. “The treaty as enacted into United States law specifically determined that in the case of a conflict between the treaty and federal law, federal law would prevail. 19 USC §3312(a)(1)(‘No provision of the Agreement ...which is inconsistent with any law of the United States shall have effect.’).” Public Citizen v. Dept. Of Transp., __F.3d__, 2003 WL 124764 at *3 (9th Cir. January 16, 2003).

14 Id. at 733, 735.
and that Mexico had failed to enforce its environmental laws in connection the death of 40,000 migratory birds in the Presa de Silva, a Mexican reservoir. While the first decade of NAAEC’s life has shown its shortcomings as a model for promoting international solutions to the environmental problems, and while the CEC may have been “born with no teeth,” the citizen submission process may ultimately prove to be a practical environmental dispute resolution mechanism for securing enforcement of domestic environmental laws of the NAFTA parties. Whether and to what extent such practicality is achieved, it is clear that the legal, cultural and political differences that affect United States-Mexico relations, particularly with respect to environmental matters, must be carefully evaluated and understood. These differences must be understood not only by governmental officials but by all participants in the environmental dispute resolution process, including attorneys from both Nations, scientific experts and representatives of nongovernmental organizations.

IV. Enhanced Protection of North American Environment

It is within this context of a new international institution and cooperative enforcement efforts that our nations - Mexico, Canada and the United States - are now committed to enhancing the protection of

15 Id. at 733.

16 Id. Individual environmental instruments like NAAEC implicitly make a concession of certain aspects of the nation’s sovereignty over its national resources, “but despite the NAFTA debate and the new trinational mechanisms that NAFTA creates, the Mexican government - due to sensitivity over sovereignty issues - remains extremely resistant to any sort of internationalization of its environmental policy.” R. Najera, The Scope and Limits of Mexican Environmental Law, http://www.us-mex.org/borderlines/1999/b161/b161env.html. Similar sensitivity and resistance were evident when the U.S. Congress, in enacting NAFTA, made it clear that the Agreement could not be construed “to amend or modify any law of the United States, including any law regarding ...the protection of human, animal, or plant life or health [or] the protection of the environment.” 19 USC §3312 (a)(2).” Public Citizen v. Dept. Of Transp., __F.3d__ 2003 WL 124764 at *3 (9th Cir. January 16, 2003).

17 Green Expectations, supra at 1616.

18 Green Expectation, supra at 1616-1617.
the North American environment. The commitment is not free of growing pains, and much remains to be done to strengthen not only the domestic environmental laws of the NAFTA parties, but also the effective implementation of those laws at the federal, state and local government levels.

V. The TMDL Program and Non-Point Source Pollution

In the United States, one such growing pain has its roots in TMDL Litigation. Found in Section 303(d) of the Clean Water Act, the Total Maximum Daily Load (TMDL) requirement has been described as “the most powerful federal handle on non-point source water pollution that Congress has enacted.”

VI. CWA’s Legislative History: Command and Control

In terms of legislative history, the Clean Water Act was originally passed by Congress in 1972 as...
amendments to the Federal Water Pollution Control Act. 22 This landmark legislation was considered one of the most important environmental initiatives in our Nation’s history. It “established the ambitious goals of restoring the Nation’s waterways and eliminating water pollution.”23 In achieving these goals, Congress “abandoned the age-old water pollution maxim that the ‘Solution to Pollution is Dilution’ and adopted a ‘command and control’ pollution law... driven by a mandatory minimum national technology-based standards for water quality, supplemented by more astringent state requirements, all of which were to be translated into specific effluent limitations at the end of the discharger’s pipe. To make these limitations directly enforceable, the CWA prohibited any discharge of a pollutant into water from a point source without a permit that imposes specific effluent limitations and reporting requirements on the discharger.”24 The heart of the CWA in terms of direct regulation of water polluters, is its command that, with the exception of compliance with specific provisions of the Act, “the discharge of any pollutant by any person shall be unlawful.”25

Up until 1972, there was a basic assumption, and indeed the underpinning of regulatory authority

22 D. Hyde, Are TMDLs the Answer for Cleaning the Nation’s Water? 23 Los Angeles Lawyer 15 (March 2000)(hereinafter Are TMDLs the Answer).

23 Id.; Are TMDLs the Answer, supra at 15.

24 D. Hodas, Enforcement of Environmental law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States and Their Citizens? 54 Md. L.Rev. 1552, 1556 (1995)(hereinafter Triangular Federal System). Mexico’s Environmental Protection System follows a similar approach. Article 8 of the National Waters Law requires the National Water Commission (CNA) to classify Mexico’s national waters according to, inter alia, “their pollution load, their capacity to dilute and assimilate pollutants and the maximum permissible level (LMP) for a particular pollutant. Article 78 requires the CNA to establish quality objectives for national waters and a timetable for achieving those goals. The classification system is used as a basis for issuing permits.” Summary of Environmental Law In Mexico, ch. 9, Protection and Management of Water Resources, Section 9.1, “Establishing Water Discharge Standards,” http://cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/mx09.cfm

25 Local or National, supra at 184.
over water pollution, that states governments and to an extent municipal governments had primary responsibility in the field of water quality protection.\textsuperscript{26} The Clean Water Act adopted an entirely new approach to water quality regulation, creating a division of regulatory authority between the states and the federal government based on the source of the water pollution. \textsuperscript{27}

The regulatory approach used by most states focused on the quality of the receiving waters, as where receiving waters were found to be polluted by a factory’s wastewater discharge and thus the cause of the pollution could be identified and appropriate restrictions and penalties could be imposed. \textsuperscript{28} The Clean Water Act, however, imposed \textit{nationwide} limits on each individual discharge to the Nation’s waters - known as “point sources” - through a permit system known as the National Pollutant Discharge Elimination System (NPDES), requiring all wastewater from point sources to meet mandatory effluent limitations. \textsuperscript{29} As the 11th Circuit Court of Appeals recently observed,\textsuperscript{30} “[p]ermits cannot control all sources of pollution. They are aimed only at pollution coming from a ‘point source,’ which is ‘any discernible, confined and discrete conveyance... from which pollutants are or may be discharged’ that

\textsuperscript{26} \textit{Local or National}, supra at 179.

\textsuperscript{27} Id.; \textit{Are TMDLs the Answer}, supra at 15.

\textsuperscript{28} Id. Pre-1972 federal law and state water quality designations made under it “reflected the common law view of public resource use. Under common law, water could be used freely for waste disposal as long as the discharger did not impair downstream riparian rights by unreasonable use, did not unreasonably interfere with the quiet use and enjoyment of downstream land (private nuisance), or did not unreasonably interfere with rights common to the public in the water (public nuisance).” \textit{Triangular Federal System}, supra at 1566. This view allowed free use of water for disposal until the enforcement authority could prove that the discharge’s pollution reached the “point of unreasonableness.” This economically-based common law view was rejected by the CWA, which was “driven more by a political or ethical view of environmental policy than an economic one.” \textit{Triangular Federal System}, supra at 1566-67.

\textsuperscript{29} \textit{Are TMDLs the Answer}, supra at 15.

\textsuperscript{30} \textit{Sierra Club vs. Meiburg} 286 F. 3\textsuperscript{d} 1021, 1024 (11\textsuperscript{th} Cir. 2002).
offers a particular ‘point’ to measure the amount of pollution being discharged, 33 U.S.C. §1362(14).”

VII. CWA’s Cost vs. Benefit

The CWA’s benefits began to appear, although at a staggering public and private cost of billions of dollars, through technology-based effluent limitations, mandatory types of water treatment processes, secondary treatment for publicly owned treatment works, and pretreatment requirements for various industries discharging of municipal treatment plants.31 Under the Clean Water Act, municipal and industrial dischargers were forced to incur huge costs to build and operate facilities that “treat wastewater to near drinking water standards.”32

VIII. Non-Point Sources of Pollution

Many other sources of pollutants exist besides point sources, unfortunately, and the Clean Water Act did not provide effective mechanisms to achieve similar beneficial results from these “nonpoint sources” which included:

- storm drain discharges
- agricultural runoff
- runoff from timber and mining operations
- sediments contaminated by discontinued practices
- atmosphere deposition and
- naturally occurring runoff from undistributed lands. 33

31 Id.

32 Id.

33 *Are TMDLs the Answer*, supra at 15-16. A number of courts have recognized that groundwater is not protected water under the CWA, *Exxon Corp vs. Train*, 554 F. 2nd 1310, 1322 (5th Cir. 1977)(“The 1972 Amendments have been criticized as dealing ‘only ambiguously and, in some cases, inconsistently with the subject of groundwater.’ 118 Cong. Rec. 10666(1972), 1 Leg. Hist. 589.”). See *Village of Oconomowoc Lake vs. Dayton*
Non-point source pollution was dealt with through section 319 of the CWA and other federal regulatory programs such as the Conservation Reserve Program (CRP), and nonpoint sources were encouraged to implement best management practices on a voluntary basis.\footnote{Are TMDLs the Answer, supra at 16.}

**IX. Section 303(d) of the CWA: Impaired Water Bodies**

Frustrated over the progress of this voluntary approach to nonpoint source pollution control, environmental groups turned to a previously ignored section of the Clean Water Act, Section 303(d),\footnote{M. Hale, Pronsolino v. Marcus: The New TMDL Regulation, 31 Envtl L. 981, 988 (2001)(hereinafter} that required states to prepare and submit to the EPA from time to time a list of impaired water bodies, that is, waters within a state’s boundaries for which effluent limitations imposed by the CWA are not

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\textit{Hudson Corp.}, 24 F. 3rd 962, 965 (7th Cir. 1994, cert. denied, 513 U.S. 930 (1994))(CWA does not assert authority over groundwater simply because those waters may be hydrologically connected to protected surface waters). Other courts have recognized, however, that the CWA’s definition of navigable waters is broad and “encompasses groundwater that is tributary or hydrologically connected to surface waters such as wetlands or creeks.” \textit{Mutual Life Insurance Company of New York vs. Mobil Corp.}, 1998 W.L. 160820, at *1 (N.D.N.Y. 1998). See \textit{United States vs. Eidson}, 108 F. 3rd 1336, 1341-42 (11th Cir. 1996), cert. denied, 522 U.S. 899 (1997)(“It is by now well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce. Tributaries that are natural or man-made, intermittent or continuous, are within the scope of the CWA.” As the District Court observed in \textit{Mutual Life Insurance}, supra at *3, “it is unclear whether groundwater that in fact is connected to navigable water falls withing the CWA. No Circuit Court of Appeals explicitly has decided to question.” See \textit{Inland Steel Co. vs. Environmental Protection Agency}, 901 F. 2nd 1419, 1422 (7th Cir. 1990)(“The legal concept of navigable waters might include groundwaters connected to surface waters”). Cf. \textit{Quivira Mining Company vs. EPA}, 765 F. 2nd 126, 130 (10th Cir. 1985), cert denied, 474 U.S. 1055 (1986)(CWA applies where intermittent creeks and underground aquifers flow into navigable waters). A number of district courts have held, moreover, that the Clean Water Act encompasses groundwaters that are hydrologically connected to regulated surface waters. See, e.g., \textit{Williams Pipe Line Company v. Bayer Corp.}, 964 F. Supp 1300, 1319-20 (S.D.Iowa 1997); \textit{Friends of Santa Fe County vs. LAC Minerals Inc.}, 892 F. Supp. 1333, 1358 (D.N.M. 1995); \textit{Washington Wilderness Coalition vs. Hecla Mining Co.}, 870 F. Supp. 983, 990(E.D. Wash. 1994)(“The logic of these cases is compelling: Since the goal of the CWA is to protect the quality of surface water, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation”); \textit{Sierra Club vs. Colorado Ref. Co.}, 838 F. Supp 1428, 1434(D. Col. 1993). (See generally \textit{Groundwater Jurisdiction Under The Clean Water Act: The Tributary Groundwater Dilemma}, 23 B.C. Envtl. Aff. L. Rev. 603, 644 (1996); \textit{The Clean Water Act: Groundwater Regulation and The National Pollutant Discharge Elimination System}, 8 Dick. J. Envtl. L. & Pol’y 93, 120 (1999); \textit{Private Well Owners Pay Price As MTBE Contamination Exposes the Lack of Groundwater Protection in Federal and New York Law}, 18 Pace Envtl. L. Rev. 135, 165 (2000)
stringent enough to achieve applicable water quality standards.\textsuperscript{36} For each impaired water body in this list, the states were required to establish on a prioritized basis the total maximum daily load for certain pollutants. \textsuperscript{37}

X. Citizens’ Suits

In sharp contrast to the Citizen Submission process under NAFTA with its problematic results, Citizens’ Suits under §303(d) produced strikingly different results. The first 303(d) list was required in 1974, and EPA had thirty days to approve or disapprove lists and loads. Both EPA and the states ignored this portion of the CWA, however, until it was “rediscovered” by environmental groups, who caught EPA by surprise and began to bring citizens’ suits against the EPA for failing to implement TMDLs in accordance with the CWA. They argued that a tight deadline for requiring submission of TMDLs under the CWA was consistent with the congressional mandate that “TMDLs be established in a matter of years, not decades.”\textsuperscript{38} Consent decrees and other orders have been entered in over twenty states lacking a TMDL program whereby EPA, in collaboration with the states, agreed to prepare TMDLs on various

\textit{The New TMDL Regulation)}

36 \textbf{Are TMDLs the Answer}, supra at 16.

37 \textbf{Are TMDLs the Answer}, supra at 16 (The total maximum daily load, or TMDL, is a calculation of the maximum amount of a pollutant that a water body can assimilate and still meet water quality standards, plus adjustments for seasonal variations and a margin of safety for any uncertainty in the calculation process. Once established, TMDLs are allocated among wastewater discharge sources and enforced through permit limits and other restrictions.

schedules and a various minimum rates per year.\textsuperscript{39} In the ensuing blizzard of litigation, these citizens’ suits literally jump-started the TMDL program,\textsuperscript{40} and the litigation-driven TMDL program has left the states “saddled with the duty to prepare TMDLs without adequate funding and without having performed appropriate background monitoring or analysis.”\textsuperscript{41} The time constraints and pressure resulting from TMDL litigation have resulted in TMDLs being implemented on an expedited basis but without sufficient and representative sampling data, leading to “drive by “ listings under §303(d).\textsuperscript{42}

EPA has now responded to the widespread judicial affirmation of its duties pursuant to Section 303(d) and has begun to explore 303(d)’s potential.\textsuperscript{43} EPA’s issuance of TMDL’s for water bodies polluted solely by the nonpoint source pollution received its first judicial approval in \textit{Pronsolino v. Nastri}.\textsuperscript{44} Following the \textit{Pronsolino} decision, EPA promulgated the revised TMDL regulation and took a more prominent stance against nonpoint sources of pollution.\textsuperscript{45} Twenty-nine leading experts in the field of TMDL Litigation, however, have pointed out that 303(d)’s TMDL provision is “fundamentally

\textsuperscript{39} \textit{Are TMDLs the Answer}, supra at 16; \textit{Are TMDLs at a Crossroads}, supra at 63.


\textsuperscript{41} \textit{Are TMDLs the Answer}, supra at 16.

\textsuperscript{42} Id.

\textsuperscript{43} \textit{The New TMDL Regulation}, supra at 990

\textsuperscript{44} \textit{Pronsolino v. Nastri}, 291 F.3d 1123 (9th Cir. 2002)

\textsuperscript{45} \textit{The New TMDL Regulation}, supra at 1005
flawed” and “without enforcement power the TMDL is a toothless provision.”

XI. A Viable Role for Local Government: Voluntary and Participatory

The Administrator of EPA, Christie Whitman, has recognized a general need for state and local governments to cooperate in environmental enforcement by encouraging public participation in the process of creating a TMDL implementation plan. There is a corresponding need for municipal and other local governments to play a viable role in developing a successful approach to nonpoint source pollution control, referred to by some as “the Nation’s next environmental crisis.” Leading commentators have begun to advocate regulation of land use practices, such as land forming and harvesting techniques, as voluntary steps that can be feasibly taken in developing and implementing an effective TMDL.

XII. Objections to Land Use Controls Through TMDL Program

Additional federal regulations flowing from the EPA’s new TMDL program “may effectively result in restrictions on the manner in which landowners may use their land, whenever farming or

46 The New TMDL Regulation, supra at 1010. “Local governments facing tight budgets inevitably will feel pressure to avoid expensive capital investment and operating expenditures if sending pollution downstream is cost-free.” Triangular Federal System, supra at 1558.

47 Id.

48 Id. 1009. Mexico’s environmental protection system has witnessed a similar shift toward more substantial participation at the state and local government level. Areas of federal and state competency are established under the Mexican Constitution, but in the area of environmental regulation, federal and state jurisdictions overlap. Moreover, two constitutional amendments in 1987 “strengthened the power of the state and municipal governments to enact legislation regarding environmental protection matters within their own jurisdiction.” Article 73 was amended to authorize Congress “to enact laws that would establish distinct roles of the federal, state and municipal governments in preserving and restoring the ecological balance.” S. Walker, Constitutional Framework of Mexican Environmental Legislation, contained in General Overview of Mexican Environmental Law (1997), http://www.mtnforum.org/resources/library/wakr97b.htm; Summary of Environmental Law In Mexico, ch. 1, Introduction to the Legal System, Section 1.1, “Structure of Government: National-Subnational Relations,” http://ccc.org/pubs_info_resources/law_treat_agree/ summary_enviro_law/publication/mx09.cfm

49 Id.
ranching operations adversely impact the quality of nearby waters.”\footnote{\textit{Time to Bite the Bullet}, supra at 485.} The agricultural community has understandably perceived this threat as unwarranted and excessive federal intervention and has voiced strong objections to TMDLs.\footnote{Id.} Others have joined in the debate, some sympathetic to the agricultural community, some not.

### XIII. Resistance to Local Governance in Area of Non-Point Source Pollution Control

While zoning and land-use restrictions have traditionally been left to state and local governments, environmental zealots and other critics of agriculture tend to point the finger of blame at “agricultural interest groups,” emphasizing their historically favorable treatment under past water pollution laws and their considerable influence in Congress. These critics argue that “traditional farming practices are the cause of may of our national water quality problems” and “agriculture is the single largest nonpoint source of surface water-pollution.”\footnote{\textit{Time to Bite the Bullet}, supra at 488.} In their eyes, the federal government, presumably through EPA, should assert paramount authority in the area of land use to restrict nonpoint source pollution and that state and local governance of this traditionally state and local function should take a back seat to the federal government.\footnote{Id. at 485. Mexico’s environmental protection system, on the other hand, has long recognized a division of responsibility and the separate jurisdictional authority of the federal, state and municipal governments. In 1988, as a result of the new powers conferred upon Congress, the General Law of Ecological Equilibrium and Environmental Protection (Ecology Law) was passed and, along with the Mexican Constitution, the Federal Environmental Protection law and certain agreements, comprises the first tier of jurisdiction - that jurisdiction conferred upon the federal government. R. Najera, \textit{The Scope and Limits of Mexican Environmental Law}, \url{http://www.us-mex.org/borderlines/1999/b161/b161env.html}. The second tier encompassed state governments, whose jurisdiction stems from their individual constitutions and environmental laws passed by their congresses. The third tier is that of municipal governments, with jurisdiction established under Article 115, covering such traditionally local services as sewage services, solid waste, drinking water, wastewater and all other activities not reserved for the federal or state.
XIV. Previous Congressional Efforts to Address Non-Point Source Pollution

Congress addressed nonpoint source legislation on several occasions in 1994 and 1995. House Bills that would have required EPA to develop water quality criteria for nonpoint source pollution and to publish guidance documents regarding Best Management Practices (BMPs), and would have required states to impose enforceable BMP requirements, were introduced but never became law.54 BMPs should be developed through incentive-based, site-specific, voluntary conservation and management programs, not through top-down command-and-control federal edict and unfunded mandates.

XV. Best Management Practices to Address Non-Point Source Pollution

Following the Republican Party’s regaining majority control in Congress in 1995, markedly divided nonpoint source legislation in the form of proposed amendments to the Clean Water Act failed to pass, with House Republicans concluding that “federal mandates are forcing communities to make funding choices that can be detrimental to the environment.” For nonpoint source pollution, they correctly argued “the most effective method of control is the prevention of pollution in runoff through management practices and measures.” They reasoned that the cause and the nature of runoff are extremely site-specific, and thus a top-down approach for the development and implementation of best management practices is inappropriate.55

XVI. The Local Aspect of CWA Federalism

The political pendulum in the United States has begun to swing back toward the state and local end of “CWA federalism” and the clear trend appears to be against top-down federal regulation, federal mandates and greater deference to state initiatives in this field of environmental law. Federal control over governments.

54 Local or National, supra at 195-96.
local land-use practices to carry out TMDL nonpoint source load reductions is not on the political horizon.\footnote{Id.} Mexico has already witnessed this healthy shift to a more collaborative and interdependent relationship between these levels of government, evident in President Vicente Fox’s remarks on January 21, 2003 during a ceremony in the municipality of San Marcos Tlazalpan to reopen the Ixtlahuaca-Jilotepec highway,: “There is no question that only by working together will we, the three tiers of government, be able to face as many challenges as Mexico faces.”\footnote{Sistema Internet de la Presidencia de la Republica, “Remarks by President Fox,” http://www.presidencia.gob.mx/?P=2&Orden=Leer&Tipo=Pe&Art=4310.}

**XVII. Need for Local Government Assistance and Cooperation**

EPA has now acknowledged that it must have the assistance and cooperation of the states, local governments and other stakeholders and participants in the political process to establish and implement TMDLs under what it hoped would be new TMDL rules.\footnote{Time to Bite the Bullet, supra at 519. “Although all the major environmental laws are federal, the quantity, variety, and geographic dispersion of those regulated by these laws is so great that all the modern major environmental laws provide uniform, minimum national standards with the states “deputized,” to a grater or lesser degree, to do the permitting and enforcing for the federal government. Strong state enforcement programs are invaluable within a federal system. A strong state can respond more rapidly to local pollution problems than can the federal government. Additionally, compared to the federal government, state environmental agencies can better understand local environmental conditions, can be more flexible and innovative in their solutions, can avoid the weight of bureaucratically concentrated federal power, can have more day-to-day interaction with the regulated community and the public. Moreover, law enforcement traditionally has been the responsibility of state and local police, prosecutors and courts. A decentralized state-based system of environmental enforcement should perform several functions. It should inspect and monitor sources of water, air and land pollution, detect illegal activities in the field, and bring violators into compliance through judicial or administrative prosecutions. This system would}
XVIII. Withdrawal of July 2000 TMDL Rule

In an effort to revise its TMDL program under the Clean Water Act, EPA sought to amend and clarify existing regulations implementing §303(d) of the CWA in a proposed rule published in the Federal Register on July 13, 2000, entitled “Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation.”

The effective date of the July 2000 Rule was to be April 30, 2003, but Congress enacted legislation prohibiting EPA from implementing the July 2000 rule. Almost on cue, the United States Supreme Court in a landmark ruling limited the scope of the Clean Water Act, Solid Waste Association vs. U.S. Army Corp of Engineers.59 The other shoe dropped on December 20, 2002, when EPA announced, after being challenged in court by some two dozen parties, that it was proposing to withdraw its July 2000 final rule which revised EPA’s TMDL Program under the Clean Water Act, describing the 2000 rule as “unworkable based on reasons described by thousands of comments.”60 EPA Administrator Christie Whitman also acknowledged that the 2000 rule designed to implement the TMDL Program fell short of its goal of a national program that “involves the active participation and support of all levels of government and local communities.”

XIX. Conclusion

Protecting and maintaining a predictably adequate supply of quality water is an important element of NAFTA’s environmental side agreement, the North American Agreement Environmental Cooperation.

59 121 S. Ct. 675 (2001)

The Border 2012 Program provides a framework for local decisionmaking, setting priorities, and implementing projects in ways that best address the region’s environmental issues. Unlike the EPA’s “command and control” approach that characterized the first three decades of its implementation of the Clean Water Act’s goals and objectives and its initial strategy for addressing TMDL litigation, Border 2012 emphasizes a bottom-up, regional approach that solicits meaningful participation of state, municipal and other local governments and private sector stakeholders, individuals and organizations. The federal government, speaking through the Administrator of the EPA, has now recognized there is a need for municipalities and other local governments to have a substantial role in tackling nonpoint source pollution control. If nonpoint source pollution is indeed the “next environmental crisis” facing the United States, it is no less a crisis facing the border region.

In this third millenium, “we are entering a new stage of history,” President Vicente Fox observed in his January 24, 2003 remarks at the World Economic Forum. He stressed that “humanity has the opportunity to build a different future, a future of bridges instead of walls. A future of inclusion, understanding, and association.”61 As Mexico has recognized and enabled through amendments to its Constitution, the authority of the federal, state and municipal governments overlap in the area of environmental regulation, and there is indeed a role that municipal governments can and should play. That is an idea that finally gained some degree of acceptance within the United States’ environmental protection system, with its newfound encouragement of public and private sector participation, shared responsibilities in decision making and local input from those closest to the particular environmental problem. Further collaboration and greater levels of cooperation among all levels of government and among the citizens of our respective nations will call for creativity, resourcefulness, and flexibility - the hallmarks of effective local government, whether north or south of the border.

Biographical Summary

Ben Griffith earned his Juris Doctor from the University of Mississippi School of Law in 1975. He enjoys a federal and state civil litigation practice with emphasis on Voting Rights Act litigation, civil rights defense, environmental law and public sector insurance defense. He has served as Board Attorney for the 17-county Yazoo-Mississippi Delta Joint Water Management District since 1989 and Board Attorney for the Bolivar County Board of Supervisors since 1983.

He is a member of IMLA's International Committee, served as Chair of IMLA's Counties and Special Municipal Districts Department from 2000 to 2002, and is an IMLA Local Government Fellow and 2002 recipient of the IMLA Distinguished Public Service Award. He is a member of the governing Council of the American Bar Association's Section on State and Local Government Law, serving as the section's Communications Director, and is a member of the Governmental Liability Committee of the ABA's Section of Litigation, member of the Water Resources Committee of the ABA’s Section of Natural Resources and Environmental Law, and member of Defense Research Institute’s Governmental Liability Committee. He is Past-President of the National Association of County Civil Attorneys, recipient of NACo's Distinguished Service Award for his work in promoting passage of the Unfunded Mandate Reform Act of 1995, past-Chairman of the Government Law Section of the Mississippi Bar, a Fellow of the International Society of Barristers, listed in the International Who's Who of Professionals 1996, and Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy.

Ben and his wife, Kathy, live in Cleveland, Mississippi, and are the parents of two children, Clark, a senior Geological Engineering major at the University of Mississippi, and Julie, a sophomore Theatre major at George Washington University.