

# TMDLs, Federal Clean Water Programs, and Good Intentions

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for the NRWA Magazine (1/8/10) unedited

With the best of intentions, the federal Environmental Protection Agency is in full-force implementing the Clean Water Act's authorities to protect the country's surface waters from pollution – especially from non-point sources of pollution and from nutrients.

Last October, in testimony before the House Committee on Transportation and Infrastructure, EPA Administrator Lisa Jackson said, "*The time is long overdue for EPA to reexamine its approach to Clean Water Act enforcement.*" The new EPA Administrator has ordered the agency's Office of Enforcement and Compliance Assurance to begin developing a plan after news reports have claimed that water quality is suffering many parts of the country. Administrator Jackson has said another challenge she wants to tackle is dealing with EPA's expanding universe of things to regulate – namely the over a million non-point sources of pollution to surface waters – such as animal feed lots and stormwater runoff.

The agency's latest approach would focus enforcement on the greatest water-quality threats, including pollution from concentrated animal feeding operations, sewer overflows, and runoff from industrial facilities, construction sites, and urban streets. EPA plans to work with states to improve national enforcement consistency. EPA also plans for federal and state regulators to use updated information technology to identify, analyze and react to serious compliance problems quickly

The New York Times (in a series of articles on the national water program) quoted an EPA official as saying where states fail to conduct enforcement actions; EPA may step in to enforce existing rules. It also reported the likely focus of increased federal oversight includes mining companies, large livestock farms, municipal wastewater treatment plants and construction companies operating sites where polluted stormwater runs off into nearby lakes and rivers.

The environmental community is showing a similar vigor in enforcing federal Clean Water Act authorities through litigation. The December 29, 2009 article, the Florida Times-Union reports:

"[New] rules from the U.S. Environmental Protection Agency, set to be released in January, are the result of a legal battle between environmental advocates and the federal agency. In the waning days of the Bush administration, the EPA agreed to set new standards for the amount of 'nutrients' - which largely result from agricultural runoff and sewage - allowed in Florida's waters. Those will replace the more vague standards currently used by the state. The standards released in January will deal with freshwater and take effect in October; rules for saltwater will be put in place in 2011... An attorney with Earthjustice who filed the initial lawsuit, said the plan would cost about \$2 a gallon in capital costs for most plants, or about \$30 million apiece for each of Florida's largest sewer plants... Supporters of the federal intervention said the state has spent 11 years trying to craft stronger standards and has failed. They also note that other states are expected to face the same standards in the future. 'This isn't just going to be [that] we're going to be the only state this will apply to,' said the executive director of St. Johns Riverkeeper. Around 40 percent of the state's waters are considered impaired, according to advocates, and St. Johns Riverkeeper's Executive Director said that has real consequences for real estate and boating, which are harmed by algae blooms. 'We cannot afford not to clean up our rivers,' he said." Both sides expect more legal action to follow once the EPA reveals its standards.

No reasonable person can argue with the intention to protect our surface waters from pollution. However, as Saul Bellow frequently observed through his ironic reference to the “Good Intentions Paving Company,” the proverbial road due south is paved with good intentions. And many in Florida think the “Good Intention Paving Company” is in full-force in the implementation of the new EPA clean water rules. *“It's going to cost people in Florida a whole lot of money, and in many, many cases, it's not going to help the environment, They're not necessary, and they're not based on good science”* said Jim Alves, an attorney for several water utilities. The new standards could cost the state between \$24.4 billion and \$50.7 billion in initial construction costs and another \$400 million to \$1.3 billion a year to fund operations, Florida Water Environment Association Utility Council President Jim Oskowis estimated in a December 3, 2009 letter to the Governor. More than two-dozen members of Florida's Congressional Delegation, including both Senators also signed a letter of concern to the U.S. EPA [source: Florida Times-Union].

The Florida litigation is allegorical to the main federal clean water program; the Federal Total Maximum Daily Load (TMDL) program. The goal of the Clean Water Act (CWA) is *“to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”* Under the CWA, states are required to develop lists of *“impaired”* waters as determined by the states under the federal authorities. Impaired waters, are waters for which technology-based regulations and other required controls are not stringent enough to meet the water quality standards set by states. The law requires that states establish priority rankings for waters on the lists and develop TMDLs, for these waters. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards.

EPA's TMDL homepage ([www.epa.gov/waters/ir/index.html](http://www.epa.gov/waters/ir/index.html)) lists 44,023 impaired waters in all the states combined. We can all agree that it is virtuous to clean up all of these water bodies. However is implementing a TMDL synonymous with cleaning up a water body? Does implementing a TMDL mean that the clean-up plan implemented is the most environmentally progressive and most economical, which was the “intention” of the policy makers who initially crafted the legislation to authorize the TMDL program? The following is a letter to EPA from a Member of Congress who is hearing from his local community interests that are witnessing the actual impact and effects of one particular TMDL in rural New Mexico. Do the complaints from the local community interests sound “Bellowsque?” What if, as aphorism has it, that plural of anecdote is data? How many of the over 44,000 impaired waters are being remediated with a plan similar to the TMDL plan in rural New Mexico – what would that data indicate of the federal TMDL program?

Please help us at National Rural Water Association determine if the current national clean water program is working the way it was indented. All our policies are only a reflection of the thoughts and desires of the membership (you). And please read the following letter from Congressman Lujan (MN) because, to paraphrase **Mark Twain**, there is nothing as **pesky as a good anecdote**.

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# Congress of the United States

House of Representatives

Washington, DC 20515

December 3, 2009

The Honorable Lisa Jackson  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Ave NW  
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Dear Administrator Jackson,

I am writing to request your assistance on the implementation of the federal Total Maximum Daily Load (TMDL) program in a small, rural and economically modest community in my Congressional District (Mora, New Mexico).

The water quality in the Mora River has resulted in the adoption of an enforceable TMDL program in the watershed, which includes extremely costly revisions to the National Pollutant Discharge Elimination System (NPDES) permit held by the Mora Mutual Domestic Water & Sewer Association (MMDWSA) that only has 140 users.

The problem, reported to me by the local officials, is that the current TMDL scheme adopted by the State of New Mexico is not the most economical for the town of Mora, nor the most environmentally beneficial to the Mora River that could have been selected. They have also expressed that other options could have been adopted resulting in a less economically stressful and more environmentally friendly solution.

MMDWSA estimates that the current TMDL compliance plan will result in rate increases of up to \$60 a month to pay for a new system that will likely cost over \$1 million. All of these costs will be passed onto the already economically stressed ratepayers. Additionally problematic is that the current TMDL enforcement plan will do little to reduce nutrient loading to the river because MMDWSA only is responsible for a small fraction of the total loading, and MMDWSA will likely be forced to land-apply their sewage which will be very costly while complying with the TMDL, but could still result in the same nutrient loading from the sewage by turning it into a non-point source of pollution to the river.

The current enforcement plan does not have any compliance measures for reducing the non-point sources of pollution to the river. Some of these sources contribute over 90% of the pollution loading to the river including the over 900 septic/cesspool systems (many that are not working adequately) and other land-use activities contributing to the non-point source loading to the river. According to MMDWSA, the current plan will result in proliferation of new septic systems in the area by drastically raising the cost of public sewer which will only add to the non-point sources of pollution to the river.

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Under the EPA TMDL program, would it have been permissible for this TMDL for the Mora River to be implemented in an alternative manner? Such as requiring more of the loading reductions to be assigned to non-points sources such as faulty septic systems/cesspools near the river, allowing MMDWSA to pay non-point source contributors to reduce their loading to off-set their required reductions, utilizing the EPA's Water Quality Trading Policy. Additionally, could a solution be modeled after the one provided to the Town of Taos, allowing the extension sewer lines in future years to convert individual septic/cesspool systems to the public sewer system to be used as credits (for the loading reductions realized from the elimination of those individual waste disposal systems)?

If the federal TMDL program would have permitted some or any of these alternative compliance options, a plan could have been designed to be more economical and environmentally beneficial to the river. I hope that these alternatives can these still be considered to allow the opportunity for needed compliance to take place and for the longevity of the Mora River.

MMDWSA would be interested in alternative compliance options that allow for expansion of the public sewer system and the reduction of individual septic/cesspool systems, which is likely the most progressive and long-term solution to improving the river's water quality.

Thank you for your assistance. I look forward to working with you to clarify these questions to allow for this TMDL to be implemented in the most economically and environmentally beneficial manner that will result in local support of the program.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Ray Lujan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ben Ray Lujan  
Member of Congress