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POLLUTION SOLUTION 2

By Charles E. Gilliland

Texas is cleaning up its water. In an effort to avoid environmental law suits, the Texas Natural Resources Conservation Commission plans to clean up all of Texas' waters that have been identified as polluted within the next ten years. However, most Texas property owners highly value their private property rights and view environmental regulations as government infringing on their rights. In that vein, many landowners have expressed dismay at the adoption of water cleanup projects, called Total Maximum Daily Load projects. Landowners view them as the next environmentally inspired threat.

The first step in a Total Maximum Daily Load (TMDL) program is to assess water quality in a body of water and identify the sources of the pollution found in it. Program officials then establish the amount of pollution the water can contain while still supporting its officially designated uses, such as contact recreation (swimming and water skiing), noncontact recreation (boating and fishing) and domestic water (household water and water for livestock). If a lake is used for contact recreation, for example, it is not permitted to contain high levels of bacteria or toxic chemicals.

Water quality standards established by the Texas Natural Resources Conservation Commission (TNRCC) are used to establish the allowed pollution levels. A portion of the allowable pollution amount is allocated to each land use and to the previously permitted sources of pollution found in the watershed. Because the allocated amounts may or may not equal the current pollution levels originating from each land use, the process threatens to pit individuals pursuing different land uses against each other in a struggle for a larger portion of the allowed pollution load.

Setting Pollution Levels

For impaired water bodies (those too polluted to support their designated use), TNRCC and the Environmental Protection Agency (EPA) are required to approve a plan assigning pollution allowances to various classes of users as a means of achieving the required water quality. In other words, cities or farms that have been identified as contributors to a specific kind of pollution in a watershed are allowed to continue polluting up to a specified level. If the allowed level is exceeded, the cities and farms are required to adopt management practices designed to reduce the polluting runoff and meet the goals of the TMDL plan.

Although TMDL projects have recently emerged as a flash point in environmental protection, regulations targeting water pollution date to the early 1970s when Congress adopted the Clean Water Act. This measure sought to eliminate or greatly reduce water pollution, charging the EPA with the task of tackling the problem. The subsequent attack on pollution took a technological approach to water quality improvements by requiring operators of industrial plants, concentrated agricultural operations and municipal wastewater plants (point-source polluters) to obtain permits and adopt practices designed to reduce emissions.

The Clean Water Act also included provisions based on the amount of pollution found in water. This approach, embodied in the TMDL program, focuses on the entire spectrum of potential polluters in a watershed and identifies so-called nonpoint-source pollution as well as point-source pollution. Fertilized fields, native pastures, city lawns and streets, golf courses and construction sites are all potential nonpoint-source polluters. Storm waters can transport fertilizer and pesticide residues as well as animal wastes and chemicals from vehicle exhausts. These substances eventually find their way into rivers, streams and lakes, adversely affecting water quality.

EPA Forcing Action

While the TNRCC can readily identify individual plants that contribute substantial amounts to total pollution, identifying nonpoint-sources of pollution, which are scattered throughout the watershed, is much more difficult. Because of this, the states and the EPA have historically avoided the TMDL approach to water cleanup.

However, a flood of litigation has forced the EPA to begin the TMDL process in earnest. The Clean Water Act instructs states to devise TMDL programs for impaired water bodies and mandates that if a state fails to attack the problem, the EPA must design a TMDL program from the federal level. Much of the current litigation seeks to force the EPA to act if particular states do not. Currently, the EPA is under court order to act in 17 states and has been sued in 12 others. Intentions to sue have been announced in five more states. Texas is not currently involved in any of this litigation. To avoid potential action, however, the TNRCC has pledged to complete TMDL projects for all impaired Texas waters within ten years.

The TMDL process begins when the state creates a list of impaired water segments known as a 303(d) list. This list identifies impaired waterways, types of pollution present and prioritizes the waterways for TMDL plan development. The current Texas 303(d) list contains more than 200 water segments in five water basin groups.

Uncooperative Landowners Face Action

Next, a watershed action plan designed to reduce pollution to acceptable levels is devised by TMDL program officials. This plan assigns the maximum load to the various sources of pollution. The plan enlists the cooperation of rural landowners in adopting water quality management plans in consultation with the Texas State Soil and Water Conservation Board (TSSWCB). The board helps the landowners identify best management practices for their land. Owners who refuse to cooperate or willfully violate plans face potential action by TNRCC. Those who cooperate may receive funds from the water conservation board to implement the water quality management plans.

Apppearance on the 303(d) list does not automatically ensure that a TMDL plan will be implemented for the water segment. If repeated testing proves that the segment meets the standards for its intended use, TNRCC can remove it from the list, and a TMDL plan will not be required. Texas landowners should be prepared to request additional testing if their properties are within a watershed with stream segments appearing on the 303(d) list.

Since 1997, when Texas enhanced its water pollution reduction program, no TMDL projects have received EPA approval. However, work has progressed on TMDLs in several areas, including the Arroyo Colorado of the Lower Rio Grande Valley and the Bosque River. All TMDL plans currently in development are described at the TNRCC website (<http://www.tnrcc.state.tx.us/water/quality/tmdl/>). The site lists the areas involved, the designated uses for the water segments, officials involved in TMDL plan development and percentages of completion for each step of the TMDL process.

Cleanup by Committee

The TNRCC administers or designates a lead agency to guide the TMDL drafting process. Designated lead agencies differ depending on the area. A river authority or university may lead in some cases, while private consultants provide the leadership in others.

The lead agency assembles an advisory committee made up of local citizens from potentially affected groups, including industry, agriculture, the general public and environmentalists. This committee must guide the TMDL process to a consensus on an action plan to reduce water pollution. If consensus eludes the committee, the TNRCC is responsible for allocating the pollution load.

The State of Texas plans to rely on voluntary adoption of specified best management practices by landowners to accomplish the goals established in TMDL plans. Urban landowners will be required to deal with TNRCC while agricultural and timber-growing interests will work with the water conservation board. Prescribed practices will depend on the land use involved, the water body and the targeted pollutants and will likely vary substantially among watersheds and landowners. Better land managers may already have adopted the required practices while others may incur costs to comply.

After the process has been completed, the load allocated and an action plan designed, TNRCC must approve the completed plan and forward it to the EPA for federal approval. Water bodies will be monitored to document the plan's progress.

Despite efforts to devise workable TMDLs, a second round of litigation has emerged as various groups have sued the EPA over the allocations and restrictions in some TMDL plans.

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Landowner's Stake

Many landowners undoubtedly would prefer to avoid this process. They see nonlandowners as interfering with the profitable use of their land by second-guessing their management skills. Because of this, some landowners may choose to ignore the TMDL process and its voluntary prescriptions for cleaning up water pollution. But doing so will create more difficulties in the future by perpetuating pollution of Texas waters.

Agriculture represents the lion's share of nonpoint-source pollution in many rivers and streams. Affected downstream populations are, by contrast, increasingly urbanized, with little or no connection to the land. They view clean water as an element essential to their quality of life. By refusing to cooperate, landowners may create a perception they are irresponsible members of the community and may invite

eventual imposition of the mandatory regulations they scorn.

The campaign to improve Texas water quality will not evaporate. Landowners may find it in their best interests to become part of the solution to the water pollution problem. By becoming part of the community process and participating in public hearings, landowners are likely to exert some influence on the process.

To take a proactive stance, landowners should examine the list of impaired water segments on the Internet (http://www.tnrcc.state.tx.us/water/quality/00_303d.html) or request a printed copy from the TNRCC by telephone. If a river or stream near you appears on the list, inquire about the TMDL process for that water body. ♣

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