

Owing largely to developments on the international trade front, billions of new dollars are flowing into U.S. Department of Agriculture programs designed to reduce agricultural nutrient discharges. This presents an historic opportunity to address nutrient impairments in a way that does not place the full burden of that effort on municipal point sources.

Reducing nutrient discharges to achieve water quality goals is a top priority in waterbodies around the nation. What remains unclear in many cases, however, is whether the costs of making the required nutrient reductions will be carried solely by municipalities – or whether other key nutrient sources like agricultural operations also will help carry the burden.

The developments discussed in this article present the municipal community with a unique opportunity to create and fund programs capable of making the agricultural community a full partner in the nutrient reduction effort. This article explores the interplay between these factors and outlines an effort that could result in a win-win for both clean water agencies (publicly owned treatment works (POTWs)) and agriculture.

I. Background

The Clean Water Act's (CWA's) structure inherently pits point source dischargers and nonpoint sources against each other by counting nutrient loads from agricultural and other nonpoint sources as "background loadings" in total maximum daily load (TMDL) and point source effluent limitation calculations. Often, little or no assimilative capacity is left over for point sources after agriculture's background loadings are subtracted from a stream's assimilative capacity. This results in extremely low discharge limits, high treatment costs and, sometimes, the need

to purchase credits to make up for shortfalls in either capital or available treatment technologies.

While POTWs process most of the point-source contributions of nutrients, their discharges generally pale in comparison to the nutrient loadings into the same streams from agriculture. In the Mississippi River basin, for example, it has been estimated that some 90 percent of the nutrient loadings are contributed by agricultural activities. Even in the heavily populated Chesapeake Bay watershed, agriculture accounts for roughly 50 percent of the nutrient load. With a 60 percent reduction in nutrients needed in that watershed to achieve objectives for the year 2010, it is clear that even complete elimination of point source nutrient discharges would be insufficient.

If municipalities are not to be effectively reduced to the status of zero dischargers – and that without guaranteeing that water body goals are achieved – it is essential to find a way to induce the agricultural community to contribute to the solution to nutrient overloading.

II. USDA Funding on the Rise

Over the last decade or so, the U.S. Department of Agriculture (USDA) has developed a range of programs designed to assist farmers and ranchers to improve their environmental stewardship of the land. These include the

USDA-administered Conservation Reserve Program (CRP), the Conservation Security Program (CSP), the Environmental Quality Incentives Program (EQIP).ⁱ These programs provide funding to support or encourage the adoption by farmers of voluntary management practices and structural measures to protect water quality and other environmental values. Many of the practices eligible for funding are specifically intended to minimize nutrient runoff from agricultural lands.

In the last three years, however, USDA's environmental programs have been supercharged. The CSP, for example, is a new program that operated in federal fiscal year (FY) 2004 at just short of \$1.8 billion. The pre-2002 Farm Bill EQIP program distributed payments averaging \$9.3 million per year to support environmentally friendly farming practices. Following passage of the 2002 Farm Bill, EQIP allocations increased to \$400 million (FY 2002), \$626 million (FY 2003), and \$908 million (FY 2004) – and allocations are expected to rise to \$1.3 billion (FY 2007). Altogether, EQIP's authorization over five years totals \$5.8 billion. Simply put, USDA is investing on the order of two to three billion dollars per year – \$40 billion over 10 years – on environmentally-oriented programs.

III. Why The Shift?

This historic shift of resources was born, at least in part, of the need to find ways to get money to farmers without triggering sanctions by the World Trade Organization. Historically, the U.S. has assisted its farmers by using commodity price supports, which compensated growers at near normal rates of return even where a surplus reduced the market price of their crops. Such supports, however, encouraged overproduction and effectively lowered the world price for the agricultural products involved. In past years, this market effect has been cited by foreign nations seeking World Trade Organization sanctions against U.S.-grown commodity crops.

The pressure to transform simple price supports into environmental payments is a part of an effort by the USDA and the United States Trade Representative (USTR) to re-cast a sizeable quantity of the massive farm support system so that it continues to assist the American farmer but does not result in the kinds of market distortion that are likely to trigger international sanctions. In the current round of trade negotiations which began in 2002 with meetings in Doha, the capital of Qatar (the Doha Round), the USTR has put forward a formal initiative that all but confirms that U.S. agricultural policy is moving away from traditional price supports and toward non-price-based payments under programs such as the EQIP, CSP and CRP.

While the ultimate “conversion” is likely to be long and contentious, there is no reason to believe that this shift of billions of dollars of farm subsidies into environmentally-based programs will end any time soon.ⁱⁱ As a result, the opportunity to invest these sums in cleaning up nutrient-enriched streams (to the benefit of the streams, U.S. trade relations, and downstream municipal dischargers) will remain within reach as long as this international pressure persists.

IV. Future Challenges

While promising, USDA's effort to shift its traditional price supports towards more environmentally-based initiatives presents at least two significant challenges to the municipal community. Each of these challenges could significantly affect the impact of these programs on POTWs.

First, meaningful reductions of agricultural nutrient loadings can be achieved via these rich federal programs only if funding targeted to critical watersheds and farmers within those watersheds are encouraged to participate.

USDA has not embraced this role to date. For example, while it is true that the CSP requires that its funds be expended only in specifically-identified watersheds,ⁱⁱⁱ those watersheds are nominated by state governors rather than prioritized strictly on the basis of their water quality needs. On the other hand, farm groups in the mid-west are busily populating sub-basin and basin committees created by the largest U.S. watershed restoration effort – the Mississippi River Basin/Gulf of Mexico Hypoxia Task Force – to ensure that USDA dollars are distributed broadly to all farmers.

The time is certainly ripe for the nation’s POTWs to seek a place at the table as decisions are made about how best to distribute USDA’s environmental dollars. Steps that can be taken at the local level include identifying waterbodies where restrictive nutrient limitations are largely due to upstream agricultural loadings, and becoming active in sub-basin and basin committees to ensure that USDA’s environmental programs in fact target and solve existing environmental problems and benefit the nation’s clean water agencies.

Second, it is possible that members of the agricultural community could attempt to convert USDA-funded water quality improvements into nutrient “credits” – and then sell them to needy point sources, much as wetlands mitigation credits are sold today. The difference, of course, is that water quality benefits achieved through the application of programs such as EQIP and CSP will already have been purchased by federal tax dollars. Plans to resell federally-purchased water quality improvements to point sources would be troubling – both philosophically and economically. Municipalities should actively enquire about their agricultural partners’ intentions on this point, and take early steps to secure protection against any such “double dipping.”

V. Conclusion

The international trade developments discussed in this article are flowing billions of new dollars into USDA programs designed to reduce nutrient discharges from agriculture. An historic opportunity is at hand to address nutrient impairments in our nation’s waters in a way that does not place the full burden of that effort on our municipal point sources. In order for these programs to fulfill their promise, however, the POTW community will have to assert and insert itself to ensure that these new dollars are applied in a way that improves water quality – and reduces the burdens on municipalities in the future.

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Legal Perspectives is a publication of the National Association of Clean Water Agencies (NACWA). NACWA thanks Richard Davis for his work on this issue.

Founded in 1970, NACWA represents over 300 of the nation’s POTWs. NACWA members are environmental stewards, serving the majority of the U.S. sewered population, and collectively treating and reclaiming over 18 billion gallons of wastewater every day.

We welcome your comments on *Legal Perspectives*. Please contact Alexandra Dapolito Dunn, General Counsel, NACWA, by telephone at 202/533-1803 or via e-mail at adunn@nacwa.org.

ⁱ EPA operates a similar but much smaller program known as the Targeted Watersheds Program.

ⁱⁱ See, e.g., 10/16/05 Washington Post article at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/15/AR2005101501230.html>.

ⁱⁱⁱ See http://www.nrcs.usda.gov/programs/csp/2006_CSP_WS/index.html.