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AFBF v. EPA: Intervenors' Briefs In Opposition of AFBF's Summary Judgment Motion

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In April, three intervenors filed its briefs in opposition of AFBF's summary judgment motion. While the briefs made arguments mirroring the EPA, the intervenors diverged from the agency in several instances. This document highlights each intervenor's arguments.

Chesapeake Bay Foundation (CBF) – Brief in Opposition of AFBF's Summary Judgment Motion

Standard of review: CBF argues the court must accord the EPA high deference and a presumption of validity of agency action when the EPA promulgated the Bay TMDL. CBF further alleges AFBF bears the burden of overcoming the presumption.

Standing: CBF, like EPA in its cross-summary judgment motion, argues AFBF failed to prove standing. Unlike EPA, CBF mentions two different reasons why AFBF cannot prove standing. First, CBF argues there is no nexus between the alleged injury and EPA's conduct; rather, CBF contends any injury would be due to state decisions, not EPA decisions. Moreover, CBF argues the alleged injury cannot be imminent; rather, CBF posits the alleged injury is speculative, dependent on state action.

Response #1: EPA was legally authorized to issue Bay TMDL: Initially, CBF supports EPA's arguments made in its cross-summary judgment memorandum. CBF adds several arguments: (1) EPA did not impose unlawful interference with states when

creating the Bay TMDL; to the contrary, EPA “did nothing more than act in accordance with a judicial order and state specific request; (2) EPA is lawful since no state has filed suit challenging the authority of the EPA to issue the Bay TMDL; this is particularly persuasive since CBF argues the States have more at stake than Plaintiffs.

Response #2: Public Notice and Comment Was Sufficient: Again, CBF supports EPA’s arguments made in the agency’s cross-summary judgment memorandum. CBF adds and argues the EPA acted valid by providing the TMDL public notice process no longer than its internal procedural requirement. Further, CBF argues the models was a process of cooperative federalism and not federal usurping of state power. Next, CBF supports EPA’s contention that its model documentation was adequate for the public notice and comment period. Here, CBF’s rationale seems to significantly coincide with similar rationales made by EPA.

Response #3: Bay TMDL Models not Arbitrary and Capricious; Rather, the Models had a Rational Basis: CBF contends arbitrary and capricious review allows agency decisions to stand as long as an agency can give a reasonable explanation for its decision based on the information it had at the time. Further, CBF argues the court can only find in favor of AFBF if it determines there is no rational relationship between the model chosen and the situation to which it is applied. Given this deferential standard, CBF argues that notwithstanding uncertainties in the models EPA and the states together have reasonably concluded that use of the models and the existing data provide the *best* scientific support for allocating pollution loads throughout the Bay watershed.

Nation Association of Clean Water Agencies (NACWA) - Brief in Opposition To Plaintiffs’ Motion for Summary Judgment

Argument #1: Holistic “Watershed Approach” Embodied in TMDL Program Lawful and Necessary to Restore Water Quality: NACWA contends “this litigation threatens to decimate two central tenants of this essential watershed approach – full and fair contribution by all major source sectors to the clean-up effort and full and coordinated participation by all states in the watershed. NACWA continues by contending that the inclusion of both nonpoint and point sources allocations was lawful and reasonable. Further, NACWA contends inclusion of both upstream and downstream States was lawful and reasonable; NACWA reasoned nothing in the Clean Water Act prevents such inclusion and otherwise the TMDL would be non-effective. NACWA then writes: “one is left to wonder if Plaintiffs’ goal is to evade responsibility for their members’ fair contributions to the Bay cleanup effort, given the fact that the alternatives they offer to the Bay TMDL are inequitable and would likely lead to years of delay.”

Argument #2: EPA Cannot and Has Not Assumed Authority of Bay States Over Allocations and Other Implementation Decisions: Here, NACWA concedes states’

primacy in controlling water pollution. But, NACWA contends EPA acted properly when it obtained consent of the Bay states to create the TMDL. Much of NACWA's closely mirrors EPA's arguments in its cross-summary judgment motion. NACWA writes: "Municipal Associations take EPA at its word that 'each Bay state retains discretion regarding how to implement the TMDL allocations' and incorporate this argument by reference." Lastly, NACWA argues that notwithstanding an adverse ruling against the EPA, the allowable nutrient load delivered at each state line should remain the same.

Argument #3: Point Sources Should not be Targeted for Further Reductions: NACWA argues the TMDL imposes more stringent controls on point sources than on nonpoint sources; any more controls on point sources via NPES Permits would be cost defective and benefit the environment less significantly than similar requirements on non-point sources. NACWA argues "without commensurate nonpoint source reductions, water quality standards will not be met and will require adjustment." Next, NACWA argues other options should be exercised rather than "backstopping" against point sources. For example, NACWA argues EPA has the option to utilize a Use Attainable Analysis to assess the attainability of the Bay's existing tidal water quality standards.

Pennsylvania Municipal Authorities Association (PMAA) – Motion in Opposition to Plaintiff's Motion for Summary Judgment

Argument #1: EPA Lawfully Created TMDL: PMAA argues the Bay TMDL is a number. PMAA addresses Plaintiffs' cite to the case of *Pronsolino v. Nastri*: PMAA argues the case hurts Plaintiffs' position more than helps because the court in *Pronsolino* ruled the Garcia River TMDL was a lawful exercise of EPA power under the CWA, even though it addressed non-point sources exclusively.

Argument #2: TMDL's Current Allocations Should Not Be Disturbed Because They Were Developed With the Assistance of the States: Here, PMAA basically reiterates EPA's contention that due to "cooperative federalism" the TMDL cannot be said to usurp State power.

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