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AFBF v. EPA: Synopsis of AFBF's Summary Judgment Motion

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On January 27, 2012, the American Farm Bureau Federation (AFBF) filed its motion and memorandum in support of summary judgment in the United States District Court for the Middle District of Pennsylvania. Summary judgment generally requires the requesting party to prove there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

In a complaint filed January 3, 2011, AFBF seeks the court to overturn the EPA Chesapeake Bay Final Total Maximum Daily Load (TMDL). The TMDL sets a total pollution cap on nitrogen, phosphorous and sediment discharges throughout the covered region.

Argument

AFBF essentially makes three arguments in its summary judgment motion: (1) the Environmental Protection Agency (EPA) unlawfully exceeded its Clean Water Act (CWA) Authority by establishing mandatory watershed-wide implementation plans upon subjected jurisdictions; (2) EPA violated the Administrative Procedure Act by restricting public access to critical information during the public comment period; and, (3) EPA engaged in arbitrary and capricious rulemaking. AFBF asserts each argument justifies the abolishment of the EPA Final TMDL. Each argument and any sub-arguments are addressed below.

EPA's Final TMDL Unlawfully Exceeds CWA

AFBF makes seven sub-arguments supporting its contention that EPA exceeded its CWA powers:

First, AFBF asserts CWA Section 303 does not authorize EPA to dictate implementation requirements. AFBF reasons EPA has some powers under the CWA and the TMDL implementation (specifically 402 permitting for point source discharges and grant money allocations for state nonpoint source pollution management programs); however, EPA powers do not extend to crafting state implementation plans, even when EPA uses its backstop authority. AFBF also claims the CWA and relevant case law suggest state implementation plan creation is vested with the states; and, even when EPA uses its backstop authority, states nonetheless control the formation of their implementation plan.

Second, AFBF pleads Section 117(g) does not authorize EPA to dictate implementation requirements. AFBF contends Section 117(g)(providing EPA the power to ensure that management plans are developed and that implementation is begun) does not permit the EPA to issue final TMDL. Rather, AFBF submits EPA's power is limited to awarding or withholding implementation grants to states.

Third, AFBF proposes neither Executive Order 13508 nor any consent decree, memorandum of understanding, or settlement agreement confers authority on EPA to dictate implementation requirements. AFBF reasons none of the sources cited by EPA permissibly expand CWA authority to EPA.

Fourth, AFBF advances EPA regulations do not authorize EPA to impose TMDL implementation requirements on the states. AFBF rationalizes the CWA merely requires TMDL(s) to provide a calculated number that represents the total amount of a given pollutant that a waterbody can receive without violating its water quality standards; nothing in the CWA requires an entity establishing a TMDL to also impose allocations among all sources. Thus according to AFBF, EPA regulations are inconsistent with the CWA and cannot justify the Final TMDL.

Fifth, AFBF insists the detailed allocations and EPA-imposed backstops unlawfully impose implementation requirements on the states. AFBF explains that since the final TMDL sets forth a binding allocation scenario, the affected jurisdictions are no longer free to choose both if and how to implement the Final TMDL; thus, EPA impermissibly abrogated the CWA provision that allocated implementation plan construction to the States.

AFBF alternatively reasons EPA unlawfully imposed “backstop” adjustments to state implementation plans. Specifically, EPA’s allocation changes to three states were unlawful. AFBF urges such measures violate the State’s power to administer its own implementation plan.

Sixth, AFBF stresses EPA lacks the authority under the CWA to require TMDL implementation under the banner of “reasonable assurance.” AFBF reasons the reasonable assurance requirement in the Final TMDL lacks any basis in the CWA and is therefore impermissible.

Seventh, AFBF submits upstream allocations in the TMDL are contrary to the CWA. AFBF reasons EPA cannot expand its TMDL authority beyond the authority of the downstream States for whom EPA is acting. According to AFBF, the CWA provides no further authority.

Alternatively, AFBF claims EPA justification based on *Arkansas v. Okalahoma* is off base since the case failed to even mention TMDL.

As an ancillary point, AFBF proposes EPA has lawful options to address waters in upstream States other than implementing a final TMDL. For example, AFBF contends EPA can establish upstream water quality standards (and associated TMDLs); the agency cannot, however, simply declare new regulatory authorities that circumvent Congress’s carefully crafted scheme.

EPA Withheld Important Information From the Public During the Comment Period

AFBF submits three main points as to how the EPA inadequately held information from the public during the comment period.

First, AFBF contends key components of the “Scenario Builder” (model used to estimate sediment and nutrient loads and the effectiveness of best management practices in reducing loads from various sources) were not provided to the public for review. AFBF claims the only information available upon the opening of the public comment period for Scenario Builder was a single document describing how the model was developed.

Second, AFBF asserts key documentation for the watershed model (calculates fate and transport of pollutants throughout the Chesapeake Bay watershed) was not provided to the public for review. AFBF explains some documents available were outdated, making its availability of little value to the public. EPA scientific peer review committee (Chesapeake Bay Program’s Scientific and Technical Advisory Committee, hereinafter STAC) requested watershed model documentation be completed before public review; AFBF believes EPA allegedly ignored this request.

Third, AFBF proposes key documentation for the water quality and sediment transport model was not provided to the public for review. AFBF rationalizes the full and complete document was available after the close of public comment period.

The Final TMDL is Arbitrary and Capricious

AFBF presents two main points supporting why the Final TMDL is arbitrary and capricious.

First, AFBF asserts EPA's models were used to support management decisions that were beyond the models' predictive capabilities. AFBF reasons the watershed model and underlying data (including inputs from Scenario Builder) was "not appropriate for development and implementation at the local watershed scale." This is because the model is mainly geared toward the Bay itself and its major tributaries.

Second, AFBF claims the models used flawed data. AFBF provides the following example: the EPA determined that 50 percent of all cultivated crops used conventional tillage, even though the United States Department of Agriculture, Natural Resources Conservation Service reported the same figure as seven percent. The 43 percent swing in estimates significantly alters the total TMDL calculation. AFBF proposes this one discrepancy changes the loading estimate in the Chesapeake Bay Basin by over eight million pounds per year.

Conclusion

AFBF asks the court to grant its summary judgment motion for all the reasons provided within its supporting memorandum. The court ordered EPA to submit its cross-motion and brief in support of summary judgment by March 27, 2012.

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