

Procedural History: American Farm Bureau Federation v. Environmental Protection Agency

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This document contains the procedural history of AFBF v. EPA, a case filed in the United States District Court for the Middle District of Pennsylvania (Case No. 11-cv-00067-SHR). As this case is currently active, please check this document periodically for updates.

AFBF v. EPA Procedural History

January 10, 2011: AFBF Files Complaint

AFBF makes four claims in its initial motion for relief.

First, AFBF claims EPA's final TMDL is arbitrary and capricious. AFBF reasons EPA utilized models that used erroneous assumptions, were not adequately calibrated or validated and, were not capable of assigning valid pollutant loadings to individual sources.

Second, AFBF claims EPA failed to provide adequate public notice and comment. AFBF provides three reasons to support its claim. First, AFBF asserts the agency failed to provide the public with a meaningful opportunity to comment on the Draft TMDL and participate in the regulatory proceeding. Second, AFBF claims the EPA failed to provide the public with sufficient access to the models and other information on which it relied to develop the final TMDL. Third, AFBF posits some of the most vital information that EPA relied upon continued to change even after the close of the brief comment period.

Third, AFBF claims the Final TMDL violates the Clean Water Act (CWA) and EPA regulations. AFBF reasons the EPA exceeded its delegated authority under the Act and otherwise violated the Act and its own regulations.

Fourth, AFBF claims EPA's Final TMDL is *ultra vires* (meaning beyond EPA's authority) due to the reasons stated in the paragraph immediately above.

March 14, 2011: EPA Answer to Complaint

EPA responds to AFBF's assertions as true, false, or uncertain. EPA denies all AFBF causes of action.

March 25, 2011: Chesapeake Bay Foundation (CBF) and Others File Joint Motion to Intervene as Defendants

CBF files a motion to intervene. The following groups join: Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County West Virginia Public Service District, Midshore Riverkeeper Conservancy, National Wildlife Federation. The group makes four conjoined arguments in support of their motion: (1) the group made their motion in a timely manner; (2) each member has a strong interest in the issues that are the subject of the action; (3) without the TMDL the Bay's water quality will not improve and may worsen; (3) the group has defenses shared with the main action; (4) the group will not unduly delay or prejudice the adjudication of the original parties' rights by filing joint briefs, without raising collateral issues, and agree to be bound by the Court's final scheduling order.

March 25, 2011: Municipal Clean Water Associations File Motion and Memorandum in Support of their Motion to Intervene as Defendants

This group seeks intervention *of right* and permissive intervention. Intervention *of right* automatically mandates a party's intervention. Permissive intervention potentially allows intervention; granting intervention is left to the discretion of the presiding judge.

This group consists of the National Association of Clean Water Agencies, Maryland Association of Municipal Wastewater Agencies, Inc. (MAMWA), and Virginia Association of Municipal Wastewater Agencies, Inc. (VAMWA) (collectively "Municipal Associations)."

The Municipal Associations provide three primary and interlinked arguments in support for intervention: (1) The Municipal Associations have a significantly protectable interest that has been previously recognized in similar circumstances; (2) The Municipal Associations discharge directly to or immediately upstream of waters that are already listed for TMDL development, and, like the facilities and lands owned by Plaintiffs' members, are now subject to the control strategy established by the TMDL; and, (3) The Municipal Associations interest in this litigation is considerably different than EPA's interest. Specifically, the TMDL would present significant problems for the Municipal Associations: economic upgrade costs, corresponding rate increases, and limitations on economic growth and development in the municipal sewer service areas; also, additional discharge restrictions will burden this group.

June 3, 2011: CBF Files Memorandum in Support of their Motion to Intervene as Defendants

CBF seeks intervention as a matter of right and permissive intervention.

As for intervention as a matter of right, CBF requests this status for three reasons.

First, CBF asserts their motion is timely.

Second, CBF claims their interest is substantial and would be harmed should plaintiffs' action be successful. Specifically, CBF proposes it has four substantial interests: (a) restoration of natural resources, (b) efforts supporting the reduction of pollutant loads, (c) proportional allocation of pollutant loads and control efforts, (d) and preservation of settlement agreement in *Fowler v. EPA*.

Third, the government does not adequately represent CBF's interests. CBF reasons the EPA's duty to serve the broad public precludes the agency from adequately representing its particular interests. Specifically, CBF claims its interests do not change with the interchanging of new Executive Administrations, unlike EPA. Also, CBF asserts EPA's commitment to ensure that the Bay TMDL remain in its current form is subject to external pressures, such as Congressional oversight, unlike the CBF's similar commitment. Next, CBF posits it cannot and did not write the TMDL and cannot prescribe the manner in which it is implemented. Further, CBF alleges it has no ability to control decision of appeal without intervention. Last, unlike EPA, CBF has a unique interest in preserving the terms of the settlement agreement in *Fowler v. EPA*.

As for permissive intervention, CBF requests this status for four reasons: (1) their motion is timely, (2) intervention would not impede the prompt resolution of the issues raised by Plaintiffs, (3) CBF will not bring cross-claims, counterclaims, or other claims unrelated to this litigation, (4) and, CBF's intervention will assist in the just resolution of this case.

June 20, 2011: Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene

AFBF oppose both permissive and mandatory intervention for the CBF and Municipal Associations group (hereinafter "Proposed Intervenors").

As for invention as a matter of right, AFBF provides two reasons for mandatory intervention.

First, AFBF proposes the Proposed Intervenors' interests in this case are adequately represented by EPA. Specifically, AFBF asserts the Proposed Intervenors speculate and generalize that the EPA cannot adequately represent their interests. Also, AFBF claims there is a complete unity between the CBF Group and the EPA: both believe the Final TMDL is a lawful exercise of EPA's statutory authority, is based on sound modeling, and was established with adequate notice and comment.

Second, AFBF advances that none of the Proposed Intervenors have a legally protectable interest relating to this action that would be impaired by a judgment in favor of the plaintiffs.

As for the Municipal Associations, AFBF claims this group would be benefited, not burdened, by a ruling favoring Plaintiffs due to saved compliance costs. Next, AFBF claims the Municipal Associations incorrectly assume agriculture allocations will shift to municipality allocation with

the TMDL overturned; AFBF seeks to terminate the entire TMDL, not reallocate pollutant limits. Also, AFBF posits the CBF group lacks an interest that would be impaired by a judgment in favor of the Plaintiffs. The absence of a federal TMDL for the entire Bay watershed does not authorize discharge of pollutants or authorize any increase in pollution.

As for the CBF group, AFBF claims this group's interest in preserving future litigation and enforcement options is not a sufficient interest to justify intervention. AFBF reasons this litigation does not affect CWA regulation of point source discharges and the CBF Group remains able to allege violations of those regulations as before. Further, AFBF proposes there is no interest nexus between the *Fowler* settlement agreement and this litigation. The TMDL is not the fruit of the *Fowler* litigation as the CBF Group claims. Lastly, AFBF asserts the CBF group proves no expertise or knowledge beyond that possessed by EPA.

As for permissive intervention, AFBF claims the Proposed Intervenors participation in this litigation will be merely duplicative of the EPA's efforts. Also, AFBF asserts the interests articulated by the Proposed Intervenors are collateral to the specific issues of statutory authority and regulatory process before the Court.

June 27, 2012: Pennsylvania Municipal Authority Association (PMAA) Motion and Memorandum to Intervene as Defendant

PMAA asserts its right to intervention and in the alternative requests permissive intervention. PMAA's reasoning closely mirrors those made by the Municipal Associations memorandum filed on March 25, 2011.

July 05, 2012: Municipal Clean Water Associations' Reply to Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene

The Municipal Associations group (Group) retorts AFBF's Motion Opposing Intervention. This group makes four primary responses.

First, the group asserts that the Plaintiffs' reliance on the presumption of adequate representation is misplaced. The Municipal Associations refer to Third Circuit precedent holding governmental interest is sometimes not identical to individual parochial interest. The group pleads this precedent supports their right to intervention.

Second, the group argues AFBF incorrectly posited the group and EPA's interests are the same. The group proposes EPA's interest is to achieve compliance with water quality standards; in contrast, the group's interests are more immediate and direct in the nature and extent of their members' specific regulatory compliance requirements as established in the TMDL.

Third, the group submits Plaintiffs incorrectly categorize the Municipal Associations' interest as unimpaired by a decision favoring the Plaintiffs. The Municipal Associations claim Plaintiffs filed this lawsuit to limit the scope of the TMDL and subsequently provide relief for the

agriculture industry. Vacating the TMDL would cause uncertainty upon projects and would place capital investments of Municipal Associations' members at risk.

Fourth, Plaintiffs are incorrect to state its initiation of this lawsuit is not designed to harm the Municipal Associations' members. If Plaintiffs prevail, there is a significant likelihood that a shift in the burden of pollution reductions to point source contributors, such as Municipal Associations members, will occur.

July 07, 2011: Chesapeake Bay Foundation (CBF) Group's Reply to Plaintiffs' Consolidated Opposition to the Proposed Intervenors' Motion for Leave to Intervene

The CBF responds to the Plaintiffs' opposition against intervention. The CBF group counters the Plaintiffs' argument for non-intervention.

First, CBF group claims Plaintiffs are incorrect to assert the CBF's interests are not legally cognizable, as their interest is too general. CBF submits that if the TMDL is set aside water quality will continue to degrade, harming natural resources essential to CBF's educational and restoration programs.

Second, CBF group argues the plaintiffs incorrectly posit EPA and CBF's interests are substantively similar. For example, transitions in executive powers change EPA goals; whereas, CBF's goal substantively remains the same. Moreover, CBF has taken administrative and judicial actions to force EPA to undertake the very actions challenged by Plaintiffs.

July 14, 2011: AFBF's opposition to Pennsylvania Municipal Authorities Association's (PMAA) Motion for Leave to Intervene

AFBF challenges PMAA's intervention motion since" (1) EPA and PMAA share a "general alignment of interest;" (2) PMAA's general interest does not equate to a legally protectable interest; and, (3) PMAA's participation in this lawsuit would be unnecessarily duplicative.

July 27, 2011: PMAA's reply to Plaintiffs' Opposition to Motion for Leave to Intervene

PMAA disagrees with AFBF's three main arguments against their intervention. PMAA's rationale closely mirrors arguments made by the Municipal Associations Group and CBF Group's replies submitted on July 5, 2011 and July 7, 2011 respectively.

October 11, 2011: AFBF Motions and Submits Supporting Memorandum for Miscellaneous Relief

AFBF seeks permission to complete the administrative record. In support, AFBF makes four arguments to support its pleading.

First, AFBF claims EPA's compiled record omits documents that were before EPA at the time of its decision and so the record is incomplete.

Second, AFBF submits EPA has refused to complete the record with documents pertaining to its technical modeling that were before the agency at the time of its decision. AFBF asserts the missing documents highlighted flaws in the EPA's modeling, EPA's awareness of those flaws, and its decision not to address them.

Third, AFBF criticizes EPA's refusal to include American Nutrient Policy Council's (ANPC) LimnoTech Report. AFBF asserts EPA did consider the ANPC Report prior to its submission of the Final TMDL and therefore should be included in the administrative record.

Fourth, AFBF seeks further discovery to adequately complete the record.

October 13, 2011: Court's Order on Motions to Intervene

The court grants all three motions for leave to intervene. The three groups seeking intervention are the Municipal Associations group, the Pennsylvania Municipal Authorities Association (PMAA), and the Chesapeake Bay Foundation (CBF) group (collectively Proposed Intervenors). The court grants both intervention as a matter of right and permissive intervention.

As for intervention as a matter of right, the court determined that the Proposed Intervenors met all four requirements. First, the court ruled the Proposed Intervenors made timely motions. Second, the court determined the Proposed Intervenors had legally protectable interests. The court separately addressed each party's interest:

Municipal Associations: The court ruled this group has two legally protectable interests: the group's continued discharge and sediment into waters of the Chesapeake Bay watershed pursuant to state-issued NPDES permits and its economic expenditures made in light of current TMDL allocations.

PMAA: The court determined PMAA has the same legally protectable interests as the Municipal Associations.

CBF Group: The court decided that given their past legal, educational, and physical efforts geared toward protecting and restoring the Bay, and the personal use and enjoyment of the Bay by the groups' individual members, the CBF group demonstrates a legally protectable interest.

Third, the court determined each party had a potential impairment of interests. Again, the court addressed each party's potential impairment.

Municipal Associations and PMAA: The court agreed that each party's assertion that a greater burden may shift to them if the TMDL is struck down is a plausible impairment of interest.

CBF Group: The court agreed with CBF that an adverse decision in this suit could jeopardize the interests of the CBF group in preserving habitat, protecting wildlife, and maintaining their members' use and enjoyment of the Bay.

Fourth, the court ruled the Proposed Intervenor are inadequately represented within intervention. The court reasons the proposed intervenors' *narrow* interests may conflict with EPA's broader interest of protecting the public welfare and thus EPA may not adequately represent their interests.

As for permissive intervention, the court ruled that even if intervention as a matter of right were not permitted, all proposed intervenors meet the threshold for permissive intervention. Each group made their timely motion with claims that had a question of law or fact in common.

October 28, 2011: EPA's Memorandum in Opposition to Plaintiff's Motion to Complete the Administrative Record

In this document, EPA discredits AFBF's contention that EPA filed an incomplete record to the court.

EPA initially claims Plaintiffs failed to meet their burden of proof that expansion of the administrative record is *necessary*. According to EPA, the Third Circuit recognizes only two exceptions to the rule limiting judicial review to the administrative record compiled by the agency: where the record does not demonstrate the factors considered by the agency; or, where a showing of bad faith in agency decision making is made. EPA posits AFBF cannot prove either exception.

As for the first exception, EPA denies that it failed to include documents that it considered in its Final TMDL decision-making process. Also, EPA submits AFBF cannot prove otherwise. AFBF requested six documents to be added to the record: five EPA emails related to the Final TMDL process and the America Nutrient Policy Council's (ANPC) LimnoTech Report rebutting the models used in the Final TMDL. EPA denies that any of these documents were considered when creating the Final TMDL.

Furthermore, EPA contends Plaintiffs cannot overcome EPA's presumption of good faith. Also, EPA asserts none of AFBF's requested documents were improperly excluded from the record. Moreover, EPA posits the requested information does not provide novel, revelatory or any other information suggestive of a bad faith.

Concerning the ANPC Report, EPA denies consideration for several reasons: the report was submitted the EPA 20 days before the TMDL was signed; Gary Shenk, who led the effort to develop the watershed model that was the subject of the ANPC report, read the ANPC report and determined that it contained fundamental errors, did not contribute relevant information that EPA had not already considered in evaluating the watershed model, and should not be considered in making allocation or other decisions regarding the final Bay TMDL; the Scientific and Technical Advisory Committee of the Chesapeake Bay Program (STAC) and four external peer reviewers corroborated Mr. Shenk's findings.

As for the second exception, EPA asserts Plaintiffs failed to overcome the presumption against discovery in Administrative Procedure Act Cases because they failed to show agency bias. EPA also submits that Plaintiffs misinterpret relevant judicial precedent.

October 28, 2011: CBF Memorandum in Opposition to Plaintiff's Motion to Expand the Record and for Discovery

CBF discredits AFBF's motion to expand the record to include its American Nutrient Policy Council-LimnoTech Report (ANPC report) and EPA emails. Specifically, CBF makes three main contentions. First, CBF contends Plaintiff's inaccurately assume that the ANPC report is accurate. CBF reasons the Scientific and Technical Advisory Committee (STAC) of the Chesapeake Bay Program found that ANPC report's comparison of the Chesapeake Bay Program and NRCS models is flawed and does not provide sufficient evidence to suspend implementation of the Chesapeake Bay TMDL. Second, CBF opposes Plaintiff's expectation that EPA's model must be "correct." Instead, CBF adopts a different standard: reasonable and useful considering its objectives. Third, CBF asserts the requested documents are not relevant to the Court's inquiry.

November 14, 2011: AFBF Reply Brief to CBF and EPA Opposition of Motion for Miscellaneous Relief

AFBF argues against CBF and EPA's motions in opposition to their request to expand the administrative record. Specifically, AFBF pleads the Court need only consider whether Plaintiffs have clearly shown that the documents in question were, in fact, considered by EPA. AFBF also pleads it does not have to show bad faith. AFBF seeks the Court to add six documents: the American Nutrient Policy Council-LimnoTech Report (ANPC report) and five emails sent or received by EPA officials.

In regards to the ANPC report, AFBF submits EPA conclusively established that it considered the ANPC Report in its decision making process. Further, AFBF reasons EPA cannot credibly assert the report was not considered because the report was erroneous.

In regards to the five emails, AFBF asserts EPA considered the five emails when drafting the Final TMDL. AFBF pleads EPA at a minimum indirectly considered these documents. AFBF states EPA offered no logical reason to distinguish these documents from other documents in the record that illustrate the Agency's decision-making process; also, the contested emails are no different in substance than other emails in the record. Further, AFBF argues EPA and CBF erroneously attacked the merits of the ANPC Report; AFBF reasoned the attacks have no value in AFBF's instant motion to expand the record.

Lastly, AFBF alleges discovery is warranted to complete the record. Plaintiffs state it has not requested a limitless fishing expedition based only on a hunch. The record contains too few details about agricultural pollution in the Chesapeake Bay Basin: it contains only a single document referencing the ANPC report and a small sampling of documents related to agriculture.

December 28, 2011: Court Order on Plaintiff's Motion for Miscellaneous Relief

The court rules on AFBF's motion to continue discovery and expand the record to include the ANCP/LimnoTech Report and the five EPA emails. The court grants the motion in part and denies in part.

First, the court clarifies the proper standard of proof: plaintiffs must make a clear showing that the documents at issue were before the agency and were considered, directly or *indirectly*, by EPA during the TMDL drafting process. With this in mind, the court turned to each proposed addition to the record. Later, the judge addressed AFBF's request for additional discovery.

Regarding the ANPC report, the court determined EPA staff members received, reviewed, and analyzed the ANPC Report prior to the issuance of the TMDL. Therefore, the court determined the report was considered and will be added to the administrative record. The court reasoned EPA missed the point when arguing that the Report cannot be included since it is deeply flawed; only consideration before the Final TMDL matters.

Regarding two of the five emails related to the TMDL Model, the court ruled on the Perkinson email and the Pollack email. The Perkinson email was an email chain between EPA Regional Administrator and Virginia Department of Conservation and Recreation employee concerning the Watershed Implementation Plan guidelines. The Pollack email was an email chain commenced by a Virginia Department of Environmental Quality employee.

The court added the Perkinson email to the record. The court reasoned the email was considered by the EPA before the Final TMDL and EPA included other emails by the same author on the same topic in the administrative record. Unlike the Perkinson email, the court denied its addition to record. The court reasoned there was no evidence to suggest EPA considered this email in drafting the TMDL and the website was not initiated by the EPA.

The remaining three emails dealt with TMDL allocations. The court ruled on the Pollack email, the Corbin email, and the Shenk email. The Pollack email was commenced by EPA Senior Advisor to Virginia Department of Environmental Quality Employee regarding the WIP guidelines with requested feedback. The Corbin email was an email indicating a timeline for submission of Virginia's WIP and notice that Virginia's WIP will satisfy EPA's draft allocations. The Shenk email was an email concerning the draft WIP.

The court determined the Pollack and Shenk emails will be added to the record. The judge reasoned the emails were considered by the EPA and even though its information may be cumulative, that alone is no reason to deny completion of the record. Unlike the Pollack and Shenk emails, the court denied adding the Corbin email to the record. The judge reasoned the Corbin email does not request feedback and no response is given.

Lastly, the court denied additional discovery for AFBF. The court clarified AFBF's standard: Plaintiffs had to make a strong showing of bias or incompleteness to obtain additional discovery. Plaintiffs argued incompleteness but failed because Judge Rambo determined: (1) Plaintiffs did not point to EPA procedures that define the scope of an administrative record; (2) Plaintiffs did

not prove *fundamental* or otherwise *critical* documents were missing from the record; and (3) the size of the record was large enough to prevent additional discovery.

January 11, 2012: Court Order Setting Dates and Deadlines

In this document, Judge Rambo sets dates and deadlines for both parties:

<u>Party</u>	<u>Type of Motion</u>	<u>Deadline</u>
Plaintiffs	Initial Summary Judgment Motion and Brief	January 27, 2012
Defendants	Cross-Motion and Brief for Summary Judgment	March 27, 2012
Intervenors	Briefs in Support of Defendant's Cross-Motion for Summary Judgment	April 20, 2012
Plaintiffs	Reply Brief	May 20, 2012
Defendants	Reply Brief	June 20, 2012
Intervenors	Reply Brief	July 13, 2012

January 27, 2012: Plaintiffs' Motion and Memorandum in Support of Summary Judgment

AFBF files its initial summary judgment motion against EPA. AFBF makes three primary arguments: (1) 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 these arguments justify the abolishment of the EPA Final TMDL.

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