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Legal Challenge to EPA's Promulgation of Final Chesapeake Bay TMDL

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Abstract prepared by Ross Pifer (Penn State Law) for the Chesapeake Bay Program's Scientific and Technical Advisory Committee as a follow-up to the workshop addressing Multiple Models for Management in the Chesapeake Bay

On January 10, 2011, American Farm Bureau Federation (AFBF) and Pennsylvania Farm Bureau (PFB) filed suit against EPA challenging the promulgation of the Final Chesapeake Bay TMDL. In this litigation, AFBF and PFB seek to prevent EPA from engaging in any further activities related to the enforcement or implementation of this Final TMDL. This presentation addressed the legal basis for the claims asserted by AFBF and PFB, EPA's legal response to the complaint, and the current procedural status of the litigation.

Since the filing of the original complaint, numerous parties have entered the litigation. In addition to the AFBF and PFB, the plaintiffs in this lawsuit now include the Fertilizer Institute, National Chicken Council, U.S. Poultry & Egg Association, National Pork Producers Council, National Corn Growers Association, National Turkey Federation, and National Association of Home Builders. Organizations that have been granted permission to participate in the litigation as intervenor defendants in support of EPA include Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, National Wildlife Federation, Virginia Association of Municipal Wastewater Agencies, Maryland Association of Municipal Wastewater Agencies, National Association of Clean Water Agencies, and Pennsylvania Municipal Authorities Association.

The specific relief requested by the plaintiffs is: (1) a court declaration that the final TMDL is contrary to federal law, (2) a court declaration that the EPA violated the Administrative Procedures Act in the process of issuing the final TMDL; (3) a vacation of the final TMDL; and (4) the enjoinder on the enforcement, application, and implementation of the final TMDL by EPA or any other body. To justify the grant of the requested relief, plaintiffs assert a number of legal arguments.

Plaintiffs argue that, in promulgating the final TMDL, EPA exceeded the authority granted to it under the Clean Water Act. According to this argument, there is no authority for EPA to dictate implementation requirements as this is the exclusive province of states. Plaintiffs argue that neither sections 303 nor 117 of the Clean Water Act provide EPA with such implementation authority. Similarly, the relevant executive order and consent decrees do not provide a legitimate basis for the actions taken by EPA.

Plaintiffs also argue that the final TMDL is flawed because EPA violated the notice and comment requirements for agency action. They point to the 45-day public review period as being insufficient. Additionally, plaintiffs allege that key information related to the models used by EPA was not available for public review during the notice and comment period.

Finally, plaintiffs argue that EPA's rulemaking was arbitrary and capricious. To support this argument, plaintiffs claim that EPA made decisions that were beyond the predictive capacity of the models used. They also argue that EPA "fed its models flawed data." As an example to support their argument, plaintiffs point to EPA's determination that 50% of crops were raised using conventional tillage while an NRCS report indicated this figure to be 7%. As another example, plaintiffs argue that EPA used inaccurate assumptions on manure runoff by treating all animal feeding operations as being covered with impervious surfaces and by considering that all manure on impervious surfaces flows directly into watercourses.

In defense of these claims asserted by plaintiffs, EPA initially argues that plaintiffs have failed to prove standing to bring this lawsuit. EPA asserts that no evidence has been submitted to establish a basis for plaintiffs to represent the legal interests of its members. EPA also counters each of the arguments asserted by plaintiffs. EPA argues that the establishment of the final TMDL was a proper exercise of authority. The TMDL does not impose implementation requirements according to EPA. Rather, the TMDL was developed through a collaborative process.

With regard to the issues pertaining to notice and comment, EPA argues that the 45-day period provided sufficient opportunity, particularly when there has been an open debate on this topic for more than a decade. Additionally, EPA argues that the final TMDL is an "informal adjudication" not a rule so there was not a requirement for any notice and comment period.

EPA also argues that its usage of the models should only be overturned if there is not rational relationship between the model and situation. EPA disputes the contention of plaintiffs that it used flawed data relating to conservation tillage as its data was more comprehensive than the cited NRCS report. In any event, EPA argues that it should be entitled to deference in its decision making, and that its actions in establishing the final TMDL were neither arbitrary nor capricious.

Both sides to the litigation filed Motions for Summary Judgment seeking to have the court resolve the case without the necessity of holding a trial. The briefing on these motions was completed in July 2012. Arguments were held before the court in October 2012. The parties now await the judge's decision. Depending upon the judge's ruling, the case could be resolved in favor of either party without any further proceedings. If the judge believes that there are factual issues that need to be determined, then the case will continue to proceed towards a trial.



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