CPR Case Brief:

Food & Water Watch v. EPA*: Judge Rejects Challenge to the Trading Provisions of the Chesapeake Bay Pollution Diet*

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Introduction

On Friday, December 13, Judge Rudolph Contreras of the U.S. District Court for the District of Columbia dismissed a lawsuit asking him to strike down the nutrient trading provisions contained in the Environmental Protection Agency's (EPA) plan to restore the Chesapeake Bay, known as the Total Maximum Daily Load (TMDL). His decision means that the TMDL will be implemented with water trading as one component of its pollution-control requirements. The decision follows a Pennsylvania district court opinion that also upheld the legality of the TMDL against a challenge by the American Farm Bureau Federation.[1]

Here, plaintiffs Food & Water Watch and Friends of the Earth argued that the TMDL's authorization of pollution trading and offsets would give rise to "hotspots" of pollution in violation of the Clean Water Act (CWA). In dismissing the suit, the judge found that the plaintiffs sued too early—in the absence of any concrete evidence that "hotspots" or other CWA violations had occurred, the judge said that plaintiffs had not suffered actual injury. And, since the trading provisions within the TMDL encouraged—but did not require—states to participate in trading or offset programs, the court also found that the challenged action was not reviewable final agency action.

While offsets and nutrient trading, also known as water quality trading, raise a host of issues, including serious environmental justice concerns,[2] the judge's decision reinforced the legality of the Bay-wide TMDL. The states and EPA may now direct their full attention to achieving the pollutant reductions necessary to restoring the biological integrity of the Bay.

Background

The Chesapeake Bay is choking on too much pollution in the form of nitrogen, phosphorus, and sediment. Years of half-hearted interstate efforts to check polluting emissions and restore the health and vitality of the nation's largest estuary have failed. The Obama administration breathed new life into the restoration efforts with a 2009 Executive Order instructing EPA to work with state governments to reduce pollutants flowing into the Bay. A year later, EPA released the final Bay-wide TMDL,[3] a comprehensive "pollution diet" for the Bay. A TMDL specifies the maximum amount or "load" of a pollutant that can be discharged into the waters from all sources combined while still allowing that body of water to meet water quality standards.[4] Specifically, the Bay-wide TMDL calls on states to reduce nitrogen and phosphorus loadings to the Chesapeake Bay by 25 percent by 2025, and sediment loadings by 20 percent.

Section 10 of the TMDL, the provisions most in dispute in this case, outlines EPA's expectations for how states will keep pollution levels down despite future population growth. The section begins by discussing offsets, which "[f]or purposes of the Chesapeake Bay TMDL, mean[] . . . compensating for the loading of a pollutant of concern from a point or nonpoint source with a reduction in the loading from a different source or sources, in a manner consistent with meeting [water quality standards]."[5] Section 10.2 covers water quality trading. The EPA has defined trading as an approach that "allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs. Trading capitalizes on economies of scale and the control cost differentials among and between sources."[6]

Food and Water Watch and Friends of the Earth sued EPA on October 3, 2012.[7] The American Farm Bureau Federation and the National Association of Home Builders intervened to "ensure that states have the ability to use water quality trading as a cost efficient means to implement TMDLs."[8]

At Issue

Food & Water Watch and Friends of the Earth alleged that EPA authorized offsets and water quality trading in the Chesapeake Bay TMDL and that this authorization violated the CWA by unlawfully allowing new and increased pollution discharges into the Bay watershed. The plaintiffs also argued that EPA's authorization of pollution trading and offsets violated the notice-and-comment requirements of the Administrative Procedure Act.

The Court's Reasoning

Plaintiffs Lacked Standing

The U.S. Constitution requires a plaintiff to have "standing" to bring a case.[9] To demonstrate standing, the plaintiffs must show three things: (1) they have suffered actual injury, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) the injury is likely to be redressed by a favorable decision.[10] Judge Contreras found that the plaintiffs' allegations failed on all three counts.

To show injury, Food & Water Watch and Friends of the Earth argued that their members' use and enjoyment of the Bay would be affected by the creation of "hotspots" of pollution once states began implementing offsets and water quality trading. The judge disagreed, noting that the TMDL was written to avoid this problem and that the creation of "hotspots" was therefore highly speculative.[11] In support, the judge emphasized that the TMDL does not allow offsets or trading if it would result in an "exceedance of [water quality standards] in either receiving segment or anywhere else in the Bay watershed."[12]

Even if the plaintiffs could demonstrate injury, the court found that the injury was not

traceable to EPA's inclusion of trading and offsets in the Bay TMDL. To satisfy this prong, Food & Water Watch and Friends of the Earth claimed that EPA indirectly caused their injury by "authorizing" trading in the TMDL, allowing states to engage in the trading that gave rise to their injury. They also argued that that the TMDL directly caused their injury because it strong-armed states into implementing trading programs. Since, according to the court, EPA had actually approved the trading program at issue in 2003, the TMDL itself did not "authorize" nutrient trading.[13] While the court acknowledged that EPA could withhold federal grants if a state failed to implement the TMDL in accordance with EPA's recommendations, it did not agree that this amounted to coercion. Instead, "[o]ffsets and trades are but one option in the States' arsenal for [accommodating population growth while complying with the CWA and TMDL]."[14]

Finally, the court concluded that the plaintiffs' injuries would not be redressed by a decision in their favor. If the court granted the relief sought and took out the references to trading and offsets in the Bay TMDL, the pre-existing 2003 trading authorization would remain in place.[15] Under that policy, states would still be able to implement offset and trading programs—exactly what the plaintiffs were trying to stop.

Plaintiffs' Claims Not Ripe for Adjudication

Ripeness refers to whether a case is ready for the judge to consider it. The doctrine bars judicial review when a dispute is insufficiently developed or a potential injury is too speculative. The doctrines of ripeness and standing have the injury requirement in common. If a plaintiff claims sufficient injury, the court then considers the harm of withholding judicial review and whether the case would benefit from more factual development.[16]

According to Judge Contreras, just as the injury claimed was too speculative to establish standing, so too was it too speculative to render the case ripe for review. If, for example, a state were to authorize an offset under the TMDL that violated the CWA, then the case would be ripe. In the absence of such a tangible event, the court refused to consider the merits of the plaintiffs' case.[17]

Plaintiffs Failed to State a Claim

The plaintiffs' case arose under the Administrative Procedure Act (APA). The APA grants a court the authority to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[18] But the APA does not allow courts to review agency activities until their actions are final, meaning that the agency has finished its work and will not change its decision.[19] Judge Contreras concluded that the trading provisions in the TMDL did not amount to final agency action for a variety of reasons.

First, he reasoned that because the TMDL only authorized, but did not require, trading, it did not impose any legal requirements. In referencing offsets, for example, the TMDL "*encourages* and *expects* that the jurisdictions will . . . implement programs for offsetting new and increased loadings."[20] Second, binding precedents in the same court held that, "where agency action requires separate implementation plans to make its goals come to

fruition, such agency action is not final for purposes of judicial review."[21] The TMDL follows this structure: It imposes general but mandatory goals and the states develop specific implementation plans, known as Watershed Implementation Plans (WIPs), to meet those goals.

Issues the Court Did Not Reach

Because Judge Contreras decided the case on procedural grounds, he did not reach the question of whether, as the plaintiffs had argued, trading is legally authorized under the Clean Water Act. His decision is likely to mean, though, that if such a case is ever brought, it will have to wait until water quality trading programs are put into effect in Chesapeake Bay jurisdictions. Of course, the catch-22 of the judge's decision is that any future court will be more hesitant to overturn a program that is already operating. Plaintiffs may appeal Judge Contreras' decision, although we suspect that effort would be an uphill battle.

Endnotes

[1] Anne Havemann, Center for Progressive Reform Case Brief #1308, *Case Brief: American Farm Bureau Federation v. EPA* (Oct. 2013), *available at* http://www.progressivereform.org/articles/FBF_CaseBrf1308.pdf.
[2] *See* Rena Steinzor et al., Center for Progressive Reform Briefing Paper #1208, *Environmental Justice and Nutrient Trading* (Aug. 2012), *available at* http://www.progressivereform.org/articles/WQT_and_EJ_1208.pdf (assessing the potential impacts of trading on low-income and minority communities and recommending ways to integrate environmental justice into trading programs in the Bay region); *see also* Rena Steinzor et al., Center for Progressive Reform Briefing Paper #1205, *Water Quality Trading in the Chesapeake* (May 2012), *available at* http://www.progressivereform.org/articles/WQT_1205.pdf (identifying critical elements of an effective trading program).
[3] CHESAPEAKE BAY PROGRAM, *Chesapeake Bay TMDL*, http://www.chesapeakebay.net/about/programs/tmdl.
[4] 40 C.F.R. § 130.2(i).
[5] Chesapeake Bay TMDL, Appendix S-2 (Dec. 29, 2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/AppendixSOffsets_final.pdf.
[6] *See* U.S. ENVTL. PROTECTION AGENCY, FINAL WATER QUALITY TRADING POLICY 1, (Jan. 13, 2003), *available at* http://water.epa.gov/type/watersheds/trading/upload.
[7] Complaint for Declaratory and Injunctive Relief, Food and Water Watch v. EPA, No. 1:12-cv-1639 (D.D.C. filed Oct. 3, 2012), *available at* http://documents.foodandwaterwatch.org/doc/FINALCOMPLAINT.pdf.
[8] Motion to Intervene as Defendants by American Farm Bureau Federation and National Assocation of Home Builders, Food & Water Watch v. EPA, No. 1:12-cv-1639 (D.D.C. filed Dec. 7, 2012); *see also Current Cases: Food & Water Watch v. EPA*, AM. FARM BUREAU FED'N, http://www.fb.org/index.php?action=legal.recentDocket&id=90 (last visited Dec. 18, 2013).
[9] U.S. CONST. art. III.
[10] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). An organization has standing to bring a suit on behalf of its members if it meets certain requirements. Specifically, the organization must show that: "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).
[11] Food & Water Watch v. EPA, No. 12-cv-1639, at 15 (D.D.C. Dec. 13. 2013).
[12] Chesapeake Bay TMDL at 10-3 (Dec. 29, 2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/CBayFinalTMDLSection10_final.pdf. The plaintiffs also argued that the participation of certain sites in nutrient trading and offsets would increase pollution around those sites. The court found that one challenged site would not be built and the other site had yet to begin offsetting its pollution, making injury at that site merely speculative. *Food & Water Watch*, No. 12-cv-1639, at 16–17.

[13] *Id.* at 19.
[14] *Id.* at 21.
[15] *Id.* at 22.
[16] Ohio Forestry Ass'n Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).
[17] *Food & Water Watch*, No. 12-cv-1639, at 25–26.
[18] 5 U.S.C. § 706(2)(A).
[19] *See* Bennett v. Spear, 520 U.S. 154, 177 – 78 (1997) (finding that to be final, the agency action must mark the "consummation" of the agency's decision-making process and that the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow").
[20] Chesapeake Bay TMDL 10-2 (Dec. 29, 2010) (emphasis added).
[21] *Id.* at 32; *see also, e.g.*, Fund for Animals v. Williams, 391 F. Supp. 2d 132, 139 (D.D.C. 2005).

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.

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Acknowledgements

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