CPR Case Brief:

American Farm Bureau v. EPA*: Third Circuit Affirms Validity of the Chesapeake Bay Total Maximum Daily Load*

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Summary

In a long-awaited decision, the U.S. Court of Appeals for the Third Circuit recently upheld a key regulatory initiative of the U.S. Environmental Protection Agency (EPA) aimed at protecting the Chesapeake Bay. The circuit court affirmed the decision of the U.S. District Court for the Middle District of Pennsylvania that EPA did not exceed its Clean Water Act (CWA) authority in issuing the total maximum daily load (TMDL) for the Chesapeake Bay.[1] The case was brought by a coalition of agricultural groups led by the American Farm Bureau Federation, which tried to persuade the court that EPA's authority under the statute was confined to announcing a single number for the total load of individual nutrients that an impaired water segment (*e.g.*, two consecutive miles of the Potomac River) could absorb and still remain healthy enough to support its designated use (*e.g.*, drinking, swimming, or boating).

The court held that EPA acted within its authority not just in specifying total loads, but also allocating how the Chesapeake Bay watershed states should go about reducing discharges to safe levels. Its decision to defer to the agency was welcome news but also not a great surprise given the radical nature of the Farm Bureau's arguments. The ruling affirmed the legality of the nation's most ambitious TMDL and, more broadly, it also rejected the plaintiffs' exceedingly narrow view of TMDL documents. The decision was also notable for the court's traditional and methodical approach to statutory interpretation, in light of several recent hints that the United States Supreme Court's support for the *Chevron* doctrine may be weakening. The Third Circuit's decision is a reminder that in the lower courts, at least, *Chevron* is alive and well.

Background

The CWA takes a two-step approach to restoring water quality. The first step is to use technology-based controls to achieve effluent based limitations on individual point sources.[2] The second step calls for the creation of water quality standards,[3] which serve as a backstop when controls imposed on point sources are not enough. States promulgate water quality standards by setting a designated use for each water body and the water quality criteria needed to protect all designated uses. If a state finds that a water body is impaired, the CWA requires the establishment of a TMDL.[4]

EPA and the states have been working together for decades to restore the Bay. In 1983, Virginia, Maryland, Pennsylvania, Washington, D.C., EPA, and the Chesapeake Bay Commission signed a simple one-page pledge to address the Bay's pollution problems.

They affirmed this commitment in 1987 when they signed the *Chesapeake Bay Agreement*, which set the first numeric goals to reduce nitrogen and phosphorus pollution—a forty percent reduction by 2000.[5] When it became clear that the 1987 goals would not be met, EPA and the states signed a new agreement, *Chesapeake 2000*, which established 102 goals to reduce pollution by 2010.[6] Seven years later, EPA admitted that they were nowhere near on track to meet the goals.[7] Pressured by impatient legislators, including Senator Barbara Mikulski (D-MD), EPA began to realize that it needed to step in to take the lead on restoration, taking a more prescriptive approach to the nutrient pollution that was causing dead zones across the Bay.

In 2009, President Obama breathed new life into these restoration efforts when he signed an Executive Order instructing EPA to work with state governments to reduce pollutants flowing into the Bay.[8] Drawing on its own expertise as well as heavy state input, EPA issued the Bay TMDL[9] a year later, which set a comprehensive "pollution diet" for the Bay. The TMDL calls on states to reduce nitrogen and phosphorus loadings to the Bay by about one quarter by 2025, and sediment loadings by about 20 percent.

Legal Challenge in the District Court

Not long after the ink was dry on the final TMDL, the American Farm Bureau Federation and the Pennsylvania Farm Bureau filed the original complaint, which was later amended to name six additional plaintiffs, all of which were agricultural organizations.[10] Numerous environmental and public interest groups intervened on EPA's side of the dispute, including the Chesapeake Bay Foundation (CBF)[11] and several municipal clean water associations.[12]

The Farm Bureau and its allies made three main arguments:

1. EPA had acted outside the scope of its authority under the CWA by "implementing" the Bay TMDL in a manner that regulated how much of different kinds of nutrient pollution could be discharged by various sectors;
2. the TMDL was arbitrary and capricious in that it relied on flawed science; and
3. EPA failed to provide an adequate notice and comment period, in violation of the Administrative Procedure Act (APA).

On September 13, 2013, Judge Sylvia Rambo rejected these arguments.[13] In her 99-page opinion, Judge Rambo thoroughly addressed each argument, holding that EPA developed the Bay TMDL consistent with its authority under the CWA;[14] that its reliance on its own models was reasonable;[15] and that EPA's notice and comment period was adequate.[16]

Appeal to the Third Circuit

On appeal, the appellants did not raise the previous arguments that the TMDL was arbitrary and capricious or that EPA failed to provide adequate public notice and comment. Thus, the Third Circuit focused on what Congress intended when it used the term "Total Maximum Daily Load."[17]

Appellants urged the court to take an unusually narrow conception of TMDLs, essentially arguing that the words allow nothing more than the specification of an allowable daily mass of pollutants.[18] In other words, EPA's approach to TMDLs as a framework – including pollutant allocations, timelines, and requirements for states to demonstrate compliance – went beyond a simple mass allocation. That argument, if accepted, would have been fatal, not just for the Chesapeake Bay TMDL, but also for thousands of other TMDLs across the country. For years, EPA regulations have required that TMDLs subdivide their pollutant budgets into load allocations, wasteload allocations, and margins of error, and many TMDLs have contained a variety of other prescriptions that go beyond just identifying allowable daily pollutant loadings. Those standard practices, the Farm Bureau argued, were beyond EPA's authority. EPA countered that other plausible meanings of the words, as well as the structure, context, purpose, and history of the relevant portions of the CWA all support its approach to TMDLs.

On appeal, the court applied the familiar framework of *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*[19] to EPA's interpretation of its statutory authority. That Supreme Court decision provides that when statutory language has a "plain" or obvious meaning, the courts must decide whether agencies have acted consistently with the instructions Congress gave them. However, if a statute's wording is ambiguous, and subject to interpretation, the courts must defer to the expert agency charged with implementing its requirements, overturning the agency's interpretation only if it is unreasonable. The Third Circuit panel concluded that the term Total Maximum Daily Load did not have a plain meaning and that it would, therefore, defer to EPA's interpretation of its authority.

Courts and commentators alike have criticized *Chevron* deference, and it is no secret that such criticisms often stem from particular policy agendas. For example, conservative judges and commentators frequently criticize deference to progressive agency interpretations of environmental statutes. Depending on the case, business groups and environmentalists can be on different sides of the *Chevron* debate. Moreover, the doctrine is applied erratically in the courts. The Bay TMDL decision, however, is a good example of how judicial deference can protect important agency efforts to protect the environment.

The Third Circuit explained that the precise question about the meaning of TMDL was a matter of first impression.[20] Although the court found some discussion in previous decisions around the contours of EPA's authority to devise TMDLs,[21] it found no direct consideration of whether the language could support more than a mere quantity of pollutant loads. No court had yet considered the question.

The court then proceeded to analyze the definition of TMDL by looking at the plain meaning of the words.[22] In its textual analysis, the court determined that, on its face, the phrase "total maximum daily load" has several plausible meanings, likely rendering the term ambiguous and requiring consideration of the case under *Chevron's* more deferential second step. The court's examination of the structure and purpose of the relevant provisions of the CWA also supported this determination. The court noted that the whole

point of the TMDL is to achieve water quality standards that cannot be met by only addressing point sources with the technology-based controls required under the National Pollutant Discharge Elimination System (NPDES).[23] It logically follows that, in developing a TMDL to achieve water quality standards, EPA must *allocate* pollutant loads from both point sources *and* nonpoint sources. The court found this a matter of "common sense."[24]

Having found ample support for the notion that a TMDL appropriately includes an allocation of pollutants among different source sectors, the court applied similarly straightforward reasoning to dispatch with the appellants' two other points of contention with the Bay TMDL. First, the court rejected the argument that EPA cannot impose deadlines as part of a TMDL by noting that "the amount of acceptable pollution in a body of water is necessarily tied to the date at which the EPA and the states believe the water should meet its quality standard; if the target date is 100 years from now, more pollution per day will be allowable than if the target date is five years from now."[25] Second, the court reasoned that EPA could require states to demonstrate reasonable assurance that their plans are consistent with the TMDL, noting that the CWA requires a TMDL to be set "at a level necessary to implement the applicable water quality standards."[26] It would be arbitrary and capricious, the court reasoned, for EPA to "blindly accept" states' proposed watershed implementation plans, approving even those plans that are incapable of meeting water quality standards.[27]

Having concluded that the applicable statutory terms were ambiguous, the court had no problem holding that the interpretation provided by EPA was reasonable. Drawing from its *Chevron* step one analysis, the court reiterated that it was entirely reasonable for the Bay TMDL to include (1) allocations among sectors and jurisdictions; (2) deadlines for plan submissions and final implementation; and (3) a demonstration of reasonable assurance that state actions would actually achieve the water quality standards that gave rise to the TMDL.[28] The only significant new ground covered in step two was the court's consideration of the legislative history of TMDLs.

The court's examination of CWA history, and the 1987 amendments to the Act in particular, strongly supported a broad interpretation of TMDLs. First, the court cited one provision added in the 1987 amendments that refers to TMDLs "and *other* waste load *allocations*,"[29] showing clearly that Congress had already understood TMDLs to be frameworks for allocating pollutant reduction responsibilities and acknowledged the existing EPA definition of TMDL contained in federal regulations. Finally, the court pointed to Congress' ratification, in the 1987 amendments, of the Chesapeake Bay Program.[30] At the same time that Congress was focusing new efforts on the problem of nonpoint source pollution and the need for watershed-based solutions, it was also directing EPA to work cooperatively with the states to "ensure that management plans are developed and implementation is begun" to restore the Bay.[31]

The court also rejected the appellants' invitation to apply interpretive canons of constitutional avoidance. The appellants argued that, because the TMDL allocated pollution reductions to the nonpoint sector and, they claimed, regulated land uses, which

is traditionally within the scope of state authority, EPA was stepping upon dangerous constitutional boundaries grounded in federalism concerns. However, the court reasoned that these canons were mostly irrelevant to the matter, because the TMDL was specifically designed to be a tool of cooperative federalism.[32] As the court put it, "the TMDL's provisions that could be read to affect land use are either explicitly allowed by federal law or too generalized to supplant state zoning powers in any extraordinary way. Further, the court noted, the Chesapeake Bay is an interstate body of water, which is at the core of Congress's power under the Commerce Clause.[33]

Implications

The circuit court's resounding support for the Bay TMDL should provide the impetus for states and municipalities in the Bay region to finally work toward achieving the TMDL goals and should also remove whatever justification may have existed in the minds of some state politicians to resist implementation. The court's decision may arguably be as important to national efforts to clean up impaired waters as it is to restoring the Bay watershed. The Farm Bureau, its allies, and the 21 states that challenged the Bay TMDL were undoubtedly as interested in chilling the spread of similar regional TMDLs as they were in upending the Bay's 93 TMDLs. Instead, by upholding the authority of EPA to establish TMDLs that contain allocations among point and nonpoint sources, the Third Circuit affirmed the validity of the traditional and standard way of writing TMDLs. Thus, the decision should also discourage challenges to efforts by state officials in other troubled watersheds around the country to develop regional TMDLs.

Examples demonstrating the need to address nonpoint source pollution in the United States abound. Last year, terrible algal blooms choked the waters of Lake Erie and poisoned the municipal water supply of Toledo, Ohio, spurring renewed multistate (and bipartisan) efforts to address agricultural and other nonpoint sources of pollution in the Great Lakes.[34] And several recent lawsuits over nutrient pollution in Florida's coastal waters,[35] Iowa's rural streams,[36] and the vast Mississippi River watershed[37] highlight the growing tension between farmers and municipalities, and clean water advocates and state regulators. Nonpoint sources of pollution have long been recognized as the most common cause of water quality impairments and there is now an increasingly widespread understanding that agricultural nutrients in particular are the most intractable problem affecting many watersheds.

The question going forward is whether TMDLs – with more than 60,000 created to date – can fully live up to their potential as the most effective solution for addressing both point and nonpoint source pollution through a watershed-based approach. The Third Circuit's ringing endorsement of a robust, multistate and multi-sector TMDL for the Chesapeake Bay brings national attention to the substantial value of this tool for addressing water pollution on a regional scale. However, TMDLs exist within a framework of cooperative federalism. Replicating the progress created under the Bay TMDL will require EPA and local clean water advocates to push state and local governments to create, support, and enforce their own robust TMDLs.

Endnotes

[1] *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, No. 13-4079, 2015 WL 4069224 (3d Cir. July 6, 2015).
[2] 33 U.S.C. § 1311.
[3] 33 U.S.C. § 1313.
[4] 33 U.S.C. § 1313(d)(1)(C)
[5] CHESAPEAKE BAY PROGRAM, *1987 Chesapeake Bay Agreement*, http://www.chesapeakebay.net/content/publications/cbp_12510.pdf.
[6] CHESAPEAKE BAY PROGRAM, *Chesapeake 2000*, http://www.chesapeakebay.net/content/publications/cbp_12081.pdf.
[7] David A. Fahrenthold, *A Revitalized Chesapeake May Be Decades Away*, WASH. POST, Jan. 5, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601712.html.
[8] Exec. Order No. 13508, 74 Fed. Reg. 23099 (May 15, 2009).
[9] CHESAPEAKE BAY PROGRAM, *Chesapeake Bay TMDL*, http://www.chesapeakebay.net/about/programs/tmdl.
[10] These additional plaintiffs were: The Fertilizer Institute, the National Pork Producers Council, the National Corn Growers Association, the National Chicken Council, the U.S. Poultry and Egg Association, and the National Turkey Federation.
[11] These groups were: the Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Defenders of wildlife; Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and the National Wildlife Federation.
[12] These groups included: the National Associations of Clean Water Agencies (NACWA), the Maryland Association of Municipal Wastewater Agencies (MAMWA), and the Virginia Association of Municipal Wastewater Agencies (VAMWA).
[13] Am. Farm Bureau Fed'n v. EPA, 984 F. Supp.2d 289 (M.D. Pa. 2013).

[14] *Id*. at 76.
[15] *Id*. at 90-97.
[16] *Id*. at 76-90.
[17] *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 2015 WL 4069224 (3d Cir. July 6, 2015), at 20.
[18] *Id*. at 20.
[19] 467 U.S. 837 (1984).
[20] *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 2015 WL 4069224 (3d Cir. July 6, 2015), at 31.
[21] *Id.* at 31-34.
[22] *Id.* at 35.
[23] *Id.* at 39.
[24] *Id*. at 40.
[25] *Id*. at 40.
[26] *Id.* at 41.
[27] *Id.* at 41.
[28] *Id*. at 53-60.
[29] *Id.* at 56.
[30] *Id*. at 57.
[31] *Id*. at 57 (citing 33 U.S. § 1267(g)).
[32] *Id.* at 44.
[33] *Id*. at 49-52.
[34] WESTERN BASIN OF LAKE ERIE COLLABORATIVE AGREEMENT, http://www.michigan.gov/documents/snyder/Western_Basin_of_Lake_Erie_Collaborative_Agreement--Lieutenant_Governor_491709_7.pdf.
[35] *Florida Wildlife Fed'n Inc v. Adm'r, U.S. Envtl. Prot. Agency*, 2015 WL 4081495 (11th Cir. July 7, 2015).

[36] Timothy Meinch, *Water Works requests damages in federal suit*, Des Moines Register, Mar. 16, 2015, available at: http://www.desmoinesregister.com/story/news/2015/03/16/water-works-federal-suit-requests-damages/24870321/.
[37] *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

About the Center for Progressive Reform

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