



Third Circuit Upholds EPA's Chesapeake Bay TMDL in Landmark Decision, September 2015

On July 6, a three-judge panel of the United States Court of Appeals for the Third Circuit issued its ruling in *American Farm Bureau Federation v. U.S. EPA*. As expected based on participation in the November 18, 2014 oral argument, the Third Circuit affirmed the U.S. District Court's September 13, 2013 decision and again upheld EPA's TMDL for the Chesapeake Bay Watershed.

This appeal was brought by the American Farm Bureau Federation, other agricultural trade associations, and the National Association of Home Builders (collectively, "Farm Bureau") representing nonpoint sources (NPS) interested in altering the CWA TMDL Program.

This ruling affirming the District Court once again meets the big picture objectives of the Intervenor-Defendant Municipal Water Associations (VAMWA, MAMWA, NACWA) addressed in this litigation, specifically: (1) preserving the TMDL "watershed approach" under which nonpoint sources (NPS) share responsibility with point sources (PS) for contributing to required clean water efforts under the TMDL Program; and (2) protecting the Municipal Water Associations' Members' nutrient allocations at risk in the event of the loss of the watershed approach and of adequate NPS participation.

While there will be many details to parse from the opinion for their meaning and significance to this TMDL, the national TMDL Program, and the CWA, here is a high-level summary of the major elements of the decision.

The Third Circuit's opinion is a legal exercise in statutory construction, primarily one of applying the Supreme Court's two-step *Chevron* analysis to test the bounds of EPA's "total maximum daily load" authority established in CWA Section 303(d). This legal test was applied to answer the Farm Bureau's main contention that TMDLs are limited to a **single number** representing the "total" allowable pollutant load to the water body that would not prevent attainment of applicable water quality standards.

Farm Bureau challenged (1) EPA's establishment of PS and NPS allocations, (2) EPA's use of the so-called "reasonable assurance" test for accepting NPS load allocations and the assumption that they would be implemented, (3) the Bay TMDL's inclusion of a timeframe for the Bay States to implement it.

At Step One of the *Chevron* test, Farm Bureau would have prevailed if the Court had found that Congress had unambiguously limited the phrase "total maximum daily load" to a single number. The Third Circuit, however, found that the phrase "total maximum daily



load” was ambiguous. The Court’s “most significant textual concern” was that Farm Bureau’s reading rendered the word “total” redundant. The Court found that a plausible reading of “total” is that a TMDL is “the sum of the constituent parts of the load” (*i.e.*, the sum of NPS load allocations and PS waste load allocations – EPA’s longstanding regulatory definition).

Having found “TMDL” to be an ambiguous phrase, the Court moved to Step Two of the *Chevron* test, where an administrative agency’s interpretation survives unless the Court finds it to be “arbitrary, capricious, or manifestly contrary to the statute.” Step Two does not require the agency to make the “best interpretation”; instead, the agency receives “considerable deference” and its policy choices are upheld unless they are unreasonable. Here, the Court found that EPA’s Chesapeake Bay TMDL should be upheld under a *Chevron* Step Two analysis. Key issues relevant to Association Members whose communities and facilities are affected by TMDL development and implementation are discussed below.

The Third Circuit directly addressed three key aspects of the Chesapeake Bay TMDL that have significant regional and national implications:

Allocations between Point and Nonpoint Sources – This is the most important aspect of the decision. The Third Circuit upheld the watershed approach of assigning pollutant reduction responsibility to NPS through TMDLs. The Court agreed with an earlier ruling that TMDLs “tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water”. The Third Circuit added that “[s]pecifically allocating the pollution load between point sources (primarily the EPA’s responsibility) and nonpoint sources (the states’ dominion) is a commonsense first step to achieve the target water quality.” A loss on this point would have eliminated the ability to budget NPS pollutant loads through TMDLs and would have left only regulatory authority over PS (which Farm Bureau repeatedly had pointed out could be leveraged against PS and States to force water quality improvements).

Reasonable Assurance Test – The Court upheld EPA’s process for reviewing the reasonableness of assumed NPS pollutant load reductions, stating: “The EPA chose to set the TMDL with substantial input from the states but, in order to comply with the [CWA] and the [Administrative Procedure Act], the EPA would not blindly accept states’ submissions. Instead it decided to satisfy itself that the states’ proposals would actually ‘implement the applicable water quality standards.’ This requirement made sure that the EPA could exercise ‘reasoned judgment’ in evaluating the states’ proposed standards and was thus consistent with the [CWA]”. For PS that desire a balanced, equitable approach including NPS, EPA authority to review the reasonableness of assumed NPS reductions goes with the territory.



Deadlines or Target Dates – In upholding the TMDL, the Court rejected Farm Bureau’s position – arguably the challenger’s most persuasive argument – that a TMDL cannot include “deadlines” or “target dates.” The Third Circuit stated “it is common sense that a timeline complements the [CWA’s] requirement that all impaired waters achieve applicable water quality standards.” The Third Circuit reasoned, “As promulgating an accurate TMDL—that is, one that states a pollutant load “necessary to implement the applicable water quality standards,” 33 U.S.C. § 1313(d)(1)(C)—requires consideration of a timeline and of changes over time, it is more consistent with the purpose of the [CWA] to express the deadline that the EPA relied on in calculating the TMDL than to make states and the public guess what it is.” There is an obvious tie-in here between timeframe and NPS reasonable assurance.

Unfortunately, the Third Circuit differed from the District Court in its approach to the deadline issue. The District Court properly pointed out that the timeline was not EPA’s decision, but rather that EPA and the Bay States “reached a consensus regarding the target dates” through the Chesapeake Bay Program. Twice the District Court characterized the Bay TMDL’s 2017 and 2025 deadlines merely as “targets” rather than firm regulatory deadlines. The Third Circuit omits most of this explanation and interchangeably refers to “deadlines,” “target dates” and “timeframe” in a manner that endorses EPA authority. The general PS concern is that any significant NPS failure to meet load reductions on strict schedules could lead to EPA “backstop” actions against PS. To keep this in perspective, however, EPA has authority over PS wasteload allocations regardless, and preservation of the District Court’s more nuanced approach would not, in and of itself, block EPA from revisiting PS allocations in the future.

Going forward, the “deadline” issue is perhaps the Farm Bureau’s strongest CWA legal point for a potential appeal. The Farm Bureau had until August 20 to file petition for rehearing en banc before the entire Third Circuit, but it did not file such a request. Its sole remaining option is to seek an appeal to the U.S. Supreme Court, which must be filed by October 5.

The Third Circuit wrapped up its opinion by noting that the solution to the complex problem facing the Bay watershed, like many others nationwide, will result in winners and losers. The Court observed that based on the “the arguments and *amici* briefs filed in this case, the winners are environmental groups, the states that border the Bay, tourists, fisherman, ***municipal waste water treatment works, and urban centers.***” The Third Circuit’s ruling is another major win for the Municipal Water Associations and the watershed approach to clean water.