

COMMENTARY

ENVIRONMENTAL LAW

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Third Circuit Upholds EPA's Authority for Chesapeake Bay TMDL

The U.S. Court of Appeals for the Third Circuit recently determined that the U.S. Environmental Protection Agency acted within its statutory authority in publishing the total maximum daily load, or TMDL, of nitrogen, phosphorous and sediment that can be released into the Chesapeake Bay to comply with the Clean Water Act, in *American Farm Bureau Federation v. U.S. Environmental Protection Agency*, No. 13-4079 (3d Cir. July 6, 2015). It calls for substantial reductions in discharges of these pollutants from municipal sewage treatment plants and industrial sources, but also for steps to control runoff from "nonpoint" sources, like agricultural fields, yards and streets. Those controls often are not imposed by conventional Clean Water Act permits, and require steps to be taken on private or municipal land.

In 2010, the EPA promulgated the Chesapeake Bay TMDL—the largest and most complex of its kind—through the notice-and-comment rulemaking process of the Administrative Procedure Act. Soon after, trade associations, including the American Farm Bureau Federation, the National Association of Home Builders, and other agricultural organizations with members who would be affected by the TMDL's implementation sued the EPA in the Middle District of Pennsylvania. The Farm Bureau argued the EPA exceeded its statutory authority in drafting the TMDL by including deadlines and allocations and by requiring "reasonable assurance" from the states that they would adopt measures to achieve those deadlines.

The district court granted the EPA's motion for summary judgment. The Third Circuit has now affirmed, ruling in the EPA's favor. It remains to be seen what this decision means for Pennsylvania, a state that did not provide reasonable assurance to the EPA that it would be able to meet target pollutant limitations during the drafting of the TMDL.

Practitioners have concerns about the lack of flexibility in the TMDL and how the state will go about meeting the standards

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through permitting changes. Some emission cap-and-trade programs as the answer; however, litigation over permitting decisions will inevitably result.

The Third Circuit reviewed the statutory structure of the Clean Water Act and the relationship between federal and state actors in determining when a TMDL is necessary. The Clean Water Act directs states to designate a use for each relevant water in the state (such as recreation or fishing use) and to set water quality standards based on that use. The EPA must approve or disapprove the water quality standards; if the EPA disapproves, it must promulgate its own water quality standard for the state. The EPA and the states share responsibility for meeting those standards.

This means the EPA (or a state with delegated authority under the Clean Water Act) regulates point sources by establishing effluent limitations in their National Pollutant Discharge Elimination System permits, while states regulate nonpoint sources through other means.

When effluent limitations in permits for point sources alone are insufficient controls for a body of water to meet the water quality standards, the state must identify that water on what is called a Section 303(d) list, named after the applicable section of the Clean Water Act. Additionally, the state must submit TMDLs for pollutants that cannot be brought to an acceptable level through the point source controls.

Historically, the states have gone first in presenting the Section 303(d) list and accompanying TMDL, and then the EPA either approves or disapproves. If the EPA disapproves, it then must create its own list and TMDL. Here, the EPA and the seven states in the Chesapeake Bay water-

shed—Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York and the District of Columbia (considered a state here)—agreed that the states would not submit TMDLs, but instead, the EPA would draft the TMDL in the first instance.

The Farm Bureau challenged in part the EPA's inclusion in the TMDL of a requirement of assurance from the states that they would fulfill the TMDL objectives. The Third Circuit found the EPA's inclusion of assurance from the states to be consistent with the Clean Water Act, and thus permissible. During development of the TMDL, the states submitted draft Phase I watershed improvement plans to the EPA, which proposed target pollutant limitations, and the states were expected to demonstrate reasonable assurance that they would be able to achieve and maintain those limitations. The executive summary of the TMDL explains that the EPA evaluated the draft watershed improvement plans, and upon finding deficiencies in state plans, the EPA included backstop allocations in the TMDL. These back-

stop allocations represent a hybrid of the state's allocations modified by the EPA's allocations for certain sectors.

The EPA found deficiencies in Pennsylvania's Phase I draft watershed improvement plan for urban stormwater and imposed a backstop adjustment that shifts a portion of nonpoint load allocations to point source waste load allocations, indicating future regulatory or permitting action may be necessary. That is, the EPA transferred 50 percent of the stormwater load not currently subject to NPDES permits from the load allocation—the allocation for nonpoint source runoff not subject to permit requirements—to the wastewater alloca-

tion. Therefore, the EPA has the backstop of requiring greater reductions from point sources if Pennsylvania cannot meet its projected load allocations.

Under the Chesapeake Bay TMDL, states are directed to have pollution control mechanisms fully in place by 2025, and to have at least 60 percent of actions completed by 2017. On March 30, 2012, Pennsylvania submitted its Phase II watershed improvement plan. The EPA provided comments in May 2012, indicating that while Pennsylvania made improvements that "increased [the] EPA's confidence that Pennsylvania will meet its pollution reduction goals," the EPA would need to maintain enhanced oversight for agriculture and offsets and trading and backstop actions for the urban stormwater sector. The EPA reasoned that the final Phase II watershed improvement plan and milestones did not provide clear strategies for how the state would achieve 40 to 50 percent reductions in nutrient and sediment pollution from urban areas.

As of June, Pennsylvania is the only state in the Chesapeake Bay watershed currently with backstop action oversight, and Pennsylvania has this status for both the urban/suburban stormwater and agriculture sectors. The EPA says Pennsylvania is on track to meet the 2017 target for phosphorus, but is falling short with nitrogen and sediment reductions. On June 10, the EPA issued an interim evaluation of Pennsylvania's progress toward meeting its 2014-15 milestones and watershed implementation plan. The EPA will determine in 2016 whether Pennsylvania has achieved these milestones and whether Pennsylvania is on track to have practices in place by 2017 that will achieve 60 percent of the nitrogen, phosphorus and sediment reductions compared to 2009.

Pennsylvania would need to reduce nitrogen loads from agriculture by 14.6 million pounds to be on track at the end of the 2014-15 period. If the Chesapeake Bay Program's Nutrient Management Panel's current efforts result in finding additional ways to manage nutrients beyond the current definition for nutrient management, this may aid Pennsylvania in obtaining ad-

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ditional credit. But Pennsylvania also will need to get farmers or others with land next to streams to install over 22,000 acres of additional forests and grass buffers, often on private or municipal land, to meet the 2014-15 milestone; only about 3,000 acres of buffers were created in 2014. The EPA found it unclear how Pennsylvania would go about meeting this target and future targets for buffers.

The urban sector recommendations were equally daunting. While Pennsylvania committed in its watershed improvement plan

to reduce urban and suburban stormwater loads for nitrogen by 41 percent, phosphorous by 45 percent, and sediment by 50 percent, to date the state has only reduced nitrogen loads by 1 percent, phosphorous by 10 percent and sediment by less than 1 percent. The EPA proposes increased implementation of priority best management practices, including infiltration practices, urban tree planting and buffers and stream restoration. Many of these would have to be implemented by private landowners or municipalities that, like the farmers who must install buffers, are not subject to NPDES permit requirements. Sufficient incentives must be in place in the absence of coercive

mechanisms.

The EPA indicated it expects a 2016-17 milestone for Pennsylvania's urban and suburban stormwater to include a shift in load reductions to different sectors to get Pennsylvania back on track. Additionally, renewal of industrial and construction stormwater permits are expected by November 2017. Renewal of permits often means changes in expectations and conditions.

The EPA characterizes the TMDL as having an "adaptive management framework," but there is concern whether there is, in fact, enough flexibility. Key to the success of the program will be the ability to adapt to changing land uses over time. Already,

the EPA acknowledged that Pennsylvania agricultural production has changed since the development of the 2014-15 milestones, which has increased nitrogen and sediment levels and decreased phosphorus levels. While future milestones may be adjusted based on new information, it is unclear what that ultimately means for the end goal. In light of the Third Circuit's recent decision, practitioners and various stakeholders in the state should pay careful attention to the next steps as Pennsylvania moves forward with efforts to comply with the Chesapeake Bay TMDL. •