Water: The Choices: Water Law and Policy” Conference
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Chesapeake Bay
TMDL Litigation:

Legal and Policy Implications

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What is a TMDL?
Clean Water Act Sec. 303(d)

“Each State shall establish for the waters identified in paragraph (1)(A) of this subsection [impaired waters], and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation.”
Chesapeake Bay TMDL

Signed: December 29, 2010
Status of Litigation

- American Farm Bureau Federation, Pennsylvania Farm Bureau filed the initial complaint January 10, 2011.

- Complaint was amended on April 4, 2011, to add: Fertilizer Institute, National Pork Producers Council, National Corn Growers Association, National Chicken Council, U.S. Poultry & Egg Association, and National Turkey Federation

- The National Association of Homebuilders filed a similar complaint on June 27, 2011.

- Municipal and Environmental Groups intervened on EPA’s behalf.

- The cases are consolidated.

- Oral argument took place October 4, 2012. A decision is not expected for several months.
Issues in the Litigation

- EPA authority to issue TMDL for 7 jurisdictions.
- EPA authority to make allocations to sources and source categories.
- EPA’s authority to assign allocations of loadings to the Bay to upstream sources.
- EPA’s insistence that a TMDL must be based on reasonable assurance that nonpoint source allocations will be met and that EPA has authority to mandate reasonable assurance.
- EPA’s threats against states to compel submission of and changes to state implementation plans.
- Accuracy of the models relied on by EPA.
- Public notice and opportunity to comment.
Top-down Federal Approach

– “It’s a new day for restoring local streams, rivers and the Chesapeake Bay”
– Jeff Corbin Sept. 9, 2010 presentation to the NAS committee on TMDL implementation.
CWA Legal Authority Claims

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• No authority to issue a federal TMDL unless a state has failed to act. EPA authority is derivative of state authority.

• EPA is acting in a backstop capacity for only 23 Virginia TMDLs and 2 TMDLs for the District of Columbia.

• Legal consequences of EPA’s theory:

  – EPA would have authority to issue TMDLs without working with States.
CWA Legal Authority Claims

• EPA impermissibly crosses the line into TMDL implementation by incorporating detailed load and waste load allocations into the TMDL.

  – The CWA provides authority for the state (and EPA acting in an appropriate backstop manner) to establish a total maximum daily load for each pollutant that is causing a segment to be impaired.

  – Nothing in the Act gives EPA the authority to divide that load among sources. The policy choices inherent in that allocation of loadings is left to the states and is part of TMDL implementation.
CWA Legal Authority Claims

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• EPA impermissibly crosses the line into TMDL implementation by claiming the authority to require States to change their implementation plans to provide “reasonable assurance.”

  – Reasonable assurance was first discussed in EPA’s 1991 TMDL guidance to address when a nonpoint source reduction could be relied upon to establish a point source allocation.

• EPA recently revoked approval of the 2002 Lake Champlain Phosphorus TMDL. Among the reasons was failure to provide “reasonable assurance.”

• EPA generally invokes “reasonable assurance” to require further reductions from point sources.
CWA Legal Authority Claims

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• EPA impermissibly crosses the line into TMDL implementation by issuing “backstop allocations” that override the state choices regarding TMDL implementation in the State’s watershed implementation plan.

  – EPA transferred 50% of NY’s urban stormwater load from the nonpoint source to the point source category.

  – EPA transferred 50% of PA’s urban stormwater load from the nonpoint source to the point source category.

  – EPA transferred 75% of WV’s animal feeding operation load from the nonpoint source the point source category.
• EPA impermissibly crosses the line into TMDL implementation by incorporating State assumptions regarding BMP implementation into the TMDL itself.

• In the TMDL, EPA attempts to bootstrap a provision of its permitting regulations to lock in TMDL implementation measures by “assuming” them.

  – EPA did not incorporate the watershed implementation plans into the TMDL, because that would be a blatant violation of the law.

  – Instead, EPA incorporated the assumptions from the state plans into the TMDL.
APA Arbitrary and Capricious Claims

- EPA knowingly relied on inaccurate information to establish the TMDL. EPA knew:
  - The impervious surface estimate was off by as much as 100%.
  - Many BMPs are not accounted for in the models.
  - The model attributes in stream sediment to adjacent land uses.

- EPA’s estimates for agriculture loadings are vastly different from USDA’s estimates.
### Chesapeake Bay TMDL
Comparison of USDA’s CEAP Study and EPA Draft TMDL

<table>
<thead>
<tr>
<th></th>
<th>Agricultural Nitrogen (million pounds)</th>
<th>Agricultural Sediment (1,000 tons)</th>
<th>Agricultural Phosphorus (million pounds)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current EPA</td>
<td>111.1</td>
<td>2,586</td>
<td>7.3</td>
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<tr>
<td>Current USDA</td>
<td>149.5</td>
<td>930</td>
<td>5.5</td>
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<tr>
<td>USDA + 2M Acres</td>
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<td>3.6</td>
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<tr>
<td>USDA + 3.5M Acres</td>
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<td>479</td>
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</tr>
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</table>

**EPA TMDL**
- **Agricultural Nitrogen**: 78.1 million pounds
- **Agricultural Sediment**: 1,961,000 tons
- **Agricultural Phosphorus**: 6.1 million pounds

APA Notice and Comment Claims

- A significant model, Scenario Builder, that EPA used to determine loadings based on land use, was not made publicly available.

- The documentation for both the Scenario Builder model and the Bay Watershed Model continued to change and was not final even after the TMDL was signed.

- EPA is continuing to change the models and the assumptions that feed into the models, acknowledging their flaws.
Policy Issue: No Cost-Benefit Analysis

Dissolved Oxygen Criteria Attainment

Basin-wide load is 190 N and 12.7 P (MPY)
Why Does The Chesapeake Bay Litigation Matter?

- In September 2011 and March 2012 EPA over-rove Louisiana’s determination and added 3 coastal areas to Louisiana’s list of impaired waters under the Clean Water Act, due to low dissolved oxygen.

- This action triggers a TMDL.
“Louisiana, not the EPA, is the primary entity responsible for developing the TMDLs for the three coastal segments--even though Region 6 added these waters to the state's 2010 Section 303(d) lists. The EPA expects that the state will work toward developing TMDLs for the coastal waters within the 8-13 years that is consistent with long standing Agency policy. During this time, there is an opportunity to build on the scientific understanding of the causes of the dissolved oxygen problems in these three coastal waters and the role that nutrient pollution from upstream is playing in the impairments. Although the TMDLs developed by the state may account for pollutant loading contributions from upstream states in the modeling assumptions, the TMDLs would not set waste load allocations for dischargers in upstream states. Louisiana's TMDLs need to address contributions by the state's own sources to the dissolved oxygen impairment. It is not responsible for controlling upstream pollutant sources.”
Lawsuit to Force EPA Action

- In July 2008, 13 environmental non-governmental organizations (ENGOs) petitioned EPA to set numeric nutrient standards for the entire Mississippi River Basin and establish TMDLs for the waters that would be considered impaired based on those new standards.

- On July 29, 2011, EPA denied the petition, saying numeric standards are important and would help the hypoxic zone in the Gulf of Mexico, but they don’t have the resources or scientific capability to set standards at this time.

- In March 2012 ENGOs sued EPA asking the court to require EPA to respond to their petition in a non-arbitrary way, i.e., to grant it.

- In their answer to the complaint: “EPA admits the allegations that nutrient pollution in the Mississippi River Basin and northern Gulf of Mexico causes or contributes to a low-oxygen “dead zone” in the Gulf of Mexico; that such pollution degrades and impairs water quality; and that such pollution harms aquatic life, human health, and the economic, aesthetic, and recreational values of rivers, lakes, streams, estuaries, and coastal waters.”

- Agriculture, industry and states have intervened. Currently, the states joining this litigation are: Louisiana, Alabama, Arkansas, Iowa, Kansas, Kentucky, Missouri, Nebraska, North Dakota, Oklahoma, and South Dakota all have intervened in this lawsuit.

- Plaintiffs opening brief is due November 19, 2012; EPA’s reply is due January 18, 2012.
Next?
Questions?

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