

The Chesapeake Bay TMDL

How did we get here?



About the Chesapeake Bay

- ◆ The nation's largest estuary worth \$1 trillion
- ◆ Covers 64,000 square miles
- ◆ 6 states and the District of Columbia contribute: PA, VA, MD, NY, DE, WV

Legal Questions about Regulating Nutrients

- ◆ Is the waterway impaired?
 - ◆ How to go about creating a water quality standard for nutrients?
 - ◆ Numeric or narrative criteria?
- ◆ If it is impaired, who is responsible for reductions in pollutant loading?
 - ◆ Who comes up with the reductions?
 - ◆ Who administers the load reductions?

Nutrient Water Quality Criteria in the Basin

- ◆ OH: “waters shall be...free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.” 3745-1-04.
- ◆ MI: less than 1 mg/1 phosphorus for point sources; and “nutrients shall be limited to the extent necessary to prevent stimulation of growths of aquatic rooted, attached, suspended, and floating plants, fungi or bacteria which are or may become injurious to the designated uses of the surface waters of the state.” R

What is a TMDL?

- ◆ Total Maximum Daily Load – a planning tool to get a water body back to healthy fishable/swimmable levels.
- ◆ For waters that are not meeting water quality standards, states are to identify them and establish a “load” of how much of a certain pollutant the water body can take with a margin of safety.

Prior to the TMDL

- ◆ Chesapeake Bay Agreement: Multi-state agreements to clean up the bay began in 1983
- ◆ In 2000, Clean Water Act amended to establish the Chesapeake Bay Program to implement and coordinate scientific activities and assist Agreement signatories in carrying out their responsibilities.
- ◆ From 1983-2005, the Bay's quality *declines*.

How to stop a moving train?

- ◆ Interest from a federal legislator
- ◆ Data development: Survey by EPA to determine the problem
- ◆ TMDL Litigation
- ◆ Some state willingness
- ◆ Action by the Chief Executive

The Litigation

- ◆ *American Canoe Ass'n v. EPA*, 54 F.Supp.2d 621 (E.D.Va. 1999).
- ◆ Started as a *Scott v. City of Hammond* case: if the state fails to submit TMDLs, it is a “constructive submission” that EPA must act on.
- ◆ Ultimately a consent decree entered related to settlement with Virginia and EPA, who agreed on a timeline to establish TMDLs.

The Executive Order

- ◆ In 2009, President Obama signs an Executive Order that:
 - ◆ Renews the federal commitment to control pollution from all sources
 - ◆ Establishes a federal leadership committee
- ◆ Soon after, EPA announces its intent to create a basinwide TMDL with caps on nitrogen, phosphorous, and sediment by year, jurisdiction & basin.
 - ◆ EPA self-imposed deadlines: June 2010 draft; December 2010 final

The TMDL

- ◆ Reductions:
 - ◆ 25% nitrogen: allowed loading of 185.9 million lbs
 - ◆ 24% phosphorous: allowed loading of 12.5 million lbs
 - ◆ 20% sediments: allowed loading of 6.45 million lbs
- ◆ Timeline:
 - ◆ 60% pollution controls in place by 2017
 - ◆ 100% pollution controls in place by 2025
- ◆ Lag time between implementation & healthy Bay = 20-40 years!

Implementation by the states

- ◆ Watershed implementation plans (WIPs) are the state plans to meet the federal basin-wide TMDL
 - ◆ Descriptions of authority & actions each state will take to achieve point source & nonpoint source target loads and TMDL allocations
- ◆ States had to provide “reasonable assurances” that pollutant loads would be achieved & maintained.

Did you say “nonpoint source?”

- ◆ Yes. EPA used a model called “Scenario Builder” – admittedly just estimates of NPS contributions of each state by source:
 - ◆ Agriculture
 - ◆ Atmospheric deposition
 - ◆ Forest lands
 - ◆ On-site wastewater treatment
 - ◆ Nonregulated stormwater runoff
 - ◆ Oceanic inputs
 - ◆ Streambank & tidal shoreline erosion
 - ◆ Wildlife
 - ◆ Tidal resuspension

Challenges to the TMDL

- ◆ *American Farm Bureau Federation v. EPA*, 984 F.Supp.2d 289 (2013).
 - ◆ January 2011 complaint alleging:
 - ◆ EPA exceeded authority in allocation among source categories
 - ◆ Pollutant loads determined on erroneous information
 - ◆ Scenario Builder a joke
 - ◆ Insufficient information on model runs during public comment period

Challenges to the TMDL

- ◆ *American Farm Bureau Federation v. EPA*: On cross motions for summary judgment, court asked: what does the CWA allow EPA to impose on states in the TMDL process?
 - ◆ EPA may create a TMDL, but can only exercise oversight of the state implementation plan and process.
 - ◆ Court deferred to EPA on what should go into a TMDL.
 - ◆ Responsibility is on the states for implementation!
- ◆ On 1/27/2014, AFBF filed its appellate brief in the 3rd Circuit. Oral argument is scheduled for November 17, 2014.

Why a TMDL?

- ◆ A numeric measure of what the Bay can take, but also improves local rivers and streams.
- ◆ A method for EPA, states, municipalities to deal with nonpoint source pollution.
- ◆ While cooperation between states & EPA is important, a TMDL is also a required tool under the Clean Water Act.

Questions?

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