

# NACWA Legal Committee

February 4, 2013

## Chesapeake Bay Litigation

*The TMDL & Water Quality Trading Cases*

**CHRIS POMEROY**

**MEMBER & PRESIDENT**

**AQUALAW**

# TMDL Appeal

*American Farm Bureau et al v. USEPA  
(U.S. Dist. Ct. M.D. Pa – Harrisburg)*

# Farm Bureau v. EPA Litigation (M.D. Pa.)

- **Plaintiffs**
  - American & PA Farm Bureaus filed in Jan. 2011
  - In April 2011, six more agricultural organizations joined
  - Nat'l Homebuilders filed too; cases consolidated
- **Basic Legal Claims**
  - Unlawful / exceeded CWA authority
  - Arbitrary and capricious / bad science
  - Failure to observe proper administrative procedures
- **Suit threatens holistic “watershed approach”**
  - Need Ag NPS to do its share
  - Ag victory could shift burden to Point Sources downstream<sup>3</sup>

# Intervenor-Defendants

- **Municipal Intervenor Group**
  - NACWA plus VA & MD Assns of Muni Wastewater Agencies
  - Targeted defensive effort (with EPA)
  - Support and preserve holistic watershed approach
  - Not a plaintiff, not challenging technical issues at this time
- **Other Intervenor**
  - PA Muni Authorities Assn
  - Citizen Group Coalition (CBF, NWF, Defenders, Others)

# Clean Water Agency Policy Issues

- **Support EPA's Holistic "Watershed Approach"**
- **Support Fair Allocations for All Sources & All States**
- **Support States' Role & Implementation Discretion**
- **Oppose Leveraging of Point Source NPDES Permits**
- **Oppose Fixed End Dates for TMDL Implementation**

# Plaintiffs Assert State Primacy as to TMDL Implementation Planning

- **State Primacy Argument Based on CWA**
  - EPA only approves State WQS, 303(d) listings, TMDLs
  - States have “exclusive authority” for implementation
- **EPA’s impermissible micro-management & coercion**
  - EPA’s “Reasonable Assurance” review
  - EPA’s “threats” and “backstops” applied to TMDL and IP
  - 2017/2025 deadlines
  - EPA’s authority is “T” only (no authority for WLAs & LAs)

***Plaintiffs repeatedly argue EPA may object to Point Source NPDES permits that cause WQS violation***

# Plaintiffs Question EPA's Approach to Upstream Watershed States

- **Argue EPA Authority is Derivative of States' Authority**
  - Downstream state may not allocate to upstream States
  - Therefore, EPA may not assign allocations there either
- **Argue EPA's Alternative (Only Option) is to**
  - Object to NPDES permits in upstream States
  - Revise upstream States' local WQS for downstream protection of Bay WQS
- **Plaintiffs View Ches Bay as Mississippi Basin Precedent**

# EPA Defense Highlights

- **Role of States**
  - EPA-States collaborated on TMDL; no State appealed
- **Flexibility: TMDLs are only “informational tools”**
  - TMDL allocations  $\neq$  implementation plan
  - States control state policies, permits, trades, etc
- **EPA Has Legal Authority for TMDL Equation**
  - $\text{TMDL} = \text{WLAs} + \text{LAs} + \text{MOS}$
- **No Fixed End Date**
  - EPA did not establish a federal timeline for implementation
- **Inclusion of Upstream States**
  - Consistent with CWA and regulations; jointly made with states (consent); fair, effective, and equitable



# Observations

- **Transition in Plaintiffs' Focus**
  - Coercive EPA role (Reasonable Assurance review of NPS)
  - EPA's authority = IMDL only (no WLA / LA authority)
- **EPA's Representations of Flexibility**
  - Implementation actions
  - Timeline / fixed end deadline
- **Allocations to Upstream States / Sources**
  - CWA is not especially detailed on this point
  - Plaintiffs' alternative is procedurally tedious, unworkable

# Summary Judgment Oral Argument Held Oct. 4, 2012

- **Municipal Water Associations Key Points**
  - Split in regulated community (Muni Water with EPA)
  - Parallel State IP process, even with EPA oversight, was good for State/local input on WLAs & LAs in EPA TMDL
  - Impracticality of Ag's alternatives (local WQS)
  - Impracticality and inequity of Ag's invitation for EPA to go after PS permits (WWTP, MS4)
  - Accepted EPA's stated flexibility on fixed end date (none)
- **Status/Next Steps**
  - Marathon 6 hr hearing with extremely well-prepared judge
  - Judge: "Don't expect a decision anytime soon"
  - Impressions (legal authority, model, public comment)<sub>10</sub>

# Water Quality Trading Case

*Food & Water Watch et al v. USEPA  
(U.S. Dist. Ct. D.C.)*

# Trading Litigation

- **Plaintiffs filed Oct. 3, 2012**
  - Food & Water Watch (DC)
  - Friends of the Earth (DC)
  - Represented by Columbia Univ. Law School's Envtl Clinic
- **Basic Legal Claims**
  - Trading is unlawful and arbitrary & capricious
  - New/increased discharge offsets are unlawful and A&C
  - Both violate APA notice & comment requirements
- **Significant Implications**
  - This TMDL covers 6 States & DC
  - Obviously a significant national precedent

# Plaintiffs' Claims: Count I (Trading)

- Ex: CWA does not authorize trading
- Ex: CWA does not allow permittee to exceed its TMDL WLA in exchange for pollutant reductions in another location
- Ex: Trading authorization exceeds EPA authority
- Ex: No rational basis to conclude EPA/States can adequately oversee trading to avoid worsening WQ

# Plaintiffs' Claims: Count II (Offsets)

- Ex: Even when load is offset, new/expanded discharges will “cause or contribute”
  - Citing 40 CFR §122.4(i)
- Ex: Existing discharges are not “subject to compliance schedules designed to bring the segment into compliance with applicable WQS”
  - Citing 40 CFR §122.4(i)(2)

# Plaintiffs' Claims:

## Count III (Notice & Comment)

- Ex: Trading effectively amends a TMDL, and does so without formal notice and comment procedures
- Ex: Trading creates new load allocations that were not included in the TMDL
- Ex: Violates notice and comment procedures allegedly required by APA (5 USC §553(b) and (c))

# **Intervenor-Defendants Supporting EPA & Trading**

- **Intervention as of Right Granted Feb. 2, 2013**
  - Based on active trading of some intervenors
- **Municipal Intervenor Group**
  - NACWA
  - Virginia Assn of Municipal Wastewater Agencies (VAMWA)
    - Virginia Nutrient Credit Exchange Association
  - Others (MD, NC and WV state assns, and WWP)
- **Ag / NAHB Group Intervenor Group**
  - American Farm Bureau Federation
  - National Assn of Homebuilders



# EPA's Motion to Dismiss

- **Plaintiffs Lack Standing**
  - No injury (claim only future permit violations & WQ loss)
  - Not redressable (not “authorization,” just state option)
- **No Final Agency Action**
  - TMDL is not self-implementing
  - States were operating trading programs prior to Bay TMDL
  - TMDL does not require use of trading or offset programs
- **Claims Are Not Ripe**
  - Fitness Test – Claims based on speculative future events
  - Hardship Test – No present harm, ample opportunity to seek review later if harm ever materializes

# Status / Next Steps

- **Briefing on EPA's Motion to Dismiss**
  - Intervenor's brief due Feb. 22
  - Plaintiffs' opposition brief due Mar. 22
  - EPA's reply brief due April 12
- **If Court Denies EPA's Motion**
  - Potential additional intervenor-defendant envtl group
  - Presumably case resolved on Summary Judgment Motions

# QUESTIONS?

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**CHRIS@AQUALAW.COM  
(804) 716-9021**