

# Case Brief:

*American Farm Bureau Federation v. EPA*

by CPR Policy Analyst Anne Havemann



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### Introduction

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On Friday, September 13, 2013, Judge Rambo of the U.S. District Court for the Middle District of Pennsylvania ruled that EPA had the authority under the Clean Water Act (CWA) to issue the total maximum daily load (TMDL) plan for the Chesapeake Bay.<sup>1</sup> In upholding the TMDL, Judge Rambo provided welcome certainty as the states carry out the complex task of developing their own plans for meeting the cleanup goals set forth in the Bay TMDL. And, even more importantly, it allows EPA and the states to direct their full attention to the pressing need to achieve the pollutant reductions necessary to restore the biological integrity of the Bay. The Farm Bureau has appealed the ruling to the U.S. Court of Appeals for the Third Circuit.<sup>2</sup>

### Background

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EPA and the states have three decades of experience working together to clean up the Chesapeake Bay. In 1983, Virginia, Maryland, Pennsylvania, Washington, D.C., EPA, and the Chesapeake Bay Commission signed a simple one-page pledge to address the Bay's pollution problems. They affirmed this commitment in 1987 when they signed the *Chesapeake Bay Agreement*, which set the first numeric goals to reduce pollution—a forty percent reduction by 2000.<sup>3</sup> When it became clear that the 1987 goals would not be met, EPA and the states signed a new agreement, *Chesapeake 2000*. This agreement, signed in 2000, established 102 goals to reduce pollution by 2010.<sup>4</sup> Seven years later, EPA admitted that it was nowhere near on track to meet the goals.<sup>5</sup>

The Obama administration breathed new life into the restoration efforts with a 2009 Executive Order instructing EPA to work with state governments to reduce pollutants flowing into the Bay. A year later, EPA released the final Bay-wide TMDL,<sup>6</sup> a comprehensive “pollution diet” for the Bay that was developed with input from the states’ Phase I water implementation plans.<sup>7</sup> The TMDL calls on states to reduce nitrogen and phosphorus loadings to the Bay by 25 percent by 2025, and sediment loadings by 20 percent.

Judge Rambo’s decision came more than 11 months after both sides made oral arguments in the U.S. District Court in Harrisburg. Plaintiffs American Farm Bureau Federation and the Pennsylvania Farm Bureau filed the original complaint, which was later amended to name six additional plaintiffs.<sup>8</sup> The court also granted three motions by defendant-intervenors. The first motion allowed various environmental and public interest groups to intervene, including the Chesapeake Bay Foundation (CBF).<sup>9</sup> The second group of defendant-intervenors included several municipal clean water associations.<sup>10</sup> The final movant was the Pennsylvania Municipal Authorities Association.<sup>11</sup>

## At Issue

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The plaintiffs had three main allegations: (1) that the EPA was acting outside the scope of its authority under the Clean Water Act by “implementing” the Bay TMDL; (2) that the TMDL was arbitrary and capricious in that it relied on flawed science; and (3) that EPA failed to provide an adequate notice and comment period, in violation of the Administrative Procedure Act (APA).

## The Court’s Reasoning

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### EPA’s TMDL is authorized by the CWA

The meat of the Farm Bureau’s argument was that EPA overstepped its authority. While the plaintiffs conceded that EPA has the power to *issue* a TMDL, they argued that EPA improperly *implemented* the TMDL by including wasteload allocations (WLAs), load allocations (LAs), and sector and individual source allocations in the TMDL. Judge Rambo agreed that TMDL implementation primarily falls to the individual states, but disagreed that the TMDL represented an unlawful implementation plan. The “TMDL is not an implementation plan because it contains only allocations, and no formal statement of *how* the allocations are to be achieved,”<sup>12</sup> that is, no methodology, strategy, or other implementation measures. Moreover, the court found that nothing in the CWA prohibits EPA from defining the TMDL in terms of WLAs and LAs<sup>13</sup> and noted that the states provided most of the individual allocations, rather than EPA.<sup>14</sup>

Key to the court’s decision was the TMDL’s demonstrated commitment to cooperative federalism. Judge Rambo dedicated nearly 20 pages of her 99-page opinion to reviewing the history of the Bay preservation efforts, which have spanned more than 30 years, been the subject of considerable litigation, and yielded numerous consent decrees, settlement agreements, and MOUs.<sup>15</sup> This history reveals consistent communication and cooperation between EPA and the states. Indeed, the Bay states *asked* EPA to set pollution levels for the entire watershed in 2007 and, as the court emphasized, “no state has filed suit challenging the TMDL.”<sup>16</sup>

Interestingly, the court disagreed with EPA that its authority to promulgate the watershed-wide pollution limit was augmented by the President’s executive order and the consent decrees, MOUs, and settlement agreements that the states and other parties had entered into over the years. In rejecting this argument, the court stated that these supplemental sources could not by themselves expand congressionally bestowed powers.<sup>17</sup> Nonetheless, the court upheld the TMDL as a valid exercise of EPA’s powers under the CWA.

### EPA’s reliance on scientific models and data were reasonable

The court found that EPA’s reliance on certain models and data were reasonable and, under *Chevron*, deferred to the agency’s expertise.<sup>18</sup>

### The length of the comment period and information provided was adequate

The court had very little trouble finding that the 45-day public comment period was sufficient. First, the period exceeded the statutory minimum requirement of 30 days. Second, because the TMDL was developed over a ten-year period, plaintiffs actually had much longer than the 45 days in which to participate in the plan’s development. Finally, the court disagreed that the

process was procedurally insufficient because EPA allegedly withheld information about three models underlying the final TMDL. The court found that not only did the EPA give as much information as it could regarding these ever-changing models, but also that the plaintiffs failed to demonstrate how they were prejudiced by the lack of information.<sup>19</sup>

## Endnotes

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The author wishes to thank CPR Member Scholars William L. Andreen and Rena Steinzor for their helpful edits and input.

<sup>1</sup> Am. Farm Bureau Fed'n v. EPA, No. 1:11-cv-00067-SHR (D. Pa. Sept. 13, 2013), *available at* [http://www.eenews.net/assets/2013/09/16/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2013/09/16/document_gw_03.pdf).

<sup>2</sup> Plaintiffs' Notice of Appeal to the United States Court of Appeals for the Third Circuit, Am. Farm Bureau Fed'n v. EPA, No. 11-cv-0067-SHR (3d Cir. filed Oct. 7, 2013), *available at* [http://www.eenews.net/assets/2013/10/08/document\\_pm\\_01.pdf](http://www.eenews.net/assets/2013/10/08/document_pm_01.pdf).

<sup>3</sup> CHESAPEAKE BAY PROGRAM, *1987 Chesapeake Bay Agreement*, [http://www.chesapeakebay.net/content/publications/cbp\\_12510.pdf](http://www.chesapeakebay.net/content/publications/cbp_12510.pdf).

<sup>4</sup> CHESAPEAKE BAY PROGRAM, *Chesapeake 2000*, [http://www.chesapeakebay.net/content/publications/cbp\\_12081.pdf](http://www.chesapeakebay.net/content/publications/cbp_12081.pdf).

<sup>5</sup> David A. Fahrenthold, *A Revitalized Chesapeake May Be Decades Away*, WASH. POST, Jan. 5, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010401051.html>.

<sup>6</sup> CHESAPEAKE BAY PROGRAM, *Chesapeake Bay TMDL*, <http://www.chesapeakebay.net/about/programs/tmdl>.

<sup>7</sup> CHESAPEAKE BAY PROGRAM, *Watershed Implementation Plans*, <http://www.chesapeakebay.net/about/programs/watershed>; *see also, e.g.*, MD. DEP'T OF THE ENV'T, *Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Watershed*, [http://www.mde.state.md.us/programs/Water/TMDL/TMDLHome/Pages/Final\\_Bay\\_WIP\\_2010.aspx](http://www.mde.state.md.us/programs/Water/TMDL/TMDLHome/Pages/Final_Bay_WIP_2010.aspx) (Maryland's Phase I WIP).

<sup>8</sup> These additional plaintiffs were: The Fertilizer Institute, the National Pork Producers Council, the National Corn Growers Association, the National Chicken Council, the U.S. Poultry and Egg Association, and the National Turkey Federation.

<sup>9</sup> These first group of movants were: the Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Defenders of Wildlife; Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and the National Wildlife Federation.

<sup>10</sup> The second group of movants included: the National Associations of Clean Water Agencies (NACWA), the Maryland Association of Municipal Wastewater Agencies (MAMWA), and the Virginia Association of Municipal Wastewater Agencies (VAMWA).

<sup>11</sup> Another challenge to the Bay-wide TMDL is pending. In that case, Food & Water Watch and Friends of the Earth contend that the Bay plan's water quality trading provisions violate the CWA by unlawfully allowing new and increased pollution discharges into the Bay watershed. Food and Water Watch v. EPA, No. 1:12-cv-01639 (D.D.C. filed Oct. 3, 2012), *available at* <http://documents.foodandwaterwatch.org/doc/FINALCOMPLAINT.pdf>.

<sup>12</sup> Am. Farm Bureau Fed'n v. EPA, No. 1:11-cv-00067-SHR (D. Pa. Sept. 13, 2013), at 74–75, *available at* [http://www.eenews.net/assets/2013/09/16/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2013/09/16/document_gw_03.pdf).

<sup>13</sup> *Id.* at 52.

<sup>14</sup> *Id.* at 55–56.

<sup>15</sup> *Id.* at 10–27.

<sup>16</sup> *Id.* at 58–60.

<sup>17</sup> *Id.* at 75–76.

<sup>18</sup> *Id.* at 79–97.

<sup>19</sup> *Id.* at 77–79.

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## About the Center for Progressive Reform

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.

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