EPA'S CHESAPEAKE BAY TMDL SURVIVES LEGAL CHALLENGE: STRICTER WATER QUALITY REGULATION OF FARMS, MUNICIPALITIES, INDUSTRY, AND BUSINESS MAY FOLLOW

Date: 15 July 2015

Environment, Land and Natural Resources Alert

By: R. Timothy Weston, Tad J. Macfarlan

On July 6, 2015, a three-judge panel of the U.S. Court of Appeals for the Third Circuit unanimously rejected a challenge brought by agricultural and builder groups to the U.S. Environmental Protection Agency's Chesapeake Bay "Total Maximum Daily Load" ("TMDL"). [1] The decision paves the way for full implementation of the TMDL's comprehensive pollutant reduction plan for sources of nitrogen, phosphorous, and sediment in the Chesapeake Bay watershed.

The Chesapeake Bay TMDL,[2] which EPA issued in December 2010, identifies the total amount of certain constituents (i.e., the total maximum daily load) that the watershed can contribute to the Bay in order to restore water quality to a level that will support protected water uses (such as fisheries and recreation). Based on these total maximum daily loads, the TMDL then allocates individualized pollutant loadings to "point sources" (such as wastewater treatment plants and industrial dischargers) and "non-point source" sectors (such as agriculture and stormwater runoff) in the affected portions of Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. The TMDL also establishes deadlines for the states to develop and implement plans to come into compliance with the designated loadings.

The plaintiffs in the case argued that the source- and sector-specific pollutant allocations and compliance timelines exceeded EPA's authority under the Clean Water Act,[3] claiming that the statute only confers on EPA the authority to establish a "total maximum daily load" for impaired waters (if the states fail to do so), but is silent with respect to EPA's authority to direct TMDL implementation in the states.[4] The court disagreed, finding EPA's inclusion of the contested TMDL elements to be a legitimate policy choice that was grounded in a reasonable interpretation of the Act. In this regard, the Third Circuit affirmed a September 2013 decision of the federal district court for the Middle District of Pennsylvania, which similarly upheld the Bay TMDL.[5]

The plaintiff agricultural and builder groups may attempt to obtain reconsideration by the Court of Appeals, or seek to appeal the Third Circuit's decision to the U.S. Supreme Court. However, in the meantime, EPA and the Bay states will move forward with implementation of the TMDL and the states' accompanying watershed implementation plans ("WIPs"), which collectively call for significant pollution reductions from farms, municipalities, and industrial dischargers.

©2005-2026 K&L Gates LLP. All Rights Reserved.

1. ESTABLISHMENT OF TMDLS UNDER SECTION 303 OF THE CLEAN WATER ACT

Section 303 of the Clean Water Act[6] governs the interrelated processes by which the states and EPA establish water quality standards, identify impaired waters, and create TMDLs for those waters.

First, the states are required to establish "water quality standards," consisting of (1) designating one or more uses (e.g., fishing, recreation, agriculture) for each federally-regulated water body, and (2) promulgating the narrative or numeric water quality criteria necessary to protect these uses.[7] EPA must approve or disapprove the states' water quality standards, and, if the latter, promulgate its own water quality standards for the state.[8]

Once water quality standards are in effect, states must identify the water bodies that are failing to attain those standards using traditional methods of pollution control under the Clean Water Act, such as the imposition of effluent limits on point source dischargers through national pollutant discharge elimination system ("NPDES") permits.[9] This list of waters is often referred to as the "impaired waters list" or "Section 303(d) list." States must submit their impaired waters lists to EPA for approval, and if EPA disapproves, EPA must itself identify impaired waters in the state.[10]

The states then must establish a TMDL for each identified impaired water. Specifically, under Section 303(d)(1)(C) of the Act, the states "shall establish … the total maximum daily load" of pollutants for each impaired water, which "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety …." [11] The states must submit their TMDLs to EPA for approval, and if EPA disapproves, EPA shall "establish such loads for such waters as [EPA] determines necessary to implement the water quality standards applicable to such waters …."[12] Once EPA establishes a TMDL, the state "shall incorporate [it] into its current plan" for implementing various requirements of the Clean Water Act, which EPA refers to as "water quality management plans."[13]

Pursuant to these statutory provisions, EPA and the states have developed approximately 68,000 TMDL's across the country. TMDLs have become an increasingly important Clean Water Act tool because they provide a means for EPA to pursue pollution reductions from non-point sources (including most of the agricultural sector), which otherwise are not subject to federal regulation or permitting requirements under the Clean Water Act. After more than 40 years of aggressive Clean Water Act enforcement against point source dischargers, non-point source pollution is often viewed as the lowest-hanging fruit remaining when it comes to achieving additional improvements in the quality of our nation's waters.

2. THE CHESAPEAKE BAY TMDL

In October of 2007, after more than 30 years of coordinated multi-state efforts to restore the degraded water quality of the Bay, the seven Bay jurisdictions and EPA reached consensus that they would jointly develop and EPA would establish a Bay TMDL. Similarly unsatisfied with the pace of restoration efforts, the Chesapeake Bay Foundation and others brought suit against EPA in January 2009 to force aggressive federal action to cleanup the Bay.[14] EPA and the Chesapeake Bay Foundation reached a settlement agreement in May 2010 that required EPA to establish a TMDL for the watershed by December 31, 2010. Accordingly, EPA issued the Chesapeake Bay TMDL on December 29, 2010, after a period of intense wrangling between EPA and the Bay states over the TMDL's form and content. The TMDL was based in substantial part on the states' Phase I watershed implementation plans ("WIPs"), which the states developed with significant EPA oversight and influence.

©2005-2026 K&L Gates LLP. All Rights Reserved.

As noted by the federal district court for the Middle District of Pennsylvania, "[t]he Chesapeake Bay TMDL … is the largest and most complex TMDL" created since the inception of the Clean Water Act.[15] EPA itself describes the TMDL as "a historic and comprehensive 'pollution diet' with rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region's streams, creeks and rivers."[16]

The Bay TMDL begins by setting total maximum loadings for nitrogen, phosphorous and sediment in 92 discrete impaired segments of the Bay watershed (276 total loads). These loadings were developed using water quality monitoring networks and predictive modeling. EPA's total load determinations were not challenged before the Third Circuit, although the plaintiffs did (unsuccessfully) object to some aspects of EPA's modeling before the Middle District of Pennsylvania.[17]

Next, the TMDL contains "waste load allocations" ("WLAs") for point sources and "load allocations" ("LAs") for non-point source sectors that allocate the total loads between significant sources of pollution in the watershed. These WLAs and LAs are not self-executing. However, pursuant to EPA regulation, NPDES permit writers must incorporate permit limits that are consistent with the WLA's when point source permits come up for renewal.[18] With respect to non-point sources, EPA required the states to commit to specific regulatory actions in their WIPs to provide "reasonable assurance" that the required reductions in pollution will come to fruition. EPA based the WLAs and LAs in substantial part on the allocations proposed in the states' Phase I WIPs. However, in a handful of instances, EPA rejected the states' proposed allocations, instead setting forth "backstop" allocations, adjustments, and actions that EPA thought necessary to reasonably assure that the overall load reductions are achieved. For instance, in Pennsylvania, EPA shifted 50 percent of Pennsylvania's urban stormwater load from the LA (non-point source) to the WLA (point source) category, signaling EPA efforts to control stormwater runoff from urban and suburban areas via NPDES permit requirements for municipal separate storm sewer systems ("MS4").[19]

The TMDL also sets interim and final deadlines for the states to identify and implement all control measures necessary to achieve the pollution reductions called for in the TMDL. The states submitted their more refined Phase II WIPs to EPA in 2012, and are required to submit Phase III WIPs to EPA by 2017. The TMDL requires that at least 60 percent of all necessary pollution control measures be implemented by 2017, with full implementation by 2025.[20] If the states fail to meet these deadlines, EPA has indicated (some would say threatened) that it will take aggressive action to correct any deficiencies, including, but not limited to, expanding the scope of the NPDES permit program, requiring additional pollution reductions from point source dischargers, prohibiting new or expanded discharges, increasing federal enforcement, and conditioning or redirecting federal grant money.[21]

3. THE DISTRICT COURT DECISION

Shortly after EPA issued the Chesapeake Bay TMDL, the American Farm Bureau Federation and the Pennsylvania Farm Bureau filed a complaint against EPA in the federal district court for the Middle District of Pennsylvania. Other agricultural groups and the National Association of Home Builders eventually joined in the suit. Environmental groups and associations representing municipal wastewater agencies intervened on EPA's behalf.

©2005-2026 K&L Gates LLP. All Rights Reserved.

The plaintiffs argued that the TMDL exceeded EPA's authority under the Clean Water Act because it represented an unlawful federal implementation plan, impeding on the states' right to implement a TMDL as each state sees fit.[22] Specifically, the plaintiffs objected to the source- and sector- specific pollution allocations, EPA backstop measures, and implementation deadlines as unlawful under Section 303(d) of the Act, which only confers on EPA the authority to establish a "total maximum daily load" for impaired waters "at a level necessary to implement the applicable water quality standards …."[23] In the plaintiffs' view, EPA should have halted after establishing the total pollutant loadings for each of the 92 impaired segments of the watershed, and left implementation to the states.

In a lengthy opinion issued on September 13, 2013, the district court granted summary judgment in favor of EPA.[24] The court found that the TMDL did not constitute an unlawful federal implementation plan because the states contributed significantly to the development of the TMDL, the TMDL left room for the states to develop implementation strategies, and the contested TMDL elements were not technically binding on the states.[25] The court also rejected procedural arguments regarding the adequacy of the 45-day comment period on the draft TMDL and the sufficiency of documentation relating to EPA's modeling efforts.[26] Finally, the court found that the plaintiffs had failed to carry their heavy burden in establishing that alleged modeling flaws rendered EPA's action in issuing the TMDL arbitrary and capricious.[27]

4. APPEAL TO THE THIRD CIRCUIT

The plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit. Before the appellate court, the plaintiffs argued that EPA did not have the authority under § 303(d) of the Clean Water Act to issue a TMDL that (1) incorporates pollutant limits for individual sources and source sectors, (2) requires states to provide "reasonable assurance" that such limits will be achieved, and (3) establishes deadlines for states to put control measures and practices in place.[28] Under the familiar *Chevron*[29] two-step framework for evaluating the legality of agency statutory interpretations, EPA responded that Congress left a gap for EPA to fill by leaving the term "total maximum daily load" undefined (under *Chevron* step 1), and thus the court should defer to EPA's reasonable interpretation of the provision as including the contested elements (under *Chevron* step 2).[30] The plaintiffs, on the other hand, countered that § 303(d) is clear and unambiguous under *Chevron* step 1—EPA may only establish a "*total* maximum daily load" at a specified "level," and none of the contested TMDL elements, according to plaintiffs, are fairly encompassed within this limited grant of authority.[31] Both sides also cited to case law, ancillary statutory provisions, statutory context and structure, and legislative history in support of their respective positions.

On July 6, 2015, a three-judge panel of Third Circuit Court of Appeals issued a unanimous opinion siding with the EPA and affirming the district court's judgment.[32] Under *Chevron* step 1, the court found that the term "total maximum daily load" (in particular, the word "total") is ambiguous and susceptible to multiple interpretations, implicitly authorizing EPA to fill the gap created by Congress.[33] In this regard, the court identified several factors that (arguably) suggest that a TMDL can include more than just a single number for each impaired water. For instance, the court noted that § 303(d) of the Act requires a TMDL to be set at a level that accounts for "seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."[34] The court indicated that "[i]t would be strange to require the EPA to take into account these specific considerations but at the same time command the agency to excise them from its final product."[35] Similarly, the court noted that the Administrative Procedures Act requires

©2005-2026 K&L Gates LLP. All Rights Reserved.

an agency provide sufficient information about how it reached its final decision, and "it would fall afoul of this requirement if it published only a number with no supporting information."[36] The court did not explain how these factors applied any differently to the TMDL than in any other agency rulemaking, where agencies always document their consideration of a variety of factors in reaching a final decision, but place this analysis in supporting documents (such as a preamble) rather than in the actual, binding regulatory text.

Continuing with its *Chevron* step 1 analysis, the court found that EPA's interpretation was consistent with the structure and purposes of the Clean Water Act because it would account for pollution from non-point sources and further the Act's goal of achieving water quality standards in a timely manner.[37] The court also dismissed plaintiffs' federalism concerns, determining that EPA's interpretation did not require a "clear statement" of support from Congress because it did not include any "actual, identifiable land use rule" encroaching on the states' constitutionally-reserved sphere of authority.[38]

With respect to *Chevron* step 2, the court concluded that EPA's interpretation of the Clean Water Act was "reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute."[39] The court indicated that the plaintiffs' competing reading of the statute, on the other hand, "would stymie the EPA's ability to coordinate among all the competing possible uses of the resources that affect the Bay."[40] Ultimately, the court's decision appears to have been driven by this underlying practical concern regarding the efficacy of the Bay TMDL. To this end, the court indicated that it "defies common sense and experience" to believe, as asserted by the plaintiffs, that the Bay would be cleaned up in the absence of aggressive intervention by EPA.[41]

5. NEXT STEPS

The plaintiffs in the case can now appeal the Third Circuit's decision by filing a petition for (1) reconsideration before the same three-judge panel, (2) *en banc* review by the entire slate of Third Circuit judges, and/or (3) writ of *certiorari* with the U.S. Supreme Court. If plaintiffs exercise one or more of these options, the ultimate resolution of the case could be months or years away.

Meanwhile, EPA and the states are forging ahead with implementation of the Bay TMDL and the states' WIPs. The Bay states are currently in the process of implementing their Phase II WIPs and are working toward achievement of their 2014-2015 two year milestones. The next significant deadlines for the states occur in 2017, when they must submit their Phase III WIPs and have practices in place that are designed to achieve 60% of all necessary TMDL pollution reductions. The TMDL timeline calls for EPA to make any necessary modifications to the TMDL in 2017 as well.

One of the huge challenges in meeting TMDL goals is the fact that EPA only has limited "tools in the tool box." While EPA has, under federal law, authority to regulate point source discharges of pollutants (such as municipal treatment plants), the agency lacks effective regulatory power over most non-point sources. The states, in some cases, have broader regulatory and other programs to address non-point sources, such as stormwater and agriculture, but have been reluctant to exercise those powers for both political and cost reasons.

Most recently, on June 10, 2015, EPA provided interim evaluations to the states regarding their progress toward meeting their 2014-2015 milestones and Phase II WIP commitments. According to these evaluations, several of the states, including Pennsylvania, are not on track to meet one or more of their targets for nitrogen, phosphorous, or sediment, in some cases by significant margins.[42] While the point source sector was by and

©2005-2026 K&L Gates LLP. All Rights Reserved.

large meeting or beating its interim milestones, stormwater and agricultural runoff loadings were well over their respective targets. If such trends continue, EPA may begin to take more aggressive federal action to force additional pollution reductions, as promised in the body of the TMDL. EPA has indicated that if non-point source controls for agriculture and other stormwater continue to lag, stricter "backstop" controls may be placed on other sectors, such as municipal sewage plants and industries, even though the latter point source sectors contribute a relative small percentage of nutrients and sediment loadings to the Bay.

The Bay TMDL literally impacts all communities, economic sectors and landowners within the multi-state watershed that drains water into the Bay. All have a stake in assuring that the efforts to achieve the reductions in pollutants are carried out in a sensible and cost-effective manner. All should carefully monitor the states' progress in implementing the TMDL and consider how the agencies' emerging regulatory responses could and will affect their interests.

Notes:

[1] *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079, 2015 WL 4069224 (3d Cir. July 6, 2015).

[2] Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous and Sediment (Dec. 29, 2010), available at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html.

[3] 33 U.S.C. §§ 1251–1387.

[4] *Id.* § 1313(d)

[5] *Am. Farm Bureau Fed'n v. EPA*, 984 F.Supp.2d 289, 303 (M.D. Pa. 2013).

[6] 33 U.S.C. § 1313.

[7] *See Id.* § 1313(c); 40 C.F.R Part 131.

[8] *Id.* § 1313(a)(3)(A)–(C).

[9] *Id.* § 1313(d)(1)(A).

[10] *Id.* § 1313(d)(2).

[11] *Id.* § 1313(d)(1)(C).

[12] *Id.* § 1313(d)(2).

[13] *Id.* § 1313(d)(2), (e); 40 C.F.R. § 130.6.

[14] Complaint, *Fowler v. EPA*, No. 1:09-cv-00005-CKK (D.D.C. Jan. 5, 2009).

[15] 984 F.Supp.2d at 30.

[16] Chesapeake Bay TMDL at ES-1.

[17] *See* 984 F.Supp. 2d at 334–44.

[18] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[19] Chesapeake Bay TMDL at 8-26.

[20] *Id.* at ES-1.

©2005-2026 K&L Gates LLP. All Rights Reserved.

[21] *Id.* at ES-13.

[22] 984 F.Supp.2d at 313.

[23] 33 U.S.C. § 1313(d).

[24] 984 F.Supp.2d 289.

[25] *Id.* at 313–33.

[26] *Id.* at 333–40.

[27] *Id.* at 340–44.

[28] Brief of Plaintiffs-Appellants at 2, *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079 (3d Cir. Jan. 27, 2014).

[29] *Chevron v. NRDC*, 467 U.S. 837 (1984).

[30] EPA Response Brief, *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079 (3d Cir. Apr. 2, 2014).

[31] Reply Brief of Plaintiffs-Appellants at 6, 9–12, *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079 (3d Cir. Aug. 20, 2014).

[32] *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079, 2015 WL 4069224 (3d Cir. July 6, 2015).

[33] *Id.* at *12.

[34] *Id.* (quoting 33 U.S.C. § 1313(d)(1)(C)).

[35] *Id.*

[36] *Id.*at *11.

[37] *Id.* at *12–14, 20.

[38] *Id.* at *15–20.

[39] *Id.* at *22.

[40] *Id.*

[41] *Id.* at *21.

[42] EPA's interim assessments are available at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/RestorationUnderway.html?tab2=2&tab1=4.

KEY CONTACTS



R. TIMOTHY WESTON
SENIOR OF COUNSEL

HARRISBURG
+1.717.231.4504
TIM.WESTON@KLGATES.COM



TAD J. MACFARLAN
PARTNER

HARRISBURG
+1.717.231.4513
TAD.MACFARLAN@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.