

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer Court of Appeals rules in favor of EPA in Chesapeake Bay lawsuit

In a ruling that could have implications for reducing pollution in the Mississippi River and Great Lakes watersheds, a three judge panel of the US Court of Appeals for the Third District ruled that the US Environmental Protection Agency (EPA) had not exceeded its statutory authority in the plan it developed with the affected states and the District of Columbia to reduce pollution in the Chesapeake Bay (<http://tinyurl.com/o6vl3nl>).

The lawsuit was brought by the American Farm Bureau Federation, the Pennsylvania Farm Bureau, The Fertilizer Institute, the National Chicken Council, the US Poultry and Egg Association, the National Pork Producers Council, the National Corn Growers Association, the National Turkey Federation, and the Association of Homebuilders, referred to collectively by the court as the “Farm Bureau” in response to the 2010 publication by the EPA of the “‘total maximum daily load’ (‘TMDL’) of nitrogen, phosphorus, and sediment that can be released into the Chesapeake Bay (the Bay)...to comply with the Clean Water Act.... The TMDL is a comprehensive framework for pollution reduction designed to ‘restore and maintain the chemical, physical, and biological integrity’ of the Bay.

“Trade associations with members who will be affected by the TMDL’s implementation...sued. They allege that all aspects of the TMDL that go beyond an allowable sum of the pollutants (i.e. the most nitrogen, phosphorus, and sediment the Bay can safely absorb per day) exceeded the scope of the EPA’s authority to regulate, largely because the agency may intrude on states’ traditional role in regulating land use.” The District Court ruled in favor of the EPA in 2013 and the Farm Bureau appealed to the Court of Appeals.

The Chesapeake Bay is the largest estuary in North America and is home to 17 million people. The Bay supports many of the activities of this population. “As a result, it is plagued by dead zones with opaque water and algae blooms that render significant parts of it unable to support aquatic life.” By 1972 the Bay, along with other waterways, had captured the attention of Congress which passed the Clean Water Act (CWA).

In seeking to clean up the Bay under the CWA, the seven states (“Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia, which is a ‘state’ for CWA purposes) first had to “designate a use for each relevant water...and set...a target water quality based on the use.” TMDLs are then set to achieve the target water quality. The states deferred to the EPA in setting the TMDLs for each “water quality limited segment” in the Chesapeake Bay estuary.

Those segments “for which effluent limitations and technology-based point source (‘discrete places where pollutants are discharged, like a drainpipe at a wastewater treatment plant’) controls are insufficient to meet the applicable water quality standard” must then turn to nonpoint sources like roads, construction sites, and farms. In the case of the Chesapeake Bay, point sources alone are not sufficient to enable the Bay to meet the applicable water quality standard.

Much of the Court of Appeals ruling is a detailed analysis of the relevant statutes and applicable Supreme Court rulings, each of which is resolved in favor of the EPA. In that discussion, the court points out that “there can be no serious question that the Chesapeake Bay is a channel of interstate commerce” and thus is subject to “Congress’s commerce power.” In affirming Federal jurisdiction, Judge Ambro writes, “we are not concerned here with a small intrastate area of wetlands; we are dealing with North America’s largest estuary.”

A couple of paragraphs later Ambro pens, “Because the TMDL forms part of a plan to clean up a channel of interstate commerce, we have no constitutional concerns with the EPA’s interpretation of the statute.” As to Farm Bureau’s contention that the TMDLs infringes upon the power of the states in land use planning the court makes two points. First, the CWA envisions an EPA/state partnership in reducing water pollution and second, the EPA does not tell the states how to achieve the nonpoint source pollution needed to achieve the TMDLs assigned to each section.

“Even Farm Bureau ‘agree[s] with EPA that developing source limits, assurances, and deadlines are useful’.... Although Farm Bureau claims that the Chesapeake Bay will be cleaned up without EPA intervention, the convention defies common sense and experience. The Clean Water Act sought to eliminate the pollution by 1985, but by 2010 62 percent of the Bay had insufficient oxygen to support aquatic life and only 18 percent of the Bay had acceptable water clarity.”

The ruling concludes “Water pollution in the Chesapeake Bay is a complex problem currently affecting at least 17,000,000 people (with more to come). Any solution to it will result in winners and losers.

“To judge from the arguments and the amici briefs filed in this case, the winners are environmental groups, the states that border the Bay, tourists, fishermen, municipal waste water treatment works, and urban centers. The losers are rural counties with

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farming operations, nonpoint source polluters, the agricultural industry, and those states that would prefer a lighter touch from the EPA.

“Congress made a judgment in the Clean Water Act that the states and the EPA could, working together, best allocate the benefits and burdens of lowering pollution. The Chesapeake Bay TMDL will require sacrifice by many, but that is a consequence of the tremendous effort it will take to restore health to the Bay—to make it once again a part of our ‘land of living,’ Robert Frost, The Gift Outright line 10—a goal our elected representatives have repeatedly endorsed. Farm Bureau’s arguments to the contrary are unpersuasive, and thus we affirm the careful and thorough opinion of the District Court.”

As of the writing of this column, the Farm Bureau has not decided whether or not to appeal this ruling.

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