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The Potentially Sweeping Effects Of EPA's Chesapeake Plan

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The U.S. Environmental Protection Agency's Chesapeake Bay "Total Maximum Daily Load" (TMDL) regulation under the Clean Water Act prescribes limits on sources of nutrients (nitrogen and phosphorus) and sediment across the 64,000-square-mile Chesapeake Bay watershed (which includes portions of Maryland, Virginia, West Virginia, Delaware, Pennsylvania, New York, and the Washington, D.C.). The American Farm Bureau Federation has filed a petition for certiorari with the U.S. Supreme Court challenging the Third Circuit's decision upholding the EPA's statutory authority to include certain pollution limits, deadlines and other mandates on states as part of its Chesapeake Bay TMDL.

The AFBF asserts that in the guise of setting a "total maximum daily load," the EPA has seized much broader authority by adding matters that Congress reserved to the states. The government's opposition brief counters that the affected states agreed that the EPA could "take the lead drafting role"[2] and that the EPA would "draft the TMDL in the first instance."[2]

As explained below, however, the EPA did not merely "draft" the TMDL, it exercised complete control over its contents, often over state objections. For most of the affected states, the history of this TMDL is a story of grudging acquiescence to the EPA's decisions. This article will summarize what happened after that initial "agreement," and the lessons that should be drawn from what transpired.

"Some Partners Are More Equal Than Others"

The EPA has referred to the bay watershed states as its "partners" in developing the bay TMDL.[3] But, to paraphrase George Orwell's satire of Soviet communism in "Animal Farm," all partners were equal, but some were "more equal than others." In fact, once the EPA took over the "lead drafting role," it also took full control of the outcome despite state objections.

The EPA developed this TMDL by imposing an "accountability framework" on the seven jurisdictions. The EPA summarized its requirements in an "expectations" letter (Nov. 4, 2009) that it sent to each of them. Although the EPA has historically agreed that it has no authority over state plans for implementation of TMDLs, for this one the EPA required states to submit watershed implementation plans (WIPs) for the EPA's approval. The EPA's addition of this WIP review and revision process was extraordinary, given the EPA's longstanding policy that it "is not required to and does not approve TMDL implementation plans." U.S. EPA, "Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992" (May 20, 2002).[4]

For the Chesapeake Bay TMDL, however, the EPA required the states to submit such plans and specified that they had to describe the authorities, actions and control measures that would be imposed on sources to achieve the TMDL's limits. According to the EPA, "the WIPs are the roadmap for how the jurisdictions ... will achieve and maintain the [final] TMDL[.]" AR0000255.[5] The final deadlines, control measures and other mandates in the TMDL, however, remained exclusively in the EPA's control.

In case the states had any lingering doubts about the EPA's control of this process, they were laid to rest by the EPA's Region 3 Regional Administrator Shawn Garvin, as confirmed by the minutes of an April 29 bay TMDL development meeting: "Chair Shawn Garvin wanted to reiterate that this was the EPA's plan, and that there was nothing on the table for a vote." JA552.[6]

Despite the EPA's explicit enumeration of its "expectations" and the available sanctions for failing to meet them, the EPA rejected the initial WIPs submitted by all seven jurisdictions, concluding that the pollution controls were insufficient and that none of the draft WIPs provided "reasonable assurance" that the identified pollution controls would be implemented to achieve the pollution reduction targets. See AR0024035; AR0024039-41.

But the EPA did not merely reject the state WIPS: in its draft TMDL, the EPA imposed its own "backstop measures" to compensate for the perceived state deficiencies, accompanied by threats of retaliatory actions. See AR0024050-52; AR0024032-33. The EPA threatened to regulate currently unregulated sources, such as smaller livestock and poultry farms. See AR0024032. The EPA also threatened to object to state-issued discharge permits to individual sources, see id., even though disagreement with a state's WIP is not one of the grounds for objection in the EPA's regulations. See 40 C.F.R. § 123.44. Other EPA threats included: (a) promulgating federal water quality standards, (b) requiring additional point source discharge reductions, (c) engaging in increased federal enforcement activity, and (d) withholding grant money to states for reasons not intended by Congress, all because the EPA did not agree with a state's WIP. See AR0024032-33.

New York, Pennsylvania and West Virginia objected in writing to the assumption of federal control over source limits in the EPA's draft TMDL. New York stated that it "cannot agree to the allocations [i.e., source limits] in this draft TMDL" and that "the EPA's determination to assert sole authority to make these complicated decisions for New York, and over New York's objections, appears to be well beyond the providence of the EPA's authority." JA898, 902. The state wrote that "New York has not agreed to participate in the legally binding TMDL." JA333.

Pennsylvania wrote that "Pennsylvania does not ... agree with the approach outlined in the EPA's draft Chesapeake Bay TMDL ... Pennsylvania objected to the imposition of 'federal backstop measures' in the draft bay TMDL, including the establishment of [detailed allocations to point and nonpoint sources]." JA1004. West Virginia wrote, inter alia, "we feel the need to provide formal comment and adamantly oppose the imposition by the EPA of the backstop TMDL." JA903-04. West Virginia's Governor wrote that West Virginia "[d]esperately does not want the federal backstops." JA855. Virginia, too, objected. Gov. Bob McDonnell wrote to the EPA expressing Virginia's numerous concerns with the legality of the TMDL, including its "reasonable assurance" requirements. JA557-60. "The final TMDL should not include any federal backstops." JA954.

Despite the foregoing objections, each of the seven jurisdictions revised their implementation plans in an effort to avoid the "backstop" (federal control) measures that the EPA had placed in its draft TMDL. See AR0000266. Even after these revisions, however, for three of the states (New York, Pennsylvania

and West Virginia) the EPA nevertheless imposed federal backstop measures in the final regulation. See AR0000283, AR0000287. For New York, the EPA added restrictions on wastewater facilities. See AR0000284-85. For West Virginia and Pennsylvania, it imposed new requirements for farms and stormwater sources, respectively, to obtain Clean Water Act permits. See AR0000265-66.

Lesson 1: The Genie Won't Go Back In the Bottle

Shawn Garvin was right: When the EPA (or any agency) implements a federal law, cooperation will take you only so far. In fact, the EPA can act lawfully only by complying with the statute that authorizes it to act, regardless of the warm feelings it may have for its "collaborators."

It is well-established that an agency may not act beyond the scope of its statutory authority. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.") "Regardless of how serious the problem an administrative agency seeks to address, [] it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (citation and internal quotation marks omitted).

Thus whatever the "collaborating" state "partners" thought they were doing when they agreed to the EPA's "taking the lead" on drafting the TMDL, once the EPA began the process, the outcome would be a federal TMDL. There could be only one decision maker — the EPA.

Lesson 2: If it Doesn't Work Out, Divorce is an Option

A corollary of lesson one is that if you don't like the result, you can sue — and so can others who are adversely affected. An agency can't by agreement expand its own statutory authority, but neither does the state agreeing to the agency action thereby waive the right to challenge it if the action exceeds the agency's authority.

The Supreme Court has observed this principle on several occasions. An agency's exceedances of its statutory authority and intrusion into matters of traditional state concern cannot be ratified by states' consent. Thus, the plurality opinion Rapanos v. United States, 547 U.S. 715, 737 n.8 (2006), found it irrelevant that "33 states plus the District of Columbia ... filed an amici brief" supporting the Army Corps of Engineers' expansive (and ultimately unlawful) interpretation of the phrases "navigable waters" and "waters of the United States."

"It makes no difference," the court held, "to the statute's stated purpose of preserving states' responsibilities and rights ... that some states wish to unburden themselves of them." Id. (internal quotation marks omitted). Likewise, in United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting), the Supreme Court struck down a legislative enactment that intruded on states' rights despite the fact that 36 states and the Commonwealth of Puerto Rico filed an amicus brief supporting the challenged legislation. While this case did not involve limits on an agency's regulatory authority, it demonstrates that states' support for legislation cannot save an otherwise unlawful act from infirmity.

The case that is most cited for this proposition is New York v. United States, 505 U.S. 144, 182 (1992), which held that "[w]here Congress exceeds its authority relative to the states, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." See also Board Of Natural Resources v. Brown, 992 F.2d 937, 946 (9th Cir. 1993) (finding it irrelevant that "the state of

Washington not only ha[d] declined to challenge the statute ... but actually ha[d] supported the act in other litigation.") By analogy, the EPA's alleged encroachment into traditional areas of state concern in the Chesapeake Bay TMDL could not be saved even if all the affected states consented to this encroachment. Federalism "does not protect the sovereignty of states for the benefit of the states ... [it does so] for the protection of individuals." New York, 505 U.S. at 181.

Lesson 3: Mighty Oaks from Little Acorns Grow

If the court declines to grant review or upholds the bay TMDL, the EPA will not need the agreement of the states for future revisions to this TMDL, nor will it need the consent of other states for the next federal TMDL. The Chesapeake Bay TMDL itself asserts that the EPA has authority to establish even "finer scale" requirements with or without the states' agreement. JA1366. The issue raised by the American Farm Bureau Federation is whether the Clean Water Act confers the authority that the EPA is claiming here. If it does, the EPA has the authority to act unilaterally, without state consent.

Here, the consequences could be quite dramatic. The EPA has claimed the last word on land use decisions such as how much nitrogen, phosphorus and sediment can come from a particular urban area in Pennsylvania, or how much can come from agriculture, forestry or construction in particular areas of Virginia. And the EPA has proclaimed authority to make even more detailed land use decisions in the future, such as how much nitrogen, phosphorus and sediment can come from a particular farm or construction site. If the EPA's position is upheld, it will have such authority in every state in the union. Because the issue hinges on the meaning of the Clean Water Act, the impact of the court's decision will be felt nationwide.

Conclusion

From a legal standpoint, the states' "agreement" to let the EPA draft the Chesapeake Bay TMDL should mean very little. It does not enhance the legal rights of those states to influence the result, and it does not protect the EPA from suits by those same states (or others) asserting that the result exceeds the EPA's powers. These limitations on the impact of the agreement are appropriate, given that the impact of the underlying legal dispute will not be limited to the parties to the agreement or to the parties to this pending lawsuit, but will affect future TMDLs (and thus and countless communities and businesses) throughout the nation.

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Disclosure: Crowell & Moring represented the American Farm Bureau Federation and the other

plaintiff/petitioners in this case in the U.S. District Court and the court of appeals, and filed an amicus brief on behalf of 92 members of Congress in support of the pending certiorari petition of the American Farm Bureau Federation.

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[1] American Farm Bureau Federation v. EPA (U.S. Supreme Court No. 15-599) "Brief For The Federal Respondent in Opposition" at 18.

[2] Id., at 19.

[3] See, for example, "U.S. Environmental Protection Agency's Response Brief" (April 2, 2014), at 11, 16, in American Farm Bureau Federation v. EPA, 792 F.3d 281 (3d Cir. 2015).

[4] That the EPA has no role in creation or approval of implementation plans was upheld by the 11th Circuit. Sierra Club v. Meiburg, 296 F.3d 1021 (11th Cir. 2002).

[5] References to "AR___" refer to the administrative record in American Farm Bureau Federation v. EPA, 984 F. Supp. 2d 289 (M.D. PA 2013).

[6] References to "JA___" refer to the Joint Appendix in American Farm Bureau Federation v. EPA, 792 F.3d 281 (3d Cir. 2015).