

Vermont Law Journal TMDL Symposium October 23, 2015

- *American Farm Bureau Federation v. U.S. Environmental Protection Agency (Chesapeake Bay TMDL)*, (3d. Cir. No. 13-4079; decided July 6, 2015)

AFBF v. EPA (Chesapeake Bay)

1. Standing and ripeness
2. Chevron Step One
 - a. Statutory scheme
 - b. Statutory Text
 - a. Allocations between point and nonpoint sources
 - b. Deadlines
 - c. Reasonable assurance
 - c. Federalism and Constitutional avoidance
3. Chevron Step Two

AFBF v. EPA (Chesapeake Bay)

- Statutory framework:
 1. Water Quality Standards (uses and criteria)(303(c))
 2. Impaired waters list (303(d)(1)(A))
 3. Total Maximum Daily Load (303(d)(1)(C))
 4. Continuing planning process (303(e))
 5. Areawide Waste Treatment Management (208)
 6. Nonpoint Source Management Programs (319)

AFBF v. EPA (Chesapeake Bay)

- Standing
 - Informational: No direct injury
 - Likely economic injury before the regulatory action fully takes effect
- Ripeness
 - Fitness and hardship
 - Purely legal dispute on a well-developed record
 - Hardship to plaintiffs and defendants

- Chevron step 1 – unambiguously expressed intent of Congress
 - Mead: intent to delegate gap-filling powers
 - Court’s analysis
 - Previous courts ignored this issue
 - Complex statutory scheme requiring technical or scientific justification

AFBF v. EPA (Chesapeake Bay)

- Statutory Text: “*Total* maximum daily load . . .
At *a level* necessary [to implement WQS]”
 - “total” would be redundant with “maximum” [?]
 - Provide information for public comment
 - Statutory purpose

AFBF v. EPA (Chesapeake Bay)

- Allocations:
 - Control of point sources not enough, so must consider nonpoint
 - Commonsense first step
 - No command, but allowable
- Deadlines: “common sense”
- Reasonable assurance: “EPA decided to satisfy itself”
- Summary: the phrase TMDL “has enough play in the joints”

AFBF v. EPA (Chesapeake Bay)

- Avoidance Canons
 - Federalism: distinguishes SWANCC and Rapanos: waters traditionally regulated by the States
 - Interstitial detail
 - Does not include means of enforcement
 - EPA will not take enforcement action
 - Constitution: Bay is a channel of interstate commerce

AFBF v. EPA (Chesapeake Bay)

- Chevron Step 2:
 - “total” can mean “a sum of parts”
 - Legislative history unhelpful
 - Need EPA intervention to clean up the Bay

AFBF v. EPA (Chesapeake Bay)

- Missing: No discussion of Section 208 (Areawide) or 319 (nonpoint)