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Legal Initiatives Driving Clean Up of Chesapeake Bay

By Roy A. Hoagland and Jon Mueller

There are three unique legal initiatives currently at play that will affect not only the actual restoration of the Chesapeake Bay for the foreseeable future but also those responsible for pollution reductions key to the restoration. This article provides a short history of the prior framework designed to address Bay restoration and then discusses the implications of the *Fowler v. EPA* lawsuit and settlement, President Obama's Executive Order and subsequent strategy, and the "Bay TMDL."



Background – Federal and State Efforts to Restore the Bay

The first multi-state Chesapeake Bay Agreement was signed in 1983 http://www.chesapeakebay.net/content/publications/cbp_12512.pdf. The 1983 Agreement briefly outlined a cooperative, voluntary approach to improve management of the Bay's resources. The Agreement created an Executive Council (EC), consisting of the following signatories to the Agreement: the Governors of Pennsylvania, Maryland and Virginia, the Administrator of EPA (on behalf of the United States), the Mayor of the District of Columbia,

and the Chairman of the Chesapeake Bay Commission (a tri-state legislative body). The EC's charge was to assess and oversee implementation of coordinated efforts, to improve water quality and the living resources of the Bay, and to establish an implementation committee to coordinate and evaluate management plans.

In 1987, the members of the EC signed a subsequent Bay Agreement. http://www.chesapeakebay.net/content/publications/cbp_12510.pdf. This agreement amended the 1983 Agreement to include more specific quantitative goals and commitments, including a 40 percent nutrient (nitro-

gen and phosphorous) reduction goal. That same year Congress authorized \$52 million in federal assistance for this multi-jurisdictional Chesapeake Bay restoration effort, called the Chesapeake Bay Program.

Its job, among other things, was to coordinate federal and state efforts to improve Bay water quality. 100 PL 4; 33 U.S.C. § 1267. The EC members amended the 1987 Agreement in 1992 to, among other things, reaffirm the nutrient reduction goal made in 1987, and commit to achieving this goal by 2000. On June 28, 2000, the EC members signed the most recent Bay agreement, *Chesapeake 2000*. http://www.chesapeakebay.net/content/publications/cbp_12081.pdf. *Chesapeake 2000* incorporated and reaffirmed past commitments and outlined over 100 specific restoration goals. Of particular importance among the many goals was the commitment to improve water quality in the Bay and its tidal tributaries in order to remove the Bay from the Clean Water Act "impaired" waters list by 2010; *Chesapeake 2000* specified that the EPA would require the development of a Total Maximum Daily Load (TMDL) for the Bay if the signatories failed to achieve this goal.

In concert with *Chesapeake 2000*, Congress passed the Estuaries and Clean Water Act of 2000. 106 P.L. 457. This Act included the Chesapeake Bay Restoration Act of 2000 (the "2000 Act"), 33 U.S.C. § 1267. Its purpose was "to expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay and to achieve the goals established in the Chesapeake Bay Agreement."

Fowler v. EPA: The Lawsuit

On January 5, 2009, the Chesapeake Bay Foundation, Inc., and several co-

plaintiffs (former MD state senator Bernard Fowler, former MD Governor Harry Hughes, former VA Secretary of Natural Resources Tayloe Murphy, former DC Mayor Anthony Williams, Maryland Watermen's Association, Maryland Saltwater Sportfishermen's Association, and the Virginia State Waterman's Association) filed suit in federal court in the District of Columbia against EPA. The plaintiffs alleged three claims: 1) the Administrator of EPA violated the Clean Water Act (CWA), 2) the Administrator violated the Administrative Procedure Act, and 3) the United States violated the terms of the Chesapeake Bay Agreements.

The Administrator Violated the CWA.

Clean Water Act Section 117(g), 33 U.S.C. § 1327(g), provides that the Administrator of EPA shall work with the states to develop and implement plans necessary to achieve and maintain the Chesapeake Bay Agreements' goals for nutrients, water quality, toxins, habitat restoration, and living resources. *Chesapeake 2000* sought, for example, a 40 percent reduction in nitrogen pollution and removal of the Bay from the CWA impaired waters list by 2010. At the time suit was filed, EPA had not developed a plan to achieve all of the many *Chesapeake 2000* goals and had admitted that it would not achieve the water quality goals by the 2010 deadline. Thus, the Administrator had violated the Act.

The Administrator Violated The Administrative Procedure Act.

The Administrative Procedure Act allows citizens to challenge federal agency decisions that are arbitrary, capricious, unlawfully withheld, or unreasonably delayed. 5 U.S.C. § 706. The Administrator's failure to develop

a plan to meet the goals of the Bay Agreements by 2010 was arbitrary, capricious, and unreasonably delayed.

Chesapeake 2000 Is An Interstate Compact

Interstate compacts have the force of law and may be judicially enforced. *Cuyler v. Adams*, 449 U.S. 433; 101 S. Ct. 703 (1981). To establish an enforceable interstate compact, three factors must be satisfied: a) the agreement must increase the power of the signatory states; b) the terms of the agreement must be appropriate for Congressional legislation; and c) the agreement must have been approved by Congress. Here, all three requirements were met.

The "increased powers" factor was met where *Chesapeake 2000* set goals for each state to achieve; goals for which one signatory could hold another accountable. For example, when Pennsylvania agreed to improve water quality in the Susquehanna River to meet Maryland water quality standards in its portion of the Chesapeake Bay, Maryland's "power" over Pennsylvania was increased. In addition, as a result of the 1983 Agreement, Maryland, Pennsylvania, and Virginia passed reciprocal laws accepting the agreement and creating state authorities responsible for complying with the terms of the agreement. Hence, each state recognized the authority of the other Bay states to require it to take action to restore the Bay.

As for the second and third factors, Congress, in the Clean Water Act, consented to the states entering into "agreements or compacts . . . , for (1) cooperative effort and mutual assistance for the prevention and control of pollution. . . ." Congress also consented to the 1983 Bay Agreement by allocating funds in support of the purposes of the Chesapeake Bay Agreement in the Chesapeake Bay

Restoration Act of 2000.

Because each of the signatory states and the federal government entered into the Bay Agreement, committed to undertake specific tasks in the Agreement, and authorized participation in the Agreement, the Bay Agreement is an enforceable interstate compact. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir.1974).

Fowler v. EPA: The Settlement Agreement

On May 10, 2010, EPA and the Plaintiffs agreed to resolve the case via a settlement agreement. <http://www.cbf.org/Document.Doc?id=512> This agreement represents the first legally binding document in which EPA has agreed to undertake specific Bay-related actions by a date certain. The agreement provides that the plaintiffs may reinstitute their suit should EPA default on any of the agreement's provisions. The essential terms of the agreement are:

- 1) EPA will complete a Bay Total Maximum Daily Load (TMDL) by December 31, 2010 and will ensure that the states provide "reasonable assurances" for the implementation of necessary nonpoint pollution loads established by the TMDL. In addition, EPA will require the Bay states to provide Watershed Implementation Plans (WIPs) describing how each state will meet the loading requirements of the TMDL.
- 2) EPA will require each state to offset all new nitrogen, phosphorous, and sediment loads.
- 3) EPA will be responsible for an 8 million pound reduction in nitrogen

pollution from airborne sources. It will do this by promulgating regulations aimed at reducing nitrogen oxide emissions from mobile and stationary sources. In developing pre-TMDL load allocations, EPA stated that the federal government would achieve this reduction. It planned to do so largely via the Clean Air Interstate Rule and the reductions in power plant pollution emissions it would accomplish. However, the DC Circuit Court determined the regulation to be invalid. *North Carolina v. EPA*, 531 F.3d 896 (DC Cir. 2008). Thus, EPA, absent additional action, could no longer clearly commit to achieving those reductions absent an agreement to pursue new regulations.

4) EPA will establish a tracking system that is publically available and which clearly describes whether a state has or has not included increased pollution from new, small sewage treatment plants and industrial dischargers in its calculations of whether the state or local jurisdiction is meeting its nitrogen and phosphorous load limits.

5) EPA will review all new construction general permits drafted by the Bay states and make sure they meet federal standards; develop guidance for major municipal stormwater permits in the Bay region; propose new industrial and municipal stormwater regulations by September 30, 2011 and take final action by November 19, 2012. These agreements address one of the biggest sources of pollution in the Bay region, urban stormwater.

6) EPA will propose new regulations for controlling pollution from

agriculture by June 30, 2012 and will take final action by June 30, 2014.

7) EPA will examine existing monitoring data and implement actions to address toxic chemicals in the Bay Watershed with particular focus on the Anacostia and Elizabeth River watersheds.

To date, EPA has met all of the deadlines in the settlement agreement.

The Bay Executive Order Strategy

On May 12, 2009, President Obama issued Executive Order No. 13508, directing EPA and six other federal agencies (the departments of Agriculture, Commerce, Defense, Homeland Security, Interior, and Transportation) to develop a plan for restoring and preserving the Chesapeake Bay. http://www.chesapeakebay.net/news_execorder.aspx?menuitem=36188 The federal government released a final strategy on May 12, 2010 pursuant to the Order. <http://executiveorder.chesapeakebay.net/file.axd?file=2010%2f5%2fChesapeake+EO+Strategy%20.pdf> The strategy aims to restore clean water through the development and implementation of the Bay TMDL (see below). Habitat goals include restoration of 30,000 acres of wetlands, enhancement of another 150,000 of wetlands, and restoration of over 180,000 miles of forest buffers along streams and shoreline. The strategy also includes other specific goals regarding the restoration of finfish, shellfish, and wildlife populations as well as goals concerning land conservation. Supporting strategies include expanding citizen stewardship, responding to climate change, developing environmental markets, and strengthening the science of the Bay.

A critical element of the final strategy is the Compliance and Enforcement Strategy for the Bay region EPA developed. (<http://www.epa.gov/compliance/civil/initiatives/chesapeake-strategy-enforcement.pdf>) This compliance and enforcement effort will focus on:

- Identifying and addressing industrial, municipal, and agricultural sources releasing significant amounts of pollutants in excess of the amounts allowed by the federal law.
- Identifying, inspecting, and bringing enforcement actions against key regulated business sectors such as Concentrated Animal Feeding Operations (CAFOs), municipal and industrial wastewater facilities, and Municipal Separate Storm Sewer System (MS4s). EPA has already begun inspecting farms and issuing administrative orders directing that those farms comply with the Clean Water Act. See <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/8251ff00c18ad84f85257736006defea!OpenDocument>
- Identifying opportunities for compliance and enforcement activities related to the CWA wetlands protection program, federal facilities, Superfund sites, and Resource Conservation Recovery Act (RCRA) corrective action facilities.
- Exploring opportunities for the use of imminent and substantial endangerment authorities under the CWA, Safe Drinking Water Act, RCRA, Superfund, and the CAA.

The Bay TMDL

The "Bay TMDL" actually consists of 92 TMDLs for 92 impaired stream,

river and Bay segments within the tidal portions of the Bay's waters. A TMDL is a "pollution budget" that sets a limit on the amount of a pollutant allowed in a waterbody so that water quality standards, can be met. The permissible amount of pollutant specified in the TMDL coming from "point sources," *i.e.*, coming from a discharge pipe or conveyance (*e.g.*, a sewage treatment plant effluent pipe) is called the "wasteload allocation." The amount coming from the "nonpoint sources," *i.e.*, coming from diffuse discharges (*e.g.*, stormwater running off a parking lot or a lawn) is called the "load allocation." http://www.epa.gov/reg3wapd/pdf/pdf_chesbayHonorableShariTWilson-701122302-0001.pdf

In the case of the Chesapeake Bay, there are 92 waterbody segments that contain excess levels of nitrogen, phosphorus and sediment pollution at such levels that these segments are "impaired." They are impaired because the excess pollution leads to violations of the water quality standards for that waterbody segment. It is these violations of these standards in 92 different segments that necessitate the construction of a TMDL for each segment, or when considered together, "the Bay TMDL."

EPA and states across the nation have issued or approved thousands of TMDLs. Their success in achieving improved water quality is disputable. What makes the Bay TMDL different from others previously developed, and thus more likely to achieve restoration, is:

- EPA's insistence on the Bay states developing and providing a Watershed Implementation Plans (WIP). The WIP is to detail how the state will achieve its portion of the wasteload and load allocations



set forth in the TMDL. The District of Columbia, Delaware, Maryland, New York, Pennsylvania and Virginia have all submitted their first draft WIP in September 2010.

- EPA's insistence that the WIPs contain "reasonable assurances." This means that the states must provide clear and definitive commitments that it will achieve the wasteload and load allocations within a time certain. EPA has defined for the states what actions would constitute reasonable assurances. http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/EPARegionIIIlettertoPSC091108.pdf Actions include, for example, identification of the controls needed to achieve the allocations; description of the state and local capacity to achieve the controls; identification of the gaps in the current programs needed to meet the controls; and identification of the tools to be utilized to fill the gaps.
- EPA's commitment to imposing consequences upon states that fail to develop sufficient WIPs or meet their portion of the TMDL wasteload and load allocations. Those consequences were described in a December 2009 letter to the states. <http://www.epa.gov/region03/>

[chesapeake/bay_letter_1209.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesapeake/bay_letter_1209.pdf) Those consequences include the denial of discharge permits to new sources of pollution or the denial of federal funds for wastewater treatment plant upgrades.

Conclusion

Despite the lack of enough progress in Bay restoration over the last 27 years, within the last two years there have been major changes to the legal landscape that defines how restoration of the Chesapeake Bay will occur over the next 15 years. Whether it is the boundaries set by the settlement of *Fowler v. EPA*, President Obama's Executive Order, or the Bay TMDL, there is a heightened degree of accountability and responsibility on governments and polluters whose actions are critical to cleaner water within the Chesapeake Bay watershed.

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