



# Legal Challenge to EPA's Promulgation of Final Chesapeake Bay TMDL

Scientific and Technical Advisory Com.

Multiple Models for Management in the  
Chesapeake Bay

February 26, 2013





## **Am. Farm Bureau Fed'n v. EPA**

- **Litigation filed January 10, 2011**
  - **AFBF and other plaintiffs are challenging the lawfulness of EPA's Bay TMDLs.**
  - **Plaintiffs want declaratory and injunctive relief prohibiting EPA from issuing and enforcing Bay TMDLs.**



# ***Am. Farm Bureau Fed'n v. EPA***

## ■ Plaintiffs

- American Farm Bureau Federation
- Pennsylvania Farm Bureau
- The Fertilizer Institute
- National Chicken Council
- U.S. Poultry & Egg Association
- National Pork Producers Council
- National Corn Growers Association
- National Turkey Federation
- National Association of Home Builders



# **Am. Farm Bureau Fed'n v. EPA**

- **Intervenor Defendants**
  - Chesapeake Bay Foundation
  - Citizens for Pennsylvania's Future
  - Defenders of Wildlife
  - Jefferson County Public Service District
  - Midshore Riverkeeper Conservancy
  - National Wildlife Federation
  - Virginia Association of Municipal Wastewater Agencies
  - Maryland Association of Municipal Wastewater Agencies
  - National Association of Clean Water Agencies
  - Pennsylvania Municipal Authorities Association
- **Amicus – City of Annapolis**



## **Am. Farm Bureau Fed'n v. EPA**

- **Relief Requested by AFBF:**
  - Declare that Final TMDL is contrary to federal law
  - Declare that EPA violated the APA in issuing the Final TMDL
  - Vacate the Final TMDL
  - Enjoin enforcement, application, and implementation of Final TMDL



## ***Am. Farm Bureau Fed'n v. EPA***

- **Arguments asserted by AFBF:**
  - **EPA exceeded authority granted under Clean Water Act;**
  - **EPA violated Administrative Procedures Act in the process of developing TMDLs;**
  - **The rulemaking is arbitrary and capricious.**



## **Am. Farm Bureau Fed'n v. EPA**

- **Argument: EPA exceeded authority**
  - **No authority exists for EPA to dictate implementation requirements**
    - **States have exclusive authority over implementation.**
    - **CWA sections 303 and 117 do not provide authority for implementation.**
    - **Executive order and consent decree do not provide authority.**





## ***Am. Farm Bureau Fed'n v. EPA***

- **Argument: EPA exceeded authority**
  - EPA cannot assign allocations for upstream states within a TMDL for downstream states.
  - Proper use of authority would be to revise upstream state's water quality standards.





## **Am. Farm Bureau Fed'n v. EPA**

- **Argument: EPA violated notice and comment**
  - **Only 45 days for public review**
  - **Key information related to “Scenario Builder”, Watershed, and Water Quality and Sediment Transport models were not available for review during the public comment period.**



## ***Am. Farm Bureau Fed'n v. EPA***

- **Argument: Rulemaking was arbitrary and capricious**
  - **Decisions were made that were beyond predictive capacity of models.**
    - **Cannot be used for allocations at local watershed level.**
    - **Used freeway / parking lot analogy**



## **Am. Farm Bureau Fed'n v. EPA**

- **Argument: Rulemaking was arbitrary and capricious**
  - **“EPA fed its models flawed data.”**
    - **EPA determined 50% of crops used conventional tillage while NRCS reported figure as being 7%.**
    - **EPA used inaccurate assumptions on manure runoff**
      - **Assumed all AFOs are covered with impervious surfaces and that all manure on impervious surfaces directly flows into watercourse.**



## **Am. Farm Bureau Fed'n v. EPA**

- **Arguments asserted by EPA:**
  - **AFBF failed to prove standing.**
    - **Standing requires injury and causal connection with Defendant.**
    - **Submitted no evidence to establish basis for representation of its members' interests.**



## **Am. Farm Bureau Fed'n v. EPA**

- **Arguments asserted by EPA:**
  - **Establishment of Final TMDL was proper exercise of authority.**
    - TMDL does not impose implementation requirements.
    - TMDL was developed through collaborative process.
    - Watershed states requested EPA to develop the TMDL.



## **Am. Farm Bureau Fed'n v. EPA**

- **Arguments asserted by EPA:**
  - **EPA complied with Administrative Procedures Act requirements.**
    - 45 days is sufficient time period for notice and comment.
    - Open debate has been in progress for more than a decade.
    - TMDL is an “informal adjudication” not a rule, and thus does not require notice and comment.



## **Am. Farm Bureau Fed'n v. EPA**

- **Arguments asserted by EPA:**
  - **EPA complied with Administrative Procedures Act requirements.**
    - Adequate documents were available for public review.
    - All documents related to final models could not be made available for public review as comments were incorporated.
    - AFBF has not shown prejudice.





# **Am. Farm Bureau Fed'n v. EPA**

- **Arguments asserted by EPA:**
  - **Action to establish TMDL was not arbitrary nor capricious.**
    - **Use of models will be overturned only if there is no rational relationship between model and situation.**
    - **Used more comprehensive data re: conservation tillage than NRCS data.**
      - **Entitled to deference on decision.**



## **Am. Farm Bureau Fed'n v. EPA**

- **Procedural Status:**
  - **Briefing on Motions for Summary Judgment has been completed.**
    - **Last Reply Brief filed on July 20, 2012.**
  - **Argument scheduled for October 4, 2012.**
  - **Court requested additional briefing on question of deference.**
    - **Additional briefing completed on November 2, 2012.**



## **Am. Farm Bureau Fed'n v. EPA**

- What's next:
  - Case is resolved?
    - TMDL process moves forward as planned?
    - TMDLs are vacated?
    - Some aspects of TMDL need to be amended?
  - Case continues to move forward?



## **The Agricultural Law Resource and Reference Center**

**Prof. Ross Pifer, Director**

**Phone: (814) 865-3723**

**Email: [rpifer@psu.edu](mailto:rpifer@psu.edu)**

**Web: [www.law.psu.edu/aglaw](http://www.law.psu.edu/aglaw)**

**Blog: [www.pennstatelawbayblog.com](http://www.pennstatelawbayblog.com)**