Agriculture, Water Pollution, and the Future of EPA’s Regulatory Authority in a Post-American Farm Bureau Federation v. U.S. EPA America

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Cover Page Footnote
† J.D., Seattle University School of Law, May 2017. A special thank you to the SJEL editorial staff for your suggestions and edits; my parents, Anne Doyle and Jim Brudney, for your unwavering love and encouragement; and to my family and friends for your consistent support.

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Henry Brudney†

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B. Those Adversely Affected by American Farm Bureau Federation, and the Future of Litigation Over TMDLs and Nonpoint Source Pollution

CONCLUSION

As concerns surrounding pollution in domestic water sources mounted, Congress passed the Clean Water Act of 1972 (CWA). The CWA applied a cooperative federalism approach whereby the Environmental Protection Agency (EPA) and States would work together establishing regulations geared towards clean domestic waters. One such regulation, referred to as the total maximum daily load (TMDL), sought to limit the amount of enumerated pollutants that could be present in certain bodies of water. In reference to the TMDL, the CWA states that “[s]uch load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” This provision of the act, however, attaches no specific, substantive standards to the definition of the TMDL itself.

In the recent decision of American Farm Bureau Federation vs. U.S. EPA, the Third Circuit added substantive criteria to the TMDL requirements. The Farm Bureau Federation argued that the EPA, in setting the TMDL for the Chesapeake Bay, exceeded its authority by including deadlines and allocations for individual pollution sources and by requiring “reasonable assurance” from the states in drafting that document. Affirming the decision of the District Court, the Third Circuit Court held that such requirements by the EPA were within its statutory authority. The authority granted to the EPA under American Farm Bureau Federation to include, among other things, allocations of pollution levels among different kinds of sources in setting its TMDLs, represented a further expansion of the EPA’s regulatory power under the Clean Water Act. By permitting the EPA to set limitations on both point and nonpoint source pollutants, the EPA will have more control over regulating the water pollution that comes from agricultural sources. Such a development, if implemented in other jurisdictions, should have a monumental

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2 Id.
4 Id.
5 Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281, 288 (3d Cir. 2015).
6 Id. at 292.
7 Id. at 281.
8 Id.
effect on the improvement of water quality standards in the United States.

The CWA distinguishes between two overarching sources of pollutants – point-source pollutants and nonpoint-source pollutants.\(^9\) Point-source pollutants, defined in section 502(14) of the CWA, are understood as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”\(^10\) Nonpoint source pollutants, in contrast, are those that do not fall within the point-source umbrella. Common examples of nonpoint source pollutants are chemicals from urban runoff, sediment from construction sites, bacteria and nutrients from livestock and pet wastes, and acid drainage from abandoned mines.\(^11\) In permitting the EPA to set specific limits for nonpoint source pollutants, establish timeframes for compliance with the TMDL’s requirements, and demand assurance from the states that will implement the standard, the Third Circuit paved the way for the Agency to make monumental improvements in the quality of our nations waters.

This article will examine the problem of water pollution from nonpoint source pollutants and discuss how the decision in American Farm Bureau Federation will have a positive effect on future efforts to curb domestic water pollution. The analysis will begin with an overview of the domestic water pollution problem in this country before moving through the evolving case law on TMDLs, and conclude with a lengthy discussion of the American Farm Bureau Federation case and what it means moving forward for the efforts to eradicate pollution in our domestic waterways.

I. DOMESTIC WATER POLLUTION AND A HISTORY OF THE EPA’S AUTHORITY REGULATING POLLUTANTS


The CWA amended the prior initiative, The Federal Water Pollution Control Act of 1948, and came into existence as a result of growing public awareness and concern over controlling water pollution.\(^12\) Congress’s passing of the CWA represented an immense victory for envi-

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\(^10\) Id.
\(^12\) History of the Clean Water Act, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act (last updated June 1, 2015).
vironmental protection and water pollution eradication efforts in the United States.13 “Never before had the federal government so comprehensively and ambitiously addressed the longstanding and growing problem of water pollution.”14

The Act enumerated seven specific goals designed to help contribute to the “[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters.”15 Some of these included: eliminating the discharge of pollutants into the navigable waters by 1985; obtaining water quality levels “which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved” by 1983; improving and implementing area wide waste treatment management planning processes; developing mechanisms and procedures controlling nonpoint sources of pollution so as to enable the goals of the Act to be realized.16

One of the ways that the Act sought to meet these goals was through employment of water quality standard and effluent limitations programs.17 The TMDL provision of the Act is one mechanism that allows the EPA to effectuate such standards and programs. A TMDL is a pollution budget that includes “a calculation of the maximum amount of a pollutant that can occur in a waterbody and allocates the necessary reductions to one or more pollutant sources.”18 In other words, a TMDL acts as a planning tool and starting point for restoration or protection activities with the hope of ultimately contributing to the reaching or maintaining of certain water quality standards.19 Under section 303(d) of the CWA, states are required to submit lists of impaired waters – waters that are too polluted or otherwise degraded to meet water quality standards.20 The law requires that the states establish TMDLs and priority rankings for waters on the lists.

The TMDL provision in the CWA has been riddled with controversy and litigation almost since its inception.21 One of the more common early issues in TMDL litigation was whether the EPA had a respon-

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14 Id.
16 Id.
19 Id.
20 Id.
sibility to implement TMDLs when a state refuses to do so. In *Scott v. City of Hammond* the plaintiffs alleged that a state’s failure to take any measure to comply with its statutory duty to develop TMDLs amounted to “the constructive submission of no TMDL.” Accordingly, the EPA was compelled to “disapprove” of this submission and promulgate a TMDL list for the state within the statutorily defined time period of thirty days. The United States Court of Appeals for the Seventh Circuit found that Congress did not intend that the states, by refusing to act, could prevent the implementation of TMDLs. In so holding, the Seventh Circuit agreed with the plaintiffs’ contention that a state’s inaction amounted to a refusal to act, and, as a result, should be construed as a constructive submission of no TMDL. Therefore, the EPA had a statutory duty to approve or disapprove such submissions and develop a TMDL itself if the Agency determined one was necessary.

The EPA was by all accounts slow to respond to the early litigious nature of the TMDL provision. The first such response came in 1991 when the EPA issued a new guidance that included regulations requiring states to submit TMDL lists to the Agency for review and approval every two years. In 1996, after thirty-four states failed to submit their TMDL lists by the deadline, the EPA issued a document entitled TMDL Program Implementation Strategy that included an overview of the EPA’s vision of the TMDL program and its plans to effectuate progress. The following year, the EPA issued a recommendation that states receive eight to thirteen years to prepare TMDLs for all impaired waters and appointed an advisory committee to study the TMDL program.

Despite the EPA’s increased focus on TMDLs, the Agency still faced significant challenges in its water pollution reduction efforts. In 2002, for example, the EPA recognized that 40% of the nation’s assessed waters still do not meet state water quality standards. As a result, petitioners, like those before them, continue to challenge the TMDL program with the hopes of improving its efficacy.

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22 E.g., *Scott*, 741 F.2d at 997.
24 Id. at 94.
25 *Scott*, 741 F.2d at 997.
26 Id. at 998.
27 Id.
29 See id.
30 Id. at 100.
32 Id.
33 Id.
34 Id.
B. TMDLs and Litigation Surrounding the Regulation of Nonpoint Source Pollutants

One controversy, which continues to permeate throughout the Federal Courts, is “whether Congress intended nonpoint sources of water pollution from logging, farming, and mining to be regulated as stringently as industrial and municipal point sources.” Although the CWA requires point-source pollutants to “be regulated pursuant to federally-imposed, technology-based controls,” no such federal oversight or EPA standards exist for nonpoint source pollutants. This lack of federal regulatory control is extremely problematic as it pertains water pollution stemming from agricultural waste, which is excluded from the “point source” definition in the CWA.

However, nonpoint source pollutants, while not subject to the same “regulated pursuant to federally-imposed, technology-based controls” language as point-source pollutants, are still subject to some of the CWA’s limitations. Under Section 303(d), states are required to maintain and submit to the EPA a list of waters for which technology-based effluent limitations “are not stringent enough” to implement its state water quality standard. It is to these waters that TMDLs pertain. Once listed, states must develop TMDLs for all pollutants, including nonpoint source pollutants, at a necessary level to achieve water quality standards. Thus, a TMDL represents a total quantity for a particular pollutant, and included in this total quantity are nonpoint source contributions of that pollutant.

It is here that nonpoint source pollutants have been so prominently featured in TMDL-based litigation. One of the more influential cases dealing with TMDLs and nonpoint source pollutants was decided in the Ninth Circuit in the early 2000’s. In Pronsolino v. Nasti, environmental and fishing groups sued the EPA to set a TMDL for the Garcia River after neither they nor the State of California did so by the previously established deadline. As a result, the EPA agreed to establish a TMDL for the Garcia River by March 18, 1998.

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38 Id.
40 Id.
42 See Pronsolino v. Nasti, 291 F.3d 1123 (9th Cir. 2002).
43 Id. at 1129.
44 Id.
lished load allocations for sedimentation among a series of categories; however, none of them pertained to nonpoint source pollutants.45

The appellants, Betty and Guido Pronsolino, were 800-acre landowners along the Garcia River watershed, who sought to harvest timber on their land.46 After applying for a harvesting permit from the California Department of Forestry, the Pronsolinos were told that their logging plans must comply with a series of conditions set forth by the Garcia River TMDL.47 As a result, the Pronsolino’s sued the EPA, challenging the Agency’s authority with regard to the Garcia River TMDL.48 The Pronsolino’s argued that waters polluted solely by nonpoint source pollutants were outside the scope Section 303(d) and TMDLs because that provision pertained to waters polluted by both point-source and nonpoint source pollutants alike.49

The District court held, and the Ninth Circuit affirmed, that the TMDL provision of the CWA granted the EPA authority to list and develop a TMDL for the Garcia River in Northern California, polluted solely by nonpoint source pollution.50 The decision marked the first time that sources of polluted runoff, including farming, grazing and logging, may be held accountable under the CWA for contributing to violations of state water quality standards.51 In so holding, the Ninth Circuit refuted the petitioners’ argument, reasoning that such a conclusion would “for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source had been added or removed… and establish TMDLs accordingly.”52

_Pronsolino_ stands for the proposition that the EPA can list and develop a TMDL for a body of water impaired solely by nonpoint source pollutants.53 However, other jurisdictions have since expressed some doubt as the Agency’s authority under the CWA to address state water quality regulations directly addressing nonpoint source pollutants.54 In the Tenth Circuit, for example, the court stated, “Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution.”55 Therefore, in that jurisdiction, “states cannot be compelled to

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46 Pronsolino, 291 F.3d at 1129.
47 Tobin, _supra_ note 45, at 816.
48 Id.
49 Id. at 825.
50 Pronsolino, 291 F.3d at 1126.
51 Tobin, _supra_ note 45, at 823.
52 Pronsolino, 291 F.3d at 1139.
53 Id.
54 See American Wildlands v. Browner, 260 F.3d 1192, 1197 (10th Cir. 2001).
55 Id.
establish a program for agricultural nonpoint sources, and the EPA cannot step in to impose its own nonpoint source regulation."

Litigation surrounding nonpoint source pollutants and the EPA’s oversight has persisted since Pronsolino and Browner. However, there have been relatively few significant developments at the circuit court level in the last several years.\textsuperscript{57} \textit{American Farm Bureau Federation} brought TMDL litigation over nonpoint source pollutants back to the foreground.\textsuperscript{58}

\section*{II. \textit{American Farm Bureau Federation} and the Changing Jurisprudence Over TMDLs}

\textit{A. Chesapeake Bay Overview and Background}

The Chesapeake Bay is the nation’s largest estuary and one of the more prominent geographic features in the United States.\textsuperscript{59} It spans across six states\textsuperscript{60} and the District of Columbia.\textsuperscript{61} Additionally, the Chesapeake Bay possesses a rich cultural history known for, amongst other things, being the landing spot for Captain John Smith and his English Crew in 1607.\textsuperscript{62} However, it is the social and economic significance of the Chesapeake region that brings it to the forefront of the litigation in \textit{American Farm Bureau Federation}. More than seventeen million people populate the Chesapeake Bay region, and its nature as a watershed means that each individual resident has the ability to directly affect the ecosystem through his or her own respective backyard.\textsuperscript{63}

The development of the present day Chesapeake Bay TMDL began in 2000 following a pledge by the EPA and others to reduce pollution in the bay in what was known as the Chesapeake 2000 agreement.\textsuperscript{64} This agreement eventually led to the states of the Chesapeake Bay region submitting to the EPA proposed Watershed Improvement Plans, whereby the states would provide target pollutant limitations and procedures for how these limitations would be achieved.\textsuperscript{65} The EPA developed the Chesapeake Bay TMDL out of the states’ Watershed Improvement Plans

\textsuperscript{56} Laitos & Ruckriegle, \textit{supra} note 36, at 1054. 
\textsuperscript{57} But see, Barnum Timber Co. v. United States EPA, 633 F.3d 894 (9th Cir. 2011). 
\textsuperscript{58} \textit{Am. Farm Bureau Fed’n}, 792 F.3d at 288. 
\textsuperscript{60} Virginia, Maryland, Delaware, West Virginia, Pennsylvania, and New York. 
\textsuperscript{61} \textit{Id.} 
\textsuperscript{62} \textit{Id.} 
\textsuperscript{64} \textit{Am. Farm Bureau Fed’n}, 792 F.3d at 291. 
\textsuperscript{65} \textit{Id.}
after requiring reasonable assurances from the states in their efforts to meet their target pollutant limitations.66

After some adjustments by the EPA to the Watershed Improvement Plans, the EPA developed the Chesapeake Bay TMDL.67 Included in the Chesapeake TMDL were “point- and nonpoint-source limitations on nitrogen, phosphorous, and sediment” for ninety-two specific segments of the Chesapeake Bay region identified as over-polluted.68 These allocated limits in the TMDL were specific to point sources and to nonpoint source sectors.69 Additionally, the TMDL specified target dates for meeting 60% of its proposed actions by 2017 and having all pollution control measures in place by 2025.70 On December 29, 2010, the EPA promulgated the TMDL through the Administrative Procedure Act’s (APA) notice and comment rule-making procedure and over the ensuing forty-five days, the EPA held eighteen public meetings and received more than 14,000 comments.71 These meetings and comments were taken into account in producing the final TMDL.72

B. Parties and Facts of the Case

The American Farm Bureau Federation (AFBF or Farm Bureau), a national interest group comprised of farmers and representatives from the agricultural industry,73 sued the EPA under the APA and the citizen-suit provision of the CWA.74 In its suit, Farm Bureau asserted that the EPA exceeded its statutory authority by including deadlines and allocations in the TMDL and by requiring “reasonable assurance” from the states in drafting that document.75 The crux of Farm Bureau’s contention stems from the EPA’s interpretation of the words “total maximum daily load” in the CWA.76 According to Farm Bureau, the term “total maximum daily load” was unambiguous and could “consist only of a number representing the amount of a pollutant that [could] be discharged into a particular segment of water and nothing more.”77 Specifically, Farm Bureau argued that the EPA overstepped its statutory authority by: (1) including in the TMDL allocations of permissible levels of nitrogen, phosphorous,
and sediment among different kinds of sources of these pollutants; (2) promulgating target dates for reducing discharges to the level the TMDL envisions, and; (3) obtaining assurance from the states that they would fulfill the TMDL’s objectives.78

C. Third Circuit Court’s Analysis

The Third Circuit considered the issue of whether the EPA’s interpretation of the “total maximum daily load” definition in the CWA was a permissible one under the Chevron analytical framework.79 Thus, the court’s first inquiry under Chevron was whether the statute unambiguously precluded the EPA from its interpretation of the CWA’s total maximum daily load provision. Specifically, whether the statutory language of the Act barred the EPA from including “(1) allocations of pollution levels among different kinds of sources, (2) a timeframe for complying with the TMDL’s requirements, and (3) assurance from the states that will implement the TMDL.”80

1. Chevron Step One: Was the Word “Total” in the CWA’s TMDL Provision Ambiguous?

In its analysis, the Third Circuit first considered the then current case law on TMDLs.81 Although one jurisdiction found the “total maximum daily load” phrase to be unambiguous with regard to the term “daily,”82 there was no prior precedent that supported Farm Bureau’s contention that the phrase was unambiguous in its entirety.83 Absent any case law supporting the notion that total maximum daily load, as defined in the CWA, was unambiguous, the court proceeded to the plain language of the provision.84

Here, the court stated that the Farm Bureau made its strongest argument for why the total maximum daily load phrase was unambiguous. According to the Farm Bureau, Congress “specifically authorized the EPA to publish ‘total maximum daily load[s] ... at a level necessary to implement the applicable water quality standards...’” and in this context the word “total” would just refer to a number, akin to the total at the bottom of a receipt.85 While Farm Bureau’s interpretation of “total” is consistent with the word in other sections of the CWA, the court was ultimately not persuaded that Congress intended to exclude everything

78 Id.
79 Id.
80 Id. at 295.
81 Id. at 295.
82 See Friends of Earth, Inc. v. EPA, 446 F.3d 140, 144 (D.C.Cir.2006).
83 Am. Farm Bureau Fed’n, 792 F.3d at 296.
84 Id.
85 Id. at 298.
other than a sum of pollutants from a TMDL. 86 In doing so, the court reasoned that the word “total” was without definition in the act and susceptible to multiple interpretations. 87 This, the court articulated, was further exemplified by the fact that Congress explicitly required the EPA to establish “total maximum daily loads,” but nowhere prescribed how the EPA was to do so. 88 Therefore, the court found that, contrary to Farm Bureau’s contention, Congress left the phrase “total maximum daily load” ambiguous, intending the EPA to fill the gap. 89 This being the case, the court moved on to consider whether the EPA’s interpretation fell within this gap. 90

In answering the question of whether the EPA’s interpretation of “total maximum daily load” fell within the parameters of the gap set by Congress for the agency to fill, the court looked at the statutory structure and purpose of the CWA. 91 Citing the statutory language, the court found that the Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 92 This goal, the court reasoned, was broad enough to permit the Agency’s interpretation, including allocations, target dates, and reasonable assurances. 93

With regard to the EPA’s allocation between point source and nonpoint source limitations in its Chesapeake Bay TMDL, the Third Circuit found that the CWA unambiguously required the EPA to consider nonpoint source pollutants. 94 Although the CWA assigned the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states, the court reasoned that because TMDLs relate to bodies of water affected by both point source and nonpoint source pollution, the EPA considering only point source pollutants would be wildly insufficient in promulgating its TMDLs. 95 Similarly, the Third Circuit stated that the deadlines or “target dates” included in the EPA’ Chesapeake TMDL were common sense. 96 Specifically, the court articulated that to create acceptable pollutant levels in a body of water necessarily required a date that the EPA and the states believe that the requisite pollutant level could be achieved.

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86 Id. at 298.
87 Id.
88 Id.
89 Id.
90 Id.
91 Id. at 299.
92 Id. (citing 33 U.S.C. § 1251(a) (1977)).
93 Am. Farm Bureau Fed’n, 792 F.3d at 299.
94 Id.
95 Id. at 300.
96 Id.
Additionally, the Third Circuit refuted Farm Bureau’s contention that the CWA precluded the EPA from seeking reasonable assurances from the states that their Watershed Improvement Plans would meet their stated goals. In its reasoning, the court stated that absent these reasonable assurances, the EPA would have to rely blindly on the states’ submissions, even if those submissions were inconsistent with the Agency’s goals.

Ultimately, the court held that because the word “total” was susceptible to multiple meanings, the Act was silent on whether the EPA may consider and express the time frames within which it and the states would achieve water quality standards, and the Act does not expound upon the extent to which the EPA may consider and express whether a state would meet the goals it sets. The court also concluded that the phrase “total maximum daily load” was ambiguous enough to allow the EPA to include the three challenged elements in the Chesapeake TMDL.

2. Chevron Step Two: Was the EPA’s Interpretation Reasonable?

Finding the TMDL provision of the CWA to be ambiguous, the court moved to apply the second prong of Chevron’s two-step analysis to the EPA’s promulgation of the Chesapeake TMDL. The second prong of Chevron’s two-step analysis determines whether an Agency’s interpretation has faithfully filled the gap that Congress created. Here, the inquiry was not whether it was the best possible interpretation of Congress’s ambiguous language; instead, courts extended considerable deference to the Agency and inquired only whether it made “a reasonable policy choice” in reaching its interpretation. Thus, the Third Circuit moved on to consider whether the EPA’s interpretation of the CWA’s total maximum daily load provision in promulgating the Chesapeake Bay TMDL was reasonable. Specifically, whether the Agency’s development of allocations between point source and nonpoint source pollutants, deadlines for compliance, and reasonable assurances by the states, amounted to a reasonable policy choice.

In its analysis, the court focused primarily on legislative history and “Congressional acquiescence” in its articulation that the EPA had
“reasonably carried out Congress’s directives in administering the TMDL section of the Clean Water Act.”105 Particularly, the court pointed to the 1987 amendment to CWA, which defined “total maximum daily load” as governing the revision of effluent limitations “based on a total maximum daily load or other waste load allocation established under this section.”106 According to the Third Circuit, the word “other” suggested that a TMDL contains a waste load allocation.107

In addition, the court pointed to Congress’s ratification of the Chesapeake Bay Program, a voluntary partnership among several watershed states and the EPA, and its subsequent 2000 amendment that directed the EPA to “ensure that management plans are developed and implementation [has] begun” to meet the goals of the Chesapeake Bay Agreement.108 According to the court, this language in the 2000 amendment was strongly suggestive of the notion that cleaning up the Bay was a “priority for Congress and that it did not have a problem with the EPA’s role in developing goals for the watershed.”109 The court further reasoned that to accept Farm Bureau’s reading of the Act would all but eliminate the EPA’s ability to effectively reduce pollutants in the Bay. “At best, it would shift the burden of meeting water quality standards to point source pollutants, but regulating them alone would not result in a clean Bay.”110 For all of the reasons discussed in the court’s aforementioned analysis under the first prong of Chevron, the EPA’s actions were neither arbitrary nor capricious and they received full Chevron deference.111

D. Significance of the American Farm Bureau Federation

It was a question of first impression whether a TMDL could include more than just a quantity of a pollutant.112 Therefore, by holding that the EPA’s three requirements (allocations between point-source and non-point source pollutants; target dates; requesting assurances) in setting TMDLs for the Chesapeake Bay were within the Agency’s authority under the CWA, the Third Circuit Court took an unprecedented stance.113

Most broadly, this decision “recognizes the cooperative federalism structure underlying the CWA and TMDLs, which gives joint responsibility to state and federal governments to restore and maintain the

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105 Id. at 308.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id. at 309.
111 Id. at 308.
112 Id. at 309.
113 Id.
quality of the nation’s waters.”¹¹⁴ At a more specific level, American Farm Bureau Federation stands for the premise that TMDLs can include waste load and load allocations for point source and nonpoint source pollutants alike.¹¹⁵ Additionally, this decision confirms that deadlines with which states must comply with and that a reasonable assurance from the states with regard to their compliance are permissible in the Agency’s issuance of TMDLs and perhaps necessary in achieving the goals set forth by the CWA.¹¹⁶

III. WHY THE THIRD CIRCUIT’S INTERPRETATION OF TMDLS BENEFITS THE ENVIRONMENT, AND WHAT COMES NEXT?

The current state of water pollution in the U.S. is more than problematic. In the U.S., “[a]bout 44% of assessed stream miles, 64% of assessed lake acres, and 30% of assessed bay and estuarine square miles are not clean enough to support uses such as fishing and swimming.”¹¹⁷ American Farm Bureau Federation’s inclusion of limits to nonpoint source pollutants, deadlines or target dates for completion of pollution eradication, and reasonable assurances that “the states' proposals would actually implement the applicable water quality standards” represents the latest interpretation of the total maximum daily load provision in the CWA.¹¹⁸ By adding these greater specificities, American Farm Bureau Federation increased the EPA’s ability to effectuate pollution reduction in U.S. waterways.

A. Nonpoint Source Pollutant Limitations, Target Dates, and Reasonable Assurances: The Prospective Effects of American Farm Bureau on Agricultural Pollution

Agricultural pollution in America’s waterways represents one of the greatest problems of environmental law.¹¹⁹ In 2000, the EPA conducted a National Water Quality Inventory where states reported, “agricultural nonpoint source (NPS) pollution was the leading source of water quality impacts on surveyed rivers and lakes, the second largest source of impairments to wetlands, and a major contributor to contamination of surveyed estuaries and ground water.”¹²⁰ Additionally, more recent esti-

¹¹⁴ Gregory Gethard, Circuit Court OKs EPA’s Chesapeake Bay TMDL (C.A.3), WestLaw Energy and Environment Daily Briefing (July 8, 2015).
¹¹⁵ Id.
¹¹⁶ Am. Farm Bureau Fed’n, 792 F.3d at 281.
¹¹⁸ Id.
¹¹⁹ Laitos, supra note 37, at 1035.
mates have shown that nonpoint source pollutants, most of which come from agricultural sources, account for approximately half of the country's water pollution.\textsuperscript{121}

Agricultural pollutants can add ammonium, nitrates, nitrites, and phosphorous to ambient water quality and devastate downstream watercourses.\textsuperscript{122} Downstream lakes and reservoirs can experience a variety of adverse pollution-induced circumstances including the permanent alteration of marine ecosystems.\textsuperscript{123} The problem is exacerbated by the fact that, outside of the §303(d) and the implementation of TMDLs, the CWA is largely incapable of reaching agricultural pollutant sources.\textsuperscript{124}

\textit{American Farm Bureau Federation} represents a significant development in the EPA’s limited regulation of agricultural pollutants under the CWA. Most notably, the CWA allows States and the EPA to formulate TMDLs that set pollutant limitations for both point source and nonpoint source pollutants alike. This development at least suggests that the CWA will have more control over the agricultural water pollution problem. Although the CWA is precluded from imposing “regulated pursuant to federally-imposed, technology-based controls” on agricultural and other nonpoint source pollutants, \textit{American Farm Bureau Federation} provides a window whereby the federal government can have some oversight with regard to agricultural water pollutants.\textsuperscript{125} In this regard, \textit{American Farm Bureau Federation} can be looked at as an extension of the EPA’s authority established under \textit{Pronsolino}.\textsuperscript{126} However, unlike the law in the Ninth Circuit, the EPA need not deal with water bodies exclusively affected by nonpoint source pollutants to make its presence felt in the Third Circuit.\textsuperscript{127}

In addition to the nonpoint source pollutant limitations, the requirement that states comply with target dates for meeting acceptable water quality standards and provide reasonable assurances that they will in fact meet these standards also furthers the EPA’s reach under the CWA.\textsuperscript{128} As discussed in \textit{American Farm Bureau Federation}, “[t]he amount of acceptable pollution in a body of water is necessarily tied to the date at which the EPA and the states believe the water should meet its quality standard.”\textsuperscript{129} Additionally, by allowing the EPA to seek reasonable assurance from the states, the Agency will be able to “satisfy itself that the states’ proposals would actually implement the applicable water

\begin{footnotesize}
\begin{itemize}
  \item[121] Laitos, \textit{supra} note 37, at 1037.
  \item[122] \textit{Id.} at 1033.
  \item[123] \textit{Id.} at 1034.
  \item[124] \textit{Id.}
  \item[126] \textit{Pronsolino}, 291 F.3d at 1139.
  \item[127] \textit{Am. Farm Bureau Fed’n}, 792 F.3d at 309.
  \item[128] \textit{Id.} at 300.
  \item[129] \textit{Id.}
\end{itemize}
\end{footnotesize}
quality standards.\textsuperscript{130} Such assurances permit the EPA to exercise “reasoned judgment” in considering the states’ proposed standards and ensure that the targets set forth in their TMDL are met.\textsuperscript{131} Further yet, the decision “implies that establishing a TMDL without reasonable assurance might be arbitrary and capricious.”\textsuperscript{132}

**B. Those Adversely Affected by American Farm Bureau Federation, and the Future of Litigation Over TMDLs and Nonpoint Source Pollution**

While American Farm Bureau Federation marks a significant victory for the EPA in its efforts to reduce domestic water pollution, the decision likely assigns some degree of burden on farmers and the agricultural industry. As nonpoint source pollutants are now subject to federal regulation and specific limitations set by the States or the EPA in TMDLs, farmers will likely need to change their current practices.\textsuperscript{133} This likely means incorporating “buffer strips” around streams to comply with limits set by TMDLs.\textsuperscript{134} In addition to higher costs, the agricultural industry has been vocal about its fears surrounding “arbitrary enforcement of TMDLs against individuals in the agriculture business who own land abutting bodies of water.”\textsuperscript{135} So the argument goes, because of the innate difficulty surrounding the pinpointing of sources and quantities of pollution contributing to diffuse surface runoff, the industry fears whether such limitations will be enforced evenhandedly.\textsuperscript{136} Although there are likely some merits to the agricultural industry’s gripes, allowing those most responsible for the current, dire state of water quality in this country to run roughshod is unreasonable.\textsuperscript{137}

However, just because the agricultural industry has been asked to be more accountable for its runoff pollutants does not mean it will do so quietly. The Supreme Court denied a petition for writ of certiorari of American Farm Bureau in February of this year.\textsuperscript{138} Nevertheless, the litigious nature and history of this topic suggests that the American Farm Bureau precedent is fluid. Additionally, the fact that some of these compliance measures could result in significant costs further speaks to the likelihood of subsequent litigation. In Pronsolino, for example, the harvesting permit that the Pronsolino’s applied for, which had incorporated

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\textsuperscript{130} Id.
\textsuperscript{131} Id. (citing Ctr. for Biological Diversity v. EPA, 749 F.3d 1079, 1087 (D.C. Cir. 2014)).
\textsuperscript{133} Laitos, supra note 37 at 1052.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1053.
\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} Am. Farm Bureau Fed’n, 792 F.3d 281, cert. denied., 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016).
the Garcia River TMDL compliance measures, estimated costs in excess of $700,000.\textsuperscript{139} Given that was a logging permit on a mere 800 acres in 1998, it is reasonable to assume that the stakes will be greater when big fishes in the agriculture industry are forced to comply with TMDLs in 2015 and beyond.

**CONCLUSION**

While the *American Farm Bureau* decision marks a win for environmental groups and clean water enthusiasts, it by no means solves the current dilemma of water pollution resulting from agriculture. For example, the new standard in the Third Circuit does nothing to solve the issue pertaining to citizens’ inability from compelling the EPA to implement TMDLs.\textsuperscript{140} Additionally, any effects from the increased federal regulation over nonpoint source pollutants likely will take some time to be felt; which means that the staggering degree of water pollution will likely linger before significant improvements are made. Furthermore, as seen earlier, this was not the first and likely will not be the last challenge to the issues surrounding federal regulation of nonpoint source pollutants. Moreover, the amount of money at stake will likely make subsequent litigation an inevitability.

However, as it currently stands, *American Farm Bureau* marks a new and changing landscape in the world of TMDLs and nonpoint source pollutant regulation under the CWA. Moving forward, in order for the CWA to meet its overall goal of restoring and maintaining the “chemical, physical and biological integrity of Nation’s waters,” courts will need to continue to permit the EPA to regulate water pollution stemming from nonpoint source pollutants.

\textsuperscript{139} Pronsolino, 291 F.3d at 1130.