Federal Oversight and State Cooperation in the Chesapeake Bay

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Summary

As an increasing number of communities in the United States face significant flooding, droughts, and degradation of water quality, interest in the management of interstate water basins has heightened. Interstate water management requires a number of interests to be balanced, including different priorities among states affected by the particular water basin, federal interests in federal water projects, and private interest groups who may be affected by regulation of the basin. Because of these competing interests, interstate water management often becomes controversial and may lead to lengthy legal disputes among the parties, as has been the case in the Chesapeake Bay watershed.

The federal government has broad authority over water resources within the United States under the Commerce Clause of the U.S. Constitution. Under the Commerce Clause, the U.S. Supreme Court has ruled that Congress has "superior power" to ensure the navigability of the nation's waterways. Although states generally have a legal right to the waters within their borders and Congress traditionally has deferred to states on a number of water resources issues, the states' rights to control waters within the state is subject to Congress's authority under the Commerce Clause. Because many water resources issues often affect water basins that span several jurisdictions, states may seek to cooperate in the resolution of such issues through interstate water compacts. The U.S. Constitution generally requires congressional consent for such an agreement, which, when it is approved by the states and Congress, becomes binding law and provides for a uniform system of regulation of the water basin among the states.

The Chesapeake Bay illustrates the complex issues involved in interstate water basins. To address concerns regarding the impacts of pollution, the federal government, states, and private organizations have sought to apply water quality protections provided under the federal Clean Water Act (CWA). Additionally, a number of interested parties have entered voluntary agreements committing them to particular goals and actions related to restoring the resources of the Chesapeake Bay, though none of the agreements has been an interstate compact. The lack of progress toward the goals set by the parties has resulted in a number of lawsuits and increased federal attention and action with respect to setting pollution reduction requirements in the Bay.

This report explains the legal authority of the federal and state governments to manage water resources. It also examines the role of interstate water compacts to address management issues in interstate water basins. The report analyzes efforts made to resolve disputes in the Chesapeake Bay to illustrate the concurrent roles that states and the federal government may play in managing interstate water resources.

Contents

Introduction 1
Legal Framework of Federal and State Authority over Regulation and Management of Water Resources 1
Constitutional Authority of Federal Government to Regulate Waterways 1
States' Role in Water Regulation 2
Interstate Agreements and Authority for Water Compacts 3
Intersection of Federal and State Water Management Efforts in the Chesapeake Bay 4
Federal and State Roles Under the Clean Water Act 4
Chesapeake Bay Interstate Agreements 7
Federal Administrative Actions and Related Legal Challenges 8
Litigation Concerning the Sufficiency of State and Federal Action in the Chesapeake 8
Executive Order 13508 and the Chesapeake Bay TMDL 10
Recent Legal Challenge to Federal Establishment of the Chesapeake Bay TMDL 11

Contacts

Author Contact Information 12

Introduction

As an increasing number of communities in the United States face significant flooding, droughts, and degradation of water quality, interest in the management of interstate water basins has heightened. Interstate water management requires a number of interests to be balanced, including different priorities among states affected by the particular water basin, federal interests in federal water projects, and private interest groups who may be affected by regulation of the basin. Because of these competing interests, interstate water management often becomes controversial and may lead to lengthy legal disputes among the parties.

The Chesapeake Bay provides one example of an interstate water basin with a long history of joint efforts to find long-term solutions to water resources problems affecting federal, state, and private interests. This report explains the legal authority of the federal and state governments to manage water resources. It also examines the role of interstate water compacts to address management issues in interstate water basins. The report analyzes efforts made to resolve disputes in the Chesapeake Bay to illustrate the concurrent roles that states and the federal government may play in managing interstate water resources.

Legal Framework of Federal and State Authority over Regulation and Management of Water Resources

Historically, the federal government has claimed control over the nation's waterways to facilitate navigation. The states have claimed authority to control the water resources within their own boundaries. Many waterbodies cross state boundaries, though, and one state's management of part of a water basin may affect the portion of the basin located in another state. To address these competing interests, states may enter into interstate water compacts with the consent of Congress that provide uniform rules for management of the basin.

Constitutional Authority of Federal Government to Regulate Waterways

The Commerce Clause of the U.S. Constitution grants the federal government broad authority over water resources within the United States, empowering Congress "to regulate Commerce ... among the several States."[1] The U.S. Supreme Court has interpreted the Commerce Clause broadly. Under the Commerce Clause, Congress may regulate (1) channels of interstate commerce, for example, highways and rivers; (2) instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.[2]

[1] U.S. Const. art. I, §8.

[2] *See* Gonzales v. Raich, 545 U.S. 1, 16-17 (2005).

The U.S. Supreme Court historically has held that the federal authority over water derives from the Commerce Clause and the significant federal interest in promoting navigation throughout the nation's waterways.[3]

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders.[4]

The breadth of this authority has been recognized repeatedly. In 1899, the Court explained that the states' authority over water was subject to "the superior power of the General Government to secure the uninterrupted navigability of all the navigable streams within the limits of the United States."[5] According to the Court, states' interests in controlling waters within their boundaries could not restrict federal actions related to water.[6] Even if the federal action would interfere "with the state's own program for water development and conservation ... [that program] must bow before the 'superior power' of Congress."[7]

The Supreme Court has held that the constitutional authority of the federal government "is as broad as the needs of commerce."[8] It has explained that maintaining the navigability of waterways is only one of the various purposes for which the government may claim authority over water.[9] In other words, congressional authority to regulate water resources may serve a number of purposes other than navigation, such as flood control, hydropower, and watershed development.[10] Thus, although the federal government often defers to states' authority regarding allocation and water management, a state's authority over its waters is "subject to the power of Congress to control the waters for the purpose of commerce."[11]

States' Role in Water Regulation

The U.S. Supreme Court has long held that a state owns the navigable waters within its borders.[12] In 1842, the Court explained that when the United States was formed, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since

[3] *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824).

[4] Gilman v. Philadelphia, 70 U.S. 713, 724-25 (1865).

[5] United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899).

[6] Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) ("Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state.").

[7] *Id*. at 534-35.

[8] United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940).

[9] *Id*.

[10] *Id*.

[11] *Id*. at 423.

[12] Martin v. Lessee of Waddell, 41 U.S. 367 (1842); Pollard v. Hagan, 44 U.S. 212 (1845). *See also* PPL Montana v. Montana, 132 S.Ct. 1215 (2012).

surrendered by the Constitution to the general government."[13] Under the constitutional equal footing doctrine, states that later joined the union acquired the same rights granted to the original states, and therefore also acquired ownership of their state's navigable waters upon achieving statehood.[14]

It is notable that, although the Court recognized state ownership of water within state boundaries, it also indicated that the state's interest in its waters could be limited by superseding rights assigned under the Constitution to the federal government.[15] In other words, the state may not claim absolute authority to navigable waters if the federal government has constitutional authority to act with respect to those waters.

Interstate Agreements and Authority for Water Compacts

The competing interests of the federal and state governments may result in disputes over the management of water resources in interstate basins.[16] These disputes may be addressed through interstate water compacts, which allow states to cooperate in solving problems that cross state lines. Several dozen interstate water compacts have been established over the past century, and most states have engaged in the compacting process at some point.[17] The U.S. Constitution generally requires congressional consent for such an agreement between states, but does not specify a particular procedure for states to enter compacts.[18] Congressional consent is necessary for a compact if it "may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States.... "[19] Usually, consent by Congress takes the form of a joint resolution or act of Congress, which specifies its approval of the text of the compact, adds any conditions or provisions it deems necessary, and often embodies the compact document.[20]

Generally, to form an interstate compact, states need to negotiate and agree upon the terms of the compact. Each state legislature and Congress then must enact the precise language of the agreement. As an alternative to approving the exact language of the negotiated compact, Congress may give its consent in the form of prior authorization in order to encourage agreements in a specific area.[21] So long as the states enter into a compact that fits into the preapproved purposes

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[13] *Martin*, 41 U.S. at 410.

[14] *Pollard*, 44 U.S. at 228-29. *See also* U.S. Const. art. IV, §3, cl. 1.

[15] *Martin*, 41 U.S. at 410.

[16] Interstate water compacts generally offer states an opportunity to address competing interests, but may also raise controversies between states regarding the extent to which a compact may supersede states' rights over water within their borders. *See, e.g.,* Tarrant Regional Water District v. Herrmann, 656 F.3d 1222 (10th Cir. 2011), cert. granted, No. 11-889 (January 4, 2013). *Tarrant* raises a number of questions related to the interpretation of the Red River Compact under a constitutional principle known as the Dormant Commerce Clause. Specifically, the Court has been asked to consider whether states that are parties to the Red River Compact may discriminate against water users in other states that also are parties to the compact. The Court has not issued its decision in the case.

[17] *See* Jerome C. Muys et al., *Utton Transboundary Resources Center Model Interstate Water Compact*, 47 NAT. RESOURCES J. 17 (2007).

[18] U.S. CONST. art. I, §10, cl. 3.

[19] Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

[20] *See, e.g.*, Delaware River Basin Compact, P.L. 87-328, 75 Stat. 688 (1961).

[21] Cuyler v. Adams, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state action in advance or by giving express or implied approval to an agreement the States have already joined."). *See, e.g.*, Crime Control Consent Act of 1934, 4 U.S.C. §112(a) (granting prospective approval of interstate agreements (continued...)

enacted by Congress, the compact would be valid. If any provisions were different from, or added to, the preapproved ones, congressional approval may be required for the compact to take effect. One Congress cannot bind a future Congress, and thus, the possibility exists that Congress might amend any compact notwithstanding any prospective congressional approval.[22] Furthermore, the Supreme Court has held that Congress retains the power to override provisions of an interstate compact through subsequent legislation.[23]

Intersection of Federal and State Water Management Efforts in the Chesapeake Bay

The Chesapeake Bay watershed covers 64,000 square miles and includes parts of six states (Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia), as well as the District of Columbia (hereinafter referred to as the states or the watershed jurisdictions).[24] It provides an example of joint federal-state efforts to address water management across jurisdictional lines. Under its constitutional authority discussed above, Congress enacted the Federal Water Pollution Control Act, which is commonly referred to as the Clean Water Act (CWA), to control pollution of the nation's waterways.[25] Efforts to address pollution in the Chesapeake Bay illustrate the various roles that states and the federal government may play in managing water resources.

In addition to Congress's enacting the CWA to create a coordinated approach to pollution control through federal statute, federal and state authorities have used other measures to manage the Bay's resources. The U.S. Environmental Protection Agency (EPA), the Chesapeake Bay states, and private regional interests have entered a number of interstate agreements in efforts to address the issues facing the watershed, as discussed below. Most recently, the Obama Administration announced new restrictions on pollution that would apply across the Chesapeake Bay states.[26] Each of these approaches—joint authority under federal statute, interstate agreements, and federal administrative action—is addressed below.

Federal and State Roles Under the Clean Water Act

The CWA governs pollution of the nation's waterways.[27] In the CWA, Congress identified a number of goals "to restore and maintain the chemical, physical, and biological integrity of the

(...continued)

among states "for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies ...").

[22] Fletcher v. Peck, 10 U.S. 87, 135 (1810) (Chief Justice Marshall).

[23] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 433 (1855).

[24] *The Chesapeake Bay Watershed*, Chesapeake Bay Program, *available at* http://www.chesapeakebay.net/discover/baywatershed.

[25] 33 U.S.C. §§1251 *et seq*.

[26] *See Notice for the Establishment of the Total Maximum Daily Load (TMDL) for the Chesapeake Bay*, U.S. Environmental Protection Agency, 76 Fed. Reg. 549 (January 5, 2011).

[27] *See* P.L. 92-500, 86 Stat. 816, codified at 33 U.S.C. §§1251 *et seq*. A comprehensive analysis of the CWA is beyond the scope of this report. For more information, see CRS Report RL30030, *Clean Water Act: A Summary of the Law*.

Nation's waters," including restricting the discharge of toxic pollutants and controlling various sources of pollution.[28] Congress also acknowledged the role of states in pollution control, stating that "[it] is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources, and to consult with the Administrator in the exercise of his authority" under the CWA.[29] The result often is referred to as "cooperative federalism," an arrangement in which the federal government establishes goals and national policy, and states are responsible for day-to-day implementation of the law.

To achieve the statute's objectives, the CWA regulates pollution by prohibiting point-source discharges into the waters of the United States except if made in compliance with the CWA.[30] Two of the primary enforcement mechanisms that regulate discharges into waters of the United States, including the territorial seas, are the use of permits under the National Pollutant Discharge Elimination System (NPDES) and requiring permits for dredged or fill materials discharged.[31] Each of these approaches includes explicit recognition of the roles of both the federal government and the states in managing waterways subject to the statute.[32]

The CWA requires states to set water quality standards for waterways within its borders, which are then subject to federal approval.[33] Water quality standards consist of the designated use of a waterbody (e.g., recreation or water supply), water quality criteria necessary to protect the designated use, and a nondegradation statement to conserve and protect existing uses.[34] The statute also requires EPA to establish effluent limitations for point sources that identify industry-specific national standards that limit the discharge of pollutants.[35] In order to discharge pollutants in compliance with the CWA, point sources must obtain a permit under the NPDES program, which requires that the discharge will comport with relevant effluent limitations and other CWA requirements.[36] Permits are issued either by EPA or by qualified states, which may administer their own program for discharge permits in place of the national program.[37] If a state establishes its own program, it must demonstrate to EPA that it has adequate legal authority to do so.[38] Following federal approval of analogous state-administered programs, the federal permitting process is suspended for that state, though EPA retains authority to require modifications of the state program or withdraw its approval and authority to review permits that a state proposes to issue.[39] Forty-six states have been delegated this authority.[40]

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[28] 33 U.S.C. §1251(a).

[29] 33 U.S.C. §1251(b). The CWA also explicitly notes that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act.... " *See id.* at §1251(g).

[30] *See* 33 U.S.C. §1311(a).

[31] *See* 33 U.S.C. §§1342, 1344.

[32] *See id.*

[33] 33 U.S.C. §1313(a)(1).

[34] *See id.* at §1313(c); 40 C.F.R. §131.6.

[35] *See id.* at §1311(b). *See also Industry Effluent Guidelines*, Environmental Protection Agency, *available at* http://water.epa.gov/scitech/wastetech/guide/questions_index.cfm.

[36] 33 U.S.C. §1342(a).

[37] *See id.* at §1342(b).

[38] *Id.*

[39] *Id*. at §1342(c).

[40] *See State Program Status, National Pollutant Discharge Elimination System*, U.S. Environmental Protection Agency, *available at* http://cfpub.epa.gov/npdes/statestats.cfm.

In some cases, permit limitations may not be sufficient to meet the applicable water quality standards. Under the CWA, states are required to identify waters for which water quality standards are not being attained and rank those waters based on the severity of the pollution and the uses of the waters.[41] The state then must "establish ... in accordance with the priority ranking, the total maximum daily load, for those pollutants [identified by EPA] as suitable for such calculation."[42] The total maximum daily load (TMDL) identifies the maximum amount of pollutant discharges that may be released into the waters while achieving the state-established water quality standards.[43] States are required periodically to submit their assessment of waters that do not meet the water quality standards, that is, are impaired, and the corresponding TMDLs for federal review.[44] Nationwide, more than 20,000 waterways are known to be violating water quality standards and to require a TMDL.[45] If EPA disapproves of a state's assessment of its waters or establishment of its TMDLs, those responsibilities transfer to the federal government, and EPA must identify the waters that do not meet water quality standards and establish corresponding TMDLs.[46] The state then must implement the TMDLs.[47]

As noted above, the CWA also regulates discharges of dredged or fill materials into navigable waters, requiring a federal permit for most discharges.[48] Although a wide range of dredge-or-fill discharges are restricted under the CWA, some discharges do not require a permit, for example, materials discharged because of "normal farming, silviculture, and ranching activities."[49] Like the NPDES permit process, qualified states may administer their own permit programs for discharges in some cases.[50] To do so, the state must submit a description of its proposed program and the legal authority under which it would be administered, that is, state law or interstate compact.[51] If EPA determines that the state has the necessary authority to administer a permit program sufficiently, the federal permit program will be suspended with respect to activities governed by the state's program.[52] However, EPA is authorized to withdraw its approval for any state program that is not administered consistently with the CWA.[53] Two states have been delegated this authority.[54]

Among the other administrative roles available to states under the CWA is authority for states to certify whether discharges comply with the act. Under the CWA, applicants for permits for activities "which may result in any discharge into the navigable waters, shall provide ... a

[41] *Id.* at §1313(d)(1)(A).

[42] *Id.* at §1313(d)(1)(C).

[43] *See* CRS Report R42752, *Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs)*.

[44] 33 U.S.C. §1313(d)(2).

[45] *See Overview of Current Total Maximum Daily Load—TMDL—Program and Regulations*, U.S. Environmental Protection Agency, *available at* http://www.epa.gov/region1/eco/tmdl/pdfs/NationalTMDLFactSheet.pdf.

[46] 33 U.S.C. §1313(d)(2).

[47] *Id*.

[48] *See generally* 33 U.S.C. §1344. This permit program is administered by the U.S. Army Corps of Engineers, in consultation with EPA.

[49] *Id.* at §1344(f).

[50] *See id.* at §1344(g).

[51] *Id*.

[52] *Id*. at §1344(h)(2)(A).

[53] *Id*. at §1344(i).

[54] *See State or Tribal Assumption of the Section 404 Permit Program*, U.S. Environmental Protection Agency, *available at* http://water.epa.gov/type/wetlands/outreach/fact23.cfm.

certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions [of the CWA]."[55] Under this provision, states may play a significant role in the federal permitting or licensing process for discharges in navigable waters.[56]

Chesapeake Bay Interstate Agreements

Although the Chesapeake Bay states and federal government have cooperated in joint efforts to address water resources problems over the past several decades, a formal interstate compact has never been adopted for the Bay.[57] Instead, the federal and state parties have entered a number of voluntary agreements in which they have identified issues of concern, set goals for watershed restoration, and established deadlines for achieving progress toward those goals.

Interstate cooperation in the Chesapeake Bay began with the creation of the Chesapeake Bay Commission, a tri-state legislative body that includes representatives from Maryland, Pennsylvania, and Virginia, in the early 1980s. The Commission coordinates policy issues affecting the Bay states "to develop shared solutions."[58] In 1983, a number of jurisdictions with interests in the Bay signed the first Chesapeake Bay Agreement, which recognized the "historical decline" of the Bay and the need for "a cooperative approach" going forward.[59] Under that general agreement, EPA, the District of Columbia, Maryland, Pennsylvania, Virginia, and the Chesapeake Bay Commission agreed to establish an interstate council with federal and state representatives. The council would "meet at least twice yearly to assess and oversee the implementation of coordinated plans to improve and protect ... the Chesapeake Bay estuarine systems."[60]

The same parties agreed to a second Chesapeake Bay Agreement in 1987, which addressed concerns affecting the Bay in more detail.[61] The 1987 Agreement identified a number of broad goals and set specific objectives related to each goal. It also set a timeline for achieving results toward the goals and objectives. For instance, the 1987 Agreement committed the parties "to develop, adopt and begin implementation of a basin-wide strategy to equitably achieve by the year 2000 at least a 40 percent reduction of nitrogen and phosphorus entering the main stem of

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[55] *Id.* at §1341(a)(1). For more information on this requirement, see CRS Report 97-488, *Clean Water Act Section 401: Background and Issues.*

[56] *See also* S.D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370 (2006).

[57] Because of continued concern that the Bay's water resources problems were not improving sufficiently, some have called for the use of an interstate compact. *See, e.g.*, Matthew L. Paeffgen, *A Ringmaster for the Circus: Using Interstate Compacts to Create a Comprehensive Program to Restore the Chesapeake Bay*, Environmental Law Institute, 37 ELR 10888 (December 2007); "Chesapeake Bay Foundation Seeks Binding Compact from Governors," *Greenwire* (September 5, 2003). Some of the Chesapeake Bay jurisdictions have entered other interstate water resources compacts, but none that address the Bay directly. *See, e.g.*, Susquehanna River Basin Compact, P.L. 91-575 (signed by Maryland, New York, and Pennsylvania).

[58] Chesapeake Bay Commission, *available at* http://www.chesbay.us/.

[59] The Chesapeake Bay Agreement of 1983 (December 9, 1983), *available at* http://www.chesapeakebay.net/content/publications/cbp_12512.pdf.

[60] *Id*.

[61] The 1987 Chesapeake Bay Agreement (December 15, 1987), *available at* http://www.chesapeakebay.net/content/publications/cbp_12510.pdf.

the Chesapeake Bay" within six months of its adoption.[62] The 1987 Agreement also reaffirmed the role of the interstate council to coordinate management efforts and oversee accountability.[63]

In 2000, the parties signed an agreement known as Chesapeake 2000, which recognized the cooperative efforts undertaken over the previous two decades and reaffirmed the partnership and joint responsibility for addressing the Bay's resources.[64] Delaware, New York, and West Virginia—the "headwater states" of the Bay—also joined the parties in committing to the goals.[65] Like the previous agreements, Chesapeake 2000 identified a variety of goals for the various resources in the Bay and a number of specific actions and deadlines to meet those goals through 2010. Chesapeake 2000 acknowledged that despite efforts to reduce pollution, portions of the Bay had been listed as impaired under the CWA because applicable water quality standards have not been attained. The parties agreed to implement a process that would integrate the Bay programs and improve water quality before further regulatory actions, that is, a TMDL, would be required by the CWA.[66]

Federal Administrative Actions and Related Legal Challenges

Despite several decades of activity by federal and state governments, the private sector, and the general public, efforts to improve the Chesapeake Bay watershed have been insufficient to meet agreed-upon restoration goals. Litigation over the past decade has demonstrated the continued difficulties in achieving progress toward those goals and eventually led to a legal agreement under which the federal government assumed a more active role in addressing issues in the Chesapeake Bay. However, as discussed below, the federal role in the Chesapeake TMDL has raised new legal challenges.

Litigation Concerning the Sufficiency of State and Federal Action in the Chesapeake

Although the federal government shares legal authority over water management with the states under constitutional and statutory law, the role that the federal government has taken in the Chesapeake Bay has been challenged in a number of cases. Among the issues that have been the subject of litigation are the extent of federal authority related to state actions under the CWA and the sufficiency of federal review of state actions.

In one case challenging the federal government's oversight of state actions under the CWA, a federal district court ruled that federal authority under the CWA did not extend to evaluating the

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[62] *Id*. at 3. The parties revisited and reaffirmed these goals in the 1992 Amendments to the Chesapeake Bay Agreement as well. *See* 1992 Amendments to the Chesapeake Bay Agreement (August 12, 1992), *available at* http://www.chesapeakebay.net/content/publications/cbp_12507.pdf.

[63] *Id*. at 6.

[64] Chesapeake 2000 (June 28, 2000), *available at* http://www.chesapeakebay.net/documents/cbp_12081.pdf.

[65] Memorandum of Understanding Among the State of Delaware, the District of Columbia, the State of Maryland, the State of New York, the Commonwealth of Pennsylvania, the Commonwealth of Virginia, the State of West Virginia, and the United States Environmental Protection Agency Regarding Cooperative Efforts for the Protection of the Chesapeake Bay and Its Rivers, *available at* http://www.chesapeakebay.net/content/publications/cbp_12085.pdf.

[66] Chesapeake 2000 at 5.

state's timing in developing TMDLs.[67] A number of environmental organizations alleged that Maryland's Department of the Environment failed to develop TMDLs for the state's impaired waterways under the CWA. The organizations sought a court order requiring EPA to assume responsibility for developing the state's TMDLs because Maryland was "developing TMDLs at a pace and in an order that are unacceptable and inadequate."[68] The court rejected their request, noting that the CWA did not set specific requirements related to the complaint.

> Nothing in [the statute] specifically references any type of pacing, scheduling, or timing related to TMDL *completion* by the state. Therefore, these factors are not outlined as ones that must be considered by EPA prior to approving a § 303(d) list, a specific TMDL, a water quality analysis, or a de-listing. While [the statute] requires waters to be ranked according to priority for treatment—a requirement that the parties do not dispute was fulfilled—the provision does not outline any specific time requirements for *completing* prioritized items.[69]

According to the court, instead of setting mandated deadlines, the CWA's requirement that states list waters for TMDL development within two years "is a form of goal setting" and does not require EPA to determine whether the TMDL actually will be completed within that time.[70]

In another case challenging the sufficiency of federal actions in the Chesapeake Bay, nonprofit organizations sued EPA, alleging that federal approval of a TMDL for the Anacostia River submitted by Maryland and the District of Columbia did not comport with statutory requirements.[71] Under the CWA and its implementing regulations, state-developed water quality standards for interstate waterways within the state must consider the designated use of those waterways.[72] In this case, the District of Columbia and Maryland designated the Anacostia River for recreation, aesthetic enjoyment, and protection of aquatic life, and established water quality criteria for each use.[73] However, the court held that by focusing only on plant and animal life and not addressing other designated uses, the Anacostia River TMDL did not comply with the CWA requirement that the TMDL reflect the applicable water quality standard.[74] Although the court recognized the lengthy history of delays in implementing the TMDL, it held that the government must address each of the statutory requirements, including considering each of the designated uses, in order to comport with its obligations under the CWA.[75]

After years of dissatisfaction with the Chesapeake Bay's progress under the federal-interstate agreements, a number of state officials, regional associations, and the Chesapeake Bay Foundation filed a lawsuit in 2009 to compel EPA to comply with its CWA obligations and the Chesapeake 2000 agreement and establish and implement programs to address water quality in the Chesapeake Bay.[76] In response to that lawsuit, the parties reached a settlement agreement that

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[67] Potomac Riverkeeper v. EPA, 2006 U.S. Dist. LEXIS 14837 (D.Md. 2006).

[68] *Id*. at 4.

[69] *Id*. at 31-32 (emphasis in original). The court also noted that EPA regulations similarly include no requirement for specific timeframes for completion. *Id*. at 32.

[70] *Id*. at 33.

[71] Anacostia Riverkeeper v. Jackson, 798 F.Supp.2d 210 (D.D.C. 2011).

[72] *See* 33 U.S.C. §1313; 40 C.F.R. §131.11(a).

[73] *See Anacostia Riverkeeper*, 798 F.Supp.2d at 224.

[74] *Id.* at 222-25.

[75] *Id*. at 253.

[76] *See* Complaint, Fowler v. EPA, No. 1:09-cv-00005-CKK (D.D.C. filed January 5, 2009).

committed EPA to establish the Bay TMDL by December 31, 2010, using information provided by the Chesapeake Bay watershed jurisdictions.[77] Under the agreement, the states were expected to provide implementation plans for EPA's review on a biennial basis.[78]

Executive Order 13508 and the Chesapeake Bay TMDL

In 2009, after state officials and regional associations sued the federal government to compel federal action, President Obama issued Executive Order 13508 (E.O. 13508), *Chesapeake Bay Protection and Restoration*, which directed certain federal agencies to lead a collaborative effort to restore the Chesapeake Bay.[79] E.O. 13508 directed federal agencies to

> consult extensively with the States of Virginia, Maryland, Pennsylvania, West Virginia, New York, and Delaware and the District of Columbia ... to ensure that Federal actions to protect and restore the Chesapeake Bay are closely coordinated with actions by State and local agencies in the watershed and that the resources, authorities, and expertise of Federal, State, and local agencies are used as efficiently as possible for the benefit of the Chesapeake Bay's water quality and ecosystem and habitat health and viability.[80]

E.O. 13508 also directs EPA, in consultation with its state counterparts, to identify its existing authorities for restoration of the Chesapeake Bay, including the CWA, that would facilitate achieving Chesapeake restoration goals.[81]

A central component of actions to implement E.O. 13508 is adoption of a Chesapeake Bay TMDL. As discussed earlier, under the CWA, states are charged with establishing TMDLs when necessary, but the states' TMDL actions are subject to federal review. However, in the case of the Chesapeake Bay, EPA established a multi-state TMDL pursuant to a 2007 agreement among representatives from federal agencies, each of the watershed jurisdictions, and regional organizations.[82] When releasing the TMDL, EPA explained, however, that each of the jurisdictions in the Chesapeake Bay watershed had been engaged in joint planning efforts for the TMDL.[83]

EPA established the Chesapeake Bay TMDL in 2010, which "identifies the necessary pollution reductions from major sources of nitrogen, phosphorus and sediment across Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia and sets pollution limits necessary to meet applicable water quality standards in the Bay and its tidal rivers.... "[84]

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[77] Settlement Agreement, Fowler v. EPA, No. 1:09-cv-00005-CKK (D.D.C. signed May 10, 2010), *available at* http://www.cbf.org/Document.Doc?id=512.

[78] *Id*. at 14-15.

[79] Exec. Order No. 13508, *Chesapeake Bay Protection and Restoration* (May 12, 2009), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900352/pdf/DCPD-200900352.pdf. Under E.O. 13508, EPA is the lead agency among a number of other federal agencies, including the Department of Agriculture, Department of Commerce, Department of Defense, Department of Homeland Security, Department of the Interior, and Department of Transportation. *Id*. at §201.

[80] *Id*. at §204.

[81] *Id*. at §301.

[82] Chesapeake Bay TMDL at ES-3, U.S. Environmental Protection Agency, *available at* http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html.

[83] *Id*.

[84] Chesapeake Bay TMDL at ES-1.

The TMDL goal is to have implementation plans in place by 2025, with more than half of the planned actions in place by 2017.[85] The Chesapeake Bay TMDL is a compilation of smaller TMDLs for 92 individual segments of the Chesapeake Bay and its tributaries.[86] Under the TMDL, EPA requires a 25% reduction in nitrogen, a 24% reduction in phosphorus, and a 20% reduction in sediment in the Chesapeake Bay Watershed.[87] The reductions are divided among the jurisdictions and major river basins within the watershed.[88] EPA has stated that "beginning in 2012, jurisdictions (including the federal government) are expected to follow two-year milestones to track progress toward reaching TMDL goals."[89] EPA will review such progress, and, if it determines a jurisdiction's actions have been insufficient, EPA has indicated it will use its authority to "take appropriate contingency actions to ensure pollution reductions."[90] Such actions could include increased federal oversight of state programs, requiring additional reductions, increasing federal enforcement measures, redirecting federal grants, or revising water quality standards.[91]

Recent Legal Challenge to Federal Establishment of the Chesapeake Bay TMDL

Further legal challenges have followed EPA's issuance of the TMDL in December 2010. Instead of challenging the insufficiency of the federal government's actions under its CWA obligations, one lawsuit has asserted that the federal government exceeded its authority under the CWA. In *American Farm Bureau Federation v. EPA*, agricultural organizations have claimed that the requirements established in the Chesapeake Bay TMDL infringe on state authority under the CWA.[92] In late 2012, a federal district court considered arguments from agricultural organizations that challenged the specific requirements set by EPA in the Chesapeake Bay TMDL, but the court has not issued a decision in the case yet.[93] Agricultural organizations have alleged that "EPA used an unprecedented process to micromanage waterways from Virginia to New York through the assignment of highly specific pollutant loads" and "unlawfully circumvented the Clean Water Act procedures that give primary authority to the states to protect water quality."[94] The organizations argued that the TMDL is meant to be "informational" only—to identify maximum pollutant amounts permissible to meet water quality standards—but is not meant to assign specific limitations to particular parties.[95]

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[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*. For a breakdown of the allocations, see Chesapeake Bay TMDL, Table ES-1, *Chesapeake Bay TMDL watershed nitrogen, phosphorus and sediment final allocations by jurisdiction and by major river basin*, at ES-7.

[89] Chesapeake Bay TMDL at ES-8.

[90] *Id*.

[91] *Id*.

[92] *See* Complaint, American Farm Bureau Federation v. EPA, No. 1:11-cv-00067-SHR (M.D. Pa. filed January 10, 2011).

[93] *Id*.

[94] *Id*. at 2.

[95] *Id*.

In other words, the case challenges whether the federal government has any authority over the *implementation* of TMDLs, or if that authority solely belongs to the states.[96] Although the case is still pending, it may be of interest that other courts have noted that "TMDLs are not self-implementing instruments, but instead serve as informational tools utilized by EPA and the States to coordinate necessary responses to excessive pollution in order to meet applicable water quality standards."[97] The court's decision in the *American Farm Bureau Federation* case may have a significant impact on future efforts to regulate discharges in the Chesapeake Bay, particularly if the court finds that EPA exceeded its authority. If the court reaches such a conclusion, efforts to address pollution in the Chesapeake Bay appear to be confined to the same processes used over the past several decades, which have not yielded significant progress. However, even if the court finds the federal government exceeded its current authority, a prominent federal role may not be impossible, as Congress may consider whether to amend EPA's existing authority under the CWA or enact new legislation to address the Chesapeake Bay specifically.

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[96] *Id*. at 12-13.

[97] Anacostia Riverkeeper v. Jackson, 798 F.Supp.2d 210, 216 (D.D.C. 2011) (citing Pronsolino v. Nastri, 291 F.3d 1123, 1129 (9th Cir. 2002).

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