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Chesapeake Bay
Court Dismisses Challenge to Trading
Option for States in Chesapeake Bay Plan



By *Amena H. Saiyid*

Dec. 13 — The U.S. District Court for the District of Columbia on Dec. 13 dismissed a lawsuit seeking to overturn the water quality trading program that the Environmental Protection Agency offered as an option to states to clean up the Chesapeake Bay (*Food and Water Watch v. EPA*, D.D.C., No. 1:12-cv-01639, 12/13/13).

In dismissing the challenge, the court said Food and Water Watch and the Friends of the Earth were unable to show that the trading and offset provisions within the total maximum daily loads plan (TMDL) to clean up the bay was a final agency action that was being forced upon states.

Moreover, the court said, “the plaintiffs have failed to show that they have an actual or imminent injury that is traceable to the EPA’s conduct and redressable by an order of this Court.”

However, the court did not address the question of whether water quality trading is legal under the Clean Water Act, as asserted by the groups in their lawsuit.

“And that is a question we are still going to pursue,” Scott Edwards, co-founder of Food and Water Justice, a project of the nonprofit Food and Water Watch, told Bloomberg BNA Dec. 13.

Ruling Upholds Trading Programs

The ruling is significant because water quality trading allows point source dischargers such as publicly owned water facilities or power plants to pay nonpoint sources such as farm operations to reduce certain pollutants like nitrogen and phosphorus.

At present, some Chesapeake Bay states are involved in intrastate trading. These programs would have been invalidated, as would a pilot trading program involving a coalition of farms, power plants and water utilities in Ohio if the court had ruled otherwise.

In the lawsuit filed in October 2012, the groups objected to the trading scheme that EPA included in the bay TMDL established in 2010. They said point sources would be allowed to exceed their TMDL allocations in trading, in violation of the Clean Water Act. The trading scheme offered in the bay program is based on the EPA water quality trading policy issued in 2003, which essentially is a cap-and-trade program—with the TMDL allocations for nonpoint and point sources serving as the cap against which various sources trade pollutant credits (192 DEN A-14, 10/4/12).

In the 2010 TMDL plan for the bay, which outlines and identifies levels of nitrogen, phosphorus, and sediment that can be discharged by the six states and the District of Columbia into the Chesapeake Bay without further degrading water quality, the EPA gave states the flexibility to use trading as one option to meet its TMDL obligations.

“The agency is pleased with the results,” the EPA said in a Dec. 13 statement to Bloomberg BNA. The agency stopped short of elaborating on the specifics of the holding.

In their lawsuit, the groups argued the EPA “essentially requires” states to adopt offsets and trading programs to comply with the bay TMDL and that the EPA’s review of the state implementation plans “constitutes de facto approval authority” of the offset and trading programs.

Bay TMDL Doesn't Authorize Trading

The court concluded that “the Bay TMDL does not authorize offset or trading programs. The plaintiffs’ repetition of that assertion throughout their opposition does not make it more true.”

Moreover, the court said the water quality trading program has been approved by the EPA since 2003.

“To the extent there is any cognizable injury caused by the offset and trading programs, then, it cannot be traced to the 2010 Chesapeake Bay TMDL because the TMDL does not authorize or require such programs, as they already existed before the establishment of the 2010 TMDL,” the court said.

Michele Merkel who along with Edwards is co-founder of Food and Water Justice, told Bloomberg BNA the practical effect of the court’s ruling is that harm would need to be shown on a permit-by-permit basis.

“We asked the court to find trading illegal, but the court did not rule on the merits of the case, so the practical effect is that we now have to challenge each trade as it comes up. That will be extremely difficult for citizen groups,” Merkel said.

Merkel said the groups may appeal, “but we have not decided yet.”

Water Utilities, Farmers Welcome Ruling

The court’s ruling was welcomed by the National Association of Clean Water Agencies, which represents nearly 300 publicly owned wastewater utilities that also manage stormwater, and the American Farm Bureau Federation. Both groups intervened on behalf of the EPA in this lawsuit.

“There was no legal basis for the plaintiff’s legal challenge to water quality trading,” NACWA general counsel Nathan Gardner-Andrews said in a Dec. 13 statement to Bloomberg BNA. “As the vast majority of regulators and clean water advocates already realize, trading programs are a valuable tool to achieve meaningful water quality improvements that are environmentally beneficial and cost-effective.”

Brian Glass, an attorney with Bryn Mawr, Pa.-based Warren Glass LLP, told Bloomberg BNA that “the dismissal is a fitting end to a misguided lawsuit.”

BNA Snapshot

Food and Water Watch v. EPA, D.D.C., No. 1:12-cv-01639, 12/13/13

Key Development:The U.S. District Court for the District of Columbia dismisses lawsuit challenging trading provisions based on the 2003 EPA policy, saying the groups could prove no harm.

Potential Impact:The ruling bolsters the use of trading programs across the country based on the policy.

What Next:The groups say they will challenge trading provisions in the permits to show harm.

Glass said it was unclear what the groups were hoping to achieve by attacking trading and offsetting programs. When designed and implemented properly, Glass said, trading can help dischargers meet their regulatory obligations in the most cost-effective manner and allow for economic growth without compromising the restoration and protection of water resources.

Benjamin Grumbles, a former EPA assistant administrator for water who oversaw the guidance that allowed trading in Clean Water Act permits, said the decision should provide needed support for the program.

"Regulation and innovation should go hand in hand to tackle the toughest challenges, whether in the Chesapeake Bay or other treasured watersheds. The hardest work isn't answering the legal questions, though; it's building the public support and crafting the environmental safeguards so that trades happen and the environment wins. All of that takes time and none of it occurs in a courtroom," said Grumbles, who now is president of the nonprofit U.S. Water Alliance.

To contact the reporter on this story: Amena H. Saiyid in Washington at asaiyid@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com

For More Information

The ruling by the U.S. District Court for the District of Columbia in *Food and Water Watch v. EPA* is available at http://www.bloomberglaw.com/public/document/FOOD_AND_WATER_WATCH_et_al_v_UNITED_STATES_ENVIRONMENTAL_PROTECTI/3.

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