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**Chesapeake Bay TMDL –
Legal Considerations**

Livestock and Poultry
Environmental Learning Center
Webcast Series



February 17, 2012

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**General Legal Framework
for Regulation**

- Federal Statutes
- Executive Orders
- Regulations
- Case Law / Court Opinions
- State Authority

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Federal Statutes

- Provide legal foundation for most actions
- Serve as basis for delegation of authority
- Can be altered through legislative amendment or successful court challenge

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Executive Orders

- Utilized to manage operations of the federal government
- Generally not based upon specific statutory authorization
- Can be changed by the current or successor administration

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Regulations

- Regulatory Agencies
 - Issue regulations pursuant to statutory authority or Executive Orders
- Regulations
 - Normally promulgated through notice and comment process
 - Can be amended or challenged in a manner similar to statutes

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Case Law

- Can determine the validity of a statute or regulation
- Can determine how statutory or regulatory language is interpreted

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State Authority

- **U.S. Constitution: federal law “shall be the supreme law of the land.”**
 - Express preemption
 - Implied preemption
 - Conflict preemption
- **Federal law can impose requirements or “encourage” state action.**

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Clean Water Act

- **Federal Water Pollution Control Act**
 - Main source of statutory authority
 - **Basic premise – Except as in compliance with the Clean Water Act, prohibits the discharge of any pollutant from any point source into navigable waters**

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Clean Water Act

- **Section 117: established the Chesapeake Bay Program and Chesapeake Bay watershed policy**

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Chesapeake Bay Program

- Directed by Chesapeake Executive Council in accordance with Chesapeake Bay Agreements
- Chesapeake Bay Program partners sign agreements to set restoration policies concerning the Bay.
- Chesapeake Bay 2000 Agreement is most recent agreement.

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Executive Order 13,508

- Chesapeake Bay Protection and Restoration
 - Issued in May 2009
 - Led to:
 - Federal Strategy – EPA will implement Chesapeake Bay Total Maximum Daily Loads
 - Action Plan

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Fowler v. EPA

- Filed January 2008; Settled May 2010
- Environmental groups claimed that EPA failed to implement sufficient measures to achieve the goal of reducing pollution levels in the Chesapeake Bay.
- Settlement required EPA to take specific actions to reduce pollution within the Bay.
 - Establishment of Bay TMDLs

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Chesapeake Bay TMDLs

- EPA issued Final Bay TMDLs in December 2010.
- Plan to have all pollution control procedures in place by 2025
- Requires watershed jurisdictions to submit WIPs for EPA's approval
 - Final Phase II WIPs due on March 30, 2012

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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.
- Several environmental groups have been permitted to intervene in case.

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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.

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Am. Farm Bureau Fed'n v. EPA

- **What it could mean:**
 - TMDL process moves forward as planned
 - TMDLs are vacated
 - The requirements for watershed jurisdictions are changed
 - i.e., the WIP process is altered

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Am. Farm Bureau Fed'n v. EPA

- **Procedural Status:**
 - Plaintiff Motion for Summary Judgment has been filed.
 - EPA Motion and Brief due on March 27, 2012
 - Intervenor Brief due on April 20, 2012
 - Reply Briefs due on or before July 13, 2012

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Summary

- **Where Are We Now**
 - Phase II WIPs are being drafted.
 - Process could be impacted by:
 - Legislation
 - Regulation
 - Litigation

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