General Legal Framework for Regulation

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

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
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

Regulations

- Regulated by 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

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.

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

- 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.

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

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
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

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.

Am. Farm Bureau Fed'n v. EPA

- Arguments asserted by AFBF:
  - EPA exceeded authority granted under Clean Water Act;
  - EPA violated Administrative Procedures Act in the process of developing TMDLs;
  - The rulemaking is arbitrary and capricious.
Am. Farm Bureau Fed’n v. EPA

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

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

Summary

Where Are We Now
- Phase II WIPs are being drafted.
- Process could be impacted by:
  - Legislation
  - Regulation
  - Litigation
National Sea Grant Law Center

This work was made possible through support provided by the U.S. Department of Commerce, NOAA through The University of Mississippi under the terms of Grant No. NA09OAR4170200. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or The University of Mississippi.

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