

Turning the Tide, Saving the Chesapeake Bay

The Chesapeake Bay Foundation's biweekly, Tuesday morning podcast

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Title: Episode 4, *Something A Little Different*

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Summary: CBF President Will Baker interviews Vice President for Litigation Jon Mueller about the litigation over the Chesapeake Clean Water Blueprint.

BAKER: Hello, I'm Will Baker, President of the [Chesapeake Bay Foundation](#) and welcome to our continuing podcast series—*Turning the Tide, Saving the Chesapeake Bay*. Today, we're going to do something a little bit different. I will interview CBF's Vice President for Litigation, Jon Mueller, specifically about the litigation that is currently working its way through federal court, in which a number of large, national lobbying associations are suing the federal [Environmental Protection Agency](#) and the Chesapeake Bay Foundation. We are full interveners in the case over the [Chesapeake Clean Water Blueprint](#)—that is the state federal partnership designed to reduce pollution coming into the Chesapeake Bay and all the rivers and streams by very specific amounts, with the deadline of the year 2025 and an interim deadline of 2017. So Jon, glad to have you here.

MUELLER: Thank you, Will.

BAKER: I want to start out with a very basic question as to what the genesis of this lawsuit was.

MUELLER: Back in 2010 we were able to settle a case that we had brought against EPA, asking them to enforce the [Clean Water Act](#). They had signed up for a number of Bay agreements and had not complied and the states had not complied with their obligations to clean up the Bay. So we sued EPA over that and along with a number of other partners we were able to successfully settle that case. One of the settlement terms was that EPA would develop a Chesapeake Bay [Total Maximum Daily Load](#), which basically sets the amount of pollution that all the different sources within the Bay region can discharge into the Bay.

BAKER: Discharge without putting the Bay out of balance, and that Total Maximum Daily Load, those limits, mean that pollution would have to come down significantly.

MUELLER: Correct.

BAKER: So, that was the original program. Who is suing EPA and why?

MUELLER: Shortly after the Chesapeake Bay Total Maximum Daily Load was put into place, issued by EPA, the [American Farm Bureau Federation](#) and the [Pennsylvania Farm Bureau Federation](#) filed suit, challenging the EPA's authority to issue that TMDL, we call it here the Chesapeake Bay Clean Water Blueprint.

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BAKER: Jon is an attorney, and so terms like Total Maximum Daily Load are important to him, but as he just mentioned this is the Chesapeake Clean Water Blueprint. It is *the* blueprint for clean water in the nation, for reducing pollution to levels that will put a very complex, very large system back into balance. So Jon, keep on calling it the TMDL if you want, that's the legal term, and I'll keep reminding the listeners that this is the Chesapeake Clean Water Blueprint. So, what are the claims that the plaintiffs are asking the court to agree with?

MUELLER: Well that has evolved a little bit over time. Within the district court case, the case was filed within the middle district of Pennsylvania, [Judge Sylvia Rambo](#) presiding. They alleged that EPA did not have the authority to issue this TMDL Blueprint, and that the model used to develop the loads for [nitrogen, phosphorus](#), and sediment that could come from the various sources within the Chesapeake Bay watershed, was flawed. And that EPA had not given the plaintiffs, or the rest of citizens, the opportunity to review that Blueprint and to challenge the way it was constructed.

BAKER: The Chesapeake Bay Foundation's involvement, give us a little bit of background there, we're full defendants in the case as of now.

MUELLER: Right, the way the lawsuit was constructed the Farm Bureau Federation and the other national lobbying groups—[the Corn Growers](#), [the Poultry Association](#), the Turkey Growers, [the Pig Growers](#)—

BAKER: And the Home Builders.

MUELLER: And the [National Association Home Builders](#) are the plaintiffs, and so they sued the EPA. We came in on the side of the EPA, in support of its authority to issue this agreement. To do that, we had to be identified as "intervening defendants." We are joined with a number of other groups. We represent the [Environmental Defense Fund](#), [Midshore Riverkeepers](#) Association, [PennFuture](#), [Southern Environmental Law Center](#), working with us.

BAKER: Now, Judge Sylvia Rambo, the federal judge who decided the first element of this case, you just can't make this up, Judge Rambo. She threw out all the claims. Tell us a little bit about her decision in federal district court in Harrisburg.

MUELLER: We didn't know much about Judge Rambo and hearing the name, you were kind of looking for a gun-toting person with a handkerchief on their head, running through the jungle, but it was actually a very nice woman who is a well-recognized jurist. She reviewed the claims, it took her about a year actually to come to a conclusion—

BAKER: After the oral argument.

MUELLER: Correct. She looked at the fact that the Clean Water Act is set up to embrace a concept known as "[cooperative federalism](#)," that is that the states and the federal government have to work together to resolve some of these really intractable problems about [non-point source pollution](#), water that runs off the land from urban areas, from industry, from agriculture,

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as well as what we call the [point sources](#) which are those things that discharge through a pipe, like wastewater treatment plants. She thought that the way that the states and the EPA worked together over 20 years developing these loads for the different kinds of pollution for the different sectors, was an exemplary example of cooperative federalism and upheld EPA on all counts.

BAKER: So EPA won, the Chesapeake Bay Foundation won, the Chesapeake Bay won, in federal district court. The plaintiffs suing to try and derail the Clean Water Blueprint lost. Then what happened?

MUELLER: Then they appealed. They filed their appeal in the [3rd Circuit Court of Appeals](#) in Philadelphia. As I mentioned earlier, their claims changed a little bit at this point. Instead of challenging the model to develop the loads, and the public involvement aspects of the Blueprint, they challenged solely the EPA's authority to issue the Blueprint. The way they went about doing that, they didn't like the fact that EPA has required what's called "reasonable assurance," that the states will actually obtain those goals. They say that that aspect of this Blueprint is not written in the Clean Water Act, and therefore when the EPA told the states if you don't do more, we're going to for example deny discharge permits for those point sources I mentioned, or reduced the limits in which they can discharge, they say that's not anywhere in the Clean Water Act and that the court should throw it out because of that.

BAKER: Jon's calling the TMDL the Blueprint repeatedly now, we're making progress, this is great! We've heard a lot in [the media](#) about 21 states Attorneys General. Can you tell us how they got involved and what the implication of that is?

MUELLER: The Farm Bureau was able to get [21 state Attorneys General](#) to weigh in as friends of the court, [amicus curiae](#), to file a brief on their behalf. Some of those Attorneys General come as far away as Alaska, way outside of the Chesapeake Bay watershed. Their argument is if the court approves this Blueprint, it will be a model for other places in the nation, like the Gulf of Mexico and the Mississippi River watershed that are suffering from the same problems that we have here in the Chesapeake Bay. [They fear](#) that this same Bay Blueprint will be used to stop their pollution.

BAKER: Heaven forbid that other water bodies around the country are cleaned up as well. The irony is pretty ripe. Now, once the decision is rendered in the Circuit Court, what happens after that?

MUELLER: Hopefully that will be the end of the matter, but we have heard from the Farm Bureau that they are going "all the way with this," as they put it.

BAKER: Hopefully if the decision goes our way, it'll be the end of it.

MUELLER: That's correct. All indications are good. We are still waiting for a decision from the 3rd Circuit, but the way the oral argument went, we're pretty hopeful. But if we were to win, we're pretty certain that the Farm Bureau is probably going to ask the Supreme Court to take a look at the case. They have to file what's called a petition for social auroria. The Supreme Court doesn't always take appeals. They have to review it and determine if there is a conflict usually

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between the different circuit courts within the United States, or there's a novel precedent-setting issue they feel like they need to review.

BAKER: If it does go to the Supreme Court, obviously that will take many months more, if not a year or more. First the Supreme Court has to accept it, then they'd have to hear it, then they'd have to decide. During that time, the Blueprint is in place and working?

MUELLER: Correct, and it has been throughout the course of this litigation.

BAKER: Well thank you very much Jon Mueller, Vice President for Litigation here at CBF. I'm Will Baker, President of the Chesapeake Bay Foundation. If you have any more interest in this issue, if you'd like to know more, look at our website at cbf.org. There's plenty on it about this case. And if you have any questions for us, feel free to email us at chesapeake@cbf.org. Thanks very much.