No. 15-599

In The
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Chesapeake Bay suffers from massive algae blooms that deplete the water of oxygen and limit water clarity. These blooms are caused by excessive nutrient (nitrogen and phosphorous) pollution. Uncontrolled sediment runoff clouds the water and suffocates bottom dwelling organisms. To stem the flow of these pollutants, the United States Environmental Protection Agency (EPA) and the seven States whose tributaries feed the Bay, jointly developed a Total Maximum Daily Load (TMDL) for the Chesapeake Bay. The TMDL identifies the amount of pollution that each State can discharge into Bay tributaries to allow water quality in the Bay to improve and restore the natural resources essential for the economic vitality, health, and aesthetic enjoyment of millions of people. The question presented is:

Whether the TMDL is authorized by the Clean Water Act, 33 U.S.C. § 1251, *et seq*., and the Chesapeake Bay Restoration Act, 33 U.S.C. § 1267.

CORPORATE DISCLOSURE STATEMENT

Intervenor-Respondents Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and National Wildlife Federation are non-profit corporations. None has a parent corporation and no publicly held company has a 10% or greater ownership interest in the respondent corporations.

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The court of appeals' opinion is reported at 792 F.3d 281 (Pet. App. 1a-50a). The district court's memorandum granting summary judgment to the United States and Defendant-Intervenors and denying summary judgment to petitioners is reported at 984 F. Supp. 2d 289 (Pet. App. 51a-157a).

JURISDICTION

The court of appeals entered judgment on July 6, 2015. Justice Alito granted an extension of time to file a petition for a writ of certiorari to November 6, 2015. The petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the petition and in the appendix to this brief.

33 U.S.C. § 1267
33 U.S.C. § 1313
40 C.F.R. § 130.2

STATEMENT OF THE CASE

Congress has recognized the national significance of the Chesapeake Bay and in a statute applicable only to the Bay region charged EPA to

ensure that management plans were developed and implemented to restore Bay water quality. After decades of unsuccessful efforts to clean up the Chesapeake Bay, the States in the Chesapeake Bay watershed (the "Bay States") proposed that EPA establish the Total Maximum Daily Load (TMDL) of pollutants that could be borne by the Chesapeake Bay while achieving state water quality goals. In a cooperative process, the States allocated among themselves the maximum amount of these pollutants each could discharge into the 92 waterbodies that ultimately flow into the Bay. EPA then promulgated the TMDL that is challenged in this case, largely incorporating the allocations that the States themselves had developed and in reliance upon the implementation plans and deadlines that the States themselves had determined were necessary. The process as a whole was a model of cooperative federalism and was entirely consistent with the provisions of the CWA, carefully respecting state interests.

Petitioners' primary argument is that the TMDL tramples on authority reserved to the States. The Bay States are the only States in any way affected by the TMDL. Yet, none of them agrees with petitioners. No State challenged the TMDL in court; indeed, four of the seven affected States enthusiastically *supported* EPA in the court of appeals and argued that their authority would be jeopardized if it were overturned. Although one Bay State – West Virginia – did join an amicus brief supporting petitioners filed by *un*affected States in the court of appeals, that action was inconsistent with West Virginia's role in the cooperative

development of the TMDL. And even West Virginia has now thought better; it did *not* join the amicus brief that a similar group of distant (and unaffected) States filed in this Court. Although petitioners' primary argument rests on the claim that the TMDL usurped the authority of the States, *no* State that was actually affected by the TMDL in this case agrees. Petitioners' claim would warrant review, if at all, only in a case in which *an affected* State believed that its authority was threatened. Review should not be granted when the States affected by the challenged action believe that their interests were respected and their authority maintained.

Moreover, the TMDL was not imposed on the Bay States as a top-down command from a federal authority. Instead, it is largely the product of the States' own decisions about how to allocate the burden of cleaning up the Bay among each other and, within each State, among various sources of pollution. The TMDL itself is primarily an informational document; its implementation remains up to the States, which have made and will continue to make the land-use and other decisions that will affect petitioners. And the TMDL is not self-enforcing; if States fail to achieve their pollution limits, EPA's only recourse is to exercise powers it already has under other CWA provisions, subject of course to judicial review if and when such action is taken. Thus, the TMDL is a reasonable construction of the CWA, and petitioners' complaints should be lodged with the States, not this Court.

A. Regulatory Background

1. The relevant regulatory structure is described at Pet. App. 5a-10a. The Clean Water Act, 33 U.S.C. § 1251, *et seq*. (CWA), establishes a national pollutant discharge elimination system (NPDES) for point source discharges. 33 U.S.C. § 1342. The program prohibits the discharge of any pollutant without a permit, 33 U.S.C. § 1311(a). NPDES permits are based upon effluent limitations designed by EPA using best practicable control technologies. *Id*. at (b)(1)(A). A nonpoint source is any source of water pollution that is not a point source. Nonpoint sources are primarily governed by the States.

2. The CWA requires all States to adopt water quality standards for each waterbody, expressed either as numeric pollution limits (*e.g*., a maximum concentration of nitrogen) or narrative standards (*e.g*., no floating debris). Regardless, the standard must be based upon the designated uses of the waterbody, *e.g*., drinking water, swimming, or fish consumption. 33 U.S.C. § 1313(a)-(c). The States must monitor their waters to determine if the water quality standards are being met and submit biannual reports to EPA. 33 U.S.C. § 1315(b). Further, the States must provide for EPA approval or disapproval a list of impaired waters - those for which point source pollution limits "are not stringent enough to implement" water quality standards. 33 U.S.C. §§ 1313(d)(1)(A), (d)(2).

For impaired waters, the State must develop a Total Maximum Daily Load (TMDL), "for those

pollutants" identified by EPA as "suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C). The TMDL "shall be established at a level necessary to implement the applicable water quality standards." *Ibid.* In 1985, EPA promulgated regulations defining a TMDL as: "the sum of the individual [wasteload allocations] for point sources and [load allocations] for non-point sources and natural background." 40 C.F.R. § 130.2(i). Thus, TMDLs apply to both point and nonpoint sources. *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003). The CWA does not specify when TMDLs are to be developed or implemented; however, States must develop and obtain EPA approval for continuing planning process and water quality management plans that must include TMDL implementation mechanisms. 33 U.S.C. § 1313(e)(3)(C).

Because the majority of States failed to timely identify their respective water impairments and develop TMDLs, courts required EPA to develop many state TMDLs. *See Scott v. Hammond*, 741 F.2d 992 (7th Cir. 1984)(Lake Michigan TMDL – "the CWA should be liberally construed to achieve its objectives – in this case to impose a duty on the EPA to establish TMDL's when the States have defaulted by refusal to act over a long period…"). As discussed below, the Bay States were no different.

B. The Chesapeake Bay and Its Water Quality

The Chesapeake Bay is North America's largest and most biologically diverse estuary, home

to more than 3,600 species of plants, fish and animals.[1] The Bay watershed – the land area that contributes water to the Bay - covers 64,000 square miles from Cooperstown, New York to Virginia Beach, Virginia.[2] Portions of the watershed are found in Delaware, Maryland, New York, Pennsylvania, Virginia, Washington, D.C., and West Virginia (the seven "Bay States"[3]). For more than 300 years, the Bay and its tributaries have sustained the region's economy and defined its traditions and culture. Congress has recognized the Chesapeake Bay as a "national treasure and resource of worldwide significance" worthy of the highest levels of protection and restoration.[4]

Unfortunately, the Chesapeake Bay has suffered from poor water quality for decades. As a result, the Bay is no longer the great economic engine it once was. Each summer, dense algae blooms caused by too much nitrogen and phosphorous blanket vast expanses of the Bay robbing the water of oxygen and suffocating fish and blue crabs. Stormwater runoff from farms, construction sites, and paved areas carries tons of

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[1] http://www.chesapeakebay.net/discover/bay101/facts

[2] The Bay Watershed is comprised of 92 segments. C.A.J.A. 1186.

[3] The CWA defines the term "State" to include the District of Columbia. 33 U.S.C. § 1362(3).

[4] Chesapeake Bay Restoration Act of 2000, Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967.

sediment to the Bay blocking sunlight and smothering bottom dwelling organisms like oysters. These pollutants come from a variety of sources within the Bay States. Given the myriad of sources and volume of pollution, regulation of one type of source or State alone will not resolve the Bay's woes.

C. Unsuccessful Efforts to Clean Up the Chesapeake Bay Created the Need for a TMDL

Beginning in 1976, EPA and the Bay States embarked on a series of cooperative efforts to reduce the amount of nutrient and sediment pollution entering the Chesapeake Bay.

1. First, Congress directed EPA to undertake a comprehensive study of the Bay to determine how best to manage this national resource. 94 P.L. 116. In response, EPA undertook 40 research projects to determine the cause of the Bay's decline and identify management strategies to restore the Bay. C.A.J.A. 1155, 1486.

In 1977, Maryland and Virginia held a conference on the Chesapeake Bay.[5] There, representatives of the federal government, Maryland, and Virginia observed that an overabundance of nutrients and sediment were

[5] Proceedings of the Bi-State Conference on the Chesapeake Bay: April 27-29, 1977, The Chesapeake Research Consortium, Inc., October 1977, Library of Congress Catalog Card No. 77-20344 (CRC).

harming Bay resources.[6] They bemoaned the fact that despite the plethora of citizen, federal, and state entities working to protect and restore the Bay there was "no workable way to coordinate their stewardship."[7] Moreover, no State had the authority to control the pollution discharges of another State.[8]

2. In support of these cooperative efforts, Virginia, Maryland, and Pennsylvania legislatively established the Chesapeake Bay Commission comprised of state legislators, cabinet secretaries and citizens to coordinate restoration planning and programs. C.A.J.A. 137.[9]

3. *First Chesapeake Bay Agreement.* In 1983, Maryland, Virginia, Pennsylvania, the District of Columbia, and EPA signed the first Chesapeake Bay Agreement. C.A.J.A. 135. It outlined a cooperative approach to improve management of Bay resources and created the Bay Program, a federal–state partnership directed by an Executive Council comprised of the signatories of the Bay Agreement. *See* 33 U.S.C. § 1267(a)(5). Together, the Bay States and EPA developed the Chesapeake Bay Restoration and Protection Plan (the "Plan") designed to reduce "point and nonpoint source nutrient loadings to attain nutrient and dissolved oxygen concentrations

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[6] *Id.* at 53.

[7] *Id.* at 15.

[8] *Id.* at 15, 262-3, 271-2.

[9] Maryland Natural Resources Code Ann. § 8-301 (2003); Pennsylvania 32 P.S. § 820.11, § 820.12 (2004); Virginia Code § 30-240 (2004).

necessary to support the living resources of the Bay."[10] The Plan detailed State actions necessary to achieve that goal including extensive plans for the reduction of polluted runoff from agriculture.[11] The Plan was a "major step in establishing a cooperative federal-state effort for comprehensive environmental management of the Bay."[12]

Affirming these cooperative efforts, Congress amended the CWA adding a unique Chesapeake Bay provision. The Water Quality Act of 1987, 33 U.S.C. § 1267 ("Section 117"); Feb. 4, 1987, Pub. L. 100-4, Title I, § 103, 101 Stat. 10. Congress directed the EPA Administrator to continue the Bay Program and authorized the Bay States to submit a plan to EPA if it described actions the States would "take *within a specified time period* to reduce pollution in the Bay and to meet applicable water quality standards…." *Id.* at (b)(2)(emphasis added). If EPA found that the proposal would contribute to the attainment of national goals set forth in the CWA, EPA was required to fund the proposal. *Id.* The Restoration Plan met those requirements. However, while Plan implementation slowed the discharge of pollutants, it ultimately failed to achieve Bay restoration. C.A.J.A. 1156.

4. *Second Chesapeake Bay Agreement*. Recognizing that specific pollution reduction goals

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[10] Chesapeake Executive Council, US EPA, September 1985. http://www.chesapeakebay.net/content/publications/cbp_13264.pdf

[11] *Id.* at II.A.1.p.13.

[12] *Id.* at ii.

and a deadline for action were necessary, D.C., Maryland, Pennsylvania, Virginia, the Chesapeake Bay Commission, and EPA signed a second Bay Agreement in 1987. C.A.J.A. 137. The parties pledged to reduce nitrogen and phosphorous discharges to the Bay by 40 percent. A 1992 amendment set 2000 as the deadline. C.A.J.A. 206. The Bay partners agreed to jointly develop "Tributary Strategies" using an EPA computer model that would help them allocate point and nonpoint source pollutant loads between them and designate implementation strategies. C.A.J.A. 209, 271, 280.

5. *Third Bay Agreement*. Having been unsuccessful in meeting the 40% pollutant reduction goal by 2000, the Bay States and EPA agreed to a third Bay Agreement – *Chesapeake 2000*.[13] C.A.J.A. 249, 253, 280; C.A.CBFS.J.A. 1. The 2000 Agreement, among other things, reaffirmed the States' prior pollutant reduction goals and established 2010 as the deadline to remove the Bay from the CWA impaired waters list. The Agreement reflected the obligations created by judicial orders

[13] http://www.chesapeakebay.net/documents/cbp_12081.pdf. Delaware, New York, and West Virginia signed an MOU with EPA and the other Bay States agreeing to restore the Bay by 2010. C.A.CBFSJ.A. 1.

and memoranda of understanding (MOU) between EPA and the Bay States.[14]

In support, Congress passed the Estuaries and Clean Water Act of 2000, 106 P.L. 457, which included the Chesapeake Bay Restoration Act of 2000 and added subsection (g) to the original Chesapeake Bay law, Section 117. The statute's purposes were to expand and strengthen cooperative efforts to restore the Bay and to achieve the goals established in the Bay Agreements. Pub. L 106-457, Title II, § 202, Nov. 7, 2000, 114 Stat. 1967 at (b). Subsection (g) required the EPA Administrator, *in coordination with the Bay States*, to "*ensure* that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreements to achieve and maintain," among other things, the nutrient reduction and water quality goals of the Bay Agreement. 33 U.S.C. §§ 1267(g)(1)(A) and (B)(emphasis added).

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[14] A district court order required EPA to develop a TMDL for Virginia's portion of the Bay by May 2011 if Virginia failed to do so by May 2010. *American Canoe Ass'n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999). C.A.J.A. 226. Virginia did not object to the decree and entered into a separate memorandum of agreement with EPA memorializing these terms. C.A.J.A. 240. Similar orders addressed waters in the other Bay States. *See American Littoral Society, et al. v. U.S. EPA*, Civ No. 96-489 (E.D. Pa. 1996)(Pennsylvania)*; Ohio Valley Environmental Coalition, Inc., et al. v. Carol Browner, et al.,* No. 2:95-0529 (S.D.W.VA. 1997)(West Virginia); *American Littoral Society, et al. v EPA, et al.,* No. 96cv591 (D.Del. 1997)(Delaware); *Kingman Park Civic Assoc. v. United States*, 84 F. Supp. 2d 1 (D.DC 1999)(District of Columbia). EPA signed an MOU with Maryland obligating the agency to develop a TMDL for Maryland's portion of the Bay. C.A.J.A. 211, 221.

In 2003, the Chair of the Principal Staff Committee of the Chesapeake Bay Commission sent a memorandum to the committee and representatives of the "headwater" States (DE, NY, WVA) providing pollutant cap loads for each State. C.A.J.A. 272, 276-77. The memorandum noted that, "[u]sing the best scientific information available, *Bay Program partners have agreed to allocations* that are intended to meet the needs of the plants and animals that call the Chesapeake home." C.A.J.A. 271 (emphasis added). These pollutant allocations – similar to those to which petitioners now object – later formed the basis of the Bay TMDL. C.A.J.A. 1159.

D. The TMDL Was Developed at the Bay States' Request and Largely Adopted the States' Pollutant Allocations

After 27 years of concerted effort, the Bay States had not made sufficient progress to meet Bay water quality goals. Had they met those goals, the Bay would have been removed from the list of impaired waters, and there would have been no need for a Bay TMDL. 33 U.S.C. § 1313(d)(4)(B). The Bay States, however, recognized that the 2010 goal would not be met, that a Bay-wide TMDL was necessary,

and that they could not develop it alone.[15] C.A.CBFS.J.A. 1, 20-28. As petitioners concede, the Bay States agreed that EPA would establish the TMDL on their behalf through the Bay Program partnership. Pet. 9; *see* C.A.J.A. 295, 318, 1160-61.[16] Over five years, hundreds of meetings were conducted by Bay Program committees comprised of States, federal agencies, and the public (including petitioners) discussing how to develop and fairly allocate the pollutant loads to each State. *See* C.A.J.A. 877, 1123, 1527-57.

2. In 2010, using tributary basin, *e.g.*, Maryland's portion of the Potomac River, allocations developed by a Bay Program federal-state committee, the States drafted individual "Phase I Watershed Improvement Plans" (WIPs). C.A.J.A. 295, 1110, 1112, 1302-3. There, the States further allocated the basin pollutant allocations to point and nonpoint sources within their respective jurisdictions creating 92 separate TMDLs compiled into one Baywide TMDL. C.A.J.A. 1327; C.A. CBFS J.A. 20-28. The States were allowed to exchange

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[15] As early as 1999, EPA advised Congress that EPA and the States would develop a Bay TMDL if water quality did not improve enough to remove the Bay from the CWA impaired waters list by 2010. Hearing Before the Committee on Environment and Public Works, Estuary and Coastal Habitat Conservation, S. Hrg. 106-284, p. 55-56 (July 22, 1999). EPA emphasized that the effort was a cooperative federal-state enterprise: the States were "fully cooperating in the development of the next round of nutrient reductions through the expanded TMDL effort." *Id*. at 56.

[16] Petitioners do not challenge EPA's authority to develop a TMDL on behalf of the States, and EPA's basic authority to do so must accordingly be observed.

pollutant loads within and between their major river basins. C.A.J.A. 1327. These were not hard and fast limits, but *targets* to be met over a period of time utilizing a variety of methods identified by each State based upon its own priorities. *See, e.g.*, C.A.J.A. 1089 (Maryland). The point source limits were based upon existing discharge permits issued by the States and plans for the installation of pollution reduction equipment. *See, e.g.*, C.A.J.A. 1102-03 (Maryland); 1220-21; 1325.

EPA reviewed the WIPs and determined whether they provided sufficient specificity to ensure that the targets would be met. In three instances (New York, Pennsylvania, and West Virginia) EPA found the States' draft plan insufficient. In response to New York's fairness concerns, EPA *increased* the State's nitrogen and phosphorous allocations. C.A.J.A. 1388. EPA also proposed "backstop" allocations, shifting nonpoint source allocations to point sources with specific NPDES permit limits. C.A.J.A. 1388-93, 1396-98; 33 U.S.C. § 1342. Those States later revised their plans. Pet. App. 12a. The major river basin allocations developed by the States and EPA were incorporated into the draft TMDL and further sub-allocated by the States to their 92 Bay segment watersheds. C.A.J.A. 1399.

The draft TMDL was issued on September 24, 2010. C.A.J.A. 565, 1121. Over 45 days, EPA held 18 public meetings around the watershed concerning the draft and the State WIPs. *Id*. at 1121; Pet. App. 13a. Approximately 2,500 citizens attended these meetings and submitted more than 14,000 written comments. *See* C.A.J.A 859, 882-959. EPA

considered these comments and on December 29, 2010 promulgated the final TMDL. Pet. App. 13a. The TMDL provided a thorough description of how the allocations were developed, identified the state pollutant allocations to point and nonpoint sources, set an interim deadline of 2017 for 60% of the practices set in the State WIPs to be installed, and a final deadline of 2025 for all practices to be in place. C.A.J.A. 1106-1598. States were to develop Phase II WIPs that apply their allocations to the local level by 2012.[17] Phase III WIPs are due in 2017 at which time progress will be reviewed and necessary adjustments to the allocations will be made. *Id.*

E. Procedural History

Not surprisingly in light of their extensive involvement in the TMDL's creation and development, the Bay States were ultimately satisfied with the outcome. None of them challenged EPA's promulgation of the TMDL. Petitioners, however, brought suit in January 2011, alleging that the TMDL exceeded EPA's authority under the CWA, because the allocations, deadlines, and implementation goals (all of which were primarily State-created), "usurps States' roles under the CWA." Pet. 12. A number of interested parties including citizen groups and municipal wastewater

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[17] http://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips.

treatment associations intervened as defendants supporting EPA.[18]

1. The district court denied petitioners' motion for summary judgment and granted EPA's. The court held that "the statutory provisions at issue are precisely the type that Congress intended to leave to EPA for interpretation" and that the TMDL's allocations were "entirely reasonable, and consistent with the Congress's goals." Pet. App. 101a, 107a. The court also held that EPA's role was entirely consistent with the federalism principles embodied in the Act. The court acknowledged the extensive cooperative arrangements by which the States had asked EPA to develop a TMDL they were unable to develop themselves and the major role they took in developing the final TMDL. As the court explained, "most of the individual allocations were provided by the states, not EPA." Pet. App. 115a.

2. The Third Circuit affirmed.[19] Pet. App. 1a. There, three Bay States (D.C., Delaware, and Maryland) filed an amicus brief in support of

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[18] The following entities intervened as defendants: Intervenor-Respondents on this brief; National Association of Clean Water Agencies; Virginia Association of Municipal Wastewater Agencies; Maryland Association of Wastewater Agencies; and Pennsylvania Municipal Authorities Association.

[19] The court explained that "[t]he TMDL is yet unenforced against anyone, nor can it be until it is implemented as part of a state's continuing planning process for managing water pollution." Pet. App. 14a; *see* Pet. App. 10a n.11 (TMDLs are "informational tools"). Considering its jurisdiction *sua sponte*, the court held that it nonetheless had jurisdiction and the case was ripe. Pet. App. 14a-16a.

affirmance. Those States expressly "join[ed] the arguments advanced by EPA and intervenor-defendants [Respondent citizens and municipal wastewater organizations] in support of the district court's judgment…." Md. C.A. Amicus Br. 2. The brief explained that "the Bay states asked EPA to establish a TMDL for the Chesapeake Bay and then participated in a lengthy process that led to the creation of the Bay TMDL." *Id.* at 15. "Ultimately, the Bay TMDL that EPA established was almost entirely based on the allocations that the Bay States had themselves proposed." *Ibid.* Virginia also submitted an amicus brief supporting affirmance. It too explained that "the Bay TMDL is largely the product of the Bay States' own plans and authority" and is "based entirely on the Bay States' [WIPs], with only three 'backstop' allocations determined by EPA." Va. C.A. Amicus Br. 4, 10. Virginia noted that "the Bay States have led the charge to protect the Bay through concerted efforts by and among all concerned jurisdictions," and that rejecting petitioners' challenge "would not aggrandize the powers of the EPA," but would instead "allow the Bay States and EPA to continue their work together." *Id.* at 10.

A number of distant States submitted a brief supporting petitioners. Only one Bay State – West Virginia – joined. The brief did not explain how its arguments squared with West Virginia's cooperative participation in the TMDL development process. *See* C.A.J.A. 335, 1058; E.S.J.A. 48-51. Nor did it explain West Virginia's failure to bring its own challenge to the TMDL if it believed the TMDL intruded upon its authority. In this Court, West

Virginia is conspicuously absent from the brief filed by distant States in support of petitioners.

3. The court of appeals analyzed the validity of the TMDL under the settled principles of *Chevron v. NRDC*, 467 U.S. 837 (1984). First, the court expressly agreed with all previous courts to consider the statute and held that the CWA is ambiguous as to whether a TMDL may include more than a mere recitation of a quantity of a pollutant. Pet. App. 20a-25a. The court also noted that EPA followed public notice and comment procedures in promulgating the TMDL. Thus, in order to satisfy its basic obligations under the Administrative Procedure Act, 5 U.S.C. § 501, *et seq*., the agency likely had to identify more than one number for each pollutant to provide "sufficient information in connection with the TMDL for the public adequately to comment on the agency's judgment and to make suggestions where appropriate." *Id.* at 25a. The court found that the TMDL was also consistent with the structure and purposes of the CWA, and with the statute's division of responsibility between the States and the federal government. Pet. App. 26a-31a.

The court rejected petitioners' claim that the TMDL in some way altered the federal-state balance. The court did recognize that it might "reach a different result if the TMDL in fact made land-use decisions diminishing state authority in a significant way." Pet. App. 34a. But, petitioners' claims that the TMDL usurped States' authority over land-use regulation were "long on swagger but short on specificity." Pet. App. 34a. That was "because the TMDL's provisions that could be read to affect land

use are either explicitly allowed by federal law," as in the case of its regulation of point sources, "or too generalized to supplant state zoning powers in any extraordinary way." Pet. App. 34a. As the court noted, "the TMDL nowhere prescribes any particular *means* of pollution reduction to any individual point or nonpoint source," but instead "contains pollution limits and allocations to be used as an informational tool used in connection with a *state's* efforts to regulate water pollution." Pet. App. 35a.

At *Chevron* step two, the court concluded that the TMDL "is reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute." Pet. App. 49a. In reaching that conclusion, the court relied in part on the fact that Congress had added a provision to Section 1313 in 1987 governing the revision of point source effluent limitations "based on a total maximum daily load *or other waste load allocation* established under this section," and that the use of the term "other" suggests Congress's recognition that a TMDL may itself contain an "allocation." Pet. App. 46a (citing 33 U.S.C. § 1313(d)(4)(A) and (B)). In addition, the court relied in part on Congress's concern with the Chesapeake Bay, and its direction in 2000 to EPA to "*ensure* that management plans are developed and implementation is begun" to restore the Bay. Pet. App. 46a (citation 33 U.S.C. § 1267(g)).

REASONS FOR DENYING THE PETITION

The petition should be denied because it is not a proper vehicle for considering petitioners' question: no Bay State supports the petition or challenged the

TMDL; the TMDL is based upon unique statutory authority; overturning the TMDL would change little; and the Third Circuit's decision does not conflict with any other decision. Moreover, the Third Circuit's analysis of the CWA was correct. Thus, the petition does not present a compelling reason for the Court to grant certiorari.

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE TO CONSIDER PETITIONERS' QUESTION

A. The Affected States Cooperatively Developed the TMDL and Do Not Support the Petition

1. Petitioners' primary claim is that EPA's action should be reversed in order to protect *the States'* authority to regulate land use. Pet. 32. Their Question Presented asks whether the TMDL "displaces powers reserved to the States." Pet. i. Petitioners argue that the CWA reserves decisions about how to control pollution to the States and that EPA's action "usurps the role reserved by Congress…." Pet. 2, 4. They assert that the TMDL upsets the balance of power between the States and the federal government regarding land use and other nonpoint sources. Pet. 15. Further, they assert that the TMDL "guts the scheme of cooperative federalism that Congress established." Pet. 16. Petitioners' primary complaint is that by identifying specific pollution limits and timelines for achieving them "in a federal TMDL precludes the States' ability to establish and modify them going forward

as Congress prescribed." Pet. 24. As the lower courts found, these assertions are meritless.

2. Because the gravamen of petitioners' argument is that the TMDL usurps the authority of the States, the fact that *no affected State* agrees with petitioners is sufficient to warrant denial of the petition. It is undisputed that EPA's action in this case affected only the seven Bay States. All of them deeply and significantly participated in the development of the TMDL and the provisions contested here. Given that involvement, it should be no surprise that none of the Bay States challenged the TMDL.

Indeed, the majority of the Bay States (Maryland, Virginia, the District of Columbia, and Delaware) affirmatively *supported* EPA's action and joined its arguments in the court of appeals. They explained how the States "*asked EPA* to establish a TMDL" and that it "is largely the product of the Bay States' own plans and authority." Md. C.A. Amicus Br. 15 (emphasis added). *See* Va. C.A. Amicus Br. 4. They viewed the process as a model of cooperative federalism. Their complaint was not that EPA had intruded on their authority, but that *petitioners'* challenge if granted would not "allow the Bay States and EPA to continue their work together." Va. C.A. Amicus Br. 10.

Two other Bay States – Pennsylvania and New York – did not formally join as amici in support of EPA. But, neither did they challenge EPA's action. That is significant because the final TMDL did differ modestly from the proposals of those

States, as well as West Virginia. Had Pennsylvania or New York believed that the differences intruded significantly on their authority, they could have legally challenged EPA's action. Their refusal to do so instead indicates, if anything, that, given their role in the cooperative venture that all the Bay States hope will result in a cleanup of the Bay, in the end Pennsylvania and New York were content with the TMDL.

Below, West Virginia did join an amicus brief filed by Kansas and a number of other distant States supporting petitioners. In light of West Virginia's role in the cooperative effort to restore the Bay and its failure to bring a challenge in its own right, its decision to join that amicus brief was puzzling.[20] Regardless, West Virginia is conspicuously *absent* from the amicus brief filed by many of the same distant States in support of the petition.

Finally, by signing a new Chesapeake Bay Agreement, *all* of the Bay jurisdictions have re-committed their pledge to ensure that the Bay TMDL and *their* WIP goals are met by the 2025 deadline.[21]

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[20] West Virginia's Phase I WIP "begins the process of defining how West Virginia, in partnership with federal and local governments, will achieve the pollution load reductions required of the state of West Virginia to support the TMDL." C.A.J.A 1057. "West Virginia helped to shape its own responsibilities under the TMDL by submitting to EPA a final Phase I Watershed Implementation Plan (WIP)…." http://www.wvca.us/bay/tmdl.cfm

[21] http://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf at 7.

In short, petitioners base their petition on a claim that EPA's action intruded on the authority Congress intended to reserve to the States under the CWA. The affected States, however, believe that *rejecting* the TMDL would be a rejection of *their own* choices and decisions. That alone warrants denial of the petition for certiorari. If and when EPA takes action in a future case that some State believes intrudes on its authority, the lower courts and, if necessary and appropriate, this Court can consider that claim.

3. The Bay States support the TMDL because it is largely based on the policy choices they made and was the result of a cooperative federal-state process envisioned by Congress in the CWA. Pet. App. 115a. Petitioners' claim that the TMDL usurps state authority, as the court of appeals recognized, is "long on swagger but short on specificity." Pet. App. 34a. The court of appeals certainly showed great respect for state authority; the court itself noted that "[p]erhaps [it] would reach a different result [in this case] if the TMDL in fact made land-use decisions diminishing state authority in a significant way." Pet. App. 34a. But, the court correctly held that the TMDL is based on actions that the States themselves took and strategies that they adopted and urged on EPA. Pet. App. 11a. In particular, the allocations that are at the heart of petitioners' complaints were developed by the States themselves.

a. Petitioners claim "[t]he Act requires States – and only the States – to develop plans to implement TMDLs." Pet. i. That is exactly what happened here. The Bay States voluntarily

determined what load allocations were appropriate for their respective point and nonpoint sources of pollution. *See, e.g.,* C.A.J.A. 973-78. (D.C.'s allocation of specific numeric loads to point sources). Using that information, they drafted their own unique, and differing, plans for attaining those allocations. C.A.J.A. 962-1105 (WIPs). EPA simply listed those allocations in the TMDL document. TMDL Appendices Q and R, *see* below. The cooperative process that resulted in the TMDL respected – and in no way intruded – on the Bay States' authority.

Petitioners claim without support that *EPA* assigned specific waste load allocations to individual point sources which improperly intruded upon state authority. Pet. 10, 20. That is incorrect. While the TMDL lists those allocations in Appendices Q and R, the allocations came from *pre-existing state issued* NPDES permit limits set by the States and identified in their respective Phase I WIPs.[22]

For example, West Virginia's Phase I WIP issued on November 29, 2010, *a month before* the final TMDL, identified the existing discharge limits for permit WV0005495 (Pilgrim's Pride) as: TN (total nitrogen) .01309 mm#/yr (million pounds per year)[23]; TP (total phosphorous) .00131 mm#/yr. Appendix B.1, "Significant Industrial Facilities," Pilgrim's Pride. TMDL Appendix Q identified the limits for

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[22] Bay TMDL Appendices, http://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-appendices. *See* side bar, Appendices Q-1 and R-1, "Annual WLAs."

[23] Pounds are converted to "mm#" by moving the decimal point six places to the left.

the facility in pounds per year as "EOS[24] N [Nitrogen] 13095.91 lbs/yr" and "EOS P [Phosphorus] 1309.59 lbs/yr." Thus, after rounding, the TMDL limits simply repeat the limits previously set by the State. Neither EPA nor the Bay TMDL set those limits.

Virginia law set enforceable nitrogen and phosphorous discharge limits for its wastewater facilities up to *five years before* the TMDL was issued. C.A.J.A 1037 (Va. Code § 62.1-44.19:12[25]). *See also*, C.A.J.A. 1038; 1042. Those permit limits became the allocations listed in TMDL Appendices Q and R. Since promulgation of the Bay TMDL, Virginia has issued regulations adopting the Bay TMDL wasteload allocations for specific point sources discharging to Bay tributaries like the Potomac River. *See* 9 VAC 25-720-50 C through 9 VAC 25-720-120 C.[26]

4. The TMDL does not "effectively dictate[] how the land may be used" or amount to a seizure of "super-zoning authority" by EPA. Pet. 25. Nor does it "lock[] in a position to which the States acquiesced at a particular time." Pet. 25. Instead, aside from their initial proposal of the allocations, the TMDL

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[24] "EOS" stands for Edge of Stream. "An edge-of-stream load … is the amount of pollutant that enters the stream in the locality of the pollutant source." WVA Phase I WIP pg. 11. http://www.wvca.us/bay/files/bay_documents/208_WV_Final_WIP_I_Nov_29_2010.pdf

[25] The statute specifically references the *Chesapeake 2000* Agreement as the impetus for the law, not the Bay TMDL.

[26] Virginia law requires that the State develop and implement plans to achieve TMDL goals. Va. Code Ann. § 62.1-44.19:7.

gives EPA little or no authority over land use that it did not already have. EPA provided the structure for the Bay TMDL, but the States and local governments make decisions and provide the details that govern land use within the Bay TMDL framework.

a. As the court of appeals recognized, the TMDL is "not self-executing," Pet. App. 10a, and

> nowhere prescribes any particular *means* of pollution reduction to any individual point or nonpoint source. Instead, it contains pollution limits and allocations to be used as an informational tool used in connection with a *state's* efforts to regulate water pollution.

Pet. App. 35a. *See also* C.A.J.A. 1113 (provision in TMDL noting that "[t]he cornerstone of the accountability framework is the jurisdictions' development of [WIPs], which serve as roadmaps for how and when a jurisdiction plans to meet its pollutant allocations under the TMDL"). Implementation decisions remain in the hands of the States.

In addition, the TMDL embraces the concept of "adaptive management" and contemplates modification. C.A.J.A. 1434, 1437. States can request to adjust load allocations for specific tributaries or reallocate nonpoint source loads to point sources and *vice versa*. C.A.J.A. 1438. Further, as long as the total amount of a pollutant

does not increase, sources can trade allocations. C.A.J.A. 1436. Some States emphatically reserved the right to adjust their WIPs "based on new information." *See, e.g.*, C.A.J.A. 1022 (Virginia). Thus, petitioners' claim that EPA imposed rather than adopted the allocations and solely holds the key to revising them is incorrect. Pet. 23-24.

b. Although petitioners casually invoke some unspecified "punitive federal enforcement mechanism" set in place by the TMDL that could trample the rights of the Bay States, Pet. 15, no such mechanism exists. EPA repeatedly stated below that "it will not undertake any enforcement action under the TMDL." Pet. App. 35a. Beyond that, the only enforcement actions that EPA may take are those it is statutorily authorized to take under the CWA. Pet. App. 36a. For example, although a State's failure to implement the TMDL could affect future point-source discharge permits, EPA already has authority independent of the TMDL – as petitioners concede, Pet. 5, over the NPDES permitting program. *See, e.g.*, 33 U.S.C. § 1342(a)(1); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 194 (1980) (*per curiam*). Thus, federal law allows EPA to adjust future point source permit limits. Similarly, EPA could deny grant funding to a non-compliant State for a wastewater treatment facility. 33 U.S.C. § 1281. These are not mechanisms directly related to the Bay TMDL, but pre-existing facets of the CWA.

Of course, the authority of EPA to take any of those actions can be challenged if and when EPA attempts to exercise those other authorities. As the

court of appeals concluded, "it is illogical to assert that the EPA usurps states' traditional land-use authority when it (1) makes no actual, identifiable land-use rule and (2) proposes regulatory actions that are specifically allowed under federal law." Pet. App. 37a. That is the reason that the affected States have supported, not challenged, EPA's position in this case. If some future exercise of EPA's authority threatens to intrude on other States in some other case, the Court can consider any claim that might be brought at that time.

B. The Validity of the TMDL Depends in Part on Considerations Unique to the Bay

Petitioners argue that the TMDL "opens the door for a dramatic expansion of federal power over land use and water quality planning nationwide." Pet. 16. To the contrary, as explained above, the TMDL is the product of a unique and cooperative federal-state relationship that produced a plan for cleaning up a particular body of water – the Chesapeake Bay. That cooperative federal-state relationship may or may not be repeated in other segments of the country. Moreover, EPA's obligation to develop the Bay TMDL is supported by specific statutory authority, interstate agreements, judicial orders, and MOUs. Those case-specific factors make this an unsuitable vehicle to consider the analysis under CWA Section 303(d) alone – the crux of the petition.

1. First, as discussed above, Congress provided in Section 117(g) that EPA "*shall ensure*

that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain" the nutrient goals, water quality standards, and "the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories." 33 U.S.C. §§ 1267(g)(1)(A), (B), and (E) (emphasis added). As the court of appeals recognized, that Chesapeake Bay-specific command informed EPA's choices and required EPA to exercise Chesapeake Bay-specific authority. *See* Pet. App. 46a. The provision would not be applicable to EPA actions elsewhere in the country, and review of EPA's action here may cast little or no light on the validity of any similar actions that EPA may take elsewhere in the country in the future.

2. Second, the States entered into three agreements whereby they agreed to reduce the amount of pollution they discharged into their tributaries and the Bay. The 2000 agreement provided that the signatories would remove the Bay from the impaired waters list by 2010. C.A.J.A. 249. That agreement embodied the terms of a judicial order that required EPA to develop a TMDL for Virginia's portion of the Chesapeake Bay by May 2011 if Virginia failed to do so by May 2010. Petitioners agree that these unique Bay Agreements were ratified by Congress in Section 117. Pet. 9.

3. Third, EPA was required by judicial order to develop a TMDL for Virginia's portion of the Bay by May 2011 if Virginia did not do so by May 2010. *American Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908,

912 (E.D. Va. 1998). Similar orders and MOUs with all of the Bay States obligated EPA to develop TMDLs for their waters including Bay tributaries. *Supra*, fn 14.

Thus, in addition to the requirements of Section 303(d), EPA was obligated to develop the Bay TMDL in three other ways – Section 117(g), interstate agreements, and contractually.[27] These additional obligations blur the petition's Question Presented and make this case an inappropriate vehicle for this Court's jurisdiction.

C. The Remedy Petitioners Seek Would Accomplish Nothing

Petitioners' argue that a TMDL must be "a single number that is the sum of the constituent sources of pollution" for each pollutant, and vindicating that principle "is a matter of surpassing practical importance." Pet. 16. They concede that "EPA is not forbidden from considering constituent loading [of pollutants] from various sources" and that "EPA would be free to provide that information to the public by way of explanation." Pet. 20. But, including that information in the TMDL is forbidden.

Aside from their error in construing the CWA, petitioners are mistaken that adopting their view would be of "fundamental importance." Pet. 14. For even if the Court were to grant certiorari and decide

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[27] *Sierra Club v. Meiburg*, 296 F.3d 1021, 1029 (11th Cir. 2002), citing *Reynolds v. Roberts,* 202 F.3d 1303, 1312 (11th Cir. 2000)(consent decree is a form of contract).

in petitioners' favor, it would change little. In developing the TMDL, EPA did provide the States with the total amounts of nitrogen phosphorous and sediment the Bay could absorb – 185.93 mm#/year nitrogen, 12.54 mm#/year phosphorous, 6,453.61 mm#/year sediment. C.A.J.A. 1106, 1127.[28] Because the Bay is fed by multiple tributaries from several States, EPA distributed portions of that load to the respective States based upon the pollutant load their major tributaries deliver to the Bay using State data. *The States* then allocated those amounts to their respective point and nonpoint sources which are listed in their WIPs and the TMDL.

Hence, regardless of what this Court may decide, the States would still utilize the individual sub-allocations they developed in their WIPs to determine how to meet their share of the total number. And if States did not meet the hypothesized single-number TMDL, EPA could still take the same actions, authorized by the same CWA provisions, to ensure that water quality in the Bay is restored. Thus, as with the State WIPs, petitioners' real complaint is not with EPA, but with the States. A grant of certiorari would do nothing to relieve petitioners of their obligation to comply with state laws.

II. The Third Circuit's Decision Does Not Conflict With Any Decision of Any Other Court of Appeals

No other judicial decision has addressed the question of whether the word "total" in the Section

[28] Petitioners admit this in their complaint. C.A.J.A. 1663.

303(d) phrase "total maximum daily load" is ambiguous or what that word means. Thus, the Third Circuit's decision does not conflict with any other decision. If in the future another court of appeals disagrees with the Third Circuit's holding in this case, the Court can consider at that time whether review is warranted.

1. Petitioners claim that the decision in this case conflicts with only one decision of another court of appeals: *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002). *See* Pet. 29. The Eleventh Circuit in *Meiburg* held that while a consent decree entered by the district court in that case required EPA to develop TMDLs for the State of Georgia, it did not require EPA to develop implementation plans. *Id*. at 1032. Further, the district court could not modify the decree to include such a requirement. *Id*. In so holding, the court interpreted the terms of a consent decree, not the meaning of the words "total maximum daily load" in Section 303(d) of the CWA. This case, by contrast, does not involve the meaning of any particular consent decree, and it does involve the meaning of CWA Section 303(d). There is no conflict.

Petitioners cite the Eleventh Circuit's statement in *Meiburg* that "[t]he responsibility for implementing the TMDLs once they [are] established [is] left to [to (sic) the State], *as it is in the Clean Water Act itself*." Pet. 29-30 (quoting 296 F.3d at 1031; emphasis added by petitioners). Intervenors do not disagree with that holding. EPA is not empowered by the CWA to develop TMDL implementation plans; that is for the States to do, as

they did in this case. Nothing in the Bay TMDL dictates "how the level of [a] pollutant can and will be brought down to or kept under the TMDL." Pet. 30 (citing *Meiburg*, at 1030). Both lower courts held that the Bay TMDL is not an implementation plan and the Bay States developed their own unique implementation plans. Pet. App. 96a ("The court does not find that the level of detail associated with allocations renders the TMDL a *de facto* implementation plan."). Moreover, both lower courts were cognizant of the *Meiburg* decision and thoroughly reviewed the holding to determine if it provided any direction to them. Pet. App. 20a, 106a-107a. They found it did not. The decision in this case does not conflict with *Meiburg*.

2. "More broadly," petitioners halfheartedly contend that the decision in this case "adds to a conflict among the lower courts over the proper role of policy considerations in the interpretation of the CWA." Pet. 30. While the Third Circuit did discuss policy issues in its opinion, it also relied on textual analysis, Pet. App. 23a, other provisions using the same terms, Pet. App. 24a, related statutory provisions, Pet. App. 24a-26a, and the statutory structure, Pet. App. 27a-30a. That is the same mix of considerations that numerous other courts – and this Court – have widely used in statutory construction. Petitioners argue that there is an alleged conflict between two other courts of appeals over a *different* term in the same statutory phrase at issue here – "daily." *See* Pet. 30-31. Petitioners offer no reason to believe that the existence of any such conflict somehow suggests or implies that either of those courts would disagree with the Third Circuit's

construction of the word "total." "More broadly" or otherwise, petitioners fail to make out a credible claim of conflict.

III. THE LOWER COURT DECISIONS WERE UNANIMOUS AND CORRECT

Petitioners claim that the Third Circuit erroneously determined that a TMDL could be the sum of point source and nonpoint source pollutant allocations, assign pollutant loads to specific pollution sources or sectors, or require assurances of completion. Pet. 17-29. They also assert that the circuit court's approval of the TMDL violates the concept of cooperative federalism. Pet. 22-26. However, the Third Circuit's decision is correct.

1. First, the Third Circuit determined that the statutory phrase "total maximum daily load" was ambiguous and capable of more than one meaning. Pet. App. 19a-23a. Reviewing prior decisions, Third Circuit concluded that prior courts had allowed EPA by regulation to fill "gaps" in the statute left by Congress on how to develop a TMDL noting only the circuit differences over the definition of "daily." *Id*. Those regulations define "TMDL" to mean "the sum of individual WLAs [wasteload allocations] for point sources and LAs [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2. Thus, the Bay TMDL could include allocations for point sources and nonpoint source sectors. Pet. App. 28a.

The Third Circuit noted that the word "total" as defined by petitioners (one number) would make

the following word "maximum" redundant. That is, the phrase "maximum daily load" would have the same meaning as "total maximum daily load": a number set at a level needed to alleviate water pollution. *Id.* at 23a. The canon against surplusage allows "a plausible understanding" of "total" to mean "the sum of the constituent parts of the load." *Id.* Because Congress did not prescribe how TMDLs were to be developed, it was permissible for EPA to explain why it arrived at the number it chose, how the affected jurisdictions might meet that number, when it expects the number to be achieved, and what it will do if the water quality standard is not met.

The court of appeals found that because EPA promulgated the TMDL pursuant to public notice and comment, providing specific point and nonpoint source allocations was likely consistent with the informational requirements of the Administrative Procedure Act, 5 U.S.C. § 501, *et seq*. *Id.* at 24a-26a.

The Third Circuit held that EPA's interpretation of "TMDL" was consistent with the policy objectives of the statute which expects a partnership between the States and the federal government. *Id.* at 26a, citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The scope of the Congressional goal was broad enough to allow a "total maximum daily load" to include allocations, target dates, and reasonable assurance." *Id.* at 26a. The court found the need for a deadline to be "common sense" given the statutory need to "*meet* water quality standards" and not "make states and the public to guess what it is." *Id.* at 29a. (emphasis added).

The Third Circuit's reasoning comports with the majority of existing TMDLs and follows the manner in which the bulk of the States develop TMDLs. Kansas, a supporter of the petition, defines TMDLs in accord with the EPA's regulations as "[t]he process for … developing … Wasteload Allocations and Load Allocations" and includes implementation plans with interim deadlines.[29] Amici Indiana and Missouri also define TMDLs in this way using the mathematical equation "TMDL = ∑WLA + ∑LA + Margin of Safety." [30] Thus, the States provide the sum of waste load allocations (WLA) for point sources and the sum of the load allocations (LA) for nonpoint sources, just as in the Bay TMDL. Both States recognize the need for a TMDL to provide reasonable assurance and Missouri includes an implementation plan in all TMDLs.[31]

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[29] http://www.kdheks.gov/tmdl/basic.htm#establishing

[30] The ∑ symbol means sum.

[31] Indiana: "What Is A TMDL" http://www.in.gov/idem/nps/2654.htm. The state recognizes the need for "[r]easonable assurance for point source/nonpoint source pollution." Missouri: "Impaired Waters and Total Maximum Daily Loads," http://dnr.mo.gov/env/wpp/tmdl/index.html, "Each TMDL document will include allocations of the acceptable load *for all sources of the pollutant*. *It will also include an implementation plan* to identify how the load will be reduced to a level that will protect water quality." (emphasis added); "What Are TMDLs" fact sheet: "A TMDL … distributes the allowable pollutant loads among … various sources. The portion of the load distributed to *point sources* (e.g., sewage treatment plants) is the *wasteload allocation*, *and* the load distributed to *nonpoint* sources (e.g., pollutants carried by stormwater runoff) is the *load allocation*." http://dnr.mo.gov/pubs/pub2090.htm (emphasis added).

Thus, petitioners' arguments contradict the practices of their own supporters.

Finally, the court considered petitioners' federalism concerns and found the argument that the Bay TMDL intruded on State land-use decisions to be "long on swagger but short on specificity." *Id.* at 34a. The assignment of point source loads is consistent with EPA's authority under the federal pollution discharge permit system. The allocation of loads to nonpoint source sectors gives the States flexibility in achieving the limits as the TMDL "nowhere prescribes any particular *means* of pollution reduction to any individual point or nonpoint source." *Id*. at 35a. (*emphasis* in original). As discussed above, how the reductions are to be achieved is defined in the State WIPs. Thus, it is the States that choose how implementation of the allocations is to be achieved, not the TMDL and not EPA. Nothing in the Third Circuit's analysis violates the CWA or canons of statutory construction.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted.

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APPENDIX

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Appendix B.1 Significant Industrial Facilities

WV/NPDES Permit No.	Permittee	2010 No Action Q (MGD)	(2010 NA) Base N (mg/l)	(2010 NA) Base P (mg/l)	(2010 NA) EOS Base N Load (mm#/yr)
WV0005495	PILGRIM'S PRIDE CORPORATION	0.860	115	54	0.30106
WV0047236	PILGRIM'S PRIDE CORPORATION	0.500	20.83	19.54	0.03170
WV0005649	USDOI - Leetown	1.200	5	4.15	0.01826
WV0111821	WVDNR - Reeds Creek	1.727	5	0.51	0.02629
WV0112500	WVDNR- Spring Run	4.300	5	3.45	0.06545
WV0116149	CONSERVATION FUND	1.010	5	0.5	0.01537
WV0005525	VIRGINIA ELECTRIC & POWER CO	0.000	5	0.5	0.14827

(2010 NA) EOS Base P Load (mm#/yr)	WLA N EOS N Load (mm#/yr)	WLA P EOS P Load (mm#/yr)	Land/River Segment	County	2010 NA Delivery factor N
0.14137	0.01309	0.00131	B54031 PU2 5190 4310	Hardy	0.102
0.02974	0.00761	0.00076	B54031 PU2 5190 4310	Hardy	0.102
0.01514	0.01826	0.00183	A54037 PU2 4220 3900	Jefferson	0.325
0.00268	0.02629	0.00263	A54071 PU1 5820 5380	Pendleton	0.058
0.04511	0.06545	0.00654	B54023 PU4 5050 4310	Grant	0.153
0.00154	0.01537	0.00154	A54037 PU6 3750 3752	Jefferson	0.736
0.03814	0.14827	0.03814	A54023 PU1 4840 4760	Grant	0.001

2010 NA Delivery factor P	2010 E3 Delivery factor N	2010 E3 Delivery factor P	(2010 NA) Delivered N Load (mm#/yr)	(2010 NA) Delivered P Load (mm#/yr)	WLA N DEL @ E3DF N Load (mm#/yr)	WLA P DEL @ E3DF P Load (mm#/yr)
0.453	0.122	0.569	0.030708	0.064058	0.001597	0.000745
0.453	0.122	0.569	0.003234	0.013476	0.000928	0.000433
0.453	0.457	0.569	0.005936	0.006861	0.008347	0.001040
0.453	0.061	0.569	0.001525	0.001215	0.001603	0.001497
0.453	0.167	0.569	0.010014	0.020443	0.010930	0.003727
0.453	0.768	0.569	0.011314	0.000697	0.011806	0.000875
0.010	0.016	0.017	0.000148	0.000363	0.002372	0.000638

33 U.S.C. § 1267

Current through PL 114-93,
with a gap of 114-92, approved 11/25/15

§ 1267. Chesapeake Bay

(a) Definitions. In this section, the following definitions apply:

(1) Administrative cost. The term "administrative cost" means the cost of salaries and fringe benefits incurred in administering a grant under this section.

(2) Chesapeake Bay Agreement. The term "Chesapeake Bay Agreement" means the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council.

(3) Chesapeake Bay ecosystem. The term "Chesapeake Bay ecosystem" means the ecosystem of the Chesapeake Bay and its watershed.

(4) Chesapeake Bay Program. The term "Chesapeake Bay Program" means the program directed by the Chesapeake Executive Council in accordance with the Chesapeake Bay Agreement.

(5) Chesapeake Executive Council. The term "Chesapeake Executive Council" means the signatories to the Chesapeake Bay Agreement.

(6) Signatory jurisdiction. The term "signatory jurisdiction" means a jurisdiction of a signatory to the Chesapeake Bay Agreement.

(b) Continuation of Chesapeake Bay Program.

(1) In general. In cooperation with the Chesapeake Executive Council (and as a member of the Council), the Administrator shall continue the Chesapeake Bay Program.

(2) Program office.

(A) In general. The Administrator shall maintain in the Environmental Protection Agency a Chesapeake Bay Program Office.

(B) Function. The Chesapeake Bay Program Office shall provide support to the Chesapeake Executive Council by—

(i) implementing and coordinating science, research, modeling, support services, monitoring, data collection, and other activities that support the Chesapeake Bay Program;

(ii) developing and making available, through publications, technical assistance, and other appropriate means, information pertaining to the environmental quality and living resources of the Chesapeake Bay ecosystem;

(iii) in cooperation with appropriate Federal, State, and local authorities, assisting the signatories to the Chesapeake Bay Agreement in developing and implementing specific action plans to carry out the responsibilities of the signatories to the Chesapeake Bay Agreement;

(iv) coordinating the actions of the Environmental Protection Agency with the actions of the appropriate officials of other Federal agencies and State and local authorities in developing strategies to—

(I) improve the water quality and living resources in the Chesapeake Bay ecosystem; and

(II) obtain the support of the appropriate officials of the agencies and authorities in achieving the objectives of the

Chesapeake Bay Agreement; and

(v) implementing outreach programs for public information, education, and participation to foster stewardship of the resources of the Chesapeake Bay.

(c) Interagency agreements. The Administrator may enter into an interagency agreement with a Federal agency to carry out this section.

(d) Technical assistance and assistance grants.

(1) In general. In cooperation with the Chesapeake Executive Council, the Administrator may provide technical assistance, and assistance grants, to nonprofit organizations, State and local governments, colleges, universities, and interstate agencies to carry out this section, subject to such terms and conditions as the Administrator considers appropriate.

(2) Federal share.

(A) In general. Except as provided in subparagraph (B), the Federal share of an assistance grant provided under paragraph (1) shall be determined by the Administrator in accordance with guidance issued by the Administrator.

(B) Small watershed grants program. The Federal share of an assistance grant provided under paragraph (1) to carry out an implementing activity under subsection (g)(2) shall not exceed 75 percent of eligible project costs, as determined by the Administrator.

(3) Non-Federal share. An assistance grant under paragraph (1) shall be provided on the condition that non-Federal sources provide the remainder of eligible project costs, as determined by the Administrator.

(4) Administrative costs. Administrative costs shall not exceed 10 percent of the annual grant award.

(e) Implementation and monitoring grants.

(1) In general. If a signatory jurisdiction has approved and committed to implement all or substantially all aspects of the Chesapeake Bay Agreement, on the request of the chief executive of the jurisdiction, the Administrator--

(A) shall make a grant to the jurisdiction for the purpose of implementing the management mechanisms established under the Chesapeake Bay Agreement, subject to such terms and conditions as the Administrator considers appropriate; and

(B) may make a grant to a signatory jurisdiction for the purpose of monitoring the Chesapeake Bay ecosystem.

(2) Proposals.

(A) In general. A signatory jurisdiction described in paragraph (1) may apply for a grant under this subsection for a fiscal year by submitting to the Administrator a comprehensive proposal to implement management mechanisms established under the Chesapeake Bay Agreement

(B) Contents. A proposal under subparagraph (A) shall include—

(i) a description of proposed management mechanisms that the jurisdiction commits to take within a specified time period, such as reducing or preventing pollution in the Chesapeake Bay and its watershed or meeting applicable water quality standards or established goals and objectives under the Chesapeake Bay Agreement; and

(ii) the estimated cost of the actions proposed to be taken during the fiscal year.

(3) Approval. If the Administrator finds that the proposal is consistent with the Chesapeake Bay Agreement and the national goals established under section 101(a) [33 USCS § 1251(a)], the Administrator may approve the proposal for an award.

(4) Federal share. The Federal share of a grant under this subsection shall not exceed 50 percent of the cost of implementing the management mechanisms during the fiscal year.

(5) Non-Federal share. A grant under this subsection shall be made on the condition that non-Federal sources provide the remainder of the costs of implementing the management mechanisms during the fiscal year.

(6) Administrative costs. Administrative costs shall not exceed 10 percent of the annual grant award.

(7) Reporting. On or before October 1 of each fiscal year, the Administrator shall make available to the public a document that lists and describes, in the greatest practicable degree of detail—

> **(A)** all projects and activities funded for the fiscal year;

(B) the goals and objectives of projects funded for the previous fiscal year; and

(C) the net benefits of projects funded for previous fiscal years.

(f) Federal facilities and budget coordination.

(1) Subwatershed planning and restoration. A Federal agency that owns or operates a facility (as defined by the Administrator) within the Chesapeake Bay watershed shall participate in regional and subwatershed planning and restoration programs.

(2) Compliance with agreement. The head of each Federal agency that owns or occupies real property in the Chesapeake Bay watershed shall ensure that the property, and actions taken by the agency with respect to the property, comply with the Chesapeake Bay Agreement, the Federal Agencies Chesapeake Ecosystem Unified Plan, and any subsequent agreements and plans.

(3) Budget coordination.

(A) In general. As part of the annual budget submission of each Federal agency with projects or grants related to restoration, planning, monitoring, or scientific investigation of the Chesapeake Bay ecosystem, the head of

the agency shall submit to the President a report that describes plans for the expenditure of the funds under this section.

(B) Disclosure to the council. The head of each agency referred to in subparagraph (A) shall disclose the report under that subparagraph with the Chesapeake Executive Council as appropriate.

(g) Chesapeake Bay Program.

(1) Management strategies. The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain—

(A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed;

(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;

(C) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating

the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health;

(D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for wetlands, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; and

(E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem.

(2) Small watershed grants program. The Administrator, in cooperation with the Chesapeake Executive Council, shall—

(A) establish a small watershed grants program as part of the Chesapeake Bay Program; and

(B) offer technical assistance and assistance grants under subsection (d) to local governments and nonprofit organizations and individuals in the Chesapeake Bay region to implement—

(i) cooperative tributary basin strategies that address the water quality and living resource needs in the Chesapeake Bay ecosystem; and

(ii) locally based protection and restoration programs or projects within a watershed that complement the tributary basin strategies, including the creation, restoration, protection, or enhancement of habitat associated with the Chesapeake Bay ecosystem.

(h) Study of Chesapeake Bay Program.

(1) In general. Not later than April 22, 2003, and every 5 years thereafter, the Administrator, in coordination with the Chesapeake Executive Council, shall complete a study and submit to Congress a comprehensive report on the results of the study.

(2) Requirements. The study and report shall—

(A) assess the state of the Chesapeake Bay ecosystem;

(B) compare the current state of the Chesapeake Bay ecosystem with its state in 1975, 1985, and 1995;

(C) assess the effectiveness of management strategies being implemented on the date of enactment of this section and the extent to which the priority needs are being met;

(D) make recommendations for the improved management of the Chesapeake Bay Program either by strengthening strategies being implemented on the date of enactment of this section or by adopting new strategies; and

(E) be presented in such a format as to be readily transferable to and usable by other watershed restoration programs.

(i) Special study of living resource response.

(1) In general. Not later than 180 days after the date of enactment of this section [enacted Nov. 7, 2000], the Administrator shall commence a 5-year special study with full participation of the scientific community of the Chesapeake Bay to establish and expand understanding of the response of the living resources of the Chesapeake Bay ecosystem to improvements in water quality that have resulted from investments made through the Chesapeake Bay Program.

(2) Requirements. The study shall—

(A) determine the current status and trends of living resources, including grasses, benthos, phytoplankton, zooplankton, fish, and shellfish;

(B) establish to the extent practicable the rates of recovery of the living resources in response to improved water quality condition;

(C) evaluate and assess interactions of species, with particular attention to the impact of changes within and among trophic levels; and

(D) recommend management actions to optimize the return of a healthy and balanced ecosystem in response to improvements in the quality and character of the waters of the Chesapeake Bay.

(j) Authorization of appropriations. There is authorized to be appropriated to carry out this section $ 40,000,000 for each of fiscal years 2001 through 2005. Such sums shall remain available until expended.

History

(June 30, 1948, ch 758, Title I, § 117, as added Feb. 4, 1987,P.L. 100-4, Title I, § 103, 101 Stat. 10; Nov. 7, 2000, P.L. 106-457, Title II, § 203, 114 Stat. 1967.)

Amendments:

2000 . Act Nov. 7, 2000, substituted this section for one which read:

"Chesapeake Bay

"(a) Office. The Administrator shall continue the Chesapeake Bay Program and shall establish and maintain in the Environmental Protection Agency an office, division, or branch of Chesapeake Bay Programs to—

"(1) collect and make available, through publications and other appropriate means, information pertaining to the environmental quality of the Chesapeake Bay (hereinafter in this subsection referred to as the 'Bay');

"(2) coordinate Federal and State efforts to improve the water quality of the Bay;

"(3) determine the impact of sediment deposition in the Bay and identify the sources, rates, routes, and distribution patterns of such sediment deposition; and

"(4) determine the impact of natural and man-induced environmental changes on the living resources of the Bay and the relationships among such changes, with particular emphasis placed on the impact of pollutant loadings of nutrients, chlorine, acid precipitation, dissolved oxygen, and toxic pollutants, including organic chemicals and

heavy metals, and with special attention given to the impact of such changes on striped bass.

"(b) Interstate development plan grants.

(1) Authority. The Administrator shall, at the request of the Governor of a State affected by the interstate management plan developed pursuant to the Chesapeake Bay Program (hereinafter in this section referred to as the 'plan'), make a grant for the purpose of implementing the management mechanisms contained in the plan if such State has, within 1 year after the date of the enactment of this section, approved and committed to implement all or substantially all aspects of the plan. Such grants shall be made subject to such terms and conditions as the Administrator considers appropriate.

"(2) Submission of proposal. A State or combination of States may elect to avail itself of the benefits of this subsection by submitting to the Administrator a comprehensive proposal to implement management mechanisms contained in the plan which shall include (A) a description of proposed abatement actions which the State or combination of States commits to take within a specified time period to reduce pollution in the Bay and to meet applicable water quality standards, and (B) the estimated cost of the abatement actions proposed to be taken during the next fiscal year. If the Administrator finds that such proposal is consistent with the national policies set forth in section 101(a) of this Act and will contribute to the achievement of the national goals set forth in such section, the Administrator shall approve such

proposal and shall finance the costs of implementing segments of such proposal.

"(3) Federal share. Grants under this subsection shall not exceed 50 percent of the costs of implementing the management mechanisms contained in the plan in any fiscal year and shall be made on condition that non-Federal sources provide the remainder of the cost of implementing the management mechanisms contained in the plan during such fiscal year.

"(4) Administrative costs. Administrative costs in the form of salaries, overhead, or indirect costs for services provided and charged against programs or projects supported by funds made available under this subsection shall not exceed in any one fiscal year 10 percent of the annual Federal grant made to a State under this subsection.

"(c) Reports. Any State or combination of States that receives a grant under subsection (b) shall, within 18 months after the date of receipt of such grant and biennially thereafter, report to the Administrator on the progress made in implementing the interstate management plan developed pursuant to the Chesapeake Bay Program. The Administrator shall transmit each such report along with the comments of the Administrator on such report to Congress.

"(d) Authorization of appropriations. There are hereby authorized to be appropriated the following sums, to remain available until expended, to carry out the purposes of this section:

"(1) $ 3,000,000 per fiscal year for each of the fiscal years 1987, 1988, 1989, and 1990, to carry out subsection (a); and

"(2) $ 10,000,000 per fiscal year for each of the fiscal years 1987, 1988, 1989, and 1990, for grants to States under subsection (b).".

Other provisions:

Nutrient loading resulting from dredged material disposal. Act Aug. 17, 1999, P.L. 106-53, Title IV, § 457, 113 Stat. 332, provides:

"(a) Study. The Secretary shall conduct a study of nutrient loading that occurs as a result of discharges of dredged material into open-water sites in the Chesapeake Bay.

"(b) Report. Not later than 18 months after the date of enactment of this Act, the Secretary shall submit to Congress a report on the results of the study.".

Chesapeake Bay Restoration Act of 2000; findings and purposes. Act Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967, provides:

"(a) Findings. Congress finds that—

"(1) the Chesapeake Bay is a national treasure and a resource of worldwide significance;

"(2) over many years, the productivity and water quality of the Chesapeake Bay and its watershed were diminished by pollution, excessive

sedimentation, shoreline erosion, the impacts of population growth and development in the Chesapeake Bay watershed, and other factors;

"(3) the Federal Government (acting through the Administrator of the Environmental Protection Agency), the Governor of the State of Maryland, the Governor of the Commonwealth of Virginia, the Governor of the Commonwealth of Pennsylvania, the Chairperson of the Chesapeake Bay Commission, and the mayor of the District of Columbia, as Chesapeake Bay Agreement signatories, have committed to a comprehensive cooperative program to achieve improved water quality and improvements in the productivity of living resources of the Bay;

"(4) the cooperative program described in paragraph (3) serves as a national and international model for the management of estuaries; and

"(5) there is a need to expand Federal support for monitoring, management, and restoration activities in the Chesapeake Bay and the tributaries of the Bay in order to meet and further the original and subsequent goals and commitments of the Chesapeake Bay Program.

"(b) Purposes. The purposes of this title [adding this section] are—

"(1) to expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and

"(2) to achieve the goals established in the Chesapeake Bay Agreement.".

Chesapeake Bay protection and restoration. Ex. Or. No. 13508 of May 12, 2009, 74 Fed. Reg. 23099, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America and in furtherance of the purposes of the Clean Water Act of 1972, as amended (33 U.S.C. 1251 et seq.), and other laws, and to protect and restore the health, heritage, natural resources, and social and economic value of the Nation's largest estuarine ecosystem and the natural sustainability of its watershed, it is hereby ordered as follows:

PART 1—PREAMBLE

"The Chesapeake Bay is a national treasure constituting the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world. The Federal Government has nationally significant assets in the Chesapeake Bay and its watershed in the form of public lands, facilities, military installations, parks, forests, wildlife refuges, monuments, and museums.

"Despite significant efforts by Federal, State, and local governments and other interested parties, water pollution in the Chesapeake Bay prevents the attainment of existing State water quality standards and the 'fishable and swimmable' goals of the Clean Water Act [33 USCS §§ 1251 et seq.]. At the current level and scope of pollution control within the Chesapeake Bay's watershed, restoration of the

Chesapeake Bay is not expected for many years. The pollutants that are largely responsible for pollution of the Chesapeake Bay are nutrients, in the form of nitrogen and phosphorus, and sediment. These pollutants come from many sources, including sewage treatment plants, city streets, development sites, agricultural operations, and deposition from the air onto the waters of the Chesapeake Bay and the lands of the watershed.

"Restoration of the health of the Chesapeake Bay will require a renewed commitment to controlling pollution from all sources as well as protecting and restoring habitat and living resources, conserving lands, and improving management of natural resources, all of which contribute to improved water quality and ecosystem health. The Federal Government should lead this effort. Executive departments and agencies (agencies), working in collaboration, can use their expertise and resources to contribute significantly to improving the health of the Chesapeake Bay. Progress in restoring the Chesapeake Bay also will depend on the support of State and local governments, the enterprise of the private sector, and the stewardship provided to the Chesapeake Bay by all the people who make this region their home.

PART 2--SHARED FEDERAL LEADERSHIP, PLANNING, AND ACCOUNTABILITY

"Sec. 201. Federal Leadership Committee. In order to begin a new era of shared Federal leadership with respect to the protection and restoration of the Chesapeake Bay, a Federal Leadership Committee

(Committee) for the Chesapeake Bay is established to oversee the development and coordination of programs and activities, including data management and reporting, of agencies participating in protection and restoration of the Chesapeake Bay. The Committee shall manage the development of strategies and program plans for the watershed and ecosystem of the Chesapeake Bay and oversee their implementation. The Committee shall be chaired by the Administrator of the Environmental Protection Agency (EPA), or the Administrator's designee, and include senior representatives of the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Homeland Security (DHS), the Interior (DOI), Transportation (DOT), and such other agencies as determined by the Committee. Representatives serving on the Committee shall be officers of the United States.

"Sec. 202. Reports on Key Challenges to Protecting and Restoring the Chesapeake Bay. Within 120 days from the date of this order, the agencies identified in this section as the lead agencies shall prepare and submit draft reports to the Committee making recommendations for accomplishing the following steps to protect and restore the Chesapeake Bay:

"(a) define the next generation of tools and actions to restore water quality in the Chesapeake Bay and describe the changes to be made to regulations, programs, and policies to implement these actions;

"(b) target resources to better protect the Chesapeake Bay and its tributary waters, including resources under the Food Security Act of 1985 [Act

Dec. 23, 1985, P.L. 99-198; for full classification, consult USCS Tables volumes] as amended, the Clean Water Act [33 USCS §§ 1251 et seq.], and other laws;

"(c) strengthen storm water management practices at Federal facilities and on Federal lands within the Chesapeake Bay watershed and develop storm water best practices guidance;

"(d) assess the impacts of a changing climate on the Chesapeake Bay and develop a strategy for adapting natural resource programs and public infrastructure to the impacts of a changing climate on water quality and living resources of the Chesapeake Bay watershed;

"(e) expand public access to waters and open spaces of the Chesapeake Bay and its tributaries from Federal lands and conserve landscapes and ecosystems of the Chesapeake Bay watershed;

"(f) strengthen scientific support for decisionmaking to restore the Chesapeake Bay and its watershed, including expanded environmental research and monitoring and observing systems; and

"(g) develop focused and coordinated habitat and research activities that protect and restore living resources and water quality of the Chesapeake Bay and its watershed.

"The EPA shall be the lead agency for subsection (a) of this section and the development of the storm water best practices guide under subsection (c). The

USDA shall be the lead agency for subsection (b). The DOD shall lead on storm water management practices at Federal facilities and on Federal lands under subsection (c). The DOI and the DOC shall share the lead on subsections (d), (f), and (g), and the DOI shall be lead on subsection (e). The lead agencies shall provide final reports to the Committee within 180 days of the date of this order.

"Sec. 203. Strategy for Protecting and Restoring the Chesapeake Bay. The Committee shall prepare and publish a strategy for coordinated implementation of existing programs and projects to guide efforts to protect and restore the Chesapeake Bay. The strategy shall, to the extent permitted by law:

"(a) define environmental goals for the Chesapeake Bay and describe milestones for making progress toward attainment of these goals;

"(b) identify key measureable indicators of environmental condition and changes that are critical to effective Federal leadership;

"(c) describe the specific programs and strategies to be implemented, including the programs and strategies described in draft reports developed under section 202 of this order;

"(d) identify the mechanisms that will assure that governmental and other activities, including data collection and distribution, are coordinated and effective, relying on existing mechanisms where appropriate; and

"(e) describe a process for the implementation of adaptive management principles, including a periodic evaluation of protection and restoration activities.

"The Committee shall review the draft reports submitted by lead agencies under section 202 of this order and, in consultation with relevant State agencies, suggest appropriate revisions to the agency that provided the draft report. It shall then integrate these reports into a coordinated strategy for restoration and protection of the Chesapeake Bay consistent with the requirements of this order. Together with the final reports prepared by the lead agencies, the draft strategy shall be published for public review and comment within 180 days of the date of this order and a final strategy shall be published within 1 year. To the extent practicable and authorized under their existing authorities, agencies may begin implementing core elements of restoration and protection programs and strategies, in consultation with the Committee, as soon as possible and prior to release of a final strategy.

"Sec. 204. Collaboration with State Partners. In preparing the reports under section 202 and the strategy under section 203, the lead agencies and the Committee shall consult extensively with the States of Virginia, Maryland, Pennsylvania, West Virginia, New York, and Delaware and the District of Columbia. The goal of this consultation is 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.

"Sec. 205. Annual Action Plan and Progress Report. Beginning in 2010, the Committee shall publish an annual Chesapeake Bay Action Plan (Action Plan) describing how Federal funding proposed in the President's Budget will be used to protect and restore the Chesapeake Bay during the upcoming fiscal year. This plan will be accompanied by an Annual Progress Report reviewing indicators of environmental conditions in the Chesapeake Bay, assessing implementation of the Action Plan during the preceding fiscal year, and recommending steps to improve progress in restoring and protecting the Chesapeake Bay. The Committee shall consult with stakeholders (including relevant State agencies) and members of the public in developing the Action Plan and Annual Progress Report.

"Sec. 206. Strengthen Accountability. The Committee, in collaboration with State agencies, shall ensure that an independent evaluator periodically reports to the Committee on progress toward meeting the goals of this order. The Committee shall ensure that all program evaluation reports, including data on practice or system implementation and maintenance funded through agency programs, as appropriate, are made available to the public by posting on a website maintained by the Chair of the Committee.

PART 3--RESTORE CHESAPEAKE BAY WATER QUALITY

"Sec. 301. Water Pollution Control Strategies. In preparing the report required by subsection 202(a) of this order, the Administrator of the EPA (Administrator) shall, after consulting with appropriate State agencies, examine how to make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters and, as appropriate, shall consider revising any guidance and regulations. The Administrator shall identify pollution control strategies and actions authorized by the EPA's existing authorities to restore the Chesapeake Bay that:

"(a) establish a clear path to meeting, as expeditiously as practicable, water quality and environmental restoration goals for the Chesapeake Bay;

"(b) are based on sound science and reflect adaptive management principles;

"(c) are performance oriented and publicly accountable;

"(d) apply innovative and cost-effective pollution control measures;

"(e) can be replicated in efforts to protect other bodies of water, where appropriate; and

"(f) build on the strengths and expertise of Federal, State, and local governments, the private sector, and citizen organizations.

"Sec. 302. Elements of EPA Reports. The strategies and actions identified by the Administrator of the EPA in preparing the report under subsection 202(a) shall include, to the extent permitted by law:

"(a) using Clean Water Act tools, including strengthening existing permit programs and extending coverage where appropriate;

"(b) establishing new, minimum standards of performance where appropriate, including:

"(i) establishing a schedule for the implementation of key actions in cooperation with States, local governments, and others;

"(ii) constructing watershed-based frameworks that assign pollution reduction responsibilities to pollution sources and maximize the reliability and cost-effectiveness of pollution reduction programs; and

"(iii) implementing a compliance and enforcement strategy.

PART 4--AGRICULTURAL PRACTICES TO PROTECT THE CHESAPEAKE BAY

"Sec. 401. In developing recommendations for focusing resources to protect the Chesapeake Bay in the report required by subsection 202(b) of this order, the Secretary of Agriculture shall, as

appropriate, concentrate the USDA's working lands and land retirement programs within priority watersheds in counties in the Chesapeake Bay watershed. These programs should apply priority conservation practices that most efficiently reduce nutrient and sediment loads to the Chesapeake Bay, as identified by USDA and EPA data and scientific analysis. The Secretary of Agriculture shall work with State agriculture and conservation agencies in developing the report.

PART 5--REDUCE WATER POLLUTION FROM FEDERAL LANDS AND FACILITIES

"Sec. 501. Agencies with land, facilities, or installation management responsibilities affecting ten or more acres within the watershed of the Chesapeake Bay shall, as expeditiously as practicable and to the extent permitted by law, implement land management practices to protect the Chesapeake Bay and its tributary waters consistent with the report required by section 202 of this order and as described in guidance published by the EPA under section 502.

"Sec. 502. The Administrator of the EPA shall, within 1 year of the date of this order and after consulting with the Committee and providing for public review and comment, publish guidance for Federal land management in the Chesapeake Bay watershed describing proven, cost-effective tools and practices that reduce water pollution, including practices that are available for use by Federal agencies.

PART 6--PROTECT CHESAPEAKE BAY AS THE CLIMATE CHANGES

"Sec. 601. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, organize and conduct research and scientific assessments to support development of the strategy to adapt to climate change impacts on the Chesapeake Bay watershed as required in section 202 of this order and to evaluate the impacts of climate change on the Chesapeake Bay in future years. Such research should include assessment of:

"(a) the impact of sea level rise on the aquatic ecosystem of the Chesapeake Bay, including nutrient and sediment load contributions from stream banks and shorelines;

"(b) the impacts of increasing temperature, acidity, and salinity levels of waters in the Chesapeake Bay;

"(c) the impacts of changing rainfall levels and changes in rainfall intensity on water quality and aquatic life;

"(d) potential impacts of climate change on fish, wildlife, and their habitats in the Chesapeake Bay and its watershed; and

"(e) potential impacts of more severe storms on Chesapeake Bay resources.

PART 7--EXPAND PUBLIC ACCESS TO THE CHESAPEAKE BAY AND CONSERVE LANDSCAPES AND ECOSYSTEMS

"Sec. 701. (a) Agencies participating in the Committee shall assist the Secretary of the Interior in development of the report addressing expanded public access to the waters of the Chesapeake Bay and conservation of landscapes and ecosystems required in subsection 202(e) of this order by providing to the Secretary:

"(i) a list and description of existing sites on agency lands and facilities where public access to the Chesapeake Bay or its tributary waters is offered;

"(ii) a description of options for expanding public access at these agency sites;

"(iii) a description of agency sites where new opportunities for public access might be provided;

"(iv) a description of safety and national security issues related to expanded public access to Department of Defense installations;

"(v) a description of landscapes and ecosystems in the Chesapeake Bay watershed that merit recognition for their historical, cultural, ecological, or scientific values; and

"(vi) options for conserving these landscapes and ecosystems.

"(b) In developing the report addressing expanded public access on agency lands to the waters of the Chesapeake Bay and options for conserving landscapes and ecosystems in the Chesapeake Bay, as required in subsection 202(e) of this order, the

Secretary of the Interior shall coordinate any recommendations with State and local agencies in the watershed and programs such as the Captain John Smith Chesapeake National Historic Trail, the Chesapeake Bay Gateways and Watertrails Network, and the Star-Spangled Banner National Historic Trail.

PART 8--MONITORING AND DECISION SUPPORT FOR ECOSYSTEM MANAGEMENT

"Sec. 801. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, organize and conduct their monitoring, research, and scientific assessments to support decisionmaking for the Chesapeake Bay ecosystem and to develop the report addressing strengthening environmental monitoring of the Chesapeake Bay and its watershed required in section 202 of this order. This report will assess existing monitoring programs and gaps in data collection, and shall also include the following topics:

"(a) the health of fish and wildlife in the Chesapeake Bay watershed;

"(b) factors affecting changes in water quality and habitat conditions; and

"(c) using adaptive management to plan, monitor, evaluate, and adjust environmental management actions.

PART 9--LIVING RESOURCES PROTECTION AND RESTORATION

"Sec. 901. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, identify and prioritize critical living resources of the Chesapeake Bay and its watershed, conduct collaborative research and habitat protection activities that address expected outcomes for these species, and develop a report addressing these topics as required in section 202 of this order. The Secretaries of Commerce and the Interior shall coordinate agency activities related to living resources in estuarine waters to ensure maximum benefit to the Chesapeake Bay resources.

PART 10—EXCEPTIONS

"Sec. 1001. The heads of agencies may authorize exceptions to this order, in the following circumstances:

"(a) during time of war or national emergency;

"(b) when necessary for reasons of national security;

"(c) during emergencies posing an unacceptable threat to human health or safety or to the marine environment and admitting of no other feasible solution; or

"(d) in any case that constitutes a danger to human life or a real threat to vessels, aircraft, platforms, or other man-made structures at sea, such as cases of force majeure caused by stress of weather or other act of God.

PART 11--GENERAL PROVISIONS

"Sec. 1101. (a) Nothing in this order shall be construed to impair or otherwise affect:

"(i) authority granted by law to a department, agency, or the head thereof; or

"(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

"(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

"(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.".

Restoration activities in the Chesapeake Bay watershed. Act Dec. 18, 2014, P.L. 113-273, 128 Stat. 2967-2970, provides:

"Section. 1. Short title.

"This Act may be cited as the 'Chesapeake Bay Accountability and Recovery Act of 2014'.

"Sec. 2. Definitions.

"In this Act:

"(1) Administrator. The term 'Administrator' means the Administrator of the Environmental Protection Agency.

"(2) Chesapeake Bay State. The term 'Chesapeake Bay State' or 'State' means any of--

"(A) the States of Maryland, West Virginia, Delaware, and New York;

"(B) the Commonwealths of Virginia and Pennsylvania; and

"(C) the District of Columbia.

"(3) Chesapeake Bay watershed. The term 'Chesapeake Bay watershed' means all tributaries, backwaters, and side channels, including watersheds, draining into the Chesapeake Bay.

"(4) Chesapeake Executive Council. The term 'Chesapeake Executive Council' has the meaning given the term by section 117(a) of the Federal Water Pollution Control Act (33 U.S.C. 1267(a)).

"(5) Chief executive. The term 'chief executive' means, in the case of a State or Commonwealth, the Governor of the State or Commonwealth and, in the case of the District of Columbia, the Mayor of the District of Columbia.

"(6) Director. The term 'Director' means the Director of the Office of Management and Budget.

"(7) Federal restoration activity.

(A) In general. The term 'Federal restoration activity' means a Federal program or project carried out under Federal authority in existence as of the date of enactment of this Act with the express intent to directly protect, conserve, or restore living resources, habitat, water resources, or water quality in the Chesapeake Bay watershed, including programs or projects that provide financial and technical assistance to promote responsible land use, stewardship, and community engagement in the Chesapeake Bay watershed.

"(B) Categorization. Federal restoration activities may be categorized as follows:

"(i) Physical restoration.

"(ii) Planning.

"(iii) Feasibility studies.

"(iv) Scientific research.

"(v) Monitoring.

"(vi) Education.

"(vii) Infrastructure development.

"(8) State restoration activity.

(A) In general. The term 'State restoration activity' means any State program or project carried out under State authority that directly or indirectly protect, conserve, or restore living resources, habitat,

water resources, or water quality in the Chesapeake Bay watershed, including programs or projects that promote responsible land use, stewardship, and community engagement in the Chesapeake Bay watershed.

"(B) Categorization. State restoration activities may be categorized as follows:

"(i) Physical restoration.

"(ii) Planning.

"(iii) Feasibility studies.

"(iv) Scientific research.

"(v) Monitoring.

"(vi) Education.

"(vii) Infrastructure development.

"Sec. 3. Chesapeake Bay crosscut budget.

"(a) In general. The Director, in consultation with the Chesapeake Executive Council, the chief executive of each Chesapeake Bay State, and the Chesapeake Bay Commission, shall submit to Congress a financial report containing—

"(1) an interagency crosscut budget that displays, as applicable—

"(A) the proposed funding for any Federal restoration activity to be carried out in the

succeeding fiscal year, including any planned interagency or intra-agency transfer, for each of the Federal agencies that carry out restoration activities;

"(B) to the extent that information is available, the estimated funding for any State restoration activity to be carried out in the succeeding fiscal year;

"(C) all expenditures for Federal restoration activities from the preceding 2 fiscal years, the current fiscal year, and the succeeding fiscal year;

"(D) all expenditures, to the extent that information is available, for State restoration activities during the equivalent time period described in subparagraph (C); and

"(E) a section that identifies and evaluates, based on need and appropriateness, specific opportunities to consolidate similar programs and activities within the budget and recommendations to Congress for legislative action to streamline, consolidate, or eliminate similar programs and activities within the budget;

"(2) a detailed accounting of all funds received and obligated by each Federal agency for restoration activities during the current and preceding fiscal years, including the identification of funds that were transferred to a Chesapeake Bay State for restoration activities;

"(3) to the extent that information is available, a detailed accounting from each State of all funds

received and obligated from a Federal agency for restoration activities during the current and preceding fiscal years; and

"(4) a description of each of the proposed Federal and State restoration activities to be carried out in the succeeding fiscal year (corresponding to those activities listed in subparagraphs (A) and (B) of paragraph (1)), including—

"(A) the project description;

"(B) the current status of the project;

"(C) the Federal or State statutory or regulatory authority, program, or responsible agency;

"(D) the authorization level for appropriations;

"(E) the project timeline, including benchmarks;

"(F) references to project documents;

"(G) descriptions of risks and uncertainties of project implementation;

"(H) a list of coordinating entities;

"(I) a description of the funding history for the project;

"(J) cost sharing; and

"(K) alignment with the existing Chesapeake Bay Agreement, Chesapeake Executive Council goals and priorities, and Annual Action Plan required by section 205 of Executive Order 13508 (33 U.S.C. 1267 note; relating to Chesapeake Bay protection and restoration).

"(b) Minimum funding levels. In describing restoration activities in the report required under subsection (a), the Director shall only include--

"(1) for the first 3 years that the report is required, descriptions of--

"(A) Federal restoration activities that have funding amounts greater than or equal to $ 300,000; and

"(B) State restoration activities that have funding amounts greater than or equal to $ 300,000; and

"(2) for every year thereafter, descriptions of—

"(A) Federal restoration activities that have funding amounts greater than or equal to $ 100,000; and

"(B) State restoration activities that have funding amounts greater than or equal to $ 100,000.

"(c) Deadline. The Director shall submit to Congress the report required by subsection (a) not later than September 30 of each year.

"(d) Report. Copies of the report required by subsection (a) shall be submitted to the Committees on Appropriations, Natural Resources, Energy and Commerce, and Transportation and Infrastructure of

the House of Representatives and the Committees on Appropriations, Environment and Public Works, and Commerce, Science, and Transportation of the Senate.

"(e) Effective date. This section shall apply beginning with the first fiscal year after the date of enactment of this Act.

"Sec. 4. Independent evaluator for the Chesapeake Bay program.

"(a) In general. There shall be an Independent Evaluator for restoration activities in the Chesapeake Bay watershed, who shall review and report on—

"(1) restoration activities; and

"(2) any related topics that are suggested by the Chesapeake Executive Council.

"(b) Appointment.

(1) In general. Not later than 30 days after the date of submission of nominees by the Chesapeake Executive Council, the Independent Evaluator shall be appointed by the Administrator from among nominees submitted by the Chesapeake Executive Council with the consultation of the scientific community.

"(2) Nominations. The Chesapeake Executive Council may nominate for consideration as Independent Evaluator a science-based institution of higher education.

"(3) Requirements. The Administrator shall only select as Independent Evaluator a nominee that the Administrator determines demonstrates excellence in marine science, policy evaluation, or other studies relating to complex environmental restoration activities.

"(c) Reports. Not later than 180 days after the date of appointment and once every 2 years thereafter, the Independent Evaluator shall submit to Congress a report describing the findings and recommendations of reviews conducted under subsection (a).

"Sec. 5. Prohibition on new funding.

"No additional funds are authorized to be appropriated to carry out this Act.".

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

*** This document is current through January 7, 2016 ***
*** issue of the Federal Register ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

40 C.F.R. § 130.2

§ 130.2 Definitions.

(a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

(b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

(f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.

(g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

(h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

HISTORY: [50 FR 1779, Jan. 11, 1985, as amended at 54 FR 14359, Apr. 11, 1989; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
33 U.S.C. 1251 et seq.

NOTES: NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010; 77 FR 42181, July 18, 2012.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

LexisNexis (R) Notes:

CASE NOTES

Natural Resources Defense Council v. Fox, 93 F. Supp. 2d 531, 93 F. Supp. 2d 531, 2000 U.S. Dist. LEXIS 5690 (SD NY May 2, 2000).

Overview: *EPA did not need to treat a state's inaction as constructive submission of deficient water pollution standards, but having approved the listing of some reservoirs, was obligated to approve or disapprove state's submissions.*

> Environmental Protection Agency regulations require total maximum daily loads, or TMDLs, to comprise the sum of the individual wasteload allocations for