

**RECORD NO. 13-4079**

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*In The*  
**United States Court of Appeals**  
*For The Third Circuit*

**AMERICAN FARM BUREAU FEDERATION, et al.,**

*Plaintiffs – Appellants,*

**v.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,**

*Defendants – Appellees.*

**On Appeal from the United States District Court for the Middle District of  
Pennsylvania, No. 1:11-cv-00067 (Hon. Sylvia H. Rambo)**

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**RESPONSE BRIEF OF DEFENDANTS INTERVENORS-APPELLEES  
CHESAPEAKE BAY FOUNDATION, CITIZENS FOR PENNSYLVANIA’S  
FUTURE, DEFENDERS OF WILDLIFE, JEFFERSON COUNTY PUBLIC  
SERVICE DISTRICT, MIDSHORE RIVERKEEPER CONSERVANCY,  
AND NATIONAL WILDLIFE FEDERATION**

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## **RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and L.A.R. 26.1, Defendant Intervenors-Appellees make the following disclosures:

Chesapeake Bay Foundation, Inc., is a non-profit corporation. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest in Chesapeake Bay Foundation, Inc.

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## TABLE OF CONTENTS

	<b>Page</b>
RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	vi
GLOSSARY.....	x
INTRODUCTION .....	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE ISSUES.....	2
RELATED CASES .....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS .....	3
I.    The Historical, Environmental, And Economic Significance Of The Chesapeake Bay: Why Water Quality Matters .....	3
A.    The Chesapeake Bay Prior to Colonization.....	4
B.    Poor Water Quality Has Destroyed Bay Resources .....	5
1.    The Bay’s Natural Resources Have Suffered.....	6
2.    Poor Water Quality Harms Bay Watermen and Recreational Fishing .....	8
C.    Poor Bay Water Quality is Not the Problem of Just One State or Source .....	10
II.   The State And Federal Chesapeake Bay Restoration Partnership .....	11

A.	State and Federal Efforts to Determine the Cause of the Bay’s Decline .....	11
B.	The Chesapeake Bay Agreements: State and Federal Cooperative Efforts to Reduce Bay Pollution .....	13
III.	The Bay Agreement Goals Were Not Achieved And Progress Was Insufficient .....	16
IV.	The Bay TMDL Does Not Give EPA Authority To Make Land Use Decisions .....	17
	SUMMARY OF THE ARGUMENT .....	18
	STANDARD OF REVIEW .....	19
	ARGUMENT .....	19
I.	EPA And The Bay Jurisdictions Adhered To The Principle Of Cooperative Federalism.....	19
A.	The Pollutant Load Allocations Were Set by the Bay Jurisdictions and EPA .....	21
B.	The Bay Jurisdictions Agreed to Provide Reasonable Assurance That TMDL Goals Will be Met .....	23
C.	The TMDL Target Dates Are Not Illegal .....	26
II.	EPA Was Legally Authorized To Issue The Bay TMDL .....	27
A.	By Statute .....	27
B.	By Consent Decree.....	28
C.	By Interstate Compact.....	29
D.	By Settlement Agreement .....	29
E.	By Executive Order.....	29

III. The States May Ask EPA For Assistance Developing A TMDL.....30

CONCLUSION.....32

COMBINED CERTIFICATES

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>American Canoe Ass’n v. EPA</i> , 30 F. Supp. 2d 908 (E.D. Va. 1998) .....	28
<i>American Canoe Ass’n v. EPA</i> , 54 F. Supp. 2d 621 (E.D. Va. 1999) .....	21, 38
<i>Citizens to Protect Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	19
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1, <i>cert. denied</i> , 426 U.S. 941 (1976).....	19
<i>Fowler v. EPA</i> , No. 09-005 (D.D.C. May 11, 2010) .....	29
<i>Kingman Park Civic Assoc. v. United States</i> , 84 F. Supp. 2d 1 (D.D.C. 1999).....	28
<i>Scott v. Hammond</i> , 741 F.2d 992 (7th Cir. 1984) .....	27
<b>CONSTITUTIONAL PROVISION</b>	
U.S. CONST. amend. X .....	30
<b>STATUTES</b>	
5 U.S.C. § 706.....	3
5 U.S.C. § 706(2)(A).....	19
33 U.S.C. § 1251, <i>et seq.</i> .....	3

33 U.S.C. § 1251(b) .....	20, 30, 31
33 U.S.C. § 1251(g) .....	20, 28, 30
33 U.S.C. § 1267 .....	29
33 U.S.C. § 1267(g) .....	15, 27, 31
33 U.S.C. § 1267(g)(1)(A) .....	27
33 U.S.C. § 1267(g)(1)(B) .....	27
33 U.S.C. § 1313(b) .....	27
33 U.S.C. § 1313(d) .....	27
33 U.S.C. § 1313(d)(1)(C) .....	27
33 U.S.C. § 1313(d)(2) .....	27
33 U.S.C. § 1342 .....	11
33 U.S.C. § 1362(12) .....	11
33 U.S.C. § 1362(14) .....	11
Chesapeake Bay Restoration Act of 2000, Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967 .....	<i>passim</i>
Md. Code Ann., Nat. Res. § 8-301 (2003) .....	13
Pa. 32 P.S. § 820.11 (2004) .....	13
Pa. 32 P.S. § 820.12 (2004) .....	13
Va. Code § 30-240 (2004) .....	13
<b>RULES</b>	
3d Cir. L.R. 28.1(a)(2) .....	2



## OTHER AUTHORITIES

74 Fed. Reg. 23,099 .....	29
94 P.L. 116 .....	11
Bay Barometer, <a href="http://www.chesapeakebay.net/documents/cbp_59306.pdf">http://www.chesapeakebay.net/documents/cbp_59306.pdf</a> .....	7
Chesapeake Bay Program, “Bay Grasses,” <a href="http://www.chesapeakebay.net/issues/issue/bay_grasses#inline">http://www.chesapeakebay.net/issues/issue/bay_grasses#inline</a> .....	7
Chesapeake Bay Program, “Chesapeake Executive Council,” <a href="http://www.chesapeakebay.net/groups/group/chesapeake_executive_council">http://www.chesapeakebay.net/groups/group/chesapeake_executive_council</a> .....	13
Chesapeake Bay Program, “Learn the Issues,” <a href="http://www.chesapeakebay.net/issues">http://www.chesapeakebay.net/issues</a> .....	6
Chesapeake Bay Program, “Nutrients,” <a href="http://www.chesapeakebay.net/nutrients.aspx?menuitem=14690">http://www.chesapeakebay.net/nutrients.aspx?menuitem=14690</a> .....	7
Chesapeake Bay Report Card, 2010, UMD Center for Environmental Sciences, <a href="http://ian.umces.edu/ecocheck/report-cards/chesapeake-bay/2010/indicators/water_clarity/">http://ian.umces.edu/ecocheck/report-cards/chesapeake- bay/2010/indicators/water_clarity/</a> .....	6
Columbia/Snake Rivers Mainstem TMDL Fact Sheet, April 7, 2001, <a href="http://yosemite.epa.gov/r10/water.nsf/af6d4571f3e2b1698825650f0071180a/c0407629f46c7acc88256a3000735a02!OpenDocument">http://yosemite.epa.gov/r10/water.nsf/af6d4571f3e2b1698825650f0071180a/ c0407629f46c7acc88256a3000735a02!OpenDocument</a> .....	32
Estuaries and Clean Water Act of 2000, 106 P.L 457 .....	15
Haile, E.W., <i>John Smith in the Chesapeake</i> , Preface, RoundHouse (2008), ISBN 978-0-9664712-3-6 .....	4
Hearing Before the Committee on Environment and Public Works, Estuary and Coastal Habitat Conservation, S. Hrg. 106-284 (July 22, 1999) .....	17
Horton, T., “Turning the Tide – saving the Chesapeake Bay,” Island Press 2nd ed. (2003) .....	9
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<http://www.chesapeakebay.net/bluecrab.aspx?menuitem=19367> .....8

[http://www.chesapeakebay.net/content/publications/cbp\\_13264.pdf](http://www.chesapeakebay.net/content/publications/cbp_13264.pdf) .....14

[http://www.noaanews.noaa.gov/stories2008/20080923\\_bluecrab.html](http://www.noaanews.noaa.gov/stories2008/20080923_bluecrab.html) .....8

*Imperiled Chesapeake Bay*, PBS, Frontline (April, 2009)  
<http://www.pbs.org/wgbh/pages/frontline/poisonedwaters/view/> .....9

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[https://marylandwatermen.com/Watermen\\_of\\_the\\_Bay.html](https://marylandwatermen.com/Watermen_of_the_Bay.html).....8

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SB/236/HB 445 .....18

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SB 614/HB 987 .....18

Rountree, H.C., *et al*, *John Smith’s Chesapeake Voyages: 1607-1609*, University of Virginia Press (2007), ISBN 978-0-8139-2728-2 .....4, 5

Smith, J., “A True Relation,” in *The Complete Works of Captain John Smith (1580-1631)*, edited by Barbour, P.I, Chapel Hill: University of North Carolina Press (1986).....5

Virginia Watermen’s Association, <http://viriniawaterman.com>.....9

Warner, W., *Beautiful Swimmers*, Back Bay, 1976.....8

*What is the “Value” of the Chesapeake Bay and Virginia’s Waterways*, CBF, [www.cbf.org/Document.Doc?id=561](http://www.cbf.org/Document.Doc?id=561) .....9

## **GLOSSARY**

Abbreviations used in this brief:

CBFSJA	CBF Appellees Supplemental Joint Appendix
CBP	Chesapeake Bay Program
CWA or Act	Clean Water Act
EC	Executive Council
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NPDES	National Permit Discharge Elimination System
TMDL	Total Maximum Daily Load
WIP	Watershed Implementation Plan
LA	Load Allocation
PSC	Principals' Staff Committee (of the Chesapeake Bay Program)
WLA	Wasteload Allocation

## INTRODUCTION

The Chesapeake Bay has been recognized by Congress as a national treasure. However, plagued by the discharge of too much nitrogen, phosphorous and sediment, the Bay is listed as “impaired” under the Clean Water Act (CWA). For over 30 years, the United States and the Bay Jurisdictions (Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia) attempted to end that impairment by entering into voluntary agreements to reduce the pollution. No agreement worked because each lacked accountability.

At the direction of Congress and, significantly, at the request of the Bay Jurisdictions, the United States Environmental Protection Agency (EPA) issued the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) on December 29, 2010. JA 1106. The Bay TMDL limited the amount of pollution destroying the natural resources of the Chesapeake Bay and along with them, the culture, economy, and way of life of millions of people.

Plaintiffs-Appellants, agricultural and development lobbyists, do not contest the fact that these limits are needed. Instead, they mischaracterize the Bay TMDL as a heavy-handed federal intrusion on state prerogatives. They argue that EPA exceeded its CWA authority by assigning pollution limits to source categories (point and non-point sources) and by requiring the Bay Jurisdictions to provide

specific accountability measures (“reasonable assurance”) through implementation plans with deadlines. Apl. Br. 2-3.

The Appellants factual and legal assertions are erroneous. EPA respected the CWA principle of cooperative federalism by developing the pollution limits with the Bay Jurisdictions predicated upon the level of accountability provided by each jurisdiction in its respective implementation plan.

Appellees (Defendant-Intervenors), Chesapeake Bay Foundation, Citizens for Pennsylvania’s Future, Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and National Wildlife Federation, support the briefs filed by the United States and the other Defendant-Intervenors. Appellees ask the Court to uphold the last chance for Bay survival and affirm the District Court’s decision.

### **STATEMENT OF JURISDICTION**

Appellees agree with the basis for jurisdiction stated in the Appellants’ opening brief.

### **STATEMENT OF THE ISSUES**

Appellees adopt the Statement of the Issues presented by the United States.

### **RELATED CASES**

Appellees are not aware of any related cases. Local Rule 28.1(a)(2).

## STATEMENT OF THE CASE

Plaintiffs-Appellants asked the District Court for the Middle District of Pennsylvania to find that EPA's issuance of the Bay TMDL was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706, and the Clean Water Act, 33 U.S.C. § 1251, *et seq.* The District Court denied the Plaintiffs-Appellants' motion for summary judgment and granted the motions for summary judgment filed by the United States and Defendant-Intervenor Municipal Associations Group. JA5-103. This appeal challenges the correctness of those decisions.

## STATEMENT OF FACTS

### **I. The Historical, Environmental, And Economic Significance Of The Chesapeake Bay: Why Water Quality Matters**

The Chesapeake Bay is North America's largest and most biologically diverse estuary, home to more than 3,600 species of plants and animals. JA 1173. 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. Portions of the watershed are found in Delaware, Maryland, New York, Pennsylvania, Virginia, Washington, D.C., and West Virginia. *Id.* The geology of the Bay presents an ecosystem intertwined between land and water. Only 200 miles long, the Bay is fed by 19 major rivers and hundreds of creeks and streams with a combined tidal shoreline of approximately 11,000 miles. JA 1173

A national treasure, for more than 300 years the Bay and its tributaries have sustained the region's economy and defined its traditions and culture.<sup>1</sup> As the federal and state governments have agreed, the Bay is a resource of extraordinary value, worthy of the highest levels of protection and restoration.<sup>2</sup>

A. The Chesapeake Bay Prior to Colonization

The London Virginia Company sent Captain John Smith and others to colonize America for England. Smith's company arrived in Virginia's portion of the Chesapeake Bay on April 26, 1607, and settled near Jamestown, Virginia.<sup>3</sup> Smith and his crew explored the Bay, its tidal tributaries, and adjoining lands. During his exploration, Smith and members of his crew kept logs of their discoveries. It is from these records that we know the Bay region supported numerous Native American tribes who survived off the bounty of the land and the Bay.<sup>4</sup>

Before European settlement, the land feeding the Bay was largely forested. Native American activities were finely tuned to the Bay's ecology which served

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<sup>1</sup> Chesapeake Bay Restoration Act of 2000, Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967.

<sup>2</sup> *Chesapeake 2000*. JA 249; CBFSJA 1.

<sup>3</sup> Haile, E.W., *John Smith in the Chesapeake*, Preface, RoundHouse (2008), ISBN 978-0-9664712-3-6.

<sup>4</sup> Rountree, H.C., *et al*, *John Smith's Chesapeake Voyages: 1607-1609*, pgs. 3, 7-15, 29-30, University of Virginia Press (2007), ISBN 978-0-8139-2728-2.

the needs of many species, supplying enough nutrients to sustain an estuary with vast quantities of fish, shellfish, and aquatic vegetation.<sup>5</sup>

The water was clear enough to allow sunlight to feed vast beds of underwater grasses. These grasses served as food for throngs of migrating waterfowl and as nurseries for immature fish and crabs.<sup>6</sup>

Striped bass (rockfish), shad, sturgeon, and white perch were plentiful in the Bay.<sup>7</sup> Large schools of menhaden, a herring species, swarmed throughout the Bay, so many that Smith's crew attempted to catch some with a frying pan.<sup>8</sup> Blue crabs were plentiful and favored by Native Americans.<sup>9</sup> Oysters grew in reefs or "rocks" so large they were noticed by early cartographers.<sup>10</sup>

B. Poor Water Quality Has Destroyed Bay Resources

Today, over 17 million people call the Chesapeake Bay watershed home. Thus, life in the mid-Atlantic is intricately tied to the Chesapeake Bay and its multitude of sustaining rivers and streams.

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<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 9-10.

<sup>8</sup> *Id.* at 9; Smith, J., "A True Relation," in *The Complete Works of Captain John Smith (1580-1631)*, edited by Barbour, P.I, Chapel Hill: University of North Carolina Press (1986). Smith wrote: "Here are mountains, hills, planes, valleys, rivers and brooks, all running most pleasantly into a fair Bay, compassed but for the mouth, with fruitful and delightsome land."

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 14.



Most of the Bay and its tidal waters are listed as impaired because of excess nutrients (nitrogen and phosphorous) and sediment (dirt washed off the land).<sup>11</sup> These pollutants cause algae blooms that, as they decay, consume oxygen and create “dead zones” where fish and shellfish cannot survive, block sunlight that is needed for underwater grasses, and smother benthic aquatic life. JA1198. High levels of nutrients and sediment enter the water from agricultural operations, urban and suburban stormwater runoff, wastewater facilities, air pollution, and other sources. Despite some reductions in pollution during the past 25 years, there has been insufficient progress toward meeting the water quality standards for the Bay. JA 1123.

1. *The Bay’s Natural Resources Have Suffered*

As water quality in the Bay and its tributaries has degraded, major components of the ecosystem have been compromised. Low oxygen and reduced water clarity are the primary culprits. In 2010, 62% of the Bay had levels of dissolved oxygen below that established by EPA as sufficient for healthy aquatic life.<sup>12</sup> Only 18% of the Bay had acceptable water clarity.<sup>13</sup>

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<sup>11</sup> Chesapeake Bay Program (CBP), “Learn the Issues,” <http://www.chesapeakebay.net/issues>. See also Chesapeake Bay Report Card, 2010, UMD Center for Environmental Sciences, <http://ian.umces.edu/ecocheck/report-cards/chesapeake-bay/2010/indicators/water-clarity/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

The amount of underwater grasses essential to the sustainability of crab and fish populations has declined.<sup>14</sup> In addition to providing food and shelter, underwater grasses also improve Bay water quality by generating oxygen through photosynthesis. Most importantly, they utilize nutrients like nitrogen and phosphorous as they grow.<sup>15</sup> For underwater grasses to grow, the water must be clear enough to allow sunlight to reach the bottom. Sediment carried by stormwater run-off has reduced the growth of underwater grasses in the Bay by blocking sunlight and smothering grass beds. This run-off also carries nutrients, providing fuel for increased algae growth, which also blocks sunlight.<sup>16</sup>

Poor water quality due to lack of oxygen and low water clarity has also contributed to a dramatic loss of oysters.<sup>17</sup> The oyster population in the Bay has been estimated at between 1% and 4% of its historic numbers.<sup>18</sup> As a result, oyster harvests have plummeted.

The Bay blue crab comprises one of the most valuable commercial and recreational fisheries in the Bay. Blue crabs are a critical link in the Bay food web

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<sup>14</sup> CBP, “Bay Grasses,”

[http://www.chesapeakebay.net/issues/issue/bay\\_grasses#inline](http://www.chesapeakebay.net/issues/issue/bay_grasses#inline)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> CBP, “Nutrients,”

<http://www.chesapeakebay.net/nutrients.aspx?menuitem=14690>.

<sup>18</sup> Bay Barometer at 8. [http://www.chesapeakebay.net/documents/cbp\\_59306.pdf](http://www.chesapeakebay.net/documents/cbp_59306.pdf)

serving as predators and as prey.<sup>19</sup> But, low oxygen caused by pollution drives blue crabs from their preferred habitat and kills many of the small bottom organisms on which the blue crabs feed. The numbers of blue crabs within the period between 1997 and 2008 were not sustainable. *Id.* In 2008, at the request of Congress, the Secretary of Commerce declared a federal fisheries disaster for the Bay.<sup>20</sup>

In sum, until water quality improves, Bay natural resources will not recover.

2. *Poor Water Quality Harms Bay Watermen and Recreational Fishing*

Since colonial times, a unique water borne “farmer” known as a “waterman” has harvested the Bay’s bounty. The culture and fishing practices of the waterman have been handed down from generation to generation for over 300 years.<sup>21</sup>

Watermen harvest many species of seafood from the Bay in different seasons of the year. In any given year, a Bay waterman may harvest blue crabs in the summer months, oysters in the fall, striped bass and perch in the winter months and either eels, catfish, yellow perch or soft shell clams in the spring and back to crabbing in the summer.<sup>22</sup>

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<sup>19</sup> <http://www.chesapeakebay.net/bluecrab.aspx?menuitem=19367>.

<sup>20</sup> [http://www.noaaneews.noaa.gov/stories2008/20080923\\_bluecrab.html](http://www.noaaneews.noaa.gov/stories2008/20080923_bluecrab.html)

<sup>21</sup> See Warner, W., *Beautiful Swimmers*, Back Bay, 1976.

<sup>22</sup> Maryland Watermen’s Association,  
[https://marylandwatermen.com/Watermen\\_of\\_the\\_Bay.html](https://marylandwatermen.com/Watermen_of_the_Bay.html)

As the Bay's bounty has diminished it has become increasingly difficult to make a living on the water. The number of full time commercial watermen has declined dramatically. In the 1970s, there were over 14,000 commercial watermen in Maryland and Virginia. Today, there are less than 7,000.<sup>23</sup> Although overharvesting has contributed to their plight, poor water quality has caused and continues to cause the greatest harm to commercial and recreational fishing.<sup>24</sup> Due to our collective inability to resolve Bay water pollution, a way of life and a valuable commercial and cultural resource is disappearing, perhaps forever.<sup>25</sup>

The impact of poor water quality has been equally felt by recreational fishermen and the sport-fishing industry.<sup>26</sup> Without sustainable fisheries, food, and habitat, the sport-fishing industry and recreational fishing upon which it depends are harmed. The revenues derived by the states from recreational fishing licenses and taxes on gear and related expenses are significant. As sport-fish stocks decline, so do public revenues associated with sport-fishing and private sales of sport-fishing gear.

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<sup>23</sup> Horton, T., "Turning the Tide – saving the Chesapeake Bay," p. 178, Island Press 2nd ed. (2003); Virginia Watermen's Association, <http://viriniawaterman.com>.

<sup>24</sup> *Imperiled Chesapeake Bay*, PBS, Frontline (April, 2009) <http://www.pbs.org/wgbh/pages/frontline/poisonedwaters/view/>.

<sup>25</sup> *Id.* See also, *Last Boat Out* (2010) <http://www.lastboatout.com/index.html>.

<sup>26</sup> *What is the "Value" of the Chesapeake Bay and Virginia's Waterways*, CBF, [www.cbf.org/Document.Doc?id=561](http://www.cbf.org/Document.Doc?id=561).

C. Poor Bay Water Quality is Not the Problem of Just One State or Source

Nutrients and sediment discharged by agriculture, construction, industry, municipalities, and suburban sprawl that enter Lake Otsego in Cooperstown, NY, flow into the Susquehanna River and harm water quality in the Chesapeake Bay hundreds of miles away.<sup>27</sup> This scenario is applicable to every tributary within the 64,000 square mile Bay watershed. Because pollution is generated in six different jurisdictions, no one state can address the problem as Maryland, for example, cannot direct Pennsylvania to limit its pollution. As discussed below, the Bay Jurisdictions acknowledged this fact when they entered into a series of agreements and developed an inclusive management system based upon sophisticated Chesapeake Bay Watershed and Water Quality Models to assign pollutant loads for their respective water bodies.<sup>28</sup> The Bay Jurisdictions' cooperative efforts with EPA led to the Bay TMDL.

Should the Bay TMDL be vacated, there will be an adverse impact on Bay health and the economy it supports. If the Court determines that EPA does not have the authority to issue the Bay TMDL and vacates the allocations, EPA's only

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<sup>27</sup> The Susquehanna River contributes 46% of the nitrogen, 26% of the phosphorous, and 33% of the sediment loads to the Chesapeake Bay. JA 1215.

<sup>28</sup> JA 135, 137, 206, 249, 271, 1106.

remaining authority is to further restrict point sources subject to NPDES permits.<sup>29</sup> 33 U.S.C. § 1342. However, even if all permitted point sources installed the most advanced treatment technology, Bay restoration would not be achieved. JA 1302-3, 1321, 1324-26. Thus, only a comprehensive allocation of pollutant discharges across all jurisdictions and source sectors can restore and preserve the Chesapeake Bay. By developing over years of painstaking effort the allocations set forth in the Bay TMDL, the Bay Jurisdictions and the Federal government have set a path for attainment of that goal.

## **II. The State And Federal Chesapeake Bay Restoration Partnership**

### **A. State and Federal Efforts to Determine the Cause of the Bay's Decline**

In 1976, Congress directed U.S. EPA to undertake a comprehensive study of the Bay to determine how best to manage this national resource. 94 P.L. 116.<sup>30</sup> In response, EPA executed approximately 40 research projects over seven years. In 1983, EPA published its “Framework for Action” which described the findings of the research and identified management strategies that could be utilized to restore the Bay. JA 1486.

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<sup>29</sup> Point sources discharge pollutants via “discernible, confined and discrete conveyances,” such as a pipe or ditch. 33 U.S.C. § 1362(12), (14).

<sup>30</sup> The Public Law does not mention this directive as the law is an appropriation to EPA. However, the Senate Appropriations Committee report does reference this directive.

A Bi-State Conference on the Chesapeake Bay was held in 1977. Members of the federal and state governments of Maryland and Virginia participated.<sup>31</sup> State representatives explained the significance of the Bay to their respective economies, culture and heritage. They recognized even then that an overabundance of nutrients and sediment were harming Bay resources.<sup>32</sup> Senator Mathias of Maryland, the sponsor of the legislation calling for EPA's investigation of the Bay, bemoaned the fact that despite the plethora of citizen, federal, and state entities working to protect and restore the Bay there still was "no workable way to coordinate their stewardship."<sup>33</sup> He recommended a commission overseeing a partnership between Maryland, Virginia, the federal government, and other jurisdictions.<sup>34</sup> Others recognized that no state had the authority to control the pollution discharges of another state and only the United States had the jurisdiction "to manage the Bay as an integrated whole."<sup>35</sup>

In 1980, Virginia and Maryland legislatively established the Chesapeake Bay Commission to coordinate interstate planning and programs. JA 137.

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<sup>31</sup> 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).

<sup>32</sup> *Id.* at 53.

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 15, 262-3, 271-2.

Pennsylvania joined the Commission in 1985. *Id.*<sup>36</sup> Creation of this interstate management group marked the beginning of interstate efforts to restore the Bay.<sup>37</sup>

B. The Chesapeake Bay Agreements: State and Federal Cooperative Efforts to Reduce Bay Pollution

Maryland, Virginia, Pennsylvania, the District of Columbia, and EPA signed the first Chesapeake Bay Agreement in 1983 outlining a cooperative, voluntary approach to improve management of the Bay's resources. JA 135. The Agreement created an Executive Council to assess and oversee implementation of coordinated plans, to improve water quality and the living resources of the Bay. An Implementation Committee was established to coordinate and evaluate management plans.<sup>38</sup> The Executive Council later created several other committees<sup>39</sup> including a Principals Staff Committee, a Scientific & Technical

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<sup>36</sup> Maryland Natural Resources Code Ann. § 8-301 (2003); Pennsylvania 32 P.S. § 820.11, § 820.12 (2004); Virginia Code § 30-240 (2004).

<sup>37</sup> The Commission includes fifteen legislators (five from each state), three natural resource cabinet secretaries and three citizen representatives, one each from Maryland, Pennsylvania, and Virginia. The Commission is a signatory to all the Bay Agreements and amendments beginning in 1987 and is a member of the Executive Council of the Chesapeake Bay Program.

<sup>38</sup> The Implementation Committee was responsible for implementing the policy decisions and technical studies of the Executive Council. It has been replaced by several Implementation Workgroups. JA 1164-7.

<sup>39</sup> CBP, "Chesapeake Executive Council,"

[http://www.chesapeakebay.net/groups/group/chesapeake\\_executive\\_council](http://www.chesapeakebay.net/groups/group/chesapeake_executive_council). Executive Council members were designated by the EPA administrator and the governors of Maryland, Pennsylvania, and Virginia, and the mayor of D.C. *Id.*



Advisory Committee, and a Citizens Advisory Committee (“CAC”).<sup>40</sup> JA 1163-67. The 1983 Agreement was the genesis of the Chesapeake Bay Program (CBP or “Bay Program”).<sup>41</sup>

A Chesapeake Bay Restoration and Protection Plan (the “Plan”) was developed by EPA, Maryland, Virginia, the District of Columbia and Pennsylvania in 1985. Chesapeake Executive Council, US EPA, September 1985.<sup>42</sup> The Plan’s primary goal was the reduction of “point and nonpoint source nutrient loadings to attain nutrient and dissolved oxygen concentrations necessary to support the living resources of the Bay.” *Id.* The Plan detailed the actions the respective parties would take to achieve this goal including extensive plans for the reduction of polluted runoff from agriculture.<sup>43</sup> Sadly, those implementation strategies were not fulfilled.

In 1987, a second Bay Agreement was signed by Maryland, Pennsylvania, Virginia, the District of Columbia, the Chesapeake Bay Commission, and EPA.

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<sup>40</sup> The CAC assists the Executive Council in implementing the Chesapeake Bay Agreements. Membership includes representatives from agriculture, business, conservation, industry, and civic groups. The group provides a non-governmental perspective on the Bay cleanup effort and on how Bay Program policies affect citizens who live and work in the Chesapeake Bay Watershed.

<sup>41</sup> The CBP is comprised of state and federal partners and is broader in scope than the research program developed by US EPA in response to Congress’ 1976 directive. Hereafter, reference to the “Bay Program” refers to this latter partnership.

<sup>42</sup> [http://www.chesapeakebay.net/content/publications/cbp\\_13264.pdf](http://www.chesapeakebay.net/content/publications/cbp_13264.pdf)

<sup>43</sup> *Id.* at II.A.1.p.13.

JA 137. This agreement included a 40 percent nutrient reduction goal with no set deadline.

A 1992 amendment to the 1987 Agreement reaffirmed the nutrient reduction goal and committed the same signatories to achieving this goal by 2000. JA 206. “Tributary Strategies” developed by the jurisdictions using a watershed model would allocate pollutant loads to the jurisdictions and describe implementation methods. JA 209. Unfortunately, that goal was not attained.

Eight years later, the Chesapeake Bay Commission, the United States, Maryland, Pennsylvania, Virginia, and the District of Columbia agreed to a third Bay agreement, *Chesapeake 2000*. JA 249; CBFSJA 1. The 2000 Agreement reaffirmed their prior commitments and established an overarching objective to remove the Bay from the impaired waters list by 2010.

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 Section 117 of the CWA. The subsection required the EPA Administrator to “coordinate” with the Bay Jurisdictions to ensure that management plans were developed and implementation was begun to, among other things, achieve and maintain the nutrient and water quality goals of the Chesapeake Bay Agreement. 33 U.S.C. § 1267(g).

### **III. The Bay Agreement Goals Were Not Achieved And Progress Was Insufficient**

Appellants assert that the Bay Jurisdictions had been making progress in addressing the Bay's ills by creating Tributary Strategies and a TMDL was not necessary. Apl. Br. 5-7. In support, Appellants cite a chart showing *modeled* nitrogen, phosphorous, and sediment loads by sector (agriculture, developed land, wastewater treatment) over time, and comparing Tributary Strategy loads to the draft TMDL allocations. JA 622-24. The point of the chart is that the modeled loads upon which the Tributary Strategies were based were not that different from the draft TMDL allocations. The chart does *not* show actual Tributary Strategy progress in achieving those load allocations.

In fact, the Bay Jurisdictions had not made sufficient progress to meet Bay water quality goals. Had they done so, there would have been no need for a Bay TMDL. The jurisdictions agreed in 1987 to reduce nitrogen and phosphorous entering the mainstem of the Bay by 40% by the year 2000. JA 139. The Bay Jurisdictions were supposed to have developed and begun implementation of their Tributary Strategies by August 1993. JA 207. When that goal was not met, the Bay Jurisdictions entered into the *Chesapeake 2000* agreement and committed to

remove the Bay from the CWA impaired waters list by 2010. JA 249. However, as time passed, the Bay Jurisdictions recognized that goal would not be met.<sup>44</sup>

In 2007, the Bay Jurisdictions responded to the overwhelming weight of evidence that their voluntary Tributary Strategies would not achieve their mutual goal and asked EPA to develop a Bay TMDL. JA 295. As explained above, the Bay Jurisdictions and EPA had planned for this eventuality and were already well on their way to developing a joint TMDL.

#### **IV. The Bay TMDL Does Not Give EPA Authority To Make Land Use Decisions**

Appellants assert that the Bay TMDL allows EPA to make land use decisions for the Bay Jurisdictions. Apl. Br. 3, 8, 12. As the United States explains in its brief, US Br. 45-46, 49, and we explicate further below, the record is devoid of any factual support for such an argument.

Moreover, the economies of several Bay jurisdictions rely heavily on agriculture. If the Bay TMDL would harm their respective economies, they would not have developed WIPs or would have challenged the allocations. No state has filed suit challenging the authority of EPA to issue the Bay TMDL or the load

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<sup>44</sup> EPA advised Congress in 1999 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 represented that the states were “fully cooperating in the development of the next round of nutrient reductions through the expanded TMDL effort.” *Id.* at 56.

allocations. In fact, Virginia has filed an *amicus* brief in support of the Bay TMDL. Further, the states have begun to pass legislation furthering TMDL implementation.<sup>45</sup>

### **SUMMARY OF THE ARGUMENT**

Appellants argue that the Bay TMDL pollutant allocations and accountability measures (reasonable assurance and deadlines) were requirements demanded by EPA and thus, are illegal. Apl. Br. 33-59. Their arguments fail for two reasons.

First, the Bay Jurisdictions helped develop and agreed to the pollutant allocations. Thus, the Bay TMDL, an informational tool, is not solely EPA's pronouncement of how Bay water quality will be improved.

Second, the Bay Jurisdictions agreed that after three prior failed attempts to restore Bay water quality certain measures of accountability were essential. Several workgroups comprised of state and federal representatives were commissioned to ensure that each jurisdiction's implementation plan would ensure success within a reasonable timeframe. Again, it was the Bay Jurisdictions in

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<sup>45</sup> In April 2012, Maryland passed SB 240/HB 446 which doubles the fees collected to upgrade septic systems, provide stormwater control grants, and the planting of cover crops. The legislature also passed SB 614/HB 987 requiring a stormwater utility fee and SB/236/HB 445 that requires local jurisdictions to develop land use plans that encourage growth in existing developed areas. <http://mlis.state.md.us/2012rs/billfile/SB0236.htm>

collaboration with EPA determining their course of action, not EPA usurping state authority.

In both cases, the CWA encourages, and nothing in the Constitution prohibits, such actions.

### **STANDARD OF REVIEW**

Administrative Procedure Act (APA) review is pursuant to an “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A). This standard of review is highly deferential to the agency, *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (*en banc*), *cert. denied*, 426 U.S. 941 (1976), and presumes the validity of agency action, *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). The party challenging the agency action bears the burden of overcoming the presumption. Review is narrow and a court may not substitute its judgment for that of the agency. *Id.* at 416.

### **ARGUMENT**

Appellees concur with the arguments presented by the United States in its Response Brief. Appellees augment those arguments with additional facts and legal arguments discussed below.

#### **I. EPA And The Bay Jurisdictions Adhered To The Principle Of Cooperative Federalism**

Appellants focus on the Bay TMDL as a single event and assert that its development was engineered by EPA with strong arm tactics. Apl. Br. 8. But the

federal government and the Bay Jurisdictions have been working to restore the Bay for over three decades. JA1156. The Bay TMDL is simply another step in a lengthy continuum of decisions and agreements developed in cooperation.<sup>46</sup>

Bay Program Partnership correspondence and meeting minutes, some of which are discussed below, provide detailed evidence of how the Bay Jurisdictions and EPA worked together to solve complex and unique problems related to Bay restoration and TMDL development. *See* JA 877-81 (summaries of selected TMDL Appendix C documents, JA 1527-59).<sup>47</sup> These documents establish that EPA and the Bay Jurisdictions embraced the CWA principle of cooperative federalism and did not grant EPA the extreme concentration of power as Appellants suggest. 33 U.S.C. §§ 1251(b) and (g) (discussed, below); *The Federalist* 17 (Alexander Hamilton). Moreover, these documents support the District Court's holding that while "cooperative federalism can be, at times, messy and cumbersome," nothing in this process violated the Clean Water Act. JA 62.

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<sup>46</sup> Maryland and Virginia had been resolving disputes over the management of shared resources, like the Bay, since the Virginia-Maryland Compact of 1785. CRC at 265. In 1970, Maryland, New York, Pennsylvania and Congress put the Susquehanna River Basin Compact into effect. *Id.* at 271.

<sup>47</sup> There were over 20 partnership committees and work groups that provided input into development of the Bay TMDL. JA 1527.

A. The Pollutant Load Allocations Were Set by the Bay Jurisdictions and EPA

Appellants contend that EPA set pollution load allocations for specific sources and sectors. Apl. Br. 9. EPA's participation in the development of those loads was not the one-sided affair they portray. As the United States notes, the TMDL development process was a cooperative partnership with the states fully participating in the development of the model and compromising on their respective allocations. US. Br. 14-15, 56.

The Bay Jurisdictions agreed in *Chesapeake 2000* to remove the Bay from the impaired waters list by 2010, reflecting the *American Canoe Ass'n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999), consent decree deadline and Maryland's memorandum of understanding with EPA. JA 226, 249, 271, 275. In 2003, the Chair of the PSC sent a memorandum to the committee and representatives of the "headwater" states (DE, NY, WVA) establishing pollutant cap loads for each. JA 272, 276-77. The Chair stated, "[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." JA 271 (emphasis added).

He further stated, "[t]he jurisdictions agreed that it is critical to work together to assure the aggregate of control actions recommended within the nutrient and sediment strategies yield the load reductions and the Bay and tidal



tributary water quality improvements desired.” *Id.* at JA 275. Thus, as early as 2003 the jurisdictions, not EPA, recognized the need for accountability measures in their implementation plans. Moreover, these were not edicts from EPA, but “comprehensive agreements made by the Bay watershed partners.” *Id.*

Various committee meetings were held over the following four years addressing numerous issues such as model improvements, the release date for the TMDL, and what kind of accountability would be required of the jurisdictions. JA 1528-31. The give-and-take between the states and federal government described in meeting minutes and correspondence establishes that several states, New York and Pennsylvania,<sup>48</sup> did not want to be a part of the TMDL and did not want fine scale allocations. Other states, Maryland and Virginia, did. JA 333-4; CBFSJA 34-58; 64; 78-87. Ultimately, all of the jurisdictions approved sub-basin allocations with specific designations for point sources and agreed to the TMDL. JA 962, 979, 1020, 1055, 1078, 1106.

The Bay Partnership PSC met on October 1, 2007, and reached the following decisions:

- The Bay watershed TMDLs will be developed jointly between the six Bay watershed states, the District and EPA and then established by EPA.
- The Water Quality Steering Committee will draft nutrient and sediment cap load allocations by tributary basin by jurisdiction. ...

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<sup>48</sup> *See, e.g.*, PA: “Reasonable assurance provisions shouldn’t apply to Pennsylvania since the state will not be included in the formal TMDL.”

- The Bay Jurisdictions would have responsibility for further assigning loads – waste load allocations (WLA) and load allocations (LA) – to sources consistent with EPA regulations and guidance.<sup>49</sup>
- These Bay Jurisdiction sub-allocations (WLA/LA) would become part of the overall Bay watershed TMDLs report.

JA 295; 1161. Thus, it was the jurisdictions which decided to jointly develop the Bay TMDL with EPA, to provide WLA and LAs for their respective sources, and to make these allocations part of the TMDL.

On August 22, 2008, the Chair of the PSC wrote to EPA stating that because the Bay Program “partners have agreed that we are not going to meet our Chesapeake 2000 commitment to delist the Chesapeake Bay and its tributaries from the 303(d) list of impaired waters by the year 2010, we are moving forward with a Baywide TMDL” by the end of 2010. CBFSJA 31.

B. The Bay Jurisdictions Agreed to Provide Reasonable Assurance That TMDL Goals Will be Met

Appellants argue that the WIPs should not have been associated with the TMDL, but again, the states recognized that without requiring state specific implementation there would be no assurance that Bay TMDL goals would be met. *See* CBFSJA 96 (“VA (Russ Perkins) – I don’t like the thought of separating WIP

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<sup>49</sup> The Bay Jurisdictions were interested in providing fine level allocations, *e.g.*, “Virginia is very interested and supportive of drilling down allocations to municipal or county level...” CBFSJA 82. Pennsylvania agreed to divide its total load “into a WLA and LA and have a plan to meet those allocations.” CBFSJA 84. Thus, it was the states, not EPA, which wanted to subdivide the loading allocations and to develop implementation plans that would succeed.

from the TMDL. ... NY – How can you decouple WIP from the TMDL? How would EPA know the numbers we give you are realistic? ....).

In 2003, the Bay Partners agreed to reevaluate the allocations in 2007 to ensure that they remained on course. JA 275. In 2006, Virginia agreed that it was “reasonable to expect that the states will include implementation plans as part of their TMDLs.” CBFSJA 7.

On June 19, 2008, the PSC re-appointed a “reasonable assurance” workgroup comprised of representatives from EPA and several states to discuss whether and how the concept could be incorporated into the Bay TMDL. CBFSJA 74. During its meetings, the workgroup members discussed whether EPA could require the states to provide reasonable assurance,<sup>50</sup> whether the states wanted to provide a higher degree of accountability in meeting TMDL goals, and whether there would be a third-party evaluator of state implementation plans. CBFSJA 88.

Because so much time and effort had been expended by the states addressing the problem of Bay pollution, the Jurisdictions determined that the concept would be incorporated into the TMDL. The states reasoned that the public needed to see that the Bay TMDL was not just a “paper exercise” with no firm deadline.

CBFSJA 81; 91.

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<sup>50</sup> Pennsylvania believed that reasonable assurance did not apply to it. CBFSJA 86.

In one meeting, EPA's representative observed that the states did not want EPA telling the states how to implement the TMDL, thus it was up to the states to describe in their WIPs how the goals would be achieved.<sup>51</sup> CBFSJA 80. Maryland noted that the "prior tributary strategy exercise just theoretically talked about how" gaps in allocations and implementation would be met but did not specify who would be responsible for filling the gaps. CBFSJA 81. The Workgroup agreed that there was a need to identify the consequences for not filling programmatic and resource gaps. CBFSJA 82. One of the consequences discussed for non-compliance was the imposition of greater regulatory control over point sources. However, the other jurisdictions agreed with Pennsylvania's observation that "it would be financially ludicrous and foolhardy to push even double the WLA reductions on [point sources] ... rather than calling for non-point source ... reductions. CBFSJA 85.

The Workgroup agreed that there was a need to:

- undertake a comprehensive evaluation of the ability of jurisdictions and federal agencies to implement the TMDL, CBFSJA 80;
- identify the gaps between necessary reductions and reductions that existing resources will produce, CBFSJA 81;
- provide a clear commitment to fill those gaps, *id.*;

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<sup>51</sup> The "tributary strategy" referenced in the meeting minutes later became the WIPs. CBFSJA 80.

- identify consequences for not filling programmatic and resource gaps, CBFSJA 82 and 85; and
- provide a time frame for filling those gaps; CBFSJA 84.

These were the Jurisdictions' recommendations for providing accountability and ensuring success, not EPA's.

C. The TMDL Target Dates Are Not Illegal

Appellants contend that EPA illegally required the Jurisdictions to attain the TMDL goals by 2017 and 2025. Apl. Br. 8, 11. The Bay TMDL is “designed to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017.” JA 1121, 1126. As the District Court held, the Bay TMDL does not set a mandatory compliance deadline. JA 73. The Bay Jurisdictions determined that a critical accountability measure was the establishment of interim and final deadlines for implementation of actions necessary to restore Bay water quality. JA 1128, 1161, 1356, 1359-63.<sup>52</sup>

Based upon the cited partnership discussions, it is apparent that the jurisdictions led the debate and resolved the question of whether the TMDL would provide local level allocations and whether their respective WIPs would provide assurance that the Bay TMDL goals would be met in a timely manner. Moreover,

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<sup>52</sup> During a Bay Partnership committee meeting a representative from Pennsylvania observed that a 2020 deadline was “fantasy” and pushed for 2025. JA 335.

the record disproves Appellants' argument that EPA illegally compelled the Bay Jurisdictions to provide reasonable assurance. The Jurisdictions, as the sovereigns Appellants proclaim, decided to shoulder that burden; not because EPA coerced them to, but because they recognized after 30 years of failure that it was the only way to ensure success. *See* 33 U.S.C. § 1267(g).

## **II. EPA Was Legally Authorized To Issue The Bay TMDL**

Despite Appellants' claims, EPA was authorized to issue the Bay TMDL by statute, interstate compact, judicial consent decree, a binding settlement agreement, and an Executive Order. Appellees agree with the arguments of the United States with respect to EPA's statutory authority. US Br. 35, 56. However, there are additional arguments supporting EPA's authority to issue the Bay TMDL.

### **A. By Statute**

Congress required EPA to ensure that TMDLs are developed to preserve water quality in our nation's waters. 33 U.S.C. § 1313(d). While states are required to develop TMDLs, 33 U.S.C. § 1313(d)(1)(C), if states fail to perform their duties, EPA is required to perform them. 33 U.S.C. §§ 1313(b), (d)(2); *Scott v. Hammond*, 741 F.2d 992, 998 (7th Cir. 1984).

Congress also directed EPA, in cooperation with the states, to develop a plan and begin its implementation to achieve the nutrient and water quality goals of the Bay Agreements. 33 U.S.C. §§ 1267(g)(1)(A) and (B).

B. By Consent Decree

All of the Bay Jurisdictions had failed to timely designate their impaired waters and develop TMDLs. Citizens sued EPA to develop TMDLs for D.C. and Virginia waters including its portion of the Bay. *Kingman Park Civic Assoc. v. United States*, 84 F. Supp. 2d 1 (D.D.C. 1999); *American Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 912 (E.D. Va. 1998).

EPA settled these lawsuits by entering into detailed consent decrees that set specific time frames for when EPA was to act if the state failed to designate impaired waters and develop TMDLs for those water bodies. *Kingman Park, supra*; *American Canoe, supra*, 54 F. Supp. 2d 621.<sup>53</sup> Pursuant to the Virginia decree, if the Commonwealth failed to develop a TMDL for its portion of the Bay by May 2010, EPA was to do so by May 2011. JA 226-48. As explained above, Virginia did not meet this deadline. On June 19, 2008, Virginia's Secretary of Natural Resources, as a member of the PSC, asked EPA to develop the Bay TMDL by 2010. JA 313. Thus, in developing the Bay TMDL, EPA did nothing more than comply with a judicial order and respond to the Bay Jurisdictions' request. *See* 33 U.S.C. § 1251(g).

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<sup>53</sup> Maryland entered into a memorandum of understanding with EPA to develop impaired waters lists and TMDLs including its portion of the Bay. JA 211.

C. By Interstate Compact

EPA signed all of the Chesapeake Bay Agreements on behalf of the United States. The 1987 Agreement required a 40% reduction in nutrient loads to the Bay. JA 137. *Chesapeake 2000* required pollution reductions sufficient to remove the Bay from the CWA impaired waters list by 2010. JA 249. Those agreements were interstate compacts ratified by Congress in Section 117 of the CWA. 33 U.S.C. § 1267. Thus, EPA was obligated by law to develop the Bay TMDL with the states.

D. By Settlement Agreement

CBF and others sued EPA in 2009 alleging that the agency had failed to comply with the terms of the Chesapeake Bay Agreements. EPA settled the lawsuit by agreeing to, among other things, issue a Bay TMDL by December 30, 2010. *Fowler v. EPA*, No. 09-005 (D.D.C. May 11, 2010). CBFSJA 103.

E. By Executive Order

On May 15, 2009, President Obama issued Executive Order 13508 – Chesapeake Bay Protection and Restoration. 74 Fed. Reg. 23,099. Developing a TMDL for the Bay was a “keystone commitment of the federal strategy to meet” the obligations of the Executive Order. JA 1106, 1162.

Thus, in addition to the requirements of the CWA and existing case law, EPA was obligated to develop the Bay TMDL in four other ways.



### **III. The States May Ask EPA For Assistance Developing A TMDL**

Appellants opine that the Bay Jurisdictions cannot decide to work with EPA to develop a plan for restoring the Bay. Apl. Br. 52-53. Curiously, Appellants cite with the approval the Bay Jurisdiction Tributary Strategies that were developed with EPA using an earlier version of the Chesapeake Bay Watershed Model, the same model used to develop the Bay TMDL pollutant load allocations. Apl. Br. 5-7. There is no logic to the argument that the states and federal government could develop models, set load allocations and devise implementation strategies calling them Tributary Strategies, but could not agree that a better strategy was to follow the TMDL rubric. Nor is there a legal impediment to the States working with EPA to develop pollutant load allocations for their respective rivers and streams that feed the Bay. *See* Tenth Amendment, 33 U.S.C. §§ 1251(b) and (g).

Appellants suggest that the states could not seek EPA's assistance in developing TMDL pollutant load allocations or proscribe pollutant loadings from upstream states. Apl. Br. 52. Appellants are mistaken.

First, the two cases they cite in support are inapposite. Apl. Br. 53. The cases concern matters of federal statutory preemption and do not address the question of whether states are free to work with the United States to reduce interstate water pollution.

Second, the Constitution provides that all powers not granted to the federal government or prohibited to the States are reserved to the States, or the people.

Tenth Amendment. Nothing in the Constitution prohibits the States from seeking federal assistance to resolve water resource concerns.

Third, Appellants rely heavily on CWA Section 101(b) in support of their contention that EPA acted illegally in assisting the states in developing the Bay TMDL. Apl. Br. 14, 29, 34, 39, 44, 48, 50, 52. The section provides:

[i]t is the policy of Congress to recognize the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b)(emphasis added). Thus, the very section they cite establishes the right of the Bay Jurisdictions to consult with EPA. In addition, Congress required the EPA Administrator to work cooperatively with the states to develop and implement plans to achieve the goals of the Bay Agreement. 33 U.S.C. § 1267(g).

Thus, nothing in the Act prohibits the states from seeking EPA's assistance in the development of a TMDL. Moreover, EPA routinely works with states in the

development of TMDLs. *See, e.g.,* Columbia/Snake Rivers Mainstem TMDL Fact Sheet, April 7, 2001.<sup>54</sup>

## CONCLUSION

Based upon the above, the Brief in Opposition submitted by the United States, and the Briefs *Amicus Curiae* submitted in support of the Bay TMDL, the Court should affirm the decision of the District Court.

Respectfully submitted,

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<sup>54</sup> <http://yosemite.epa.gov/r10/water.nsf/af6d4571f3e2b1698825650f0071180a/c0407629f46c7acc88256a3000735a02!OpenDocument>

## COMBINED CERTIFICATIONS

I, Jon A. Mueller, hereby certify:

1. That this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

3. Pursuant to Local Rule 46.1, that Jon A. Mueller is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

4. That text of the electronic brief is identical to the text in the paper copies.

5. That a virus detection program (McAfee VirusScan Enterprise, Version 8.7i) has been run on the electronic file and no virus was detected.

Dated: April 21, 2014

/s/ Jon A. Mueller  
Jon A. Mueller

### **CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that the Response Brief and Supplemental Joint Appendix of Defendants Intervenors-Appellees Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and National Wildlife Federation were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 21, 2014

/s/ Jon A. Mueller  
Jon A. Mueller