**No. 13-4079**

In The
United States Court of Appeals
For The Third Circuit

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AMERICAN FARM BUREAU
FEDERATION, *et al.*,

*Plaintiffs-Appellants*,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Defendants-Appellees*.

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**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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# BRIEF FOR *AMICI CURIAE* LAW PROFESSORS CRAIG N. JOHNSTON, *et al.* IN SUPPORT OF AFFIRMANCE

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# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ... ii

INTEREST OF *AMICI CURIAE* ... 1

SUMMARY OF ARGUMENT ... 1

ARGUMENT ... 2

I. The Farm Bureau Fails to Understand the Underpinnings and Rationale of the Cooperative Federalism Model, and the Implications of CWA Section 303's Use of that Model ... 2

A. CWA Section 303 is Based on a Model of Cooperative Federalism that is Well-Established in Environmental Law ... 3

B. The Farm Bureau Wrongly Discounts the Federal Interests in This Case ... 7

C. Where Congress Has Commerce Clause Authority, it May Use the Conditional Preemption Model of Cooperative-Federalism Without Violating the Tenth Amendment ... 17

D. This Court Should Not Apply Any "Plain Statement" or "Avoidance" Canons in Interpreting Section 303(d) ... 20

II. EPA's Rules Interpreting Section 303(d) Should Be Afforded Deference ... 23

CONCLUSION ... 28

ADDENDUM (Description of *Amici Curiae*) ... A-1

# TABLE OF AUTHORITIES

Page(s)

**CASES**

*Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency*,
No. 1:11-cv-0067, 2013 WL 5177530 (M.D. Pa., Sept. 13, 2013) ............. 26

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ................................................. 4, 6, 11

*Auer v. Robbins*, 519 U.S. 452 (1997) ................................................................ 27

*B.H. v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) ....................... 13

*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)..... 25

*E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977)............................ 9

*Genon Rema, LLC v. U.S. Envtl. Prot. Agency*, 722 F.3d 513 (3d Cir. 2013) ......... 7

*Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*,
452 U.S. 264 (1981) ........................................................................... *passim*

*Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).................................................... 3

*Lopez v. Davis*, 531 U.S. 230 (2001) .................................................................... 24

*Marks v. United States*, 430 U.S. 188 (1977) ....................................................... 13

*Morse v. Frederick,* 551 U.S. 393 (2007)............................................................ 13

*N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) ............ 14

*Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*,
859 F.2d 156 (D.C. Cir. 1988)................................................................ 15, 16

*New York v. United States*, 505 U.S. 144 (1992)................................................ 3, 4

*Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) ............... 22

*Petersburg Cellular Partnership v. Board of Sup'rs of Nottaway Cnty.*,
205 F.3d 688 (4th Cir. 2000) .......... 4

*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) .......... 5, 26

*Rapanos v. United States*, 547 U.S. 715 (2006) .......... *passim*

*Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*,
531 U.S. 159 (2001) .......... 3, 11, 12, 21

*United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) .......... 6

*United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) .......... 14

*United States v. Bass,* 404 U.S. 336 (1971) .......... 21

*United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) .......... 14

*United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011) .......... 13

*United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) .......... 14

*United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) .......... 14

*United States v. Pozgai*, 999 F.2d 719 (3d Cir. 1993) .......... 20

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) .......... 10, 12

*United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007) .......... 14

**STATUTES**

30 U.S.C. § 1265(d) .......... 6

30 U.S.C. § 1265(e) .......... 6

33 U.S.C. § 1251(a) .......... 8

33 U.S.C. § 1251(b) .......... 8

33 U.S.C. § 1251(d) ........ 8

33 U.S.C. § 1311(b)(1)(A) ........ 9

33 U.S.C. § 1311(b)(1)(C) ........ 27

33 U.S.C. § 1313 ........ 5

33 U.S.C. § 1313(a) ........ 5

33 U.S.C. § 1313(c) ........ 5

33 U.S.C. § 1313(d) ........ 5

33 U.S.C. § 1313(d)(1) ........ 23

33 U.S.C. § 1313(d)(1)(C) ........ 24

33 U.S.C. § 1313(d)(2) ........ 23, 24

33 U.S.C. § 1319 ........ 27

33 U.S.C. § 1329 ........ 4

33 U.S.C. § 1329(h)(1) ........ 4

33 U.S.C. § 1342 ........ 5

33 U.S.C. § 1342(b) ........ 5

33 U.S.C. § 1342(c) ........ 5

33 U.S.C. § 1342(d) ........ 5

33 U.S.C. § 1342(d)(2) ........ 27

33 U.S.C. § 1361(a) ........ 23

33 U.S.C. § 1362(7) ........ 11

42 U.S.C. § 6926(a) ........................................................................................ 5

42 U.S.C. § 6926(b) ........................................................................................ 5

42 U.S.C. § 6926(e) ........................................................................................ 5

42 U.S.C. § 7410(a) ........................................................................................ 5

42 U.S.C. § 7410(c)(1) ..................................................................................... 5

42 U.S.C. § 7410(k) ........................................................................................ 5

42 U.S.C. § 7661a(b) ...................................................................................... 5

42 U.S.C. § 7661a(d) ...................................................................................... 5

**REGULATIONS**

40 C.F.R. § 130.2(i) ....................................................................................... 25

40 C.F.R. § 122.4(d) ...................................................................................... 27

40 C.F.R. § 122.44(d) .................................................................................... 27

**OTHER AUTHORITIES**

50 Fed. Reg. 1773 (Jan. 11, 1985) ................................................................ 25

Fed. R. App. P. 29(a) ....................................................................................... 1

Fed. R. App. P. 29(c)(5) ................................................................................... 1

R. Seth Davis, Note, Conditional Preemption, Commandeering, and the
Values of Cooperative Federalism: An Analysis of Section 216 of EPAct,
108 Colum. L. Rev. 404 (2008) ................................................................. 4

EPA, Guidance for Water Quality-Based Decisions:
The TMDL Process (1991) ......................................................................... 26

## INTEREST OF AMICUS CURIAE[1]

*Amici* are professors of environmental, administrative, and constitutional law. *Amici* have a long-standing interest in the proper interpretation of environmental statutes, such as the Clean Water Act. Collectively, *Amici* have spent decades interpreting, teaching, and writing about the Clean Water Act and the cooperative federalism scheme central to its implementation. Several *Amici* are professors of constitutional law and have particular expertise regarding the federalism and Tenth Amendment questions raised by Appellants and their *amici*. *Amici* also teach the administrative law and the statutory interpretation principles at issue in this case. A further description of the *Amici* is set forth in an Addendum to this brief.

## SUMMARY OF ARGUMENT

This case involves a straightforward application of the principles of cooperative federalism and deference to agency interpretations of the statutes and regulations they administer. The American Farm Bureau Federation, *et al*. ("Farm

[1] Pursuant to Fed. R. App. P. 29(a), *Amici* may file this brief because all parties have consented to its filing. Appellants do not oppose the filing of this amicus brief on the condition that *Amici* inform the court that Appellants may seek leave for an expanded word limit in their reply brief to respond to the multiple Intervenor and amicus briefs filed in support of Appellee. Pursuant to Fed. R. App. P. 29(c)(5), counsel for *Amici* states that no party's counsel authored this brief in whole or in part, no party and no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amici* or counsel contributed money that was intended to fund preparing or submitting this brief.

Bureau") casts this case as both an unprecedented and impermissible intrusion on the States' right to control land-use matters. It is neither. The Supreme Court has long recognized that Congress can use the cooperative federalism model at issue in this case where land use issues touch on Commerce Clause concerns.

Given the clear federal interests at stake in this case, this Court should interpret the relevant Clean Water Act ("CWA") provisions in a way that will enable the federal and state actors to jointly regulate in this zone of jurisdictional overlap without compromising federal statutory obligations regarding our nation's waters. The Court can do this by affording EPA's interpretations of the relevant statutory and regulation provisions the deference to which they are due.

## ARGUMENT

### I. The Farm Bureau Fails to Understand the Underpinnings and Rationale of the Cooperative Federalism Model, and the Implications of CWA Section 303's Use of that Model

The Farm Bureau downplays the role that the well-established principles of cooperative federalism should play in this case. It does this in four, related ways. First, it ignores the extent to which courts, including both the Supreme Court and this Court, have embraced the dynamics of cooperative federalism partnerships. Second, it repeatedly characterizes the nonpoint source issues in this case as involving only land use concerns, which in its view should be the sole province of the States; in so doing, it wrongly discounts the federal interest in the quality of our

nation's waters. Third, it omits *any* substantive discussion of *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) ("*Hodel*"), the Supreme Court's leading case addressing the intersection of federal power, the States' traditional land use powers, and the Tenth Amendment, which arose in the context of a statute using the same cooperative federalism model here at issue. And fourth, it erroneously relies on *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), and the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), for the proposition that courts should interpret Section 303 narrowly due to its potential impact on State powers and its perceived constitutional doubt. In total, the Farm Bureau's arguments fail to account for the rationale of the cooperative federalism model and its implications for CWA Section 303 and this case.

### A. CWA Section 303 is Based on a Model of Cooperative Federalism that is Well-Established in Environmental Law

As the Supreme Court repeatedly has recognized, the CWA employs a system of cooperative federalism, pursuant to which the Federal Government and the States share responsibility for protecting our nation's waters. *See New York v. United States*, 505 U.S. 144, 167 (1992) ("This arrangement, which has been termed 'a program of cooperative federalism,' is replicated in numerous federal statutory schemes[, including the CWA]") (quoting *Hodel*, 452 U.S. at 288); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) ("The [CWA] … establishes a

regulatory 'partnership' between the Federal Government and the source State"); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The [CWA] anticipates a partnership between the States and the Federal Government ….").

Cooperative federalism refers to the collaboration between the federal and state governments to achieve federal statutory objectives. Cooperative federalism statutes usually utilize one of two forms. In its more intrusive form, sometimes referred to as "conditional preemption,"[2] Congress may offer States a choice between implementing a program pursuant to federal standards and having state law pre-empted through direct federal control. *See*, *e.g.*, *Hodel*, 452 U.S. at 288–289. Alternatively, Congress may seek to induce a State to take particular action by conditioning the receipt of federal funds on the adoption or implementation of a federal program; under this form, States can avoid the federal requirements entirely if they are willing to forgo the relevant monies. *See New York v. United States*, 505 U.S. at 167.[3]

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[2] *See*, *e.g.*, R. Seth Davis, Note, Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct, 108 Colum. L. Rev. 404 (2008); and *Petersburg Cellular Partnership v. Board of Sup'rs of Nottaway Cnty.*, 205 F.3d 688, 702 (4th Cir. 2000).

[3] Section 319 is an example of a CWA provision that uses the alternative model of cooperative federalism. 33 U.S.C. § 1329. Under that provision, States identify the need for and develop programs to manage nonpoint source pollution. While EPA may condition federal funding on the successful development and implementation of these programs, *Id.* § 1329(h)(1), it has no other recourse if the State chooses not to act.

The CWA uses a blend of these two approaches. As pertinent here, two of its most central provisions, Sections 303 (relating to the establishment and implementation of water quality standards) and Section 402 (relating to the National Pollution Discharge Elimination System ("NPDES") permit program) rely either primarily or exclusively on the conditional preemption model. 33 U.S.C. §§ 1313 and 1342. This case, of course, involves Section 303.[4] Section 303 affords States the initial opportunity to set their own water quality standards, to identify their own impaired waters, and to establish their own total maximum daily loads ("TMDLs"). Importantly, with respect to TMDLs, if any such submittal does not meet the requisite standards, EPA must step in and take over the development of the TMDL. 33 U.S.C. § 1313(a), (c), and (d); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002) (noting these same dynamics).

The conditional preemption model is widely used in federal pollution control statutes. In addition to using it in Sections 303 and 402 of the CWA, for example, Congress employed the same dynamics under the Resource Conservation and Recovery Act, *see* 42 U.S.C. §§ 6926(a), (b), and (e), in both the State Implementation Plan ("SIP") and Title V Permit programs under the Clean Air Act, *see* 42 U.S.C. §§ 7410(a), (c)(1), and (k), 7661a(b) and (d), and under the

[4] For the NPDES program, *see* 33 U.S.C. § 1342(b), (c), and (d), regarding the submission for approval of both the State permit programs and individual permits.

Surface Mining Control and Reclamation Act ("SMCRA"), *see*, *e.g.*, 30 U.S.C. §§ 1265(d) and (e).

The courts have embraced these relationships. Most significantly, as discussed more fully in Section I.C, below, the Supreme Court in *Hodel* upheld SMCRA's use of the conditional preemption model against a multi-pronged constitutional attack. *Hodel*, 452 U.S. at 275–304. Additionally, specifically in the context of the CWA, in *Arkansas v. Oklahoma* the Supreme Court noted that "[t]he [CWA] contemplates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" 503 U.S. at 101 (quoting 33 U.S.C. § 1251(a)). Building on this, Justice White soon noted that:

> Even when a State obtains approval to administer [the NPDES] permitting system [under the CWA], the Federal Government maintains an extraordinary level of involvement. EPA reviews state water quality standards. It retains authority to object to the issuance of particular permits, to monitor the state program for continuing compliance with federal directives, and even to enforce the terms of state permits when the State has not instituted enforcement proceedings.

*United States Dept. of Energy v. Ohio*, 503 U.S. 607, 634 (1992) (J. White, dissenting) (citations omitted).

This Court recently recognized that these dynamics apply under the Clean Air Act. After first pointing out that States must submit their SIPs to EPA for

review and approval, this Court summarized this process and its potential outcomes as follows:

> If the EPA approves the SIPs, they become enforceable as federal law. If the EPA finds that a SIP is inadequate …, the EPA issues a "SIP call" requiring the state to submit a revised SIP to correct the inadequacies. The EPA may also promulgate a Federal Implementation Plan ("FIP") to establish direct federal controls on sources of air pollution if the EPA disapproves a SIP in whole or in part, or finds that a state has failed to submit either a SIP or SIP revision.

*Genon Rema, LLC v. U.S. Envtl. Prot. Agency*, 722 F.3d 513, 516 (3d Cir. 2013) (citations and footnote omitted).

Though the Farm Bureau concedes that the CWA brings certain minimal attributes of the conditional preemption model of cooperative federalism into play (*see*, *e.g.*, Brief of Plaintiff-Appellant American Farm Bureau, *et al*, at 19, American Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency, No. 1:11-cv-00067 (3d Cir. Jan. 27, 2014) ("Pl. Br.")), it improperly minimizes the implications of this cooperative scheme, focusing on what it perceives to be the States' traditional dominion over land use issues and never even mentioning the strong federal interest in maintaining the quality of our nation's waters.

### B. The Farm Bureau Wrongly Discounts the Federal Interests in This Case

CWA Section 101(a) speaks in sweeping terms about the Act's goals and policies. Its prefatory clause highlights the Act's overarching objective to "restore

and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 101(a) then specifies several subsidiary goals, three of which are particularly pertinent here:

> (1) it is the national goal that the discharges of pollutants into the navigable waters be eliminated by 1985;
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983; … and
> (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

*Id.*

Section 101(a) is followed by two other subsections of note, which are arguably in some tension with each other. First, Section 101(b) declares Congress' intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use … of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). And second, Section 101(d) provides that "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] shall administer this chapter." *Id.* § 1251(d).

Tellingly, the Farm Bureau never quotes from either Section 101(a) or Section 101(d). Instead, it presents this case entirely through the lens of Section

101(b), as if Congress' intent to preserve the States' authority to control land use was its foremost concern. As the Supreme Court repeatedly has recognized, this is a misleading portrayal.

The Supreme Court first addressed the relative roles of EPA and the States in administering the CWA in *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977) ("*du Pont*"). In that case, the Court analyzed whether Section 301(b)(1)(A) authorizes EPA to set certain uniform, nationally-applicable effluent limitations for categories of industry–an issue upon which the statute was silent, merely indicating that the standards were "[to] be achieved … not later than July 1, 1977…." 33 U.S.C. § 1311(b)(1)(A). The petitioners argued that EPA had no authority to set nationally-applicable regulations, and that they should instead be set by permit issuers–typically the States–in issuing individual permits. 430 U.S. at 124.

The Supreme Court disagreed, determining that EPA could set the standards. In so doing, it relied on both structural dynamics and legislative history stressing the importance of uniform standards. *Id.* at 126–132. Tellingly, the Court never mentioned Section 101(b), but instead referenced Section 101(d), which charges EPA with administering the Act, and Section 501(a), which gives EPA the power to promulgate "such regulations as are necessary to carry out" the Act. *Id.* at 132 (quoting 33 U.S.C. § 1361(a)).

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("*Riverside Bayview*"), the Supreme Court again shed light on the federal and State interests under the statute. In that case, the Court addressed the propriety of the U.S. Army Corps of Engineers' assertion of jurisdiction under the Act over wetlands that are adjacent to navigable waters–an assertion that implicated the States' traditional land use powers. *Id.* at 134. In resolving the issue, the unanimous Court highlighted the statute's ambiguity, noting that the "point at which the water ends and land begins" is "far from obvious." *Id.* at 132. It then found that the Corps was justified in resolving this ambiguity in accordance with Section 101(a)'s goal of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." *Id*. (quoting 33 U.S.C. § 1251). Relying in part on legislative history, the Court noted that the "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." *Id.* at 132–133 (internal quotation and citations omitted). Notably, as in *du Pont*, the Court in *Riverside Bayview* never mentioned Section 101(b).

The Supreme Court's 1992 opinion in *Arkansas v. Oklahoma* is also instructive. After first determining that EPA reasonably could interpret the CWA to require permit-issuers in upstream States to ensure permits meet the water

quality standards of downstream States, 503 U.S. at 105–107, the Court considered whether it should defer to EPA's or Oklahoma's interpretation of an Oklahoma water quality standard. *Id.* at 107–111. The Court concluded that EPA's interpretation should control, finding that the federal interests were paramount:

> [S]tate water quality standards—promulgated by the States with substantial guidance from the EPA and approved by the Agency—are part of the federal law of water pollution control. Two features of the body of law governing water pollution support this conclusion. First, … we have long recognized that interstate water pollution is controlled by *federal* law. Recognizing that the system of federally approved state standards as applied in the interstate context constitutes federal law is wholly consistent with this principle. Second, treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing EPA to create and manage a uniform system on interstate water pollution regulation.

*Id.* at 110 (footnotes and citations omitted) (emphasis in original).

Rather than discussing the Supreme Court's clear endorsements of the CWA's focus on federal interests, the Farm Bureau cites *SWANCC* for the proposition that preserving the States' traditional powers over land use should control the analysis. Pl. Br. at 43–45, 48. This reliance is misplaced. *SWANCC* dealt with the Corps' jurisdiction over "nonnavigable, isolated, intrastate waters…." *SWANCC*, 531 U.S. at 172. The question was whether the isolated ponds at issue in that case were "water[s] of the United States," and therefore "navigable waters" within the meaning of Section 502(7), 33 U.S.C. § 1362(7). The Court concluded they were not, distinguishing *Riverside Bayview* as a case in

which there was a "significant nexus between the wetlands and 'navigable waters.'" *Id.* at 167.

The result in *SWANCC* was based on the Court's determination that there was no evidence that Congress, in enacting the CWA, "intended to exert anything more than its commerce power over navigation." *Id.* at 168, n.3. Thus the Court declined to read the phrase "waters of the United States" in a way that would render the navigability concept meaningless. *Id.* at 172. In the context of "isolated waters" having no connection to navigation, and in the absence of any Congressionally-recognized federal purpose in those waters, it is hardly surprising that the Court was loath to interpret the statute as "permitting federal encroachment upon a traditional state power." *Id.* at 173. This stands in marked contrast with the Court's earlier decision in *Riverside Bayview*, in which, as discussed, the Court relied on the federal interest in protecting navigable waters in the context of upholding the Corps' jurisdiction over wetlands adjacent thereto, despite a similar intrusion on State power. *Riverside Bayview*, 474 U.S. at 132.

The Supreme Court's more recent jurisprudence in *Rapanos* sheds further light on the relationship between *Riverside Bayview* and *SWANCC*. As this Court has noted, *Rapanos* resulted in a fractured opinion, the upshot of which is that, with regard to wetlands that are adjacent to non-navigable tributaries that ultimately feed into navigable water, courts should find CWA jurisdiction in all

cases in which *either* Justice Kennedy or the plurality would find that jurisdiction is satisfied. *United States v. Donovan*, 661 F.3d 174, 182–183 (3d Cir. 2011) ("*Donovan*").[5]

In practical effect, this Court's approach in *Donovan* means that the logic supporting jurisdiction in either the plurality's or Justice Kennedy's opinion in *Rapanos* is, in effect, the logic of the Court; as noted above, *supra*, n. 5, the four dissenters in *Rapanos* explicitly embraced the pro-jurisdictional elements of each opinion.[6] The key point here is that Justice Kennedy rejected the plurality's emphasis on protecting State prerogatives, noting that "[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in

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[5] The crux of this Court's logic in *Donovan* was that in *Rapanos* "neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other," thus making unworkable a strict application of the approach the Supreme Court had established for interpreting fractured opinions in *Marks v. United States*, 430 U.S. 188 (1977). *Donovan*, 661 F.3d at 182. However, the Court noted that, in similar situations, it previously had "looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue." *Id.* (citing *United States v. Richardson*, 658 F.3d 333, 340 (3d Cir. 2011)). In applying this approach to *Rapanos*, this Court relied on Justice Stevens' explicit statement, on behalf of the dissenters, that "'all four [dissenting] Justices … would uphold the Corps' jurisdiction in [all cases] in which either the plurality's or Justice Kennedy's test is satisfied.'" *Id.* at 183 (quoting *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) (footnotes omitted)).

[6] *Cf.*, *B.H. v. Easton Area School District*, 725 F.3d 293, 310 (3d Cir. 2013) (*en banc*) ("*Easton Area School District*") (deeming Justice Alito's concurring opinion to be the controlling opinion in *Morse v. Frederick*, 551 U.S. 393 (2007), even though it was signed by only one other Justice, and even though those two Justices had joined in the five-member majority opinion).

particular." 547 U.S. at 777 (Kennedy, J., concurring). In that same vein, Justice Kennedy found that the limits the plurality would have imposed gave "insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate." *Id.* at 778. And he specifically dismissed the notion that Section 101(b)'s reference to preserving the States' "responsibilities and rights" should override the CWA's otherwise clear focus on protecting waters, noting that "the Act protects downstream States from out-of-state pollution that they cannot themselves regulate." *Id.* at 777.[7]

*Rapanos* is thus consistent with a long line of Supreme Court cases recognizing the important federal interests that Congress sought to protect in enacting the CWA. In cases in which there has been some tension between Section 101(a)'s expression of the federal goals and Section 101(b)'s nod to residual State

[7] Every single Circuit that has interpreted *Rapanos* has determined that jurisdiction should obtain whenever Justice Kennedy's test is met. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), and *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (both reaching the same result as in *Donovan*); *United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); and *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (all determining that jurisdiction should exist *only* in situations in which Justice Kennedy's test is met); and *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) (declining to decide which test was controlling under *Marks* because government jurisdiction over the relevant wetlands was proper under either Justice Kennedy's or the plurality's test). Importantly, none of these Circuits has deemed the plurality opinion in *Rapanos* to have *any* significance, in terms of limiting jurisdiction, in situations in which Justice Kennedy's test is met.

roles, the Court has favored the former over the latter. The only even arguable exception to this rule was in *SWANCC*. As indicated above, however, *SWANCC* is best understood as a case in which there was no Congressionally-expressed federal purpose at all, because the relevant waters bore no relationship to what the Court perceived to be Congress' sole concern: protecting navigable waters and the waters that feed into them.

The lower courts also have been reluctant to elevate the Act's recognition of a continuing State role over the statutorily-identified federal interests. For example, the D.C. Circuit dealt with a challenge to an EPA rule under which EPA reserved the power to veto a State-issued NPDES permit if it disagrees with the State's "best professional judgment" regarding what limits to impose when EPA has not yet established nationally-applicable limitations for a category of dischargers. *NRDC v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 182–183 (D.C. Cir. 1988) ("*NRDC*"). In that case, industrial challengers argued that, given the statute's reservation of State powers, EPA's veto authority should be limited to situations in which State-issued permits are inconsistent with nationally-promulgated guidelines. *Id.* at 183.

While noting that there could be "no reasonable doubt" that Congress intended for the States to "play the primary role in administering the Act," the court still deferred to EPA, concluding that

> [T]he general, pro-federalism thrust of the statutory regime does not manifest itself in the legislative history in helpfully specific ways as to the issue at hand: whether in the absence of formally promulgated effluent limitations guidelines, EPA can veto state permits on the basis of inadequate effluent limits.

*Id.* at 184. In the absence of such an indication, the court gave greater weight to EPA's concern that, absent the veto authority, States could undermine the Act with regard to those industries for which EPA had yet to set effluent standards:

> Under Industry's view, … until EPA has promulgated national guidelines …, the agency is powerless to supplant a state permitting authority's judgment of whether a particular permit meet the technology-based standards.… States would be able (under Industry's view) to approve permits that plainly violate section 1311(a)—the Act's bedrock prohibition of pollutant discharges—and the federal authority must nonetheless stand helplessly aside, awaiting the uncertain coming of national effluent limitation guidelines. *Cf.*, S. Beckett, *Waiting for Godot*.
>
> This is the sort of situation (although admittedly stated in the extreme) that the Act's veto provision, by its very nature, was designed to address. *EPA persuasively argues that, although the States are to play a large role in administering the Act, section 1342(d)'s veto authority provides considerable evidence that Congress intended federal minima (even if crafted on the basis of BPJ) to take precedence. In short, the several States are to be centrally involved in the Act's administration, but their involvement is supposed to be in the achievement of federal goals….*

*Id.* at 185–186 (emphasis added).

In sum, both the Supreme Court and lower courts repeatedly have recognized the federal interests in protecting our nation's waters. This Court should reject the Farm Bureau's invitation to allow concerns regarding the States'

traditional control over land use to trump EPA's clear statutory authority to issue a TMDL for the Chesapeake Bay.

### C. Where Congress Has Commerce Clause Authority, it May Use the Conditional Preemption Model of Cooperative-Federalism Without Violating the Tenth Amendment

In addition to ignoring the above-mentioned CWA jurisprudence, the Farm Bureau ignores the Supreme Court's seminal *Hodel* decision. In *Hodel*, the Court dealt with a challenge to SMCRA, a statute requiring the reclamation of mining sites. SMCRA uses the same conditional preemption model of cooperative federalism at issue here. The Supreme Court described these dynamics most fully in discussing a portion of the statute mandating the reclamation and maintenance of "steep slopes:"

> [T]he steep-slope provisions of [SMCRA] govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. The most that can be said is that [SMCRA] establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs….

*Hodel*, 452 U.S. at 289 (citations omitted); *see also id.* at 270–271 (describing the same approach elsewhere under SMCRA). The Court went on to note the similarity of these dynamics to those employed by Congress in both the CWA and the Clean Air Act. *Id.* at 289, n. 30 (and accompanying text).

The challengers attacked SMCRA and its reliance on cooperative federalism on four grounds, the first two of which are relevant here.[8] They first argued that the Court should not apply its "rational basis" test under the Commerce Clause because SMCRA regulates land use, which they viewed as being purely a matter of local concern. *Id.* at 280–281. The Court was willing to assume that the challengers "correctly characterize[d] the land use regulated by [SMCRA] as a 'local' activity." *Id.* at 281. Despite this, the Court, in a unanimous opinion, rejected their argument, applying the "rational basis" test and relying on Congress' findings regarding surface mining's destructive effects on the relevant lands and nearby rivers. *Id.* at 276–283. The Court further noted that "[t]he denomination of an activity as a 'local' or 'instrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause." *Id.* at 281. The Court further supplemented its analysis by stating that it agreed "with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water

[8] The Court also rejected challenges based on the "takings" and "due process" clauses of the Fifth Amendment. *Id.* at 293–304.

pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282.

The challengers' second argument in *Hodel* raised a more particularized challenge to SMCRA's use of the cooperative federalism model in the "steep slope" context, arguing that it contravened the Tenth Amendment because the approach "interfere[d] with the States' traditional governmental function of regulating land use." *Id.* at 284–285 (quotation omitted). In particular, the challengers argued that "the threat of federal usurpation of [the States'] regulatory roles [inherent in the cooperative federalism structure] coerce[d] the Sates into enforcing" SMCRA. *Id.* at 289. The unanimous Court was not persuaded:

> A wealth of precedent attests to congressional authority to displace or pre-empt states laws regulating private activity affecting interstate commerce when these laws conflict with federal laws. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all–and not just inconsistent–state regulation of such activities. Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result….
>
> Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why [SMCRA] should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.

*Id.* at 290 (citations omitted).

*Hodel* makes clear that the Tenth Amendment poses no barrier to Congress' use of the conditional preemption model of cooperative federalism where Congress

has the power to act under the Commerce Clause. Neither the Farm Bureau nor its *amici* raises any direct challenge to Congress' authority to regulate the Chesapeake Bay and its tributaries.[9] Nor could they. As a traditionally navigable water, the Bay itself fits comfortably within Congress' power to protect the channels of interstate commerce. *Cf.*, *Rapanos*, 547 U.S. at 782–783 (Kennedy, J., concurring) (citing, *inter alia*, *Oklahoma ex rel. Philips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–526 (1941)).[10] Here, as in *Hodel*, the cooperative federalism model does not run afoul of the Tenth Amendment.

### D. This Court Should Not Apply Any "Plain Statement" or "Avoidance" Canons in Interpreting Section 303(d)

The Farm Bureau and, to a greater extent, its *amici* argue that this Court should find plain meaning based at least in part on interpretive protocols disfavoring certain interpretations. The Court should reject these entreaties. Although the Farm Bureau does not invoke the "plain statement" canon by name, its does quote from that portion of *SWANCC* in which Chief Justice Rehnquist, writing for the Court, applied the canon in disfavoring an interpretation it

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[9] The *amici* States do allude to perceived Commerce Clause issues in their constitutional avoidance argument. Brief of the States of Kansas, *et al.* at 24, American Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency, No. 1:11-cv-00067 (3d Cir. Jan. 27, 2014) ("Kansas Br.").

[10] This Court has recognized that Congress' Commerce Clause authority extends not only to the tributaries that feed into these channels, but also to wetlands adjacent to those tributaries. *United States v. Pozgai*, 999 F.2d 719, 731–733 (3d Cir. 1993).

determined would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." Pl. Br. at 44, quoting *SWANCC*, 531 U.S. at 173.[11] The Farm Bureau's *amici* expand on this argument by urging this Court to narrowly interpret Section 303 in the name of avoiding what they perceive to be serious Constitutional issues relating to both the Commerce Clause and the Tenth Amendment. Kansas Br., pp. 22–28.

The Farm Bureau's plain statement argument is belied by the many Supreme Court cases discussed above, from *du Pont* to *Rapanos*, which have applied normal interpretive protocols, including principles of deference, to CWA issues, even where those issues have had the potential to affect the States' traditional land use powers. Here also, *SWANCC* is the only outlier. Thus, the lesson of these cases is clear: where there are clear federal interests expressed in a statute, courts should not resolve issues arising thereunder in an unduly narrow fashion simply because Congress has chosen to exercise its power in a way that may restrict the States' traditional powers.

The *amici* States' arguments regarding constitutional avoidance are even more specious. First, as previously mentioned, there can be no serious doubt that Congress can protect the Chesapeake Bay and the waters feeding into it. *See, e.g.*,

[11] *SWANCC* derived this proposition from *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

*Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–526 (1941). Moreover, as also mentioned above, in *Hodel*, the Supreme Court specifically held that, wherever the Commerce Clause is satisfied, Congress may use the conditional preemption model of cooperative federalism without violating the Tenth Amendment. *See supra,* at 19–20. Thus, the two constitutional issues here collapse into one, and because Congress' power to protect the navigable waters is free from constitutional doubt, the constitutional concern disappears into thin air.

In *Rapanos*, Justice Kennedy and the four dissenters explicitly rejected any application of the plain-statement and constitutional-avoidance canons, in the context of evaluating the lawfulness of the Corps' assertion of jurisdiction over wetlands adjacent to non-navigable tributaries.[12] Justice Kennedy started by distinguishing *SWANCC*, a case in which the Court applied these canons:

> In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.

[12] In arguing that this Court should apply these canons, State *amici* rely on the plurality opinion in *Rapanos*, which would have applied them vis-à-vis wetlands adjacent to non-navigable tributaries. Kansas Br. at 24 and 29; *see also* 547 U.S. at 737–738. That they do so without informing this Court that five of the Justices in *Rapanos* specifically rejected the application of these canons is disingenuous, particularly in light of this Court's jurisprudence in *Donovan* and *Easton Area School District*. *See supra*, at 13.

547 U.S. at 776 (Kennedy, J., concurring). He concluded that, so long as EPA's regulations were read as requiring a significant nexus, these difficulties and concerns would dissipate:

> This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. …[T]he significant nexus test itself prevents problematic applications of the statute. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure.

*Id.* at 782-783 (citations omitted); *see also id.* at 803–804 (Stevens, J., dissenting).

## II. EPA's Rules Interpreting Section 303(d) Should Be Afforded Deference

As mentioned, Section 101(d) indicates that "except as otherwise expressly provided," EPA is to administer the CWA. Additionally, Section 501(a) expressly authorizes EPA "to prescribe such regulations as are necessary to carry out" its functions under the Act. 33 U.S.C. § 1361(a).

EPA administers Section 303(d). While States have the first crack at developing TMDLs for waters that violate water quality standards, they must submit them to EPA for approval. 33 U.S.C. §§ 1313(d)(1) and (2). EPA is to either approve or disapprove these TMDLs within 30 days after they are submitted;

if it disapproves a TMDL, EPA is to develop its own TMDL within 30 days after such disapproval. *Id.* at § 1313(d)(2).

The CWA does not define the term "total maximum daily load." Instead, Section 303(d)(1)(C) indicates that each TMDL "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety…." *Id.* at § 1313(d)(1)(C). There are at least two sources of ambiguity in this construct: first, whether the term "total maximum daily load" bespeaks only a maximum daily load or, alternatively, whether the inclusion of the word "total" suggests that the TMDL should include subcomponents to be summed to generate the overall load; and second, the text does not indicate what a TMDL should include to ensure that it is sufficiently likely to implement the applicable standards.

Given these ambiguities, EPA's role in reviewing TMDL submittals, and EPA's power under Section 501(a) to "prescribe such regulations as are necessary to carry out" its functions under the statute, it was appropriate for EPA to develop rules indicating how it would resolve these ambiguities, and, in turn, evaluate TMDL submittals. *See*, *e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243–244 (2001) ("Even if a statutory scheme requires individualized determinations, … the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general

applicability unless Congress clearly expresses an intent to withhold that authority.") (citations and internal quotations omitted).

EPA's regulatory definition of the TMDL concept resolves the above ambiguities in two significant ways. First, it indicates that a TMDL is to be the sum of individual "waste load allocations" ("WLAs") for point sources, "load allocations" ("LAs") for nonpoint sources, and natural background. 40 C.F.R. § 130.2(i). And second, it acknowledges that there is an inherent relationship between the contemplated nonpoint reductions reflected in any LAs–and the likelihood that they will come to fruition–and the required stringency of the accompanying WLAs for point sources: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then [WLAs] can be made less stringent." *Id.*

These interpretations pass *Chevron* muster because, by its terms, Section 303(d) contemplates that TMDLs are to be designed to implement water quality standards. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). As EPA explained when it promulgated this definition, "it is impossible to evaluate whether a TMDL ... will be able to achieve standards without evaluating component [allocations] and how these loads were calculated." 50 Fed. Reg. 1773, 1775 (Jan. 11, 1985). Simply put, if a TMDL were to consist only of an overall number, EPA would have no

way of analyzing whether the TMDL would have any prospect of implementing water quality standards, as mandated.

This reasoning applies with equal force to the relationship between projected nonpoint reductions and the corresponding point source WLAs. This is why EPA has long interpreted its regulation as requiring the States to provide it with "reasonable assurances" that any projected nonpoint reductions will in fact occur.[13] Where both point and nonpoint sources contribute to a water quality problem,[14] the integrity of a given TMDL depends upon the integrity of the projected nonpoint reductions. As the district court noted below:

> [T]he reasonable assurances requirement helps to inform the TMDL writer of the proper setting of pollutant allocations so that the TMDL equation is properly budgeted. This is true because WLAs are determined, in part, on the expectations of pollution reductions from LAs. If LAs are not fully achieved, water quality standards will not be met. The WLAs contained in an ineffectual TMDL will themselves be ineffectual …. On the other hand, where EPA determines reasonable assurances exists (sic), greater loadings can be allocated to point sources. Thus, the requirement of reasonable assurances allows a TMDL writer to decide *how* to apportion loadings between point and non-point sources under the TMDL cap.

*Am. Farm Bureau Fed'n v. EPA*, No. 1:11-cv-0067, 2013 WL 5177530, at *31 (M.D.Pa., Sept. 13, 2013).

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[13] *See*, *e.g*. EPA, Guidance for Water Quality-Based Decisions: The TMDL Process, at 22 (1991) ("1991 TMDL Guidance") ("There must be assurances that nonpoint source control measures will achieve expected load reductions in order to allocate a wasteload to a point source with a TMDL that also allocates expected nonpoint source load reductions.").

[14] Waters polluted by both point and nonpoint sources are often referred to as "blended" waters. *See*, *e.g.*, *Pronsolino*, 291 F.3d at 1139.

While EPA oversees the development of TMDLs, including LAs, it has no enforcement power vis-à-vis nonpoint sources of pollution. *See* 33 U.S.C. § 1319. Instead, EPA is dependent upon the States to ensure that any contemplated nonpoint reductions will occur, through the establishment of BMPs or similar mechanisms. Absent assurances that the projected LAs for nonpoint sources are "practicable," EPA's regulatory language appropriately suggests that the TMDL should impose correspondingly more stringent WLAs for point sources, which, by contrast, will be rendered enforceable when they are incorporated into NPDES permits.[15] Thus, where a TMDL is dependent on nonpoint reductions, EPA must have some ability to evaluate their practicability in order to evaluate whether the TMDL is designed "to implement the applicable water quality standards," within the meaning of Section 303(d)(1)(C). EPA's interpretation that this practicability analysis requires "reasonable assurances" is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its ambiguous regulation is entitled to deference unless "plainly erroneous").

[15] Permits issued to point-source dischargers must ensure compliance with water quality standards. 33 U.S.C. § 1311(b)(1)(C). In fact, permit issuers cannot issue these permits unless the permits ensure that the resulting discharges will neither cause nor contribute to violations of water quality standards. 40 C.F.R. §§ 122.4(d) and 122.44(d). EPA may review of State-issued permits, and may veto them if they do not adequately ensure compliance with water quality standards. 33 U.S.C. § 1342(d)(2).

The same logic applies to the deadline requirement, which is in effect an additional component of the "practicability" analysis under Section 130.2(i). Just as it is reasonable to require a State to show that its contemplated nonpoint reductions are likely to work before allowing it to set correspondingly-relaxed WLAs, so too is it reasonable to require a State to commit to implementing these reductions, both individually and cumulatively, within specified time periods. Without a timetable, even a workable plan is really no plan at all.

A TMDL establishes a framework that guides future decisions, the vast majority of which are made by States. EPA's powers, by comparison, are limited. At the approval stage, Section 303(d) authorizes EPA to ensure that each TMDL constitutes a workable plan, designed to implement the relevant standards within an appropriate timeline. Once approved, the TMDL sets benchmarks the State must meet in order remain eligible for certain federal funds under Section 319. The reasonable assurance and scheduling requirements serve only to ensure that the overall framework is clear and has a reasonable prospect of success. This Court should uphold EPA's authority to impose these requirements as reasonable interpretations of Section 303(d) and its implementing regulations.

## CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the district court.

Dated this 28th day of April, 2014.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

I, Allison M. LaPlante, 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 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2011.

2. That this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in proportionally spaced serif typeface using Microsoft Office Word 2011 in 14-point Times New Roman Font.

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

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

5. That a virus detection program (Symantec Endpoint Protection, Version 12.1.2015 (2015)) has been run on the electronic file and no virus was detected.

Dated: April 28, 2014.

*s/ Allison M. LaPlante*
Allison M. LaPlante

## ADDENDUM

## DESCRIPTION OF *AMICI CURIAE*

Craig N. Johnston is a Professor of Law at Lewis & Clark Law School, where he teaches courses in environmental law and the Clean Water Act, among other courses. He is also the Clinical Director of Earthrise Law Center, the nation's largest environmental clinic. Professor Johnston has been teaching environmental law courses for 23 years. He also has coauthored casebooks in both environmental law and hazardous waste law.

Robert W. Adler is the Interim Dean, James I. Farr Chair, and Professor at the University of Utah, S.J. Quinney College of Law, where he has taught environmental law, water law, and administrative law, among other subjects, since 1994, and written extensively about the Clean Water Act and other issues in environmental law and policy. Professor Adler has also been practicing in the field of environmental law since 1980. Among other positions, he served as counsel to the Pennsylvania Bureau of Water Quality, Director of the Clean Water Program at the Natural Resources Defense Council, and co-founder of the Clean Water Network.

William L. Andreen is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law. He has been teaching and writing about environmental law and the Clean Water Act for more than thirty years.

Michael C. Blumm is a Professor of Law and the Jeffrey Bain Faculty Scholar at Lewis & Clark Law School, where he teaches natural resources law, property, legal history and other courses. He has been teaching, writing, and practicing in the environmental and natural resources law field for thirty-seven years. Professor Blumm began teaching after practicing with an environmental group and the U.S. Environmental Protection Agency in Washington, D.C., where he helped draft EPA's wetland protection regulations. Professor Blumm chaired the American Association of Law School's Natural Resources Law Section. Professor Blumm has written widely on environmental issues. He has published over one hundred articles, book chapters, and monographs on salmon, water, public lands, wetlands, environmental impact assessment, public trust law, and constitutional takings law, among other topics.

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William Funk, Robert E. Jones Professor of Law at Lewis & Clark Law School, has taught Constitutional Law, Administrative Law, and Environmental Law for 30 years; his students have been not only law students but also practitioners and Federal Judges through the Federal Judicial Center. He has nationally recognized casebooks in each of these three areas of law, as well as numerous articles dealing specifically with the Clean Water Act, conflicts between state and federal interests, and judicial interpretation of federal statutes and regulations.

Joel A. Mintz is a Professor of Law at Nova Southeastern University Law Center. For six years he was an attorney and chief attorney with the U.S. Environmental Protection Agency in Chicago and Washington, D.C., where his responsibilities included enforcing various provisions of the Clean Water Act. For the past thirty years, as a law professor, he has written a number of books and law review articles on various aspects of environmental law and its implementation.

Jeffrey G. Miller is a Professor of Law Emeritus at Pace Law School, where he teaches numerous environmental courses, including one on the Clean Water Act. He has also coauthored a casebook on environmental law.

Patrick Parenteau is a Professor of Law and Senior Counsel to the Environmental and Natural Resources Law Clinic at Vermont Law School. He is recognized for his expertise in environmental law, including water quality and wetlands law. Courses he has taught include Environmental Policy and Management, Citizen Suits, and Watershed Protection.

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Zygmunt J.B. Plater, Professor of Law at Boston College Law School, has been involved in environmental litigation and administrative process in a variety of environmental settings and capacities, including the State of Alaska Oil Spill Commission's responses to the wreck of the Exxon Valdez, the Woburn toxics litigation, coal mining regulation, endangered species litigation including the litigation up through the federal courts in the conflict between TVA's Tellico Dam project and the endangered snail darter fish. He has taught on seven law faculties, is the author of several dozen law review articles, and is the lead author of a national environmental law casebook, Plater et al., *Environmental Law & Policy: Nature, Law & Society*, (4th ed. 2010).

Melissa Powers is an Associate Professor of Law at Lewis & Clark Law School. She practiced environmental law for seven years and had a particular focus on cases under the Clean Water Act. She has taught environmental law classes since 2004 and taught administrative law for four years.

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Erin Ryan is a Professor of Law at Lewis & Clark Law School, where she teaches property law and several environmental courses. Her scholarship focuses on federalism issues in the environmental context. She is the author of Federalism and the Tug of War Within (Oxford Univ. Press, 2012).

Gerald Torres is the Mark and Beth Goldberg Distinguished Visiting Professor of Law at Cornell University Law School and the Bryant Smith Chair in Law at the University of Texas at Austin. Professor Torres is the former president of the Association of American Law Schools (AALS). He served as deputy

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that the foregoing BRIEF FOR *AMICI CURIAE* LAW PROFESSORS CRAIG N. JOHNSTON, *et al.* IN SUPPORT OF AFFIRMANCE was electronically filed 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 28, 2014.

*s/ Allison M. LaPlante*
Allison M. LaPlante