No. 13-4079

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(Sylvia H. Rambo, District Judge)

BRIEF OF MARYLAND, DELAWARE, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chesapeake Bay is the largest estuary in the United States. The Bay and its tidal tributaries cover 4,480 square miles, and include 11,684 miles of shoreline. The Bay's watershed drains 64,000 square miles in Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the entire District of Columbia

and includes approximately 150 rivers, creeks, and streams. The Bay is the economic engine of the mid-Atlantic, providing in excess of $1 trillion annually in recreational, ecological, strategic, historic, and cultural amenities. It is a "national treasure." Executive Order 13508 (May 12, 2009).

But the Bay is in trouble. Discharges of nitrogen, phosphorus, and sediment throughout its watershed have impaired water quality in the Chesapeake Bay to the point that it does not meet water quality standards. *Id.* The decrease in water quality threatens everything the Bay offers, whether it be seafood harvests, recreational opportunities, or environmental sustainability.

Maryland, Delaware, and the District of Columbia are three of the seven states [1] within the Chesapeake Bay watershed, all of which worked closely with the United States Environmental Protection Agency ("EPA") to establish the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (the "Bay TMDL"). Like their partners in the other Bay States, the *Amici* states are committed to implementing the Bay TMDL. The Bay TMDL is an essential tool in the Bay States' ongoing efforts to restore the Chesapeake Bay. Accordingly, the *Amici* States join the arguments advanced by EPA and the intervenor-defendants in support of the district court's judgment, and submit this brief to provide the Court with their own perspective on this matter.

[1] The District of Columbia is a "state" for purposes of the Clean Water Act. 33 U.S.C. § 1362(2).

STATEMENT OF FACTS

A. Cooperative Federalism under the Clean Water Act

The Federal Water Pollution Control Act (the "Clean Water Act" or "Act") establishes a comprehensive scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Recognizing that "the primary responsibilities and rights" to address pollution and manage land and water resources remain with the states, 33 U.S.C. § 1251(b), the Act established a scheme of cooperative federalism with states having primary responsibility for complying with the Act's provisions and EPA having an oversight responsibility to ensure that the goals of the Act are met.

Initially, the Act utilized a system of state-established water quality standards to protect the nation's navigable waters. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). This system proved impractical to enforce because it was difficult to establish that a particular discharger caused a specific decrease in water quality. *Id.* Consequently, in 1972 Congress amended the Act and established a new program that utilized specific "effluent limitations" on the discharge of pollutants from point sources,[2] and managed those limitations through the federal National Pollutant Discharge Elimination System ("NPDES")

[2] A "point source' is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

permitting process. 33 U.S.C. §§ 1311, 1342; *see also Riverkeeper, Inc*, 358 F.3d at 184.

Despite this shift in focus, state-issued water quality standards remained the foundation of the country's pollution control efforts. The use of state standards ensured that "numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *PUD No. 1 v. Washington Board of Ecology*, 511 U.S. 700, 704 (1994) (quoting *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 (1976)). State water quality standards thereby serve as a necessary backstop to permit-based effluent limits and provide an additional layer of protection to state waters. Indeed, the purpose of section 303(d) of the Act, which establishes the process by which total maximum daily loads ("TMDL") are set, is to ensure that water quality standards are met where permit-based effluent limitations are insufficient to protect the integrity of waters.

1. The States' Role under the Clean Water Act

Within the Act's scheme of cooperative federalism, the states take a primary role. Under section 303(c) of the Act, the states, subject to EPA approval, are required to establish the water quality standards that apply to navigable waters within the states. 33 U.S.C. § 1313. Protection of these water quality standards is accomplished primarily through the states' implementation of the federal NPDES

permitting system, the responsibility for which has been delegated by EPA to most states.[3] *See* 33 U.S.C. § 1342(b). Under this permitting scheme, states limit pollutant discharges from point sources according to technology-based effluent limitations. 33 U.S.C. § 1311(b). Unfortunately, these technology-based effluent limits on point source discharges do not always guarantee that the receiving waters will meet water quality standards.

In those instances where a water body fails to meet applicable water quality standards, notwithstanding the implementation of effluent limitations on point source dischargers, a state must take steps to identify and address the impairment. In accordance with section 303(d) of the Act, a state must identify all waters within its boundaries where permit-based effluent limitations are not stringent enough to ensure that water quality standards are being met. *See* 33 U.S.C. § 1313(d)(1)(A). The state must provide to EPA a list of these waters—the so-called "303(d) list" of impaired waters—and for each impaired water it must establish a "total maximum daily load" or "TMDL" for every pollutant that is preventing the water from meeting water quality standards. 33 U.S.C. § 1313(d)(1)(C).

The TMDL thus is the maximum amount of a pollutant, or "load," that the water body can receive and still meet water quality standards. *Id*. It is the sum of

[3] All of the States within the Chesapeake Bay watershed, save the District of Columbia, operate NPDES permitting programs approved by EPA; NPDES permits are issued by EPA for the District.

pollutant loadings allocated to point sources (*i.e.*, "wasteload allocations"), and non-point sources (*i.e.*, "load allocations"), as well as natural background loadings. *Id.*; 40 C.F.R. § 130.2. The total load on any particular water body or stream segment is required to be set "at a level necessary to implement the applicable water quality standards" with a margin of safety. 33 U.S.C. § 1313(d)(1)(C).

A state implements the TMDL as part of a comprehensive "continuing planning process" that states are required to adopt, subject to EPA approval. 33 U.S.C. § 1313(e). Approval of a state's continuing planning process is a precondition to a state obtaining delegated authority over NPDES permits. 33 U.S.C. § 1313(e)(1), (2). The continuing planning process includes plans for developing and implementing effluent limitations for NPDES permits, plans for controls on non-point source discharges (such as those from agricultural and silvicultural activities), strategies for implementing new and revised water quality standards, and implementation plans for TMDLs. 33 U.S.C § 1313(e)(3). Accordingly, the implementation of TMDLs is a required element of each state's delegated NPDES permit program. Although a state has discretion regarding how it implements wasteload allocations and load allocations to meet a TMDL, the manner in which it chooses to do so must ensure that pollutant reductions meet water quality standards. 33 U.S.C. § 1313(d)(1)(C).

2. EPA's Role under the Clean Water Act

Where the Act gives the states the lead role in implementing pollution controls, the Act also authorizes the EPA to perform an important oversight role and gives the EPA a variety of tools to ensure effective implementation by the states. One particularly important tool is EPA's oversight authority over the NPDES program. Where a state has been delegated authority to issue NPDES permits to point source dischargers, EPA retains the right to veto any discharge permit issued by a state if EPA determines that the proposed permit will not meet water quality standards. 33 U.S.C. § 1342(d). If the state elects not to revise the permit to meet the Act's requirements, EPA is authorized to issue the permit itself. *Id.* And in extreme situations, EPA has the authority to revoke *entirely* the delegation of the NPDES program to any state and make the permitting decisions for all discharges of pollutants from point sources. 33 U.S.C. § 1342(c).

EPA plays a similar oversight role in the TMDL process. Although states have the primary authority to set TMDLs for impaired waters within their states, EPA has the authority to disapprove a state's TMDL where it fails to ensure that water quality standards will be met. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state's TMDL, EPA is required to establish its own TMDL for the state's impaired waters. *Id*; 40 C.F.R. § 130.7(d)(2). The state must then implement the TMDL as part of its continuing planning process under section 303(e). *Id*.

EPA also has a role to play in reviewing and approving a state's continuing planning process. 33 U.S.C. § 1313(e). Because an approved continuing planning process is a prerequisite to a state obtaining and maintaining delegation of the NPDES permit program, a state that fails to adequately plan for the protection of water quality—including having plans to control non-point sources or to implement TMDLs—is at risk of losing its delegated NPDES permitting authority. 33 U.S.C. § 1313(e)(2). Consequently, although EPA does not have direct authority to implement a TMDL, EPA has both the authority and the tools to ensure that a state is properly implementing its TMDLs and its delegated NPDES program. For example, if a state fails to do what is necessary to ensure water quality standards are met, EPA has the power to veto state-issued NPDES permits or withdraw a state's delegated authority to issue NPDES permits, and then impose more stringent effluent limitations on point source discharges. 33 U.S.C. §§ 1312(a), 1342(a). EPA may also influence states' implementation of the Clean Water Act through grant funding for state programs. 33 U.S.C. §§ 1311(b)(1)(C), 1342(d)(2).

Finally, EPA was given special authority under the Clean Water Act to address water pollution in the Chesapeake Bay. In 2000, Congress amended the Act to strengthen the Chesapeake Bay Program, directing the EPA to work in coordination with the signatories that entered into the Chesapeake Bay Agreement

to support their efforts to restore the water quality of the Bay. 33 U.S.C. § 1267. Congress gave EPA the specific authority to "ensure that management plans are developed and implementation is begun by the signatories to the Chesapeake Bay Agreement to achieve" the nutrient reductions goals set forth in the agreement and the improvement of water quality in the Bay. 33 U.S.C. § 1267(g). As such, Congress gave EPA specific additional authority to review management plans adopted by the states to improve water quality in the Chesapeake Bay and to oversee the implementation of those plans.

B. The History of Multi-State Cooperative Efforts to Improve Water Quality in the Bay

The Bay TMDL is the culmination of collaborative efforts by the Bay States and EPA, spanning a period of more than 30 years, to address water quality impairments in the Chesapeake Bay.[4] In 1982, a five-year study sponsored by EPA identified nitrogen, phosphorus, and sediment discharges from upstream sources as the cause of the Bay's declining water quality. (J.A. 1155). Because the sources of the Bay's pollution span seven states, it was apparent that no state alone could address the water quality problems in the Bay without the cooperation of and coordination with EPA and the other states that discharged into the Bay.

[4] As Virginia explains in its *amicus* brief, the history of collaboration on the Bay has far deeper roots still, extending back to our first years as a Nation and providing the example and impetus for what became the Constitutional Convention.

Consequently, in 1983, Maryland, Virginia, Pennsylvania, the District of Columbia, and EPA entered into the Chesapeake Bay Agreement to coordinate their efforts to reduce discharges from all of the States and improve water quality in the Bay. (J.A. 1156.) These efforts continued over the years, and in 2000, New York and Delaware entered into a Memorandum of Understanding ("MOU") with Maryland, Virginia, Pennsylvania, the District of Columbia, and EPA to expand these coordinated efforts. West Virginia joined this effort in 2002. During this time, the Bay states recognized the need to establish target reductions for nitrogen, phosphorus, and sediment to improve water quality in the Bay and contemplated the creation of a Bay TMDL. (J.A. 1158.)

In 2003, the Bay States worked with EPA to establish annual nutrient and sediment loading caps designed to eliminate the persistent water quality impairments within the Bay. The Bay states and EPA established an annual cap for nitrogen at 175 million pounds and phosphorus at 12.8 million pounds. (J.A. 1158-59; J.A. 271-72.) These figures were then allocated among the Bay States, which established local plans to reduce their discharges to meet their respective allocations.

C. Development of the Bay TMDL

In 2007, the Bay States evaluated their progress and determined that greater efforts were needed to improve water quality within the Bay. The Bay States

recognized that the best way to do so would be to coordinate with EPA on the development of a TMDL for the Chesapeake Bay. On October 1, 2007, the Bay States and EPA reached agreement on the process that would result in EPA's establishment of a Bay TMDL and subsequently agreed to implement control measures by 2025. (J.A. 1160-61.)

The parties first developed target loads for the subject pollutants—nitrogen, phosphorus, and sediment—applicable to each Bay State. (J.A. 1349.) Next, the Bay States and EPA reached consensus regarding how load reductions should be allocated among various river basins. (J.A. 1317-18.) After consultation with the Bay States, EPA developed target loads for nitrogen, phosphorus, and sediment for 19 sub-river basins. (J.A. 340-44, 1349).

Each of the Bay States used the developed target loads to draft its own Phase I Watershed Implementation Plans ("Phase I WIPs"). The Phase I WIPs established specific pollutant allocations for different sources and provided a general framework as to how the states would implement those allocations. (J.A. 1349, 1367). The strategies set forth in the Phase I WIPs differed considerably between states, as each jurisdiction grappled with its own unique challenges towards implementation. For example, Maryland's WIP focused on upgrading the 67 major wastewater treatment plants throughout the State, to allow them to achieve enhanced removal of nitrogen and phosphorous (known as

"enhanced nutrient removal" or "ENR"), and pledged to explore regulatory changes to reduce nutrient discharges from agricultural land through new measures requiring cover crops and other best management practices. (J.A. 1386-88.) Virginia committed to more directed wastewater treatment plan upgrades in the James River Basin, and shifted its allocation of discharges from certain animal feeding operations that were designated as non-point source discharges to the point source discharge category so that it could require permits to control these sources. (J.A. 1393-95.)

EPA subsequently established a draft Bay TMDL utilizing the Phase I WIPs and its own backstop allocations where EPA believed that a Phase I WIP failed to provide reasonable assurance that the reductions necessary to meet water quality standards would be met. (J.A. 1367-68; J.A. 600-620.) Although EPA published the draft Bay TMDL on September 22, 2010, EPA continued to coordinate with the Bay States to improve their Phase I WIPs.

Ultimately, the Bay States submitted final Phase I WIPs, and EPA finalized the Bay TMDL based on the allocations in each state's WIPs, with three exceptions necessary to ensure that water quality standards would be met. First, EPA determined that New York failed to meet its state-wide target loads, so EPA established a more restrictive wasteload allocation for New York's wastewater treatment plants, thus requiring New York to include more restrictive effluent

limitations in NPDES permits it issues to these plants. (J.A. 1388-90). Second, EPA concluded that, although Pennsylvania and West Virginia met their target loads, they did not provide enough assurance that specific load allocations, and therefore water quality standards, would be met. EPA re-categorized half of Pennsylvania's urban stormwater load allocation that is designated as a non-point source to urban stormwater wasteload allocations designated as point sources so the load could be controlled through NPDES permits. (J.A. 1390, 1392.) Similarly, EPA shifted seventy-five percent of West Virginia's load allocation from non-point source animal feeding operations to point source wasteload allocations so that those discharges could be controlled through NPDES permits. (J.A. 1396-97.) All other allocations set forth in the final Bay TMDL, including wasteload allocations and load allocations, were developed and submitted by the Bay States.

SUMMARY OF ARGUMENT

The Bay States have worked in partnership with EPA to restore the Chesapeake Bay. After years of efforts failed to meet the Bay State's goals for improving the Bay's water quality, the Bay States agreed with EPA on a cooperative process whereby EPA would establish a Bay-wide TMDL based on load allocations proposed by the Bay States in their Phase I WIPs. This process ensured that the Bay States would have primary responsibility for establishing load

allocations and figuring out how those load allocations would be implemented, while EPA would retain oversight authority to ensure that the load allocations and their implementation by the states would allow the Bay to attain water quality standards. In agreeing to this process, the Bay States recognized that the complexity of controlling discharges from so many different sources across seven separate states demanded that EPA take a strong role in establishing the TMDL and overseeing its implementation.

The appellants' argument that the Bay TMDL exceeds EPA's authority under the Clean Water Act, on the grounds that EPA is not allowed to include specific allocations and impose them on the Bay states as federal requirements, misunderstands the process that led to the Bay TMDL and the role EPA plays within the cooperative federalism structure of the Clean Water Act. First, although the Act defines a TMDL as a "total" of pollutant loadings, it is silent regarding what specific loadings make up the total. EPA's interpretation of the Clean Water Act to include wasteload allocations and load allocations as part of the TMDL furthers the goals of the Act and is reasonable, especially considering that the states affected by the decision requested EPA to do so. Second, the TMDL and included allocations are not enforceable requirements and do not implement anything. Rather, they serve as a roadmap to the Bay States' implementation of

the TMDL and the pollution controls necessary for the Bay to attain water quality standards.

ARGUMENT

II. EPA'S DECISION TO ISSUE THE BAY TMDL AFTER EXTENSIVE COLLABORATION WITH THE SEVEN AFFECTED STATES DOES NOT EXCEED ITS AUTHORITY UNDER THE CLEAN WATER ACT.

The Bay TMDL demonstrates the principles of cooperative federalism at work in addressing an environmental problem that requires multi-state collaboration. Working in cooperation with EPA, the Bay states asked EPA to establish a TMDL for the Chesapeake Bay and then participated in a lengthy process that led to the creation of the Bay TMDL. During that process, EPA contributed its technical expertise and took steps consistent with its ultimate oversight authority to ensure that the final TMDL would attain water quality standards. Ultimately, the Bay TMDL that EPA established was almost entirely based on the allocations that the Bay States had themselves proposed. EPA modified only three allocations out of the hundreds proposed by the Bay States.[5] These modifications were consistent with EPA's authority under the Act, and in issuing the final Bay TMDL EPA did not exceed its authority under the Act.

[5] The Bay TMDL included 478 wasteload allocations for significant point source discharges alone and additional aggregate load allocations for groups of nonpoint sources. (J.A. 141633, 1596-97.)

First, EPA had the authority to include allocations in the Bay TMDL. The Clean Water Act defines a TMDL as the sum of pollutant loadings from all sources that can be added to a water body and still ensure that the water body meets water quality standards, *i.e.* the "*total* maximum daily load." 33 U.S.C. § 1313(d)(1)(C). The Act is silent regarding what specific loads are included in the "total," but EPA regulations have long defined the total as the sum of wasteload allocations (loadings from point sources) and load allocations (loadings from non-point sources), plus background. 40 C.F.R. § 130.2(i). This definition of the sum of loadings makes sense because there are no other loadings of pollutants.

The inclusion of these allocations in the Bay TMDL, therefore, is consistent with EPA's long-standing interpretation of TMDLs and represents a reasonable interpretation that furthers the goals of the Clean Water Act. By establishing allocations up front, the Bay TMDL provides a detailed road map to assist the states in implementing the TMDL effectively. It is all the more reasonable for the Bay TMDL to include detailed allocations in this case because the Bay States specifically agreed with EPA that the Bay TMDL would include detailed allocations proposed by the Bay States. (J.A. 1302-54.)

With three narrow exceptions, the allocations included in the Bay TMDL were established by the Bay States. Because EPA is required to ensure that TMDLs are established at a level necessary to implement water quality standards,

33 U.S.C. § 1313(d)(1)(C), EPA determined that it was necessary to substitute narrow "backstops" for three of the allocations submitted by the states. The adjusted allocation for New York's wastewater treatment plants—requiring more stringent effluent limits in NPDES permits—ensured that the reductions, when combined with the reductions from all the Bay States, would allow the Bay to attain water quality standards and is also consistent with EPA's oversight authority over state-issued NPDES permits. 33 U.S.C. §§ 1312(a), 1342(a), 1342(d). Similarly, EPA's designation of certain non-point source discharges in Pennsylvania and West Virginia as point source discharges is consistent with its authority to require an NPDES permit for stormwater discharges that contribute to a violation of water quality standards. 33 U.S.C. § 1342(p)(2)(E). These backstops are also consistent with 33 U.S.C. § 1267(g), which gives EPA the authority to "ensure" that management plans established by the Bay states meet the goals of the Chesapeake Bay Agreement.

The inclusion of allocations in the TMDL, or the allocation backstops that EPA substituted in three narrow instances, do not, in any event, intrude on the Bay States' authority to implement the Bay TMDL because neither binds the Bay States to any particular action or set of actions. As the Ninth Circuit has observed, a TMDL merely "serves as an informational tool for the creation of the state's implementation plan. . . ." *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir.

2002). Implementation is instead driven by the required state "continuing planning process," which affords broad discretion to the state. *Id.* The inclusion in the Bay TMDL of specific allocations does not change the essential character of the TMDL as a planning tool. Furthermore, as the Ninth Circuit explained, "there is no pertinent statutory provision otherwise requiring implementation of § 303 [TMDL] plans or providing for their enforcement." *Id.*

Although EPA and the Bay States collaborated on drafting a robust Bay TMDL that includes a detailed roadmap for implementation, the states retain broad flexibility regarding implementation as long as that implementation is sufficient to meet water quality standards. Maryland, for example, has implemented allocations that differ from those that were established in the Bay TMDL. The Bay TMDL anticipated that the Bay states would submit additional implementation plans, the so-called "Phase II Watershed Implementation Plans" or "Phase II WIPs," that would provide further specificity regarding implementation of the Bay TMDL allocations. (J.A. 1361.) In its Phase II WIP, Maryland changed the Bay TMDL allocation for total nitrogen and total phosphorus that applied to one sub-basin by shifting that allocation to another sub-basin. Maryland modeled the reductions of total nitrogen and total phosphorus that it would achieve from implementation of the Bay TMDL in two sub-basins, the Western Shore and the Patuxent River, and determined that it would achieve greater reductions than the EPA allocations.

(Appendix H to Maryland's Phase II WIP, dated March 30, 2012.)[6] These additional reductions were used to offset shortfalls in EPA's load allocations for the Susquehanna, Eastern Shore, and Potomac sub-basins. *Id.* Consequently, based on its own implementation strategy, Maryland changed EPA's nitrogen and phosphorus allocations for the respective sub-basin waters. *Id.*

In establishing a TMDL that will ensure that the water quality standards in the Bay are attained, in basing the TMDL on allocations provided by the states, and by leaving implementation decisions to the states, EPA's decision to adopt the Bay TMDL is fully consistent with the Clean Water Act and its framework of cooperative federalism. The Bay States agreed to work with EPA to fashion a complete, robust, and more effective TMDL. The Bay TMDL should be upheld as a model of cooperative federalism that complies with, and furthers the goals of, the Act.

II. THE CLEAN WATER ACT PROVIDES EPA WITH AUTHORITY TO ESTABLISH A TMDL THAT INCORPORATES UPSTREAM DISCHARGES.

A group of states that are, with one exception, not affected by the Bay TMDL have advanced an argument, as *amici*, that the appellants have not pursued before this Court—namely, that EPA lacks authority to create a TMDL that

[6] Appendix H to Maryland Phase II WIP can be found at: http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/FINAL_PhaseII_Report_Docs/Final_Documents_PhaseII/Appendix_H_PhIIIWIP_WQ_Response_Memo.pdf

addresses pollutant discharges from upstream states. If the Court nevertheless addresses this argument, it should reject it. Nothing in the Clean Water Act requires such a cramped view of EPA's statutory authority, which unreasonably interprets the Act to limit EPA to establishing TMDLs that address water quality impairments solely within a specific state, with no authority to address background pollution. This argument is wrong and illogical.

As stated above, a TMDL is a calculation of the *total* maximum daily load of a specific pollutant that a water body can receive while still meeting the applicable water quality standard. 33 U.S.C. § 1313(d)(1)(C). Consequently, the TMDL for an interstate water body necessarily must cover not only all discharges of pollutants from within a state, but also all background sources of pollution, including pollution that comes from upstream portions of the watershed. Because it is theoretically possible for pollutant loadings into a water body to cause water quality violations absent any loadings from sources within the water body's own state, a TMDL must address background sources of pollution if water quality standards are to be achieved. The Clean Water Act requires a state, or EPA if a state fails to do so, to establish a TMDL "at a level necessary to implement the applicable water quality standards…" 33 U.S.C. § 1313(d)(1)(C). If background loadings contribute to water quality violations in a water body, then in order to satisfy this statutory requirement they must be covered in a TMDL. Given that the

Bay's watershed extends beyond a single state, including to states that do not border the Bay, EPA acted within its authority to include upstream states that contribute pollutant loadings to the Bay in the Bay TMDL.

Additionally, the Chesapeake Bay Program amendments to the Clean Water Act specifically authorize EPA to "ensure that management plans are developed and implementation is begun" to improve the water quality of the Bay. 33 U.S.C. § 1267(g). In order to improve the water quality of the Bay, this authority must necessarily extend to authorize EPA to include upstream states in a Bay TMDL, which then requires those states to prepare TMDL implementation plans, as all of the Bay States have done.

Perhaps most significantly, the Bay TMDL was established by EPA at the behest of and with the cooperation of the Bay states, including the upstream states. (J.A. 1160-1161.) If the results of this cooperative effort were to be invalidated, EPA would be forced to use more draconian authority under the Clean Water Act to ensure that pollutant reductions necessary to attain water quality standards in the Bay were implemented. For example, EPA could require upstream states to issue more restrictive permits to point sources[7] or otherwise influence the conduct of an

[7] 33 U.S.C. § 1312(a) provides that EPA may require more stringent effluent limitations where a point source's discharge "would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters." That section does not by its terms limit the scope of EPA's authority to local water

upstream state through its grant funding. 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1342(a), 1342(d)(2). The intent of the Clean Water Act to restore the Nation's waters through cooperative federalism has been honored in the collaborative approach that produced the Bay TMDL, based on a consensus about the allocations necessary to attain water quality standards in the Bay. The approach urged by the appellants would not only be less effective, but would require EPA to act using its unilateral authority to override State policy decisions in a way that would undermine the spirit of cooperative federalism embodied in the Act.

CONCLUSION

The judgment of the United States District Court for the Middle District of Pennsylvania should be affirmed.

Respectfully submitted,

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quality impairments, but merely requires EPA to be able to trace the effects to a "specific portion" of navigable waters.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B)(i) and Local Rule 31.0(b), because it contains 4,610 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2010.

2. This brief complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6), because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

3. This brief has been scanned for viruses using Microsoft System Center 2012 Endpoint Protection, and no viruses were detected.

4. The text of this electronic brief is identical to the text in the paper copies that are being mailed to the Court.

5. Peter K. Killough is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

/s/

_____

Peter K. Killough

CERTIFICATE OF SERVICE

I certify that, on April 28, 2014, the foregoing brief is being filed with the Clerk of this Court using the appellate CM/ECF system and that ten paper copies are being mailed to the Court. To my knowledge, counsel for all parties are registered to receive electronic service through the appellate CM/ECF system.

/s/

_____

Peter K. Killough