

In The
United States Court Of Appeals
For The Third Circuit

AMERICAN FARM BUREAU FEDERATION; PENNSYLVANIA FARM BUREAU;
THE FERTILIZER INSTITUTE; UNITED STATES POULTRY & EGG ASSOCIATION;
NATIONAL PORK PRODUCERS COUNCIL;
NATIONAL CORN GROWERS ASSOCIATION;
NATIONAL ASSOCIATION OF HOME BUILDERS,

Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant - Appellee,

and

CHESAPEAKE BAY FOUNDATION; CITIZENS FOR PENNSYLVANIAS FUTURE;
DEFENDERS OF WILDLIFE; JEFFERSON COUNTY PUBLIC SERVICE DISTRICT;
MIDSHORE RIVERKEEPER CONSERVANCY; NATIONAL WILDLIFE FEDERATION;
VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC; MARYLAND
ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES; NATIONAL ASSOCIATION
OF CLEAN WATER AGENCIES; PENNSYLVANIA MUNICIPAL AUTHORITIES
ASSOCIATION,

Intervenors - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF INTERVENORS - APPELLEES

VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.;
MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES; and
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 3d Cir. L.A.R. 26.1, Intervenor Defendant-Appellees make the following disclosures:

The National Association of Clean Water Agencies is a non-profit corporation. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest.

The Maryland Association of Municipal Wastewater Agencies Inc. is a non-profit corporation. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest.

The Virginia Association of Municipal Wastewater Agencies Inc. is a non-profit corporation. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest.

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Parties

County Amici	Cambria County, Pa.; Clearfield County, Pa.; Lancaster County, Pa.; Perry County, Pa.; Tioga County, Pa.; Hardy County, W.V.; Pendleton County, W.V.; and New Castle County, De.
EPA	U.S. Environmental Protection Agency
Appellants	American Farm Bureau; National Association of Home Builders; National Corn Growers Association; National Pork Producers Council; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry & Egg Association
Municipal Associations	National Association of Clean Water Agencies; Maryland Association of Municipal Wastewater Agencies, Inc.; Virginia Association of Municipal Wastewater Agencies, Inc.
State Amici	Kansas, Indiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming

Defined Terms

Bay	Chesapeake Bay
Bay States	Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia

Bay TMDL	Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 29, 2010)
CWA	Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i>
JA __	Joint Appendix at page __
LA	Load Allocation
NPDES	National Pollutant Discharge Elimination System
POTW	Publicly Owned Treatment Works
TMDL	Total Maximum Daily Load
WLA	Wasteload Allocation
WIP	Watershed Implementation Plan

JURISDICTIONAL STATEMENT

In accordance with Fed. R. App. P. 28(i), Intervenor Defendant-Appellees National Association of Clean Water Agencies, Maryland Association of Municipal Wastewater Agencies, Inc., and Virginia Association of Municipal Wastewater Agencies, Inc. (collectively, “Municipal Associations”) agree with the basis for jurisdiction stated in Appellants’¹ opening brief.

STATEMENT OF THE ISSUES

Three issues are properly presented in this appeal:

1. Whether the inclusion of wasteload allocations (“WLAs”) for point sources and load allocations (“LAs”) for various nonpoint source sectors in the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 29, 2010) (“Bay TMDL”), JA 1106–1471, is lawful;

2. Whether EPA’s “reasonable assurance” review of the nonpoint source elements of the Phase I Watershed Implementation Plans (“WIPs”) of Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia (the “Bay States”), JA 962–1105, is lawful; and

3. Whether the notation in the Bay TMDL of non-binding consensus target dates for state implementation is lawful.

¹ American Farm Bureau; National Association of Home Builders; National Corn Growers Association; National Pork Producers Council; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry & Egg Association, collectively.

INTRODUCTION

This Court should uphold EPA’s authority to establish holistic, watershed-wide Total Maximum Daily Loads (“TMDLs”)—for the Chesapeake Bay (the “Bay”) and more generally—including both point and nonpoint sources. This “watershed approach” is lawful under the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and, here, is absolutely necessary to achieve sufficient reductions in nitrogen and phosphorus (collectively, “nutrient”) loads to meet applicable water quality standards.

The Municipal Associations represent hundreds of member local governments and municipal clean water agencies leading the Nation’s clean water effort by operating publicly owned treatment works (“POTWs”) to treat wastewater generated at millions of residences, businesses, and institutions. With respect to reducing excess nutrient loads that impair many waterbodies nationwide, the Municipal Associations’ members are unquestionably doing their part.

The Municipal Associations’ members serve millions of people in the Chesapeake Bay (“Bay”) watershed. Despite population growth of 20% in the watershed from 1985 to 2004, the municipal and industrial wastewater treatment sector reduced nitrogen loads delivered to the Bay by 33.4% (eliminating 30.4 million pounds per year) and reduced phosphorus loads delivered to the Bay by 53% (eliminating 4.9 million pounds per year) over that period. JA 859. By 2008,

nutrient load estimates for wastewater treatment plants had dropped to 45% lower than 1985 levels and 62% lower than “no action levels,” JA 864, and the pace of reductions has continued.

Consistent with this tremendous progress and ongoing improvements, nutrient waste load allocations (“WLAs”) for most POTWs in the Bay States’ watershed improvement plans (“WIPs”) and resulting Bay TMDL have been set at or near the extremely stringent “E3” level (*i.e.*, Chesapeake Bay Program shorthand for the theoretical maximum load reductions that would be achieved “by doing everything everywhere by everybody”). *See* JA 866 (“[T]reatment at the 4-6 mg/L level [for nitrogen] is about 85% to 95% of the maximum technically feasible reductions.”). The citizen ratepayers of the Municipal Associations’ members are now bearing and will continue to bear a huge financial burden to meet the Bay TMDL WLAs with the installation and operation of “state-of-the-art” technology.

For example, in its Phase I WIP, the Commonwealth of Virginia noted that over \$1.5 billion has been invested in nutrient removal facilities at wastewater treatment plants since 2005. JA 1030. As of January 1, 2011, all of Virginia’s significant wastewater dischargers are subject to stringent nutrient permit limits—a first in the entire Bay watershed—under a watershed-wide general permit. JA 1046; *see also* Va. Code § 62.1-44.19:12 *et seq.*; 9 Va. Admin. Code § 25-820-10

et seq. The massive investments required for compliance are significantly increasing customers' sewer bills over and above the 67% increase in average Virginia wastewater rates for the prior decade. JA 865.

Similarly, Municipal Association members in Maryland are currently undertaking a statewide program of treatment upgrades to implement the Bay TMDL. JA 888. The Maryland Phase I WIP estimates that it will cost \$2.86 billion to implement state-of-the-art treatment and associated nutrient permit limits at the 67 major POTWs treating approximately 95% of the state's wastewater flow. JA 1091, 1093, 1095.

The District of Columbia, likewise, is requiring costly further upgrades to the Blue Plains wastewater treatment facility, the Bay region's largest. Nutrient removal technology installed at the Blue Plains facility in 2000 already reduced nitrogen concentrations by between 22% and 63% (varying based on season and flow). JA 970. Further upgrades to state-of-the-art levels comparable to those in Virginia and Maryland are expected to be completed in 2015 at a cost of nearly \$1 billion. JA 971.

The POTW community has done and will continue to do its part to reduce nutrient loads entering the Chesapeake Bay. But with the point source municipal wastewater sector already doing more than its fair share to reduce nutrient loads, it is not practical or feasible, from a technological, financial, and equitable

perspective, for the wastewater sector to do more in the nonpoint source-dominated Bay watershed. As the EPA Office of Inspector General determined, any “additional nutrient reductions from significant municipal wastewater treatment facilities” that could be obtained “are not cost effective or practical.” JA 864, 860. Similarly, EPA has acknowledged that further point source reductions should be “an option of last resort” given the “large scale public investments (estimated at over \$4 billion [as of 2008]) that are now being carried out throughout the watershed to upgrade and reduce nutrient discharges from point sources,” JA 326, and that “[a] stable regulatory environment is a priority need for these facilities and a matter of fiduciary responsibility and public trust,” *id.*

The simple truth is that advanced wastewater treatment will never be enough in watersheds like the Chesapeake Bay or the Mississippi River Basin, where nonpoint sources are the dominant sources of excess nutrients. In the Chesapeake for example, POTWs comprise the largest point source sector addressed in the Bay TMDL, but their total contributions are dwarfed by agriculture. POTWs contributed 17% of the nitrogen, 16% of the phosphorus, and less than 0.5% of the sediment entering the Bay. JA 1222. To put these figures into perspective, the Bay TMDL requires total reductions of 25% nitrogen, 24% phosphorus, and 20% sediment from existing loads. JA 1106. Even if discharges from these essential public facilities (POTWs) were *completely eliminated*, the requisite total load

reductions would not be met.² See JA 1106, 1222; see also JA 862 (reporting the EPA Office of Inspector General’s finding that “[a]dditional reductions from the wastewater treatment community, both municipal and industrial, are not large enough to compensate for shortfalls from the agricultural and developed land sectors.”). And yet municipal wastewater utilities continue to bear a massively disproportionate share of the burden to reduce water quality impairments in the Bay.

All of this is to underscore the importance of the holistic watershed approach embodied in the Bay TMDL. This *plan*—it does not actually regulate or force any particular actions by nonpoint sources—establishes the total maximum load (how much pollutant loading the Bay can tolerate) and allocates that amount among sources or source sectors based almost entirely on the Bay States’ own WIPs. Source allocations based on actual contribution to water quality impairment are the essence of the holistic watershed approach—an approach that the Municipal Associations believe holds the Clean Water Act’s greatest potential for equitably, cost-effectively, and successfully addressing excess pollutant loads in tens of thousands of water bodies nationwide.

² This is a purely theoretical exercise, however, because the municipal wastewater sector’s load cannot be eliminated. POTWs do not generate pollution, but rather provide the essential environmental and public health service of removing pollutants contained in sewage that is collected and conveyed to these facilities for treatment.

Contrary to Plaintiffs' assertions, TMDL planning is *not* the same as adopting a federal mandate or dictating specific state laws, regulations, or incentive programs for implementing and achieving the nonpoint source load allocations ("LAs"). Therefore, this case is not correctly understood as usurping states' rights or dictating local land use. Municipal Associations' members are local governments, and if the Bay TMDL intruded on local decision-making to the extent Appellants erroneously claim, the Municipal Associations would be first in line to oppose it. It does not.

Rather, the Bay TMDL is the product of an ongoing joint endeavor by the Bay States, EPA, and many stakeholders including VAMWA and MAMWA. Appellants' argument that the Bay TMDL impermissibly alters the CWA's carefully crafted division of authority between EPA and states is founded on a mischaracterization of the TMDL. Appellants grossly exaggerate its control over state and local decisions and discount the role the Bay States played in developing it. The Bay TMDL is an informational planning tool to set coordinated targets for the Bay States' respective programs to reduce nutrient and sediment loadings to the Bay based on the states' own preferences. The Bay States have wide latitude to determine how (or if) those target reductions are achieved and, if that is not reasonably possible, they ultimately have the authority to adjust the underlying goals themselves in the form of revised water quality standards. *See* 40 C.F.R.

§§ 131.10–.11 (outlining states’ wide discretion to designate uses for waterbodies, revise uses that cannot be attained feasibly, and develop criteria to achieve designated uses); *see also* Va. Code § 62.1-44.19:7.E (allowing State Water Control Board to conduct a use attainability analysis that may include suspending implementation of a TMDL); Md. Code Regs. § 26.08.02.04 (defining the process for amending designated uses and criteria).

At bottom, given Appellants’ broad attack on TMDL planning (including point source WLAs and nonpoint source LAs rather than merely the total load), this case is ultimately about whether the largest nonpoint source contributors of pollutants to the Bay will even be included in the plan that sets basic targets for possibly achieving a clean Bay. The Municipal Associations believe the law requires *all source sectors* to be addressed in the TMDL plan, even though EPA lacks the authority to dictate the specifics of state implementation policies, mandate that nonpoint sources comply, or insist on a specific implementation schedule.

STATEMENT OF THE CASE

Municipal Associations adopt EPA’s Statement of the Case.

STATEMENT OF RELATED CASES

Municipal Associations are not aware of any related cases within the meaning of 3d Cir. L.A.R. 28.1(a)(2).

SUMMARY OF ARGUMENT

The CWA unambiguously preserves states' traditional role in setting reasonably achievable water quality goals and determining how they are to be met within their jurisdictions, subject only to limited oversight functions performed by EPA. EPA does, however, have express authority under Section 303(d) to engage in TMDL planning for watersheds as a whole where the states do not do so. In exercising that authority by establishing the Bay TMDL in the manner that it did, EPA did not violate the balance of federal and state authority in the CWA. The Bay TMDL is but one element of a long-standing collaborative effort by EPA and the six Bay States to implement a holistic watershed approach to improving Bay water quality. This effort will certainly fail unless all major source sectors of nutrients and sediment throughout the Bay watershed—including the nonpoint source sectors that account for the bulk of the pollutant load—share equitably in allocated reductions. As explained in the Introduction, the Municipal Associations' members are responsible for meeting stringent allocations established at or near state-of-the-art treatment levels at a major expense to the public they serve, and further substantial reductions from the POTW sector beyond the Bay TMDL are neither practical nor cost-effective.

The Bay TMDL contemplates the equitable participation of all sources in the solution by including allocations for various point sources and nonpoint source

sectors. The CWA allows EPA to subdivide the Bay TMDL into these allocations as a TMDL plan would be essentially useless for its intended water quality function under the CWA if it were just a single number (only the “total” allowable pollutant load). Moreover, these allocations were developed by each Bay State for its respective jurisdiction and incorporated, with only minimal changes, by EPA into the Bay TMDL.

Even though the Bay TMDL was published by EPA, this does not evidence EPA usurpation of state and local prerogatives over water quality and land use throughout the watershed. The Bay States agreed to this approach under a framework established in large measure by a prior federal consent decree. *See* EPA Brief at 16. Further, allocations in the Bay TMDL are not mandatory, and states have latitude to change them or deviate from them in their discretion. The same is true of the Bay TMDL’s so-called “deadlines,” which are actually consensus “target dates” to coordinate the collective efforts of EPA and the Bay States and do not carry force of law. Likewise, EPA’s reasonable assurance review of the Bay States’ nonpoint source LAs for practicability is a sensible element of the collaborative process that imposes no involuntary obligations on the states.

ARGUMENT

I. Standard of Review

Municipal Associations adopt the Standard of Review set forth at page 29 of EPA's brief.

II. EPA Did Not Exceed its CWA Authority by Including Nonpoint Source Allocations in the Bay TMDL

A. The Bay TMDL Should Be Upheld Under *Chevron* Step One Because the CWA Expressly Recognizes that TMDLs Include Allocations

Appellants and State Amici focus on the words “total” and “load” in the term “total maximum daily load,” 33 U.S.C. § 1313(d), to argue that Congress intended to deny EPA the authority to subdivide TMDLs into source allocations. Appellants Brief at 35–36; State Amici Brief at 8. This reading of a single term in Section 303(d) disregards a longstanding tenet of statutory construction. The meaning of a statute is found by reading it in its entirety, not by focusing on disembodied fragments. *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850).

Reading Section 303(d) in its entirety, Appellants' allocation argument can be dismissed at step one of the *Chevron* analysis. If the statute directly supports EPA's interpretation, then the analysis is at an end. *Chen v. Ashcroft*, 381 F.3d 221, 224 (3d Cir. 2004) (construing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).

EPA first promulgated a regulatory definition of “TMDL” in 1985, which provided, in relevant part, that a TMDL is the “sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background.” 50 Fed. Reg. 1779, 1780 (Jan. 11, 1985) (codified at 40 C.F.R. § 130.2). At that time, the CWA made no mention of source allocations.

Congress substantially amended the CWA two years later, including by revising Section 303(d). Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 1. These amendments evidence that Congress approved of the regulatory definition of a TMDL (including WLAs and LAs) because Congress expressly provided for it in the amendments. A new subparagraph was added to Section 303(d) to specify when effluent limitations for discharges to impaired waters may be revised. It refers to effluent limitations that are “based on a total maximum daily load *or other waste load allocation* established under this section [*i.e.*, Section 303].” *Id.* § 404(b) (codified at 33 U.S.C. § 1313(d)(4)) (emphasis added). The legislative history of this section confirms that Congress understood that effluent limitations developed for discharges to Section 303(d)-listed waters—*i.e.*, waters subject to a TMDL—would typically be derived according to “waste load allocation formulas.” Section-by-Section Analysis Prepared by the Hon. James J. Howard, 1987 U.S.C.C.A.N. 5, 37, 1987 WL 61479 (Jan. 7, 1987). The reference to TMDLs “*or other* wasteload allocations” in Section 303(d)(4) demonstrates that

Congress was aware and accepted that allocations are a TMDL component as defined in EPA's regulations. This amendment recognized and effectively codified the pre-existing regulatory concept that a TMDL includes allocations. For the purposes of *Chevron* step one, this is sufficient to demonstrate that the CWA expressly authorized EPA to include WLAs in the Bay TMDL.

It follows that the authority to express LAs in a TMDL also is directly grounded in the statute. A TMDL is a simple formula: Total Load (all sources) = WLAs (point sources) + LAs (nonpoint sources and natural background). 40 C.F.R. § 130.2(i). Once a total load is determined, and WLAs are accounted for, the remainder is the portion of the total load attributable to nonpoint sources and natural background—that is, the LA. With two parts of this equation (total load and WLAs) mentioned specifically in the statute, it is nonsensical to maintain that a TMDL cannot mention the only remaining part (LAs) which is the obvious mathematical difference between the other two.

Appellants' argument that a TMDL must be expressed only as an undivided total load is contrary to a plain reading of the statute. Section 303(d) clearly contemplates the expression of the total load and the associated allocations that comprise it. Therefore, the Bay TMDL should be upheld under *Chevron* step one taken in consideration with the arguments set forth in EPA's brief.

B. The Bay TMDL and Its Holistic Watershed Approach Is Easily Affirmed as a Reasonable Interpretation of the CWA under *Chevron* Step Two

Under the *Chevron* step two analysis, EPA’s interpretation of its statutory authority must be upheld unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Chen*, 381 F.3d at 224 (quoting *Chevron*, 467 U.S. at 843–44). TMDLs generally, and the Bay TMDL specifically, effectuate the CWA’s holistic watershed approach to improving water quality and easily pass muster under step two because the Bay TMDL is not “manifestly contrary” to the text of the CWA due to its inclusion of point or nonpoint source allocations.³

First, we note that Appellants’ argument is an appeal of EPA’s 1985 regulation brought three decades too late. The essence of their argument is that 40 C.F.R. § 130.2(i) is in excess of EPA’s authority, because it defines a TMDL as “[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background.” Approximately 61,000 TMDLs have been issued using this formula,⁴ no court has ever found this to be an impermissible construction of the statute. The Ninth Circuit Court of Appeals has affirmed it. *Pronsolino v.*

³ Neither Appellants nor the amicus curiae supporting their position argue in this appeal that the Bay TMDL is arbitrary and capricious.

⁴ Striking down the Bay TMDL on these grounds would have tremendous national implications. It would potentially invalidate thousands of TMDLs nationwide that form the backbone of water quality-based standards under the CWA.

Nastri, 291 F.3d 1123, 1139 (9th Cir. 2002) (“TMDLs must be calculated with regard to nonpoint sources of pollution . . .”).

Second, as discussed above, Congress was aware that EPA’s 1985 regulatory definition of TMDL included LAs. It chose to amend Section 303(d) in 1987 without altering the definition of TMDL, and in fact even built on the TMDL WLA concept in the manner that it amended Section 303(d)(4) (referring to “TMDLs *or other* wasteload allocations” as discussed above). Given this history and the terms of the amended statute, EPA’s 1985 definition of TMDL as including WLAs and LAs cannot be said to be “manifestly contrary” to the CWA. *See Grove City College v. Bell*, 465 U.S. 555, 568 & n.19 (1984); *Helvering v. Winmill*, 305 U.S. 79, 82–83 (1938).

Third, and critically important to overall purpose and intent of the CWA, the inclusion of LAs in the Bay TMDL is absolutely necessary to accomplish the water quality goals for the Bay. TMDLs must be developed for any waterbody for which technology-based controls for point sources are insufficient to achieve applicable water quality standards. 33 U.S.C. § 1313(d)(1); *see also Pronsolino*, 291 F.3d at 1136. Many waterbodies, such as the Bay, are impaired by a combination of point and nonpoint source loads (so-called “blended waters”). For these waters, a TMDL that addresses only point sources would fall well short of planning adequately for water quality standards attainment—which is a result contrary to the

manifest intent of Section 303(d). As the Ninth Circuit has explained, “at least in blended waters, TMDLs must be calculated with regard to nonpoint sources of pollution; otherwise, it would be impossible ‘to implement the applicable water quality standards,’ which do not differentiate sources of pollution.” *Pronsolino*, 291 F.3d at 1139 (*quoting* 33 U.S.C. § 1313(d)(1)(C)). This is especially true for a nonpoint source-dominated system like the Chesapeake Bay watershed. Congress has made restoring the Bay a federal priority under the CWA, *see* 33 U.S.C. § 1267, but doing so will all the more difficult if even the non-binding plan—the Bay TMDL—must ignore nonpoint sources.

EPA’s decision to assign LAs to various nonpoint source sectors is consistent with the letter and intent of the CWA. Accordingly, it must be upheld under the *Chevron* step two analysis for the reasons set forth above taken in consideration with those set forth in EPA’s brief.

C. The Allocations in the Bay TMDL Do Not Infringe on State Authority over Local Water and Land Use Decisions

Appellants further attack the legality of the Bay TMDL on the basis that EPA has usurped state and local authorities’ exclusive powers to make local water and land use decisions. This argument is simply not reflective of how the Bay TMDL works. The fundamental flaw in that argument is that it confuses *allocation* with subsequent *implementation*. EPA may have published the allocations (which, to reiterate, were drawn from the state WIPs), but the Bay

States determine whether and how they are actually implemented. In fact, the examples cited in Appellants' brief and especially the County Amici's⁵ brief show just how extremely speculative their concerns about state implementation are.

County Amici highlight a small number of predominantly agricultural counties that have been assigned proportionate nutrient and sediment reduction targets by their respective states in the states' WIPs, which were incorporated into the Bay TMDL. County Amici Brief at 11. These examples do not reflect EPA commandeering of local land use decisions. To the contrary, they illustrate that states have a full menu of options available to meet their reduction targets. Indeed, the County Amici refer to the following measures that may be used in their jurisdictions: erosion and sediment control plans for Animal Heavy Use Areas, added vegetative cover for fields bordering streams and other stream buffers, manure use restrictions and advanced technologies, enhanced compliance with existing agricultural regulations, resource production activity limitations, development activity regulations, stream and bank restoration, tree planting, poultry litter transport regulations, nutrient management plan requirements for fertilizer use, stream fencing, barnyard runoff controls, waste management improvements, and mortality composting practices. *Id.* at 7–12. None of these

⁵ Cambria County, Pa.; Clearfield County, Pa.; Lancaster County, Pa.; Perry County, Pa.; Tioga County, Pa.; Hardy County, W.V.; Pendleton County, W.V.; and New Castle County, De., collectively.

possible *implementation* techniques (or countless others that are available) are mandated by the Bay TMDL's *allocations*. The key point is that the states will be the final arbiters of which of these measures are implemented, and the County Amici can address their concerns and preferences each with its own state government.

The fact that EPA incorporated the states' WIP allocations into the Bay TMDL or that it adjusted a handful of those allocations also does not demonstrate that EPA has assumed control over local land use issues. "A TMDL is not self-enforcing, but serves as an informational tool or goal for the establishment of further pollution controls." *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005). The Bay TMDL is no different. Ultimately, it is Bay States who will determine how the TMDL's total load is actually achieved in practice, subject to limited oversight by EPA that primarily concerns *point* source permit limit consistency with the assumptions and requirements of the Bay TMDL. *See* 40 C.F.R. § 122.44(d)(4)(vii) (providing that National Pollutant Discharge Elimination System ("NPDES") permit effluent limits should be "consistent with the assumptions and requirements of any available wasteload allocation"); *see also Food and Water Watch v. EPA*, ___ F. Supp. 2d ___, 2013 WL 6513826, *9 (D.D.C. 2013).

As EPA and amicus curiae Commonwealth of Virginia correctly explain, with a few limited exceptions the allocations were drawn directly from the Phase I WIPs prepared by each Bay State in accordance with the Chesapeake Bay Agreement. JA 1107; *see also* EPA Brief at 21–22; Virginia Brief at 12. In the WIPs, the Bay States determined how their respective tentative total pollutant allocations should be divided among various in-state point and nonpoint sources. *E.g.*, JA 1035–38 (describing Virginia’s allocation methodology). This fact undermines Appellants’ assertion that the allocations evidence an effort by EPA to commandeer local land use prerogatives.

Not only did EPA acknowledge the State’s control over implementation decisions, EPA went out of its way to document flexibility in the TMDL even for regulated *point* sources. One significant example is that the Bay TMDL acknowledges that the Bay States may, in their discretion, design and implement offset programs to add new point source discharges without increasing the total load. A second, somewhat similar example is water quality trading, which is “[a]n assumption of this TMDL.” JA 1436; *see also Food and Water Watch*, 2013 WL 6513826 at *9. In this example, two or more existing point sources have the flexibility to determine themselves how they will comply with their allocations (*e.g.*, by generating or acquiring nutrient credits), subject to the water quality requirement that their combined nutrient discharges not exceed the sum of their

individual WLAs. JA 1432–37. Furthermore, EPA acknowledged that state permit-issuing authorities may vary from facility-specific WLAs in appropriate circumstances without inviting EPA action. JA 1437 (citing *In re City of Moscow*, 10 E.A.D. 135, 2001 WL 988721 (E.A.B. 2001)).⁶

This state-level flexibility is being exercised today in Virginia, for example, where under an NPDES “watershed general permit” each covered point source has the discretion to choose to comply with its WLAs by installing advanced technology at that facility, or by acquiring nutrient credits from other covered facilities that outperform their nutrient WLAs in the same year. Va. Code § 62.1-44.19:12 *et seq.*; 9 Va. Admin. Code § 25-820-70. Maryland exercised its discretion to mandate and fund a statewide upgrade program for the 67 largest POTWs, Md. Code Ann., Environment §§ 9-1601(n), 9-1605.2, while adding a nutrient trading program for offsetting future growth beyond applicable WLAs, Md. Code, Agriculture § 8-901.

The foregoing point source examples represent different effective approaches of two Bay States that were devised in their discretion. The Bay States have even greater discretion with respect to how they choose to implement the Bay

⁶ Nonpoint sources can benefit from water quality offset and trading programs as well. In fact, Appellants intervened on behalf of EPA in another recent case to *defend* the Bay TMDL’s endorsement of offset and trading programs. *See Food and Water Watch v. EPA*, ___ F. Supp. 2d ___, 2013 WL 6513826, *1 & n.1 (D.D.C. 2013)

TMDL's LAs for *nonpoint* sources because EPA has no direct regulatory authority over most of these sources. The Bay TMDL contains aggregate allocations within each segment for five broad nonpoint source categories: agriculture, forest, non-tidal water deposition, onsite, and urban. JA 1596. While the Bay States all have their own intended implementation approaches for their LAs, the TMDL does not mandate any of those actions at the source sector level, much less for any specific parcel of land. To the contrary, it is entirely within state's discretion to determine how to meet the LAs. In fact, it is within state discretion to determine *if it will follow the source sector LAs at all*, as EPA counsel acknowledged at oral argument in the case below:

[T]he states can go their own way to achieve water quality standards. So the load allocations, if they choose to, they can say, we don't want to go with the load allocation that's included in the TMDL.

JA 1758.⁷ For each nonpoint source sector with an LA, a state has effectively unfettered discretion to determine what suite of measures it will implement to meet that allocation.

⁷ This does not mean that states *will* ignore the LAs, of course, especially given that the Bay States developed their respective LAs through the WIP process. As the states work toward meeting their targets for reducing total nutrient and sediment loads delivered to the Bay, the LAs serve as indispensable tools for planning and setting sector-specific goals.

III. The Bay TMDL’s “Deadlines” Are Mutually Agreed Planning Targets, Not Regulatory Requirements

Appellants assert that EPA unlawfully set “deadlines for states to put control measures and practices in place that are designed to achieve [the Bay TMDL’s allocations].” Appellants’ Brief at 2. Appellants cite two offending deadlines: (1) a 2025 target date to achieve the nutrient and sediment reduction (with an interim goal to have 60% of measures in place by 2017), *id.* at 11 (citing JA 1355–56); and (2) 2010, 2011, and 2017 dates for the submission of Phases I, II, and III, respectively, of the Bay States’ WIPs, *id.* at 50 (citing JA 1361). If these dates were in fact “deadlines,” *the Municipal Associations would agree* with Appellants that Section 303(d) does not authorize them. However, these so-called deadlines are not deadlines at all. They are target dates for certain implementation progress which were mutually agreed upon by the Bay States prior to the publication of the Bay TMDL.

As the district court noted, the 2025 target for full implementation of the Bay TMDL was not imposed by EPA. This 2025 target was determined by the consensus of the Bay TMDL states at a meeting of the Principals’ Staff Committee on October 1, 2007. JA 73 (citing JA 1161). The Bay TMDL refers to it as a “goal” or “target date.” JA 1119, 1161. Similarly, EPA refers to the 2017 date as an “interim goal.” JA 1356. Nothing in the Bay TMDL purports to make these

dates legally binding, because there is no authority under the CWA to make them so.⁸

The deadlines to prepare the three phases of the WIPs likewise are not legally binding. The Bay States are partners in the development of the Bay TMDL, and the Phase I WIP served as the basis for the allocations and targets in the final TMDL. JA 1368. The Phase II and III WIPs function as progress reports and planning tools as the Bay States mutually work toward reducing the total nutrient loadings to the Bay. JA 1134. Like the implementation targets, the Bay States are “expected” to submit WIPs by the target dates, JA 1361, but they are under no legal obligation to do so.

The Bay States necessarily retain the discretion to adjust their targeted implementation schedules in a reasonable manner if warranted in the future. For example, Virginia made this clear in its Phase I WIP:

Virginia . . . reserves the right to adjust this [implementation] plan based on new information such as conservation efforts currently implemented but not accounted for in the model, adverse economic impacts on business, funding availability from federal and other sources, and improved scientific methodologies.

⁸ Past proposed federal legislation (not enacted) would have changed the non-binding nature of the 2025 target by amending CWA Section 117, 33 U.S.C. § 1267. S.1816, 111th Cong. The first “primary objective” of this bill was to “[e]stablish a date-certain of 2025 . . . for all restoration actions to be implemented throughout the Chesapeake Basin.” S. Rep. No. 111-333, at 3, 2010 WL 3859682 (2010).

JA 1022. EPA cautions it may take action if a jurisdiction does not meet its expectations, JA 1365–66, but, as explained by EPA, EPA Brief at 49, nothing in the Bay TMDL confers the Agency with any more power to attempt to influence state behavior than it already has under the CWA. Because the “deadlines” Appellants complain of are non-binding “targets” set with the agreement of the Bay States, and lack the force of law, Appellants’ deadline claim is easily dismissed at *Chevron* step one.

IV. EPA’s Reasonable Assurance Review of Load Allocations Does Not Restrict State Discretion on How to Implement the Bay TMDL

Appellants allege that EPA unlawfully required the Bay States to “provide ‘reasonable assurance’ that *EPA’s allocations* ‘will’ be achieved.” Appellants Brief at 57 (emphasis added). What EPA did was review the LAs in the Bay States’ Phase I WIPs to determine if they were practicable. JA 1355–56. Reasonable assurance review of LAs is a long-standing EPA policy. *See* EPA, Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992, at 4–5 (May 20, 2002).⁹ The commonsense purpose is to evaluate whether a TMDL’s projected pollutant load reductions from nonpoint sources (*i.e.*, LAs) are practicable as a general proposition. *Id.* This is not indicative of undue coercion; it is sensible step in constructing a TMDL that is practical of attainment. *See* JA 62.

⁹ Available at <http://www.epa.gov/owow/tmdl/guidance/final52002.pdf>.

In three instances, EPA did not find reasonable assurance that the LAs in a state's Phase I WIP were practicable, so it inserted alternative "backstop" allocations in the Bay TMDL that varied from the WIP. JA 60. This is of no moment. As discussed above, the allocations in the Bay TMDL are not binding. The states have discretion on following and implementing the backstop LAs. Ultimately, EPA will judge the adequacy of Bay water quality improvement efforts based on real world progress or the lack thereof. If EPA finds a violation of the CWA, its legal authority to address it is no more than it was before the Bay TMDL plan was issued.

CONCLUSION

In the public interest of achieving clean water wherever reasonably possible and of maintaining a fair and equitable process for doing so, the Municipal Associations respectfully request that this Court protect and maintain the holistic watershed approach of the Clean Water Act and its TMDL program in general and the Chesapeake Bay TMDL in particular and affirm the challenged portions of the district court's judgment for the reasons stated above.

Dated: April 21, 2014

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, Christopher D. Pomeroy, hereby certify:

1. Pursuant to 3d Cir. L.A.R. 28.3(d), that the undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit.
2. That this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's Order of January 27, 2014, because this brief contains 5,699 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 2010.
3. That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.
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Dated: April 21, 2014

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this day, I caused an electronic copy of the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will send notice and accomplish service of such filing to the following registered CM/ECF users.

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