IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 11-cv-0067**
	)	**(Judge Rambo)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

INTERVENOR
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION'S MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SCOPE OF INTERVENTION

Pursuant to this Court's Order of December 28, 2011, Intervenor, Pennsylvania Municipal Authorities Association (hereinafter "PMAA") hereby files this Brief in support of Defendant's cross-motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

On October 13, 2011 PMAA was granted leave, pursuant to Fed. R. Civ. P. 24, by this Honorable Court to intervene in this lawsuit in order to address Plaintiffs' challenge to the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (hereinafter "TMDL"), said TMDL being established by the United States Environmental Protection Agency (hereinafter "EPA"). More specifically, PMAA intervened in order to address Plaintiffs' claims concerning the TMDL's current pollutant loading allocations and corresponding reductions.

PMAA is an association that represents approximately 720 sewer and water authorities in Pennsylvania, which collectively provide water and sewer infrastructure services to over 6 million Pennsylvania citizens. PMAA's mission is to assist water and sewer authorities in providing services that protect and enhance the environment and promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens.

The Pennsylvania Chesapeake Bay Tributary Strategy, adopted by the Pennsylvania Department of Environmental Protection ("DEP"), identified more than 180 wastewater treatment plants ("WWTPs") in the Pennsylvania portions of the Susquehanna and Potomac River basins that would have to implement certain nutrient reduction measures in order to address water quality issues in the Chesapeake Bay. Nearly half of the aforementioned 180 WWTPs are either owned or operated by municipal authorities represented by the government relations efforts of PMAA. As point source dischargers[1], PMAA's members discharge into bodies of water which are upstream of waters that are addressed by the TMDL and, like the facilities and lands owned by Plaintiffs' members, are now subject to the limits imposed by the TMDL.

PMAA's intervention in this case, however, is currently limited to Plaintiffs' specific challenge to the load reduction allocations in the TMDL. PMAA takes no position at this time as to the remainder of arguments made by Plaintiffs, either in Plaintiffs' Amended Complaint or in Plaintiffs' Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment (hereinafter "Plaintiffs' Memorandum"), but reserves the right to do so.

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[1] The Clean Water Act (hereinafter CWA) defines a "point source" as "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

II. STATUTORY AND REGULATORY BACKGROUND

For purposes of this memorandum, the statutory framework and interplay between state and federal governments is adequately delineated in EPA's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of EPA's Cross-Motion for Summary Judgment (hereinafter "EPA's Memorandum"). *See EPA's Memorandum*, pgs. 2-9.

III. PROCEDURAL BACKGROUND

On April 4, 2011 the Plaintiffs filed a complaint challenging EPA's establishment of the TMDL. This challenge included an argument that the TMDL is contrary to law because it "encompass[es] nonpoint sources within point source wasteload allocations." *Plaintiffs' Amended Complaint*, ¶ 83. Although the Plaintiffs' are seeking a vacatur of the Final TMDL "in its entirety," *Plaintiffs' Memorandum*, pg. 64, there can be no question that Plaintiffs' true interest lies not in total vacatur of the TMDL, but only with those portions of the TMDL that apply to Plaintiffs. This is best articulated by a review of Plaintiffs' Amended Complaint, where the following challenges to the TMDL can be found:

- Plaintiffs "will be directly and adversely affected by the Final TMDL, which assigns pollutant loadings both for regulated 'point sources' and for unregulated 'nonpoint source' operations." *Amended Complaint*, ¶ 9.

- Plaintiffs object to EPA's "distributing pollutant loading among numerous source categories and

> even among individual sources throughout the watershed," *Amended Complaint*, ¶ 51;
>
> - EPA lacks the "authority to impose pollutant load allocations" watershed-wide through a TMDL. *Amended Complaint*, ¶ 53;
>
> - "EPA's Final TMDL will have a significant adverse impact on Plaintiffs' members . . . . EPA intends to force agricultural sources to adopt . . . changes through the permit held by regulated agricultural sources . . . . EPA also intends to convert unregulated agricultural sources into regulated sources if they do not change their operations . . . ." *Amended Complaint*, ¶ 75 (citations omitted); and
>
> - The Final TMDL violates EPA's implementing regulations by "encompassing nonpoint sources within point source wasteload allocations . . . ." *Amended Complaint*, ¶ 83.

PMAA was permitted to intervene in order to address these specific challenges to the TMDL. PMAA's Motion to Intervene took no position regarding the remaining claims by Plaintiffs, but reserved the right to do so at a later time. Specifically, PMAA disputes Plaintiffs' claims that non-point sources, such as those identified in Plaintiffs' Amended Complaint, should be excluded from the TMDL.

On January 27, 2012, the Plaintiffs filed a Joint Motion for Summary Judgment (hereinafter "Plaintiffs' Summary Judgment Motion") and Plaintiffs' Memorandum. Although Plaintiffs' Memorandum attacks the entirety of the

TMDL for various reasons, the motion nevertheless repeats the arguments found in Plaintiffs' Amended Complaint, specifically, that the TMDL's allocation of loading reductions are contrary to law. *See Plaintiffs' Memorandum*, pgs. 32-33 ("EPA's regulations cannot be interpreted to authorize the allocation action taken by EPA in the Final TMDL"). EPA responded to Plaintiffs' Motion for Summary Judgment on March 27, 2012 by filing a Cross-Motion for Summary Judgment and EPA's Memorandum.

As it did in its Motion to Intervene, PMAA now responds to the narrow issue raised by Plaintiffs concerning the allocation of loading reductions. Again, PMAA takes no position on the remaining issues raised by Plaintiffs. PMAA argues only that the loading reductions found in the TMDL are lawful and should not be disturbed simply because some of the largest stake holders do not want to adderss their fair share.

IV. STANDARD OF REVIEW

Pursuant to the Administrative Procedures Act (hereinafter "APA"), a court may only set aside agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706(2)(A).

An agency action is only arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983); *NVE, Inc. v. Dep't of Health and Human Servs.,* 436 F.3d 182,190 (3d Cir. 2006). Because this standard of review is increasingly narrow, courts are instructed not to substitute its own judgment for that of the agency. *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health and Human Servs.*, 101 F.3d 939,943 (3d Cir. 1996). Therefore, the agency's decision should be upheld so long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

V. ARGUMENT

A. If EPA Has The Authority To Establish The TMDL, Then TMDL's Allocation of Pollutant Load Reductions Is Lawful.[2]

A TMDL is a number - a calculation that represents the total daily load of a pollutant or pollutants that a water body is able to assimilate without violating applicable water quality standards (such as fishing, swimming, etc.). The calculation takes into account both (1) point source discharges (e.g., wastewater treatment plans and municipal stormwater runoff) and (2) nonpoint source discharges (e.g., runoff from agricultural enterprises).

Simply put, Plaintiffs represent the interests of non-point source dischargers, and PMAA represents the interests of a sector of point source dischargers, specifically wastewater treatment plants (hereinafter "WWTPs"). Therefore, the difference between these two types of dischargers, and how each type of pollution is addressed by the CWA, is of paramount concern. According to federal regulation, the portion of a surface water's loading capacity that is allocated to existing and future point source discharges is referred to as the "waste load

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[2] In Plaintiffs' Motion for Summary Judgment and Plaintiffs' Memorandum, Plaintiffs challenge the TMDL and address broader issues of (i) whether or not EPA exceeded its authority under the CWA "by establishing a mandatory watershed-wide implementation plan," *Plaintiffs' Memorandum*, pg. 25; (ii) EPA violated the APA by restricting public access during the public comment period, *id.* pg. 44; and (iii) the TMDL is arbitrary and capricious because of flawed data and models. *Id.*, pg. 54. PMAA, however, is only responding to those portions of Plaintiffs' argument that address the current allocation of load reductions.

allocation" (hereinafter "WLA"). 40 C.F.R. § 130.2(h). On the other hand, the portion of a receiving water's loading capacity that is attributed either to existing or future non-point sources of pollution is referred to as the "load allocation" (hereinafter "LA"). 40 C.F.R. § 130.2 (g).

The terms WLA and LA are important because they are necessary and integral aspects of the equation used to calculate a TMDL. Federal regulation defines a TMDL as:

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

40 C.F.R. § 130.2(i). Thus, by definition, a TMDL must take into consideration pollution both from point sources and non-point sources. Lastly, the TMDL must be established at a level necessary to implement any applicable water standards "with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

Here, Plaintiffs argue that "EPA has no authority to impose allocations as binding elements of a TMDL...." *Plaintiffs' Memorandum*, pg. 33. However, to the extent that EPA has the authority to establish the TMDL under the CWA, then any inclusion of allocations between point and non-point sources in the TMDL must be considered consistent with the CWA, particularly when that allocation originated from the States, as is the case in the matter *sub judice.*

Moreover, Plaintiffs erroneously argue that EPA's inclusion of detailed WLAs and LAs is an improper exercise of power under the CWA. *Plaintiffs' Memorandum*, pgs. 33-35. However, such an argument completely ignores the simple fact that a TMDL, by statutory definition must address both non-point sources and point sources. 40 C.F.R. § 130.2(g)-(i).

Plaintiffs cite to the case of *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). However, the *Pronsolino* case actually undermines Plaintiffs' position. In *Pronsolino*, an environmental group challenged an EPA established TMDL for the Garcia River in California. The TMDL sought to address pollution coming exclusively from non-point sources. *Id.* at 1130 (Plaintiffs "challenged the EPA's authority to impose TMDLs on rivers polluted only by nonpoint sources of pollution and sought a determination of whether the Act authorized the Garcia River TMDL"). The Court in *Pronsolino*, as this Court should do in the matter *sub judice*, examined EPA's regulations and concluded that the Garcia River TMDL

was a lawful exercise of EPA's power under the CWA, even though it addressed non-point sources exclusively. *Id.* at 1131-1133 ("In short, EPA regulations concerning…TMDLs apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two") and 1139 ("Looking at the statute as a whole, we conclude that the EPA's interpretation of § 303(d) [of the CWA] is…entirely reasonable").

Thus, Plaintiffs attacks on the allocation of pollutant load reductions are without merit. The regulatory definition of TMDL includes both sources of pollution. Therefore, the TMDL's allocation of load reductions is consistent with the CWA.

B. The TMDL's Current Allocations Should Not Be Disturbed Because They Were Developed With The Assistance Of The States.

Plaintiffs argue the current allocations "intrude upon state implementation authority." *Plaintiffs' Memorandum*, pg. 34. Such an argument is completely belied by the record. Distilled, the events giving rise to EPA's establishment of the TMDL are as follows:

1. EPA used modeling tools to develop WLA and LA for use in the TMDL. AR0000152-0000196.

2. EPA then gave these WLA and LA calculations to the states and asked for each

state to prepare a strategy on how that particular state planned on meeting the required reductions. AR0000197-0000249.

3. DEP, acting for Pennsylvania, then prepared a strategy to meet those WLA and LA allocations within Pennsylvania by creating a Watershed Implementation Plan (hereinafter "WIP"). AR0000285-0000288, *and see also* AR0026393-0026671.

4. Based upon DEP's WIP, and the WIP's prepared by the other Bay States, EPA established the TMDL. AR0000017

Thus, and as explained in greater detail below, Plaintiffs are incorrect in their argument that the allocation of pollutant load reductions was an unlawful intrusion on the States' implementation authority. To the contrary, no such intrusion took place because the States were involved in the process, and in Pennsylvania's instance, drafted the implementation strategy, or WIP.

On October 1, 2007, EPA, at the request of the seven "Bay States" (Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia) agreed to establish the TMDL in coordination with, and on behalf of the Bay States. AR0000056. The allocations in the TMDL are based almost entirely on the proposed allocations developed by the Bay States in their final Phase I WIPs. AR0000263. Put another way, "based almost entirely on the Bay states' final Phase I WIPs, EPA established the Bay TMDL as a 'pollution

diet'...." *EPA's Memorandum,* pg. 23. This is directly contrary to the arguments raised by Plaintiffs that the TMDL's allocations "intrude upon state implementation authority." *Plaintiffs' Memorandum*, pg. 34.

An examination of Pennsylvania's WIP is necessary in order to address Plaintiffs' concerns that EPA is usurping state authority and imposing its will on the Bay States. According to the TMDL, "Pennsylvania's final Phase I WIP articulated a strategy to achieve its TMDL allocations" AR0000288. That strategy was chosen by Pennsylvania and is articulated in Pennsylvania's WIP, which addresses *both* non-point sources and point sources. Specifically, Pennsylvania's WIP provides that the Commonwealth, not EPA, is "developing a nonpoint source compliance effort focused on two major sectors: agriculture and stormwater." AR0026404. Simultaneously, the Commonwealth has also developed a strategy to address point source dischargers:

> To achieve targeted point source reductions to the Bay, DEP formed a Point Source Workgroup with the Pennsylvania Municipal Authorities Association as the co-chair. The workgroup proposed an allocation strategy to determine the individual cap loads for the 183 largest point source sewage discharges into the Bay watershed.
>
> DEP ultimately adopted this allocation and permitting strategy. The primary concept in the strategy was to create a level playing field for all of the municipalities. This was done by having [m]ost facilities meet cap loads based on their design flow with a total nitrogen concentration of 6 milligrams per liter (mg/L) and total phosphorus concentration of 0.8 mg/L, there have been some concerns raised on Pennsylvania being

> forced to the limit of technology with our sewage treatment plants. We will stand behind the strategy we agreed to in the past. We think it is the most cost effective and reasonable approach.

AR0026405 (emphasis added). Therefore the Plaintiffs' concern that states be brought into the decision making process has already been addressed. Pennsylvania was involved in the development of the strategy necessary to meet the requirements of the TMDL.

As EPA acknowledges, the "TMDL is shaped in large part by the jurisdictions' plans to reduce pollution…Now the focus shifts to the jurisdictions' implementation of the WIP policies and programs what will reduce pollution…." AR0000017 (emphasis added). While the Plaintiffs' may argue that the TMDL intrudes upon the states' implementation authority, the simple fact of the matter is that the TMDL is "based almost entirely on the Bay states' final Phase I WIPs." *EPA's Memorandum*, pg. 23. The allocations provided in the various Bay states' WIPS, including the allocations found within Pennsylvania's WIP, which DEP has already stated it will stand behind as "the most cost effective and reasonable approach," should not be disturbed simply because Plaintiffs do not want to contribute their fair share to pollutant load reductions. AR0026405. For additional support of this argument, PMAA directs this Court's attention to EPA's Memorandum, pages 28-41.

VI. CONCLUSION

For the reasons articulated above, PMAA respectfully requests that this Honorable Court deny the Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2), the undersigned certifies that the foregoing Intervenor's Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Joint Motion for Summary Judgment complies with the word count limit and does not exceed the allotted 7,000 words. According to the word count feature of the word-processing software used to prepare this Memorandum, the Memorandum contains 2,980 words.

/s/ Steven A. Hann
Steven A. Hann

CERTIFICATE OF SERVICE

I certify that on April 20, 2012, a copy of the foregoing Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Joint Motion for Summary Judgment was served by electronic service via the Court's ECF system pursuant to Standing Order 03-1, ¶ 12 upon:

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