UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 11-cv-00067-SHR**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

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Plaintiffs file this reply memorandum in support of their joint motion for summary judgment and in response to the memoranda filed by Defendant U.S. Environmental Protection Agency ("EPA"), Intervenors Chesapeake Bay Foundation, *et al.* ("CBF"), National Association of Clean Water Agencies, *et al.* ("NACWA"), and Pennsylvania Municipal Authorities Association ("PMAA").[1]

INTRODUCTION

EPA has attempted to portray its invasion of state authority as a benevolent collaboration with states seeking EPA's help to establish a total maximum daily load for the Chesapeake Bay watershed (the "Final TMDL"). In fact, frustrated by cleanup progress that EPA felt was too slow (although improvement was undeniable), and acting under consent decrees that it voluntarily entered into with environmental groups, EPA pressured states to "partner" with EPA to achieve the Agency's goals on the Agency's timeline. EPA demanded all seven states in the Chesapeake Bay watershed to provide EPA with "watershed implementation plans" ("WIPs") that included, among other things, detailed pollutant allocations to specific sources and source sectors. EPA then demanded that those states repeatedly revise those plans to EPA's satisfaction, in many cases over the states'

[1] Where appropriate, we refer to NACWA and PMAA collectively as "Municipal Intervenors."

protest. When even the revised plans did not satisfy the Agency, EPA simply changed them.

EPA's action is unlawful because Congress left TMDL implementation planning to the states, even when EPA itself establishes the TMDL. EPA's Final TMDL, however, locks in the detailed allocations from the WIPs and declares in no uncertain terms that the states *cannot* change EPA's final numbers without its approval. EPA thus imposed its own decisions about how to achieve the Final TMDL's total pollutant reductions and about state land use, even though the Clean Water Act ("CWA") reserved those powers to the states.

ARGUMENT

I. Plaintiffs Have Associational Standing To Challenge The Final TMDL

For the first time since this action commenced in January 2011, EPA argues that we lack standing to challenge the Final TMDL. As representatives of industries directly regulated by the CWA, however, we clearly have standing to bring this challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) ("[T]here is ordinarily little question" about standing if the "plaintiff is himself an object of the action (or foregone action) at issue.").

Only one plaintiff needs to demonstrate constitutional standing for this Court to assert jurisdiction. In prior cases involving multiple plaintiffs, the Supreme Court and the Third Circuit have found that because one plaintiff had standing,

there was no need to consider the standing of other parties. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 129 S. Ct. 2579, 2592-93 (2009); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n. 9 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing. . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Freeman v. Corzine*, 629 F.3d 146, 157 (3d Cir. 2010).

As explained below and in the supporting declarations,[2] we have standing to challenge the Final TMDL.

A. Plaintiffs' Members Have Standing To Sue In Their Own Right

For an association to sue on behalf of its members, it must first demonstrate that "its members would otherwise have standing to sue in their own right." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996). Here, declarations confirm that several of our members could sue in their own right because they satisfy the well-known test for constitutional standing: injury-in-fact; causation; and redressability.

[2] EPA wrongly states that dismissal is required because we did not submit affidavits or other evidence along with our summary judgment motion. *See* EPA Opp'n 27. None of EPA's cited cases support its position. Plaintiffs now submit numerous declarations alleging facts to support standing "[*i*]*n response to* [EPA's] summary judgment motion," and those facts "will be taken to be true." *Lujan*, 504 U.S. at 561 (emphasis added); *accord Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 161 (3d Cir. 2007).

1. Injury In Fact

There can be no dispute that the Final TMDL will injure our members. EPA itself wrote: "We agree that the allocations [in the Final TMDL] will have significant regulatory consequences. That, of course, is the point. We expect that the [Final] TMDL will indeed have immediate and direct consequences on discharges in the watershed[.]" AR0001709. Not surprisingly, Plaintiffs' member declarations indeed demonstrate a "sufficient likelihood of economic injury to establish standing." *Clinton v. City of N.Y.*, 524 U.S. 417, 432-33 (1998); *see also Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972) ("[E]conomic injuries have long been recognized as sufficient to lay the basis for standing[.]"). These injuries far exceed the "identifiable trifle" required for standing. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (standing allowed to challenge, *inter alia*, "a $5 fine and costs").

Here, Plaintiffs' members must incur significant expenses to comply with more stringent limitations on the discharge of nutrients as a result of the Final TMDL. Most obviously, the Final TMDL sets forth specific discharge limits for 478 significant point source permit holders, including some of Plaintiffs' members. *See* Ex. 1 (Shafer Decl. ¶5); Ex. 2 (Igli Decl. ¶¶5, 7). By having to comply with those new limits, these members must each incur substantial expenses. *See* Ex. 1 (Shafer Decl. ¶¶6-8) (stating that a facility must employ new treatment technology

to comply with the Final TMDL's allocations and that wastewater treatment costs are expected to increase by 161%); Ex. 2 (Igli Decl. ¶¶8-9) (noting significant costs to upgrade and operate wastewater treatment plants to comply with allocations). Notably, both courts in the *Dioxin/Organochlorine Center* litigation asserted jurisdiction over an analogous challenge to a TMDL by regulated point sources who received detailed wasteload allocations ("WLAs") in that TMDL, although neither court specifically analyzed standing. *See Dioxin/Organochlorine Ctr. v. Rasmussen*, No. C93-33D, 1993 WL 484888 (W.D. Wash. Aug. 10, 1993); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517 (9th Cir. 1995).

Plaintiffs' members who are not among the 478 significant point sources will incur comparable injuries in complying with the Final TMDL's allocations. *See, e.g.*, Ex. 2 (Igli Decl. ¶¶6, 8-9) (wastewater treatment plant upgrade needed to comply with "aggregate" WLAs); Ex. 3 (Behrer Decl. ¶¶12-14) (describing economic harm from changes to dairy operation that a farm needs to undertake to comply with "aggregate" WLAs); Ex. 4 (Kettler Decl. ¶¶11-14, 16) (costs of complying with the Final TMDL include engineering and planning work to develop stormwater pollution control plans, installation of systems to treat and control stormwater, and implementation and maintenance measures); Ex. 5 (Sowers Decl. ¶¶8-15) (same); Ex. 6 (Herz Decl. ¶¶5-8) (describing how the Final TMDL will increase the costs of complying with discharge limitations and result in

reduced fertilizer sales); Ex. 7 (Doggett Decl. ¶¶4, 6) (pollutant allocations in the Final TMDL will increase already significant costs associated with nutrient management plans for corn farms); Ex. 8 (Formica Decl. ¶¶4-7, 9).

Contrary to CBF's claims, the wide-ranging injuries to Plaintiffs' members are far from speculative. *See* CBF Opp'n 12-13. They constitute injury-in-fact for standing purposes.

2. Causation

The aforementioned injuries are fairly traceable to the Final TMDL. *See, e.g.*, Ex. 1 (Shafer Decl. ¶¶5-8); Ex. 2 (Igli Decl. ¶¶8-9); Ex. 3 (Behrer Decl. ¶¶10, 12-14); Ex. 4 (Kettler Decl. ¶¶12-14); Ex. 5(Sowers Decl. ¶¶8-15); Ex. 6 (Herz Decl. ¶¶5-8); Ex. 7 (Doggett Decl. ¶¶4, 6); Ex. 8 (Formica Decl. ¶¶6-7, 9). For an injury to be fairly traceable to the challenged action, the defendant's action need not be "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997); *see also Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) (*en banc*) ("Mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice.").

Nonetheless, CBF asserts that because TMDLs are not self-implementing, Plaintiffs' injuries are caused by state implementation, not EPA's Final TMDL. *See* CBF Opp'n at 13-14. This view of causation is too restrictive. *See Am. Rd. &*

Transp. Builders Ass'n v. EPA, 588 F.3d 1109, 1111 (D.C. Cir. 2009) ("If the federal rules [plaintiff] sought to have revised really do allow such state regulations, then the harms [plaintiff's] members . . . would plausibly suffer as a result of future EPA approvals [of state actions] are sufficiently attributable to those federal rules to satisfy the 'fairly traceable' prong."). Indeed, CBF itself acknowledges that "TMDLs are binding upon permitting authorities" by virtue of EPA's point source permitting regulations. *See* CBF Opp'n at 15 n.29.

If CBF's views on causation were correct, no parties, *e.g.*, environmental groups or regulated entities, would ever have standing to challenge a TMDL as either insufficiently protective or in excess of EPA's regulatory authority under the CWA. Yet, many courts have asserted jurisdiction over such cases. *See, e.g.*, *Natural Res. Def. Council , Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001); *Dioxin/Organochlorine Ctr.*, 57 F.3d 1517; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210 (D.D.C. 2011). Accordingly, this Court should reject CBF's arguments on causation.

3. Redressability

Plaintiffs' requested relief – vacatur of the Final TMDL – would relieve Plaintiffs' members of the injuries flowing from that action. Plaintiffs need not show that a favorable decision will certainly redress their members' injuries, only that it is likely to do so. *See Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131,

142-43 (3d Cir. 2009). Here, if Plaintiffs prevail, their members will not be bound by, and could avoid incurring significant costs to comply with, the pollutant allocations set forth in the Final TMDL because those allocations would be set aside as exceeding EPA's statutory authority. *See, e.g.*, Ex. 1 (Shafer Decl. ¶9); Ex. 2 (Igli Decl. ¶¶8-9); Ex. 3 (Behrer Decl. ¶¶12-15); Ex. 4 (Kettler Decl. ¶¶12-14); Ex. 5 (Sowers Decl. ¶¶8-15); Ex. 11 (Ward Decl. ¶16); Ex. 6 (Herz Decl. ¶¶5-8); Ex. 7 (Doggett Decl. ¶¶4, 6); Ex. 8 (Formica Decl. ¶¶6, 9). Such a remedy would redress the injuries to Plaintiffs' members.

B. Plaintiffs Seek To Protect Interests That Are Germane To Their Purposes, And Plaintiffs' Members Need Not Participate In This Lawsuit

Plaintiffs satisfy the remaining elements of associational standing. The interests that Plaintiffs seek to protect in this case are germane to their purposes. *See United Food*, 517 U.S. at 553. "Germaneness is satisfied by a 'mere pertinence' between litigation subject and an organization's purpose." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990). Here, Plaintiffs' primary purposes are to advance and promote the interests of their members' industries and thus, they have an interest in influencing the development of reasonable and lawful environmental regulations and regulatory policies that affect the use and development of their members' lands. *See, e.g.*, Ex. 9 (Parrish Decl. ¶¶3-9); Ex. 10 (Sallie Aff. ¶¶6-8, 12); Ex. 11 (Ward Decl. ¶¶4-6,

15-16); Ex. 6 (Herz Decl. ¶¶2-3, 9); Ex. 7 (Doggett Decl. ¶¶2, 4-5); Ex. 8 (Formica Decl. ¶¶2-3, 8); Ex. 12 (Starkey Decl. ¶¶3-4, 11); Ex. 13 (Picard Decl. ¶¶3-4, 10). As described above, the Final TMDL affects how Plaintiffs' members ability to use their land and conduct business. *See supra* at 4-6. Thus, there is more than a "mere pertinence" between this lawsuit and the plaintiffs' associational purposes. *Competitive Enter.*, 901 F.2d at 111-12.

Finally, "neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food*, 517 U.S. at 553. Plaintiffs are not seeking monetary damages, but vacatur of the Final TMDL. Because the relief sought is equitable, individual member participation is not required. *See id.* at 553-54.

II. The Final TMDL Violates The Clean Water Act

A. The Final TMDL Is An Unlawful Implementation Plan

EPA and the Intervenors characterize the Final TMDL as the flexible product of a collaborative effort. CBF focuses on providing "additional facts," CBF Opp'n 14-15, and the Municipal Intervenors add a lengthy response to an argument that we never made (regarding the propriety of dividing responsibility between nonpoint and point sources). *See* NACWA Opp'n 4-6, 15-23; PMAA Opp'n 7-10, 13. As explained below, EPA's and the Intervenors' defenses are

premised on mischaracterizations of applicable law, record evidence, and our arguments.

TMDLs are meant to be "informational tools" that are not "self-implementing." *See* EPA Opp'n 28. The Final TMDL, however, unlawfully establishes detailed pollutant allocations that cannot be changed without EPA approval, effectively binding regulated entities and regulators. EPA's attempts to deny the impact of the detailed allocations in the Final TMDL fail for both point and nonpoint sources. *See id.* at 28-30, 34-37.

1. TMDL Allocations For Point Sources Subject to EPA Approval Are Binding By Regulation

For point sources, EPA's regulations require that effluent limits in permits for their discharges be "consistent with the assumptions and requirements of any available wasteload allocation [in a TMDL] for the discharge prepared by the State and approved by EPA pursuant to 40 CFR [§] 130.7." 40 C.F.R. § 122.44(d)(1)(vii)(B). As CBF puts it, detailed WLAs in a TMDL "are binding upon permitting authorities." CBF Opp'n 15 n.29. For a TMDL to truly be "informational," states would have to retain flexibility to determine WLAs in the first instance and to adjust them during TMDL implementation. If a TMDL's WLAs cannot be changed, EPA would foreclose independent state decisions on how best to allocate the total load among competing land uses.

EPA acknowledges the above-cited regulation, but argues that limits in point source permits "need not be 'identical' to the WLA." EPA Opp'n 34 (citing *In re City of Moscow, Idaho*, No. 00-10, 2001 WL 988721 (EAB July 27, 2001)). EPA's reliance on *In re City of Moscow* is misplaced because that decision contemplates only that states can impose permit limits that are *more stringent* than an existing WLA. *See* 2001 WL 988721, at § IV.A.2. It does not even suggest that permit writers can include *less* stringent permit limits. Thus, a state has no flexibility to reallocate pollutant loadings among point sources or from nonpoint to point sources if those allocations are locked into place in a TMDL that can only be revised by EPA.

2. TMDL Allocations Also Have Consequences For Nonpoint Sources

Load allocations ("LAs") to nonpoint sources in a TMDL result in burdens on those sources due to EPA's power to withhold grant funding to the states. As another federal district court explained, EPA can coerce state action through threats to withhold grant funding, as EPA has here:

> [O]nce federal environmental grant money begins to flow, state regulatory agencies become dependent on it. They become sensitive to threats to terminate it–terminations that would entail job and programmatic cuts. This influences behavior. A state may knuckle under coercive threats by EPA.

Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000); *see also* AR0000261.

3. The Final TMDL Unlawfully Locks In Detailed Allocations And Requires That Revisions To Those Allocations Be Approved By EPA

For a TMDL to actually be the "informational tool" that Congress intended, *see* AR0000062, any pollutant allocations therein must not be inflexibly locked in place. Despite EPA's efforts to show otherwise, the detailed allocations in the Final TMDL are, in fact, locked in place. The Final TMDL unequivocally states that EPA alone may revise its detailed allocations, and thus, it binds state decision-making on land use. AR0000332-33. Despite this language in the Final TMDL, EPA denies that the Final TMDL imposes implementation requirements upon the states. *See* EPA Opp'n 34-35. EPA, however, cannot cite any portion of the Final TMDL that suggests that the allocations therein are not binding, and indeed, EPA's own words in the Final TMDL belie its litigation position and demonstrate that the allocations cannot be changed without EPA approval:

> [I]t might be appropriate for EPA to revise the Bay TMDL (or portions of it). EPA would consider a request by the jurisdictions to propose such a revision to the TMDL following appropriate notice and comment. Alternatively, a jurisdiction could propose to revise a portion(s) of the Bay TMDL that applies within its boundaries (including, but not limited to specific WLAs and LAs) and submit those revisions to EPA for approval. If EPA approved any such jurisdiction-submitted revisions, those revisions would replace their

> respective parts in the EPA-established Bay TMDL framework.

AR0000332-33; *accord* AR0000256.[3]

Nonetheless, EPA insists that the detailed allocations do not "lock in or override state implementation decisions." EPA Opp'n 34. First, EPA claims that "states remain free to implement the LAs as they see fit," *id.* at 34, but EPA carefully avoids saying that states may freely *change* those LAs – because they may not. As explained below, decisions on how much of the total load to allocate to particular sources and source categories are part and parcel of implementation planning. *See infra* at 18. Accordingly, the requirement that states obtain EPA approval to revise any LAs in the Final TMDL undercuts states' exclusive authority over nonpoint sources and effectively enhances EPA's authority beyond the limits set by Congress. *See* Pls.' Mem. 28-29 (quoting CWA legislative history). This is not something states can "consent" to or "request" of EPA.

EPA further claims that the detailed WLAs in the Final TMDL are not "independently 'binding' on or enforceable against permittees."[4] EPA Opp'n 34. This is wrong as a matter of law, as we explained above. *See supra* at 10-11.

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[3] These passages from the Final TMDL refute NACWA's claim that "the states have retained flexibility and discretion with respect to implementation." NACWA Opp'n 14.

[4] Citing EPA regulations, CBF asserts the opposite, arguing that the Final TMDL is "binding upon permitting authorities." *See* CBF Opp'n 15 n.29.

Equally important, EPA never suggests that the Bay states can revise WLAs – in other words, EPA has not disputed that the WLAs are, in fact, locked in and can be changed only if EPA approves the changes.

EPA appears to misapprehend our arguments regarding the impropriety of imposing binding allocations. EPA notes that "long-standing regulations" and "court decisions over the last two decades" confirm that TMDLs can contain detailed WLAs and LAs, but this is off target. *See* EPA Opp'n 35. EPA violated the CWA not by referencing detailed allocations in the TMDL, but by locking those allocations in, establishing a federal timeline for implementation, and reserving exclusive authority to revise them. *See* Pls.' Mem. 33-35.

EPA can show the math behind what it calls the TMDL "equation" ("TMDL = WLAs + LAs"). *See* EPA Opp'n 39. But EPA's "equation" misleadingly suggests that a TMDL derives from the sum of the WLAs and LAs. In fact, EPA has inverted the process. A TMDL *estimates* the maximum load of a given pollutant that can be discharged into a waterbody without violating applicable water quality standards. Only then can that total load be allocated to various sources. While the TMDL number can be written in ink, the rest must be in pencil so that states can change the WLA + LA side of the equation as needed. In other words, states must retain flexibility to adjust allocations as they issue point source permits or impose nonpoint source pollution control measures. Here, however,

EPA put all elements of the "equation" in ink, and only EPA can change them. By this device, EPA haw unlawfully crossed the line into TMDL implementation.

In responding to our challenges to the binding allocations in the Final TMDL, the Municipal Intervenors fundamentally misunderstand our position. Both NACWA and PMAA argue generally that nonpoint source LAs are properly part of a TMDL, thereby implying that we are trying to inequitably shift burdens from nonpoint sources to point sources. *See* PMAA Opp'n at 7-10, 13; NACWA Opp'n 4-6, 15-23. We have never argued that the point source WLAs in the Final TMDL are lawful while the nonpoint source LAs are not. In fact, many of our members hold point source permits. Rather, we explained that *all* of the binding implementation requirements in the Final TMDL are unlawful and must be vacated.

4. EPA's "Backstop" Provisions Are Themselves Unauthorized Federal Action

The EPA-imposed "backstops" in the Final TMDL also constitute unlawful implementation for largely the same reasons as do the binding WLAs and LAs. By imposing backstops, EPA went beyond locking in the preliminary implementation assumptions developed by states at EPA's direction, and, for three states, substituted its own implementation decisions regarding how to achieve the total loads through allocations amongst point and nonpoint sources. *See, e.g.*, AR0000277; AR0000271-73; AR0000284-85; AR0000265; AR0000287;

AR0000292. States are not free to remove those backstops because any revisions to the detailed allocation scheme must go through EPA. *See* AR0000332-33; AR0000256. EPA responds that it has not "dictate[d] how states implement the TMDL" and that "states may still attempt to achieve their TMDL allocations using measures they choose." EPA Opp'n 36. Of course, EPA's responses ignore the fact that EPA *has already dictated* how states are to implement the TMDL by overriding their preliminary decisions on how best to allocate the total loads amongst sources within their borders. Moreover, EPA undeniably has changed states' implementation plans without identifying anything in the CWA that authorizes it to do so. *See* Pls.' Mem. 36; *see also* 33 U.S.C. §§ 1313(d)(2), (e).

In the Final TMDL, EPA never invites states to ignore the backstop adjustments and apply the allocations that they originally proposed. If the backstop adjustments were truly non-binding and the states are free to ignore them, why did EPA subject states to its WIP revision process, during which EPA rejected state proposals, threatened to take federal actions, and insisted that WIPs meet EPA's demands? The obvious answer, which the language in the Final TMDL confirms, is that they *are* binding.

5. The CWA Does Not Authorize EPA To Issue A Binding Implementation Plan Under The Guise Of A "TMDL"

Contrary to EPA's claims, the Final TMDL *does* "include implementation requirements" that intrude upon states' authority over land use, and therefore it

goes well beyond "those elements authorized by statute and regulation to be in any TMDL." EPA Opp'n 27-28. As explained below, a fundamental flaw in EPA's position is its assumption that the detailed allocations in the Final TMDL do not constitute implementation. *Id.* at 33-34. EPA's attempts to redefine TMDL "implementation" and to justify the Final TMDL on the basis of "cooperation" do not withstand scrutiny. The Final TMDL is an unlawful watershed-wide implementation plan.

a. Binding Allocations Are TMDL Implementation

EPA does not dispute that: (i) although Congress authorized EPA to establish TMDLs on behalf of states, it left TMDL implementation planning to the states;[5] and (ii) Congress preserved state authority over land use practices and gave EPA no authority to regulate nonpoint sources. Nor can EPA conceal the fact that the Final TMDL sets forth detailed allocations to both point and nonpoint sources and source categories that *cannot be revised without EPA approval* and are subject to EPA's deadlines. *See, e.g.*, AR0000332-33; AR0000256; *see also* Section I.A.2 *infra*. When EPA locked in those allocations and deadlines, it exceeded its CWA authority by invading state implementation planning.

[5] NACWA "agree[s] that TMDL implementation is the exclusive prerogative of the states." NACWA Opp'n 14.

EPA advances the myopic view that TMDL implementation does not include allocating loadings among particular sources and source categories. But the specifics of how to allocate a TMDL – *e.g.*, how much to allocate to point sources versus nonpoint sources; how much to allocate to one particular point source or nonpoint source sector versus another, etc. – *are* TMDL implementation.[6] They regulate land use management, which is why Congress reserved TMDL implementation planning for the states. *See* 33 U.S.C. §§ 1313(d)(2), (e). Indeed, EPA's own cited authority makes this clear:

> California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. *California is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests*.

Pronsolino, 91 F. Supp. 2d at 1355 (emphasis added). Here, EPA unlawfully stripped states of the authority to "moderate or modify" the detailed allocations in the Final TMDL. Consequently, the states are not truly free to "cho[o]se both if

[6]EPA appears to suggest that, as long as it does not restrict states' decisions on how to achieve LAs, nothing would preclude the agency from going farm to farm throughout the watershed to impose binding individual LAs on agricultural nonpoint sources in the same manner as it has on hundreds of individual point sources. *See* EPA Opp'n 29-30, 34-35. Nothing in the CWA, however, authorizes EPA to assign such allocations to individual nonpoint sources that only EPA can revise.

and how [they] would implement the [] TMDL." *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002).

b. Only Congress, And Not The States, Can Confer Clean Water Act Authority Upon EPA

EPA and the Intervenors nevertheless defend the Final TMDL on the ground that EPA "collaborated" with states to devise the allocations in the Final TMDL and that the allocations stem from state-developed WIPs. *See* EPA Opp'n 28, 29, 30-34; *see also* CBF Opp'n 16-18; NACWA Opp'n 11-14; PMAA Opp'n 10-13. No amount of "collaboration," however, can empower EPA to invade state implementation authority. EPA may exercise only the authority that Congress gave it. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Undeniably, EPA's "power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Neither EPA nor the Intervernors cite any authority to support their view that states may, by "consensus" or any other way, confer power upon a federal agency.

Although NACWA takes the view that the CWA "preclude[s] EPA from unilaterally establishing the Bay TMDL . . . with no participation of the states," it defends the Final TMDL on the ground that the states "imbued EPA with their collective TMDL authority." NACWA Opp'n 12. In fact, they did not, and could not. Congress did not delegate TMDL implementation planning authority to EPA,

and NACWA cites nothing in the CWA that authorizes states to confer that authority.

Just as state "collaboration" cannot expand EPA's CWA authority, a consent decree cannot justify EPA's *ultra vires* action. *See*, *e.g.*, CBF Opp'n 17; EPA Opp'n 6. Neither EPA nor CBF disputes that "consent decree[s] do[] not supplant the [CWA] itself." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1034 (11th Cir. 2002). Moreover, NACWA agrees that EPA's CWA authority "could not have been expanded by TMDL development consent decrees or settlement agreements with private parties[.]" *See* NACWA Opp'n 11 n.3. Any reliance, therefore, on consent decrees between EPA and environmental groups to expand EPA's authority is unavailing.

c. The Bay States Did Not Freely Confer Authority Upon EPA

Even if states could somehow confer statutory authority upon EPA (which they cannot), the Final TMDL is not truly the product of a harmonious collaboration as EPA and the Intervenors contend. Their attempts to downplay the coercive nature of the Final TMDL are unconvincing. EPA summarily deflects the evidence of coercion we cited – the two cartoons in the EPA power point presentations and two emails that EPA describes as "isolated instances of Virginia state employees expressing some displeasure with aspects of the collaboration process." *See* EPA Opp'n 31-32. The cartoons' message was quite clear: states

must meet EPA's demands or suffer the consequences. As for the "isolated instances," we quoted the statements by *EPA* in those documents, *not* by Virginia employees, and EPA spoke in no uncertain terms regarding what it expected state WIPs to contain. *See* Pls.' Mem. 18-19.

Contrary to EPA's assertions that the TMDL implementation decisions were "collaborative," EPA made it clear to states that "collaboration" had strict limits. EPA made the final TMDL implementation decisions. Minutes from an April 29, 2009 meeting state, *inter alia*, that "*Chair Shawn Garvin wanted to reiterate that this was EPA's plan, and that there was nothing on the table for a vote*. EPA would be taking jurisdiction input, but ultimately it was EPA's responsibility to publish the TMDL by December 2010." Ex. 14 at 11 (AR0000435) (emphasis added).

The states' displeasure with EPA's coercive attempts to hijack TMDL implementation planning extend beyond these examples. *See, e.g.*, AR0031947 ("New York cannot agree to the allocations in this Draft TMDL."); AR0031951 ("EPA's determination to assert sole authority to make these complicated decisions *for* New York, and over New York's objections, appears to be well beyond the providence of EPA's authority."); AR0026419 ("Pennsylvania does not . . . agree with the approach outlined in EPA's Draft Chesapeake Bay TMDL. . . . Pennsylvania objected to the imposition of 'federal backstop measures' in the Draft

Bay TMDL, including the establishment of [detailed allocations to point and nonpoint sources].")[7]; AR0023269-72 (letter from Governor McDonnell to Administrator Jackson detailing Virginia's numerous concerns with the legality of the TMDL); AR0032100-01 (West Virginia comments stating, *inter alia*, "we feel the need to provide formal comment and adamantly oppose the imposition by EPA of the backstop TMDL"). That no states have filed suit challenging the Final TMDL does not mean that it resulted from a voluntary state consensus with EPA. *See* EPA Opp'n 32; CBF Opp'n 18. Not one of the Bay states has stepped in to defend the Final TMDL, either.

EPA's attempts to diminish the significance of its threats miss the point. *See* EPA Opp'n 32-33; *see also* AR0000261. It is possible to use legal tools in a coercive manner. Furthermore, it is irrelevant whether EPA has authority, subject to applicable regulations, to exercise any of the options set forth in Section 7 of the Final TMDL. *See* AR0000261. What matters is that the real picture is not one of states "imbuing" EPA with their authority, and that they could not confer CWA authority that way even if they wanted to.

[7] Given these statements, PMAA's claim that the Pennsylvania WIP is evidence that the Final TMDL does not usurp state authority and was the product of voluntary state cooperation must fail. *See* PMAA Opp'n 11-13.

d. Clean Water Act Section 117(g) Does Not Authorize This TMDL

Although EPA no longer declares that the Final TMDL is a "management plan" under CWA Section 117(g), *see* AR0000064, it continues to rely on that section to justify its review of state implementation plans and the sufficiency of the allocations therein. *See* EPA Opp'n 31. EPA's reliance on that section remains misplaced. EPA failed to adequately rebut our analysis that Section 117(g) does not give the Agency additional regulatory authorities. *See* Pls.' Mem. 29-30. Indeed, Congress intended that EPA meet the goals of that section through grant funding, not through interfering with state TMDL implementation planning and imposing binding, watershed-wide allocations. *See* H.R. Rep. No. 106-550, at 3 (2000). In light of these limitations, EPA cannot use Section 117(g) to expand its authority under Section 303, which, on its face, does not give EPA authority over implementation planning. *See* 33 U.S.C. §§ 1313(d)(2), (e). Nor can EPA infer from Section 117(g) that it now has the authority to lock in pollutant reductions for *nonpoint* sources that states cannot revise.

e. EPA's "Reasonable Assurance" Analysis Does Not Expand Its Authority

Neither the statutory and regulatory provisions nor the policy reasons cited by EPA, *see* EPA Opp'n 37-47, demonstrate that the Agency has the authority to require states to provide "reasonable assurance" that the LAs in the Final TMDL

will be achieved. The detailed allocations and EPA-imposed "backstops" in the Final TMDL resulting from this unlawful requirement must be vacated.

EPA has yet to explain how it can lawfully require "reasonable assurance" in the Final TMDL after Congress blocked EPA's earlier attempt to implement revised TMDL regulations that incorporated this requirement. *See* Pls.' Mem. 37 (citing 68 Fed. Reg. 13608, 13609 (Mar. 19, 2003)). This congressional action also overrides EPA's pre-2000 *guidance* calling for "reasonable assurance," which EPA now asserts should receive judicial deference. *See* EPA Opp'n 40. Nor does EPA dispute that it lacks the authority under the CWA to regulate nonpoint sources of pollution and that states are responsible for implementing TMDLs with respect to nonpoint sources. *See* Pls.' Mem. 37-38 (quoting EPA brief in *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002)). EPA cites to its oversight over point source permits under 33 U.S.C. § 1311(b)(1)(C), *see* EPA Opp'n 39-40, but that provision does not authorize EPA to override state implementation decisions. Similarly, EPA's reliance on 40 C.F.R. § 130.2(i) is misplaced. *See* EPA Opp'n 38 n.18. That provision "provides for nonpoint source control tradeoffs," depending upon the efficacy of nonpoint source pollution controls. *See* 40 C.F.R. § 130.2(i). This underscores that states must retain flexibility to establish and adjust pollutant allocations: the states are uniquely positioned to determine how to achieve a total load because they – not EPA – have authority over nonpoint sources.

Despite its unsuccessful attempt to incorporate "reasonable assurance" into its regulations, EPA insists that the "reasonable assurance" requirement in the Final TMDL "is consistent with EPA's CWA authority to ensure TMDLs are sufficient to meet water quality standards." EPA Opp'n 38. This assertion is an attempt to transform EPA's limited authority to evaluate whether a *total load* will meet water quality standards into authority to make implementation decisions. With this assertion of authority, EPA arrogates to itself the power not only to develop a total load, but to decide how to allocate it. This assertion flies in the face of EPA's insinuation that its "reasonable assurance" requirement is largely an academic exercise to improve water quality planning, as opposed to binding implementation. *See id.* at 38-41. EPA's requirement that states provide "reasonable assurance that a TMDL's LAs *will in fact be met*," *see id.* at 39 (emphasis added), coupled with the fact that states cannot revise the Final TMDL's LAs absent EPA approval, *see* AR0000332-33; AR0000256, confirms that EPA has unlawfully taken over TMDL implementation.[8]

[8] EPA's reliance on 40 C.F.R. § 130.2(i) is misplaced. *See* EPA Opp'n 38 n.18. That provision "provides for nonpoint source control tradeoffs," depending upon the efficacy of nonpoint source pollution controls. *See* 40 C.F.R. § 130.2(i). This underscores that states must retain flexibility to establish and adjust pollutant allocations, and they are uniquely positioned to determine whether and how to achieve a total load in light of EPA's lack of authority over nonpoint sources.

B. EPA Cannot Demonstrate That The Clean Water Act Authorizes It To Establish Upstream Allocations In The Final TMDL

EPA offers a number of justifications why its upstream pollutant allocations – to individual sources and source categories in New York, Pennsylvania, and West Virginia – are not precluded by, but rather, are "consistent with," the CWA and its implementing regulations. *See* EPA Opp'n 41-47. Tellingly, EPA points to nothing in the CWA that *authorizes* such activity. EPA also justifies these allocations in the Final TMDL by noting that the upstream states collaborated in the development of the TMDL and indeed submitted detailed allocations to EPA. *See id.* 41-42, 46. EPA again seeks to expand its CWA authority through strained interpretations of the Act and talk of "collaboration." For many of the reasons explained above, and for additional reasons below, EPA's justifications do not withstand scrutiny.

Contrary to its claims, EPA's establishment of watershed-wide allocations is not "consistent with" the CWA. Nothing in the statute authorizes the states or EPA to assign pollutant allocations to upstream sources in a TMDL established to implement water quality standards in only downstream states. This lack of authority is not surprising given the Act's emphasis on preserving states' authority over their waters. *See* 33 U.S.C. § 1251(b).

Congress recognized that states may not be able to attain their own water quality standards due to pollution from out-of-state sources. Consequently, states

can submit written recommendations to EPA urging the Agency to object to the issuance of point source permits issued by other states. *See* 33 U.S.C. § 1342(b)(5). States can also petition EPA to convene an interstate management conference to address pollution from nonpoint sources in other states. *See id.* § 1329(g). By contrast, neither the states nor EPA have authority to assign pollutant allocations in a TMDL to upstream states. *See id.* § 1313(d). Congress's decision to omit language in § 1313(d) regarding the states' (or EPA's) ability to address pollution from upstream sources in other states was intentional and controlling. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, EPA cannot infer that the CWA authorizes it to establish upstream allocations based on the claimed lack of an express preclusion. *See* EPA Opp'n at 41.

Nor can EPA rest its authority to establish upstream allocations on CWA Section 117(g). Although EPA no longer appears to characterize the Final TMDL as a "management plan" under that section, *see* AR0000064, it continues to suggest that watershed-wide allocations are consistent with that section. *See* EPA Opp'n 42, 45. As explained above, *see supra* at 23, Section 117(g) does not give EPA new regulatory authorities, *e.g.*, the authority to establish upstream allocations in a TMDL.

EPA candidly acknowledges that its oversight authority over point source permits and its authority to establish water quality standards in upstream states to

ensure adequate protection of downstream waters do not provide "the specific, up-front implementation planning guidance that the Bay TMDL's source-specific allocations do." EPA Opp'n 45; *see also* NACWA Opp'n 7. But EPA's apparent frustration with the CWA authorities that Congress gave it does not validate its invention of "up-front" authority to establish upstream allocations in a TMDL. EPA's position amounts to this: the Agency prefers to insert itself into TMDL implementation planning rather than wait to exercise the specific statutory authority it has. *See id.* at 44-45.

Now for the first time, EPA alleges ambiguity in its regulatory definitions of "load allocation" and "wasteload allocation" in arguing in this litigation that upstream allocations are "consistent with 33 U.S.C. § 1313(d)(1)(C)." *See* EPA Opp'n 42-43 (emphasizing the words "receiving water" and "its" within 40 C.F.R. §§ 130.2(g)-(h)). This is precisely the sort of *post hoc* rationalization by agency counsel that courts routinely reject. *See, e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 484 F.3d 558, 560 (D.C. Cir. 2007); *Marshall v. Lansing*, 839 F.2d 933, 943-44 (3d Cir. 1988).

In any event, EPA's expansive interpretation of these regulatory definitions is invalid because it is inconsistent with the CWA. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977). Under EPA's proposed construction of the statute, Louisiana could establish a TMDL and assign allocations to sources in all 31 states

within the Mississippi River Basin. *See* Pls.' Mem. 42. None of the legal authorities cited by EPA in its brief support such an extraordinary action, just as they fail to support EPA's action in the Bay watershed.

Not only is EPA unable to point to any provisions in the CWA that authorize it to assign upstream allocations in a TMDL, EPA is unable to explain away the point that for prior TMDLs EPA has taken the opposite position. *See* Pls.' Mem. 40 (citing Spokane River Dissolved Oxygen TMDL (May 20, 2010) and comments from the State of New York ((AR0031954-56) noting that the Long Island Sound nutrient TMDL does not purport to bind sources in upstream states). Instead, EPA appears to maintain, without any supporting citation, that it can establish upstream allocations in this TMDL simply because the Chesapeake Bay is an interstate waterbody. *See* EPA Opp'n 46; *see also* NACWA Opp'n 7-8. As explained above, Congress knew how to make EPA the arbiter of interstate disputes over water quality, *see, e.g.*, 33 U.S.C. §§ 1329(g), 1342(b)(5), and it deliberately declined to do so in the TMDL context.

EPA and NACWA continue to try to stretch *Arkansas v. Oklahoma*, urging that the "allocations to the upstream states are consistent with the Supreme Court's treatment of interstate waters issues" in that case. EPA Opp'n 46; *see also* NACWA Opp'n 7. There, the Supreme Court dealt with EPA's authority to oversee point source permitting to ensure compliance with water quality standards

of downstream states. The Court did not address the scope of EPA's authority to establish TMDLs at all, let alone assign allocations to upstream states. *See* 503 U.S. 91, 105-06 (1992). No court has adopted a reading of *Arkansas* that is as broad as the one EPA and NACWA advance here, and this Court should decline to be the first to do so.[9]

Finally, EPA defends the upstream allocations in the Final TMDL by claiming that all seven jurisdictions collaborated on a watershed-wide approach. *See* EPA Opp'n 46. EPA's "collaboration" defense fails as a matter of law and fact. As explained above, no amount of "collaboration" justifies the creation of authority not granted by Congress. *See supra* at 19-20. Besides, record evidence from the states belies EPA's claim that all seven jurisdictions voluntarily agreed that watershed-wide allocations are proper. *See supra* at 20-22.

In sum, EPA lacks authority under the CWA to establish allocations to the non-tidal states in the Final TMDL.

III. The Final TMDL Violates The Administrative Procedure Act

A. EPA Has Not Demonstrated That Its Procedural Violations Were Either Insubstantial Or Harmless

EPA repeats the same arguments with respect to the three categories of modeling documentation it failed to disclose fully during the comment period on

[9] Even EPA's expansive reading of *Arkansas* does not support the assignment of detailed allocations *to nonpoint sources* in non-tidal states, which EPA did here.

the Draft TMDL: (1) adequate documentation was available; (2) modeling was discussed in meetings; and (3) we have not shown prejudice. *See* EPA Opp'n 47-55; *see also* CBF Opp'n 18-25. None of these arguments withstands scrutiny.

1. Contrary To EPA's Claims, Important Documentation Was Withheld During The Comment Period

EPA claims that it provided adequate documentation on its models to the public, but most of its arguments not only miss the point but also lack adequate record support. EPA argues first that it made "[h]undreds of pages of Watershed Model documentation" available for comment, including "all of the . . . calibration data." In support, EPA cites only to an appendix to the *Final* TMDL and two documents from 2005 pertaining to a review of a *superseded* phase of that model by EPA's Scientific and Technical Advisory Committee. EPA Opp'n 49 & n.23. These documents do not demonstrate that what EPA provided to the public during the comment period was even current, let alone complete. Nor does EPA's assertion that the Draft TMDL "described the application of the full suite of partnership models and supporting tools," *id.* at 50, support its position. EPA has not shown that complete documentation for the Watershed Model was ever made available for public comment, and its description of how it applied that model is no substitute for the documentation itself.

Even less convincing is EPA's attempt to demonstrate that it made complete documentation for Scenario Builder available. *See* EPA Opp'n 51-53. EPA

asserts that, before the start of the comment period, it released current information on Scenario Builder and included a "link to the formal documentation" in the Draft TMDL. *See id.* at 52 (citing AR0023947-48). But, that is the same "link" that numerous stakeholders identified (in comments to EPA) as missing important information. *See* Pls.' Mem. 48 (citing AR0000954-55; AR0001321; AR0001527-29). Second, EPA has proven Plaintiffs' point that it failed to allow for sufficient comment on Scenario Builder in claiming that it "made all relevant information available in as near to 'real time' as possible." EPA Opp'n 52. Regardless of what limited documentation it claims to have made available online to the public on September 16, 2010, EPA withheld the Scenario Builder code and supporting databases before disclosing it to a small number of stakeholders only about *one week before the comment period ended*. *See id.* Because EPA withheld such documentation, interested parties could not determine how exactly EPA used Scenario Builder.

Regarding the Water Quality and Sediment Transport Model ("WQSTM"), there is no dispute that EPA fundamentally changed the prior (2002) version of the model to include sediment transport. *See* EPA Opp'n 54; *see also* Pls.' Mem. 53. Contrary to its claims, EPA did not provide complete documentation on the sediment transport model before or during the comment period. EPA made

available the 2002 version of the documentation, but that version predated the aforementioned fundamental change. *See* AR0015530-903.

EPA nonetheless asserts that the Draft TMDL referenced "papers that provide documentation for the sediment transport model," but the sole document EPA cites in support is the same page from the Draft TMDL that we highlighted as setting forth EPA's admission that the model was still "[i]n preparation." *Compare* EPA Opp'n 54 *with* Pls.' Mem. 53. Moreover, EPA insists that draft documentation was accessible "through the extensive records of meetings and quarterly reviews of the partnership's Modeling Team," but the documents it cites do not support EPA's contention. EPA Opp'n 55 (citing 2002 version of the model and the December 2010 version released well after the close of the comment period). What those documents *do* demonstrate is that the 2002 documentation that EPA made available for comment differed dramatically from the documentation EPA "synthesized into a single report in December 2010." *Id.* EPA also points to a peer review process for the WQSTM in 2010, *see id.*, but reports and correspondence relating to that process are no substitute for the complete and current documentation for the model because the former does not tell the public how the model works.

EPA argues repeatedly that "final" documentation was compiled and made available with the Final TMDL, explaining that such "final" documentation could

not have been made available at an earlier date. *See* EPA Opp'n 50, 52 n.25, 54. But that does not excuse EPA's failure to provide the complete and current modeling documentation that supported the loads and allocations in the *Draft* TMDL. EPA cannot possibly deny that such documentation existed, and it offers no valid justification for failing to release such documentation to the public.

CBF, for its part, baldly asserts that Plaintiffs had "access to adequate 'documentation' concerning the model," yet none of its cited evidence – which consists solely of meeting lists and examples of discussions at public meetings – establishes that EPA actually provided current and complete documentation. *See* CBF Opp'n 21-24.

2. Public Meetings Did Not Cure EPA's Failure To Make Key Documentation Available For Comment

EPA and CBF contend that the ability to participate in public meetings during which modeling "was discussed" and to obtain written materials relating to those meetings is evidence that EPA provided adequate documentation relating to the three models at issue. *See* EPA Opp'n 52-53, 54; *See* CBF Opp'n 18-24. No amount of meeting participation or meeting-related documents, however, can justify EPA's failure to provide complete and current modeling documentation to the public. *See, e.g.*, ECF No. 97-2 (EPA's *Guidance on the Development, Evaluation, and Application of Environmental Models*, at 38) ("All technical information . . . must be documented in a manner that decision makers and

stakeholders can readily interpret and understand."); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("One cannot ask for comment on a scientific paper without allowing the participants to read the paper.").

Nowhere does EPA indicate that it made any of the missing documentation available at or in conjunction with any meetings, nor does EPA mention how detailed any of the discussions pertaining to modeling actually were. *See* EPA Opp'n 52-53 (referencing meeting materials, meeting summaries, and citing to meeting list); *id.* at 54 (referencing agency, reports, and meeting minutes and citing to meeting list). Likewise, CBF emphasizes the number of meetings that were held regarding modeling over a span of several years, but none of the evidence it cites substantiates its claim that meeting participation is the functional equivalent of receiving complete documentation. *See* CBF Opp'n 18-23.

3. EPA's Assertions Regarding Lack of Prejudice Are Legally Irrelevant and Factually Wrong

There can be no dispute over the critical importance of the Watershed Model, Scenario Builder, and the WQSTM to the Final TMDL. Indeed, the Final TMDL depends on the assumption that EPA's models are accurate and capable of supporting the allocations in the TMDL. *See, e.g.*, AR0000152, 202-02, 264-65. EPA's assertion that we were not prejudiced by the inability to comment on

modeling documentation withheld during the comment period is flatly incorrect. *See* EPA Opp'n 50-51, 53, 55.

According to the Third Circuit, "a regulated party *automatically* suffers prejudice when members of the public . . . are denied access to the *complete* public record." *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 130 n.9 (3d Cir. 1993) (emphasis added). As explained above in Section III.A.1, EPA failed to disclose much of the modeling documentation that support the assumptions in the Final TMDL. In light of this precedent, EPA's withholding of key documentation violates the APA.

EPA cites a number of inapposite cases to support its arguments regarding prejudice. *See* EPA Opp'n at 50-51, 53, 55. None of those cases involved the failure to disclose documentation critical to the agency's decision. *See Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995); *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 541 (D.C. Cir. 1983). Here, by contrast, EPA provided outdated and grossly incomplete documentation for models that are of critical importance to the challenged action.

EPA resorts to blaming us for not demonstrating how we would have commented differently on the Draft TMDL had we received adequate information during the comment period and not, for example, through post-decisional "errata"

months after the issuance of the *Final* TMDL. *See, e.g.*, AR0014711-13. To refute EPA's assertion, we would have to cite extra-record evidence, *e.g.*, post-decisional documents that reveal how EPA has continued to address the many flaws in its modeling since the issuance of the Final TMDL – flaws that we could have brought to EPA's attention had the complete modeling documentation been made available for comment. That EPA has attempted to address these errors since the issuance of the Final TMDL confirms not just the existence of flaws, but also their importance.

B. EPA Has Not Refuted Our Criticisms Of The Modeling Flaws

EPA responds to our challenges to its modeling with misleading statements that find no support in the administrative record. As explained below, EPA omits details that undercut each of its arguments.

1. EPA Used The Watershed Model At An Improper Scale

EPA claims that it did not use the Watershed Model at a scale below the major river basins in finalizing the allocations in the Final TMDL. *See* EPA Opp'n 57-58. That assertion is highly misleading and is undermined by numerous contrary EPA statements in the administrative record.

EPA is correct that it used the Watershed Model to develop allocations at the major river basin scale (*i.e.*, for the 92 tidal segments), but the Agency failed to mention that the "watershed model tracked all sources – point, non-point and air

deposition – within the watershed and simulated the fate of those pollutants as they were transported through the free-flowing river systems of the watershed and delivered to the tidal Bay waters." AR0012723. In fact, it was used to "*make decisions* about what … approach to take to improve water quality in the *local streams*, the rivers, and eventually all the way down in the Bay." AR0003282 (emphasis added).

EPA also declined to mention that it effectively required states to submit detailed data to EPA regarding local management decisions so that EPA could plug the data into the Watershed Model to determine whether state WIPs were acceptable. *See* AR0012717; AR0012712 (requiring the states to submit data to EPA using specific forms); AR0001692 ("EPA has clearly articulated key expectations of what data are needed in order to credit practices in the model[.]"). If a state's plan failed to meet EPA expectations based on the modeling results, EPA would reject the plan and require a new set of management scenarios to be developed. *See, e.g.*, AR0014803 (figure depicting use of Scenario Builder to prepare draft management plans for submittal to the Watershed Model); AR0025013 (noting that EPA rejected Delaware's initial draft WIP but that the revised WIP would likely meet EPA's target allocations based on "preliminary modeling runs"); AR0025019 (noting that the final LAs in Delaware's WIP would be finalized after EPA modeling).

EPA also required the states to submit even more detailed WIPs in 2011 that set "specific nutrient and sediment target loads from point sources and nonpoint sources within *each local area*." AR0012700 (emphasis added). EPA agreed to work with the states to establish the local target loads at the sub-watershed scale, but required the states to meet EPA's four established criteria for developing those local target loads, including whether the "*Chesapeake Bay Program models can track loads*" at the local scale. *Id*. (emphasis added); *see also* AR0012707. EPA indicated that it would also provide the states with "model outputs by sub-watershed" to help establish their county-level targets, AR0012700-01, despite the fact that EPA's own Scientific and Technical Advisory Committee ("STAC") stated that the Watershed Model was not capable of supporting TMDL implementation "at the local watershed scale." AR0015016.

Essentially, EPA rejected STAC's admonitions and boldly stated in its Final TMDL that the Watershed Model "now enabl[es] assessments at the local jurisdiction levels (e.g. counties) as well as at the major river basin-jurisdictional scale." AR0001277. In fact, in response to a public comment urging EPA not to assign WLAs to individual facilities due to the model's "insufficient resolution and accuracy," EPA responded "that the modeling is sufficient for individual waste load allocations to industrial facilities[.]" AR0001495. EPA's decision to use the Watershed Model below its predictive capabilities runs counter to STAC's

assessment, contradicts its brief in this litigation, and violates the APA because models must bear some rational relationship to the reality they purport to represent. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994).

2. EPA's Estimates On Tillage Practices Are Unsupported

EPA claims that the record supports its estimate of the amount of conservation tillage on cultivated cropland, *see* EPA Opp'n 59-60, but fails to provide adequate record support for this Court to validate its claim. Instead, EPA asserts that "the conservation tillage data" used in its models came from "USDA county-level agricultural census data[.]" *Id.* That is simply incorrect – the USDA agricultural census data cited in its brief does not contain *any information* on how much land in the census was actually tilled using conventional or conservation methods. *See, e.g.*, AR0014358-59 (explaining the information EPA derived from the USDA census data and failing to identify tillage methods). Nor does the census data appear to be in the administrative record. EPA also fails to provide any citation to the Conservation Technical Information Center and state data that it describes in its brief, perhaps because that data – like the USDA census data – does not appear to be in the administrative record. *See, e.g.*, Pls.' Mem. 59 & ECF No. 98-4, at 7 (describing statistically valid data used in the USDA-NRCS report and noting that a "similar level of detail is not … available for the EPA model framework"). Thus, the NRCS report we cited appears to include the most (if not

only) detailed discussion of tillage practices and data in the Chesapeake Bay region in the administrative record.

EPA also fails to adequately explain why it did not analyze the NRCS tillage data prior to finalizing the Final TMDL. EPA's citation (at 60) to general discussions between the agencies regarding some similarities in model outputs does not excuse the lack of scientific analysis of a key data input (the tillage data) that could fundamentally alter the output of one or both of those models. In fact, in those general discussions, EPA admitted that the tillage data it used was "incomplete." ECF No. 101-2, at 3 (AR0029754). When two models produce generally consistent results (as EPA claims) but use fundamentally different assumptions, one or both of those models may be suspect and should be carefully scrutinized. In EPA's rush to push the multi-billion dollar Bay TMDL across the finish line, it side-stepped sound science and punted necessary corrections to the models until *after* it released the binding allocations. *See, e.g.*, AR0023285-AR0023288 (waiting to update Watershed Model until 2011 to deal with nutrient management and impervious surface errors).

3. EPA Ignored Comments Criticizing Its Assumptions On Manure Management

EPA essentially ignores our criticisms of its assumptions regarding the management of manure at animal feeding operations ("AFOs") as well as impervious surface estimates for the watershed. *See* Pls.' Mem. 62 & n.14. In

response, EPA cites only to the 225-page final documentation for the WQSTM. *See* EPA Opp'n 61. As a threshold matter, the WQSTM does not apply to these issues, which focus on other models – Scenario Builder and the Watershed Model. Nor did EPA point to any specific discussions within the WQSTM documentation that pertain to our specific issues. EPA's failure to provide reasoned responses to these points, both in response to similar public comments and in its opposition brief, renders the Final TMDL arbitrary and capricious. *See Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1191 (D.C. Cir. 1990).

EPA does attempt to refute – without citation – one technical argument we raised concerning manure loss. EPA (at 61) claims that not all nutrients in "lost" manure is modeled as ending up in adjacent streams. EPA explains – for the first time in this litigation and in conflict with its position in the Final TMDL – that certain natural processes attenuate the nutrient load as the lost manure makes its way from land to stream. Such *post hoc* argument should be ignored.

Specifically, in EPA's draft Scenario Builder documentation made available to the public during the comment period, EPA said that "[m]anure is applied to [the] AFO in the county in which it was produced and 100% of nutrients in lost manure are applied to the *edge of stream load* where no BMPs exist." Christopher Brosch, Documentation for Scenario Builder Version 2.2, at 6-49 (Sept. 2010)

(attached as Ex. 15) (emphasis added).[10] "The edge-of-stream (EoS) load is the load delivered to the represented river or stream from the land segments." AR0014633 (discussing sediment delivery, but the EoS concept applies equally to nutrients). In other words, the edge-of-stream load is the amount of nutrients reaching a stream after the attenuation processes described in EPA's brief take place.

When the agriculture industry questioned EPA's lost manure assumptions during the public comment process, EPA confirmed its prior position and stated that "AFO acres are simulated as having *the entirety of nutrient and sediment load being at the stream's edge*." AR0001548 (emphasis added); *see also* AR0014856 ("100% of nutrients in lost manure are applied to the edge of stream load"). The problem for EPA is that there is no attenuation and reduction (as EPA claims in its brief) if 100% of nutrients in lost manure are modeled as directly entering the stream (as EPA claims in the Final TMDL). Thus, EPA is either misleading the Court now or it misled the public earlier. In either case, the Final TMDL should be vacated.

[10] During the parties' discussions regarding the scope of the administrative record for this case, EPA indicated that it does not object to including this document in the record.

CONCLUSION

Because the Final TMDL exceeds EPA's statutory authority and is arbitrary and capricious, this Court should grant Plaintiffs' motion and vacate the Final TMDL in its entirety.

Respectfully submitted,

Dated: May 21, 2012

By: /s/ Robert J. Tribeck

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2), the undersigned hereby certifies that the foregoing Opposition to EPA's Cross Motion for Summary Judgment and Reply Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment complies with the word count limit and does not exceed the allotted 10,000 words. This certification is reliant on the word count feature of the word-processing software used to prepare this brief.

Plaintiffs' Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment contains 9,989 words.

Dated: May 21, 2012

/s/ Robert J. Tribeck
Robert J. Tribeck

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012 a true and correct copy of the foregoing document was electronically filed and served on the following in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania:

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