IN THE 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,	)	**(Judge Rambo)**
Defendant.	)	

MUNICIPAL ASSOCIATIONS' REPLY MEMORANDUM IN SUPPORT OF MUNICIPAL ASSOCIATIONS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

On April 20, 2012, Defendant Intervenors National Association of Clean Water Agencies ("NACWA"), Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"), and Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), (collectively, "Municipal Associations"), filed a Cross-Motion for Summary Judgment, accompanied by a Memorandum in Support of Municipal Associations' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Municipal Associations' Summary Judgment Brief").[1] Plaintiffs filed their Opposition to EPA's Cross Motion for Summary Judgment and Reply Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment ("Plaintiffs' Reply") on May 21, 2012, and EPA filed its reply Memorandum in Support of EPA's Cross-Motion for Summary Judgment ("EPA's Reply") on June 20, 2012. Municipal Associations now respectfully submit this Reply Memorandum in Support of Municipal Associations' Cross-Motion for Summary Judgment.

[1] Municipal Associations' intervention and summary judgment briefing is limited to issues raised by Plaintiffs' claims set forth in their First Amended Complaint ("Complaint") that (1) "EPA's Final TMDL exceeds EPA's statutory authority under the Clean Water Act and otherwise violated the Act and its own regulations in multiple aspects," Complaint ¶ 77 (First Claim for Relief); and (2) "the Final TMDL is in excess of delegated statutory authority under the Clean Water Act and therefore is *ultra vires*," Complaint ¶ 93 (Fourth Claim For Relief).

II. ARGUMENT

A. Inclusion of Load Allocations and Wasteload Allocations in the TMDL Does Not Render it an Implementation Plan

The key issue in this case is where the line lies between Total Maximum Daily Load ("TMDL") allocation-setting, on the one hand, and implementation of those allocations, on the other hand. EPA's Reply already sets forth EPA's interpretation of Clean Water Act ("CWA") § 303(d) and EPA's implementing regulations with respect to the permissibility of allocating loads among all sources of the pollutant of concern (as distinguished from actual implementation of pollutant controls to achieve such allocations), and those arguments will not be duplicated here. The Municipal Associations agree that dividing a water body's assimilative capacity among sources of pollutants is the proper role of a TMDL and, further, is necessary to adequately address ***all*** sources of the pollutant of concern in any watershed for which a TMDL is established. Indeed, this is the essence of the holistic, watershed approach—an approach that the Municipal Associations believe to be not only the core of the TMDL program, but also the Clean Water Act's greatest potential for equitably, cost-effectively, and successfully restoring the tens of thousands of water bodies nationwide that are affected by excessive pollutant loads.

Contrary to Plaintiffs' position, *see* Plaintiffs' Reply at 12, setting pollutant load allocations for point and nonpoint sources in a TMDL is ***not*** the same as

dictating the means of implementing such allocations, which the Municipal Associations agree is properly the province of the states, even in the context of a multi-state TMDL. Other federal courts have recognized that "TMDLs are central to the Clean Water Act's water-quality scheme" precisely because "they tie 'together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water'" by "allocating the total 'load' . . . among contributing point and non-point sources." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (citations omitted); *see also Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011). This Court should reach the same conclusion. While EPA lacks the authority to dictate details of TMDL implementation, EPA may lawfully set load allocations and wasteload allocations in a TMDL.

B. The Parallel Watershed Implementation Plan Process Enabled States to Control Load and Wasteload Allocations for In-State Sources

While Plaintiffs protest the scrutiny that EPA applied to the Watershed Implementation Plans prepared by the states, *see* Plaintiffs' Reply at 15-16, 21, this begs the question of what EPA would have done in the absence of state-developed Watershed Implementation Plans and the allocations the states identified therein (to which EPA mostly deferred). The Watershed Implementation Plan process provided an opportunity for the states to select load and wasteload allocations for their own sources based on their own point and nonpoint source laws, regulations,

policies, and preferences. That is not to say that the Municipal Associations specifically endorse any adjustments made by the states in response to EPA review of the draft Watershed Implementation Plans, but the process was favorable to the states in terms of protecting state primacy. In other words, state primacy was better served by having a Watershed Implementation Plan process than if the entire allocation-setting process were left to EPA.

The inclusion of load and wasteload allocations for nonpoint and point sources, respectively, is both legally defensible and a practical necessity. In *Pronsolino v. Nastri,* 291 F.3d 1123, 1139 (9th Cir. 2002), the Ninth Circuit acknowledged EPA's authority as well as the practical necessity to account for nonpoint sources in TMDLs for waters such as the Chesapeake Bay impaired by both nonpoint sources and point sources. Nonpoint sources contribute a large percentage of the pollutant loads entering the Chesapeake Bay, with agriculture alone responsible for approximately 44% of the nutrient loads and 65% of the sediment loads delivered to the Bay. AR0000136. While the agricultural sector has made significant progress, for context it is important to understand that Publicly Owned Treatment Works (i.e., municipal wastewater treatment plants) contribute a much smaller percentage of the total pollutant load (17% of the nitrogen and 16% of the phosphorus entering the Bay), AR0000117, but have made and are continuing to make even more significant progress reducing pollutant

loads, *see, e.g.*, AR0026687, AR0031179. At the cost of billions of public dollars, treatment plant upgrades have been designed and constructed on the basis of the wasteload allocations in the TMDL. *See, e.g.*, *id*. For obvious reasons, any disruption of the underlying allocations of the TMDL at this late stage of point source implementation would be extremely disruptive and costly to the citizens (i.e., ratepayers) who fund these public projects.

The Municipal Associations appreciate Plaintiffs' clarification that they are not "trying to inequitably shift burdens from nonpoint sources to point sources," and Municipal Associations acknowledge that some members of the Plaintiff organizations have point source permits. *See* Plaintiffs' Reply at 15. However, by seeking to vacate the TMDL on the grounds that the allocations contained therein are unlawful implementation planning, Plaintiffs threaten EPA's holistic, watershed-wide approach taken in the TMDL, which includes allocations for both point sources and nonpoint sources, whether in downstream or upstream states. While Plaintiffs may not intend to unfairly shift the burden of addressing the Bay's water quality impairment, a consequence of the relief they request would be the elimination of the allocation of responsibility collaboratively developed by the states and EPA in the Chesapeake Bay TMDL and upon which basis so many municipal wastewater treatment plant upgrades have been designed and constructed.

C. EPA Acknowledges the Flexibility Retained by the Bay States

Plaintiffs contend that statements in the TMDL that amendments of wasteload allocations and load allocations require EPA approval "refute [Municipal Associations'] claim that 'the states have retained flexibility and discretion with respect to implementation.'" Plaintiffs' Reply at 13 n.3. In fact, the Municipal Associations take EPA at its word on this point, and are fully confident that the courts would hold EPA to its word, that "TMDL allocations are not enforceable or unlawfully 'binding,' and do not require any particular implementation action – indeed, . . . states have flexibility to implement a TMDL as they deem appropriate." EPA's Reply at 5; *see also* Municipal Associations' Summary Judgment Brief at 14.

Given the origin of such allocations with the states and their Watershed Implementation Plans, and EPA's representations before this Court that the states retain "flexibility and discretion," we understand EPA to say that individual load and wasteload allocations in the watershed-wide TMDL remain under the control and province of the states. The Municipal Associations agree that the "flexibility and discretion" of the states should be retained.[2]

[2] Beyond this general authority of the states, an additional important example of the states' implementation flexibility explicitly endorsed in the TMDL and in EPA's Reply is the flexibility to trade pollutant loading reduction responsibilities among point and nonpoint sources, which can help in more efficiently and cost-effectively

Similarly, Municipal Associations agree with EPA that EPA "did not 'establish[] a federal timeline for implementation.'" EPA's Reply at 15. Instead, the TMDL merely sets forth a "2025 implementation ***target***," which was "established jointly by the Bay Partnership." *Id*. (emphasis added). The target implementation schedule for completing pollutant control measures, which was voluntarily and collaboratively developed, is not a binding deadline, nor is it an element of the regulatory TMDL "equation." *See* 40 C.F.R. § 130.2(g)-(i) (defining TMDLs to include load and wasteload allocations). Thus, the Bay states have retained full flexibility when it comes to the temporal aspects of making reasonable further progress on implementation.

With respect to Plaintiffs argument regarding the regulatory provision for water quality-based effluent limitations in National Pollutant Discharge Elimination System ("NPDES") permits to be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL, 40 C.F.R. § 122.44(d)(1)(vii)(B), this broad statement requires one important correction beyond the reply offered by EPA. Specifically, 40 C.F.R. § 122.44(d)(1)(vii)(B) does not apply to discharges from a specific category of point sources—municipal separate storm sewer systems ("MS4s")—which instead are subject to the unique

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improving water quality in the Chesapeake Bay. *See* AR0000331-32; *see also* EPA's Reply at 12. This flexibility is already being exercised in Virginia, Maryland, and Pennsylvania.

"maximum extent practicable" statutory compliance standard enacted by Congress in 1987 subsequent to EPA's adoption of 40 C.F.R. § 122.44(d)(1)(vii)(B). CWA §402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) ("Permits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the ***maximum extent practicable*** . . . ." (emphasis added)). Though a full discussion of this Clean Water Act distinction (with which EPA disagrees) is beyond the scope of this brief and this litigation, the Municipal Associations call this distinction to the Court's attention, given the very broad and general manner that 40 C.F.R. § 122.44(d)(1)(vii)(B) is discussed in the other parties' briefs and the critical nature of this legal issue to localities that own and operate MS4s throughout this judicial circuit and the nation.

D. The Significance of the Bay States' Consent

The states consented to the extensive, multi-stage process undertaken to develop the Bay TMDL, which was necessary to adequately address the complexities of the Bay's water quality problems caused by nutrient and sediment loads from various point and nonpoint sources across the vast watershed spanning seven states. The states generally collaborated with EPA throughout this process, playing a central role in determining the load allocations and wasteload allocations that were incorporated into the TMDL, as well as related non-regulatory goals such as the targeted implementation timeline of 2025.

Municipal Associations do not dispute Plaintiffs' assertion that all actions taken by EPA must be authorized by federal statute—in this case, the CWA. *See* Plaintiffs' Reply at 19. Nevertheless, the states' consent and collaboration in the development of the Bay TMDL are highly relevant to EPA's authority to establish the TMDL. No other entity, be it a state or court, may confer power on a federal agency denied to it by Congress. *See Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 208 (3d Cir. 2007). Therefore, as Municipal Associations noted in their Summary Judgment Brief, EPA's CWA authority was not expanded—and could not have been expanded—by consent decrees or settlement agreements. Municipal Associations' Summary Judgment Brief at 11; *see also* EPA's Reply at 17.

Although EPA's ultimate authority with respect to TMDLs is derived from CWA § 303(d), 33 U.S.C. § 1313(d), the extent of EPA's authority in any particular circumstance is conditioned, pursuant to the terms of the statute, on actions taken by the states. For example, if a state submits a TMDL for an impaired water "at a level necessary to implement the applicable water quality standards," which is approved by EPA, EPA does not have the authority to establish a TMDL for that water; conversely, if the state submits a legally inadequate TMDL, EPA has the authority to disapprove it and establish a TMDL for the water itself. CWA § 303(d)(1)-(2), 33 U.S.C. § 1313(d)(1)-(2). Likewise, a state's failure to timely submit a TMDL for an impaired water triggers EPA

authority to establish a TMDL for that water. *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) ("[I]f a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the "constructive submission" by that state of no TMDL's," giving EPA the authority to establish a TMDL.). This "doctrine of constructive submission" is a "judicial gloss on the CWA" that applies when a state "'entirely failed' to act . . . or has 'flatly chosen not to act.'" *Am. Littoral Soc. v. EPA*, 199 F. Supp. 2d 217, 241 (D.N.J. 2002) (*quoting Hayes v. Browner*, 117 F. Supp. 2d 1182, 1194 (N.D. Okla. 2000), *aff'd*, 264 F.3d 1017 (10th Cir. 2001); *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 418 n.18 (D. Md. 2001)). Here, the fact that all the states in the Bay watershed agreed that EPA should establish the TMDL for the Chesapeake Bay demonstrated that they had "chosen not to act," *id*., in favor of EPA action. The states' consent, thus, opened the door to EPA development of the Bay TMDL, consistent with the "constructive submission" line of cases.

Lastly, state consent to EPA establishment of the Bay TMDL removed the impediment to EPA's watershed-wide TMDL development from principles of state sovereignty and primacy under the CWA, *see* CWA §§ 101(b), 510(2), 33 U.S.C. §§ 1251(b), 1370(2). EPA's authority to establish TMDLs is ordinarily constrained by "the states' primacy in controlling water pollution," *see Natural Res. Def. Council, Inc. v. EPA*, 770 F. Supp. 1093, 1096 (E.D. Va. 1991), and the

states' dominant role in TMDL development envisioned by CWA § 303(d), 33 U.S.C. § 1313(d). The states' agreement for EPA to establish the TMDL was an exercise of the states' primacy in controlling water pollution and prevented the TMDL from running afoul of EPA's statutory and constitutional restrictions in this regard. Because EPA acted with the blessing and cooperation of the states, EPA did not "invade" state authority over TMDLs.

III. CONCLUSION

For the reasons set forth above, and for the reasons set forth in Municipal Associations' Summary Judgment Brief, Municipal Associations respectfully request that this Court grant Municipal Associations' Cross-Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment with respect to Plaintiffs' first and fourth claims for relief. *See* Complaint ¶¶ 77, 93.

Respectfully Submitted,

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MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2) for the Middle District of Pennsylvania, I hereby certify that this Reply Memorandum in Support of Municipal Associations' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment complies with the word-count limit and does not exceed the allotted 5,000 words. *See* Case Management Order (Dkt. No. 65). Certification is reliant on the word count feature of the word-processing system used to prepare this brief.

This Reply Memorandum in Support of Municipal Associations' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment contains 2,850 words.

/s/ Christopher D. Pomeroy
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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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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