

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH and  
FRIENDS OF THE EARTH,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and LISA  
JACKSON, Administrator

Defendants.

No. 1:12-cv-01639-RC

**DEFENDANTS' MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), defendants United States Environmental Protection Agency and Lisa P. Jackson, Administrator hereby move to dismiss plaintiffs Food and Water Watch, et. al.'s (collectively "plaintiffs") Complaint for lack of jurisdiction and for failure to state a claim for which relief may be granted. As detailed in the accompanying Memorandum In Support Of Motion To Dismiss, plaintiffs (1) have failed to allege facts sufficient to establish an actual or imminent concrete and particularized injury that could be redressed by a favorable court decision, and thus lack standing; (2) have not challenged a final agency action, and thus have not stated a claim; and (3) have failed to allege facts sufficient to establish that any claim they have stated is ripe. Plaintiffs' Complaint should therefore be dismissed.

December 10, 2012

Respectfully submitted,

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*/s/ Angeline Purdy*

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

**I. INTRODUCTION**

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), defendants United States Environmental Protection Agency and Lisa P. Jackson, Administrator (collectively “EPA” or “Agency”) hereby move to dismiss plaintiffs Food and Water Watch, et. al.’s (collectively “plaintiffs”) Complaint for lack of jurisdiction and for failure to state a claim for which relief may be granted.

On December 29, 2010, EPA established a Total Daily Maximum Load for certain pollutants entering the Chesapeake Bay (the “Bay TMDL”). *See* Clean Water Act Section 303(d): Notice For The Establishment Of The Total Maximum Daily Load (TMDL) For The Chesapeake Bay, 76 Fed. Reg. 549 (Jan. 5, 2011). EPA established the Bay TMDL in collaboration with, and on behalf of, the seven jurisdictions (the “Bay states”) whose waters feed the Chesapeake Bay.<sup>1</sup> *Id.* at 549-50. The Bay TMDL sets an overall cap on discharges (or

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<sup>1</sup> Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia. 76 Fed. Reg. at 549. All of these jurisdictions are “states” as the term is defined in the Clean Water Act. *See* 33 U.S.C. § 1362(3).

“loading”) of the pollutants nitrogen, phosphorus, and sediment into the entire Chesapeake Bay (“Bay”) watershed. *See* Bay TMDL Executive Summary (excerpt attached as Exhibit A) at ES-1. Those overall limits are, in turn, allocated among various jurisdictions, waterways, and sources of pollution. *See id.* at ES-1, ES-7; *see also* 76 Fed. Reg. at 549. Although established by EPA, the Bay TMDL and its constituent allocations are being implemented by the Bay states. *See infra* at 7-8.

Plaintiffs challenge what they characterize as the “pollution trading provisions of” the Bay TMDL. Complaint ¶ 1. Plaintiffs allege that trading allows unidentified point source dischargers to violate permit limits and avoid other applicable limitations; that trading “creates a serious risk” of hindering the achievement of Bay water quality standards; and that any new or expanded pollutant discharges to the Bay watershed will lead to water quality violations even if offset by reductions from other sources. *Id.* ¶¶ 62-63, 71, 76, 86. Plaintiffs do not, however, appear to allege that any of this is presently occurring – only that it will occur at some unspecified point in the future as a result of EPA’s supposed approval of “pollution trading.” *Id.* ¶ 76; *see also id.* ¶¶ 72, 84, 86.

Plaintiffs’ speculative allegations regarding the hypothetical impact of nonexistent “pollution trading provisions” in the Bay TMDL are insufficient to demonstrate that plaintiffs or their members have suffered or will suffer an injury that is both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations omitted). Plaintiffs thus lack standing, and the Court lacks jurisdiction over their Complaint. Plaintiffs have, moreover, failed to challenge a reviewable final agency action, thereby failing to state a claim within the ambit of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. Although EPA took final action

to establish the Bay TMDL and its constituent allocations, EPA has not established any trading or offset programs to implement that TMDL. Implementation of the Bay TMDL now falls to the Bay states, and the statements that plaintiffs characterize as “trading provisions” are nothing more than descriptions of one way the states may carry out that responsibility. Finally, any claim that plaintiffs have stated is not ripe. Plaintiffs’ allegation that offset or trading programs will at some point lead to unspecified permit violations or water quality degradation presents “too many imponderables,” and as such is unfit for judicial review. *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205 (D.C. Cir. 1998). Nor would plaintiffs suffer any hardship by waiting to pursue their claims in a more concrete factual setting if the consequences that they predict ever actually come to pass.

For all of these reasons, plaintiffs’ Complaint must be dismissed.

## **II. BACKGROUND**

### **A. Statutory And Regulatory Background.**

#### **1. Water quality standards and TMDLs.**

The Clean Water Act (“CWA” or “Act”) was adopted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To that end, the Act “anticipates a partnership between the States and the Federal Government.” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); *see also United States v. Homestake Mining Co.*, 595 F.2d 421, 429 (8<sup>th</sup> Cir. 1979) (noting the “vigorous federalism underlying the Clean Water Act”); 33 U.S.C. § 1251(b).

Section 303 of the Act, 33 U.S.C. § 1313, embodies this approach. Under Sections 303(c) and (d), states first establish water quality standards and then identify bodies of water within their boundaries that do not meet those standards (the “Section 303(d) list”). 33 U.S.C.

§ 1313(c)(2), (d)(1)(A). States then establish “total maximum daily loads” (“TMDLs”) for pollutants causing nonattainment of water quality standards in waters on the Section 303(d) list. 33 U.S.C. § 1313(d)(1)(C). At each stage of this process, EPA must either approve a state’s action or, if it disapproves, take action to establish water quality standards, a Section 303(d) list, or a TMDL. 33 U.S.C. § 1313(c)(3), (d)(2).

A TMDL is essentially a pollutant loading cap – it identifies the maximum amount of a pollutant that can be added to a body of water consistent with attaining applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). This overall pollutant load is, in turn, divided into smaller components, known as allocations. 40 C.F.R. § 130.2(g)-(i). Point sources – discrete sources of pollutant discharges – receive “wasteload allocations” (“WLAs”). 33 U.S.C. § 1362(14) ; 40 C.F.R. § 130.2(g), (h), (i). Nonpoint sources – everything not fitting the definition of a point source – receive “load allocations” (“LAs”).<sup>2</sup> *Id.* The total TMDL is thus the sum of wasteload allocations to point sources and load allocations to nonpoint sources, together with a statutorily-required margin of safety. 40 C.F.R. § 130.2(i); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011).

Although a TMDL establishes an overall cap on pollutant loadings as well as allocations within that cap, TMDLs are not self-executing. *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216 (TMDLs “are not self-implementing instruments”); *see also City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) (TMDL “does not, by itself, prohibit any conduct or require any

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<sup>2</sup> Point sources include ditches, industrial pipes, drains, and any other “discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); *see also Anacostia Riverkeeper*, 798 F. Supp. 2d at 214. Nonpoint sources include, for example, agricultural runoff and erosion. *See Anacostia Riverkeeper*, 798 F. Supp. 2d at 214; *see also League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9<sup>th</sup> Cir. 2002) (nonpoint source pollution “is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source”).

actions.”). TMDLs are, instead, implemented through a variety of means, including the permitting and control programs discussed in the following sections. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1132 (9<sup>th</sup> Cir. 2002) (discussing means of TMDL implementation).

## **2. NPDES permitting of point sources.**

The Act prohibits the discharge of any pollutant from a point source into waters of the United States unless that discharge complies with the Act’s requirements. 33 U.S.C. §§ 1311(a), 1362(12). The primary way for point sources to comply with the Act is by obtaining and adhering to a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402. 33 U.S.C. §§ 1311(a), 1342(a). All NPDES permits must contain (1) technology-based effluent limitations that reflect the pollution reduction achievable based on particular equipment or process changes, without reference to the effect on the receiving water, and (2) any more stringent effluent limitations necessary to ensure that the waters into which a point source discharges achieve applicable water quality standards. 33 U.S.C. § 1311(b). An NPDES permit must also 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). NPDES permits thus transform generally applicable water quality standards and TMDL pollutant wasteload allocations into specific limits applicable to an individual point source discharger. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

EPA may authorize states to issue NPDES permits, 33 U.S.C. § 1342(b), but it retains the authority to object to an inadequate state permit and to issue a federal permit instead. 33 U.S.C. § 1342(d). Before a state can be authorized to issue NPDES permits, EPA must (among other things) approve that state’s “continuing planning process” – a comprehensive framework for implementing the measures necessary to protect water quality, of which water quality standards

and TMDLs are a part. 33 U.S.C. § 1313(e)(1)-(3); 40 C.F.R. § 130.5(b). With respect to the seven Bay states, EPA has authorized all but the District of Columbia to administer the NPDES permitting program.

### **3. Review and enforcement of NPDES permits.**

EPA's action in either issuing or denying an NPDES permit is subject to judicial review in the Court of Appeals. 33 U.S.C. § 1369(b)(1)(F). Although state-issued permits are not subject to federal judicial review, any state that seeks to administer its own permitting program must provide the opportunity for judicial review of the approval or denial of permits. 40 C.F.R. § 123.30. Whether issued by a state or by EPA, any NPDES permit is federally enforceable. *See* 33 U.S.C. § 1319(a)(1), (3). The Act also authorizes "any citizen" to bring suit against "any person" alleged to be in violation of an "effluent standard or limitation under this chapter," which includes NPDES permits. 33 U.S.C. § 1365(a)(1), (f)(6).

### **4. Nonpoint source controls.**

The NPDES program applies only to point sources, and there is no federal nonpoint source permitting program. *See National Wildlife Fed'n. v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982) (only point sources are subject to direct federal regulation); *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (Act bans only discharges from point sources). TMDL load allocations for nonpoint sources thus can only be implemented to the extent that a state makes such reductions a regulatory requirement under its own authority, or as part of a voluntary program. EPA can, however, use federal grants to encourage states to address nonpoint source pollution and implement the load allocations established in a TMDL. *See Pronsolino* 291 F.3d at 1126-27. Under Section 319 and other provisions of the Act, EPA disburses funds annually to the states to assist them in implementing nonpoint source management programs. 33 U.S.C.



§ 1329(h). Before awarding an annual section 319 grant, EPA must determine that a state has made “satisfactory progress” in meeting the nonpoint source implementation schedule in its existing Section 319 program. 33 U.S.C. § 1329(h)(8).

**B. Factual Background.**

The Chesapeake Bay watershed is the nation’s largest estuary, and its waters hold tremendous ecological, cultural, economic, historic, and recreational value. Complaint ¶¶ 14-15; 76 Fed. Reg. at 549. The Bay and its tributaries are, however, in poor environmental health. Complaint ¶¶ 25-28; 76 Fed. Reg. at 549. Excess nitrogen, phosphorus, and sediment are the primary causes of the Bay’s degradation. Complaint ¶ 19; 76 Fed. Reg. at 549. These pollutants come from many sources throughout the Bay watershed, including wastewater treatment plants, agriculture, and urban stormwater. Ex. A at ES-3.

EPA and the Bay states have been collaborating for many years in an effort to restore the Bay’s water quality, and EPA developed the Bay TMDL in coordination with the seven Bay states. Complaint ¶ 30; 76 Fed. Reg. at 549; Ex. A at ES-3. The TMDL development process was complex and multi-faceted and extended over several years. Ex. A at ES-3-ES-5. Following this process, on December 29, 2010, EPA established the final Bay TMDL for nitrogen, phosphorus, and sediment. 76 Fed. Reg. 549.

The Bay TMDL includes individual and aggregate wasteload allocations to point sources, as well as load allocations to nonpoint sources. *Id.* It does not, however, include any substantial reserve allocation for new or increased loads of nitrogen, phosphorus, or sediment. *See* Complaint ¶ 85. The Bay states are thus expected to work within the cap established by the Bay TMDL to accommodate any future growth in pollutant loadings. As EPA explained:

EPA expects that new or increased loadings of nitrogen, phosphorus, and sediment in the Chesapeake Bay watershed that are not specifically accounted for in the TMDL’s [wasteload

allocations] or [load allocations] will be offset by loading reductions and credits generated by other sources under programs that are consistent with the definitions and common elements described in Appendix S. . . . Any such offsets are expected to account for the entire delivered nitrogen, phosphorus, or sediment load. . . . In addition, such offsets may not cause an exceedance of local [water quality standards] or local TMDLs. The offsets are to be in addition to reductions already needed to meet the allocations in the TMDL and must be consistent with applicable federal and state laws and regulations.

Ex. B at 10-1; *see also* Ex. C at S-1 (where TMDL does not provide specific allocation to accommodate new or increased pollutant loadings, “a jurisdiction may accommodate such new or increased loadings only through a mechanism allowing for quantifiable and accountable offsets . . . in an amount necessary to implement the TMDL and applicable water quality standards. . . .”).

EPA further recognized that, consistent with longstanding EPA guidance, some of the Bay states are already implementing water quality trading programs. One assumption underlying the Bay TMDL is thus that trades may occur between sources contributing pollutant loadings to the Bay watershed. Ex. B at 10-3. EPA made it clear, however, that the Agency “does not support any trading activity that would delay or weaken implementation of the Bay TMDL, that is inconsistent with the assumptions and requirements of the TMDL, or that would cause the combined point and nonpoint source loadings covered by a trade to exceed the applicable loading cap established by the TMDL.” Ex. B at 10-3.

### **C. Plaintiffs’ Claims.**

Plaintiffs filed suit under the APA to challenge the alleged “pollution trading provisions” of the Bay TMDL. Complaint ¶ 1. In Count I, *id.* ¶¶ 66-77, plaintiffs allege that “pollution trading” allows (unidentified) point sources to avoid otherwise applicable permit limitations, as well as creating a “serious risk that pollution trading will impede or impair achievement of water quality standards in the Chesapeake Bay and its tributaries.” *Id.* ¶¶ 71-72, 76; *see also id.* ¶¶ 62-

63. For those reasons, plaintiffs contend that EPA’s alleged “authorization” of trading in the Bay TMDL is arbitrary and capricious. *Id.* ¶ 77. In Count II, *id.* ¶¶ 78-90, plaintiffs allege that EPA’s “[a]uthorization of offsets” similarly threatens Bay water quality, asserting that “[n]ew or expanded discharges into the Chesapeake Bay watershed will cause or contribute to ongoing violations of water quality standards . . . even where such new or expanded discharge is ‘offset’ by a reduction in pollution discharges from another source.” *Id.* ¶ 86. And in Count III, *id.* ¶¶ 91-100, plaintiffs allege that trading and offsets transfer TMDL allocations from one source to another, thereby improperly amending the Bay TMDL without notice and comment. For all of these reasons, plaintiffs seek a declaration that “the trading provisions of the [Bay] TMDL are in violation of the Clean Water Act and are null and void.” *Id.* ¶ 101.

### **III. STANDARD OF REVIEW**

Federal courts are courts of limited jurisdiction, and may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The first and most fundamental question presented by every case brought to a federal court is thus whether the court has jurisdiction to hear it. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998) (jurisdiction must “be established as a threshold matter”). On a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of demonstrating subject matter jurisdiction. *See Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). In assessing whether plaintiffs have met this burden, the Court must accept the factual allegations of the complaint as true, and must give plaintiffs the benefit of all inferences to be drawn from those allegations. *See, e.g., Best v. United States*, 522 F. Supp. 2d 252, 254-55 (D.D.C. 2007). The Court need not, however, accept plaintiffs’ legal conclusions as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see also Kowal v. MCI Commc’ns Corp.*,

16 F.3d 1271, 1276 (D.C. Cir. 1994); *Best*, 522 F. Supp. 2d at 255. In addition to the allegations in the complaint, the Court may consider materials referred to in the complaint that are central to plaintiffs' claim. *American Historical Ass'n v. National Archives & Records Admin.*, 516 F. Supp. 2d 90, 101 (D.D.C. 2007).

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), by contrast, the moving party has the burden of demonstrating that a plaintiff has failed to state a claim for which relief may be granted. *Kimberlin v. U.S. Dep't of Justice*, 150 F. Supp. 2d 36, 41 (D.D.C. 2001), *aff'd*, 318 F.3d 228 (D.C. Cir. 2003). In determining whether plaintiffs have stated a claim, the allegations of the complaint are again taken as true, and plaintiffs are given the benefit of "all reasonable inferences that can be drawn from the facts alleged." *Id.* As with a motion to dismiss under Rule 12(b)(1), a court may also consider documents attached to or incorporated in the complaint, as well as matters of public record (such as statements in the Federal Register). *See American Historical Ass'n*, 516 F. Supp. 2d at 102; *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993).

Plaintiffs must provide "more than labels and conclusions" to show that they have stated a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft*, 129 S. Ct. at 1949-50 (citation omitted). "[A] formulaic recitation of the elements of a cause of action will not do;" instead, plaintiffs must state factual allegations that, if taken as true, are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see also Ashcroft*, 129 S. Ct. at 1949 (to survive motion to dismiss, complaint must contain factual allegations that, if true, "state a claim to relief that is plausible on its face;" this "asks for more than a sheer possibility that a defendant has acted unlawfully") (quoting *Twombly*, 550 U.S. at 570)). If plaintiffs have failed to do so, "a claim must be dismissed, without regard to whether it is based

on an outlandish legal theory or on a close but ultimately unavailing one.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

#### **IV. SUMMARY OF ARGUMENT**

In order to meet their burden of establishing that the Court has jurisdiction over their claims, plaintiffs must, *inter alia*, demonstrate that they have standing. Plaintiffs have failed to allege facts sufficient to demonstrate that they have suffered (or imminently will suffer) concrete or particularized injuries caused by the so-called “trading provisions” of the Bay TMDL, or that any such injuries could be redressed by a favorable judicial decision. Plaintiffs therefore lack standing, and their Complaint must be dismissed for lack of jurisdiction.

Plaintiffs must also have a federal cause of action. For that, plaintiffs rely on the APA, which provides a cause of action for persons “adversely affected or aggrieved” by “final agency action.” Complaint ¶ 12; 5 U.S.C. §§ 702, 704. The alleged “trading provisions” that plaintiffs seek to challenge do not constitute final agency action – in fact, they do not even exist. EPA’s statement that it assumes that the Bay states will implement the Bay TMDL in part through offset and trading programs neither authorizes nor precludes any conduct, and has no legal effect on any existing or future permit or on the statutory and regulatory scheme governing discharges of pollutants into waters of the United States. Because plaintiffs have not identified a reviewable final agency action, they have not stated a claim under the APA, and their Complaint should be dismissed.

Finally, for largely the same reasons that plaintiffs lack standing, any claim plaintiffs have stated is not ripe. Plaintiffs’ allegations center on the alleged future impact of trading and offset programs on permit terms, permit compliance, water quality, and so forth. Because these claims remain wholly speculative and abstract, the issues raised by plaintiffs are not fit for

judicial decision at this time. Plaintiffs have, moreover, failed allege facts sufficient to establish that they will suffer any hardship if they are required to wait and seek judicial review at some later date, if and when their hypothetical claims have been given some concrete form. Plaintiffs' Complaint should therefore be dismissed.

## V. ARGUMENT

### A. **Plaintiffs Have Not Alleged Facts Sufficient To Establish An Imminent, Redressable Injury Caused By EPA's Statements Regarding Implementation Of The Bay TMDL.**

Under Article III of the Constitution, a court may exercise jurisdiction only over “cases” or “controversies” – and “the core component of standing is an essential and unchanging part of the case-or-controversy requirement.” *Lujan*, 504 U.S. at 560. The “irreducible constitutional minimum of standing” requires that: (1) the plaintiff has suffered an injury in fact – an invasion of a legally protected interest which is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical;” (2) the injury complained of is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Id.* at 560-61 (internal citations omitted); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (except where necessary to prevent actual or imminently threatened injury, “courts have no charter to review and revise legislative and executive action”). If any one of these essential elements is lacking, there is no “case or controversy” under Article III of the Constitution, and the case must be dismissed for lack of subject matter jurisdiction. *Lujan*, 504 U.S. at 560-61.

Plaintiffs challenge EPA's purported authorization of (1) water quality trading programs that allow trades between sources contributing pollutants to the Bay watershed, and (2) offset programs that allow the Bay jurisdictions to accommodate new or increased pollutant loadings

that do not have an allocation in the Bay TMDL with quantifiable reductions from other sources. *See supra* at 8-9. In neither case, however, have plaintiffs adequately alleged any present or imminent injury that could be redressed by a favorable decision. Plaintiffs' Complaint must therefore be dismissed for lack of jurisdiction.

**1. Plaintiffs have not alleged a particularized injury.**

Plaintiffs do not allege that they have suffered any particularized injury caused by the use of water quality trading programs or offset programs in the Bay states. Plaintiffs argue that such programs will threaten the achievement of water quality standards in the Bay. Complaint ¶¶ 76, 86. For purposes of Article III, however, "[t]he relevant showing . . . is not injury to the environment, but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (emphasis added); *see also Summers*, 555 U.S. at 494 (generalized harm to the environment will not support standing). Plaintiffs have not alleged that they (or any of their members) will be harmed by unidentified offsets or trades or as-yet-nonexistent new or increased pollutant loads.<sup>3</sup> Nor have plaintiffs even begun to speculate when any such injuries would occur, let alone alleged that they are imminent. *See infra* Section V.A.2.

Plaintiffs' allegation that water quality trading contradicts their organizational goals and values, Complaint ¶¶ 6-7, does not suffice. Plaintiffs are still required to allege that any agency

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<sup>3</sup> In addition to suing in their own right, associations and other organizations may sue on behalf of their members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). To do so, an organization must demonstrate that "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Fed'n of Am. v. Fed. Commc'ns Comm'n*, 348 F.3d 1009, 1011 (D.C. Cir. 2003) (quoting *Hunt*, 432 U.S. at 343). Plaintiffs allege only that they have members living in the Chesapeake Bay watershed, Complaint ¶¶ 6-7, which is wholly insufficient to establish injury to those members, let alone to meet the remaining organizational standing requirements. *See Summers*, 555 U.S. at 498 (Court has required plaintiff organizations "to make specific allegations establishing that at least one identified member had suffered or would suffer harm."). EPA thus understands plaintiffs to be suing solely in their own right.

actions they challenge have caused some concrete and demonstrable harm to their activities. *National Taxpayers' Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Center for Law & Educ. v. U.S. Dep't of Educ.*, 315 F. Supp. 2d 15, 23-24 (D.D.C. 2004)). This requires that an organization allege "that discrete programmatic concerns are being directly and adversely affected by the challenged action," with a consequent drain on the organization's resources. *National Taxpayers*, 68 F.3d at 1433 (citation and internal quotation omitted); *see also Long Term Care Pharmacy Alliance v. UnitedHealth Group Inc.*, 498 F. Supp. 2d 187, 192 (D.D.C. 2007) ("The law is clear that actions contrary to an organization's mission do not create an injury if the organization's activities are not somehow impeded . . . . Were an association able to gain standing merely by choosing to fight a policy that is contrary to its mission, the courthouse door would be open to all associations."). Plaintiffs' conclusory statement that water quality trading "contradicts" their values, Complaint ¶ 7, does not meet this standard. *See National Taxpayers*, 68 F.3d at 1433 (allegation that regulation "frustrated" organization's objectives "is the type of abstract concern that does not impart standing").

## **2. Plaintiffs have not alleged an imminent injury.**

Instead of alleging a present injury, plaintiffs rely on the claim that trading and offset programs will lead to *future* violations of permit limits or water quality standards. Even if plaintiffs' claims of future harm were sufficiently particularized (which they are not), they would remain too speculative to establish standing. For purposes of Article III, any injury must at a minimum be "imminent," which the Supreme Court defines as "*certainly impending.*" *Lujan*, 504 U.S. at 564 n.2 (emphasis in original). As the Court explained, the concept of imminent injury "has been stretched beyond the breaking point when . . . the plaintiff alleges only an injury



at some indefinite future time.” *Id.* And as the D.C. Circuit has elaborated, “[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, non-imminent injuries could be dressed up as increased risk of future injury. [Courts] therefore generally require that petitioners demonstrate a substantial probability that they will be injured.” *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (internal citations and quotation omitted).

Given these criteria, plaintiffs have not alleged facts sufficient to establish an imminent injury. They allege first that trading “allows point sources to avoid or outright violate their NPDES permit.” Complaint ¶ 62; *see also id.* ¶ 71. Plaintiffs’ conclusory allegation does not explain how any trading provision adopted by a State could override the Act’s overarching command that a point source discharge that does not comply with a permit is a violation of the Act. Nor do plaintiffs even suggest that any such violations are presently occurring, let alone identify specific permits that have supposedly been violated. Similarly, plaintiffs allege that EPA’s actions “create[] a serious *risk* that pollution trading will impede or impair achievement of water quality standards in the Chesapeake Bay.” Complaint ¶ 76 (emphasis added). Merely identifying a risk of future violation is wholly insufficient to establish an “imminent” injury. *See NRDC*, 464 F.3d at 6.

Plaintiffs fare no better with regard to offset programs. They allege that “[n]ew or expanded discharges” – in other words, discharges that have yet to occur – “will cause or contribute to ongoing violations of water quality standards in the Bay [watershed].” Complaint ¶ 86. Plaintiffs’ speculation regarding the future effects of as-yet-nonexistent discharges does not constitute an imminent injury. Plaintiffs’ speculative claims assume, moreover, that EPA and the Bay states will simply disregard their obligation to ensure that future NPDES permits are

consistent with applicable water quality standards and wasteload allocations – an assumption wholly at odds with the presumption that agencies will discharge their duties in good faith. *See CTIA-The Wireless Ass’n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008) (“[W]e have long presumed that executive agency officials will discharge their duties in good faith.”) (citations omitted).<sup>4</sup>

**3. Plaintiffs’ claimed injuries were not caused by EPA’s statements in the Bay TMDL and are not redressable by a favorable decision.**

Even if plaintiffs’ speculations could establish an Article III injury, plaintiffs have not alleged facts sufficient to meet their burden of demonstrating causation and redressability. It is important to understand that plaintiffs do not attack the Bay TMDL itself, or claim that they are injured by it; indeed, their complaint is largely premised on the theory that trading and offset programs adopted by the Bay states will allow sources to *avoid* the allocations established in that TMDL and will cause other violations of the Act (such as exceedance of water quality standards). *See* Complaint ¶¶ 62, 72, 98. What plaintiffs seek is an order that somehow severs and vacates the purported “trading provisions” of the TMDL, leaving the rest of the TMDL intact. *See* Complaint ¶ 101.

The “trading provisions” plaintiffs wish to see vacated do not, however, exist. The Bay states bear the primary responsibility for implementing the Bay TMDL through permitting, nonpoint source controls, and whatever other means are necessary to accommodate any new or

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<sup>4</sup> Plaintiffs also allege that any future trading will amount to an amendment of the Bay TMDL without notice and comment. Complaint ¶¶ 91-99. “[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing.” *Summers*, 555 U.S. at 496; *see also Lujan*, 504 U.S. at 573 n.8 (individual can enforce procedural rights “so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”). For the reasons discussed in the text, plaintiffs have failed to adequately allege actual or imminent harm to any “concrete interest;” thus, they cannot establish standing based on an alleged procedural injury.

increased pollutant loadings. *See supra* at 4-7. Unless and until the Bay TMDL is revised, it caps pollutant loading of nitrogen, phosphorus, and sediment to the Bay watershed. If any of the Bay states contemplate increasing their pollutant loads – if, for example, some new industrial facility opens, or agricultural runoff increases – that state would still need to work within the cap (and constituent allocations) established by the TMDL. *See id.* Although the Bay states remain free to pursue other solutions, one way of accommodating future increases is through programs under which new or increased pollutant loads can be offset with reductions elsewhere. Ex. C at S-1; *see also* Ex. B at 10-3.

Trading and offset programs thus are not something that EPA *authorized* in the Bay TMDL – they are, instead, one way that EPA anticipates the Bay jurisdictions will *implement* the TMDL. *See* Ex. C at S-1; *see also infra* section V.B. EPA’s establishment of the Bay TMDL did not give states the authority to create trading or offset programs, and plaintiffs have not even alleged that if the (nonexistent) “trading provisions” of that TMDL could somehow be vacated states would stop doing so. “[M]ere ‘unadorned speculation’ as to the existence of a relationship between the challenged government action and . . . third-party conduct ‘will not suffice to invoke the federal judicial power.’” *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)); *see also Friends of the Earth*, 528 U.S. at 181 (plaintiff must demonstrate that it is “likely, as opposed to merely speculative” that any injury would be redressed by a favorable decision).

In sum, a speculative risk of generalized future harm does not constitute an Article III injury. Nor have plaintiffs alleged facts sufficient to establish either that EPA’s statements regarding trading and offsets in the Bay TMDL caused any such risk that does exist, or that those

risks could be ameliorated through a favorable judicial decision. Plaintiffs Complaint must therefore be dismissed for lack of jurisdiction.

**B. EPA's Statements Regarding Implementation Of The Bay TMDL Are Not A Final Agency Action.**

In order to proceed in federal court, plaintiffs are required to identify a federal cause of action. *See FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994); *Floyd v. District of Columbia*, 129 F.3d 152, 155-56 (D.C. Cir. 1997). The only statute that plaintiffs cite that could fulfill this requirement is the APA.<sup>5</sup> In order to state a claim under the APA, plaintiffs must allege facts sufficient to establish that they are “adversely affected or aggrieved” by a “final” agency action. 5 U.S.C. § 702, 704. For the reasons discussed in the preceding section, plaintiffs have not alleged facts sufficient to establish that they are adversely affected or aggrieved by the alleged “trading provisions” of the Bay TMDL. More fundamentally, however, plaintiffs have failed to identify any reviewable final agency action. Because plaintiffs have failed to state a claim under the APA, their Complaint must be dismissed.

An agency action is “final” if it “mark[s] the consummation of the agency’s decisionmaking process” and is one “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations and internal quotations omitted). In considering whether the supposed “trading provisions” that plaintiffs challenge satisfy this test, it is important to bear in mind that a TMDL is not

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<sup>5</sup> Plaintiffs also cite 28 U.S.C. §§ 1331 and 1361. Complaint ¶ 10. 28 U.S.C. § 1331 grants federal courts jurisdiction over claims raising a federal question, but does not itself create a cause of action. *Marciano v. Shulman*, 795 F. Supp. 2d 35, 38 (D.D.C. 2011) (citing *Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951)). Nor have plaintiffs alleged facts sufficient to state a claim for mandamus under 28 U.S.C. § 1361. Nowhere in the Complaint do plaintiffs even allege that EPA owes them “a clear nondiscretionary duty” that EPA has failed to perform. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *see also Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (mandamus available only if defendant has clear duty to act).

self-implementing; instead, it is implemented through applicable provisions of federal, state, and local law. As one court has explained:

A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. . . . Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

*City of Arcadia*, 265 F. Supp. 2d at 1144-45; *see also Sierra Club v. Meiburg*, 296 F.3d 1021, 1025-26 (11<sup>th</sup> Cir. 2002) (once established, TMDLs are implemented through permitting and state management plans); *Pronsolino*, 291 F.3d at 1129 (TMDLs are informational tools that “serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation’s waters”); *supra* at 4-7.

Viewed within this framework, it is clear that the so-called “trading provisions” of the Bay TMDL do not create any new legal rights or obligations, and thus are not final agency actions. The Bay TMDL does not authorize trading or offset programs – it merely identifies them as tools that EPA anticipates the Bay jurisdictions may use to implement the Bay TMDL. Some of the Bay states were operating such programs even before the Bay TMDL existed; indeed, EPA published guidance concerning water quality trading programs nearly a decade ago. *See* Ex. B at 10-1. Conversely, the Bay TMDL does not require states to use trading or offset programs.<sup>6</sup> As a practical matter, the Bay states may not be able to accommodate new or

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<sup>6</sup> EPA set forth common elements that EPA anticipates the Bay states will use to develop and implement offset programs if they choose to do so. *See* Ex. C. EPA made it clear that these common elements are not regulatory requirements. Ex. C at S-2. Plaintiffs have moreover, attacked the entire concept of trading and offset programs. Nowhere do they allege that EPA’s identification of potential elements of such programs was arbitrary or capricious.

additional pollutant loadings without doing so. States remain free, however, to pursue any other available means of implementing the Bay TMDL if they so choose.

The statements that plaintiffs characterize as the “trading provisions” of the Bay TMDL thus are merely descriptions of one means by which the Bay states may *meet* the TMDL caps and allocations. They do not *alter* those caps and allocations, or affect any other legal right or obligation. Because EPA’s statements regarding the potential use of trading and offset programs to implement the Bay TMDL did not alter the legal landscape, they do not constitute final agency action. *See Independent Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (letter that expressed agency’s view of the law “left the world just as it found it” rather than implementing or prescribing law or policy, and thus was not final action). Plaintiffs have therefore failed to state a claim within the ambit of the APA, and their complaint must be dismissed.

### **C. Plaintiffs’ Claims Are Not Ripe.**

Even if plaintiffs had identified a final agency action and had stated a claim under the APA, that claim would be unripe for largely the same reasons that plaintiffs lack standing. *See Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) (noting that ripeness and standing are not always clearly separable). The ripeness doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreement over administrative policies.” *Abbot Labs v. Gardner*, 387 U.S. 136, 148 (1967). In determining whether a claim is ripe, courts consider two factors: the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. *Abbot Labs*,

387 U.S. at 149; *Wyoming Outdoor Council*, 165 F.3d at 48.<sup>7</sup> In this case, both factors favor a finding that plaintiffs' claims are not ripe.

**1. Plaintiffs have not identified any issues that are fit for judicial decision.**

Courts have typically found claims unfit for judicial decision where further factual development would significantly advance the court's ability to deal with the issues presented. *See Ohio Forestry*, 523 U.S. at 736-37; *Clean Air Implementation Project*, 150 F.3d at 1205 (finding case unripe where court would benefit from having scope of controversy reduced and factual components fleshed out by concrete action). Plaintiffs' claims are all based on the impact that plaintiffs presume – without explanation – any trading and offset programs will have on future events such as potential future permit violations, the terms of as-yet-unissued NPDES permits, and the prospective degradation of water quality.<sup>8</sup> *See supra* at 14-15. Such claims simply cannot be addressed in the abstract, outside of the context of the facts of a specific case (e.g., the terms of a particular permit, or the pollutants discharged by a particular source). There is, moreover, no question but that further factual developments will occur. The Bay states will undoubtedly continue to issue NPDES permits, which can then be assessed by the plaintiffs (to say nothing of EPA) to determine if they conform to applicable laws and regulations and are consistent with any applicable TMDL allocations.

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<sup>7</sup> The Supreme Court has elaborated on the “fitness” prong, stating that courts should consider both whether judicial intervention would interfere with further administrative action and whether the court would benefit from further factual development. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998). At this point, EPA does not contemplate any immediate further administrative action with regard to the Bay TMDL. As discussed in the text, however, plaintiffs' claims cannot be resolved without further factual development following state actions to implement the Bay TMDL.

<sup>8</sup> Plaintiffs allege – again without explanation – that trading “allows” point sources to avoid or violate permit limits and other applicable standards. Complaint ¶¶ 62-63. Nowhere, however, do plaintiffs allege that such violations are in fact occurring, or explain how trading programs adopted by states could override permit limits or other requirements of the Act.

Given the highly speculative nature of plaintiffs' claims and the near-certainty of future factual developments, there is no justification for judicial review at this juncture. *See Ohio Forestry*, 523 U.S. at 735 (claim unripe in part because "the possibility that further consideration will actually occur . . . is not theoretical, but real"). Review at this point would inevitably lack the focus that a specific permit or other agency action would provide, and would require precisely the sort of judicial inquiry into an abstract disagreement over general policies that the ripeness doctrine is designed to avoid. *See id.* at 736. It would also entangle the Court with potentially needless litigation, because the supposed permit violations, inadequate permits, water quality degradation, and other consequences feared by plaintiffs may never come to pass. *See, e.g., Cronin v. FAA*, 73 F.3d 1126, 1131-32 (D.C. Cir. 1996) (finding claim unripe where, inter alia, it was uncertain whether any employees would be subject to challenged regulations without receiving due process).

**2. Plaintiffs will not suffer any hardship from delayed review.**

To show hardship, a plaintiff must demonstrate that an agency action inflicts "adverse effects of a strictly legal kind." *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 809 (2003) (citation omitted). The supposed "trading provisions" plaintiffs challenge do not pass this test. EPA's statements in the Bay TMDL regarding the use of trading programs

do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.

*Ohio Forestry*, 523 U.S. at 733. Still less has EPA taken any action that affects plaintiffs' own "primary conduct" by requiring plaintiffs to somehow alter their behavior. *See National Park*, 538 U.S. at 810.



Not only have plaintiffs suffered no present harm, but they will have ample opportunity to seek review should the harms that they speculate about ever actually come to pass. If, for example, EPA or a state issues an NPDES permit that plaintiffs believe does not conform with applicable statutes and regulations, plaintiffs will have the opportunity to seek judicial review of that action. *See supra* at 6. And if any source “outright violate[s]” an existing permit, Complaint ¶ 62, in the absence of state or federal enforcement action plaintiffs have the option of pursuing a citizen suit. *See supra* at 6; 33 U.S.C. § 1365(a)(1), (b)(1). Plaintiffs thus will not suffer any hardship or prejudice if the Court declines to review their claim now.

It is true that later review would be directed at individual agency actions (or, in the case of permit violations, actions by a private party), rather than allowing plaintiffs to strike down the purported “trading provisions” with a single blow. That does not, however, justify reviewing an otherwise unripe claim. *See Ohio Forestry*, 523 U.S. at 735 (“The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – postimplementation litigation.”). Plaintiffs may see later case-by-case litigation as less efficient, “[b]ut this is the traditional, and remains the normal, mode of operation of the courts.” *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 894 (1990). There simply is no “strong reason why [plaintiffs] must bring their challenge now in order to get relief.” *Ohio Forestry*, 523 U.S. at 734.

Plaintiffs have, in sum, failed to allege facts that might demonstrate that they have suffered any present hardship as a result of the agency actions they attack, or that those actions can be reviewed in the abstract without further factual development. Plaintiffs’ Complaint should therefore be dismissed as unripe.

**VI. CONCLUSION**

For the foregoing reasons, plaintiffs' Complaint should be dismissed for lack of jurisdiction and for failure to state a claim for which relief may be granted.

December 10, 2012

Respectfully submitted,

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Food & Water Watch, et al. v. EPA

No. 12-1639

Motion to Dismiss

**EXHIBIT A**

# CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY

## INTRODUCTION

The U.S. Environmental Protection Agency (EPA) has established the Chesapeake Bay Total Maximum Daily Load (TMDL), a historic and comprehensive “pollution diet” with rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region’s streams, creeks and rivers.

Despite extensive restoration efforts during the past 25 years, the TMDL was prompted by insufficient progress and continued poor water quality in the Chesapeake Bay and its tidal tributaries. The TMDL is required under the federal Clean Water Act and responds to consent decrees in Virginia and the District of Columbia from the late 1990s. It is also a keystone commitment of a federal strategy to meet President Barack Obama’s Executive Order to restore and protect the Bay.

The TMDL – the largest ever developed by EPA – identifies the necessary pollution reductions of nitrogen, phosphorus and sediment across Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia and sets pollution limits necessary to meet applicable water quality standards in the Bay and its tidal rivers and embayments. Specifically, the TMDL sets Bay watershed limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus and 6.45 billion pounds of sediment per year – a 25 percent reduction in nitrogen, 24 percent reduction in phosphorus and 20 percent reduction in sediment. These pollution limits are further divided by jurisdiction and major river basin based on state-of-the-art modeling tools, extensive monitoring data, peer-reviewed science and close interaction with jurisdiction partners.

The TMDL is designed to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017. The TMDL is supported by rigorous accountability measures to ensure cleanup commitments are met, including short-and long-term benchmarks, a tracking and accountability system for jurisdiction activities, and federal contingency actions that can be employed if necessary to spur progress.

Watershed Implementation Plans (WIPs), which detail how and when the six Bay states and the District of Columbia will meet pollution allocations, played a central role in shaping the TMDL. Most of the draft WIPs submitted by the jurisdictions in September 2010 did not sufficiently identify programs needed to reduce pollution or provide assurance the programs could be implemented. As a result, the draft TMDL issued September 24, 2010 contained moderate- to high-level backstop measures to tighten controls on federally permitted point sources of pollution.

A 45-day public comment period on the draft TMDL was held from September 24 to November 8, 2010. During that time, EPA held 18 public meetings in all seven Bay watershed jurisdictions, which were attended by about 2,500 citizens. EPA received more than 14,000 public comments and, where appropriate, incorporated responses to those comments in developing the final TMDL.

After states submitted the draft WIPs, EPA worked closely with each jurisdiction to revise and strengthen its plan. Because of this cooperative work and state leadership, the final WIPs were significantly improved. Examples of specific improvements include:

- Regulated point sources and non-regulated nonpoint sources of nitrogen, phosphorus, and sediment are fully considered and evaluated separately in terms of their relative contributions to water quality impairment of the Chesapeake Bay's tidal waters.
- Committing to more stringent nitrogen and phosphorus limits at wastewater treatment plants, including on the James River in Virginia. (Virginia, New York, Delaware)
- Pursuing state legislation to fund wastewater treatment plant upgrades, urban stormwater management and agricultural programs. (Maryland, Virginia, West Virginia)
- Implementing a progressive stormwater permit to reduce pollution. (District of Columbia)
- Dramatically increasing enforcement and compliance of state requirements for agriculture. (Pennsylvania)
- Committing state funding to develop and implement state-of-the-art-technologies for converting animal manure to energy for farms. (Pennsylvania)
- Considering implementation of mandatory programs for agriculture by 2013 if pollution reductions fall behind schedule. (Delaware, Maryland, Virginia)

These improvements enabled EPA to reduce and remove most federal backstops, leaving a few targeted backstops and a plan for enhanced oversight and contingency actions to ensure progress. As a result, the final TMDL is shaped in large part by the jurisdictions' plans to reduce pollution, which was a long-standing priority for EPA and why the agency always provided the jurisdictions with flexibility to determine how to reduce pollution in the most efficient, cost-effective and acceptable manner.

Now the focus shifts to the jurisdictions' implementation of the WIP policies and programs that will reduce pollution on-the-ground and in-the-water. EPA will conduct oversight of WIP implementation and jurisdictions' progress toward meeting two-year milestones. If progress is insufficient, EPA is committed to take appropriate contingency actions including targeted compliance and enforcement activities, expansion of requirements to obtain NPDES permit coverage for currently unregulated sources, revision of the TMDL allocations and additional controls on federally permitted sources of pollution, such as wastewater treatment plants, large animal agriculture operations and municipal stormwater systems.

In 2011, while the jurisdictions continue to implement their WIPs, they will begin development of Phase II WIPs, designed to engage local governments, watershed organizations, conservation districts, citizens and other key stakeholders in reducing water pollution.

## **TMDL BACKGROUND**

The Clean Water Act (CWA) sets an overarching environmental goal that all waters of the United States be "fishable" and "swimmable." More specifically it requires states and the District of Columbia to establish appropriate uses for their waters and adopt water quality standards that are protective of those uses. The CWA also requires that every two years jurisdictions develop – with EPA approval – a list of waterways that are impaired by pollutants and do not meet water

quality standards. For those waterways identified on the impaired list, a TMDL must be developed. A TMDL is essentially a “pollution diet” that identifies the maximum amount of a pollutant the waterway can receive and still meet water quality standards.

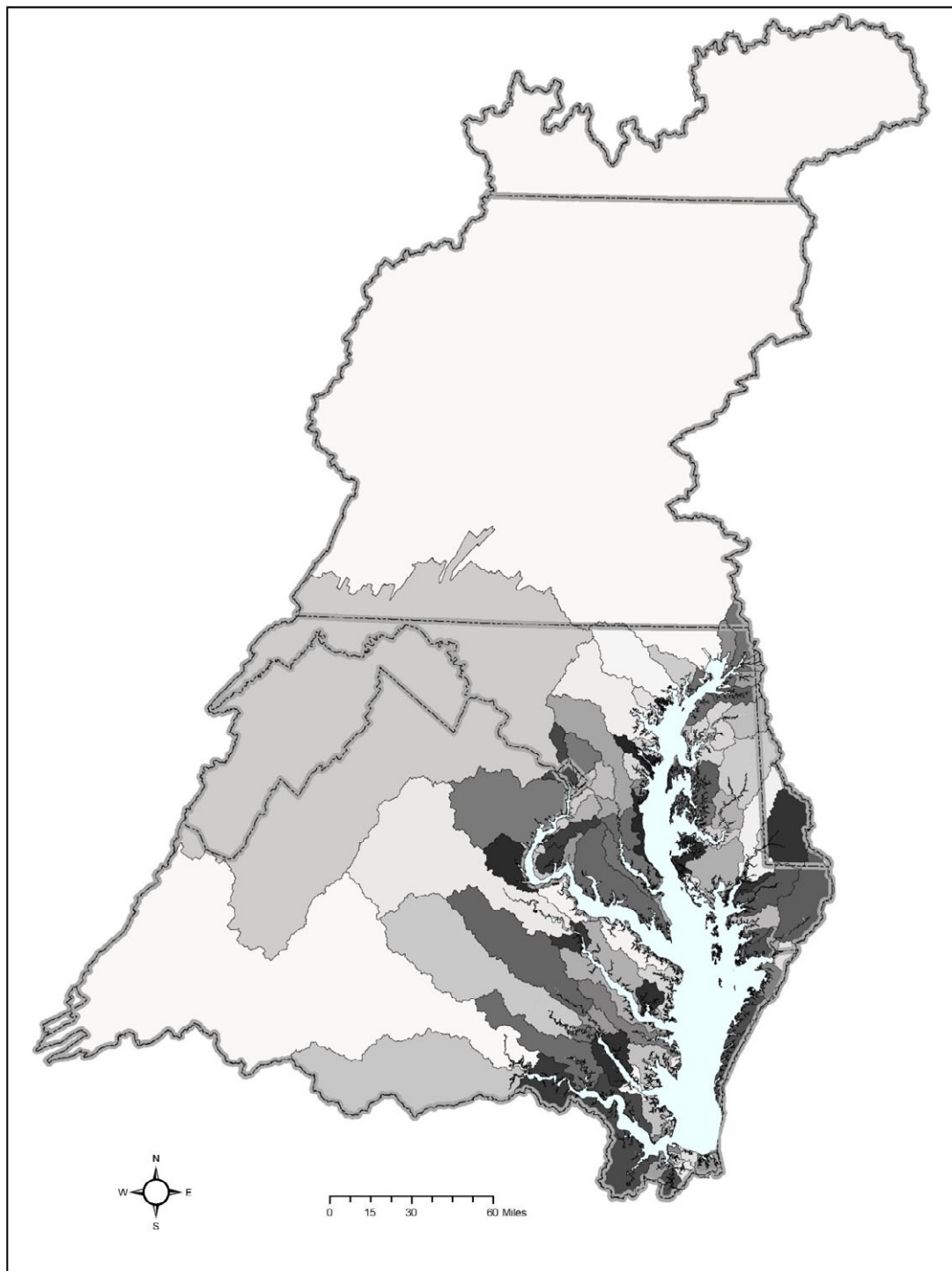
Most of the Chesapeake Bay and its tidal waters are listed as impaired because of excess nitrogen, phosphorus and sediment. These pollutants cause algae blooms that consume oxygen and create “dead zones” where fish and shellfish cannot survive, block sunlight that is needed for underwater Bay grasses, and smother aquatic life on the bottom. The high levels of nitrogen, phosphorus and sediment enter the water from agricultural operations, urban and suburban stormwater runoff, wastewater facilities, air pollution and other sources, including onsite septic systems. Despite some reductions in pollution during the past 25 years of restoration due to efforts by federal, state and local governments; non-governmental organizations; and stakeholders in the agriculture, urban/suburban stormwater, and wastewater sectors, there has been insufficient progress toward meeting the water quality goals for the Chesapeake Bay and its tidal waters.

More than 40,000 TMDLs have been completed across the United States, but the Chesapeake Bay TMDL will be the largest and most complex thus far – it is designed to achieve significant reductions in nitrogen, phosphorus and sediment pollution throughout a 64,000-square-mile watershed that includes the District of Columbia and large sections of six states. The TMDL is actually a combination of 92 smaller TMDLs for individual Chesapeake Bay tidal segments and includes pollution limits that are sufficient to meet state water quality standards for dissolved oxygen, water clarity, underwater Bay grasses and chlorophyll-*a*, an indicator of algae levels (Figure ES-1). It is important to note that the pollution controls employed to meet the TMDL will also have significant benefits for water quality in tens of thousands of streams, creeks, lakes and rivers throughout the region.

Since 2000, the seven jurisdictions in the Chesapeake Bay watershed (Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia), EPA and the Chesapeake Bay Commission, which are partners in the Chesapeake Bay Program, have been planning for a Chesapeake Bay TMDL.

Since September 2005, the seven jurisdictions have been actively involved in decision-making to develop the TMDL. During the October 2007 meeting of the Chesapeake Bay Program’s Principals’ Staff Committee, the Bay watershed jurisdictions and EPA agreed that EPA would establish the multi-state TMDL. Since 2008, EPA has sent official letters to the jurisdictions detailing all facets of the TMDL, including: nitrogen, phosphorus and sediment allocations; schedules for developing the TMDL and pollution reduction plans; EPA’s expectations and evaluation criteria for jurisdiction plans to meet the TMDL pollution limits; reasonable assurance for controlling nonpoint source pollution; and backstop actions that EPA could take to ensure progress.

The TMDL also resolves commitments made in a number of consent decrees, Memos of Understanding, the Chesapeake Bay Foundation settlement agreement of 2010, and settlement agreements dating back to the late 1990s that address certain tidal waters identified as impaired in the District of Columbia, Delaware, Maryland and Virginia.



**Figure ES-1. A nitrogen, phosphorus and sediment TMDL has been developed for each of the 92 Chesapeake Bay segment watersheds.**

Additionally, President Obama issued Executive Order 13508 on May 12, 2009, which directed the federal government to lead a renewed effort to restore and protect the Chesapeake Bay and its watershed. The Chesapeake Bay TMDL is a keystone commitment in the strategy developed by 11 federal agencies to meet the President's Executive Order.

## DEVELOPING THE CHESAPEAKE BAY TMDL

Development of the Chesapeake Bay TMDL required extensive knowledge of the stream flow characteristics of the watershed, sources of pollution, distribution and acreage of the various land uses, appropriate best management practices, the transport and fate of pollutants, precipitation data and many other factors. The TMDL is informed by a series of models, calibrated to decades of water quality and other data, and refined based on input from dozens of Chesapeake Bay scientists. Modeling is an approach that uses observed and simulated data to replicate what is occurring in the environment to make future predictions, and was a critical and valuable tool to develop the Chesapeake Bay TMDL.

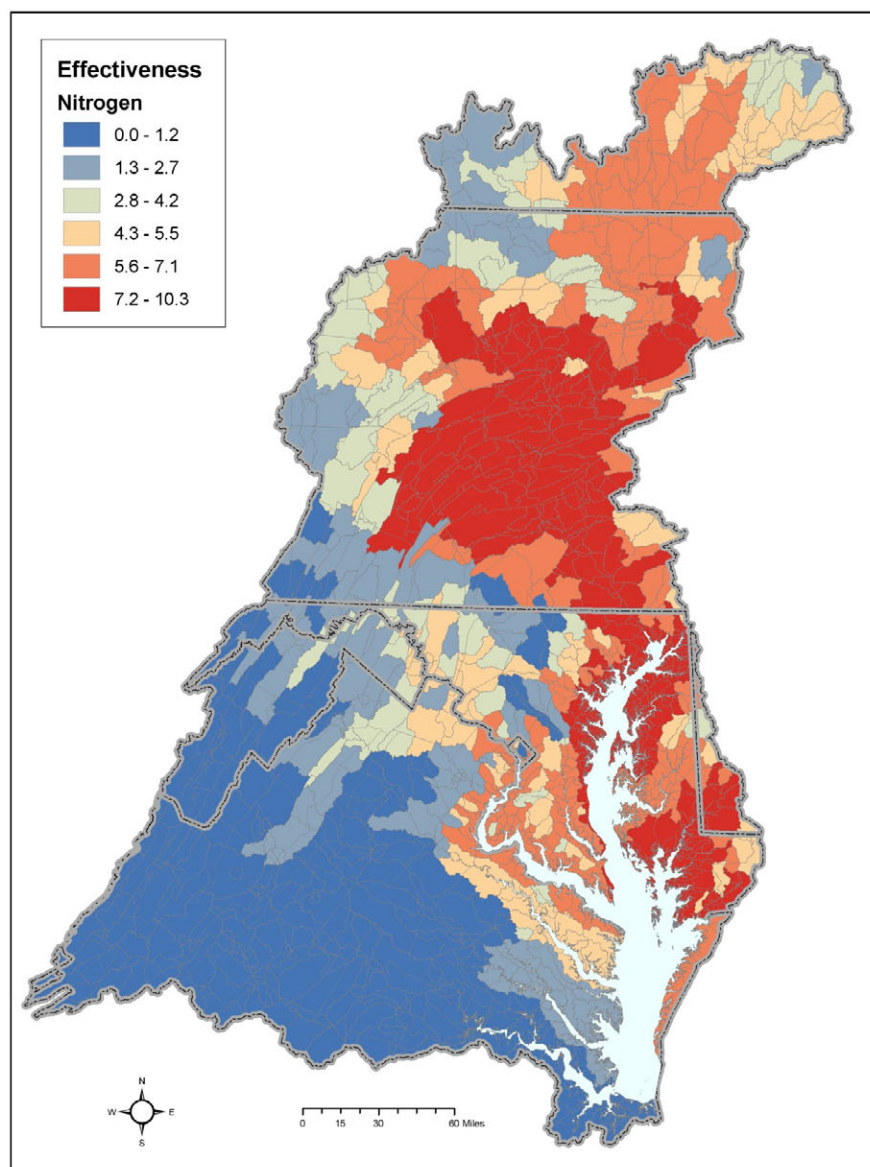
The development of the TMDL consisted of several steps:

1. EPA provided the jurisdictions with loading allocations for nitrogen, phosphorus and sediment for the major river basins by jurisdiction.
2. Jurisdictions developed draft Phase I WIPs to achieve those basin-jurisdiction allocations. In those draft WIPs, jurisdictions made decisions on how to further sub-allocate the basin-jurisdiction loadings to various individual point sources and a number of point and nonpoint source pollution sectors.
3. EPA evaluated the draft WIPs and, where deficiencies existed, EPA provided backstop allocations in the draft TMDL that consisted of a hybrid of the jurisdiction WIP allocations modified by EPA allocations for some source sectors to fill gaps in the WIPs.
4. The draft TMDL was published for a 45-day public comment period and EPA held 18 public meetings in all six states and the District of Columbia. Public comments were received, reviewed and considered for the final TMDL.
5. Jurisdictions, working closely with EPA, revised and strengthened Phase I WIPs and submitted final versions to EPA.
6. EPA evaluated the final WIPs and used them along with public comments to develop the final TMDL.

Since nitrogen and phosphorus loadings from all parts of the Bay watershed have an impact on the impaired tidal segments of the Bay and its rivers, it was necessary for EPA to allocate the nitrogen and phosphorus loadings in an equitable manner to the states and basins. EPA used three basic guides to divide these loads.

- Allocated loads should protect living resources of the Bay and its tidal tributaries and should result in all segments of the Bay mainstem, tidal tributaries and embayments meeting water quality standards for dissolved oxygen, chlorophyll *a*, water clarity and underwater Bay grasses.
- Tributary basins that contribute the most to the Bay water quality problems must do the most to resolve those problems (on a pound-per-pound basis) (Figure ES-2).
- All tracked and reported reductions in nitrogen, phosphorus and sediment loads are credited toward achieving final assigned loads.





**Figure ES-2. Sub-basins across the Chesapeake Bay watershed with the highest (red) to lowest (blue) pound for pound nitrogen pollutant loading effect on Chesapeake Bay water quality.**

In addition, EPA has committed to reducing air deposition of nitrogen to the tidal waters of the Chesapeake Bay from 17.9 to 15.7 million pounds per year. The reductions will be achieved through implementation of federal air regulations during the coming years.

To ensure that these pollutant loadings will attain and maintain applicable water quality standards, the TMDL calculations were developed to account for critical environmental conditions a waterway would face and seasonal variation. An implicit margin of safety for nitrogen and phosphorus, and an explicit margin of safety for sediment, also are included in the TMDL.

Ultimately, the TMDL is designed to ensure that by 2025 all practices necessary to fully restore the Bay and its tidal waters are in place, with at least 60 percent of the actions taken by 2017.

## Chesapeake Bay TMDL

The TMDL loadings to the basin-jurisdictions are provided in Table ES-1. These loadings were determined using the best peer-reviewed science and through extensive collaboration with the jurisdictions and are informed by the jurisdictions' Phase I WIPs.

**Table ES-1. Chesapeake Bay TMDL watershed nitrogen, phosphorus and sediment final allocations by jurisdiction and by major river basin.**

<b>Jurisdiction</b>	<b>Basin</b>	<b>Nitrogen allocations (million lbs/year)</b>	<b>Phosphorus allocations (million lbs/year)</b>	<b>Sediment allocations (million lbs/year)</b>
Pennsylvania	Susquehanna	68.90	2.49	1,741.17
	Potomac	4.72	0.42	221.11
	Eastern Shore	0.28	0.01	21.14
	Western Shore	0.02	0.00	0.37
	<b>PA Total</b>	<b>73.93</b>	<b>2.93</b>	<b>1,983.78</b>
Maryland	Susquehanna	1.09	0.05	62.84
	Eastern Shore	9.71	1.02	168.85
	Western Shore	9.04	0.51	199.82
	Patuxent	2.86	0.24	106.30
	Potomac	16.38	0.90	680.29
	<b>MD Total</b>	<b>39.09</b>	<b>2.72</b>	<b>1,218.10</b>
Virginia	Eastern Shore	1.31	0.14	11.31
	Potomac	17.77	1.41	829.53
	Rappahannock	5.84	0.90	700.04
	York	5.41	0.54	117.80
	James	23.09	2.37	920.23
	<b>VA Total</b>	<b>53.42</b>	<b>5.36</b>	<b>2,578.90</b>
District of Columbia	Potomac	2.32	0.12	11.16
	<b>DC Total</b>	<b>2.32</b>	<b>0.12</b>	<b>11.16</b>
New York	Susquehanna	8.77	0.57	292.96
	<b>NY Total</b>	<b>8.77</b>	<b>0.57</b>	<b>292.96</b>
Delaware	Eastern Shore	2.95	0.26	57.82
	<b>DE Total</b>	<b>2.95</b>	<b>0.26</b>	<b>57.82</b>
West Virginia	Potomac	5.43	0.58	294.24
	James	0.02	0.01	16.65
	<b>WV Total</b>	<b>5.45</b>	<b>0.59</b>	<b>310.88</b>
<b>Total Basin/Jurisdiction Draft Allocation</b>		<b>185.93</b>	<b>12.54</b>	<b>6,453.61</b>
<b>Atmospheric Deposition Draft Allocation<sup>a</sup></b>		<b>15.7</b>	<b>N/A</b>	<b>N/A</b>
<b>Total Basinwide Draft Allocation</b>		<b>201.63</b>	<b>12.54</b>	<b>6,453.61</b>

<sup>a</sup> Cap on atmospheric deposition loads direct to Chesapeake Bay and tidal tributary surface waters to be achieved by federal air regulations through 2020.

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**EXHIBIT B**

## SECTION 10. IMPLEMENTATION AND ADAPTIVE MANAGEMENT

### 10.1 FUTURE GROWTH

As an assumption of the Chesapeake Bay TMDL, EPA expects Chesapeake Bay jurisdictions to account for and manage new or increased loadings of nitrogen, phosphorus, and sediment.

#### *10.1.1 Designating Target Loads for New or Increased Sources*

Where the TMDL does not provide a specific allocation to accommodate new or increased loadings of nitrogen, phosphorus, or sediment, a jurisdiction may accommodate such new or increased loadings only through a mechanism allowing for quantifiable and accountable offsets of the new or increased load in an amount necessary to implement the TMDL and applicable WQS in the Chesapeake Bay and its tidal tributaries. Therefore, the Chesapeake Bay TMDL assumes, and EPA expects, that the jurisdictions will accommodate new or increased loadings of nitrogen, phosphorus, or sediment that do not have a specific allocation in the TMDL with appropriate offsets supported by credible and transparent offset programs subject to EPA oversight.

#### *10.1.2 Offset Programs*

EPA expects that new or increased loadings of nitrogen, phosphorus, and sediment in the Chesapeake Bay watershed that are not specifically accounted for in the TMDL's WLA or LA will be offset by loading reductions and credits generated by other sources under programs that are consistent with the definitions and common elements described in Appendix S. These definitions and common elements are important to ensure that offsets are achieved through reliable pollution controls and that the goals of the Chesapeake Bay TMDL are met.

EPA expects the jurisdictions to develop offset programs that are credible, transparent, consistent with the definitions and common elements set out in Appendix S, and subject to EPA and public oversight. Any such offsets are expected to account for the entire delivered nitrogen, phosphorus, or sediment load after accounting for location of the sources, delivery factors affecting pollutant fate and transport, equivalency of pollutants, and the certainty of any such reductions. In addition, such offsets may not cause an exceedance of local WQS or local TMDLs. The offsets are to be in addition to reductions already needed to meet the allocations in the TMDL and must be consistent with applicable federal and state laws and regulations.

For nonpoint sources, this assumption and expectation is based on the fact that any new or increased nonpoint source loadings not accounted for in the TMDL's LA will have to be offset by appropriate reductions from other sources if the TMDL's pollutant loading cap and applicable WQS are to be met. For permitted point sources, the assumption and expectation also is based on the statutory and regulatory requirements that effluent limits for any such discharges be derived from and comply with all applicable WQS and be consistent with the assumptions and

Chesapeake Bay TMDL

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requirements of any available WLAs [CWA sections 301(b)(1)(C), 303(d); 40 CFR 122.44(d)(1)(vii)(A) & (B)].

In addition, CWA section 117(g) authorizes EPA to ensure that management plans are developed and implementation is begun to achieve and maintain the Bay's nutrient goals. If jurisdictions authorize new or increased loadings without a specific TMDL allocation, an offset is a necessary component of any management plan designed to meet those goals. Accordingly, the Bay TMDL assumes that new point source dischargers, without an allocation in the TMDL (or in other words, with a zero allocation), will find offsets large enough to compensate for their entire loading. The TMDL similarly assumes that point source dischargers that increase pollution loading will find offsets large enough to compensate for the entire increase in their loading and to meet their Water Quality Based Effluent Limit (WQBEL) consistent with the WLA in the TMDL. In the case of new or increased loading from sources other than permitted point source dischargers, jurisdictions are expected to estimate loadings and ensure offsets that fully compensate for this estimated increase in pollutant load.

Although EPA assumes that there can legitimately be some flexibility in the design and content of Bay jurisdiction offset programs, EPA encourages and expects that the jurisdictions will generally develop and implement programs for offsetting new and increased loadings consistent with the definitions and common elements described in detail in Appendix S. EPA also encourages and expects jurisdictions with existing trading programs that address new or increased loadings (such as several jurisdictions have), to ensure that their programs address new or increased loads consistent with the definitions and common elements in Appendix S.

### **10.1.3 Additional Offset Program Features**

The jurisdictions also may consider using the following features to build their offset programs for new or increased loadings of nitrogen, phosphorus, and sediment:

*Net Improvement Offsets:* For purposes of the Bay TMDL, this means an offset at a ratio greater than merely accounting for the entire new or increased load. The jurisdiction's offset program would need to provide the authority and procedures for invoking such a provision. This tool might be considered as a means to accelerate load reductions where a jurisdiction is not on a schedule to ensure that nitrogen, phosphorus, and sediment controls are in place by 2017 and 2025 to meet interim and final target loads, respectively. This may be determined based on an EPA evaluation of a jurisdiction's progress on its WIP and 2-year milestones, as discussed in EPA's December 29, 2009 letter (USEPA 2009d). Net improvement offsets also might be considered, in the case of permitted point sources, to offset new or increased loads from nonpoint sources or from point sources not expected to be permitted.

*Aggregated Programmatic Credits:* For purposes of the Bay TMDL, this means defining a programmatic solution for over-control of nitrogen, phosphorus or sediment beyond the basic WIP strategies to achieve the TMDL allocation. In essence, it is an aggregation of credits from reductions by a class or subclass of sources where such reductions have been achieved by the jurisdiction or another duly authorized body. The jurisdiction may consider making such credits available to offset new or increased loadings. In some circumstances, such class reductions also



could be applied as a reallocation of loadings under the TMDL. Such reallocation may require modification of the TMDL.

*Reserve-Offset Hybrid:* For purposes of the Bay TMDL, this applies where a jurisdiction reserves a portion of its allocations for future growth and, once that allocation is depleted, uses an offset program as described herein.

#### **10.1.4 EPA's Oversight Role of Jurisdictions' Offset Programs**

EPA encourages jurisdictions to consult with EPA throughout the development of their offset programs to facilitate alignment with the CWA and the Bay TMDL. EPA has various oversight responsibilities under the CWA, MOUs for authorization of jurisdictions' NPDES programs, and the TMDL/Executive Order 13508, including approval of revisions to WQS, review of NPDES permits, and provisions for reviewing and making recommendations regarding revisions to a jurisdiction's water quality management plans through the continuing planning process.

EPA intends to maintain regular oversight of jurisdictions' offset programs through periodic audits and evaluations. EPA will report its findings to the respective jurisdiction. EPA's first such review of jurisdictional offset and trading programs will take place in calendar year 2011. EPA expects that the findings of this evaluation will inform offset and trading provisions included in the jurisdictions' Phase II WIPs. Such oversight generally will be conducted on a programmatic basis, not an individual offset basis. EPA reserves its authority, however, to review any individual offset (including an NPDES permit containing an offset) and to comment on, object to, or issue the permit as needed if EPA determines that the offset is not consistent with the Clean Water Act or EPA's regulations. When questions or concerns arise, EPA will use its oversight authorities to ensure that offset programs are fully consistent with the CWA and its implementing regulations. EPA recognizes the value of implementing a strategy for offsets that, wherever possible, is consistent among the jurisdictions to increase credibility, scalability, and broader regional implementation such as interstate trading.

### **10.2 WATER QUALITY TRADING**

EPA recognizes that a number of Bay jurisdictions already are implementing water quality trading programs. EPA supports implementation of the Bay TMDL through such programs, as long as they are established and implemented in a manner consistent with the CWA, its implementing regulations, and EPA's 2003 *Water Quality Trading Policy*<sup>1</sup> (USEPA 2003e) and 2007 *Water Quality Trading Toolkit for NPDES Permit Writers*<sup>2</sup> (USEPA 2007d). An assumption of this TMDL is that trades may occur between sources contributing pollutant loadings to the same or different Bay segments, provided such trades do not cause or contribute to an exceedance of WQS in either receiving segment or anywhere else in the Bay watershed. EPA does not support any trading activity that would delay or weaken implementation of the Bay TMDL, that is inconsistent with the assumptions and requirements of the TMDL, or that would cause the combined point source and nonpoint source loadings covered by a trade to exceed the applicable loading cap established by the TMDL.

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<sup>1</sup> See <http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf>.

<sup>2</sup> See <http://www.epa.gov/owow/watershed/trading/WQTToolkit.html>.

In Section 10.1, EPA explains how Bay jurisdictions may accommodate new or increased loadings of nitrogen, phosphorus, and sediment either through a specific TMDL allocation or by offsetting those loadings with quantifiable and accountable reductions necessary to implement applicable WQS in the Bay and its tidal tributaries. In Appendix S, EPA discusses a number of definitions and common elements that EPA encourages and expects the jurisdictions to include and implement in their offset programs. EPA believes the definitions and common elements in Appendix S also constitute important components of trading programs in the Chesapeake Bay watershed. EPA anticipates using these Appendix S definitions and elements in reviewing jurisdictions' trading programs.

### 10.3 FUTURE MODIFICATIONS TO THE CHESAPEAKE BAY TMDL

EPA has established the Chesapeake Bay TMDL, including its component WLAs, LAs, and margin of safety, based on the Bay and tidal tributaries' applicable WQS and the totality of the information available to it concerning Bay Watershed water quality and hydrology, present and anticipated pollutant sources and loadings, and jurisdiction-submitted implementation plans. In establishing the TMDL and making determinations about reasonable assurance, EPA has also relied on facts and assumptions regarding its own ability to ensure and successfully track TMDL implementation through the two-year milestone process and the application, if necessary, of appropriate federal actions. As a result, EPA believes this TMDL is an appropriate and effective framework for the point source and nonpoint source-focused implementation activities that the jurisdictions, EPA, and the other Bay watershed stakeholders must take to meet the Bay's nitrogen, phosphorus, and sediment reduction goals.

EPA recognizes, however, that neither the world at large nor the Bay watershed is static. In a dynamic environment like the Bay watershed, during the next 15 years change is inevitable. It may be possible to accommodate some of those changes within the existing TMDL framework without the need to revise it in whole, or in part. For example, EPA's permitting regulations at 122.44(d)(1)(vii)(B) require that permit WQBELs be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" contained in the TMDL. As the EPA Environmental Appeals Board has recognized, "WLAs are not permit limits *per se*; rather they still require translation into permit limits." *In re City of Moscow*, NPDES Appeal No. 00-10 (July 27, 2001). In providing such translation, the EAB said that "[w]hile the governing regulations require consistency, they do not require that the permit limitations that will finally be adopted in a final NPDES permit be identical to any of the WLAs that may be provided in a TMDL." *Id.* Accordingly, depending on the facts of a particular situation, it may be possible for the jurisdictions to write a permit limit that is consistent with (but not identical to) a given WLA without revising that WLA (either increasing or decreasing a specific WLA), provided the permit limit is consistent with the operative "assumptions" (e.g., about the applicable WQS, ambient water quality conditions, the sum of the delivered point source loads, hydrology, implementation strategies, the sufficiency of reasonable assurance) that informed the decision to establish that particular WLA.

There might, however, be circumstances in which the permit authority is not comfortable with, or the CWA would not allow, the degree to which a permit limit might deviate from a WLA in the TMDL such that one or more WLAs and LAs in the Bay TMDL would need to be revised. Or, fundamental assumptions like the nature and stringency of the applicable WQS or a



jurisdiction's legal authority might change. In these cases, it 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. In approving any such jurisdiction-submitted revisions (or in making its own revisions) EPA would ensure that the revisions themselves met all the statutory and regulatory requirements for TMDL approval and did not result in any component of the original TMDL not meeting applicable WQS.

Based on possible updates to the model and on jurisdictions' WIPs, EPA will consider revising the Chesapeake Bay TMDL, if appropriate, in 2012 and 2017. EPA will also consider revising the TMDL based on other new or additional information provided by the jurisdictions. All revision requests from jurisdictions should be coordinated with EPA to fit within EPA's planned revision time frame.

#### **10.4 FEDERAL FACILITIES AND LANDS**

Federal lands account for approximately 5.3 percent of the Chesapeake Bay watershed. The federal sector is like other sectors in that EPA expects federal land owners to be responsible for achieving LAs and WLAs through actions, programs, and policies that will reduce the release of nitrogen, phosphorous, and sediment (CWA section 313, 33 U.S.C. 1323).

EPA expects federal agencies with property in the watershed to provide leadership and work with the seven Bay watershed jurisdictions in implementing their Phase I WIPs. Federal agencies have provided information on the spatial boundaries and land use types for facilities in the watershed. EPA used that information to model current pollutant loads from federal facilities and has provided the estimated loads to the jurisdictions. The Federal Strategy also requires federal agencies with property in the Bay watershed to work with the jurisdictions in developing their WIPs by identifying pollutant reductions from point and nonpoint sources associated with federal lands and committing to actions, programs, policies, and resources necessary to reduce nitrogen, phosphorus, and sediment by specific dates.

In their final Phase I WIPs, jurisdictions have established load reduction goals for sectors contributing nitrogen, phosphorus, and sediment loads to the Chesapeake Bay. The TMDL allocations are based almost wholly upon these load reductions; federal lands and installations are expected to contribute to these load reductions. In the Phase II WIPs, the jurisdictions are expected to further distribute LA and WLA allocations among local level target areas such as counties. These more local targets also could include federal facilities. EPA also expects that federal agencies will cooperate with Bay jurisdictions and provide them with information on federal agency actions, programs, policies, and resources necessary to achieve federal facility-specific load reduction targets in jurisdictions' Phase II WIPs.

Like the Bay jurisdictions, federal agencies are expected to create 2-year milestones detailing specific implementation actions to achieve federal lands' and facilities' share of load reductions.



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Motion to Dismiss

EXHIBIT C

**Appendix S.**  
**Offsetting New or Increased Loadings of Nitrogen, Phosphorus, and Sediment to the Chesapeake Bay Watershed**

As an assumption of the Chesapeake Bay total maximum daily load (TMDL), U.S. Environmental Protection Agency (EPA) expects Chesapeake Bay jurisdictions to account for and manage new or increased loadings of nitrogen, phosphorus, and sediment.

As explained in Section 10.1, where the TMDL does not provide a specific allocation to accommodate new or increased loadings of nitrogen, phosphorus, or sediment, a jurisdiction may accommodate such new or increased loadings only through a mechanism allowing for quantifiable and accountable offsets of the new or increased load in an amount necessary to implement the TMDL and applicable water quality standards (WQS) in the Chesapeake Bay and its tidal tributaries.

Therefore, the Chesapeake Bay TMDL assumes and EPA expects that the jurisdictions will accommodate any new or increased loadings of nitrogen, phosphorus, or sediment that lack a specific allocation in the TMDL with appropriate offsets supported by credible and transparent offset programs subject to EPA and independent oversight. This appendix provides details of common elements from which EPA expects the jurisdictions to develop and implement offset programs.

## Source Documents

The common elements are based on, and consistent with, the following documents provided or made available to the jurisdictions:

### *National Guidance*

- *Water Quality Trading Policy*, EPA, 2003 (<http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf>).
- *Water Quality Trading Toolkit for NPDES Permit Writers*, EPA, 2007 (<http://www.epa.gov/owow/watershed/trading/WQTToolkit.html>).

### *Regional/Chesapeake Bay Specific Documents*

- *Expectations Letter*, EPA Region 3 to Principals' Staff Committee, Nov. 4, 2009 ([http://www.epa.gov/reg3wapd/pdf/pdf\\_chesbay/tmdl\\_implementation\\_letter\\_110409.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/tmdl_implementation_letter_110409.pdf)).
- *Federal Actions Letter*, EPA Region 3 to Chesapeake Bay jurisdictions, Dec. 29, 2009 ([http://www.epa.gov/region3/chesapeake/bay\\_letter\\_1209.pdf](http://www.epa.gov/region3/chesapeake/bay_letter_1209.pdf)).
- *A Guide for EPA's Evaluation of Phase I Watershed Implementation Plans*, EPA Region 3, Apr. 2, 2010 ([http://archive.chesapeakebay.net/pubs/Guide\\_for\\_EPA\\_WIP\\_Evaluation\\_4-2-10.pdf](http://archive.chesapeakebay.net/pubs/Guide_for_EPA_WIP_Evaluation_4-2-10.pdf)).

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- *Strategy for Protecting and Restoring the Chesapeake Bay Watershed*, Federal Leadership Committee, May 12, 2010 (<http://executiveorder.chesapeakebay.net/category/Reports-Documents.aspx>).

**Definitions**

The terms used in this appendix are to be interpreted consistently with the above-listed source documents, unless specifically defined below.

1. *Offset*. For purposes of the Chesapeake Bay TMDL, means (n.) a reduction in the loading of a pollutant of concern from a source or sources that is used to compensate for the loading of the pollutant of concern from a different point or nonpoint source in a manner consistent with meeting WQS; or (v.) compensating for the loading of a pollutant of concern from a point or nonpoint source with a reduction in the loading from a different source or sources, in a manner consistent with meeting WQS.
2. *Credit*. For purposes of the Chesapeake Bay TMDL, means a measured unit of nitrogen, phosphorus, or sediment pollutant reduction per unit of time at a location designated and standardized by the jurisdiction that can be generated, sold, or traded as part of an offset.
3. *Offsets Baseline*. For purposes of the Chesapeake Bay TMDL, means the amount of pollutant loading allowed by wasteload allocation (WLA) or load allocation (LA) that applies to individual credit generators in the absence of offsets. Sources generating credits are expected to first achieve their applicable offset baselines before credits may be generated.
4. *New or Increased Loading of nitrogen, phosphorus or sediment*. For purposes of the Chesapeake Bay TMDL means, for a point or nonpoint sources meeting its Chesapeake Bay TMDL WLA or LA as of the date of establishment or modification of the Chesapeake Bay TMDL, any nitrogen, phosphorus, or sediment loading from the point or nonpoint source in an amount greater than reflected by WLAs or LAs in the Chesapeake Bay TMDL; for a point or nonpoint sources not meeting its Chesapeake Bay TMDL WLA or LA as of the date of establishment or modification of the Chesapeake Bay TMDL, any nitrogen, phosphorus, or sediment loading from the point or nonpoint source in an amount greater than reflected by WLAs or LAs in the Chesapeake Bay TMDL, after the point in time the source begins meeting its WLA or LA.

**Common Elements**

As an assumption of the Chesapeake Bay TMDL, EPA expects that offset credits will be generated under programs that are consistent with the common elements described below. Those common elements are not presented here as regulatory requirements. However, EPA believes that in the aggregate, they will help to ensure that offsets are achieved through reliable pollution controls and that the goals of the Bay TMDL are met. EPA recognizes the value that consistent offset programs will have in promoting effective regional implementation of the TMDL.

1. *Authority*. That legal authority exists to authorize the new or increased loading of nitrogen, phosphorus, and sediment on the basis of offsetting reductions from another point or nonpoint source and to implement, monitor, and enforce such offsets.

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2. *Offsets Baseline (for credit generators).* That any point or nonpoint source generating a credit has implemented practices or met any reductions necessary to be consistent with the Chesapeake Bay TMDL allocations:
  - (a) For point sources generating credits, the TMDL assumes that the offsets baseline is the water quality-based effluent limit (WQBEL) included in that discharger's permit consistent with the applicable WLA in the TMDL. For some point sources, the baseline will be a numeric limitation; for others, it will be a suite of BMPs determined to be protective of WQS.
  - (b) For nonpoint sources generating credits, baseline options should be consistent with the TMDL LA for the appropriate sector and may be further defined in terms of load, geographic scale, minimum practices, schedule of implementation and/or time needed to facilitate improved environmental compliance with WQS.
3. *Minimum Controls (for credit users).* That any point or nonpoint source using a credit has implemented certain minimum controls:
  - (a) For point sources using credits, that the discharger using a credit will meet on-site any relevant minimum technology-based standards or secondary treatment standards.
  - (b) For nonpoint sources using credits, that the source has met all federal, state, and local requirements applicable to nonpoint sources.
4. *Eligibility.* Inclusion in the basis and record for any offset, any additional criteria the jurisdiction will use to determine when a point source or nonpoint source may generate credits. Inclusion of a statement defining the eligibility requirements for and acceptable roles of aggregators or third parties in generation, sale, and purchase of offsets on behalf of others.
5. *Credit Calculation and Verification:* Ensuring that credits are quantified using appropriate metrics and are routinely verified to ensure that they are producing expected reductions, including the following:
  - (a) Appropriately quantifying pollutant loading credits generated and ensuring that offsets acquired reflect load reductions equivalent to or greater than the new or increased loadings being offset, including the following:
    - i. Accounting for the equivalency of pollutants to compensate for changes in pollutant form, e.g., total nitrogen versus dissolved nitrogen;
    - ii. Accounting for uncertainty of source reductions due to factors such as practice efficiencies related to the use of BMPs, a lack of required monitoring or reporting compared to other sources, and/or the lack of regulation of the source by federal, state and/or local regulations;
    - iii. Accounting for any distance between the generating and acquiring sources that could affect water quality including the potential for

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- water chemistry variations and other delivery factors that could cause pollutant attenuation;
  - iv. Accounting rules for inclusion of practices implemented through public cost-share incentives; and
  - v. Accounting for degradation in the effectiveness of a practice over the projected term of the practice.
- (b) Validating that proposed activities to create reductions (e.g., treatment or BMP installation) are expected to generate the credits offered for offsets, including identifying the metrics and data used to quantify the offset/credit generated and the period for credits.
  - (c) Verifying that the credit was and continues to be generated, via monitoring, inspection, reporting, or some other mechanism, including articulating the frequency of on-site or other monitoring and the entity responsible for conducting monitoring or inspections.
  - (d) Articulating whether third parties may verify and certify credits and offsets within and between jurisdictions.
6. *Safeguards.* Inclusion in the basis and record for any offset, safeguards to ensure that the entire delivered load is accounted for and that water quality will be protected, such as the following:
- (a) Prohibiting the use of offsets where such use would cause or contribute to exceedances of WQS, TMDLs, WLAs or LAs in affected receiving waters, locally or elsewhere;
  - (b) Restricting the use or generation of offsets by an unpermitted point source or a source that is not in compliance with its NPDES permit or a jurisdiction equivalent, or other federal or state law or regulation;
  - (c) Protecting affected communities from disproportionate harm arising from offsets; and
  - (d) Ensuring temporal consistency between the period when a credit or offset is generated and when it is used. As provided for in EPA's *Water Quality Trading Toolkit*, "credits should not be used before the time frame in which they are generated." That includes any credits expected to be generated under a contract between a new discharger and a generating source, or credits generated under an in-lieu fee program in which the jurisdiction uses discharger paid fees to achieve loadings reductions beyond baseline. For NPDES dischargers, credits should be created and used within the periods that are used to determine compliance with effluent limitations. The permitting authority may have discretion to determine the appropriate averaging period for WQBELs, depending on the pollutants of concern and other watershed specific factors. The permitting authority should decide whether and when a credit expires.

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7. *Certification and Enforceability.* Designating the process to be used and the institutional entity responsible for credit/offset program operation and certification, and ensuring the enforceability of Clean Water Act discharge permits and offset transactions, including the following:
- (a) Requiring that any offsets, along with the enforceable WQBELs based on the applicable WLA (e.g., zero for new dischargers), will be included and recorded in the NPDES permit.
  - (b) Estimating annually the increased pollutant loading from nonpoint sources and discharges from point sources that will not be permitted, acquiring offsets needed to fully offset such increases, and recording those offsets in an appropriate instrument.
  - (c) Determining whether offsets may occur without reopening or modifying a NPDES permit to incorporate the offset transaction.
  - (d) Ensuring that transactions can be enforced by the jurisdiction. Articulating how transactions can otherwise be protected by the jurisdiction, for example through a credit reserve insurance account, if failure by the offset generator occurs.
  - (e) Determining whether a civilly enforceable agreement exists between an offset generator and an offset user.
  - (f) Ensuring that an NPDES permittee remains accountable for meeting the WQBEL(s) in its permit, for example through a standard condition in all NPDES permits within a jurisdiction.
8. *Accountability and Tracking.* Developing accountability and tracking system(s) that are holistic and focused on performance outcomes while providing maximum transparency, operational efficiency, and accessibility to all interested parties. Such system(s) should demonstrate the following:
- (a) An appropriate offset baseline is used to generate credits.
  - (b) The offset is quantified and verified according to standards established by the jurisdiction.
  - (c) The offset or credit is sold to no more than one purchaser at a time.
  - (d) The nutrient delivery equivalency of the offset generated and the offset consumed both in terms of the equivalency of pollutants and appropriate attenuation.
  - (e) The locations(s) of the offset, including where the offset or credit is generated.
  - (f) Authentication of ownership.
  - (g) The NPDES permit number or other identification of the purchaser of the offset or credit.
  - (h) Documentation of agreements between parties to the offset transaction.



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- (i) Whether sufficient offsets will be acquired over the period of the new or increased loading.
  - (j) Compliance status of NPDES parties.
  - (k) The results of monitoring and verification for each offset.
  - (l) Time frames for regular review and evaluation of the offset program.
9. *Nutrient-impaired Segments.* In addition to the safeguards in 6 above, ensuring that offsets in nutrient-impaired water segments
- (a) Result in progress toward attainment of WQS in the impaired segment;
  - (b) Do not result in exceedances of WQS in the purchaser's impaired segment; and
  - (c) Do not increase delivery loads in downstream impaired segments, do not violate WQS in any intermediary segments, and do not violate local WQS.
10. *Credit Banking.* Appropriate roles and operating practices of credit banks should be specified. It is recommended that credit banking on a basin or interstate basis be authorized subject to meeting the elements noted above. Expectations concerning necessary costs and reasonable expenses of banks that acquire and sell credits should be described.

The Chesapeake Bay jurisdictions also can consider whether to use the additional offset program features discussed in Section 10.1.3 to build their offset programs for new or increased loadings of nitrogen, phosphorus, and sediment. Those include net improvement offsets, aggregated programmatic credits, and a reserve-offset hybrid.

In developing and implementing their offset programs, EPA encourages jurisdictions to consult with EPA to facilitate alignment with the Clean Water Act and the Chesapeake Bay TMDL. EPA intends to fulfill its various oversight responsibilities of these offset programs by conducting periodic audits and evaluations as detailed in Section 10.1.4. Where questions or concerns arise, EPA will use its oversight authorities to ensure that offsets and offset programs are fully consistent with the Clean Water Act and its implementing regulations.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH and  
FRIENDS OF THE EARTH,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and LISA  
JACKSON, Administrator

Defendants.

No. 1:12-cv-01639-RC

**[Proposed] ORDER GRANTING  
DEFENDANTS' MOTION TO DISMISS**

This matter came before the Court on defendants' United States Environmental Protection Agency and Lisa Jackson, Administrator's, Motion to Dismiss plaintiffs' Complaint for lack of jurisdiction and for failure to state a claim for which relief may be granted. Having considered the motion and all materials submitted in support of and in opposition thereto, the Court has determined that the motion should be, and hereby is, GRANTED. Plaintiffs' Complaint is hereby dismissed.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Rudolph Contreras  
United States District Judge