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 BOB PERCIASEPE, Acting 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 Bob Perciasepe, Acting 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.

April 22, 2013

Respectfully submitted,

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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 Bob Perciasepe, Acting Administrator (collectively "EPA" or "Agency") hereby move to dismiss plaintiffs Food and Water Watch, et. al.'s (collectively "plaintiffs'") Amended Complaint For Declaratory Relief, Docket No. 27-1 ("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.[1] *Id.* at 549-50. The Bay TMDL sets an overall cap on discharges (or "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 5, 20-21.

Plaintiffs challenge what they characterize as "provisions [of the Bay TMDL] authorizing pollution trading and offset programs," further alleging that such programs "create[] an impending threat" of hindering the achievement of Bay water quality standards. Complaint ¶¶ 1, 98. Plaintiffs do not, however, allege that any such threat has yet materialized – only that trading and offsets supposedly *allow* unidentified point source dischargers to violate permit limits, and that at some unspecified point in the future "[n]ew or expanded" discharges of pollutants will allegedly contribute to violations of water quality standards. *Id*. ¶ 109; *see also id*. ¶¶ 78, 80, 108.

The Bay TMDL is an "informational tool[]," not a statute, rule, or regulation. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir 2003). As such, it does not and cannot function as a source of legal authority for the Bay states to establish trading or offset programs (which, indeed, some states had done even before the Bay TMDL existed). Plaintiffs' speculative allegations regarding the hypothetical impact of such programs are, moreover, insufficient to demonstrate that members of the plaintiff organizations have suffered or will

[1] 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).

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 also 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. EPA took final action to establish the Bay TMDL and its constituent allocations, but *implementation* of that TMDL now falls to the Bay states. The statements that plaintiffs characterize as trading and offset "provisions" of the Bay TMDL are nothing more than descriptions of strategies the Bay states might use to 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 (8th 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").[2] *Id.* The total TMDL is thus the sum of wasteload allocations to point sources and load allocations to nonpoint sources,

[2] 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, Inc. v. Jackson*, 798 F. Supp. 2d 210, 214 (D.D.C. 2011). Nonpoint sources include, for example, agricultural runoff and erosion. *See id.*; *see also League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th 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").

together with a statutorily-required margin of safety. 40 C.F.R. § 130.2(i); *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216.

Although a TMDL establishes an overall cap on pollutant loadings as well as allocations within that cap, TMDLs are not self-executing. *Id.*; (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 actions."). TMDLs are, instead, implemented through a variety of means, including the permitting and control programs discussed in the following sections. *See Pronsolino*, 291 F.3d at 1132 (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. Regardless of whether a permit is issued by EPA or an authorized state, the proposed permit must go through an administrative process that includes an opportunity for public comment. 33 U.S.C. § 1342(a)(1), (b) (3).

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 judicial review by the federal courts, 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). In addition to granting EPA administrative and judicial enforcement authority, *see id.*, the Act 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). This provision "extends standing to the outer boundaries set by the 'case or controversy' requirement

of Article III of the Constitution." *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citation omitted). Environmental organizations that are otherwise able to establish organizational standing thus may pursue claims under this provision. *See id.* at 1147-50 (environmental organization had standing to challenge alleged violations of NPDES general permit where individual members of organization were deterred from using creek receiving runoff from facilities subject to permit).

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 ¶¶ 16-17;

76 Fed. Reg. at 549. The Bay and its tributaries are, however, in poor environmental health. Complaint ¶¶ 27-30; 76 Fed. Reg. at 549. Excess nitrogen, phosphorus, and sediment are the primary causes of the Bay's degradation. Complaint ¶ 21; 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 Bay states. Complaint ¶ 32; 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 ¶¶69, 102. 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.

Bay TMDL, Section 10 (excerpt) (Ex. B) at 10-1; *see also* Bay TMDL, Appendix S (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. Ex. B at 10-3. One assumption underlying the Bay TMDL is thus that trades may occur between sources contributing pollutant loadings to the Bay watershed, provided that such trades do not cause or contribute to an exceedance of water quality standards in that watershed. *Id.* 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 challenge EPA's purported "authoriz[ation]" 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 (sometimes referred to collectively herein as "trading and offset programs"). *See* Complaint ¶¶ 1, 5. In Count I, *id.* ¶¶ 88-100, plaintiffs allege that trading may allow (unidentified) point sources to avoid otherwise applicable permit limitations, as well as creating an "impending threat" of "imped[ing] or impair[ing] achievement of water quality standards in the Chesapeake Bay and its tributaries." *Id.* ¶¶ 94-95, 98; *see also id.* ¶¶ 78, 80. For those reasons, plaintiffs contend that EPA's alleged "authorization" of trading in the Bay TMDL is

arbitrary and capricious. *Id.* ¶ 100. In Count II, *id.* ¶¶ 101-112, plaintiffs allege that EPA's purported "[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.* ¶ 109. And in Count III, *id.* ¶¶ 113-123, plaintiffs allege that trading and offsets transfer TMDL allocations from one source to another, thereby amending the Bay TMDL without notice and comment. For all of these reasons, plaintiffs seek a declaration that what they characterize as "the trading and offset provisions of the [Bay] TMDL" are in violation of the Clean Water Act and the Administrative Procedure Act ("APA") and therefore "are null and void." *Id.* ¶ 124.

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) (court need not "accept legal conclusions cast in the form of factual allegations"); *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 again, the legal conclusions are not), and plaintiffs are given the benefit of "all reasonable inferences that can be drawn from the facts alleged." *Id.*; *Autor v. Blank*, 892 F. Supp. 2d 264, 270 (D.D.C. 2012). 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 any of their members have suffered (or imminently will suffer) concrete or particularized injuries caused by the so-called trading and offset "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 "provisions [allegedly] authorizing pollution trading and offset programs," Complaint ¶ 1, that plaintiffs seek to challenge do not constitute final agency action. EPA's statement that it expects that the Bay states will implement the Bay TMDL in part through trading and offset programs neither authorizes nor precludes any particular conduct, and has no legal effect on any existing or future permit or on the statutory and regulatory program 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 impact of trading and offset

programs on permit terms, permit compliance, and water quality. 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 to 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 Their Representational Standing.

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. In this case, plaintiffs are environmental organizations suing on behalf of their members. Complaint ¶¶ 6, 8. To establish standing to sue on behalf of its members, 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 v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)).

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. *Lujan, 504 U.S* 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. Because plaintiffs have not adequately alleged any present or imminent injury to their members (or for that matter to their own interests) that was caused by any EPA action in the Bay TMDL, or that could be redressed by a favorable decision, their Complaint must be dismissed for lack of jurisdiction.

1. Plaintiffs have not alleged a particularized injury.

Plaintiffs do not allege that their members have suffered any particularized injury caused by the use of trading or offset programs in the Bay states. Plaintiffs argue that such programs will threaten the achievement of water quality standards in the Bay. Complaint ¶¶ 98, 109; *see also id*. ¶¶ 80-81. 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 Envtl. 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). An organizational plaintiff must allege that specific members of the organization either have been or imminently will be injured. *Summers*, 555 U.S. at 498 (organizations must make specific allegations establishing that at least one member has suffered or will suffer harm); *Western Wood Preservers Inst. v. McHugh*, No. 12-1253, 2013 WL 692789, at *4 (D.D.C. Feb. 27, 2013) (plaintiff trade associations did not have standing to sue in a representational capacity where they had not identified specific members who suffered alleged harm); *Californians for Renewable Energy v. Dep't of Energy*, 860 F. Supp. 2d 44, 48 (D.D.C. 2012) (organization must name at least one

member that has suffered requisite harm).[3] In this case, plaintiffs allege no more than that (1) members of their organization live, work, and recreate somewhere in the Bay watershed; (2) trading and offset programs will allegedly allow point sources also located somewhere in the Bay watershed to violate their NPDES permits; and (3) if such permit violations occur (notably, plaintiffs do not allege that any such violations *are* occurring), they will in turn affect plaintiffs' members enjoyment of the Bay watershed. *See* Complaint ¶¶ 7, 9, 81, 87. Plaintiffs simply have not alleged facts sufficient to demonstrate a particularized injury to any of their members.

Plaintiffs appear to be suing solely on behalf of their members, and not in their own right as organizations. *See* Complaint ¶¶ 6, 8. Plaintiffs' allegations that water quality trading contradicts their organizational missions, goals and values, Complaint ¶¶ 6, 8, would not in any event suffice to establish a constitutionally adequate injury. Plaintiffs are still required to allege that any agency 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); *see also Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere interest in a problem is not sufficient in itself to render organization adversely affected or aggrieved). This requires that an organization allege

[3] *But see Association of American Physicians & Surgeons Inc. v. Sebelius*, No. 10-0499, 2012 WL 5353562, at *5 (D.D.C. Oct. 31, 2012) (concluding that plaintiff need not "identify the affected members by name at the pleading stage"). In this case, the problem is not only that plaintiffs have failed to name names; more broadly, it is that they have failed to allege that *any* members of their organizations have suffered, or are at imminent risk of, concrete and particularized harm caused by trading or offset programs in the Bay watershed. *Compare, e.g., Building & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 142-43, 144-45 (2d Cir. 2006) (plaintiffs alleged that unnamed organization members (1) had been employed at identified contaminated site and had been exposed to contaminants while working there; (2) resided and worked near site; (3) drank water drawn from Lake Erie that was allegedly polluted by site; and (4) used area surrounding site for recreation) *with* Complaint ¶¶ 7, 9 (plaintiff members live, work, and recreate in Bay watershed generally and are "fearful" of using unidentified waters), ¶¶ 80-81, 87 (alleging generally that trading and offsets adversely affect members' enjoyment of Bay watershed).

"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 statements do 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 actual or imminent injury.

Even if plaintiffs' allegations of harm were sufficiently particularized, they would remain too speculative to establish standing. For purposes of Article III, any injury must be either actual or "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 actual or imminent injury. They allege that trading and offsets "allow point sources to violate their NPDES permits" by discharging more pollutants than those permits allow, and that such discharges in turn "contribute to both local and downstream non-attainment of water quality standards and adversely affect Plaintiffs' members use of waters in those areas" ("those areas," however, remain unidentified). Complaint ¶ 80; *see also id*. ¶ 109 (alleging 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]," even where offset by reductions from other sources). Plaintiffs' conclusory allegations fail to explain how any trading or offsets authorized 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 allege that any permit violations are presently occurring (only that they are theoretically "allow[ed]"), let alone identify specific permits that have supposedly been violated or waters that have supposedly been damaged. [4]

Plaintiffs' allegation that unidentified NPDES permit holders in the Bay watershed "have *applied for* trading and offset privileges" Complaint ¶ 82 (emphasis added), is not sufficient to

[4] Plaintiffs also allege that their members are currently "fearful" and "concerned" regarding the potential effect of trading and offsets. Complaint ¶¶ 7, 9. Unfounded fears regarding the potential effect of unidentified permits, or of permit violations that may never occur, are insufficient to establish Article III standing. *See U.S. International Trade Comm'n v. Tenneco West*, 822 F.2d 73, 75 (D.C. Cir. 1987) (unspecific fear of injury cannot suffice to provide standing under Article III); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n. 8 (1983) (reality of threat of injury, rather than plaintiff's "subjective apprehensions," is what is relevant to standing inquiry). Plaintiffs' allegation that their members are harmed by presently existing water quality violations might, with greater specificity, suffice to establish an Article III injury; however, as discussed below, plaintiffs have failed to link this purported injury to any EPA action in the Bay TMDL. *See* Complaint ¶¶ 80, 81; *see also id*. ¶ 109.

establish imminent harm.[5] NPDES permit applications must go through an extensive administrative process that includes the opportunity for public comment, and EPA may object to any proposed State-issued permit that does not conform to the requirements of the Act. *See supra* at 5-6; 33 U.S.C. § 1342(a)(1), (b)(3), (d)(2). It is thus sheer speculation to assume that merely because a permit applicant *requests* particular terms, the final permit (if and when it is issued, following the full administrative process) will *contain* those terms. Plaintiffs' speculative claims assume, moreover, that EPA and the Bay states will disregard their obligation to ensure that future NPDES permits are consistent with applicable water quality standards and wasteload allocations. This assumption is 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).[6]

Plaintiffs also allege that trading will amount to an amendment of the Bay TMDL without notice and comment.[7] Complaint ¶¶ 113-123. "[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

[5] Still less would a mere expression of intent to seek such a permit establish imminent injury to plaintiffs' members. *See* Complaint ¶ 82. Nor does the bare allegation that "[t]rading authorizations and offsets are actual or imminent," Complaint ¶ 83, suffice to meet plaintiffs' burden of establishing standing, based as it is on the alleged existence of unidentified permit applications.

[6] As discussed *supra* at 6-7 and *infra* at 27-28, there are remedies available if EPA or a state ultimately issues an NPDES permit that plaintiffs believe does not conform with applicable statutes and regulations, or if a source violates an existing permit.

[7] Plaintiffs allege that "EPA's approval of trading and offsets violates notice and comment requirements under the APA." Complaint ¶ 114. To the extent that this is an allegation that EPA failed to seek notice and comment before (allegedly) approving trading or offset programs as part of the Bay TMDL itself, it fails for the reasons discussed in Section V.B. below – i.e., EPA took no action to approve or establish such programs.

(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 above, plaintiffs have failed to adequately allege actual or imminent harm to any "concrete interest." They thus do not have standing to challenge *any* alleged procedural defaults – let alone procedural defaults that will supposedly derive from future trading or offset programs, and that thus have yet to even occur.

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. Where, as here, a plaintiff's asserted injuries arise not from the government's regulation of the plaintiff itself, but from agency actions that govern third parties, it is "substantially more difficult" to establish standing. *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (citing *Lujan*, 504 U.S. at 562); *see also Grocery Mfrs Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (fact that EPA actions did not directly impose regulatory restrictions or other burdens on petitioners made task of establishing standing more difficult). That is because Article III requires that federal courts act "only to redress injury that fairly can be traced to the challenged action of the defendant, *and not injury that results from the independent action of some third party not before the court*." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added); *see also Fla. Audubon Soc'y*, 94 F.3d at 669-71. In such cases, "the necessary elements of causation and redressability" both turn on third-party choices, increasing the plaintiffs' burden to "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability." *Lujan*, 504 U.S. at 562.

Plaintiffs do not attack the pollutant loading caps or allocations in the Bay TMDL itself, or claim that their members are injured by those caps and allocations. Their complaint is, instead, largely premised on the theory that trading and offset programs adopted, or permits issued, *by the Bay states* – i.e., parties other than EPA – will allow sources to *avoid* the allocations established in EPA's TMDL and will cause other violations of the Act (such as exceedance of water quality standards). *See* Complaint ¶¶ 80, 95, 121. Plaintiffs' theory appears to be that by allegedly "authorizing" trading and offset programs in the Bay TMDL, EPA made it possible for the states to adopt such programs and to issue NPDES permits whose limits can be met using trades or offsets, which will in turn injure plaintiffs' members.

This theory ignores the fact that some states had already developed and implemented trading or offset programs before EPA even issued the Bay TMDL. Moreover, and more importantly, this chain of causation is too tenuous to satisfy Article III. 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 increased pollutant loadings. *See supra* at 4-7. Unless and until the Bay TMDL is revised, it establishes the maximum 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.*

One way of accommodating future increases is through programs under which new or increased pollutant loads can be offset with reductions elsewhere – and, indeed, this is the course that EPA expects the Bay states will follow in implementing the Bay TMDL. Ex. C at S-1; *see also* Ex. B at 10-1, 10-3; *infra* section V.B. The fact remains that nothing in the Bay TMDL

legally obligates the Bay states to follow this path, or constrains them from developing some other means of implementation. "[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)).

For similar reasons, plaintiffs have failed to demonstrate that any injury their members have suffered would be redressable by a favorable decision. What plaintiffs seek is an order that somehow severs and vacates the purported "trading and offset provisions" of the TMDL, leaving the rest of the TMDL intact. *See* Complaint ¶ 124. For the reasons already discussed, those "provisions" have no legal effect. Even if all mention of trading and offset programs as a likely means of implementation were eliminated from the Bay TMDL, states would retain discretion to continue to develop such programs. Plaintiffs have thus failed to allege facts sufficient to demonstrate that any injury they have suffered would be redressable through a favorable decision. *See 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 harm to unspecified members of the plaintiff organizations 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 actionable risk of harm, or that any such risk 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.[8] 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 their members are adversely affected or aggrieved by the alleged trading or offset "provisions" of the Bay TMDL. More fundamentally, however, plaintiffs have failed to identify any reviewable final agency action.[9] 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 and offset

[8] Plaintiffs also cite 28 U.S.C. §§ 1331 and 1361, as well as the Declaratory Judgment Act (28 U.S.C. § 2201). Complaint ¶ 12, 13. 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). Finally, the Declaratory Judgment Act is not an independent source of jurisdiction and does not provide a cause of action. *See Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011)

[9] Plaintiffs' statement that EPA's alleged authorization of trading and offsets "is final agency action" is a legal conclusion, not a factual allegation, and as such need not be taken as true. Complaint ¶ 85; *see also id*. 86 (stating legal conclusion that validity of trading and offset provisions "is a purely legal question fit for judicial review"); *supra* at 10-11.

provisions that plaintiffs challenge satisfy this test, it is important to bear in mind that a TMDL is not 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 (11th 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 apparent that the so-called trading and offset "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 – again, 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.[10] As a practical matter, the Bay states may not be able to

[10] EPA set forth common elements that EPA expects any Bay state to use in developing and implementing offset programs if and when a state chooses to do so to implement the Bay TMDL. *See* Ex. C. EPA made it clear that these common elements are not regulatory requirements. *Id.*

accommodate new or 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 trading or offset "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.[11] *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).

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at S-2. Plaintiffs attack the entire concept of using trading and offset programs to implement the Bay TMDL, but do not allege that EPA's identification of potential elements of such programs was arbitrary or capricious.

[11] Plaintiffs allege that EPA "has already reviewed state trading and offset programs for compliance with TMDL Section 10 and Appendix S." Complaint ¶ 76; *see also id.* ¶ 105. Plaintiffs do not, however, identify any judicially reviewable final agency action resulting from any such review.

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.[12] 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 permit violations, the terms of as-yet-unissued NPDES permits, and the prospective degradation of water quality. *See supra* at 17-19. Such claims 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.

[12] 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.

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 and offset 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' or their members' "primary conduct" by requiring them to somehow alter their behavior. *See National Park*, 538 U.S. at 810.

Not only have plaintiffs and their members 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 – perhaps even one of the permits that plaintiffs point to in ¶ 82 of the Complaint –any party with standing will have the opportunity to seek judicial review of that action. *See supra* at 6. And if any source "violate[s]" an existing permit, Complaint ¶ 80, plaintiffs have the option of pursuing a citizen suit (in the absence of state or federal enforcement action). *See supra* at 6-7; 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 and offset "provisions" of the Bay TMDL 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 statements they attack, or that those

statements 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.

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Respectfully submitted,

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