IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH and FRIENDS OF THE EARTH, **Plaintiffs,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY and BOB PERCIASEPE, Acting Administrator, U.S. Environmental Protection Agency,** **Defendants,** **and** **AMERICAN FARM BUREAU FEDERATION and NATIONAL ASSOCIATION OF HOME BUILDERS,** **Intervenor-Defendants.**	**No. 12-cv-1639**

MOTION TO DISMISS AMENDED COMPLAINT BY AMERICAN FARM BUREAU FEDERATION AND NATIONAL ASSOCIATION OF HOME BUILDERS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and Local Civil Rule 7, Intervenor-Defendants American Farm Bureau Federation and National Association of Home Builders respectfully move to dismiss the Amended Complaint of Plaintiffs Food and Water Watch and Friends of the Earth for lack of jurisdiction and failure to state a claim upon which relief can be granted. As explained in the accompanying Statement of Points and Authorities In Support Of Intervenors' Motion To Dismiss, Plaintiffs lack standing because their alleged injuries are neither fairly traceable to the challenged agency action nor redressable by this Court. Moreover,

Plaintiffs' Amended Complaint fails to state a claim because Plaintiffs have not challenged a final agency action. Accordingly, Plaintiffs' Amended Complaint should be dismissed.

April 22, 2013

Respectfully submitted,

/s/ Kirsten L. Nathanson

Richard E. Schwartz, No. 185561
Kirsten L. Nathanson, No. 463992
David Y. Chung, No. 500420
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for American Farm Bureau Federation and National Association of Home Builders

Ellen Steen, Of Counsel
Danielle Quist, Of Counsel
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000W
Washington, DC 20024
(202) 406-3600

Thomas Ward, Of Counsel
National Association of Home Builders
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8200

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed with the Clerk of the Court on the 22nd day of April, 2013 using the CM/ECF system which will send electronic notification to all counsel of record.

/s/ David Y. Chung
David Y. Chung

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY AMERICAN FARM BUREAU FEDERATION AND NATIONAL ASSOCIATION OF HOME BUILDERS

Intervenor-Defendants American Farm Bureau Federation and National Association of Home Builders ("Intervenors") submit this statement of points and authorities in support of their motion to dismiss the Amended Complaint in this case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted, respectively.

In this lawsuit, Plaintiffs challenge an action of the U.S. Environmental Protection Agency ("EPA") that they characterize as the "provisions authorizing pollution trading and offset programs" in EPA's December 29, 2010 Chesapeake Bay Total Maximum Daily Load for

Nitrogen, Phosphorus and Sediment ("Bay TMDL"), which sets forth the total amounts of those substances that can be "loaded" into the Chesapeake Bay without violating applicable water quality standards.[1] *See* Am. Compl. ¶ 1. But contrary to Plaintiffs' characterization, there are no such authorizations in the Bay TMDL. The states – not EPA – are authorized by the CWA to *implement* TMDLs. Rather than authorize trading and offsets, the Bay TMDL anticipates that states within the Chesapeake Bay watershed – the entities authorized to implement the TMDL – will rely on their own trading and offset programs to implement the federal loading limits. In particular, at the time EPA developed the Bay TMDL, it acknowledged that some of those states were *already* relying on their trading and offset programs – established through state legislation – to discharge their responsibilities under the Clean Water Act.

Because these state trading and offset programs are products of state legislation, Plaintiffs' Amended Complaint must be dismissed for lack of standing and because Plaintiffs do not challenge a reviewable final agency action. First, Plaintiffs lack standing because they have not alleged facts demonstrating that their claimed injuries are fairly traceable to the Bay TMDL. Those alleged injuries, assuming they satisfied the injury-in-fact requirement of Article III standing, would not be caused by the Bay TMDL, but by yet-to-be-identified state authorizations of individual trades and offsets under state laws establishing those programs. Moreover, any such injuries would not not be redressable by this Court. If the underlying state programs are

[1] EPA published a Notice of Availability of the Bay TMDL in the Federal Register on January 5, 2011. 76 Fed. Reg. 549. The Bay TMDL and its appendices are available on EPA's website at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html (last visited April 22, 2013).

As explained in their motion to intervene, Intervenors filed a separate lawsuit in January 2011 challenging the Bay TMDL as contrary to the Clean Water Act and as arbitrary and capricious and procedurally defective in violation of the Administrative Procedure Act. *See Am. Farm Bureau Fed'n v. EPA*, No. 11-cv-00067 (M.D. Pa.). That case has been fully briefed and argued on the merits. Intervenors' requested remedy in that lawsuit—vacatur of the Bay TMDL in its entirety—would moot this case. Intervenors have intervened in this case because, to the extent the Bay TMDL survives their lawsuit, Intervenors' members will depend on, and benefit from, state pollutant trading and offset programs during the states' implementation of the Bay TMDL.

ripe for challenge, Plaintiffs must challenge them in another forum. The Bay TMDL does not provide the jurisdictional basis for Plaintiffs to litigate their generalized complaint against Clean Water Act trading and offset programs, which are creatures of state law and are not "authorized" by the Bay TMDL.

Second, for similar reasons, Plaintiffs have also failed to identify an actual, reviewable final agency action and thus, the Amended Complaint fails to state a claim upon which relief can be granted under the Administrative Procedure Act ("APA"). Because EPA's discussions of state trading and offset programs in the Bay TMDL do not create any rights or obligations or give rise to any legal consequences, those discussions are not "final agency action" by EPA. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Plaintiffs seek a judicial ruling that the Clean Water Act does not authorize trading or offset programs, but the federal action they challenge – EPA's opinion about trading and offsets – does not actually provide any such authority. Accordingly, the Amended Complaint should be dismissed.

I. BACKGROUND

A. Statutory and Regulatory Framework

The Clean Water Act leaves the task of controlling water pollution largely to the states: it expressly recognizes, preserves, and protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b) (emphasis added). The Act also bars any interpretation of its provisions that would "impair [] or in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States[,]" except as otherwise "expressly provided" by the statute. *Id.* § 1370(2).

In particular, states are responsible for:

(i) establishing water quality standards for waters within their boundaries, *see* 33 U.S.C. § 1313(c);

(ii) identifying which waters are not meeting those standards (commonly called "impaired" waters) and calculating a total maximum daily pollutant load—a TMDL—for those waters, *see id.* § 1313(d); and

(iii) generating plans to, among other things, implement water quality standards. *See id.* §§ 1313(e), 1288(b), 1329(b).

Authorized federal involvement in these state actions is carefully limited. If EPA disapproves of or objects to state action or inaction, it has authority under the Act to step into a state's shoes and establish water quality standards, identify impaired waters, and/or establish TMDL(s). *See* 33 U.S.C. §§ 1313(c)(3)-(4), 1313(d)(2). Under no circumstances, however, does the Act authorize EPA to assume state responsibility to develop a planning process or TMDL implementation plan. *See, e.g.*, *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 n.10 (11th Cir. 2002); *Bravos v. Green*, 306 F. Supp. 2d 48, 57 (D.D.C. 2004).

1. Establishment Of Water Quality Standards

The Clean Water Act places primary authority with each state to adopt water quality standards for its water bodies. *Id.* § 1313(c)(2)(A). Each state must designate one or more uses for each of its water bodies (such as recreation, drinking water supply, or aquatic life uses) and identify water quality criteria (characteristics) necessary to protect these uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10 and 131.11. State-promulgated standards are subject to EPA review and approval to ensure that they meet the Clean Water Act's requirements. 33 U.S.C. § 1313(c)(2)-(3).

EPA has limited authority under the Act to "step in and promulgate water quality standards itself." *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993). EPA may

only do so if "(1) it determines that a state's proposed new or revised standard does not measure up to CWA requirements and the state refuses to accept EPA-proposed revisions to the standard or (2) a state does not act to promulgate or update a standard but, in the EPA's view, a new or revised standard is necessary to meet CWA muster." *Id.* (citing 33 U.S.C. § 1313(c)(3)-(4)).

2. Listing Of Impaired Waters And Establishing TMDLs For Those Waters

Clean Water Act section 303(d) requires each state to (i) identify those waters "within its boundaries" for which limitations on point source[2] discharges are not stringent enough to implement the standards "applicable to such waters" and (ii) establish a priority ranking of these waters. 33 U.S.C. § 1313(d)(1)(A). For each listed ("impaired") water, the state must establish a TMDL for pollutants that EPA identifies as "suitable for such calculation." *Id.* § 1313(d)(1)(C). The Act does not define the term "total maximum daily load," but it directs that a TMDL be established "at a level necessary to implement the applicable water quality standards." *Id.*

Like water quality standards, state lists of impaired waters and TMDLs are subject to EPA review and approval. 33 U.S.C. § 1313(d)(2). If EPA disapproves a TMDL, or if a state fails to establish a required TMDL, EPA has 30 days to establish a TMDL. *Id.*

3. States Have The Primary Responsibility Over TMDL Implementation—EPA's Role Is Limited To Section 402 Permit Terms

In keeping with congressional policy to preserve and protect the primary responsibilities and rights of each state over its planning for the development and use of its land and water resources, the Clean Water Act "puts the responsibility for implementation of TMDLs on the states." *Meiburg*, 296 F.3d at 1031. Importantly, states retain responsibility over TMDL

[2] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Many point source discharges are regulated under the Section 402 permitting program. *See id.* § 1342. States may assume primary responsibility for administration and enforcement of the Section 402 permitting program upon EPA approval. *Id.* §§ 1342(b), 1342(c)(1). But EPA retains authority, in specified circumstances, to object to state-issued permits. *See id.* § 1342; 40 C.F.R. §§ 122.4(a) and (d), 122.44(c)-(d).

implementation even in cases where EPA establishes the TMDL itself. *See id.*; *see also Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000) ("California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is *also free to moderate or to modify the TMDL reductions, or even refuse to implement them*, in light of countervailing state interests.") (emphasis added). Thus, regardless of the calculations and assumptions that underlie EPA's establishment of a TMDL, the state retains flexibility to choose "both *if* and *how* it [will] implement the [] TMDL." *Pronsolino v. Nastri*, 291 F.3d at 1140.

Implementation of TMDLs may be achieved through a number of mechanisms under the Act. For example, most states have authority to administer the section 402 permitting program regulating point source discharges. *See* 33 U.S.C. § 1342. Section 402 permits must contain effluent limits that are consistent with applicable WLAs in a TMDL. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B). Reductions in nonpoint source pollution can be attained through state programs aided by the section 319 planning and grant funding program. 33 U.S.C. § 1329. The Act assigns responsibility to the states to prepare waste treatment management plans (33 U.S.C. § 1288), non-point source management plans (33 U.S.C. § 1329), and a continuing planning process (33 U.S.C. § 1313(e)), "which is essentially a plan for how the state is going to clean up pollution." *Meiburg*, 296 F.3d at 1026.

States may also implement TMDLs through offsets and water quality trading programs established under state laws. Under the former (offsets), new or increased loadings of a particular pollutant that are not accounted for in a state's allocation scheme for a TMDL can be offset by loading reductions achieved by, and credits generated by, existing sources. *See, e.g.*, Bay TMDL at Appendix S. Under the latter (trading), sources within a particular water segment

or watershed that face higher pollutant control costs to meet the requirements in permits may, under state-established trading programs, purchase water quality credits from other sources that can achieve pollutant reductions at lower costs, so long as such "trades" do not cause or contribute to violations of applicable water quality standards and do not delay or weaken implementation of a TMDL. *See, e.g.*, U.S. EPA, Office of Water: Water Quality Trading Policy Statement (Jan. 13, 2003) ("2003 EPA Trading Policy"), *available at* http://water.epa.gov/type/ watersheds/trading/upload/2008_09_12_watershed_trading_finalpolicy2003.pdf. At bottom, both offset and trading programs contemplate the generation of water quality credits, which can then be used by other sources to meet their obligations.

EPA has long encouraged states to develop water quality trading programs to meet the objectives of the Clean Water Act. *See generally* 2003 EPA Trading Policy. Many states have indeed established trading and offset programs, and several others are currently developing such programs. *See* http://water.epa.gov/type/ watersheds/trading/tradingmap.cfm (map on EPA's website listing state and individual trading programs). Within the Chesapeake Bay watershed in particular, Virginia established a trading program in 2005. *See* Va. Code Ann. § 10.1-603.15:2. Similarly, Pennsylvania has had nutrient and sediment trading policies in place since December 2006, and the State recently codified those policies in the Pennsylvania Code in October 2010. *See* 40 Pa. Bull. 5790 (Oct. 9, 2010), *available at* http://www.pabulletin.com/secure/data/vol40/ 40-41/1927.html. Finally, West Virginia and Maryland are in the process of developing their programs. *See* http://water.epa.gov/type/ watersheds/trading/tradingmap.cfm.

With these various, above-referenced implementation tools at their disposal, states prepare implementation plans that accompany TMDLs. These plans are not part of the TMDL itself and are not subject to EPA review and approval. *See Meiburg*, 296 F.3d at 1030 n.10

(finding that 33 U.S.C. § 1313(d) and 40 C.F.R. § 130.7 unambiguously do not "indicate[] or even impl[y] that TMDLs include implementation plans"); *see also Bravos,* 306 F. Supp. 2d 48 at 57 ("[T]here is no statutory language requiring submission to or approval of a State's implementation plan by the EPA[.]") (emphasis added). Moreover, nothing in the Act authorizes establishment or modification of an implementation plan by EPA, even if a state fails to prepare one.

This is not to say that EPA has no role in TMDL implementation. EPA retains oversight authority over section 402 permitting, including permit limits "required to implement any applicable water quality standard." 33 U.S.C. §1311(b)(1)(C). EPA may even block a state-issued section 402 permit that does not comply with the CWA. *See id.* § 1342(d)(2); *see also Arkansas v. Oklahoma,* 503 U.S. 91, 102-03 (1992). In addition, by EPA rule, TMDLs are incorporated into section 402 permits for point source discharges. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B). Moreover, although states are responsible for managing pollution from nonpoint sources, EPA may influence such management through grant funding. *See, e.g.*, *Pronsolino*, 291 F.3d at 1140; *Meiburg*, 296 F.3d at 1026. Last, where waters within one state are not attaining their water quality standards in part due to nonpoint sources of pollution in other states, EPA has the ability to convene an interstate management conference "to develop an agreement among such States to reduce the level of pollution in such [waters] resulting from nonpoint sources and to improve the water quality of such [waters]." 33 U.S.C. § 1329(g)(1).

B. Chesapeake Bay TMDL

The Bay TMDL sets limits for the 64,000-square mile Chesapeake Bay watershed of 185.9 million pounds of nitrogen, 1.2 million pounds of phosphorus, and 6.45 billion pounds of sediment per year. *See id.* at ES-1. The Bay TMDL contains hundreds upon hundreds of allocations of those total limits, which are assigned to: each water segment within the watershed;

source sectors (*e.g.*, forestry, agricultural, wastewater, etc.) that discharge into those segments; and even individual facilities throughout the watershed. *See id.* at Sec. 9 and Appendices Q and R.

Although the Bay TMDL states on its face that EPA approval is required to revise the detailed pollutant allocations, *see* Bay TMDL at 10-4 to 10-5, it simultaneously recognizes and anticipates that states are free to implement the TMDL using offsets and trading. For example, the "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." Bay TMDL at 10-1; *see also* Am. Compl. ¶¶ 69, 72, 74. The Bay TMDL goes on to state that:

> 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* (USEPA 2003e) and 2007 *Water Quality Trading Toolkit for NPDES Permit Writers* (USEPA 2007d)."

Bay TMDL at 10-3. In acknowledging that existing and future offset and trading programs are likely mechanisms for states to implement the Bay TMDL, EPA cautioned that such offsets and trades should not, among other things, "cause an exceedance of local [water quality standards] or local TMDLs" or "delay or weaken implementation of the Bay TMDL," and "must be consistent with applicable federal and state laws and regulations." *Id.* at 10-1, 10-3.

C. Plaintiffs' Challenge To The Bay TMDL

Plaintiffs' Amended Complaint challenges what Plaintiffs label as "the provisions authorizing pollution trading and offset programs" in the Bay TMDL. Am. Compl. ¶ 1.

According to Plaintiffs, EPA specifically "authoriz[ed]" trading and the offset of new or expanded loadings as part of the Bay TMDL. *See id.* ¶¶ 98-100, 105, 110, 112. Moreover, Plaintiffs allege that "EPA has already reviewed state trading and offset programs for compliance with TMDL Section 10 and Appendix S" and that "EPA controls the states' trading and offset programs through that review." *Id.* ¶¶ 76-77. Plaintiffs claim that trading and offsets violate the Clean Water Act and are arbitrary and capricious for a variety of reasons. *See, e.g.*, *id.* ¶¶ 78-81, 88-112. Plaintiffs further claim that EPA's "authorization" of trading and offsets allows for amendments or changes to the Bay TMDL without notice and comment in violation of the APA. *Id.* ¶¶ 113-123. Accordingly, Plaintiffs seek an order from this Court declaring "that the trading and offset provisions of the TMDL" are unlawful and "null and void." *Id.* ¶ 124.

II. STANDARD OF REVIEW

A. Rule 12(b)(1) Motion To Dismiss For Lack Of Subject Matter Jurisdiction

In considering whether to dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(1), this Court "should begin with the presumption that it does not have subject matter jurisdiction." *Kim v. United States*, 840 F. Supp. 2d 180, 184 (D.D.C. 2012) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Plaintiffs thus bear the burden of establishing that this Court has subject matter jurisdiction over its Amended Complaint. *Kim*, 840 F. Supp. 2d at 184 (citing *Moms Against Mercury v. Food & Drug Admin.*, 483 F.3d 824, 828 (D.C. Cir. 2007). In determining whether the Court has subject matter jurisdiction, "factual allegations in the complaint must be construed in the light most favorable to [P]laintiff[s]," though those allegations "will bear closer scrutiny when the [] [C]ourt is resolving a motion to dismiss for lack of subject matter jurisdiction as opposed to a motion to dismiss for failure to state a claim." *Kim*, 840 F. Supp. 2d at 184 (citations omitted). Moreover, the Court "is not limited to the allegations contained in the complaint." *Fox v. Dist. of Columbia*, 851 F. Supp. 2d 20, 26-27 (D.D.C. 2012)

(internal quotation marks and citation omitted). Indeed, it "may consider such materials outside the pleadings as it deems appropriate to resolve the question of whether it has jurisdiction in the case." *Id.* (internal quotation marks and citations omitted).

B. Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff "must furnish more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *Kim*, 840 F. Supp. 2d at 185 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555(2007)) (internal quotation marks and alterations omitted). While the Court may assume the alleged facts to be true, "a court may not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *United States v. Kellogg Brown & Root*, 800 F. Supp. 2d 143, 152 (D.D.C. 2011). When ruling on a motion to dismiss under Rule 12(b)(6), this Court "may consider facts alleged in the complaint, documents attached to or incorporated in the complaint, matters of which courts may take judicial notice, and documents appended to a motion to dismiss whose authenticity is not disputed, if they are referred to in the complaint and integral to a claim" without converting the motion into one for summary judgment. *Dist. Hosp. Partners, L.P. v. Sebelius*, 794 F. Supp. 2d 162, 170 (D.D.C. 2011).

III. ARGUMENT

This Court lacks jurisdiction over Plaintiffs' claims because the Amended Complaint's allegations are legally insufficient to support Plaintiffs' standing. Even if this Court accepts Plaintiffs' allegations of injury-in-fact as true, Plaintiffs have not alleged facts demonstrating that those injuries are fairly traceable to the Bay TMDL or redressable by this Court. In addition, Plaintiffs' Amended Complaint fails to state any claims upon which relief can be granted because Plaintiffs have not identified a reviewable "final agency action" under the APA. As explained more fully below, this Court should dismiss the Amended Complaint in its entirety.

A. Plaintiffs Lack Standing Because They Cannot Establish That Their Claimed Injuries Are Fairly Traceable To The Challenged Action Or Redressable By A Favorable Court Decision

Article III standing "'is an essential and unchanging' predicate to any exercise of jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (*en banc*) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 113 S. Ct. 1138, 1147 (2013) (internal quotation marks and citations omitted). Where, as in this case, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562.

Of particular relevance here, "[c]ausation and redressability . . . similarly assure that proper parties have brought their dispute to the proper branch of the federal government." *Fla. Audubon Soc'y*, 94 F.3d at 663. For Plaintiffs to prove that their alleged injuries "have a sufficient causal connection to [EPA's] actions, the injur[ies] must be fairly traceable to *the defendant's* allegedly unlawful conduct." *Black v. LaHood*, 882 F. Supp. 2d 98, 104 (D.D.C. 2012) (emphasis in original; internal quotation marks and citation omitted). Accordingly, injuries that "result[] from the independent action of some third party not before the court will not suffice." *Id.* (internal quotation marks and citation omitted). Redressability, on the other hand, focuses on "whether the relief sought, assuming the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y*, 94 F.3d at 663-64. "Causation may thus be said to focus on whether a particular party is appropriate; redresability, on whether the forum is." *Id.* at 664.

As explained below, Plaintiffs have not satisfied either the causation or redressability requirements of Article III standing. They have challenged the wrong party and action in the wrong forum. Thus, this Court should dismiss Plaintiffs' Amended Complaint for lack of jurisdiction.

1. Plaintiffs' Claimed Injuries Are Not Caused By The Challenged Action

Plaintiffs claim that trading and offsets "adversely affect and will continue to adversely affect [their] members' professional, commercial, scientific, and recreational enjoyment of the Chesapeake Bay and connected waterways." Am. Compl. ¶ 87; *see also id.* ¶¶ 7, 9. Among other things, Plaintiffs assert that trading and offsets "will perpetuate non-compliance with the TMDL" and "will cause or contribute to the violation of water quality standards." *E.g.*, ¶¶ 81, 98, 108. Even assuming Plaintiffs' injuries are "concrete, particularized, and actual or imminent," *Clapper*, 133 S. Ct. at 1147, Plaintiffs have not alleged sufficient facts to establish that these injuries are fairly traceable to the Bay TMDL.

Plaintiffs' alleged injuries are not traceable to the Bay TMDL because EPA did not, as Plaintiffs suggest, "authoriz[e]" any state trading or offset programs when it issued the Bay TMDL. *See, e.g.*, Am. Compl. ¶¶ 98-100, 110-12. Quite the contrary, EPA merely acknowledged in the Bay TMDL that trading and offset programs are among the many mechanisms available under the Clean Water Act for the states to implement the TMDL. *See* Bay TMDL at 10-3. Most notably, EPA acknowledged that state trading programs already existed prior to the Bay TMDL's issuance, and it expressed its support of such programs. *See id.* Whatever injuries Plaintiffs may purportedly suffer from yet-to-be-identified trades and offsets are the result of *state* trading and offset programs established by *state* legislation, not by any EPA "authorization."

That some of these state programs pre-date the Bay TMDL significantly undermines Plaintiffs' standing. To illustrate, Virginia established the Chesapeake Bay Watershed Nutrient Credit Exchange Program, which authorized nutrient trading and offsets in Virginia's portion of the Bay, back in 2005. *See* Va. Code Ann. § 10.1-603.15:2; *see also* Va. Admin. Code § 25-820-10 *et seq*. (containing provisions governing offsets and nutrient trading, originally promulgated in 2006). Similarly, Pennsylvania published its final nutrient trading regulation entitled "Use of offsets and tradable credits from pollution reduction activities in the Chesapeake Bay Watershed" on October 9, 2010. *See* 25 Pa. Code § 96.8. Those regulations largely codified a December 2006 Pennsylvania guidance document entitled "Final Trading of Nutrient and Sediment Reduction Credits—Policy and Guidelines" (No. 392-0900-001). *See* 40 Pa. Bull. 5790 (Oct. 9, 2010), *available at* http://www.pabulletin.com/secure/data/vol40/40-41/1927.html. As these state laws pre-date the December 29, 2010 Bay TMDL, any injuries that may conceivably result from trades under those programs cannot fairly be traced to that TMDL.

As in *Black*, the injuries that Plaintiffs claim are caused not by the challenged federal agency action, but by state laws and regulations that are not before the Court. *See* 882 F. Supp. 2d at 104-05 (D.D.C. 2012). In *Black*, residents of the District of Columbia challenged the Federal Highway Administration's 2011 "approval of a proposal to construct a multi-use trail (for pedestrians, cyclists, etc.)" along portions of a road that were permanently closed to vehicle traffic pursuant to a 2008 law passed by the D.C. Council. *See id.* at 100. Those residents attempted to "tie [a variety of] harms to the closing of the road to motorized vehicles." *Id.* at 104. On those facts, the Court had little difficulty concluding that "the D.C. Council[,] [not the federal agency defendants,] [was] ultimately responsible for any injuries arising from the prohibition on motor vehicle traffic." A similar conclusion is warranted here. To the extent

Plaintiffs' injuries constitute injury-in-fact, Plaintiffs nevertheless lack standing because those injuries are a product of state legislation authorizing any trades and offsets, not the Bay TMDL.

Even in those Bay jurisdictions that have not yet established trading and offset programs under their own laws, Plaintiffs' asserted injuries still cannot be traced to the Bay TMDL. If and when such states establish such programs, whatever injuries Plaintiffs *might* suffer as the result of a particular trade or offset would flow directly from state action. Though the Bay TMDL anticipates that states can lawfully rely on offsets and trading during implementation, it does not actually authorize states to establish such programs, nor does it authorize any individual trades or offsets. Any such actions would be taken by states under their respective laws, consistent with the Clean Water Act's emphasis on state implementation authority.

Because Plaintiffs cannot show that their alleged injuries are fairly traceable to the Bay TMDL, their Amended Complaint must be dismissed for lack of standing.

2. Plaintiffs' Claimed Injuries Are Not Redressable By This Court

Plaintiffs also lack standing because their asserted injuries "cannot be redressed by a decision in this case." *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996). As in *NAACP*, this Court cannot order Plaintiffs' requested relief because EPA lacks authority under the Clean Water Act to wholesale prohibit particular methods of TMDL implementation, *i.e.*, trading and offsets. In *NAACP*, the plaintiffs sought a court order forcing the Department of Labor "to condition any future foreign-worker certifications on the sugar cane growers' payment of back pay for past violations." *Id.* The Court held that the plaintiffs lacked standing to raise such a claim, finding that the injury could not be redressed because, among other things, "[t]he Department *has neither statutory nor regulatory authority* to order the growers to provide back pay" and the Court "almost certainly" could not "direct[] the Department to do so." *Id.* (emphasis added). Plaintiffs' asserted injuries in this case are likewise not redressable. Here,

EPA lacks statutory or regulatory authority to prohibit the Bay jurisdictions from relying on existing (or future) trading and offset programs to implement the Bay TMDL.[3] To do so would unlawfully restrict state authority over implementation—authority that Congress intentionally left to the states in the Clean Water Act. *See supra* pp. 5-8. Nor can an order from this Court enjoin any of the Bay jurisdictions—none of whom are before this Court—from either: (i) relying on existing trading or offset programs during Bay TMDL implementation; or (ii) establishing trading or offset programs to aid in TMDL implementation. Simply put, Plaintiffs' requested relief is not available from this Court. *Cf. Wilderness Soc'y v. Norton*, 434 F.3d 584, 593 (D.C. Cir. 2006) (claimed injuries not redressable because the National Park Service "has no final authority . . . to designate an area as wilderness"; "[a]n order from this court cannot make Congress designate an areas as wilderness, so the redress that [plaintiff] seeks cannot be found with the judiciary").

Even if such relief were available, an order invalidating the so-called "trading and offset provisions of the TMDL," while preserving the rest of the TMDL, would not redress Plaintiffs' asserted injuries. Am. Compl. ¶ 124. EPA did not, as Plaintiffs suggest, "authorize" trading and offset programs in the Bay TMDL. *See id.* ¶¶ 98-100, 105, 110, 112**.** Rather, EPA merely acknowledged that such programs are among the many mechanisms through which states can implement the Bay TMDL. In particular, "EPA recognize[d] that a number of Bay jurisdictions already are implementing water quality trading programs" when it issued the Bay TMDL. *See* Bay TMDL at 10-3. Excising any provisions from the Bay TMDL that reference trading and offset programs will not prevent states from continuing to use these programs to implement the

[3] EPA stated that it "supports implementation of the Bay TMDL through [trading] programs, as long as they are established and implemented in a manner consistent with [applicable law]." Bay TMDL at 10-3. EPA's proclamation of support is not surprising given its lack of authority to prohibit state implementation mechanisms—particularly, mechanisms it previously encouraged states to develop as permissible means of meeting the goals of the Clean Water Act. *See* 2003 EPA Trading Policy.

Clean Water Act and thus, cannot redress the injuries that Plaintiffs claim they will suffer as a result of such programs.

In essence, Plaintiffs seek to use a few passages in the Bay TMDL as a vehicle to try to obtain a *federal* court order that simultaneously invalidates existing *state* trading and offset programs and precludes the enactment of future *state* programs. But this Court recently rejected a similar attempt in *Black*, finding that the plaintiffs' alleged injuries were not redressable. *See* 882 F. Supp. 2d at 106-07. As in *Black*, "Plaintiffs [in this case] cannot use this action to circumvent legislation passed by" (or yet to be passed by) states within the Chesapeake Bay watershed. *See id.* at 107. The "only conceivable judicial relief" that would allow Plaintiffs to "escape the [alleged adverse] effects of [state trading and offset programs] would require a [direct] challenge" to the state legislation establishing such programs, not provisions of the Bay TMDL that merely acknowledge and anticipate that such programs fall within the states' TMDL implementation authority. *Id.* (internal quotation marks and citations omitted).

Because Plaintiffs have not shown that their alleged injuries are redressable by this Court, they lack standing to challenge the so-called "trading and offset provisions of the [Bay] TMDL." Am. Compl. ¶ 124.

B. Plaintiffs Have Not Challenged A Final Agency Action

Judicial review under the APA is limited to final agency actions. *See* 5 U.S.C. § 704. "Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). Plaintiffs "have no cause of action under the APA" if they fail to challenge a "final agency action," and their suit must be dismissed for failure to state a claim. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 811 (D.C. Cir. 2006). For an agency action to be final under the

APA, it must "mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined or from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted).

Here, while the actual EPA final actions captured within the Bay TMDL are reviewable (as articulated in Intervenors' APA challenge to the Bay TMDL), Plaintiffs in this case have challenged EPA statements that are without legal consequence. Merely alleging in the Amended Complaint that EPA's discussions of trading and offsets in the Bay TMDL constitute final agency action is insufficient. There must be a factual basis for Plaintiffs' legal conclusion (*see Twombly,* 550 U.S. at 555) and as explained below, there is none. Plaintiffs' grievances are with state laws, state regulations, and individual Clean Water Act permitting decisions, none of which are properly before this Court.

The Bay TMDL authorized neither the state trading or offset programs themselves, nor their use by states during TMDL implementation. *See supra* pp. 9, 13-14, 16. The Bay TMDL did nothing more than: (i) acknowledge that trading and offsets are permissible means for states to implement the Bay TMDL; and (ii) encourage, but not "authorize," states to develop trading and offset programs that are consistent with EPA's expectations. *See* Bay TMDL at 10-1 to 10-3. Neither of these types of statements "impos[es] any obligation . . . , den[ies] any right . . . , or fix[es] any legal relationship," and hence, the so-called "trading and offset provisions of the TMDL" (Am. Compl. ¶ 124) do not constitute reviewable final agency action. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (citation omitted); *see also Indep. Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (challenged EPA letter not a final agency action because it "tread[s] no new ground"

and "left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy").

It is unsurprising that EPA's treatment of trading and offsets in the Bay TMDL does not determine any rights or obligations or have any legal consequences given Congress's decision to leave TMDL implementation to the states. *See supra* pp. 5-8. EPA lacks the authority to dictate how states implement TMDLs. Indeed, states are free to "cho[o]se both *if* and *how* [they] w[ill] implement the [Chesapeake Bay] TMDL." *Pronsolino*, 291 F.3d at 1140. Viewed in its proper context, the Bay TMDL did not "authorize" the use of state trading and offset programs.

Finally, Plaintiffs cannot save their claims by alleging EPA oversight or control over state trading and offset programs. Plaintiffs point to passages in the Bay TMDL where EPA reserves the right to review trades. *See* Am. Compl. ¶ 74-75 (citing Bay TMDL at 10-1 and 10-3). Plaintiffs also baldly allege that EPA review of state programs has already occurred and that EPA control over those programs is ongoing. *See* Am. Compl. ¶¶ 73, 76-77. As noted above, this latter claim is simply wrong. As for the former claim, EPA's general proclamation of its intent to oversee offset programs in the future, including its reservation of the right in the future to "review any individual offset . . . and to comment on, object to, or issue the [NPDES] permit as needed if EPA determines that the offset is not consistent with the Clean Water Act or EPA's regulations" (*see* Bay TMDL at 10-3), is a non-reviewable statement of EPA's intentions that currently has no legal consequences As detailed above, state trading and offset programs are a product of state legislation. *If* a particular Bay jurisdiction authorizes a trade or offset, and *if* EPA reviews that authorization, that is a distinct, challengeable action that a court can review. But until EPA actually attempts to block or approve a particular trade or offset, there is no final

agency action for this Court to consider, whether set forth in the Bay TMDL or elsewhere. Plaintiffs' grievances are misplaced, and they have failed to state an APA claim.

IV. CONCLUSION

For the reasons stated above, Intervenors request that the Court grant their Motion to Dismiss Plaintiffs' Amended Complaint.

April 22, 2013

Respectfully submitted,

/s/ Kirsten L. Nathanson

Richard E. Schwartz, No. 185561
Kirsten L. Nathanson, No. 463992
David Y. Chung, No. 500420
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for American Farm Bureau Federation and National Association of Home Builders

Ellen Steen, Of Counsel
Danielle Quist, Of Counsel
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000W
Washington, DC 20024
(202) 406-3600

Thomas Ward, Of Counsel
National Association of Home Builders
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8200

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed with the Clerk of the Court on the 22nd day of April, 2013 using the CM/ECF system which will send electronic notification to all counsel of record.

/s/ David Y. Chung
David Y. Chung