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

REPLY IN SUPPORT OF MOTION TO DISMISS

The Chesapeake Bay TMDL ("Bay TMDL") sets an overall cap on discharges ("loadings") of nitrogen, phosphorus, and sediment into the Chesapeake Bay and allocates that cap among specific jurisdictions, waterways, and sources within the Bay watershed. *See* 76 Fed. Reg. 549 (Jan. 5, 2011); EPA's Memorandum In Support Of Motion To Dismiss (Docket No. 36) ("EPA Mem.") at 8-9. Seven jurisdictions in the Bay watershed (the "Bay states") are, in turn, responsible for implementing the Bay TMDL. *See* EPA Mem. at 1-2, 4-5. One way of doing so is through the use of offsets and trades – in broad terms, using a reduction in pollutants from one source to compensate for an increased discharge or needed reductions from a different source. There is no dispute that states were using offsets and trades before the Bay TMDL ever existed. *See* EPA Mem. at 9; Plaintiffs' Response to Defendants And Defendant Intervenors' Motions to Dismiss (Docket No. 39) ("Pl. Resp.") at 9.

Plaintiffs do not approve of states having offset or trading programs, and believe that "EPA could (and should) have interpreted [the Clean Water Act] to prohibit" such programs. Pl. Resp. at 29; *see also id.* at 17 ("Without trading, all plants would be required to decrease their

discharges, and water quality would be improved throughout the Bay."). The fact that plaintiffs would prefer a different means of implementing the Bay TMDL does not, however, mean that plaintiffs have stated a federal claim, or that the Court has jurisdiction over plaintiffs' Amended Complaint ("Complaint"). *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the [agency] or in the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.") (italics in original).

What plaintiffs style as the "provisions authorizing pollution trading and offset programs," Complaint ¶ 1, neither authorize nor require states to use offsets or trades; thus, they are not final agency actions, and plaintiffs have failed to state a claim for which relief may be granted. Because the existence or nonexistence of those so-called "provisions" has no effect on states' ability to use offsets or trades to implement the Bay TMDL, any injury plaintiffs have sustained was not caused by statements in the Bay TMDL and cannot be redressed by any order the Court could enter in this matter; thus, plaintiffs have failed to establish that they have standing. Finally, plaintiffs' allegation that offsets and trades harm water quality and otherwise violate the Clean Water Act ("CWA" or "Act") would benefit from further factual development in the context of a challenge to an actual (rather than a hypothetical) trade or offset, and plaintiffs have failed to demonstrate that pursuing such a challenge would cause them any hardship; thus, any claims plaintiffs may have stated are not ripe. For each of these reasons, the Complaint should be dismissed.

ARGUMENT

I. THE BAY TMDL NEITHER AUTHORIZES NOR REQUIRES STATES TO DEVELOP OFFSET OR TRADING PROGRAMS.

Plaintiffs argue at length that EPA took action in the Bay TMDL to authorize, or even require, the Bay states to implement that TMDL through offset and trading programs; indeed, this flawed premise underlies plaintiffs' entire opposition brief. *See generally, e.g.*, Pl. Resp. at 7-11, 20-25, 27-41. Although factual allegations in a complaint are taken as true for purposes of a motion to dismiss, legal conclusions are not. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (court is "not bound to accept as true a legal conclusion couched as a factual allegation."); EPA Mem. at 10-11. Plaintiffs thus must provide something more than the bare assertion that the Bay TMDL authorizes or requires the use of offset and trading programs if they are to survive EPA's motion to dismiss. Plaintiffs have, however, failed to do so, and for that reason among others have failed to identify a reviewable final agency action, have failed to sustain their burden of establishing standing, and have failed to demonstrate that their Complaint is ripe. *See infra* at 9-21. Their Complaint thus must be dismissed.

A. EPA Does Not Control Implementation Of The Bay TMDL.

In order to place plaintiffs' arguments in context, it is useful to review the role that TMDLs play in the Act's overall goal of "restor[ing] and maintain[ing]" water quality. 33 U.S.C. § 1251(a). In brief, states (1) establish water quality standards; (2) identify bodies of water that do not meet those standards; and (3) establish TMDLs for pollutants that cause the identified bodies of water to fall short of water quality standards. *See* 33 U.S.C. § 1313(c),(d); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-1128 (9th Cir. 2002); EPA Mem. at 3-4. A TMDL

identifies the maximum amount of a pollutant that can be added to a given body of water consistent with that body of water attaining applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). This cap is, in turn, subdivided into "wasteload allocations" for point sources, "load allocations" for nonpoint sources and natural background, and a safety margin. 40 C.F.R. § 130.2(g), (h), (i); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216-18 (D.D.C. 2011); EPA Mem. at 4-5.

Unless and until it is implemented, a TMDL "does not . . . prohibit any conduct or require any actions." *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003); *see also Pronsolino* 291 F.3d at 1129 (TMDL is primarily an informational tool that serves as "a link in an implementation chain"); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026-27 (11th Cir. 2002) (TMDLs implemented through permitting and state management plans); *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216 ("TMDLs are not self-implementing instruments, but instead serve as informational tools utilized by EPA and the States to coordinate necessary responses to excessive pollution in order to meet applicable water quality standards."). The language of the notice announcing the establishment of the Bay TMDL reflects this distinction between setting loading caps and implementing those caps:

> *The Bay TMDL consists of pollutant allocations, addressing nitrogen, phosphorous and sediment, for each of the 92 segments in the Bay and tidal tributaries. . . .* In addition, the Bay TMDL assigns individual and (as appropriate) aggregate maximum daily and annual allowable point source and nonpoint source loadings . . . across all jurisdictions within the Bay watershed. . . . *Other provisions of the CWA, as well as the jurisdictions' Watershed Implementation Plans (WIPs), were developed to implement the Bay TMDL. . . . Those WIPs are not part of the Bay TMDL itself but are part of the TMDL record* and help provide reasonable assurance that the necessary nitrogen, phosphorous and sediment reductions identified in the TMDL will be achieved. The WIPs identify specific nitrogen, phosphorous and sediment reduction targets by geographic location and sector to achieve allowable loadings, as well as a description and schedule of actions that the jurisdictions will take to achieve these reductions.

76 Fed. Reg. at 549-50 (emphasis added).[1]

For point sources (i.e., discrete sources of pollutants), TMDLs are implemented through the National Pollutant Discharge Elimination System ("NPDES") permitting program. Among other things, an NPDES permit must be "consistent with the assumptions and requirements of any available wasteload allocations" in a TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B); EPA Mem. at 5-6. For nonpoint sources (e.g., agricultural runoff), TMDLs are implemented through a state's exercise of its own regulatory authority. EPA Mem. at 7. EPA must approve a state's water quality standards, list of impaired waters, and TMDLs, and if a state's efforts in these three areas fall short, EPA has an explicit statutory obligation to step in and promulgate the relevant standards or establish appropriate lists or TMDLs. *See* EPA Mem. at 4. EPA has no similar role in TMDL *implementation* – there is no statutory requirement that EPA approve a state's TMDL implementation plan, or establish one itself if a state's plan is inadequate. EPA may, however, object to a state-issued NPDES permit that is not "consistent with" a TMDL or that otherwise fails to meet the requirements of the Act (*see* EPA Mem. at 6), and it may use various authorities to encourage states to adopt nonpoint source controls to implement TMDL load allocations (*see* EPA Mem. at 7).

With this background in mind, it is apparent that plaintiffs' mischaracterize EPA's role in implementation of the Bay TMDL. As a threshold matter, plaintiffs' claims on this point are backed with a number of factual assertions concerning EPA review of and commentary on

[1] Plaintiffs argue that *Pronsolino* and *Meiburg* are irrelevant because they do not discuss finality. Pl. Resp. at 33. EPA cited these cases solely for the principle that a TMDL is not self-implementing. *See* EPA Mem. at 22-23. Plaintiffs' only response to this point is to cite a law review article asserting that the Bay TMDL, unlike other TMDLs, includes an implementation plan. Pl. Resp. at 33. The author's opinion that any implementation plan is part of the Bay TMDL itself is belied by the quoted Federal Register language.

various state programs. S*ee, e.g.*, Pl. Resp. at 9-11, 22-24. These assertions do not appear in plaintiffs' Complaint or in any of its accompanying documents. "It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000) (citing *Morgan Distrib. Co.. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989)); *see also Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1107 (7th Cir. 1984) ("questionable" for district court to rely on plaintiffs' briefs "to embellish the conclusory allegations of the complaint"); *Foote v. Chu*, No. 11-1351, 2013 WL 796065, at *5 (D.D.C. March 5, 2013) ("The Plaintiff cannot simply amend the allegations in his Complaint by including new assertions and legal theories of liability in his Opposition") (citation omitted).[2] That rule should have extra force here, where plaintiffs have already amended their Complaint once in response to a substantially similar EPA Motion to Dismiss. *See* EPA's Motion to Dismiss and Memorandum in Support (Docket No. 14). Even if the Court considers plaintiffs' additional assertions as fair elaborations on the allegations in their Complaint and takes them as true for purposes of EPA's Motion to Dismiss, however, those allegations are insufficient to establish that EPA controls state implementation of the Bay TMDL.

Plaintiffs' claim that EPA has "final authority," Pl. Resp. at 8, over state implementation generally, or trading and offset programs in particular, is unsupported by any citation to the

[2] Where materials outside the complaint (and any documents cited or relied on therein) "are presented to and not excluded by the court" on a motion under Rule 12(b)(6), "the motion must be treated as one for summary judgment." Fed. R. Civ. P. 12(d). A motion for summary judgment must be granted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). EPA does not dispute that it has made the comments identified by the plaintiffs; however, as demonstrated in the text, those comments do not have the legal significance plaintiffs attach to them. To the extent that the Court considers EPA's 12(b)(6) motion as one for summary judgment, EPA is therefore entitled to judgment as a matter of law.

statute or its implementing regulations. Section 117(g)(1) of the Act states that EPA "shall ensure that management plans are developed and implementation is begun" by the Bay states in order to, inter alia, achieve and maintain nutrient goals. 33 U.S.C. § 1267(g)(1)(A). EPA thus reviews and comments on Watershed Implementation Plans ("WIPs") developed by the Bay states as well as other state implementation efforts. EPA does not, however, approve or disapprove such plans, nor can it insist on any particular plan content. *See Amigos Bravos v. Green*, 306 F. Supp. 2d 48, 56 (D.D.C. 2004) (EPA approval of TMDL does not translate into approval of state implementation plan); *Meiburg*, 296 F.3d at 1030 (11th Cir. 2002) (distinguishing between TMDL and implementation plan); *see also* EPA Mem. Ex. B at 10-3 (noting that EPA has "oversight responsibilities" to, inter alia, "review[] and *mak[e] recommendations*" regarding state water quality management plans) (emphasis added). Indeed, plaintiffs' description of EPA's purported approval authority as "de facto," Pl. Resp. at 9, is an implicit acknowledgment that it is *not* de jure. Plaintiffs' related argument that EPA has "provid[ed] [states] with only one feasible method" to remain within the Bay TMDL's loading caps, Pl. Resp. at 21-22, is similarly misplaced, as plaintiffs have identified no law that makes EPA responsible for providing states with *any* method of implementing the Bay TMDL.

B. The Bay TMDL Neither Provides States With Any Additional Authority To Adopt Offset Or Trading Programs Nor Requires That States Do So.

Plaintiffs insist that, were it not for the authorization purportedly provided by the Bay TMDL, state offset and trading programs would be "illegal." Pl. Resp. at 22; *see also id.* at 25, 43-44. Plaintiffs have, however, failed to identify any statutory or regulatory support for the legal conclusions that (1) states lacked the authority to adopt such programs before the Bay TMDL existed, or (2) the Bay TMDL provides the (supposedly) missing authority. It is undisputed that states have long used offsets and trades to implement TMDLs. *See* EPA Mem. at

9, 20, 23; Pl. Resp. at 9-10. Indeed, EPA has made guidance available on trading programs for a decade. *See* EPA Mem. at 9; EPA Mem. Ex. B at 10-3. Particularly when viewed in light of this undisputed history, plaintiffs' assertion that the Bay TMDL authorizes states to create offset or trading programs is entirely without merit.

Plaintiffs concede that the Bay TMDL does not explicitly require states to adopt trading programs, Pl. Resp. at 30 and n.5, asserting instead that offset and trading programs are "*effectively* required" to implement the TMDL. Pl. Resp. at 8 (emphasis added); *see also id*. at 21-24. The TMDL is not a regulation and, thus, imposes no "requirements." *See Pronsolino*, 291 F.3d at 1140 ("States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory requirement otherwise requiring implementation of § 303 plans or providing for their enforcement."). As EPA has acknowledged, as a practical matter, unless a state wishes to forego any further growth or development, meeting its TMDL allocations will necessitate offsetting new or additional pollutant loadings with reductions from existing sources. *See* EPA Mem. at 8-9, 20-21, 23-24. EPA's "expectation" that states will use offset and trading programs to implement the Bay TMDL, *see* Pl. Resp. at 23, reflects this practical reality. That does not, however, mean that there is a *legal requirement* that states adopt such programs.[3] States may, for example, offset new or additional discharges on a case by case basis, rather than through a formal program. And certainly if a state can come up with an alternative means of ensuring that additional pollutant loadings will not exceed the cap set in the TMDL, there is no legal barrier to its doing so. The

[3] Nor is it significant that EPA has identified common elements it expects states will incorporate in such programs. *See* Pl. Resp. at 8. EPA explained in its opening memorandum that these elements are not regulatory requirements, EPA Mem. at 23 n.10, and plaintiffs offer no response to this point.

mere fact that this is unlikely to happen as a matter of *fact* does not mean that states are required to employ offset or trading programs as a matter of *law*.

In a variation on this theme, plaintiffs assert that EPA has "coerc[ed]" states into adopting offset or trading programs, pointing again to facts that are not alleged in the Complaint. Pl. Resp. at 22; *see generally id.* at 22-25. These additional facts are of no help to plaintiffs in any event. Even assuming for purposes of the Motion to Dismiss that some states have adopted or expanded offset or trading programs following the establishment of the Bay TMDL, that is unsurprising – the TMDL establishes new loading caps, so states have naturally taken additional steps to ensure that pollutant loadings remain within those caps.

The theory that the Bay TMDL authorizes or compels states to adopt offset and trading programs is, in sum, nothing more than a legal conclusion that plaintiffs have failed to support. Because plaintiffs have failed to provide any support for this theory – which, in turn, underlies all of plaintiffs' arguments concerning finality, standing, and ripeness – EPA's Motion to Dismiss should be granted, and the Complaint should be dismissed.

II. STATEMENTS CONCERNING IMPLEMENTATION OF THE BAY TMDL ARE NOT FINAL AGENCY ACTION.

Plaintiffs do not dispute that in order to state a claim under the Administrative Procedure Act, they must identify a final agency action. *See* Pl. Resp. at 26; EPA Mem. at 22. Nor is there any dispute that EPA's establishment of the Bay TMDL is a final agency action. *See* Pl. Resp. at 26, 30; EPA Mem. at 3. The fact that EPA took final action to establish the Bay TMDL does not, however, mean that every associated statement is equally "final" within the meaning of the APA. *See Natural Res. Def. Council v. EPA*, 559 F.3d 561, 564-65 (D.C. Cir. 2009) (statements in preamble to final rule were not final agency action); *see also Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 59-61 (D.C. Cir. 2002) (declining to review policy statements

contained in final FERC order). If plaintiffs wish to challenge what they characterize as "provisions authorizing" offset and trading programs, Complaint ¶ 1, they must establish that those supposed "provisions" are final agency actions. Plaintiffs have failed to do so; thus, they have failed to state a claim for which relief may be granted, and their Complaint must be dismissed.

As discussed in the preceding section, the Bay TMDL creates neither the authority nor the obligation for the Bay states to adopt offset or trading programs. The fact that more such programs may be adopted as a practical result of the loading caps in the Bay TMDL is irrelevant – for purposes of finality, what is required is a change in *legal* rights or obligations. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (final action is one "by which rights or obligations have been determined, or from which legal consequences will flow") (citations and internal quotations omitted); *see also Nat'l Ass'n of Homebuilders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for purposes of judicial review"); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) ("Practical consequences . . . are insufficient to bring an agency's conduct under our purview") (citation and internal quotations omitted).

Natural Resources Defense Council v. EPA, 643 F.3d 311 (D.C. Cir. 2011) ("*NRDC*"), does not support plaintiffs' argument that EPA's statements concerning implementation of the Bay TMDL alter legal rights or obligations. *See* Pl. Resp. at 28-31. *NRDC* arose under the Clean Air Act, which requires EPA to review and approve state implementation plans ("SIPs") developed to ensure attainment of air quality standards. *See* 42 U.S.C. § 7410(a), (k). Among other things, the Clean Air Act expressly requires that SIP revisions under a particular subsection impose fees on certain sources in certain areas. *NRDC*, 643 F.3d at 314; 42 U.S.C. § 7511d(a)

(implementation plans required under identified sections "shall provide" for payment of fees by certain sources). Against a complicated factual and regulatory background, EPA issued guidance providing that states could adopt "alternative programs" in lieu of this requirement, as long as those alternatives were no less stringent than the statute. *NRDC*, 643 F.3d at 316-17. The D.C. Circuit held that this guidance changed the law by authorizing approval of SIP revisions containing alternative programs and by eliminating the discretion to disapprove a SIP revision "solely for failing to comply with" the statutory requirement that the revision include certain fee provisions. *Id.* at 405-06.

This case is entirely dissimilar. Unlike the Clean Air Act, the Clean Water Act on its face (1) does not require states to adopt plans to implement a TMDL; (2) does not specify terms to be included in any such plans a state may adopt; and (3) does not require that EPA review and approve state plans. To the extent that a TMDL is implemented through NPDES permits, EPA does have the authority to object to individual proposed permits that do not conform to the requirements of the Act. Plaintiffs do not even allege, however, that statements concerning the likely implementation of the Bay TMDL through offset or trading programs somehow limit EPA's authority to object to a proposed permit if that permit fails to ensure compliance with applicable water quality standards and TMDLs.[4] Nor can plaintiffs escape the fact that EPA has expressly reaffirmed that all applicable water quality standards *must* be complied with, and that

[4] EPA does not "approve" state-issued permits, Pl. Resp. at 31 n.7; rather, it may *object* to proposed permits that do not conform to the Act. 33 U.S.C. § 1342(d). The fact that EPA has declined to object to one particular permit that contemplates the use of offsets, in addition to being a supplement to the allegations of the complaint, is irrelevant. EPA never claimed that the use of offsets or trading was a "theoretical possibility," Pl. Resp. at 31 n.7 – only that any resulting *injury* remains wholly speculative. *See* EPA Mem. at 16-19, 27; *infra* at 15-16. Plaintiffs are, moreover, free to seek judicial review of this or any other permit that they believe does not conform to the requirements of the Act, regardless of whether EPA first objected or not. *See* EPA Mem. at 6-7, 27.

any use of offsets "may not cause an exceedance" of those standards. *See* EPA Mem. Ex. B at 10-1.

Plaintiffs also rely on cases analyzing whether agency actions were nonbinding policy statements or binding legislative rules. Pl. Resp. at 30-32. These cases are not directly on point, because as the D.C. Circuit has recognized an agency action may be final without being binding and binding without being final. *Appalachian Power Co. v. EPA*, 208 F. 3d 1015, 1022 and n.15 (D.C. Cir. 2000). To the extent these cases examine the question that is relevant for purposes of determining whether an agency action is "final" within the meaning of the Administrative Procedure Act – i.e., whether that action determines legal rights or obligations – they do not support the proposition that the "provisions" plaintiffs seek to challenge in this case are final agency actions. In *Appalachian Power*, the D.C. Circuit held that certain EPA guidance was a final agency action based on the court's view that the guidance "reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023. In this case, by contrast, EPA has said only that it "expects" that new nutrient loadings will be offset with reductions from existing sources under state-developed programs. As discussed above, this statement reflects reality rather than setting forth a legal command. *See* EPA Mem., Ex. B at 10-1; *supra* at 8. EPA did stress that any offsets "may not cause an exceedance of local [water quality standards or TMDLs]," *see id*., but this simply confirms pre-existing statutory and regulatory requirements.

Center for Auto Safety v. National Highway Traffic Safety Administration, 452 F.3d 798 (D. C. Cir. 2006), *see* Pl. Resp. at 28, 31, actually supports EPA. In *Center for Auto Safety*, the National Highway Traffic Safety Administration (NHTSA) had issued guidance concerning statutory provisions that allow automakers to initiate voluntary recalls under certain

circumstances. *Ctr. for Auto Safety*, 452 F.3d at 799. Specifically, the agency provided guidelines for conducting regional rather than national recalls. *Id.* at 799-800. Petitioners argued that these guidelines were a "*de facto* legislative rule" that violated the applicable statute. *Id.* at 804. The D.C. Circuit held, however, that the district court had properly dismissed the complaint based on plaintiffs' failure to identify a final agency action. As the court explained:

> The guidelines are nothing more than general policy statements with no legal force. They do not determine any rights or obligations, nor do they have any legal consequences. . . . *There is no doubt that the guidelines reflect NHTSA's views on the legality of regional recalls. But this does not change the character of the guidelines from a policy statement to a binding rule.* Indeed, the case law is clear that we lack authority to review claims under the APA where an agency merely expresses its view of what the law requires of a party. . . .

Id. at 808 (emphasis added, citation and internal quotation omitted); *see also id*. at 809 (noting insignificance of fact that agency had encouraged automakers to comply with guidelines), 811 (fact that guidelines had been followed by automakers did not demonstrate that guidelines had legal consequences). Similarly, the fact that the Bay TMDL contains statements that reflect EPA's views and expectations concerning the potential use of offsets and trading by the Bay states does not convert EPA's statements concerning TMDL implementation into "binding rules" or otherwise alter legal rights and obligations.[5]

Finally, to the extent that plaintiffs are now arguing that they are challenging the Bay TMDL itself, *see, e.g.*, Pl. Resp. at 32, 34, that argument is inconsistent with plaintiffs' Complaint and therefore should be disregarded. *See supra* at 6. The Complaint – which, again, has already been amended once – plainly "challenge[s] *the provisions authorizing pollution*

[5] Plaintiffs also point to the fact that EPA published a notice in the Federal Register announcing the establishment of the Bay TMDL. Pl. Resp. at 27, 31-32, 34. As quoted *supra* at 4, this notice clearly distinguishes between the TMDL and programs developed to implement the TMDL.

trading and offset programs" in the Bay TMDL. Complaint ¶ 1 (emphasis added); *see also, e.g., id.* ¶ 5 (Bay TMDL "authorizes water pollution trading and offset programs that exceed EPA's authority" and are otherwise arbitrary or capricious); ¶¶ 99-100 (alleging that "EPA's authorization of trading" violates law); ¶¶ 110, 112 (making similar allegations concerning EPA's alleged authorization of offsets). Indeed, plaintiffs expressly alleged that "*EPA's authorization of trading and offsets*, included as part of the TMDL, *is final agency action*." *Id.* ¶ 85 (emphasis added). Plaintiffs cannot now convert their challenge to the so-called "provisions authorizing pollution trading and offset programs" into a challenge to the entire Bay TMDL. Because plaintiffs have failed to demonstrate that the supposed "provisions" challenged in their Complaint are final agency actions, the Complaint fails to state a claim under the APA and must be dismissed.

III. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY HAVE STANDING.

EPA's opening memorandum demonstrates that plaintiffs failed to allege facts sufficient to establish that any of their members have suffered a "concrete and particularized" injury. *See* EPA Mem. at 14-16. In response, plaintiffs have submitted declarations that are minimally sufficient to demonstrate particularized injury to at least one member of the plaintiff organizations, at least for purposes of surviving a motion to dismiss. *See, e.g.,* Declaration of Paul Stern (Docket No. 39-1) ("Stern Decl.") ¶¶ 3, 6-9, 14.[6] Plaintiffs have, however, still failed

[6] EPA does not concede that a plaintiff has established a particularized injury whenever an agency has allegedly delayed pollution remediation measures that might benefit that plaintiff, *see* Pl. Resp. at 17-18; however, because plaintiffs have otherwise alleged particularized injury to at least one member of their organizations, EPA will not further address this point. *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (where standing can be shown for at least one plaintiff, court need not consider standing of other plaintiffs to raise a claim). Should any of plaintiffs' claims survive EPA's Motion to Dismiss, however, EPA reserves the right to challenge plaintiffs' standing at any later stage of the case. *See Lujan v.*

(footnote con't)

to allege facts sufficient to demonstrate (1) that any particularized injury their members may suffer is "actual or imminent;" and (2) that any such injury was caused by the offset and trading language in the Bay TMDL, or is redressable in this action. Plaintiffs have thus failed to satisfy their burden of demonstrating standing.

A. Even Considering Plaintiffs' Additional Allegations In Response To EPA's Motion To Dismiss, Plaintiffs Have Not Alleged Facts Sufficient To Establish An Imminent Injury.

To satisfy Article III, an injury must not only be particularized – it must be "actual or imminent," that is, "*certainly* impending." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Plaintiffs supplement the allegations of their Complaint by pointing to a variety of environmental harms that they claim will result from offsets and trades (and will, in turn, allegedly impact plaintiffs' members) – but the very materials they submit demonstrate that these supposed harms remain wholly speculative. Mr. Stern's declaration, for example, points to an operating permit that *has yet to go into effect*, precisely because the permittee has yet to identify appropriate offsets. Pl. Resp. at 15, 18-19; Stern Decl. ¶ 9. More egregiously, plaintiffs identify the Flowing Springs Wastewater Treatment Plant as a purported source of injury. *See* Pl. Resp. at 19; Stern Decl. ¶ 15; Declaration of Brent Walls (Docket No. 39-3) ¶ 21 and Exh. C.[7] In August 2011, the West

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Defenders of Wildlife, 504 U.S. 555, 561 (1992) (although general factual allegations of injury suffice at pleading stage, plaintiffs can no longer rest on such allegations at summary judgment stage).

[7] The letter attached to Mr. Walls' declaration is unsigned, undated, and stamped "draft," and there is nothing in Mr. Walls' testimony to suggest that he can authenticate the document. The letter thus would not be competent evidence even if it had not been rendered moot by the subsequent abandonment of the project. Later, plaintiffs refer to a purported permit application by NRG Energy (Pl. Resp. at 15-16) – a reference that is unsupported by *any* evidence, competent or otherwise. *See also* Pl. Rsp. at 16-17 (asserting with no citation that trading programs are "unmonitored and nontransparent").

Virginia Public Service Commission rescinded the certificate of convenience and necessity for the Flowing Springs project – and a plant that will not be constructed by definition cannot cause plaintiffs' members any injury. *See* Ex. A at 1, 22. Plaintiffs' speculative and unsupported claims regarding the purported creation of "hot spots" (which, again, appear nowhere in plaintiffs' complaint), *see* Pl. Resp. at 14-15, are untethered to any specific source, location, or discharge – whether imminent or otherwise – and thus cannot establish standing. Nor do plaintiffs' members generalized fears of the potential impact of offsets or trades, *see* Pl. Resp. at 15-16, suffice to establish that injury is imminent. *See* EPA Mem. at 17 n.4.

To be clear, EPA does not dispute that offsets and trades are already in use in the Bay states. Plaintiffs' burden is not merely to show that the conduct they complain of is occurring, however; rather, it is to show that that conduct causes a particularized injury that is "certainly impending." Because plaintiffs have failed to do so, they have failed to establish their standing, and their Complaint must be dismissed.

B. Plaintiffs Have Not Demonstrated That Any Injuries Were Caused By Statements In The Bay TMDL, Or That Any Such Injuries Can Be Redressed In This Action.

A plaintiff lacks standing where that plaintiff's injuries were caused not by agency action but by the independent choices of third parties. *See* EPA Mem. at 19. As plaintiffs note, *see* Pl. Resp. at 20-21, the causation requirement is satisfied "when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998); *see generally id*. at 440-43 (causation established where

agency regulations authorized exhibitions that were allegedly illegal under governing statute).[8] Plaintiffs have not satisfied either element of this standard: the Bay TMDL does not authorize states to use offsets or trades, and plaintiffs have not supported their bare legal conclusion that it is otherwise illegal for states to do so. *See supra* at 7-9. Plaintiffs also rely on *NRDC*, *see* Pl. Resp. at 21, in which the D.C. Circuit found that the agency action at issue "caused several nonattainment areas . . . to *abandon plans* to submit" implementation plans under the Clean Air Act. *NRDC*, 643 F.3d at 318 (emphasis added). Plaintiffs have, however, cited no case in which an agency was held to have caused third-party conduct that had been ongoing for many years, as have state trading and offset programs.

For similar reasons, plaintiffs have failed to demonstrate that any injuries they have suffered would be redressable by any order the Court could enter in this matter. What plaintiffs appear to seek is an order that would excise EPA's statements concerning offset and trading programs from the record, while leaving the loading caps in the Bay TMDL intact and functional. Even assuming that the Court could craft such an order (which EPA does not concede), *that order could not stop the Bay states from continuing to use existing offset and trading programs, or from adopting and implementing new ones*. The Bay states are not before the Court, and no order entered in this matter can bind them. *See Defenders of Wildlife*, 504 U.S. at 569 (injuries were not redressable where agencies funding projects to which plaintiffs objected were not parties to suit; "there is no reason [those agencies] should be obliged to honor an incidental legal determination the suit produced"). Nor could the Court prohibit the Bay states

[8] This was also the pattern in the other cases plaintiffs cite. *See Am. Road & Transp. Builders v. EPA*, 588 F.3d 1109, 1111 (D.C. Cir. 2009) (causation established where EPA had approved state regulatory regimes that allegedly injured plaintiffs); *America's Cmty Bankers v. FDIC*, 200 F.3d 822, 827-28 (D.C. Cir. 2000) (causation established where FDIC provided approval that was prerequisite for collecting assessment).

from implementing the loading caps in the Bay TMDL (as well as any applicable provisions of the Act) by using offsets and trades, or alter the fact that, as a practical matter, unless a state intends to preclude all further growth and development, it may need to offset new pollutant loadings with reductions from existing sources.[9]

Because plaintiffs have failed to allege facts sufficient to demonstrate either that EPA's statements in the Bay TMDL caused the injuries they identify or that those injuries are redressable in this action, they have failed to meet their burden of demonstrating standing and their Complaint must be dismissed.

IV. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEIR COMPLAINT IS RIPE.

Plaintiffs argue that the issues presented by their challenge to the "trading provisions" of the Bay TMDL are "purely legal" and therefore fit for judicial review because, in plaintiffs' view, the relevant issue is "whether EPA has properly construed the CWA to allow trading and offsets." Pl. Resp. at 35; *see generally id.* at 35-38. This is merely another variation on the argument rebutted above, i.e., that EPA's statements in the Bay TMDL authorize or compel the Bay states to use offsets or trades to implement that TMDL. *See supra* at 3-9. Nor is plaintiffs' claim ripe merely because states are already using offsets and trades. *See* Pl. Resp. at 40-41. The ripeness problem is not that states are not yet using offsets or trading; rather, it is that the propriety of doing so cannot be evaluated in the abstract, without considering the facts of a specific case.

[9] Plaintiffs also assert that a holding that trading or offsets are impermissible "will make existing trades and offsets null and void." Pl. Resp. at 25. Plaintiffs cite no legal support for the proposition that an order in this case could invalidate transactions or permits involving parties not before the Court.

The fact that plaintiffs "take the position that pollutant trading is inherently antithetical to provisions of the CWA," Pl. Resp. at 37, is of no moment. What is relevant for purposes of a ripeness inquiry is not plaintiffs' "position," but whether the questions that plaintiffs raise can be addressed in the abstract. Here, they cannot. Plaintiffs assert that trading "unavoidably" allows point sources "to evade compliance" with the requirements of the Act, *id.* – but never explain how the Court is supposed to analyze this question without being able to consider what a particular NPDES permit says, what requirements it imposes, whether those specific requirements are or are not consistent with the Act, or (in an enforcement action or citizen suit) whether the permit holder has complied with those terms. Nor would this action provide an opportunity for this sort of case-specific review. If any aspect of plaintiffs' claim survives this motion to dismiss, that claim will be reviewed on the administrative record for the Bay TMDL. *See Anacostia Riverkeeper*, 798 F. Supp. 2d at 222 (approval of TMDL subject to challenge under APA); 5 U.S.C. § 706 (in APA case court "shall review the whole record or those parts of it cited by a party"). EPA has already certified that record in another district court matter, and to the best of EPA's knowledge the record does not contain any NPDES permits. The "factual developments" that plaintiffs point to, Pl. Resp. at 39-40, thus would not be before the Court on the merits.

What these "developments" *do* illustrate is that plaintiffs already have other, more appropriate fora in which to pursue their objections – for example, by seeking review of any final NPDES permit that they believe is contrary to the terms of the Act. *See* EPA Mem. at 6-7. This is not a mere "future alternative," Pl. Resp. at 45; if plaintiffs believe that these existing permits violate the Act they are free to seek judicial review *now*, without waiting for any further action.

For this reason, plaintiffs have not demonstrated that dismissal of their complaint would cause them any hardship as it is defined for purposes of ripeness analysis.[10]

Plaintiffs also claim that they will be required to "monitor hundreds, if not thousands" of permits issued by state agencies in order to bring future challenges. Pl. Resp. at 44. This is simply a variation on an argument that has been soundly rejected by the Supreme Court – i.e., that a plaintiff suffers "hardship" sufficient to render a claim ripe merely because it would prefer to attack an agency program as a whole rather than pursuing challenges to individual agency action. *See National Wildlife Fed'n*, 497 U.S. at 894 (case by case litigation "is the traditional, and remains the normal, mode of operation of the courts"); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1206 (D.C. Cir. 1998) ("To be sure, it is easier and cheaper to mount a single challenge now rather than defend a series of enforcement actions. But 'this kind of litigation cost saving' does not 'justify review in a case that would otherwise be unripe.'") (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735)); *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 648 F. Supp. 2d 140, 147 (D.D.C. 2009) (burden and expense of litigating further at agency level was not enough to satisfy hardship element). Nor is there any reason to believe that the burden of pursuing separate challenges would be as extreme as plaintiffs claim. Even if plaintiffs cannot mount a blanket challenge to the use of trades and offsets, a ruling in one case may have precedential effect in future cases, and may otherwise influence state action. There thus is no reason to believe that plaintiffs will need to challenge individual permits *ad infinitum* in order to press their claims.

[10] The fact that plaintiffs have failed to demonstrate that any injury is "certainly impending," *see supra* at 15-16, is another reason for concluding that plaintiffs' claim is not ripe. *See National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (ripeness shares constitutional requirement of standing that injury in fact be certainly impending).

The fact that plaintiffs' members have allegedly adjusted their conduct "as a practical matter," Pl. Resp. at 44, does not establish hardship. The law is clear: for purposes of ripeness, the "hardship" referred to is hardship "of a strictly legal kind." *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 809 (2003) (citation omitted); EPA Mem. at 26-27. Typically, this occurs when an agency action requires a *regulated* party to alter its conduct in some fashion. *See id.* Plaintiffs have cited no case in which an *unregulated* party's wholly voluntary adjustment of its own conduct was held to constitute hardship sufficient to render a claim ripe.

V. PLAINTIFFS' ENTIRE COMPLAINT MUST BE DISMISSED.

EPA moved to dismiss plaintiffs' Amended Complaint in its entirety. *See* EPA Mem. at 1, 3, 28. Plaintiffs nonetheless argue that EPA's motion somehow does not cover what plaintiffs now denominate as their "reasonable assurances claims," and that these purported claims should therefore survive even if the Court grants the Motion to Dismiss. Pl. Resp. at 2 n.2, 3. This argument is not consistent with any fair reading of the Complaint.

As discussed *supra* at 3-4, a TMDL both calculates the maximum amount of pollutant loadings a waterbody can receive and still meet water quality standards and allocates those loadings between point and nonpoint sources. Although the term "reasonable assurances" does not appear in the Act or in EPA's implementing regulations, EPA interprets the statute and regulations to allow it to conduct a "reasonable assurance" analysis to ensure that the TMDL equation – wasteload allocations, plus load allocations, plus a margin of safety – yields a sum that is within the water quality standards-based cap. *See* 33 U.S.C. § 1313 (d)(1)(C) (TMDL "shall be established at a level necessary to implement the applicable water quality standards. . . .).

Plaintiffs allege that "[a]llowing point sources of pollution to engage in trading undermines EPA's ability to receive reasonable assurances that point sources will be able to meet the waste load allocations contained in the TMDL." Complaint ¶ 95. This cannot fairly be read as a separate claim, nor is it set forth in a separate count of the Complaint. It is, instead, merely one in a series of allegations concerning the purported impact of trading on water quality standards in the Chesapeake Bay. Complaint ¶¶ 95-98. For all of the reasons discussed above, plaintiffs have failed to identify a final agency action that "allow[s]" trading to occur, or to demonstrate that the Court has jurisdiction over their claims attacking trading programs. What plaintiffs now call their "reasonable assurances claim" is therefore subject to dismissal along with the rest of the Complaint.[11]

CONCLUSION

For the foregoing reasons and the reasons in EPA's opening Memorandum, plaintiffs' Complaint must be dismissed.

June 28, 2013

Respectfully submitted,

Robert G. Dreher
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United States Department of Justice
Environment and Natural Resources
Division

/s/ Angeline Purdy
By: _____
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[11] Plaintiffs may have intended to suggest that the Bay TMDL itself is arbitrary or capricious because EPA allegedly could not receive "reasonable assurances" that the Bay states can meet their load allocations. As discussed *supra* at 13-14, however, plaintiffs' Complaint cannot be read as a challenge to the Bay TMDL as a whole.

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Food & Water Watch, et al. v. EPA

No. 12-1639

Reply in Support of Motion to Dismiss

EXHIBIT A

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At as session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 12th day of August 2011.

CASE NO. 09-0347-PSD-PC-CN (Reopened)
JEFFERSON COUNTY PUBLIC SERVICE DISTRICT,
a public utility, Jefferson County.
Application for a certificate of convenience and necessity to construct a wastewater treatment plant, approval of financing and related agreements and modification to the accounting treatment and usage of the District's Capital Improvement Fee and Capacity Assurance Fee.

COMMISSION ORDER

The Commission grants the exceptions to a Recommended Decision that approved revised financing and increased project-related rates in this certificate proceeding. The Commission declines to approve the reopened certificate project because the circumstances supporting the convenience and necessity of the project have changed.

Background

On March 13, 2009, the District filed its original certificate application to construct a one million gallon per day wastewater treatment plant known as the Flowing Springs plant (the Flowing Springs project or project), and for approval of project financing and related agreements, and for modification to the accounting treatment and usage of the District's Capital Improvement Fee (CIF) and Capacity Assurance Fee (CAF). The filing anticipated receipt of funding under the American Recovery and Reinvestment Act of 2009 (ARRA) and the use of CIF and CAF funds for future debt service payments. Consequently, the District did not request a project-related rate increase. March 13, 2009 Application p. 5. At the same time, the District sought modification of an earlier Commission Order in consolidated Case Nos. 08-0322-PSD-S-PC, 06-0413-PSD-T-PC and 07-0294-PSD-PC, Commission Order issued January 14, 2009 (the 2009 CIF Order), to allow the District the necessary flexibility in its use of CIF and CAF funds. The District stated that if the Commission declined to modify the 2009 CIF Order, it would need a project-related rate increase. Therefore, the District provided notice to customers that included increased rates.

The certificate application asserted that the Flowing Springs sewage treatment plant was needed because projected growth in the Flowing Springs drainage basin was expected to place pressure upon remaining available capacity at the Charles Town Wastewater Treatment Plant (CTWWTP). With the exception of the District's Deerfield subdivision sewer system serving forty-eight customers, all of the wastewater from the District's 1,851 customers is transmitted to the CTWWTP. The Flowing Springs project would result in the diversion of at least 1,434 equivalent dwelling units (EDUs) of wastewater flow to the new Flowing Springs plant, while the District would continue to deliver at least 1,187 EDUs of District wastewater to the CTWWTP. The application also stated that Flowing Springs would be in compliance with Chesapeake Bay Compact nutrient requirements and that Charles Town was relying on diversion of District flows to Flowing Springs because the Charles Town strategy for attaining compliance with nutrient load requirements of its NPDES permit included future operation of the CTWWTP at well below its full rated capacity. March 13, 2009 Application at 2-3, 6.

The District also relied on projected population and economic growth to support the need for the Flowing Springs project. The pre-filed testimony of Joseph A. Hankins, District Chairman, relied on growth projections contained in a March 18, 2004 Jefferson County Commission Comprehensive Plan providing population data and projections using year 2000 information from the U.S. Census Bureau, the Regional Research Institute at West Virginia University, and data from the Jefferson County Department of Planning, Zoning and Engineering. Hankins direct (dated May 15, 2009), Utility Exhibit 12 at 57.

Mr. Hankins also explained that the District created Exhibit N to its application, titled "Customer Growth Projection," from information provided by developers. The District contacted developers that it knew had development projects under construction or active plans for developments in the Flowing Springs watershed. The District asked those developers for their expected build-out schedule through the year 2015. The results showed very slight growth projected for 2009, only thirty-three EDUs. Mr. Hankins stated that this was consistent with the current economic climate and the slump in new housing growth. However, the developers projected 286 new EDUs in 2010, 391 in 2011, 462 in 2012, 448 in 2013, 439 in 2014, and 441 in 2015. Id. at 60-61, citing Exhibit N at 4. In total, the District expected to add 2,500 new customers, or 357 new customers per year, in the seven year period from 2009 through 2015. Id. at 61.

During a June 26, 2009 evidentiary hearing, Staff witness Jonathan Fowler stated that the District originally projected 151 EDUs of growth per year to support the project without a rate increase. June 26, 2009 Hearing Tr. at 42. Staff believed that those projections were unrealistic and, at first, recommended a reduced calculation of forty-five

EDUs, and later reduced it to twenty-four EDUs. Some of Staff's concerns regarding growth related to the significant national recession. Id. at 43.

Staff witness Karen Buckley testified at the June 26, 2009 hearing that under the original financing offered by the West Virginia Division of Environmental Protection (WVDEP), and utilizing forty-five EDUs a year, Staff calculated that the District needed a project-related rate increase of approximately 25.5 percent. Id. at 69. When Staff determined that a twenty-five percent rate increase would have resulted in a rate higher than 1.5 percent of the average monthly income for the area, Staff again contacted the WVDEP seeking better financing. Id. at 70, 71, 72. Given the higher rate impact on customers, the WVDEP improved its financing package, including ARRA stimulus funding with seventy percent loan forgiveness and extending the length of the additional loan. Id. at 72.

Staff recommended approval of the District's Capacity Assurance Agreement with the Jefferson County Development Authority. Id. at 85, 86. Staff also recommended that the CIFs remain in the District's tariff until the project was fully paid for. Id. at 86. Any surplus CIF should be used to pay down the $10 million non-stimulus loan. Id. at 88. Ms. Buckley also recommended that CIFs be treated as non-operating revenue by the District. Id. at 92.

By Recommended Decision issued July 20, 2009, adopted by Order of the Commission issued August 14, 2009, with one exception explained below, the Commission granted the District a certificate of convenience and necessity to construct the Flowing Springs project. The Order concluded that the project was needed because of the change in treatment requirements associated with the Chesapeake Bay Compact and the continued growth in Jefferson County. In response to concerns regarding slower growth during the recession, the ALJ said:

Although it is likely that the growth will substantially slow for the remaining period of the recession, it is unlikely that the slow growth will continue indefinitely. After the recession has run its course, it is likely that Jefferson County will once again be one of the fastest growing areas of the State.

July 20, 2009 Recommended Decision at 11.

The Recommended Decision also recommended approval of the District request to modify accounting treatment of CIFs and concluded that the District request to keep CIFs in effect until the associated bonds were fully paid was reasonable. Id. at Conclusions of Law Nos. 8 and 9.

The ALJ recommended approval of the financing for the project, including ARRA funding, and project-related rates of $13.59 per thousand gallons of metered water usage with a minimum bill of $31.33 per month, or a flat rate of $61.16 per month for customers with an unmetered water supply. Flat rate customers would be charged as if those customers had a monthly bill for measured water usage of 4,500 gallons. The ALJ noted that calculation of the approved rates assumed that the District would collect approximately twenty-four CIFs a year. The ALJ described the growth projection as substantially lower than the historical growth rate actually experienced by the District in prior years, but indicated that the District concurred with Staff's conservative estimate of future CIFs as being prudent and acceptable. July 20, 2009 Recommended Decision at Finding of Fact No. 11 p. 14, citing, Staff Exhibit 1, 2; Utility Exhibit 11 at 21; Utility Exhibit 12 at 9; June 26, 2009 Hearing Tr. at 11, 12, 32, 33.

By Commission Order issued July 27, 2009, the Commission temporarily suspended the Recommended Decision on its own motion. By Commission Order issued August 14, 2009, the Commission adopted the Recommended Decision except for the legal conclusion that the CIF should remain in effect until the associated bonds were fully paid. The Commission ordered, however, that the District tariff provisions for CIF and CAF should remain in effect until further Commission Order.

The Petition to Reopen

On November 10, 2009, the District filed the pending petition to reopen because ARRA funding did not become available for the Project and the District needed a further project-related rate increase. The petition was accompanied by a request for a general rate increase, unrelated to the project (separately docketed as Case No. 09-1915-PSD-42T-PC), and a project related rate increase request of 31.7 percent over and above the general rate request. The District sought approval of revised financing in the form of: 1) a State Revolving Fund loan in the amount of $26,484,800 at zero percent interest and a .5 percent administrative fee for a term of forty years; and 2) a $1 million CAF to be paid by the Jefferson County Development Authority. The Commission required the District to publish notice, which it did in the Spirit of Jefferson Advocate on November 26 and December 3, 2009.

In Case No. 09-1915-PSD-42T-PC, the Commission granted the District a general rate increase of 8.1 percent, effective on April 9, 2010. Recommended Decision February 23, 2010; Comm'n Order rejecting in part and adopting in part, April 7, 2010.

Earlier in the year, on January 29, 2010, the Circuit Court of Berkeley County issued an Order in Faircloth Realty Inc. v. Berkeley County. Public Water District, C.A. No. 09-C-826, holding that the Berkeley County Public Service District could not

lawfully charge a CIF and that the Public Service Commission lacked jurisdiction to approve a CIF. That decision was appealed to the West Virginia Supreme Court of Appeals. In light of the Circuit Court decision, however, the Jefferson County Public Service District bond counsel issued an opinion that the District must remove CIF proceeds from its cash flow analysis and pay its project debt solely with volumetric rate revenues. Transcript of August 27, 2010 hearing at 16; Utility Exhibit 14, Attachment CY-E.

As a result of the Faircloth decision and bond counsel opinion, on May 25, 2010, the District filed a revised Rule 42 financial exhibit in support of an even higher project-related rate increase of 55.2 percent. The District's proposed post-project rate increase was now $19.80 per 1,000 gallons with a minimum charge of $49.50 per month. The proposed flat rate for customers with unmetered water usage was $89.10 per month. The District provided public notice of the revised rate request by separate mailing to all customers on June 11, 2010, and by publication in the Spirit of Jefferson Advocate on July 7, 2010. Certificate of Separate Mailing to Customers and Affidavit of Publication filed July 23, 2010.

Numerous protests were filed.

The ALJ again held both a public comment and an evidentiary hearing in August 2010.

By Recommended Decision issued November 10, 2010, the ALJ recommended a revised certificate, revised financing and revised project-related rates. The new recommended financing consisted of a $1 million CAF from the Jefferson County Development Authority, a State Revolving Fund loan from the WVDEP in the amount of $26,484,800 for forty years at zero percent interest, and a .5 percent administrative fee. Upon substantial completion of the project, sewer rates would be $18.38 per thousand gallons of metered water usage with a minimum bill of $45.95 per month, or $82.71 per month for customers with un-metered water supplies.

Commission Suspension of November 10, 2010 Recommended Decision

By Order issued November 22, 2010, the Commission, on its own motion, suspended the Recommended Decision until further order.

Exceptions

On November 23, 2010, two intervenors, Heidi Parker and Jacquelyn Milliron, filed separate exceptions to the November 10, 2010 Recommended Decision. Both Ms.

Parker and Ms. Milliron asserted that the decision was flawed because it approved rates that were unreasonably high and unaffordable for middle class customers who receive no financial assistance, and constituted an unfair financial burden. Ms. Milliron pointed out that the ALJ should have considered cost of living factors before concluding that the rates were reasonable. She also stated that the growth projections relied on by the District were outdated, and that actual growth patterns and projections do not support the need for a large and expensive plant. Both intervenors argued that the cost of a new plant should be borne by new customers and developers and not by existing customers.

On December 3, 2010, the District filed its Response to the Exceptions. The District observed that nowhere in the Exceptions did the intervenors deny that the District and Charles Town would soon be subject to nutrient discharge limits by virtue of the Chesapeake Bay Compact, and that prompt construction of the project was critical to the ability of the District and Charles Town to achieve timely compliance. The District stated that a public utility's duty to provide adequate service includes a duty to provide lawful service and nutrient discharge limitation requirements are the law. The District stated that the intervenors offered no credible explanation as to how the District and Charles Town would achieve compliance with these legal requirements without construction of Flowing Springs.

On December 10, 2010, Ms. Milliron filed a Response to the District Response and stated that the District had not addressed several of her allegations.

On January 3, 2011, the District filed a copy of its new NPDES permit issued by the WVDEP to construct the Flowing Springs project.

By Order issued January 25, 2011, the Commission stated concerns with both the cost of the project and the options available to meet nutrient discharge limits. The Order noted that in less than two years after the first application filing on March 13, 2009, the District had progressed from a utility that charged a metered water usage rate of $11.85 per thousand gallons, or $53.33 for an average customer using 4,500 gallons, to one that the ALJ has recommended charge $18.38 per thousand gallons, or $82.71 per month for an average customer using 4,500 gallons. Notice of Filing attached as Exhibit O to originally filed certificate application; November 10, 2010 Recommended Decision. The Commission stated it understood why the proposed rates are now so high. Growth in the area has fallen off; rates needed to be increased because of replacement of ARRA funding with less favorable funding; the recent District general, non project-related rate increase; and the result of the bond counsel reaction to the Berkeley County Faircloth decision which was to remove future CIF revenue from funds available to the District to help fund this project.

The Order also acknowledged that the District and the City of Charles Town must meet Chesapeake Bay Compact nutrient removal requirements as must all sewer utilities in the Chesapeake Bay watershed. The Order stated that both the Compact, and resolution by the West Virginia Supreme Court of Appeals of the legality or illegality of CIFs, would have vast implications on all aspects of sewer utility planning and development in the region, including funding of expansion projects and the impact on rates.

The Order stated that nutrient removal requirements are looming at the same time that the District has experienced a fall-off in area growth and that the diminished growth raised questions whether the District still needs a project as large in scope. The Commission stated that when it considered the diminished growth in combination with the extremely high rates that would result from the project, the Commission had doubts as to the continued public convenience and necessity of the Flowing Springs project. The Commission stated it should determine whether the District and Charles Town could achieve nutrient removal through a less costly project or projects.

The Commission concluded that a further hearing on the petition to reopen was required because the financial impact of the project since the August 14, 2010 final order had increased to a point where the original Commission findings of public convenience and necessity could no longer be conclusive. Furthermore, the Commission regarded the growth projections and income data that originally supported the project to be significantly outdated. The Commission required the District to present updated evidence showing whether the Flowing Springs project, as designed, is still the most cost-effective and reasonable alternative to achieve compliance with increased environmental requirements and to meet the current and future wastewater treatment needs of its service territory. Specifically, the District was to show that the plant is feasible notwithstanding the high customer rates. The District was also required to provide updated median household income data for the District service area as well as growth data and projections. The Commission required the District to present its evaluation of why the District, either by itself or with Charles Town, could or should not pursue less-costly alternatives to meet the Chesapeake Bay Compact nutrient removal requirements. This evaluation was to include, but not be limited to, the upgrade of existing facilities.

On February 24, 2011, the West Virginia Supreme Court of Appeals reversed the Circuit Court's declaratory judgment order in Faircloth on grounds that Mr. Faircloth had not exhausted administrative remedies at the Commission because the Commission's General Investigation of CIFs was still pending at the time Mr. Faircloth filed the Circuit Court lawsuit. Faircloth v. Berkeley County Public Service District and Public Service Commission, Nos. 35651 and 35652 (W. Va. Supreme Court, February 24, 2011) (memorandum decision).

On March 24, 2011, the District filed pre-filed testimony of seven witnesses.

On April 7, 2011, Charles Town, Staff, Ms. Milliron and Ms. Parker each filed pre-filed testimony. Charles Town and Staff each filed pre-filed testimony of two witnesses, respectively.

On April 25, 2011, the District filed pre-filed rebuttal testimony of five witnesses, and Ms. Milliron and Ms. Parker each filed pre-filed rebuttal testimony.

May 3 and 4, 2011 Hearing and Post-hearing filings

The hearing was held as scheduled on Tuesday, May 3, and Wednesday, May 4, 2011 in Charles Town. Transcripts were received on May 18, 2011. In this Order, references to the hearing on May 3, 2011 will appear as "Tr. I at [page number]" and references to the hearing on May 4, 2011 will appear as "Tr. II at [page number]" Initial briefs and reply briefs were filed.

On May 26, 2011, counsel for Charles Town filed as Commission Request Post-hearing Exhibit 1, a copy of a Draft Consent Order 7207 to be issued by the WVDEP relating to the Charles Town's NPDES and nutrient removal compliance, and a Public notice of the WVDEP's Intent to Enter the Order as published in the Spirit of Jefferson Advocate on May 23, 2011.

By Order issued June 29, 2011, the Commission ordered Charles Town and the District to file revenue requirement and rate impact projections based on Charles Town Scenarios one and three from Charles Town Exhibit 6 entered into evidence at the May 4, 2011 hearing. The Commission also took note of the testimony presented by the District that if it did not construct the Flowing Springs project it would be forced to upgrade its transmission system at a cost of $14,848,401 so that it can continue to transport all of its waste flows to the CTWWTP (the alternate transmission project). The Commission required the District to state how soon the alternate transmission project would need to be constructed, provide an estimate of the construction schedule, and an estimate of rate impacts by year, depending on the estimated construction schedule. The Order provided that the requested filings would be labeled Commission Request Post-hearing Exhibits 2 and 3, respectively. The Commission also ordered both parties to make responsive filings.

The District filed Commission Request Post-Hearing Exhibit 3 on July 11, 2011. Charles Town filed Commission-Request Post-Hearing Exhibit 2 on July 14, 2011.

On July 21, 2011, Staff filed a response to Commission Request Post-Hearing Exhibits 2 and 3. Also on July 21, 2011, the District filed a response to Commission Request Post-hearing Exhibit 2 filed by Charles Town.

On July 25, 2011, Intervenors Milliron and Parker filed a joint response to the post hearing exhibits. The Intervenors' response included questions regarding the alternate transmission project.

On July 28, 2011, the District filed a response to the Staff filing of July 21, 2011.

DISCUSSION

The looming Chesapeake Bay Compact nutrient removal requirements have been an important part of the public interest analysis in this case and in the Commission assessments of the public convenience and necessity for the Flowing Springs project. The earlier filings in this proceeding, including the District's December 3, 2010, Response to Exceptions, and the recent pre-filed testimony of District witnesses consistently asserted that both the District and Charles Town would face serious financial penalties for NPDES permit violations unless the District constructed Flowing Springs. The more recent evidence and testimony in this case indicates, however, that Charles Town has addressed and resolved compliance with Chesapeake Bay requirements even if Flowing Springs is not constructed.

The Commission Request Post-hearing Exhibits 2 and 3 and Attachment B to the District Response to Commission Request Post-hearing Exhibit 2 reveal that at least until year 2019, there will be rate savings for District customers if Charles Town proceeds with the projects outlined in its strategic plan and the District does not construct Flowing Springs. District rates will still be projected to increase over current rates as a result of increased wholesale rates charged by Charles Town and the alternative transmission project that the District intends to pursue, and the District predicts that its rates would rise from the current average monthly bill of $57.20 to $82.49. District Response to Commission Request Post-hearing Exhibit 2, Attachment B. The rate savings for Charles Town and Ranson customers will be more significant. Comm'n Request Post-hearing Exhibit 3. The current economic recession and the slow recovery that the region is experiencing, give rise to a need to constrain costs and limit rate increases as much as possible. With those concerns in mind, and having evaluated all of the evidence submitted in this proceeding, particularly the most current evidence, the Commission concludes that the public interest is better served by Charles Town going forward with its strategic plan based on its continuing status as the provider of treatment for all of the District wastewater flows, except the Deerfield flows, and the District not constructing the Flowing Springs treatment plant.

Although Flowing Springs would have provided an additional 1.0 mgd of Chesapeake Bay compliant capacity by 2014, for the reasons explained in this Order, the Commission finds that the recent growth patterns do not support an immediate need for that amount of additional capacity. With the projects planned by Charles Town, the Commission concludes that future growth in the District will be accommodated through the Charles Town strategic plan until at least the year 2025.

Chesapeake Bay Interstate Compact

The Commission concludes that Charles Town has addressed the Chesapeake Bay requirements based on the fact that Charles Town and the WVDEP have reached an agreement, memorialized by Consent Order, that eliminates the risk that Charles Town will in the near term violate its NPDES permits. Testimony of Jane E. Arnett, Tr. II at 197-201; Commission Request Post-hearing Exhibit 1. Pursuant to the Consent Order, WVDEP has agreed that Charles Town's new Tuscawilla sewage treatment plant will not have a nutrient limit until phase one construction is complete. Id. The WVDEP and Charles Town have also agreed to a compliance schedule for the CTWWTP to allow it to be in compliance through the joining of the Tuscawilla and CTWWTP nutrient discharge permits into one permit. Through the combined permit, Charles Town will remain in compliance for several years. To remain in compliance, and if Flowing Springs is not built, Charles Town plans to construct a "pump-over station" during 2014 or 2015. Charles Town Exhibit 6; Commission Request Post-hear Exhibit 2. If Flowing Springs is built, then Charles Town predicts it can delay construction of the pump-over station until 2020. Id. Construction of Flowing Springs would also enable Charles Town to delay by one year, but not eliminate, both a nutrient upgrade project and a capacity expansion project at the CTWWTP. Id.

Mr. Fowler, testifying for Commission Staff, stated that the Charles Town/WVDEP Consent Order changes the way Staff previously evaluated the District certificate application. Staff's prior analysis was based on an assumption that each of Charles Town's sewer plants had to meet nutrient discharge limitations independently. Now, however, the WVDEP will apply a nutrient limit to Charles Town's combined discharges. Fowler, Tr. II at 268. Staff does not support the District proceeding with construction of Flowing Springs at this time. Fowler direct, Staff Exhibit 5 at 2-3. Mitchell direct, Staff Exhibit 4 at 3.

Although the District in its brief contended that the WVDEP/Charles Town Consent Order does not completely resolve the Chesapeake Bay Compact requirements because its terms provide that WVDEP may reopen the Consent Order and prescribe additional or different requirements, the Commission concludes that the Consent Order

has resolved the compliance and financial penalty issues that supported the convenience and necessity of the Flowing Springs project.

Projected growth

Although the evidence and data presented by the parties on the issue of growth predictions was certainly conflicting, the Commission concludes that in view of the level of existing treatment capacity and the additional Chesapeake Bay Compact compliant capacity to result from the Charles Town strategic plan, the evidence of current and future growth is not compelling to justify a need for the project. Although the District and Charles Town predict that growth patterns will soon revert to the growth levels experienced prior to the economic recession, the Commission concludes that the conservative projections of the intervenors and Staff are more reasonable in view of the sluggish economic recovery.

The District testimony and evidence asserted that the forty-year growth pattern in the county, the proximity to Washington DC, and the fact that the fundamental drivers for past growth are still present, support a conclusion that the rapid growth of the past will resume. Hankins supplemental direct, PSD Exhibit 29 at 4-5; Edward Wormald direct, PSD Exhibit 22 at 3-5 and Tr. I at 62-63; 67-69. The County population grew by 26.8 percent in the 2000-2010 decade and that amount exceeded the County's projection of 21.9 percent. Hankins supplemental direct, PSD Exhibit 29 at 3. The number of customers served by the District grew from 764 in 1998 to 2,087 in 2008. New growth projects are underway such as the addition of table games at the Charles Town Casino, a Holiday Inn Express, a Hampton Inn, a Homeland Security training facility, an American Public University System facility, and the County has issued plat approvals for residential developers. Hankins direct, PSD Exhibit 29 at 4, 6. District witness Hankins presented data based on the most recent 2004 Jefferson County Commission Comprehensive Plan, which in turn relied on US Census Bureau data from year 2000, the Regional Research Institute at WVU, and the Jefferson County Department of Planning, Zoning and Engineering. Mr. Hankins also looked at developers' projections, the projections by the County Planning and Zoning Director - Jennifer Brockman and the City of Ranson Planning Director - Sarah Kleckner, as well as Wormald Companies General Manager - Edward Wormald. Hankins direct, PSD Exhibit 29 at 3 and attachment JH-K (relying on Wormald direct, PSD Exhibit 22; Brockman direct, PSD Exhibit 24; Kleckner direct, PSD Exhibit 23). The District believes it will experience growth of at least forty-seven EDUs per year through 2019, and higher average growth thereafter. Hankins direct, PSD Exhibit 29 at 9.

Charles Town witness Elizabeth A. Blair stated that Charles Town modified its growth projections downward for purposes of its strategic planning in 2009 and again in

2011. In 2009, the City reduced developers' projections by seventy-five percent, and for the years 2011 through 2016, the City reduced the same projections by eighty-five percent. For the years 2017 through 2021, the City reduced the projections by seventy-five percent. Ms. Blair stated that the reductions were "supported by a measured decrease in actual connections through the system as well as a county-wide reduction in requests for new construction building permits." Blair direct, Charles Town Exhibit 5 at 8-9 and attached Exhibit 2.

Intervenor Milliron cited reductions in growth projections due to economic downturn. Milliron direct, Milliron Exhibit 8 at 8; rebuttal, Milliron Exhibit 9 at 9-12. For example, she pointed out that District witness Wormald, a residential land developer, reduced build-out projections for the current year (2011) from twenty-five to ten dwellings and Ms. Brockman's testimony shows a declining trend in building permits for new housing. Milliron rebuttal, Exhibit 9 at 13; see also Wormald Tr. I at 50-51. Ms. Milliron noted that District witness John Tuggle stated the District still has 410 EDUs available and asserts that that if Flowing Springs were built, it would have extra capacity of seventy percent on opening day and it would take over sixty years at the optimistic growth rate of forty-seven EDUs per annum, for the new plant to reach treatment capacity while the two year average annual growth rate for 2009 and 2010 was only twenty-four EDUs. Id. at 9, 12. Ms. Milliron also points out the Charles Town plans to expand its Tuscawilla Plant and construct other upgrades in 2015 and urges the Commission to require the utilities to embark on a unified course. Milliron rebuttal, Exhibit 9 at 7. Ms. Milliron contends there is no immediate need for a new plant.

Ms. Parker testified as to her observations regarding reduced home building and sluggish economic growth in the county. Parker direct, Parker Exhibit 1 at 6-7. Ms. Parker stated that the Casino and American Public University growth cited by the District is less significant than the District represents because the casino has its own wastewater system and the university is an on-line program, with only staff, not students, on site. Parker rebuttal, Parker Exhibit 2 at 2. She also argues that growth in Washington DC does not translate to growth in Jefferson County. Id. at 2, 6-7. Ms. Parker stated that her research with Jefferson County government offices indicates a decline in building permits and an increase in home vacancies. Parker direct, Parker Exhibit 1 at 7.

The Staff position is that the Commission should consider the continuing effects of the recent economic downturn, evidence that the service area currently has little or no growth, and the possibility that the recession may continue for years. Mr. Fowler's pre-filed direct testimony noted that the District and City of Ranson annual reports indicate that the District and Ranson lost 370 customers between June 2009 and June 2010. Fowler Direct, Staff Exhibit 5 at 2. At hearing, however, Mr. Fowler indicated that the Ranson annual reports were likely inaccurate. Tr. II at 271. Mr. Fowler stated that

current treatment facilities have excess capacity at this time negating any argument of urgent need. Fowler direct, Staff Exhibit 5 at 2-3. Mr. Fowler pointed out that while District witness Wormald predicts an uptick in growth and home building, he did not indicate a willingness to make an advance contribution toward a plant. Citing, Wormald, May 3, 2011, Tr. at 44. If built, the plant would provide excess capacity of 670,000 gpd. Staff refutes District evidence of the number of preliminary plat approvals by noting that those plans are on paper only, and no actual construction backs them up. In its reply brief, Staff calculates that even if District witness Hankins' prediction of customer growth of forty-seven EDUs per year through 2019 is proven true, then the District has 8.72 years of dedicated capacity available to it at the CTWWTP. The Staff position is that the Flowing Springs project is not warranted at this time.

In the Charles Town brief, Charles Town states that it supports the District's Flowing Springs certificate application because the City believes that in the long run, additional treatment capacity is needed. The basis for Charles Town's position or its view of the "long run" was not made clear to the Commission.

The Commission agrees that the Flowing Springs project would provide the District, its customers, and Jefferson County with a Chesapeake Bay fully-compliant plant with extra treatment and transmission capacity that could accommodate rapid growth and sufficient capacity for a longer period of time into the future. Hankins, May 4, 2011 Tr. at 186. The updated growth data, to the extent it was filed, indicates that although Jefferson County experienced unprecedented growth early in the last decade, the recent years, including the "recovery" years, have seen little population or economic growth. Blair direct, Charles Town Exhibit 5 at 8-9 and attached Exhibit 2; Blair Tr. II at 230-231; Hankins direct, Utility Exhibit 12 at 4-5; Wormald Tr. I at 50-51, 70; Brockman Tr. I at 99-103; Parker direct, Parker Exhibit 1 at 6-7; Milliron rebuttal, Milliron Exhibit 9 at 9-12. The Commission regards the developments listed by the District, including two hotels, casino table games, a training facility, educational facility, Homeland Security training facility, as indicators of moderate but not remarkable growth. We also are aware that although the data from the Ranson annual reports used by Staff to calculate a drop in customers in recent years appeared to contain errors, the Charles Town annual reports on annual treatment volumes appear to show not just a flattening of growth, but an actual decline based on volumes treated and billing volumes.

The 2007 Charles Town annual report shows total volumes treated as 491 million gallons compared to billing volumes of 441 million gallons billed. These data infer inflow and infiltration (I&I) or unmeasured water usage of 50 million gallons per year or about 11.3 percent of billed volumes. The 2010 Charles Town annual report shows total volumes treated as 441 million gallons compared to billing volumes of 400 million gallons. These data infer I&I or unmeasured water usage of 41 million gallons or 10.2

percent. From 2007 to 2009, the volumes treated at the Charles Town plants dropped by 50 million gallons from 491 million gallons, or 1.3 million per day, to 441 million gallons or 1.2 million gallons per day. Thus, the treatment plant data included in the Charles Town annual reports indicates that annual volumes treated and billed to customers dropped considerably from 2007 to 2010. The drop is particularly significant considering the evidence of rapid growth in the 1990's and in the earlier years of the last decade.

The Commission opinion is that the Charles Town strategic plan will add sufficient capacity in the near term to handle not only moderate but even vibrant growth for many years. Accordingly, the Commission concludes that the evidence regarding current economic development and population growth, when considered along with the other evidence in this case, does not support a finding of convenience and necessity.

Project Financing and Rate Impact

The rate impact is of serious concern in the Commission's deliberations. The total Flowing Springs project is estimated to cost $27,484,000. Staff Exhibit 3 at 1. Construction costs for the treatment plant are either $15,088,488 or $14.8 million. See Zane Summerfield Testimony, District Exhibit 20, at 9; Tuggle Rebuttal, District Exhibit 28 at 2; Fowler Direct, Staff Exhibit 5 at 5. Of those construction costs, $5 million are related to nutrient compliance. Tuggle Rebuttal, District Exhibit 28 at 2. The District asserts that only the $5 million attributable to nutrient compliance would be eligible for Senate Bill 245 funding. Hankins rebuttal, PSD Exhibit 18 at 10; Tr. II at 132.

The District asserts that its proposed funding package is the best attainable:

1. Capacity Assurance Agreement with Jefferson County Development Authority will provide a $1 million contribution.

2. DEP loan commitment of $26,484,817, payable over 40 years at 0 percent interest and .5 percent administrative fee.

3. $2 million DEP negative amortization loan

4. $760,354 DEP green grant.

5. Future application of Senate Bill 245 grant - undetermined amount.

Regarding the rate impact concerns, the District has responded that once the legal obstacles to the use of CIFs are removed, developers would begin to pay more in the form of the highest CIFs in the State. Hankins rebuttal, PSD Exhibit 18 at 6-7. The

District's current CIF balance is $1,398,042 and the District has not used CIF proceeds for any project to date. Chuck Young testimony, Tr. II at 31, 123. The District also states that it may be able to propose a rate decrease in the future by applying Senate Bill 245 funds and/or CIFs to pay project debt. Hankins rebuttal, PSD Exhibit 18 at 6; Elizabeth A. Benedetto rebuttal, PSD Exhibit 25 at 2-3, 8; Tr. I at 116-17, 120, 123, 125, 127-28. The District points out that only loans closed by December 31, 2011, are eligible for Senate Bill 245 funding. Benedetto, Tr. I at 131-32. The District also relies on an assumption that housing development will resume and additional sewer customers will be added. Wormald direct, PSD Exhibit 22; Kleckner direct, PSD Exhibit 23; Brockman direct, PSD Exhibit 24. Using a very aggressive growth estimate in its July 21, 2011, response to the Commission Request Post-hearing Exhibit 2 filed by Charles Town, the District shows that rates could drop significantly in the future. These are all forecasts, and by their nature are speculative. Moreover, if the high growth rates do recur, the downward rate impact would occur with or without Flowing Springs, and the District rates would be even lower without the Flowing Springs costs.

In its brief, the District states that construction of Flowing Springs will insulate District customers from the full impact of future bulk rate increases by Charles Town because the District will divert 1,434 of the 2,646 EDUs it now sends to the CTWWTP. Therefore, only forty-six percent of District flows will be subject to the Charles Town bulk rate. The District also points out that disapproval of the Project will force the District to pursue an expensive transmission project instead. Tuggle Direct, District Exhibit 19 at 13-16; Tr. II at 90; Comm'n Request Post-hearing Exhibit 3.

Intervenors Parker and Milliron object that existing customers bear all the cost burden of the project that is planned to accommodate future and uncertain growth. Milliron direct, Milliron Exhibit 8 at 3, 5. They believe that a greater percentage of costs should be covered by either public grants or developer contributions. Milliron direct, Exhibit 8 at 5; Parker direct, Parker Exhibit 1 at 5-6, 8; Tr. II at 254, 255. They believe that Flowing Springs should not move forward until SB 245 and CIF monies become available because the resulting rates are not feasible for ratepayers. Milliron direct, Exhibit 8 at 9-10; Tr. II at 245; Parker direct, Exhibit 1 at 2-4, 27; rebuttal Exhibit 2 at 3-4. The Intervenors' position is that in view of the high post-project rates and recent economic downturn, the Commission should not approve the project absent evidence of current growth and compelling need. Milliron direct, Exhibit 8 at 4; Tr. II at 250; Parker direct, Exhibit 1 at 6-7; rebuttal, Parker Exhibit 2 at 10; Tr. II at 255. Nor should the Commission conclude that the proposed project financing is reasonable. Milliron Exhibits 8 and 9; Parker direct Exhibits 1 and rebuttal Exhibit 2, Tr. II at 254. Ms. Milliron states that post-project rates would constitute 3.24 percent of the 2000 magisterial District service area median household income (MHI), which is the data evaluated by WVDEP and IJDC. Milliron direct, Exhibit 8 at 11-12; rebuttal, Exhibit 9

at 4. Ms. Parker states that the proposed District rates are out of line with sewer utility rates in surrounding counties. Parker direct, Exhibit 1 at 12-13.

Staff believes that there is not an immediate need for the Flowing Spring project and that the project should await economic recovery and more favorable funding in the form of SB 245 and use of CIFs. Fowler direct, Staff Exhibit 5 at 2-3; Sandra Mitchell direct, Staff Exhibit 4 at 3-4. Ms. Mitchell and Mr. Fowler stated that no one can predict the amount of future SB 245 funds that may become available to the District. Mitchell Tr. II at 261-262, Fowler Id. at 264.

If approved, the post-project District rates will be the sixth highest sewer rates in the State and constitute 1.74 percent of the District service territory 2009 MHI. Milliron Tr. II at 247; Summerfield Tr. II at 35-36, 42, 45; rebuttal, PSD Exhibit 21 at 7. While sewer rates equal to 1.74 percent of MHI would not alone be a disqualifying factor for a certificate project, the Commission believes the level of increased post-project rates and potential rate shock are valid issues to consider when evaluating the proposed Flowing Springs project funding in light of the uncertain future growth and the availability of a less costly alternative which is the Charles Town planned upgrades.

Alternatives

District witness Tuggle testified that prior to designing Flowing Springs, the District's engineers analyzed seventy-one alternatives. Tuggle direct, PSD Exhibit 19 at 5. If Flowing Springs is not constructed, the District position is that its only alternative will be to construct the alternate transmission project to increase transmission capacity from the District to the CTWWTP at a cost of $14,848,401. The District believes the alternative transmission project would be eligible for less-favorable DEP funding, and would not be eligible for SB 245 grant money. Tuggle Direct, PSD Exhibit 19 at 10, 13-19; Young Supplemental direct, PSD Exhibit 26 at 4. Prior to the hearing, the District believed that when estimated debt service for the alternate transmission project, increased operation and maintenance expenses, and higher resale rates to be paid to Charles Town are taken into consideration, the alternative transmission project would impact rates at least as much as would the Flowing Springs project yet provide no new capacity. Tuggle direct, PSD Exhibit 19 at 16-19. The information provided in Commission Request Post-hearing Exhibit 3, however, shows that the rate impact will be less initially if the Charles Town strategic plan moves forward in the absence of the Flowing Springs project.

Ms. Parker questioned why the District did not pursue two small developer projects with Beallair and B.C. partners, as well as rehabilitation of the Old Standard Plant in order to add new capacity for District customers. Id. at 4-5, 9-10. The District responded that it evaluated Bellaire, B.C. Partners and Old Standard plant capacity

alternatives and determined that the proposed Bellaire plant would be incapable of providing service to customers outside of that housing development, the B.C. Partners plant would not be large enough to allow diversion of any flows away from the CTWWTP, and the Old Standard plant cannot be expanded to two million gpd and lacks solids handling facilities. Furthermore, expansion of the Old Standard plant would not qualify for the negative amortization loan, and would take longer to construct than Flowing Springs. Tuggle direct, PSD Exhibit 19 at 19-22. Therefore, the alternate transmission project costing $14,848,401 would still be required. The Commission concludes that the record lacks sufficient evidence that the developer owned treatment plants present a reasonable treatment capacity alternative.

Ms. Milliron proposed that a consolidated system with Charles Town is the most economically advantageous for the region and testified that the District should remain a resale customer of Charles Town which already plans to make Chesapeake Bay Compact upgrades. Milliron direct, Exhibit 8 at 6-7, 13. Milliron rebuttal, Exhibit 9 at 6-7. Similarly, Ms. Parker listed as an alternative that Charles Town proceed with its planned sewer plant upgrades to address Chesapeake Bay Compact requirements. Parker rebuttal at 4-5, 9. The Commission agrees that the District should continue to obtain wastewater treatment service from Charles Town as the most economic option for the region.

In the Commission Order issued January 25, 2011, the Commission stated it was reasonable to determine whether the District and Charles Town could achieve nutrient removal through a less costly project or projects. The Commission required the District to present its evaluation of why the District, either by itself or with Charles Town, could or should not pursue less-costly alternatives to meet the Chesapeake Bay Compact nutrient removal requirements. The recent evidence before the Commission indicates that the Charles Town strategic plan presents a less costly and more reasonable alternative to construction of Flowing Springs, notwithstanding the District's position that if it does not proceed with the Flowing Springs project it must file a certificate application in June 2012 for its alternative transmission project at a cost of $14,848,401.

Conclusion

The District proposed "to build Flowing Springs for two principal reasons: to meet nutrient removal requirements, and to meet the growing need for wastewater treatment in the District's service territory." Hankins direct, PSD Exhibit 29 at 1-2. The burden of proof is on an applicant for a certificate of public convenience and necessity. W. Va. Code §24-2-11(h). The District met its burden of proof in the initial stages of this proceeding by putting on sufficient evidence that pending nutrient removal requirements and the growing need for wastewater treatment capacity in its service territory required the project and that the public convenience and necessity would be served. Conditions

have changed, however. Financing problems have driven up the annual debt service cost of the project and changes in the Charles Town nutrient removal construction and upgrade plans shed a completely different light on the need for the Flowing Springs project. The current evidence before the Commission is that nutrient removal requirements can be more economically addressed by Charles Town with its NPDES permit changes and completion of its strategic improvements through 2025. The current evidence is also that there is not sufficient growth in demand for wastewater treatment in the District service territory to justify a finding of public convenience and necessity for the Flowing Springs project.

In their July 25, 2011 filing, Intervenors Milliron and Parker presented questions regarding the future District alternate transmission project. Under W.Va. Code §24-2-11, the District must apply for and obtain a certificate of convenience and necessity for that project prior to beginning construction. The District has stated that it will make that filing in June of 2012. The Commission will fully evaluate the convenience and necessity of the alternate transmission project when the case is before it, and the questions posed by the Intervenors should be answered in such a future proceeding.

FINDINGS OF FACT

1. Since this certificate application was first evaluated by the Commission financing problems have driven up the annual debt service cost of the project. November 10, 2009 Petition to Reopen.

2. Earlier filings in this proceeding, including the District's December 3, 2010, Response to Exceptions, and the recent pre-filed testimony of District witnesses consistently asserted that both the District and Charles Town would face serious financial penalties for NPDES permit violations unless the District constructed Flowing Springs. March 13, 2009 Certificate Application; Summerfield direct, PSD Exhibit 20 at 13; Hankins supplemental direct, PSD Exhibit 29 at 13; Hankins rebuttal, PSD 18 at 17-18.

3. The more recent evidence and testimony in this case indicates that Charles Town has addressed and resolved compliance with Chesapeake Bay requirements even if Flowing Springs is not constructed. Arnett Tr. II at 197-201; Comm'n Request Post-hearing Exhibit 1; Charles Town Exhibit 6.

4. Charles Town and the WVDEP have reached an agreement, memorialized by Consent Order, that eliminates the risk that Charles Town will in the near term violate its NPDES permits. Arnett Testimony, May 4, 2011 Hearing Tr. at 197-201; Comm'n Request Post-hearing Exhibit 1.

5. The WVDEP agreed that Charles Town's new Tuscawilla sewage treatment plant will not have a nutrient limit until phase one construction is complete. The WVDEP and Charles Town agreed to a compliance schedule for the CTWWTP to allow it to be in compliance through the joining of the Tuscawilla and CTWWTP nutrient discharge permits into one permit. Through the combined permit, Charles Town will remain in compliance for several years. Id.

6. To remain in compliance, and if Flowing Springs is not built, Charles Town plans to construct a "pump-over station" during 2014 or 2015. Charles Town Exhibit 6; Commission Request Post-hearing Exhibit 2. If Flowing Springs is built, then Charles Town predicts it can delay construction of the pump-over station until 2020. Construction of Flowing Springs would also enable Charles Town to delay by one year, but not eliminate, both a nutrient upgrade project and a capacity expansion project at the CTWWTP. Id.

7. The Charles Town and WVDEP Consent Order changed the Staff evaluation of the District certificate application. Staff's prior analysis was based on an assumption that each of the Charles Town sewer plants had to meet nutrient discharge limitations independently. Now, however, the WVDEP will apply a nutrient limit to Charles Town's combined discharges. Fowler Tr. II at 268.

8. The total Flowing Springs project is estimated to cost $27,484,000. Staff Exhibit 3 at 1. Construction costs for the treatment plant are either $15,088,488 or $14.8 million. See Summerfield Testimony, District Exhibit 20, at 9; Tuggle Rebuttal, District Exhibit 28 at 2; Fowler Direct, Staff Exhibit 5 at 5. Of those construction costs, $5 million are related to nutrient compliance. Tuggle Rebuttal, District Exhibit 28 at 2.

9. If approved, the post-project District rates will be the sixth highest sewer rates in the State. Summerfield Tr. II at 42, 45.

10. If approved, the post-project rates would result in the average sewer customer paying a sewer bill constituting 1.74 percent of the District service territory 2009 MHI. Summerfield rebuttal, PSD Exhibit 21 at 7; Tr. II at 35-36; Milliron Tr. II at 247.

11. There will be rate savings for District customers at least through the year 2019 if Charles Town proceeds with the projects outlined in its strategic plan and the District does not construct Flowing Springs. Commission Request Post-hearing Exhibits 2 and 3; Attachment B to the District July 21, 2011 Response to Commission Request Post-hearing Exhibit 2.

12. If Flowing Springs is not built, the District predicts that its rates will increase over current rates as a result of the alternative transmission project, and would rise from the current average monthly bill of $57.20 to $82.49. District July 21, 2011 Response to Commission Request Post-hearing Exhibit 2.

13. If Flowing Springs is not built, the rate savings for Charles Town and Ranson customers will be more significant than for District customers. Commission Request Post-hearing Exhibit 3.

14. Whether District rates could later be reduced by application of CIF funds or Senate Bill 245 monies to project debt service, or by increased demand for treatment, is not certain. Benedetto Tr. I at 120, 125, 127, 129-30; Mitchell Tr. II at 261-262, Fowler Id. at 264.

15. If the high growth rates do recur, any downward rate impact would occur with or without Flowing Springs, and the District rates would be even lower without the Flowing Springs costs.

16. The District position is that disapproval of the Flowing Springs project will force the District to pursue a $14,848,401 transmission project instead. Tuggle Direct, District Exhibit 19 at 13-16; Tr. II at 90; Commission Request Post-hearing Exhibit 3.

17. The rate impact on District customers will be less initially if the Charles Town strategic plan moves forward in the absence of the Flowing Springs project. Commission Request Post-hearing Exhibit 3.

18. Jefferson County experienced unprecedented growth early in the last decade, but the recent years, including the "recovery" years, have seen reductions in new home construction and economic growth. Blair direct, Charles Town Exhibit 5 at 8-9 and attached Exhibit 2; Blair Tr. II at 230-231; Hankins direct, Utility Exhibit 12 at 4-5; Wormald Tr. I at 50-51, 70; Brockman Tr. I at 99-103; Parker direct, Parker Exhibit 1 at 6-7; Milliron rebuttal, Milliron Exhibit 9 at 9-12.

19. If built and with current demand, on day one of operation the Flowing Springs treatment plant would provide excess capacity of 670,000 gpd. Tuggle direct, PSD Exhibit 19 at 11.

20. The current Charles Town treatment facilities have excess capacity at this time. Fowler direct, Staff Exhibit 5 at 2-3.

21. The Charles Town strategic plan outlines projects to meet anticipated demand for wastewater treatment and nutrient removal requirements through year 2025. Charles Town Exhibit 6; Commission Request Post-hearing Exhibit 2.

CONCLUSIONS OF LAW

1. The burden of proof is on an applicant for a certificate of public convenience and necessity. W. Va. Code §24-2-11(h).

2. The factual conditions in this case have changed since the time the District met its burden of proof in the initial stages of this proceeding by putting on sufficient evidence that pending nutrient removal requirements and the growing need for wastewater treatment capacity in its service territory required the project and that the public convenience and necessity would be served. Recommended Decision, July 20, 2009, *adopted* Commission Order, August 14, 2009.

3. The WVDEP and Charles Town Consent Order has resolved the compliance and financial penalty issues that previously supported the convenience and necessity of the Flowing Springs project. Arnett Tr. II at 197-201; Comm'n Request Post-hearing Exhibit 1.

4. The current evidence before the Commission is that recent growth patterns do not support an immediate need for the additional 1.0 mgd of Chesapeake Bay compliant capacity that construction of Flowing Springs would provide. Blair direct, Charles Town Exhibit 5 at 8-9 and attached Exhibit 2. Wormald Tr. I at 50-51, 70; Brockman August 27, 2010 Hearing Tr. at 181, 184; Brockman Tr. 1 at 99-103; Parker direct, Parker Exhibit 1 at 6-7; Milliron rebuttal, Milliron Exhibit 9 at 9-12; Charles Town 2007-2010 annual reports.

5. Future growth in the District will be accommodated through the Charles Town strategic plan until at least the year 2025. Comm'n Request Post-hearing Exhibit 2.

6. In view of the level of existing treatment capacity and the additional Chesapeake Bay Compact compliant capacity to result from the Charles Town strategic plan, the evidence of current and future growth is not compelling to justify a need for the project. In view of the sluggish economic recovery, the conservative growth projections of the Staff and the Intervenors are more reasonable than those of the District.

7. The proposed level of increased post-project rates and potential rate shock are valid issues to consider when evaluating the proposed Flowing Springs project in

light of the uncertain future growth and the availability of a less costly alternative which is the Charles Town planned upgrades.

8. The record lacks sufficient evidence that developer-owned treatment plants in the area present a reasonable treatment capacity alternative to the Flowing Springs treatment plant.

9. The Charles Town strategic plan presents a less costly and more reasonable alternative to construction of Flowing Springs, notwithstanding the District position that if it does not proceed with the Flowing Springs project it must file a certificate application in June 2012, for its alternative transmission project at a cost of $14,848,401. Commission Request Post-hearing Exhibits 2 and 3.

10. The current evidence before the Commission is that nutrient removal requirements can be more economically addressed by Charles Town with its NPDES permit changes and completion of its strategic improvements through 2025. The current evidence is also that there is not sufficient growth in demand for wastewater treatment in the District service territory to justify a finding of public convenience and necessity for the Flowing Springs project.

11. The public interest is better served by Charles Town going forward with its strategic plan based on its continuing status as the provider of treatment for all of the District wastewater flows, except those from Deerfield, and the District not constructing the Flowing Springs project.

ORDER

IT IS THEREFORE ORDERED that the Exceptions to the November 10, 2010 Recommended Decision are granted and the Recommended Decision is not adopted.

IT IS FURTHER ORDERED that the District petition for approval of revised financing and post-project rates for its Flowing Springs Project is denied and the previously issued certificate of convenience and necessity for the Flowing Springs project is rescinded.

IT IS FURTHER ORDERED that on entry of this Order this case is closed and will be removed from the docket of open Commission cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste:

Sandra Squire
Executive Secretary

JML/tt
090347cf