IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Intervenor-Defendants American Farm Bureau Federation and National Association of Home Builders ("Intervenor-Defendants") submit this reply in support of their motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state claims for which relief may be granted, respectively. Intervenor-Defendants' motion should be granted and this action should be dismissed.

Introduction

Plaintiffs cannot dispute that Congress left implementation of Clean Water Act mechanisms such as Total Maximum Daily Loads ("TMDLs") and National Pollution Discharge

Elimination System ("NPDES") permit programs to the states. Nor can they dispute that many states have long relied on trading and offset programs to meet the goals of the Clean Water Act. Plaintiffs nevertheless seek a sweeping judgment that no state may approve an NPDES permit that contains a "trade" or "offset" provision even if the permit complies with the Act's permit requirements.[1] Plaintiffs ask this Court to invalidate all existing (and future) state trading and offset laws through a challenge to an EPA document that merely acknowledges state programs that employ these mechanisms to implement the Clean Water Act. This audacious and ill-conceived suit should be dismissed for the reasons described below.

First, Plaintiffs incorrectly claim that statements in the Bay TMDL "authorize" the use of trades and offsets by states. In fact, EPA merely acknowledges that states have the flexibility to implement TMDLs and NPDES programs however they choose – including by creating trading and offset programs – so long as any issued permit meets the requirements of the Act. Congress left to the states TMDL implementation authority. Trading and offset programs are an exercise of that authority and are created under state law. EPA's latest recognition of reality – that these are available mechanisms for states to implement the requirements of the Act – has not caused any of Plaintiffs' alleged injuries. If Plaintiffs have suffered any injury from these programs, it was the state laws and individual trades or offsets embodied in individual permits that caused them. For similar reasons, if Plaintiffs were injured by any trades or offsets, this Court would be without power to redress them in a suit that challenges only the Bay TMDL, and not any particular state law, regulation, or individual permit.

[1] The two most important of these requirements are that: (1) the permit contain appropriate technology-based performance standards and (2) the permit not cause or contribute to the violation of any water quality standard or TMDL. 33 U.S.C. §§ 1311, 1318, 1342.

In addition, Plaintiffs' "authorization" theory is based on the demonstrably false premise that the Bay TMDL was the first time EPA interpreted the Clean Water Act to allow trading and offsets (*see, e.g.*, Pls' Br. at 9, 22, 29). EPA has published policy documents intended to assist states and tribal authorities with establishing such programs since as early as 1996. These guidance documents show that EPA has long understood that trading and offset programs established pursuant to state laws are permissible under the Clean Water Act.

To the extent it is possible for Plaintiffs to drag EPA into court to defend these state trading and offset programs, rather than challenging the state laws themselves, Plaintiffs have challenged the wrong EPA action. If Plaintiffs believe that a permit was improperly approved, they could challenge any individual permit approval. Or, if plaintiffs believe an entire state's program fails to meet Clean Water Act requirements, they could petition EPA to withdraw approval of that state's NPDES program. *See* 33 U.S.C. § 1342(c). Plaintiffs should not be allowed to maintain this suit merely because they prefer to sue EPA (rather than the states) or because they prefer not to challenge individual permits or an individual state's NPDES program rather than the Bay TMDL. Plaintiffs' litigation preference does not create standing or a final agency action.

Argument

I. PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE "TRADING" OR "OFFSET" DISCUSSION IN THE BAY TMDL.

This Court lacks jurisdiction over Plaintiffs' claims because the allegations in the Amended Complaint do not support standing. Even if Plaintiffs have suffered injury from the state nutrient trading and offset programs, those alleged injuries were not caused by statements in the Bay TMDL, and this Court could not redress them by invalidating statements in the Bay TMDL.

A. Plaintiffs Cannot Show That EPA's Discussion Of Trades And Offsets In The Bay TMDL Caused Their Alleged Injuries.

Any injuries suffered by Plaintiffs' members with respect to pollution trading or offsets in the Chesapeake Bay region are caused by the relevant state's approval of a particular permit or the state's decision to create a permit trading or offset program in the first instance. EPA's discussion of trades and offsets in the Bay TMDL does not involve either of those actions; in fact, it has no legal effect whatsoever, and, therefore, has not contributed to any of Plaintiffs' alleged injuries. Plaintiffs nevertheless assert that, in the Bay TMDL, EPA "authorized" the use of trading and offset programs. Pls' Br. at 7. The cited discussion itself, however, does not support Plaintiffs' assertion.

The Bay TMDL text merely acknowledges that states have the power to implement such programs:

> EPA *expects* that new or increased loadings of nitrogen, phosphorus, and sediment in the Chesapeake Bay watershed that are not specifically accounted for in the TMDL's WLA or LA will be offset by loading reductions and credits generated by other sources under programs that are consistent with the definitions and common elements described in Appendix S.
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> EPA *recognizes* that a number of Bay jurisdictions already are implementing water quality trading programs. EPA *supports* implementation of the Bay TMDL through such programs, as long as they are established and implemented in a manner consistent with the CWA, its implementing regulations, and EPA's 2003 Water Quality Trading Policy (USEPA 2003e) and 2007 Water Quality Trading Toolkit for NPDES Permit Writers (USEPA 2007d).

Bay TMDL at 10-1, 10-3 (emphasis added). This language is nothing more than EPA's recognition that states have implemented trading and offset programs and will continue to do so.

Plaintiffs note that, in the Bay TMDL, EPA announced that it will in the future use its supervisory power to exercise regulatory oversight of state trading and offset programs. Pls' Br. at 8. But this oversight authority is not evidence that EPA took final action with respect to

trading or offset programs in the Bay TMDL. By the cited language, EPA merely acknowledged that it intends to use its *existing* authority under the Clean Water Act to supervise these programs, as it does with all Clean Water Act programs:

> EPA reserves its authority, however, to review any individual offset (including an NPDES permit containing an offset) and to comment on, object to, or issue the permit as needed if EPA determines that the offset is not consistent with the Clean Water Act or EPA's regulations.

Bay TMDL at 10-3. Here, EPA leaves the regulatory landscape as it found it before the Bay TMDL was issued, by stating that it retains authority to oversee state NPDES permitting programs. Thus, none of Plaintiffs' purported injuries can be fairly traced to the statements in the Bay TMDL.

EPA's discussion in the Bay TMDL recognizes the basic premise of the Clean Water Act that states are responsible for implementing the requirements of the Act, including TMDLs, and, for states with approved programs, NPDES permitting. *See* Intervenor-Defendants' Mem. in Supp. of MTD at 3-6; 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "that the States will manage . . . and implement" the NPDES pollution permitting program); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1031 (11th Cir. 2002) (the Clean Water Act "puts the responsibility for implementation of TMDLs on the states"); *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002) (the state retains flexibility to choose "both *if* and *how* it [will] implement the [] TMDL") (emphasis in original). The trading and offset programs created by the Chesapeake Bay states (and other states) are permissible under this basic grant of implementation power to states. Trading and offsets (both the programs and individual trades and offsets) are, therefore, a function of state law, not EPA action. 33 U.S.C. § 1342(b) (an approved NPDES program is "establish[ed] and administer[ed] under State law"); *see Shell Oil*

Co. v. Train, 585 F.2d 408, 412 (9th Cir. 1978) (recognizing that under the Clean Water Act once a state has secured approval of its own permit program from the EPA, "its actions in permit matters are those of the state itself"). Assuming the truth of Plaintiffs' injury claims, those injuries result from the actions by the various states – not by EPA. *See Black v. LaHood*, 882 F. Supp. 2d 98, 104 (D.D.C. 2012) (to show standing, the alleged "injur[ies] must be fairly traceable to *the defendant's* allegedly unlawful conduct") (emphasis in original).

A foundational factual predicate of Plaintiffs' argument – that the Bay TMDL represents the first time that EPA has taken the position that trading is permissible under the Act – is flatly incorrect. The absence of that factual predicate is fatal to Plaintiffs' standing. In the Chesapeake Bay region, for example, some of the state programs that Plaintiffs object to *predated* the so-called "authorization" in the Bay TMDL. *See* Intervenor-Defendants' Mem. in Supp. of MTD at 14. Moreover, both the history of actual trading programs and EPA's trading policy statements show that EPA has long believed that trading and offset programs are permitted under the Act.

In 1996, EPA issued a "Draft Framework for Watershed-Based Trading." Office of Water (May 1996).[2] In the Draft Framework, EPA writes that "support for trading does not represent any change in EPA's traditional enforcement responsibilities under the CWA." *Id*. at ix. Nowhere does the 1996 Draft Framework purport to authorize trading. Instead, EPA issued this guidance to "strongly promot[e] the use of watershed-based trading" as part of President Clinton's "Reinventing Environmental Regulation" initiative. *Id*. Also in 1996, EPA published in the Federal Register "notice of an Effluent Trading in Watersheds Policy Statement." 61 Fed. Reg. 4994 (Feb. 9, 1996). This notice stated that, "EPA will actively support and promote effluent trading within watersheds to achieve water quality objectives, including water quality

[2] The 1996 Draft Framework is available online at: http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=20001QL1.txt.

standards, to the extent authorized by the Clean Water Act and implementing regulations." *Id.* at 4995. The notice further observed that trading "is being explored, developed, or implemented" in at least a dozen states. *Id.* at 4996. Moreover, a 1999 EPA report "summarize[d] 37 effluent trading and offset activities that are occurring or have occurred around the country *since the 1980s*." "A Summary of U.S. Effluent Trading and Offset Projects," Prepared for Dr. Mahesh Podar, Office of Water, EPA, at i (Nov. 1999) (emphasis added).[3]

In addition, in 2002, EPA invited public comment on a proposed Water Quality Trading Policy. 68 Fed. Reg. 1608 (Jan. 13, 2003). In January 2003, after receiving public comments and revising the proposed policy, EPA published its final Water Quality Trading Policy in the Federal Register. *Id.* EPA stated that, "The purpose of this policy is to encourage states, interstate agencies and tribes to develop and implement water quality trading programs for nutrients, sediments and other pollutants where opportunities exist to achieve water quality improvements at reduced costs." *Id.* at 1609. These guidance documents and policy statements show that EPA has for decades recognized that states have the power to implement such programs under the Clean Water Act.[4] Plaintiffs therefore cannot fairly trace their injuries to the Bay TMDL because that action did not contain the novel interpretation of the Clean Water Act that Plaintiffs suggest.[5]

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[3] The 1999 EPA report on effluent trading and offset programs is available online at: http://www.epa.gov/owow/watershed/trading/traenvrn.pdf.

[4] Plaintiffs' claim (at 22) that the Bay TMDL "provided [states] the legal cover" for allegedly unlawful trading and offset programs makes no logical sense. If the Clean Water Act prohibited states from adopting trading or offset programs, a statement by EPA could not authorize them.

[5] The Court may take judicial notice of these EPA guidance documents and Federal Register statements. *Tellabs, Inc. v. Makor Issues & Rights, LTD*, 551 U.S. 308, 322-23 (2007) ("when ruling on Rule 12(b)(6) motions to dismiss" courts must consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1179 ("federal courts are required to take judicial notice of the Federal Register").

Plaintiffs' cited authorities on the traceability requirement of Article III standing (Pls' Br. at 20-21) are all inapposite. Each of those cases involved a federal agency that authorized a third party to take some action that caused the plaintiff harm. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (USDA animal welfare regulations permitted alleged mistreatment of animals by third parties); *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1111 (D.C. Cir. 2009) (EPA rule authorized state regulation that was allegedly not permitted under the Clean Air Act); *NRDC v. EPA*, 643 F.3d 311, 318-19 (D.C. Cir. 2011) (EPA guidance affected state implementation of Clean Air Act plans which caused harm to plaintiffs). Here, by contrast, EPA's Bay TMDL did not authorize any of the state trading or offset actions of which Plaintiffs take issue, all of which must be authorized under state law.

B. This Action Does Not Empower This Court To Redress Any Harm Caused By State Nutrient Trading Or Offset Programs In The Chesapeake Bay Region.

Plaintiffs also lack standing because their alleged injuries cannot be redressed through this action. *See, e.g.*, *Wilderness Soc'y v. Norton*, 434 F.3d 584, 593 (D.C. Cir. 2006) ("redress . . . cannot be found with the judiciary"); *Black*, 882 F. Supp. 2d at 106-07 ("only conceivable judicial relief" was to directly challenge state legislation, not a federal action). Plaintiffs' cursory arguments (at 24-25) on redressability ignore this relevant precedent.

Plaintiffs claim that if the Court voids the Bay TMDL's trading and offsets language "there will be no final agency action authorizing trading and offsets in the Bay." Pls' Br. at 25. In fact, EPA has never *authorized* trading or offset programs anywhere, because EPA lacks the power to require or restrict such programs. *See* Intervenor-Defendants' Mem. in Supp. of MTD at 15-16. The order requested by Plaintiffs would, therefore, have no effect. Trading and offset programs are among the many mechanisms through which states can implement *all* TMDLs (not just the Bay TMDL), a power that Congress left to the states and that many states have exercised

through the passage of state laws.

After approval of its permitting program under section 402(c), 33 U.S.C. § 1342(c), a state has flexibility to implement its NPDES permit programs as long as the program complies with the requirements of the Act. If Plaintiffs believe that a particular state's NPDES program does not comply with the Act, they may file a petition with EPA to withdraw such approval. *See id*.[6] They cannot, however, bypass that available remedy by challenging the Bay TMDL.

In addition, Plaintiffs cannot obtain an order that prohibits the Chesapeake Bay states (none of whom are before the Court) from relying on existing state statutes and regulations (none of which have been challenged) or from establishing new programs under state law. At bottom, Plaintiffs have challenged the wrong party and the wrong governmental action in the wrong court.

C. Plaintiffs' So-Called "Reasonable Assurance Claims" Also Fail for Lack of Standing.

Plaintiffs assert that they have alleged "reasonable assurances claims" within Count One that are somehow untouched by the arguments raised in Intervenor-Defendants' motion to dismiss. Pls' Br. at 2 n.1. Those claims, to the extent they exist separately from the rest of Count One, fail for the same reason: Plaintiffs lack standing to bring them. As demonstrated above, because the Bay TMDL did not authorize any trading or offset programs, any harm allegedly suffered by Plaintiffs from such trades or offsets was not caused by EPA's discussion. To the extent Plaintiffs believe that trading and offsets will not achieve the goals of the Bay

[6] In addition to having jurisdiction, a court reviewing a decision on a petition to withdraw approval of a state's NPDES program would have many advantages over this Court in its review of Plaintiffs' claims. Such a petition would allow a reviewing court to review the trading program of a state in full – not the, perhaps unrepresentative, instances of trades or offsets offered by Plaintiffs. More importantly, EPA would be required to develop an administrative record to defend its decision on the petition, which would give the court a factual and legal context in which to assess the program.

TMDL, they must challenge state programs directly or challenge individual permits. EPA cannot restrict state implementation mechanisms such as trading and offsets, nor can this Court order such relief in this case.[7]

II. EPA TOOK NO FINAL ACTION WITH RESPECT TO THE "TRADING" OR "OFFSET" DISCUSSION IN THE BAY TMDL.

Plaintiffs' Amended Complaint fails to state claims upon which relief can be granted because Plaintiffs have not challenged a final agency action. *See* 5 U.S.C. § 704; Intervenor-Defendants' Mem. in Supp. of MTD at 17-18. In the Bay TMDL, EPA (i) acknowledged that states could use (and were already using) trading and offset programs to implement Clean Water Act requirements, (ii) encouraged states to continue to do so, and (iii) announced that EPA would rely on its existing authority to oversee such programs.

None of this discussion determined any rights or had any legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). As described above, EPA lacks authority to dictate TMDL implementation and, thus, merely acknowledging that state trading and offset programs exist and that states can use them to implement TMDLs is not a determination of any rights. States are free to continue to implement trading and offset programs under their own laws, as Congress expected and as EPA has long understood. EPA's announcement that it would rely on its *already existing* authority to oversee these programs does not change the Clean Water

[7] Though the Court need not concern itself with the issue, as a threshold matter, there is no such "reasonable assurance" requirement in the Clean Water Act or its implementing regulations. Thus, there is no basis for these so-called "reasonable assurance claims." Neither the statute nor its implementing regulations authorizes EPA to require that a TMDL or a particular allocation scheme be implemented. The statute provides only that a TMDL is to be established at a level necessary to implement water quality standards and must be incorporated into the state's planning process under section 303(e). *See* 33 U.S.C. § 1313(d)(2). Questions of whether and how that level is to be met are matters of implementation left to the states. *See, e.g., Pronsolino*, 291 F.3d at 1140.

Act's cooperative federalism regime. Such oversight authority was established and fixed by Congress in the text of the Act.

Moreover, Plaintiffs' finality argument rests entirely on the premise that the Bay TMDL somehow transformed the legal landscape by definitively interpreting the Clean Water Act as authorizing trading and offsets. That premise is false. As demonstrated above, EPA has offered its support for trading programs for decades; such support shows that EPA has long believed these programs are permissible under the Act – a conclusion implicit in Plaintiffs' own arguments. *See* Pls' Br. 30 at n.6 ("[W]hen EPA 'encourages' states to use trading, that *necessarily* carries with it EPA's determination that trading is permissible.") (emphasis in original). That EPA encouraged state trading before the Bay TMDL existed should prove to Plaintiffs that the Bay TMDL did not announce any binding change in the law.

Contrary to Plaintiffs' suggestion (at 34), the Bay TMDL did, in fact, "le[ave] the world just as it found it" because EPA has long taken the view that state trading and offset programs are permissible. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). The Bay TMDL added nothing to the trading and offsets legal landscape.

Conclusion

For the reasons stated above and in their Memorandum in Support of the Motion to Dismiss, Intervenor-Defendants request that the Court grant their Motion to Dismiss Plaintiffs' Amended Complaint.

June 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Reply in Support of Motion to Dismiss by American Farm Bureau Federation and National Association of Home Builders was filed with the Clerk of the Court on the 28th day of June, 2013 using the CM/ECF system which will send electronic notification to all counsel of record.

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