RECORD NO. 13-4079

In The
United States Court of Appeals
For The Third Circuit

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Plaintiffs – Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants – Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania, No. 1:11-cv-00067 (Hon. Sylvia H. Rambo)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL PORK PRODUCERS COUNCIL, PENNSYLVANIA FARM BUREAU, THE FERTILIZER INSTITUTE, AND U.S. POULTRY & EGG ASSOCIATION

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Parties

CBF	Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Defenders of Wildlife; Jefferson County Public Service District; Midshore Riverkeeper Conservancy; and National Wildlife Federation
EPA	U.S. Environmental Protection Agency
Municipal Associations	National Association of Clean Water Agencies; Maryland Association of Municipal Wastewater Agencies, Inc.; Virginia Association of Municipal Wastewater Agencies, Inc.
Appellants	American Farm Bureau Federation; National Association of Home Builders; National Corn Growers Association; National Pork Producers Council; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry & Egg Association

Defined Terms

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Bay	Chesapeake Bay
Bay TMDL	Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 29, 2010)
CWA	Clean Water Act, 33 U.S.C. § 1251 *et seq.*
JA__	The Joint Appendix at page __

NPDES	National Pollutant Discharge Elimination System
TMDL	Total Maximum Daily Load

INTRODUCTION AND SUMMARY OF ARGUMENT

Our opening brief (at 2) presented the precise issue for this court's resolution: whether Clean Water Act ("CWA") Section 303(d) authorizes EPA to issue a "total maximum daily load" ("TMDL") that includes source limits, "reasonable assurance" requirements, and deadlines. We explained that Congress did not authorize EPA to add these features to a TMDL, and that doing so would give EPA control over decisions that Congress reserved for the states. The issue is not whether these elements can be ***useful***, but whether they can be ***federal***.

EPA relies on an erroneous description of the *Chevron* step one analysis: the Agency argues that a statute should be reviewed under step two unless it "unambiguously prohibits" an agency from taking the challenged action. EPA Br. 38. EPA's formulation would turn administrative law upside down, because it is axiomatic that agencies can do only what Congress actually authorizes.

Chevron honors the bedrock principle that statutes control agency action. In step one, courts examine the words of the statute to determine whether they resolve the dispute. Here, the controlling words ("total maximum daily load" and "[s]uch load shall be established at a level . . . .") are plain English words that do not describe allocations, assurances, or deadlines. There is ***no ambiguity*** that justifies EPA's expansion of CWA Section 303(d)(1)(C).

Similarly, there is ***no gap*** in the CWA that authorizes EPA to expand the meaning of "total maximum daily load." Congress assigned duties to develop source limits, assurances, and deadlines to the states alone—twice. First, Section 303(e) requires the states to develop plans that include TMDLs. State plans must also include effluent limitations (for point sources) and schedules of compliance for existing water quality standards, and "adequate implementation, including schedules for compliance" for new or revised water quality standards. Second, Section 319(a)(1) requires states to identify waters impaired due to nonpoint sources, identify those nonpoint sources, and describe how they will identify measures to control pollution from such sources to the maximum extent practicable. Section 319(b) requires states to establish management programs for controlling nonpoint source pollution. Those programs must identify controls and schedules containing milestones to use those controls "at the earliest practicable date."

We agree with EPA that developing source limits, assurances, and deadlines is useful. So did Congress. But Congress assigned these tasks to the states, not EPA. And Congress gave EPA no authority to substitute its preferences if it disliked those of the states.

EPA argues that the Chesapeake Bay TMDL's added elements are lawful because (a) they provide useful information and (b) they resulted from federal/state

cooperation. There is no need to expand the definition of a TMDL to provide information. Moreover, if EPA can set federal limits and deadlines in a TMDL, then it can do so with ***or without*** state cooperation: that is why 21 State Attorneys General have supported us as *amici*.

The record in this case amply supports the conclusion that vacating the challenged elements of the Bay TMDL will not harm progress toward improving water quality in the Bay. But even if it would, "practical difficulties . . . do not justify departure from the Act's plain text." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014).

In fact, the cooperation trumpeted in various briefs and the record of state actions in the decade prior to EPA's TMDL all show that cleaning up the Chesapeake Bay does not hinge on a tortured reading of the CWA.

ARGUMENT

I. EPA's Defense Of The Bay TMDL Rests On The Erroneous Premise That The Agency Has Authority Absent An Unambiguous Prohibition By Congress.

According to EPA (at 34), this case should be resolved at *Chevron* step two because the CWA is ambiguous as to the precise question at issue here. EPA's effort to demonstrate ambiguity relies on a deeply flawed formulation of the *Chevron* step one inquiry—namely, that this Court must determine whether Congress "unambiguously prohibit[ed]" EPA from establishing a TMDL that

includes allocations, "reasonable assurance" requirements, and deadlines. *See* EPA Br. 38, *see also id.* at 2, 30, 35, 39.

1. By claiming authority to do whatever Congress did not explicitly forbid, EPA turns *Chevron* on its head. Contrary to EPA's position, EPA "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Were this Court to accept EPA's formulation and "*presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*); *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("we do not find that *Chevron*'s second step is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power."); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (rejecting the federal appellees' argument that "congressional 'silence' creates an implicit delegation under *Chevron*").

Here, the proper *Chevron* step one inquiry is not whether the CWA unambiguously prohibits EPA from establishing allocations, "reasonable assurance" requirements, and deadlines as part of a TMDL (EPA Br. 2), but rather, is the statute ***clear*** as to whether EPA has that authority (Appellants Br. 2). *See*

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 442 (2002) ("The question presented is whether the Coal Act permits the Commissioner to [take specified action]"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("[R]espondents must show a textual commitment of authority to the EPA[.]"). If a particular agency power is plainly absent from the governing statute, there is no ambiguity and no need to proceed to *Chevron* step two. To assert, as EPA essentially does, that "*Chevron* step two is implicated any time a statute . . . is not written in 'thou shalt not' terms[], is both flatly unfaithful to the principles of administrative law [], and refuted by precedent." *Ry. Labor Exec. Ass'n*, 29 F.3d at 671.

EPA's reliance on the Supreme Court's opinion in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) is misplaced. EPA Br. 38. There, the Court confirmed that "sometimes statutory silence, when viewed in context, is best interpreted as ***limiting*** agency discretion." 556 U.S. 208, 223 (2009) (emphasis added). In EPA's view, *Entergy* supports its position because the Supreme Court interpreted the "lack of an express authorization to consider cost-benefit analysis in [CWA Section 316(b)] as nothing more than a refusal to tie the agency's hands." EPA Br. 38 (quoting 556 U.S. at 222). EPA is wrong. The Court in *Entergy* emphasized that Section 316(b) "is silent not only with respect to cost-benefit analysis but with respect to ***all*** potential relevant factors." *Id.* (emphasis added)

Consequently, silence there could not imply prohibition because that would require EPA to act without considering ***any*** factors.

Here, in contrast, the statutory context shows that EPA lacks the challenged authority. Congress authorized EPA to establish a "total maximum daily load" at a specified "level"—period (Section II.A, *infra*). Interpreting that authorization, as EPA does, to include allocations, "reasonable assurance" requirements, and deadlines defies the plain language of Section 303(d) and circumvents other equally clear limits on EPA's authority. (Section II.B, *infra*.)

EPA contends (at 34-35) that courts have framed the *Chevron* step one question as whether Congress unambiguously foreclosed or prohibited an agency interpretation, but the cases EPA relies on blur the distinction between *Chevron* steps one and two. For example, in *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, a majority of the justices viewed the plurality's *Chevron* analysis as improperly inverted because it looked to the statute's background, purposes, and legislative history first, before analyzing the statutory text. *See* 550 U.S. at 105-08. In *Chem. Mfrs. Ass'n v. NRDC,* the Court summarily disposed of the respondent's *Chevron* step one argument, and only then did it conclude—in what appears to be a step two analysis—that "the legislative history itself does not evince an unambiguous congressional intention to forbid" EPA's interpretation." 470 U.S. at 129. Thus,

EPA relies on authorities that do not support its erroneous formulation of the *Chevron* step one question.

2. EPA also relies on Congress's direction that EPA "administer" the CWA and "prescribe such regulations as are necessary to carry out [its] functions[.]" EPA Br. 36-38 (quoting 33 U.S.C. §§ 1251(d), 1361(a)).

Such general administrative or rulemaking provisions, however, cannot sustain authorities beyond those conferred in the substantive provisions of the Act. *See Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) ("It would go . . . against the plain language of the text to treat a delegation for the 'execution' of [the Attorney General's] functions as a further delegation to define other functions well beyond the statute's specific grants of authority."); *NRDC v. EPA*, 749 F.3d 1055, 1064-65 (D.C. Cir. 2014) ("[W]e have consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point.").[1] Indeed, if EPA's position were adopted, the general administrative and rulemaking provisions of the CWA could override the rest of the statute. Tellingly, EPA cites no precedent for its construction of these provisions.

Amici law professors observe (at 9) that the Supreme Court referenced the CWA's general administrative and rulemaking provisions in concluding that EPA

[1] *NRDC* and similar cases interpreted provisions of the Clean Air Act (42 U.S.C. § 7545(k)(1), 7601(a)(1)) that contain grants of rulemaking authority that are nearly identical to that which EPA relies on here in 33 U.S.C. § 1361(a).

has authority to set nationally applicable effluent limitations by regulation in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-32 (1977). In that case, however, the Court had already determined that the statute unambiguously provides EPA with such authority, based on both the provision central to the case (Section 301(a)) and other provisions (Sections 301(b), 304(b), and 509(b)(1)). The Court merely cited the general provisions as further support for its interpretation of the operative provisions. Here, by contrast, the statute plainly does not authorize EPA to establish allocations, "reasonable assurance" requirements, and deadlines in a TMDL, but only a total load at a specified level (Section II, *infra*). The general administrative and rulemaking provisions cannot expand that limited grant of authority.

II. Because Clean Water Act Section 303(d) Plainly Does Not Authorize Allocations, "Reasonable Assurance" Requirements, Or Deadlines, There Are No Gaps For EPA To Fill.

Contrary to EPA's suggestions (at 34, 51), this case should be resolved at *Chevron* step one. EPA and its supporters try to ***introduce*** ambiguity into the statutory text[2] and downplay or ignore critical aspects of the CWA's overall structure. This Court should decline to follow suit.

[2] EPA misrepresents (at 39) that Appellants' "principal 'plain language' argument pertains only to the issue of allocations." To the contrary, Appellants' position is that Section 303(d) plainly does not authorize allocations, reasonable assurance requirements, or deadlines. *See* Appellants Br. 33-47.

A. EPA Cannot Show Ambiguity In The Statutory Total Maximum Daily Load Directive In Section 303(d).

Tellingly, EPA can cite only its ***regulation*** in asserting that "[a] TMDL is more than just a single number." *See* EPA Br. 9. EPA does not dispute that CWA Section 303(d) states only that a "total maximum daily load" shall be "established at a level necessary to implement the applicable water quality standards" and includes no mention of allocations, "reasonable assurance" requirements, or deadlines. *See* EPA Br. 9, 36, 39. EPA glosses over the statutory text by claiming that the CWA contains ambiguities that do not exist.[3] *See, e.g.*, EPA Br. 9, 34, 36, 39-40; *see also* Law Profs. Br. 24. EPA has not filled any statutory "gaps." Rather, it has taken action that Congress did not authorize, but instead reserved to the states.

1. EPA first argues (at 39) that the term "total maximum daily load" is not defined in the statute and lacks self-evident meaning. *See also* Law Profs. Br. 24; Maryland, *et al.* Br. 16. The absence of a statutory definition, however, "does not prove that a term is ambiguous." *United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008). To determine a statute's plain meaning, the "starting point is the ordinary meaning of the words used," and this Court "refer[s] to standard reference

[3] EPA correctly notes (at 35-37) there are some ambiguities within Section 303 and elsewhere in the CWA, which EPA has resolved through regulations and received deference under *Chevron* step two. But that does not prove that Section 303 is ambiguous as to the question here (which no court has ever considered).

works such as legal and general dictionaries in order to ascertain the ordinary meaning of words." *Id.* Here, "total maximum daily load" clearly refers to a single number specifying a particular amount of a pollutant: Congress directed the establishment of a "total" load and that "such load" be set at "a level" that is "necessary to implement the applicable water quality standards[.]"[4] 33 U.S.C. § 1313(d)(1)(C). Even though there will typically be multiple sources in a watershed contributing to the overall pollutant load, Congress chose only to authorize the establishment of the "total" load. If Congress had wanted more than the "total," it could easily have required establishment of a "total maximum daily load and allocations of the total" or "components" or "constituents"; likewise, it could have required assurances or deadlines, as it did in Section 319 and elsewhere. In Section 303(d) it authorized none of those things.

EPA cites (at 40) three cases where courts deemed "total" to be ambiguous when used in other statutory contexts—*e.g.*, accounting statutes referencing "total expenses." Yet, none of these cases indicate that "total" might mean more than a single number. Moreover, here, in Section 303(d)(1)(C), "total" modifies "load"

[4] EPA selectively quotes a portion of Section 303(d)(1)(C) in asserting that "Congress essentially required only that [TMDLs] 'implement the applicable water quality standards[.]" EPA Br. 36. What Congress actually required is for a TMDL to be "***established at a level*** necessary to implement the applicable water quality standards[.]" 33 U.S.C. § 1313(d)(1)(C) (emphasis added).

and—when coupled with the term "maximum" and the phrase "established at a level"—could hardly be more plain in calling for a single number.

The D.C. Circuit's decision in *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006), does not, as EPA proclaims, demonstrate that the Agency has freedom to expand on the phrase "total maximum daily load." *See* EPA Br. 39. The court there found "nothing ambiguous" about the word "daily," stating "daily means daily, nothing else." 446 F.3d at 141, 142. It did not consider or address a question that was never presented: the propriety of EPA's promulgation of seasonal and annual loads in addition to daily loads. If anything, in "vacat[ing] the non-daily 'daily' loads," that Court suggested that EPA cannot establish any load but a daily load. *See* 446 F.3d at 142; *id.* at 144 ("If Congress wanted seasonal or annual loads, it could easily have authorized them by calling for 'total maximum daily, seasonal, or annual loads."). Nothing in that court's restrictive interpretation of "daily" can justify expanding "total."

2. EPA further contends that "the Act is similarly ambiguous about the criteria that EPA should apply to determine whether a particular TMDL will implement the applicable water quality standards." EPA Br. 40; *see also* Law Profs. Br. 24 (same). This purported ambiguity stems from EPA's attempt to extract "implement" from its context. Section 303(d) requires only that a TMDL be "established at a ***level*** necessary to implement the applicable water quality

standards." 33 U.S.C. § 1313(d)(1)(C). If the "level" is not low enough, EPA can simply lower it. Determining whether a TMDL is established at a level that, if achieved, would result in the desired water quality—does not turn on how or when the "level" will be achieved. Contrary to EPA's argument, none of the challenged elements of the Bay TMDL is "essential" (or even relevant) to evaluating whether the ***total*** is established at an appropriate level.

3. EPA warns (at 42) that Appellants' construction of the Act would call into question approximately 30,000 of the roughly 68,000 existing TMDLs established (61,000 by States; 7,000 by EPA) pursuant to its regulations defining a TMDL as the sum of allocations. This point widely misses the mark. *Chevron* step one requires courts to examine "the language of the statute," and "[t]he inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent,'" as is the case here. *Barnhart*, 534 U.S. at 450. In other words, no amount of historical reliance[5] on a contrary agency interpretation can overcome a clear statute because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Even 30,000 wrongs do not make a right. In any event, the relief we

[5] The Municipal Associations wrongly state (at 14) that we are time-barred from challenging EPA's regulatory interpretation that a TMDL includes allocations. A claim that a regulation would exceed an agency's statutory authority can be raised when the regulation is applied. *See, e.g.*, *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7-8 (D.C. Cir. 2009).

seek would not call into question the ***total*** load in any prior TMDL, but only whether the ***allocations*** are binding on the states.

4. The Municipal Associations, for their part, break from EPA by arguing that the TMDL should be upheld at *Chevron* step one because, in their view, "Section 303(d) clearly contemplates the expression of the total load and the associated allocations that comprise it." Municipal Assocs. Br. 13. They believe that Congress acquiesced in EPA's regulatory definition of a TMDL as including individual allocations because Section 303(d)(4) references effluent limitations that have been "based on a total maximum daily load or other waste load allocation." *Id.* at 12 (quoting 33 U.S.C. § 1313(d)(4)).[6] But the quoted language certainly does not refer to a wasteload allocation as a ***component*** of a TMDL. Instead, the statutory provision in question—which was added to the CWA in 1987 amendments—limits the ability of permitting authorities to relax point source permit limits that have been established on the basis of TMDLs or waste load allocations. Congress's recognition that point source permit limits may be "based on" a TMDL or "waste load allocation" is far too thin a reed to support an inference of congressional acquiescence to federally established allocations for

[6] The City of Annapolis claims (at 14) that Section 402 clearly authorizes EPA to establish waste load allocations for point sources by setting permit limits for certain point sources. But that limited power in no way supports an inference of the much broader power to set federal allocations for point and nonpoint sources in a TMDL.

point ***and nonpoint sources***—not to mention "reasonable assurance" requirements and deadlines—as elements of a TMDL. If Congress intended such a result, it surely would not have, in the same 1987 amendments, established a detailed nonpoint source program in Section 319 that specifically reserved for the states all power to limit nonpoint sources. *See infra*, Section II.B.

Not surprisingly, the Municipal Associations cite no authority to support their acquiescence argument. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*") is instructive here. *See* 531 U.S. 159, 169 (2001). There, the Supreme Court discussed a prior case in which it found acquiescence based on the fact that Congress had held hearings discussing an agency interpretation and had considered at least thirteen bills proposing to overturn that interpretation. *Id.* at 169 n.5. The Court then stated that, "[a]bsent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* Here, there is no evidence that Congress even considered EPA's interpretation, much less acquiesced in it.

5. Although the evidence belies their contention (*see* Section IV.A *infra*), EPA and its supporters speculate that a reversal of the district court would have serious ramifications and that Appellants' construction of Section 303(d) would frustrate both Bay restoration efforts and Congress's intent to protect water

quality. *See, e.g.*, EPA Br. 42; Fl. Wildlife Fed'n Br. 16-18; Municipal Assocs. Br. 15; CBF Br. 2, 10-11. We disagree with this premise, but "[h]owever sensible (or not) [EPA's] position, a reviewing court's task is to apply the text of the statute, not to improve upon it." *EME Homer City Generation, L.P.*, 134 S. Ct. at 1600.

Because the text of the statute is clear, it cannot be altered based on the belief that a different approach would be better. *See, e.g.*, *id.* at *14 ("practical difficulties . . . do not justify departure from the Act's plain text"); *FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."). Simply put, EPA's dissatisfaction with its statutory authority is not a basis to expand that authority. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA ("UARG")*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."); *Friends of the Earth*, 446 F.3d at 145 ("EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.").

B. EPA's Assertion Of Authority To Establish Allocations, "Reasonable Assurance" Requirements, And Deadlines In A TMDL Cannot Be Reconciled With The Structure Of The CWA.

EPA admits, as it must, that the "structure and context of a statute can also reveal that Congress considered the 'precise question at issue' for purposes of *Chevron* step one review." EPA Br. 43.[7] EPA nevertheless fails to address key provisions of the CWA—Sections 319, 208, and 303(e)—that confirm that Section 303(d) plainly does not authorize allocations, "reasonable assurance" requirements, or deadlines. Rather than address these provisions, EPA diverts the Court's attention to its role as a "backstop for State authority" and its other CWA authority. *See* EPA Br. 43-51. None of the roles and authority that EPA highlights, however, can reconcile the structure of the CWA with the authority asserted here.

1. Most importantly, not one of the eleven briefs (and approximately 66,000 words) filed by EPA or its supporters deals with Congress's clear expression of its intent, in Section 319, that states, ***not*** EPA, have exclusive authority to identify nonpoint sources of water quality impairment and take actions

[7] The Supreme Court recently confirmed the importance of context in statutory interpretation, emphasizing, in particular, that "[a] statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *UARG*, 134 S. Ct. at 2442.

to limit pollution from those sources to the extent practicable.[8] 33 U.S.C. §§ 1329(a)(1), 1329(b)(2). Our point that EPA's expansive reading of Section 303(d) impermissibly renders Section 319 redundant stands essentially uncontested. *See* Appellants Br. 41-42; *see also Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1997) (rejecting a construction of a statute that "would render the two sections largely duplicative of each other").

EPA cannot explain why Congress added Section 319 in 1987 if Section 303(d)(1)(C) already authorized the states and EPA to establish allocations for all sources, require "reasonable assurances," and set deadlines in a TMDL. Section 319 outlines a process for identifying impairment and addressing pollution that parallels Section 303 in many respects, but the differences are critical and quite purposeful. Section 319, unlike Section 303, does explicitly require ***states*** to identify significant nonpoint sources of pollution and describe how they will identify best management practices and measures to control such pollution "to the maximum extent practicable." *See* 33 U.S.C. § 1329(a)(1). It further directs ***states*** to prepare nonpoint source management programs that identify measures that will be undertaken and set schedules containing milestones for utilizing best management practices "at the earliest practicable date." *Id.* § 1329(b)(2).

[8] Notably, EPA's website touts "Section 319 Nonpoint Source Success Stories" that show how various state-led efforts under Section 319 have achieved water quality improvement. *See* http://water.epa.gov/polwaste/nps/success319/.

Congress gave EPA ***no backstop authority*** for these actions. Instead, only "local public agenc[ies] or organization[s]" have backstop authority under Section 319. *Id.* § 1329(e). Comparing Sections 319 with 303(d) shows that Congress ***did*** intentionally withhold authority from EPA to set source limits, demand "reasonable assurance," and impose deadlines—all without regard to practicability—in a TMDL. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

EPA's only attempt to overcome Section 319 is its observation that Congress gave it authority to approve or disapprove states' nonpoint source management programs, which could affect states' eligibility for federal grants. *See* EPA Br. 48. What Congress plainly did not do, however, is invite EPA to step in, as a backstop, and set limits or deadlines regarding nonpoint sources. *See* Law Profs. Br. 4 n.2. This limit on EPA's authority under Section 319 would be meaningless if EPA could impose nonpoint source limits and deadlines under Section 303(d).

2. EPA summarily dismisses Section 208 as "irrelevant" because it "is part of the program for wastewater treatment in subchapter II of the Act." EPA Br. 47. EPA overlooks the significance of that provision. Like Section 319, Section

208 demonstrates Congress's determination to limit EPA's role with regard to nonpoint sources and land use. Congress left authority in the states' hands to identify nonpoint sources of pollution, such as those related to agriculture, and to set forth "procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F). Congress gave EPA no backup authority to take those actions. Section 208 further confirms that Congress did not intend to allow EPA to use its Section 303(d) backstop authority to allocate limits to nonpoint sources, require "reasonable assurance" that those limits "will" be achieved, or set deadlines for implementation without any regard to feasibility.

3. EPA likewise gives short shrift to Section 303(e). EPA correctly observes that Section 303(e) gives it authority to approve or disapprove states' continuing planning processes and that EPA disapproval could result in states' losing control over their point source permitting programs. EPA Br. 48; *see also* Appellants Br. 20. EPA does not dispute, however, that it lacks authority to disapprove or dictate the ***content*** of implementation plans that are developed pursuant to those processes or to develop a federal plan if states fail to develop the requisite plans. *See* 33 U.S.C. § 1313(e)(3) ("[EPA] shall approve any continuing planning process submitted to [it] under this section which will result in plans for all navigable waters within such State[.]"). Section 303(e) thus plainly shows

Congress's determination to maintain exclusive state control over their plans for achieving water quality goals. States would lack such control if EPA could use TMDLs to set source limits for all sources, require "reasonable assurance" that those limits "will" be achieved, and set deadlines for implementation.

4. EPA portrays Section 117(g) as a demonstration of Congress's intent to authorize EPA's actions here, but that provision cannot bear the weight placed upon it. Section 117(g) contains no mention of TMDLs or Section 303(d). Congress was well aware of how to expressly divide authority between EPA and the states, and it did not give EPA any additional power to establish allocations, "reasonable assurance" requirements, or deadlines as part of a TMDL when it added Section 117(g) in 2000. EPA's role under Section 117(g) is simply to use its existing authorities to ensure that "management plans are developed and implementation is begun" ***by others***, not to establish federal source limits and deadlines for putting implementation measures in place. *See* EPA Br. 50.

EPA and its supporters also suggest that Section 117(g)'s reference to "management plans" encompasses TMDL implementation plans because, *inter alia*, Congress was legislating against the backdrop of EPA's TMDL regulations. *See* EPA Br. 50; Annapolis Br. 17-18; Maryland et al. Br. 17, 21. A more plausible explanation, however, is that Congress was actually referring to the tributary strategies that the states had committed to developing at the time

Congress added Section 117(g) in 2000. *See* CBF Br. 15. Congress clearly enacted Section 117 because it believed pollution control efforts in the Chesapeake Bay deserved special attention. But Congress just as clearly chose not to establish any new authority for EPA in Section 117.

5. EPA strains to overcome the plain text of Sections 303(d), 319, 208, and 303(e) by trumpeting its "role as a backstop for State authority." *See* EPA Br. 43-46. Our opening brief acknowledged that Congress gave EPA backstop authority for TMDLs (meaning a single number) (at 19), water quality standards (at 17), and proposed point source permits (at 23-24). That Congress authorized EPA to perform certain specific tasks in place of the states does not mean EPA can take other actions in lieu of the states. Contrary to EPA's suggestions, *EME Homer City* does not support EPA's position that the Bay TMDL is a proper exercise of its Section 303(d) backstop authority. *See* EPA 28(j) Letter (Docket #003111609915), at 2. Unlike that statutory scheme, the authority that Congress reserved for states in CWA Sections 319, 208, and 303(e) ***never*** "shifts from the States to EPA." *Id.* EPA's backstop authority under Section 303(d) thus cannot lawfully be construed in a way that circumvents those other specific, detailed provisions.[9]

[9] EPA asserts (at 44-45) that the CWA would "create a perverse incentive for States to ignore their Section 303 duties" if the Act is interpreted to prohibit EPA from establishing allocations as part of a TMDL. Not so. When EPA sets a total

Amici law professors similarly urge the Court to prioritize federal interests. They even suggest (contrary to the express provisions of the Act) that states must yield to federal interests in the event of a conflict. *See* Law Profs. Br. 7-17. Their statutory interpretation arguments do not survive scrutiny. First, none of the cases they cite (at 9-15) for federal primacy involved the scenario here—EPA avoiding specific limits on its own authority (in Sections 319, 208, and 303(e)) by reading another provision (Section 303(d)(1)(C)) so as to override them. Second, it is beyond dispute that the Act explicitly recognizes and preserves state authority generally—and specifically with regard to land use and water quality planning. *See* 33 U.S.C. §§ 1251(b), 1370, 1313(e). Those statutory provisions have, in fact, featured prominently in Supreme Court and lower court precedents, and not only in *SWANCC* and the *Rapanos v. United States*, 547 U.S. 715 (2006) plurality opinion. *See, e.g.*, *SD Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386-87 (2006) (quoting 33 U.S.C. §§ 1251(b) and 1370 as evidence that the CWA "provides for a system that respects the States' concerns" and interpreting Section 401 in a way that "preserves the state authority apparently intended"); *City of Arcadia v. EPA*,

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load, states must still undertake implementation and put in place control measures pursuant to state law, as Sections 319 and 303(e) envision, or else risk EPA point source permit objections, denial of grant money, or even withdrawal of their power to administer the Section 402 permitting program. States may even ***choose*** to allocate loading ***at the same time*** that EPA sets a total load, but those allocations would be state actions that the states may later modify, as Congress intended, in pursuing their own state-led water quality programs.

411 F.3d 1103, 1106-07 (9th Cir. 2005) (interpreting Section 303(d) to allow EPA approval of a state-established TMDL to supersede an earlier EPA-established TMDL for the same waters and emphasizing that such a "plain reading . . . is consistent with the basic goals and policies . . . that States remain at the front line in combating pollution," as set forth in 33 U.S.C. §§ 1251(b) and 1370); *Am. Paper Inst. v. EPA*, 890 F.2d 869, 873 (7th Cir. 1989) (quoting 33 U.S.C. § 1251(b), legislative history, and case law from numerous circuits before concluding that "it seems beyond argument that we should construe the Act to place maximum responsibility for permitting decisions on the states"). Any attempt to cast *SWANCC* and the plurality opinion in *Rapanos* as anomalies (*see* Law Profs. Br. 12-15) requires a highly selective reading of the relevant authorities.

III. EPA's Attempt To Circumvent The Statutory Text Merits No Deference.

Neither EPA nor any of the other entities defending the Bay TMDL have identified any ambiguity in the CWA as to the precise question at issue here: whether the CWA authorizes EPA to establish allocations, "reasonable assurance" requirements, and deadlines in a TMDL. The text of Section 303(d) and the overall structure of the Act plainly show that Congress answered that question in the negative. But even if this Court viewed the statute to be ambiguous, EPA's expansive interpretation of Section 303(d) would be impermissible and should be rejected.

A. EPA's Position Is Contrary To The Act's Emphasis On State Authority.

Our opening brief (at 48-52) explains how EPA's interpretation is at odds with the CWA's federalism principles. Congress was careful to explain that a basic purpose of the Act is to preserve the states' primary authority over water pollution control and land and water use. 33 U.S.C. §§ 1251(b), 1370. While the Act assigns many duties to EPA, it does not follow that EPA can override the specific assignment of roles to the states concerning nonpoint source pollution and land use decisions in Sections 319, 208, and 303(e). Nothing in the CWA supports an interpretation that the tasks specifically assigned to the states, without any backstop by EPA, could nonetheless be undertaken by EPA.

EPA argues that the Bay TMDL does not intrude upon state authority because its allocations do not specify pollutant loads from particular parcels of land. *See* EPA Br. 45-46. But the Bay TMDL does, in fact, specify allocations for hundreds of individual facilities (*see* JA1400-33, 1596-97) and boldly announces that EPA has authority to "[e]stablish[] finer scale [allocations]." JA1366. The TMDL thus unquestionably asserts the power to assign ***federal*** source limits to particular nonpoint sources—such as individual farms—and even parcels of land. Under EPA's interpretation of its TMDL authority, EPA could assign nitrogen, phosphorus, and sediment limits for each farm, home site, or even each acre of undeveloped land across the countryside. That interpretation amounts to nothing

short of federal land use zoning authority, which cannot be squared with Congress's clear and consistent determination to reserve such authority for the states.

Land use regulation is "perhaps the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982), and has been "traditionally performed" by state and local governments. *Hess v. Port Auth.*, 513 U.S. 30, 44 (1994). By establishing how much of a total load can be allocated to a particular land use (*e.g.*, agriculture) or even a specific source, the Bay TMDL does, in fact, intrude upon land use decision-making. *See, e.g.*, Counties Br. 4-13. The power to assign even "finer scale" allocations would enable EPA to dictate where crops may be grown, where trees may be harvested, and where homes, roads, schools, and hospitals may be built. These decisions are at the heart of the states' traditional land use authority.

In trying to show that the Bay TMDL's allocations do not inflexibly restrict state authority, Maryland asserts that it has, in fact, recently changed some of the allocations in the Bay TMDL. *See* Maryland *et al.* Br. 18-19. This "broad flexibility," Maryland contends, demonstrates that the Bay TMDL is consistent with the Act's cooperative federalism framework. *See id.* Maryland's brief is notably silent about EPA's role with respect to this purported change, because the

Bay TMDL clearly requires that any state-proposed revisions, "including, but not limited to specific [allocations]," require EPA approval. JA1438.

Several other briefs go to great lengths to portray the Bay TMDL as a model of cooperative federalism and a product of collaboration. *See, e.g.*, EPA Br. 16, 55-56; Maryland et al. Br. 10-13; Virginia Br. 10-13; CBF Br. 19-26; PMAA Br. 13-18. These discussions miss the point. As we previously explained in our opening brief (at 52-54), cooperation is irrelevant to whether EPA has statutory authority to establish allocations, "reasonable assurance" requirements, and deadlines in a TMDL; EPA may exercise only the power that Congress gave it. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *La. Pub. Serv. Comm'n*, 476 U.S. at 374. No one would seriously propose that the Bay states could band together and ask EPA to create a federal land use permitting or zoning program. Regardless of any collaboration or cooperation, the resulting program would clearly exceed EPA's statutory authority. As in *Rapanos*, where 33 states and the District of Columbia were unsuccessful in supporting the assertion of federal jurisdiction, here "it makes no difference to the ***statute's*** stated purpose of preserving States' 'responsibilities and rights,' § 1251(b), that some States wish to unburden themselves of them." *Rapanos*, 547 U.S. at 737 n.8. Even if "[l]egislative and executive officers of the States may be content to leave 'responsibility' with [EPA] because it is attractive to shift to another entity

controversial decisions disputed between politically powerful, rival interests," the states cannot confer authority upon EPA.[10] *See id.*

EPA and the *amici* Law Professors also seek to diminish the import of the Act's specific language emphasizing the "rights of states." *See* EPA Br. 52; Law Profs. Br. 7-17, 20-23. As we explained above (at 21-23), these attempts fall short because none of the cases cited in their briefs, including *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), dealt with EPA trying to override a specific division of authority between EPA and the states such as those found in Sections 319, 208, and 303(e). Moreover, the Law Professors go even further (at 20-23) and mischaracterize *SWANCC* as "the only outlier" in Supreme Court CWA jurisprudence because that decision stressed states' rights and held that a clear statement from Congress is required before "permitting federal encroachment upon a traditional state power" such as land use planning. *See* 531 U.S. at 172-73. *SWANCC* is no outlier. For instance, in *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994), the Supreme Court warned that a "heavy regulatory burden on the States" ought not be attributed to Congress absent solid

[10] For the same reason, CBF's argument that authority can derive from a consent decree, settlement agreement, interstate compact, or executive order fails. *See, e.g.*, *Sierra Club v. Meiburg*, 296 F.3d 1021, 1034 (11th Cir. 2002) ("[C]onsent decree[s] do[] not supplant the Act itself."); *Levy v. Urbach*, 651 F.2d 1278, 1282 (9th Cir. 1981) ("Consistency with the authorizing statute is as much a predicate for validity for an Executive Order as for an agency regulation.").

"textual support" and a "clear statement" from Congress. *Id.* at 718. The *Rapanos* plurality opinion reinforced the holding in *SWANCC*. *See* 547 U.S. at 738.[11] In sum, the Act's provisions emphasizing states' rights and responsibilities cannot be casually dismissed merely because they conflict with EPA's desired methods of regulation. The Bay TMDL thus cannot be upheld at *Chevron* step two.

B. EPA's Position Finds No Support In The Act's Legislative History.

EPA contends that the legislative history of the Act reflects that "Congress sought federal action where state action alone would be ineffective." EPA Br. 53. EPA points to its backstop role under Section 303 (to establish water quality standards and TMDLs) and its authority with respect to Section 402 point source permitting as examples of Congress's desire to "restore the balance of Federal-state effort." *See id.* EPA's cited legislative history, however, does not support its interpretation of the statute.

In 1972 Congress enhanced EPA's role in water pollution control relative to the states, but its focus was on point sources. *See* House Debate on H.R. 11896 (Mar. 27, 1972) (Rep. Dorn), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 343, 466 (1973) ("The heart of the

[11] Contrary to the Law Professors' insinuation, Justice Kennedy's concurring opinion in that case did not categorically state that the clear statement and constitutional avoidance canons are never applicable in CWA cases. *See id.* at 776-77, 782-83. Rather, he merely pointed out that the "concerns addressed in *SWANCC* do not support the plurality's interpretation of the Act." *Id.* at 776.

bill is the new focus on point source limitations."). In contrast, Congress sought to leave the states and local governments in charge of addressing nonpoint source pollution. *See* S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3744 ("The control of pollutants from runoff is applied pursuant to section 209[12] and the authority resides in the State or other local agency"). EPA and its supporters offer no legislative history indicating that Congress intended to let EPA address nonpoint source pollution by, for instance, establishing source limits and deadlines in TMDLs.

EPA faults us for citing 1977 legislative history to show that Congress specifically reserved control of nonpoint sources to states and local governments. *See* EPA Br. 54. That history is indeed relevant. The Supreme Court has considered later legislative histories when construing the 1972 Act. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 137 (1985). Regardless, our claims challenge EPA's application of the CWA as it exists today, *e.g.*, after the 1987 amendment adding Section 319. What the CWA means and authorizes today is obviously relevant here.

In fact, perhaps the most important piece of legislative history relates to the 1987 amendments. Congress wanted to strengthen the Act's provisions regarding

[12] Section 208 (33 U.S.C. § 1288) was originally designated as Section 209 in the Senate bill.

nonpoint source pollution. To do so, it added Section 319, which "establishe[d] a national policy that programs for the control of nonpoint sources of pollution be developed." Section-by-Section Analysis of the Water Quality Act of 1987, reprinted in 1987 U.S.C.C.A.N. 5, 30. Two aspects of the legislative history jump out here. First, none of the debates and reports relating to the 1987 amendments even mentions TMDLs. One would expect that Congress would have at least made mention of any overlap between the new provisions in the "comprehensive" Section 319 nonpoint source framework (*e.g.*, identifying nonpoint sources of impairment and control measures) and the Section 303(d) TMDL process. Second, Congress once again stopped short of giving EPA any authority to establish nonpoint source limits or to set deadlines for putting control measures in place even if states failed to take action.

For these reasons, EPA's assertion of authority cannot be reconciled with the CWA's legislative history.

C. EPA's Regulation Does Not Validate The Bay TMDL.

Finally, EPA's regulation does not support its position in this case. *See* Appellants Br. 54-59. As we pointed out in our opening brief (at 54), the regulation expressly defines a TMDL as merely the "sum" ***of*** allocations, rather than the sum ***and*** allocations. *See* 40 C.F.R. § 130.2(i). EPA has not explained how that regulation justifies expansion of a TMDL to include more than the sum.

Moreover, EPA's rationale (at 9-10) that allocations are necessary for EPA to review and approve TMDLs is faulty. EPA conflates the determination of whether the total load is set at an appropriate level (*i.e.*, one that is sufficiently stringent to meet water quality standards) with whether the total is likely to be achieved and how it is to be achieved. A TMDL writer need not consider pollutant reductions by particular sources—let alone obtain assurances that those sources will achieve those reductions—to confirm whether the total load itself is "set low enough" to achieve water quality standards.

IV. EPA's, Intervenors', And Amici's Remaining Contentions Are Meritless.

EPA and its supporters also raise several non-statutory arguments that are either meritless or irrelevant.

A. If Appellants Prevail, Bay Cleanup Will Proceed.

The record does not support the speculative contentions that efforts to achieve water quality standards in the Bay will be thwarted if this Court vacates the allocations, "reasonable assurance" requirements, and deadlines in the Bay TMDL. *Cf.* Fl. Wildlife Fed'n Br. 16-18; Municipal Assocs. Br. 15; CBF Br. 2.

The total loads of the Bay TMDL—276 such numbers: nitrogen, phosphorus, and sediment loads for each of the 92 tidal Bay water segments—would remain unaffected. Appellants do not contest EPA's authority to promulgate these "totals" at the "level" necessary to achieve water quality

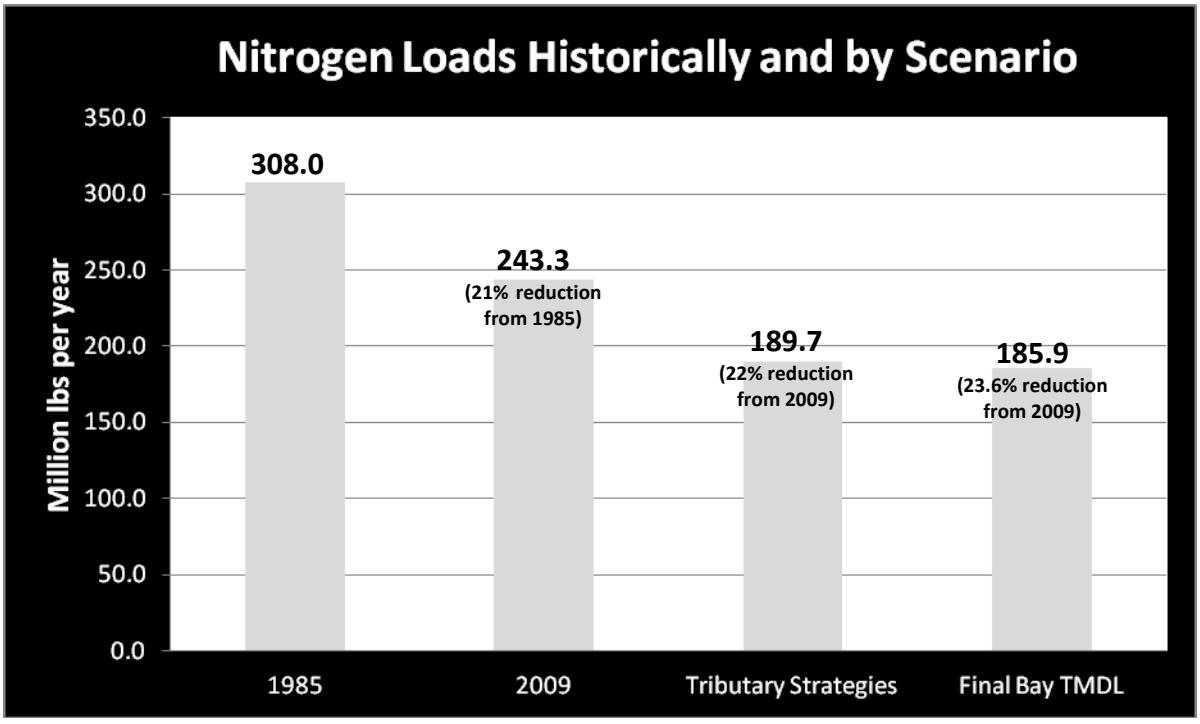
standards. Appellants Br. 19, 29. Thus, these 276 loads will remain as "target pollutant load[s] for each of those tributaries (and their respective States) that would be sufficient to meet Bay water quality standards." EPA Br. 20. If, in the future, EPA determines that any of these levels is not low enough to meet the applicable standards then EPA can either allow the states to modify them or lower the levels itself.

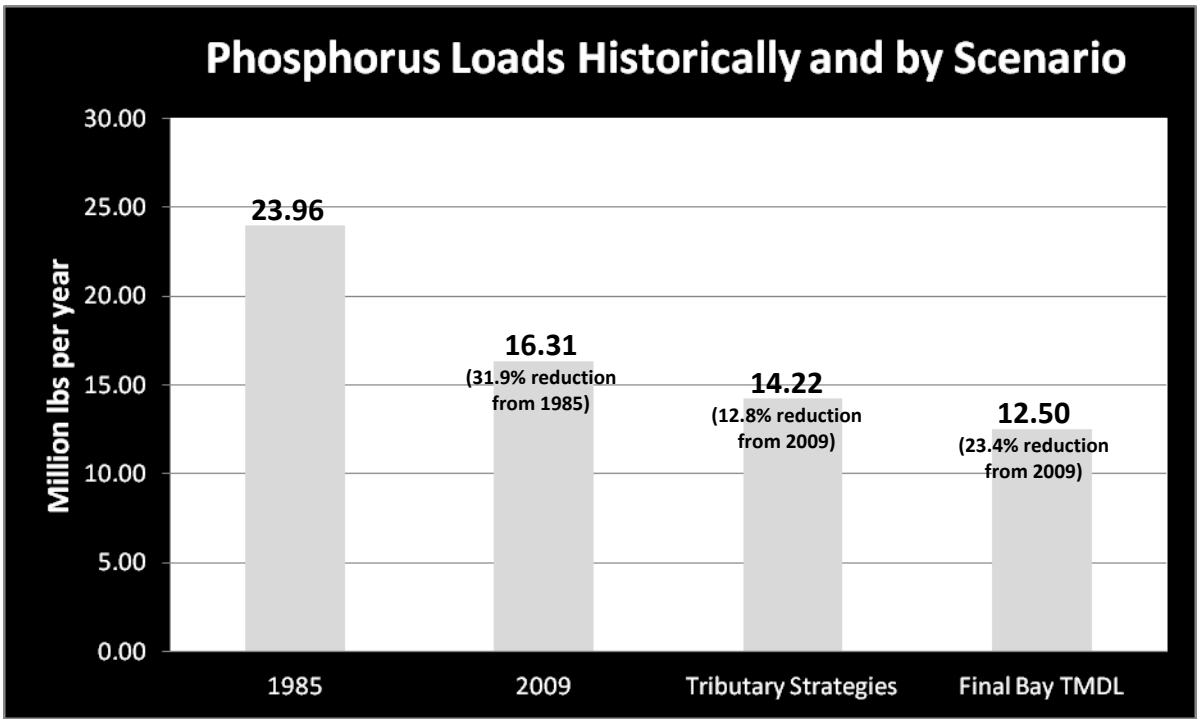
Further, although EPA's establishment of federal allocations, reasonable assurance, and deadlines violates the CWA, those elements can continue to serve as "informational tools" for state and EPA decision-makers. *Cf.* EPA Br. at 19.[13] If, as EPA and its supporters suggest, the Bay States agree with these elements, then each Bay State will continue to include them in its implementation plan. They could also, however, choose to re-apportion allocations or to adapt them over time based on new information, changes in land use, or emerging technologies. Regardless, the allocations would remain as potentially useful information should the Court vacate these aspects of the Bay TMDL.

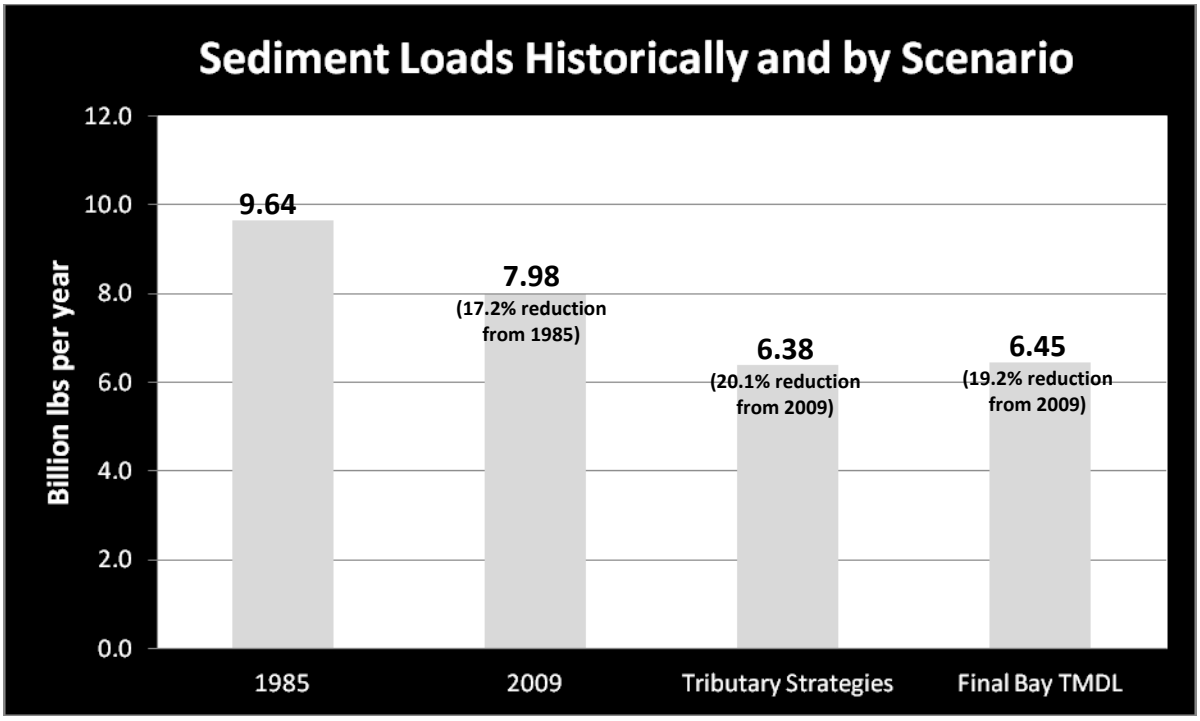
In addition, there is overwhelming evidence—including statements in the briefs filed with this Court—that the Bay States and other stakeholders remain committed to meeting the Bay TMDL's goals. Maryland, Delaware, Virginia, and

[13] EPA's position that allocations are essential elements of TMDLs is undercut by its own (incorrect) view that "they do not bind States or sources." EPA Br. 22.

the District of Columbia have proclaimed their intention to implement strategies to attain the target loads. Maryland et al. Br. 2; Virginia Br. at 10-12. This Court's action vacating the allocations, reasonable assurance requirements, and deadlines in the Bay TMDL would in no way impair the ability of any state to achieve those objectives. It would only allow them the freedom—as Congress intended—to set different allocations and deadlines, if they so choose. There is reason for optimism. By 2010, when EPA promulgated the Bay TMDL, the actions of the Bay States and stakeholders had produced results—achieving significant nutrient and sediment reductions between 1985 and 2009—and were on track to achieve further reductions:




Phosphorus Loads Historically and by Scenario
Million lbs per year
30.00
25.00
20.00
15.00
10.00
5.00
0.00
23.96
16.31
(31.9% reduction from 1985)
14.22
(12.8% reduction from 2009)
12.50
(23.4% reduction from 2009)
1985
2009
Tributary Strategies
Final Bay TMDL


Sediment Loads Historically and by Scenario
Billion lbs per year
12.0
10.0
8.0
6.0
4.0
2.0
0.0
9.64
7.98
(17.2% reduction from 1985)
6.38
(20.1% reduction from 2009)
6.45
(19.2% reduction from 2009)
1985
2009
Tributary Strategies
Final Bay TMDL

JA622-24 (historic and Tributary Strategy loads); JA1106 (final Bay TMDL loads).[14] The Tributary Strategies were poised to achieve further reductions comparable to the Bay TMDL without mandatory federal allocations, "reasonable assurance" requirements, and deadlines. This progress will continue.

EPA's supporters also raise the specter that a ruling in Appellants' favor would undermine cooperation between EPA and the Bay States. These arguments are meritless. The Court's ruling here will not affect the states' ability to consult with EPA about their TMDL implementation planning or any other issue. *Cf.* CBF Br. at 30-31. Nothing would prevent EPA from continuing to assist the Bay States with implementation of the Bay TMDL. In fact, the landscape of federal/state cooperation will not change at all if Appellants prevail, except that the allocations, "reasonable assurance" requirements, and deadlines will no longer be elements of the Bay TMDL. The state watershed implementation plans adopting these goals will be unaffected. CBF's assertion that there is no "legal impediment to the States working with EPA to develop pollutant load allocations for their respective" waters is entirely correct. CBF Br. at 30. The Bay States will always have the right to consult with EPA.

[14] As Appellants have noted, due to lag times between implementation of control measures and observed changes in in-stream nutrient loads, further reductions will occur without any further regulatory action. Appellants Br. 6-7; *see also* JA275 ("once nutrient reduction practices are installed, it may be years or even decades before the Bay benefits from these reductions").

B. The Allocations, Reasonable Assurance, And Deadlines In The Bay TMDL Are Unlawfully Binding.

EPA and its supporters insist that the allocations, "reasonable assurance" requirements, and deadlines in the Bay TMDL are not binding. EPA Br. 22-23; Maryland Br. 14, 17; Municipal Assocs. Br. 16-17. If they believe that, then they should not oppose the relief we seek, which is simply to remove those extra elements from the TMDL.

EPA's (and others') implicit point appears to be that including these elements in a federal TMDL does no real harm to a state's ability to decide for itself how to achieve a TMDL. This is argument is incorrect. Those elements are indeed binding because of the way the CWA, EPA's regulations, and the Bay TMDL itself are written. There are indeed legal consequences to including these elements in a TMDL.

CWA Section 303(e) requires each state to establish a continuous planning process that "will result in plans" that incorporate TMDLs. 33 U.S.C. § 1313(e). If a state fails to establish such a process, EPA can punish the state by revoking its NPDES program. *Id.* § 1313(e)(2). If the TMDL includes the elements that we are challenging here, and the Bay states must incorporate the TMDLs into their Section 303(e) plans, then the CWA itself requires that the allocations, deadlines, and reasonable assurance elements be incorporated into the states' 303(e) plans.

In addition, the Bay TMDL contains wasteload allocations for 478 point sources in the Bay watershed. By EPA regulation, NPDES permit limits must be "consistent with" those wasteload allocations. *See* 40 C.F.R. § 122.44(d). The practical effect of this regulation is that NPDES permit writers must not merely assure that point sources do not contribute to exceedances of water quality standards, but they must set permit limits consistent with EPA's preferences, rather than the state's own.

Finally, by its plain terms, the Bay TMDL's allocation, "reasonable assurance," and deadline provisions have legal consequences. *See* Appellants Br. 8-11. The Bay TMDL itself states that "reasonable assurance" that the allocations "will" be achieved is required.[15] JA1355-56. It further states that changes to the Bay TMDL, "including but not limited to specific [allocations]," require EPA approval. *See* JA1437-38. EPA confirms as much: "formal revisions to the Bay TMDL, like revisions to any TMDL, require EPA's approval." EPA Br. at 24. Thus, the Bay TMDL on its face purports to preclude any state from unilaterally modifying the allocations, deadlines, or reasonable assurance requirements

[15] Any suggestion that the "reasonable assurance" requirements in the Bay TMDL are not binding is particularly illogical. What was the purpose behind requiring states to show that allocations "will" be achieved if that requirement is non-binding?

enshrined therein. This limitation is undeniably "binding" and is contrary to the states' primary role in water quality decision-making under the CWA.

C. This Case Is Justiciable.

On appeal, neither EPA nor Intervenors contest our standing or the reviewability of our claims. Virginia, however, incorrectly claims that there is no "current dispute or controversy between the affected Bay States and EPA." Virginia Br. 13-16.

We are not bringing this claim on behalf of the "affected Bay States," but on behalf of our members. As the district court correctly found, our standing is "self-evident." JA39. Some of our members are point-source dischargers and NPDES permit holders who must comply with the Bay TMDL's standards. JA39-40. Others must implement measures to meet aggregate WLAs. JA40. These economic injuries are directly caused by the challenged portions of the Bay TMDL, could be redressed by a decision of the Court, and are sufficient to confer standing. *See Clinton v. City of New York*, 524 U.S. 417, 434-33 (1998). Although Virginia claims that EPA's construction of the statute did not invade its authority here (at least not yet), that does not prove there is no case or controversy or control the outcome in this case.

CONCLUSION

The judgment of the district court should be reversed.

Dated: August 20, 2014

Respectfully submitted,

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I, Richard E. Schwartz, hereby certify:

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2. That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

3. Pursuant to Local Rule 46.1, that Richard E. Schwartz is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

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Dated: August 20, 2014

/s/ Richard E. Schwartz
Richard E. Schwartz

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the BRIEF FOR PLAINTIFFS-APPELLANTS AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL PORK PRODUCERS COUNCIL, PENNSYLVANIA FARM BUREAU, THE FERTILIZER INSTITUTE, AND U.S. POULTRY & EGG ASSOCIATION was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 20, 2014

/s/ Richard E. Schwartz
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