No. 15-599

IN THE

Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENT PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

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RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Pennsylvania Municipal Authorities Association is a non-governmental corporate party. It has no parent corporations, and no publicly held company has a ten percent (10%) or greater ownership interest in Pennsylvania Municipal Authorities Association.

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I. INTRODUCTION

A. Development of the Chesapeake Bay TMDL

In 2010, the United States Environmental Protection Agency ("EPA") established the Chesapeake Bay TMDL ("Bay TMDL"), which sets forth the "total maximum daily load" ("TMDL") of nitrogen, phosphorous and sediment that can be released into the Chesapeake Bay ("Bay") to comply with the requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The Bay TMDL directly affects six states – Pennsylvania, Maryland, Virginia, New York, West Virginia and Delaware, along with the District of Columbia (collectively the "Bay Jurisdictions") – and sets the allowable sum of pollutants that may be discharged into the Bay, within each of the Bay Jurisdictions.

Certain trade associations, with members who may be affected by the Bay TMDL, including the American Farm Bureau Federation and the National Association of Home Builders ("Petitioners"), brought an action in the United States District Court for the Middle District of Pennsylvania ("District Court") against EPA regarding, *inter alia*, the implementation of the Bay TMDL. Among the allegations made by Petitioners is that all aspects of the Bay TMDL that go beyond simply setting an allowable sum of pollutants (*i.e.*, nitrogen, phosphorous and sediment) that can be discharged into the Bay exceeds the scope of EPA's authority under the Clean Water Act. The District Court ruled against Petitioners, which ruling was later affirmed by the United States Court of Appeals for the Third Circuit ("Third Circuit").

The Bay has been described as one of the most biologically productive ecosystems in the world and is the largest estuary in North America. The Bay produces in excess of five hundred million (500,000,000) pounds of seafood per year, and it has an estimated economic value of greater than one trillion dollars. The watershed area of the Bay itself is 64,000 square miles and contains tens of thousands of water bodies - streams, rivers, lakes and creeks. The watershed area supports various functions, including fishing, farming and tourism. Indeed, a growing population, intensified agricultural and urban development have placed a significant strain on the Bay's ecological health, due in part to the contribution of pollutants to the Bay. According to the TMDL, agriculture alone accounts for forty-four percent (44%) of the nitrogen and phosphorus and sixty-five percent (65%) of the sediment that reaches the Bay. *See* Bay TMDL at 4-29. On the other hand, municipal wastewater treatment plants contribute only approximately seventeen percent (17%) of the total nitrogen and sixteen percent (16%) of the total phosphorus delivered to the Bay. *See* Bay TMDL at 4-10.

The adverse impact of the aforementioned activities on the health of the Bay has not gone unnoticed. A 1982 study concluded that rapid loss of aquatic life in the Bay was due to excessive nutrient runoff, namely, nitrogen and phosphorus. The first multi-state coordinated effort via agreement to restore water quality in the Bay was negotiated in 1983. In 1987, a second multi-state agreement was established, in which the key goal was to "reduce and control point and nonpoint sources of pollution to attain the water quality condition necessary to support the living resources of the Bay." Arguably, the development of the Bay TMDL began in earnest with the

so-called Chesapeake 2000 Agreement, whereby EPA and the Bay Jurisdictions made commitments addressing the needed reduction of pollutants into the Bay. Subsequent reevaluations of the Bay were undertaken and, in 2003, EPA and the seven Bay Jurisdictions established a cap on loads for nitrogen, phosphorus and sediment entering the Bay. In order to achieve the nitrogen, phosphorus and sediment cap loads, the seven Bay Jurisdictions developed their own individual Chesapeake Bay tributary strategies. After further evaluation of the Bay's water quality in 2007, the seven Bay Jurisdictions and EPA reached consensus that EPA would establish a TMDL for the Bay. Target loads for nitrogen, phosphorus and sediment were developed throughout 2009 and part of 2010, and on July 1, 2010 and August 13, 2010, EPA issued refined target loads for these pollutants. The Bay Jurisdictions developed Phase I Watershed Implementation Plans ("WIPs") using these revised allocations.[1] EPA subsequently developed the Bay TMDL in reliance on these plans and, on December 29, 2010, the Bay TMDL was published. The Bay TMDL itself is a detailed document, as it includes point and nonpoint source limitations on nitrogen, phosphorous and sediment for 92 individual water segments, and further allocates those limits to specific point source and nonpoint source sectors (*e.g.* wastewater treatment plants, agriculture). The Bay TMDL anticipates that sixty percent (60%) of its proposed actions will be complete by 2017, with all necessary pollution control measures in place by 2025. *See* Bay TMDL at ES-1.[2]

1. "Phase I WIPs," were documents proposing target pollutant limitations, which included strategies on how the states would achieve such limitations.

2. The Bay TMDL and its appendices are available at http://www2.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-

B. The Clean Water Act

The Clean Water Act ("CWA") is the primary law addressing water quality issues in the United States. Under the CWA, EPA and the states participate in a "cooperative federalism" framework to address the nation's waters. *See generally New York v. United States*, 505 U.S. 144, 167-68 (1992); *see also American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1074 (3rd Cir. 1975) (Adams, J., concurring) (noting that despite establishing a system of cooperative federalism, the CWA "fail[s] to create clear boundaries for the authority of the states and the EPA").

Under the CWA, sources of water pollutants are generally divided into two categories: "point sources" and "nonpoint sources." Point sources are "discernible, confined and discrete conveyances," such as pipes, conduits and channels, which "discharge" pollutants into waters of the United States. 33 U.S.C. § 1362(14). Municipal wastewater treatment plants are considered point sources. The CWA gives EPA regulatory authority over point sources, such as establishing technology-based limits on the discharge of pollutants, which are then incorporated into National Pollutant Discharge Elimination System ("NPDES") permits. *See* 33 U.S.C. § 1342(a)(1).

Sources of pollutants not classified as point sources are considered nonpoint sources, a category that includes such activities as runoff from farmlands and housing construction projects. *See generally Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2012). Although the

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EPA's role in regulating nonpoint sources is less pervasive than its role in regulating point sources, states must submit to EPA a "management program for controlling pollution added from nonpoint sources to navigable waters within the state" for EPA's approval. 33 U.S.C. § 1329(b)(1).

Under Section 303 of the CWA, each state must develop its own water quality standards[3] based on EPA's regulations. *See* 33 U.S.C. § 1313(b)-(c); 40 C.F.R. Part 131. These regulations provide that once developed, the states must submit the water quality standards to EPA for approval. 33 U.S.C. § 1313(c)(2)(A). If a state does not submit water quality standards to EPA, or EPA does not approve a state submittal, EPA must then set the water quality standards for that state. 33 U.S.C. § 1313(c)(3)-(4); 40 C.F.R. § 131.22.

Subsequent to the establishment of water quality standards, each state must prepare a list of waters for which technology-based permit controls (*e.g.*, NPDES permits issued to wastewater treatment plants) alone are insufficient to meet such water quality standards. 33 U.S.C. § 1313(d)(1)(A). These water bodies are generally referred to as "impaired" waters. This may occur, for example, where there are nonpoint sources of pollution discharging into a body of water. *See Meiburg*, 296 F.3d at 1025.

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3. A water quality standard generally consists of a designated use for each particular segment of a water body and water quality criteria necessary to protect such use. *See* 40 C.F.R. § 130.2(d).

For each impaired body of water within its borders, the state is required to establish a TMDL that identifies the maximum daily load of a pollutant or pollutants from all sources (both point and nonpoint), which load must be established to allow the state to "implement the applicable water quality standards with seasonal variations and a margin of safety...." 33 U.S.C. § 1313(d)(1)(C).

Although the CWA itself does not define "TMDL," EPA's regulations implementing Section 303 of the CWA define the term as "[t]he sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). To reiterate, by EPA regulation, waste load allocations are pollutant loads from point sources, and load allocations are pollutant loads from nonpoint sources and natural background sources. 40 C.F.R. § 130.2(g)-(h). Therefore, a TMDL is more than a single number: it is the mathematical sum of pollutant contributions from both point sources (wasteload allocation) and nonpoint sources (load allocation). *See generally* 40 C.F.R. § 130.2(g)-(i).

II. STATEMENT

The Pennsylvania Municipal Authorities Association ("PMAA") is an association that represents approximately 700 sewer and water authorities in Pennsylvania, which collectively provide water and sewer infrastructure services to over six million Pennsylvania citizens. PMAA's mission is to assist water and sewer authorities in providing services that protect and enhance the environment and promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens.

The Pennsylvania Chesapeake Bay Tributary Strategy ("Pennsylvania's Tributary Strategy"), adopted by the Pennsylvania Department of Environmental Protection ("DEP") in 2004, identified more than 180 municipal wastewater treatment plants in the Pennsylvania portions of the Susquehanna and Potomac River basins that would have to implement certain nutrient reduction measures in order to address water quality issues in the Bay.

Subsequent to the publication of Pennsylvania's Tributary Strategy, DEP formed a Point Source Workgroup with PMAA as the co-chair.[4] DEP and PMAA, along with other interested stakeholders, met on numerous occasions to address nutrient reductions from wastewater treatment plants. These meetings, which commenced more than several years prior to the establishment of the Bay TMDL, resulted in an equitable strategy for significant municipal wastewater treatment plants to achieve compliance for nutrient removal. Significantly, the strategy developed by the PMAA-DEP Point Source Workgroup was later incorporated into Pennsylvania's Phase I WIP.[5] Therefore, when Petitioners argue that the Bay TMDL deprived states "from exercising their own judgment about the best and most efficient ways to achieve the goals for the Bay," such a position is clearly misplaced and contrary to the actual process undertaken in Pennsylvania to address nutrient reductions necessary

4. Pennsylvania Chesapeake Watershed Implementation Plan, excerpts reproduced at JA980 of the Joint Appendix in the Third Circuit. *See* JA991.

5. Excerpt from Pennsylvania Chesapeake Watershed Implementation Plan at JA1010-JA1016 of the Joint Appendix in the Third Circuit.

to meet the requirements of the Bay TMDL. *See* Petition for Certiorari ("Petition"), p.25. In fact, in its Phase I WIP, DEP acknowledged that "due to the development of [the Point Source Strategy] with the involvement of numerous stakeholders, the wastewater point sources will achieve their allocated reductions."[6] Indeed, in a 2015 presentation, DEP acknowledged that the wastewater treatment plants in Pennsylvania had already achieved the Bay TMDL's goals of sixty percent (60%) reduction by 2017.[7]

On October 13, 2011 PMAA was granted leave, pursuant to Fed. R. Civ. P. 24, by the District Court to intervene in this lawsuit. More specifically, PMAA intervened in order to address then-Plaintiffs' claims concerning the TMDL's pollutant loading allocations and corresponding reductions. PMAA filed a brief and argued its position in the District Court and took a similar position in a brief and at oral argument before the Third Circuit. PMAA now respectfully requests that the United States Supreme Court deny the Petition in the case *sub judice*.

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6. Excerpt from Pennsylvania Chesapeake Watershed Implementation Plan at JA1018 of the Joint Appendix in the Third Circuit.

7. *See* Pennsylvania Department of Environmental Protection's Office of Water Management Power Point presentation from January, 2015 "available" at http://pacd.org/webfresh/wp-content/uploads/2014/03/Chesapeake-Bay-101_Wolf_Tesler_Zemba.pdf (last visited January 14, 2016). *See* Power Point slides entitled Nitrogen Loads (p.12) and Phosphorus Loads (p.14), which both indicate that no further nitrogen or phosphorus reductions are required from the wastewater sector to meet the sector's 2017 Bay TMDL goals.

III. SUMMARY OF ARGUMENT

Petitioners make several arguments in support of their Petition. Distilled, these arguments can be broken down into two broad categories: 1) the Third Circuit's decision conflicts with holdings of other federal courts of appeals with respect to the implementation of the Bay TMDL; and 2) by assigning pollutant allocations to sources and categories of sources across the Bay Watershed, rather than simply setting only an aggregate upper limit amount of the pollutants that can be discharged into the receiving waters of the Bay Watershed, EPA exceeded its authority under the CWA.

As more fully defined below, PMAA believes that there is no split in the federal circuit courts and that Petitioners' argument to the contrary is merely a thinly veiled attempt to have this Court grant their Petition under one of the oft-cited criteria for granting a petition for a writ of certiorari. Interestingly, on the one hand, Petitioners argue that the Bay TMDL is "the most far-reaching TMDL ever developed" and, yet, they cite to cases which, in Petitioners' own words, are merely in "substantial tension" with the Third Circuit's decision. *See* Petition, p.30.

Similarly, Petitioners' argument that EPA is limited to setting only an overall load limit for each pollutant for each segment of water in the Bay Watershed, must also fail. As addressed *infra*, Petitioners simply ignore the relevant EPA regulations for defining and expanding upon the term "TMDL." Moreover, the Bay TMDL does not usurp the rights of the states in determining how the Bay TMDL is to be implemented, but rather reaffirms the

states' rights to determine their water quality goals and how they will achieve the necessary loading reductions through the development of watershed implementation plans.

IV. ARGUMENT

A. The Decision of the Third Circuit Does Not Conflict With the Holdings of Other Circuit Courts

The Rules of the Supreme Court of the United States set forth the following guidelines for granting a petition for a writ of certiorari:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

> lower court, as to call for an exercise
> of this Court's supervisory power...

U.S. Sup. Ct. R. 10.

In the case *sub judice*, the District Court noted that it was a question of first impression whether a TMDL could include more than a quantity of a pollutant. *Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289, 313, 316–18 (M.D. Pa. 2013). According to the Third Circuit, since the District Court's Opinion, there has been no development in the case law on that point. *See* Appendix attached to Petition ("Pet. App."), 20a. Thus, there is no other case that Petitioners can cite to support their argument that a split in the circuit courts exists, which could warrant review by this Court.

Notwithstanding the lack of cases in conflict with the Third Circuit, Petitioners still cite to certain decisions, which are simply not persuasive, to show that a split in the circuit courts exists. For example, *Sierra Club v. Meiburg* is very fact specific, and focuses on the modification of a consent decree, not the meaning of the term "total maximum daily load." Moreover, there is a fundamental difference between the "implementation plan" in *Meiburg* and what is at issue in the case *sub judice*. In *Meiburg*, the Sierra Club moved the court to order EPA to prepare implementation plans for the 124 TMDLs that the agency had established in 1998. *Meiburg*, 296 F.3d at 1028. Here, there is no argument for a separate and distinct implementation plan. Instead, Petitioners' argument is that the Bay TMDL permits EPA to allocate pollutant levels among various source sectors, whereas *Meiberg* dealt with an entirely separate implementation plan—

one requested well after the TMDL was established. Therefore, the *Meiburg* case is not germane to the case *sub judice*.

Petitioners also cite to both the *Defenders of Wildlife v. U.S. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) and *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002) to support their position that a TMDL is merely one number for each pollutant, and nothing more. In *Defenders of Wildlife*, the court observed that "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined." *Defenders of Wildlife*, 415 F.3d at 1124 (citation omitted). Similarly, in *San Francisco BayKeeper*, the Court states that "TMDLs are the maximum quantity of a pollutant the water body can receive on a daily basis without violating the water quality standard." *San Francisco BayKeeper*, 297 F.3d at 880. Significantly, neither case states that a TMDL *cannot* include pollutant allocations among different source sectors. The lack of discussion on this issue in these cases hardly supports Petitioners' argument that there exists a split in the circuit courts, which could warrant review by this Court.

B. EPA's Allocation of Pollutant Loadings is Lawful Under the Clean Water Act

In the case *sub judice*, Petitioners argue that Congress specifically authorized EPA to publish TMDLs at a level necessary to implement the applicable water quality standards which, under its reading, is just a "total" number that cannot, *inter alia*, include allocations among point and nonpoint sources. In other words, Petitioners interpret the words "total maximum daily load" to consist

of *only* a number representing the maximum amount of a pollutant that can be discharged into a body of water, and nothing more.

According to the Third Circuit, this case is governed by the two-part test under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), a standard on which the parties agree. *See* Pet. App. 17a. Under *Chevron* "Step One," courts inquire as to "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. However, if the intent of Congress is ambiguous, courts proceed to *Chevron* "Step Two," in which an agency's interpretations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. In other words, when reviewing an agency interpretation under *Chevron* "Step Two," a court will "extend considerable deference to the agency and inquire only whether it made 'a reasonable policy choice' in reaching its interpretation." Pet. App. 19a (citing *Nat. Cable and Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967, 986 (2005)).

1. EPA Did Not Exceed its Authority under the CWA by Including Point and Nonpoint Source Allocations in the Bay TMDL

As the Third Circuit aptly noted, Petitioners' "Step One" and "Step Two" arguments are essentially the same. *See* Pet. App. 43a. In specifically addressing "Step One," the Third Circuit correctly observed that the word "total" in "total maximum daily load" is not

unambiguous, but "susceptible to multiple meanings." Pet. App. 42a. Significantly, the Third Circuit also found that the structure of the CWA "supports that TMDLs need to account for point and nonpoint sources..." *Id.* Finally, the Third Circuit also observed that "expressing the allocation of pollution limits between EPA-regulated point sources and state-regulated nonpoint sources furthers the Clean Water Act's goal of achieving water quality standards." Pet. App. 43a.

Although Congress required EPA to establish TMDLs under CWA Section 303, nowhere in Section 303 did Congress expressly prescribe how EPA is to do so. In fact, the requirements that a TMDL (1) be established at a level necessary to implement water quality standards, with (2) seasonal variations, and (3) a margin of safety that takes into account (4) any lack of knowledge concerning the relationship between effluent limitations and water quality, taken together, tend to suggest that "total maximum daily load" is simply a statutory term of art that is meant to be augmented by regulation and certainly something more than one number. *See generally* Pet. App. 25a-26a. It is precisely these statutory factors under Section 303(d) of the CWA which caused the Third Circuit to correctly state "that Congress wanted an expert to give meaning to the words it chose..." Pet. App. 26a. Under *Chevron* "Step Two," when "Congress has explicitly left a gap for the agency to fill, there is an express delegation of the authority to the agency to elucidate a specific provision by regulation." *Chevron*, 467 U.S. at 843-44.

Notwithstanding the aforementioned, Petitioners argue that there is no support for the Third Circuit's approval of EPA's "regulatory scheme" in the Bay TMDL. Petition, p.14. Specifically, Petitioners argue that EPA cannot set both point and nonpoint source allocations, but that EPA is bound under the CWA to publish but one number, the total allocation of pollutants, in the Bay TMDL. *See* Petition, p.19. (The CWA "plainly requires a single number that is the sum of the constituent sources of pollution."). However, Petitioners' position discounts and plainly ignores the long-standing EPA regulations implementing the statutory TMDL directives. *See* 40 C.F.R. §§ 130.2 and 40 C.F.R. § 130.7. In fact, Petitioners' argument seems not to be with the CWA *per se*, but with EPA's regulations implementing the CWA, a challenge that is many years too late.

The importance of EPA's regulations in the context of Petitioners' arguments cannot be overstated. Put simply, a TMDL is a number - a calculation that represents the total daily load of a pollutant or pollutants that a water body is able to assimilate without violating applicable water quality standards (*e.g.*, fishing, swimming). The calculation takes into account both (1) point source discharges (*e.g.*, wastewater treatment plans and municipal stormwater runoff) and (2) nonpoint source discharges (*e.g.*, runoff from agricultural enterprises, natural background). *See* 40 C.F.R. § 130.2(i).

According to EPA's regulations, the portion of a surface water's loading capacity that is allocated to existing and future point source discharges is referred to as the "wasteload allocation" ("WLA"). *See* 40 C.F.R. § 130.2(h). The portion of a receiving water's loading

capacity that is attributed to existing or future nonpoint sources of pollution is referred to as the "load allocation" ("LA"). *See* 40 C.F.R. § 130.2(g). The terms WLA and LA are important because they are necessary and integral aspects of the equation used to calculate a TMDL, which is precisely how EPA developed the Bay TMDL, and which is at the heart of Petitioners' challenge in the case *sub judice*.

Federal regulation defines a TMDL as:

> The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

40 C.F.R. § 130.2(i). Thus, by regulatory definition, a TMDL must take into consideration pollution both from point sources and nonpoint sources.

Again, Petitioners have not specifically challenged the aforementioned regulation by name, but instead focus on a strained interpretation of the CWA to suggest

that EPA can only establish a single "total" load for a particular pollutant discharged to a body of water, and has no authority to allocate loadings for that pollutant to various sectors. However, Petitioners ignore the obvious fact that the aforementioned regulations, promulgated to implement the TMDL program, state otherwise.

Therefore, to the extent that EPA has the authority to establish the Bay TMDL under the CWA, any inclusion of allocations amongst point and nonpoint sources in the TMDL must be considered consistent with the CWA. "As should be apparent, TMDLs are central to the [CWA's] water-quality scheme because . . . they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water." *Meiburg*, 296 F.3d at 1025 (internal quotation marks omitted).

Thus, to summarize, the Bay is a nonpoint source–dominated system. In such a system, a TMDL must address nonpoint sources and include allocations to those sources to adequately address the attainment of water quality standards – a result consistent with the objectives of CWA Section 303(d) and EPA's regulations implementing CWA Section 303. To do otherwise would be contrary to the goals of the CWA and the restoration of the Bay.

C. The Bay TMDL Supports "Cooperative Federalism"

As the Third Circuit notes, "[i]nterpreting 'total maximum daily load' as requiring one number and nothing more is in tight tension with the CWA's goal of providing a cooperative framework for states and

the federal Government to work together to eliminate water pollution." Pet. App. 42a. Petitioners nevertheless claim that the Bay TMDL intrudes on land use, an area traditionally regulated by states. Petitioners suggest that local governments' authority over water quality and land use decisions are being usurped by the Bay TMDL. With this argument, Petitioners seemingly attack the *implementation* of the Bay TMDL, as set forth in the states WIPs, not EPA's *allocation* of the total nutrient load. Respectfully, Petitioners ignore the role played by the states in the TMDL development process.

It is important to note that TMDLs serve as informational tools that assist in developing plans to address impaired waters. *See* Pet. App. 10a n.4. *See also generally Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). Thus, being an informational tool, a TMDL does not directly impose controls or pollutant limits, but instead is implemented only through further action, such as the issuance of NPDES permits (which in Pennsylvania, as in most other states, is the responsibility of the state). The TMDL process is designed to create a mechanism to integrate the management of both point and nonpoint sources of pollution that together contribute to the impairment of a body of water, such as the Bay.

In examining the role that states played in the development of the Bay TMDL, it is instructive to look at Pennsylvania. A closer examination of the events in Pennsylvania leading to the development of the Bay TMDL shows that Pennsylvania's power was not usurped in the process. *See generally* Bay TMDL at 5-1 through 5-45, 6-1 through 6-53 and 8-24 through 8-27. EPA used modeling tools to develop WLAs and LAs for use in the

Bay TMDL, gave these calculations to Pennsylvania and the other Bay Jurisdictions, and asked that each prepare a strategy on how that particular jurisdiction planned to meet the required reductions. DEP, acting for Pennsylvania, subsequently prepared a strategy to meet those WLAs and LAs within Pennsylvania by creating a WIP. Based upon DEP's WIP and the WIPs prepared by the other Bay Jurisdictions, EPA established the Bay TMDL. *See* Bay TMDL at ES-1.

Therefore, in Pennsylvania, it was the Commonwealth, through DEP, that developed the policy to allocate the burdens of achieving water quality goals that was ultimately incorporated into the Bay TMDL. As EPA acknowledged, the "TMDL is shaped in large part by the jurisdictions' plans to reduce pollution … [n]ow the focus shifts to the jurisdictions' implementation of the WIP policies and programs that will reduce pollution on-the-ground and in-the-water." *See* Bay TMDL at ES-2. According to the Bay TMDL, "Pennsylvania's final Phase I WIP articulated a strategy to achieve its TMDL allocations." *See* Bay TMDL at 8-27. That strategy was chosen by Pennsylvania and is articulated in Pennsylvania's WIP, which addresses both nonpoint sources and point sources. Specifically, Pennsylvania's WIP provides that the Commonwealth, not EPA, is "developing a nonpoint source compliance effort focused on two major sectors: agriculture and stormwater."[8] Simultaneously, the Commonwealth developed a strategy to address point source dischargers:

8. *See* excerpt from Pennsylvania Chesapeake Watershed Implementation Plan at JA990 of the Joint Appendix in the Third Circuit.

> To achieve targeted point source reductions to the Bay, DEP formed a Point Source Workgroup with the Pennsylvania Municipal Authorities Association as the co-chair. *The workgroup proposed an allocation strategy* to determine the individual cap loads for the 183 largest point source sewage discharges into the Bay watershed.
>
> DEP ultimately adopted this allocation and permitting strategy. The primary concept in the strategy was to create a level playing field for all of the municipalities. This was done by having [m]ost facilities meet cap loads based on their design flow with a total nitrogen concentration of 6 milligrams per liter (mg/L) and total phosphorus concentration of 0.8 mg/L, there have been some concerns raised on Pennsylvania being forced to the limit of technology with our sewage treatment plants. *We will stand behind the strategy we agreed to in the past. We think it is the most cost effective and reasonable approach.*[9]

This is hardly indicative of an unlawful intrusion on states' authority or state authority being usurped by EPA.

Thus, Petitioners are incorrect in their argument that the allocation of pollutant loadings was an unlawful intrusion on states' authority. To the contrary, no

9. *See* excerpt from Pennsylvania Chesapeake Watershed Implementation Plan at JA991 of the Joint Appendix in the Third Circuit (emphasis added).

such intrusion took place because the states, such as Pennsylvania, were actively involved in the Bay TMDL development and implementation process.

Comments from EPA's Office of Inspector General underscore the significance of the aforementioned PMAA-DEP Point Source Workgroup strategy in the overall context of the Bay TMDL allocation process and the critical importance of considering both point and nonpoint allocations in the context of the Bay TMDL. According to EPA's Office of Inspector General, "[t]he concept of 'fair and equitable' nutrient allocations among the various partners underlined the collaborative process used to derive the final 2010 nutrient allocation commitments."[10] Further, "[r]esetting nutrient wasteload allocations for municipal or industrial wastewater facilities as a result of other sectors not delivering on their commitments could undermine the agreement achieved by the states amongst themselves and with their nutrient sources."[11] Therefore, as EPA's Office of Inspector General aptly noted, "[a]dditional reductions from the wastewater treatment community, both municipal and industrial, are not large enough to compensate for shortfalls from the agricultural and developed land sectors."[12]

Thus, to summarize, the watershed approach used by EPA and upheld by the Third Circuit, which requires

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10. Reproduced at Joint Appendix in the Third Circuit, at JA861

11. *Id.*

12. Reproduced at Joint Appendix in the Third Circuit at JA862

that both point and nonpoint source loading allocations be included in the Bay TMDL, is an example of cooperative federalism and is the best mechanism to ensure an equitable restoration of one of our nation's most prized resources.

1. The Costs of Restoration of the Bay Should be Equitably Distributed

The approach taken by EPA in the Bay TMDL, whereby it allocates pollutant loadings to specific sectors, is especially important in this case, because the Chesapeake Bay Watershed is a nonpoint source dominated system. Therefore, it makes practical sense that, to restore the health of the Bay, the costs of restoration must be addressed equitably according to the relative contribution of pollutants that the various sectors discharge to the Bay. Not surprisingly, Petitioners and Amici Curiae argue that the Bay TMDL should be set aside, with the hope that they will avoid the costs to restore the Bay, which rightfully lie at their doorstep. Interestingly, both Petitioners and Amici Curiae raise significant concerns regarding the likely cleanup costs associated with the restoration of the Bay, but seem to ignore the fact that someone will have to bear these costs. Significantly, however, neither Petitioners nor Amici Curiae challenge the pollutant levels set by EPA for the attainment of water quality standards or how they were derived; rather, their only challenge is how those numbers are allocated amongst the various sectors. Therefore, although Petitioners and Amici Curiae agree that much needs to be done to restore the Bay, they just want to foist the costs of such restoration onto other sectors.

Petitioners' and Amici Curiae's acceptance of the levels of pollutants that can be safely assimilated by the Bay in order to attain water quality standards suggest their understanding that cleaning up the Bay is an expensive proposition. PMAA appreciates the economics of restoring the Bay's health, but the treatment plants in Pennsylvania have nevertheless "stepped to the plate" to meet the requirements of the Bay TMDL and, by doing so, have already met their 2017 pollution reduction goals for nitrogen and phosphorus. *See supra*, p.8, note 7. These wastewater treatment plants should not be expected to incur any additional costs, and it is time for the other sectors that contribute pollutants to the Bay to take responsibility and do their fair share. Amici Curiae Chamber of Commerce of the United States of America, *et al*, argue that "agriculture within the watershed will be subject to significantly increased regulatory burdens" and that "[t]he TMDL will impose more costs through regulation of agricultural nonpoint sources..." Amici Curiae Chamber of Commerce of the United States of America Brief, p.12, n.3. As stated earlier, agriculture is the primary source of pollutants to the Bay, therefore, agriculture will have to incur a significant portion of the costs to restore the Bay. It is only fair and equitable that agriculture do its fair share and the Bay TMDL provides a mechanism to do so.

Likewise, Amici Curiae States of Kansas, Indiana, Missouri, *et al*, argue that the Bay TMDL includes nearly 700 allocations for nonpoint sources and suggest that "this vast regulatory regime will cost states tens of billions of dollars to implement." Amici Curiae States of Kansas, Indiana, Missouri, *et al* Brief, p.13. Here, again, Amici Curiae do not dispute the total level of pollutants that

may be assimilated by the Bay under the Bay TMDL; therefore, since they essentially observe that restoring the health of the Bay is necessary, they must also acknowledge that the cost of such restoration should not be borne by those sources that have already spent significant sums of money to meet their allocated responsibility under the Bay TMDL.

Finally, Petitioners themselves suggest that the cost of state compliance with the Bay TMDL "is staggering – tens of billions of dollars." Petition, at i. What Petitioners fail to acknowledge is that the "total" pollutant load levels set forth in the Bay TMDL are levels that the Bay TMDL requires be met, irrespective of how they are met. While PMAA clearly understands the economics associated with the restoration of the Bay, costs associated with such restoration must be distributed equitably and based upon a sector's contribution to the pollution in the Bay. That being said, the wastewater treatment plants have already done their fair share, and it is now time for other sectors to bear *their* fair share for the restoration of the Bay.

V. CONCLUSION

For all the reasons herein, PMAA respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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Date: January 19, 2016

SUPREME COURT OF THE UNITED STATES

No. 15-599

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AMERICAN FARM BUREAU FEDERATION, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

---X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,948 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2016.

____

Mariana Braylovskiy

Sworn to and subscribed before me
this 19th day of January, 2016.

____

Eli Melendez

#263000

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STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Mariana Braylovskiy, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Intervenor Respondent.*

That on the 19th day of January, 2016, I served the within *Brief in Opposition for Intervenor Respondent Pennsylvania Municipal Authorities Association* in the above-captioned matter upon:

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by depositing three copies of same, addressed to each individual respectively, and enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service, via Regular Mail.

That on the same date as above, I sent to this Court forty copies of the within *Brief in Opposition for Intervenor Respondent Pennsylvania Municipal Authorities Association* through the United States Postal Service by Express Mail, postage prepaid.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of January, 2016.

____
Mariana Braylovskiy

Sworn to and subscribed before me this 19th day of January, 2016.

____
Elias Melendez

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