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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

We demonstrated in our petition that EPA's Chesapeake Bay "total maximum daily load" makes nonsense of the word "total" by imposing inflexible allocations of pollutant loads over small geographic areas by source types, as well as rigid deadlines for compliance regardless of cost or feasibility. Not only are those requirements out of step with the plain language of the statute, but they mean that EPA, rather than the States, gets to decide how the burdens of achieving water quality goals are shared among land uses like farming, construction, and forestry. Congress, however, assigned responsibility for making such decisions to the States, which are better attuned to local economic and social needs.

As 22 States explain in urging the Court to grant certiorari, EPA's approach to the Bay TMDL "relegat[es] States to the role of EPA's agents for implementing EPA's preferred approach to satisfying water quality standards." States' Am. Br. 2. Beyond that, a number of Bay State counties, 92 Members of Congress, forestry-industry representatives, and trade groups for both large and small businesses nationwide have joined in asking this Court to review EPA's unwarranted federalization of land use policy.

Against that background, the Court should take this opportunity to decide once and for all whether the Bay TMDL—hailed by the President as a model that will be followed nationwide (Pet. 3, 33)—comports with the CWA's plain language and cooperative-federalism design.

A. The Third Circuit was wrong to defer to EPA's rewriting of the Clean Water Act

1. The statutory text is unambiguous. EPA admits that a "total maximum daily load" is properly understood as "the greatest amount of pollutant load [a water] segment can bear" from "point sources," "nonpoint sources," and natural background, "without exceeding water quality standards." U.S. Br. 4. It further admits that the ordinary definition of "total" is, in noun form, "summation" and, in verb form, "to add up." U.S. Br. 14 (quoting *Webster's Third New International Dictionary* 2414 (1993)).

All of that leads to a straightforward conclusion: A TMDL is the maximum sum of pollutant loads from all sources that would achieve water quality standards. That number alone is the "*total* maximum daily load."

EPA takes the contrary position that "'total' may reasonably be understood to permit a TMDL to include not only a bottom-line number, but constituent elements as well." U.S. Br. 14. That makes no sense. The "total" of 6 and 4 is *not* 6 and 4; it is *10*. That is an important difference, because someone asked to identify the best allocation of the number 10 between two constituent parts might say 7 and 3, or 8 and 2, rather than 6 and 4.

In response, EPA insists (at 15) that, in calculating a TMDL, it "must consider how an overall load might be achievable through feasible reductions in pollutants from the variety of sources and sectors" to arrive at a single total load that a water can bear. That also makes no sense. Calculating a TMDL entails a simple comparison of the present state of the water with the water quality standard that must be achieved. Allocation of a TMDL among constituent sources (that is, its "apportion[ment]" or "divi[sion]" among constituent

sources, *Webster's Third New International Dictionary* 57 (1986)) is a subsequent question—one that Congress reserved exclusively for the States.

EPA insists that the word "implement" requires it to "assess whether the TMDL can be effective in practice," which in turn requires it to "consider how an overall load" should be allocated among "the variety of sources and sectors that contribute" pollutants. U.S. Br. 15 (citing 33 U.S.C. § 1313(d)(1)(C)). Even supposing that were true, it does not follow that because EPA must "consider" sources and sectors in its decision-making process, specific allocations are properly included in the TMDL itself. We made this point in the petition (at 20), but EPA ignores it.

EPA's assertion (at 15-16) that Congress ratified its reading of "total" is wishful thinking. Section 1313(d)(4)(A) adverts to "a total maximum daily load or other waste load allocation established *under this section*" (emphasis added). Section 1313 separately requires States to have "continuing planning process[es]" to establish strategies and practices that include "adequate implementation" of water quality standards. It is those state plans, and not EPA-imposed TMDLs, that rightly incorporate "waste load allocations" among sources.

2. We showed in the petition (at 21-22) that the words "total maximum daily load" cannot be stretched to authorize the setting of deadlines or extraction of assurances from the States. EPA does not directly disagree. It says only that in its decision-making process, it had "to gather the information it needs to make a 'reasoned judgment' about whether a TMDL will be effective to meet" applicable water quality standards. U.S. Br. 16. But there is a vast difference between "gathering information" to assist in analysis

and demanding "reasonable assurances" that States will meet prescribed deadlines. Notably, while notice-and-comment rulemaking requires an agency to *disclose* its reasoning, such data and deliberations do not become elements of final rule.

3. We demonstrated (Pet. 26-28) that even if the words "total maximum daily load" were ambiguous, deference would not be warranted because (1) States' traditional authority over land use tips the scale in favor of state, rather than federal, regulation; (2) congressional silence limits, rather than enlarges, agency authority; (3) Congress must speak expressly if it wishes to assign to an agency decisions of vast economic and political significance; and (4) as part of an appropriations measure in 2000, Congress rejected precisely the approach reflected in the Bay TMDL.

EPA talks past the first two points, asserting without analysis that congressional silence "reinforces EPA's authority." U.S. Br. 21. For reasons that go unanswered (see Pet. 27), that is wrong.

As to the third point, EPA asserts that the Bay TMDL is just like "thousands of [other] TMDLs" promulgated over the past three decades. U.S. Br. 21. But EPA tellingly fails to cite a single example. That is unsurprising, because no other EPA-promulgated TMDL of which we are aware has ever attempted to enforce thousands of sector-based allocations with deadlines, assurances, and a compliance framework. This is an unprecedented enlargement of EPA's role under a provision that is "central to the Clean Water Act's water-quality scheme." *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).

Beyond that, EPA acknowledges that the Bay is "important both ecologically and economically, with an estimated value of more than *$1 trillion*." U.S. Br. 6

(emphasis added)); accord Pa. Municipal Auth. Ass'n Opp. 2. And no one denies that the Bay TMDL will impose many tens of billions of dollars in costs on six States and the District of Columbia (Pet. 11-12) and affect daily life for some 17,000,000 Americans. EPA itself touts the TMDL as a "landmark" regulation. See Press Release, *EPA Establishes Landmark Chesapeake Bay 'Pollution Diet'*, Dec. 29, 2010, perma.cc/DDJ6-XZ9T. It would blink reality to say that the Bay TMDL does not "regulate a significant portion of the American economy," with "vast 'economic and political significance.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014). In circumstances like these, deference is not warranted.

As for Congress's enactment of a spending prohibition in 2000, EPA says that the measure "does not suggest that Congress objected to any particular provision of the rule regarding 'reasonable assurances.'" U.S. Br. 22. But there is no mistaking the similarities between the rule that Congress rejected and the Bay TMDL. Both expand the concept of a TMDL to include deadlines, milestones, and "reasonable assurances" over vigorous opposition.

B. EPA's regulatory overreach has upset the CWA's federal-state balance

EPA admits how a TMDL is *supposed* to work. It is supposed to be an "informational tool" that leaves it to States to determine how a "source or category can reduce its discharge of a pollutant to the necessary level." U.S. Br. 5. EPA concedes (at 6) that the CWA leaves it to the States to "decide that certain nonpoint sources should be subject to greater control than others" and that "particular pollution reduction measures should be employed in certain locales but not others."

But that is not how the *Bay* TMDL works. EPA admits that it "imposed" as part of the TMDL its own "adjustment[s]" on States and threatened States that did not comply with EPA's view of what is "adequate and feasible." U.S. Br. 8-9. EPA admits, moreover, that it imposed allocations for "particular water segments" by land-use "sector," for changes to which "EPA approval would be required." *Id.* at 19-20. And all of that is backed up by "rigorous accountability measures" (TMDL ES-1) to force state compliance with the federal plan, including the specter of "revision of the TMDL allocations" to "[e]stablish finer scale" allotments among source sectors. TMDL ES-2, 7-12.

Respondents conjure a picture of federal-State cooperation that ignores how allocations by land-use "sectors" will tie local governments' hands in planning the futures of their communities. EPA, for example, pretends that the Bay TMDL "does not specify the measures that the Bay watershed States should take to reduce pollutant levels in accordance with the TMDL." U.S. Br. 23; accord *id.* at 19. But that is *exactly* what it does—it dictates how much loading must be reduced over narrow areas from agricultural activities, as opposed to other land uses.

To be sure, the TMDL does not expressly dictate *how* reductions are to be achieved—but the allocation of specific load reductions *to* agriculture is an enormously consequential land-use decision in its own right. And as a practical matter, allocations often *do* dictate the measures that States must adopt—taking agricultural land out of production all together, for example. See Pet.12. Thus, as Bay State counties have told the Court, the TMDL requires them to undertake "costly and extensive changes to their zoning and other

land-use laws and regulations." Lebanon Cty. Am. Br. 3. That is a picture of dictation, not cooperation.[1]

EPA rejoins that the TMDL "did not reflect a usurpation of state authority," because "'the relevant states and the EPA agreed that the EPA would draft the TMDL in the first instance.'" U.S. Br. 19. That begs the question. If EPA properly understood a TMDL to be a cap on daily pollutant loading, we would agree that there is no usurpation because the CWA expressly authorizes EPA to take on that role. Pet. 6-7: U.S. Br. 17-18. But the CWA does *not* allow a transfer of authority from the States to EPA to set source load allocations and deadlines, under the guise of setting a TMDL. When it comes to such matters, which are at the heart of nonpoint-source regulation, the CWA constrains EPA to influencing the States with "the 'threat and promise' of federal grants," no more. *Or. Nat. Desert Ass'n* v. *Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

Thus, the question here is whether EPA's reconceptualization of the Bay TMDL to include a detailed federal implementation framework impermissibly upsets the CWA's mandatory federal-state balance. It plainly does. EPA has hardly hidden that fact—as its own representative told the States, "this was EPA's plan," and "there was nothing on the table for a vote." JA552. In the end, EPA's allocations were forced on the States by EPA (*e.g.*, JA1086-88) and overrode State objections that the TMDL should contain "a minimum amount of information, leaving flexibility for the states." CBFSJA24 (statement of Virginia representative).

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[1] Respondents' focus on effluent limitations on point sources (*e.g.*, CBF Br. 23-25, 27) is irrelevant to EPA's usurpation of traditional local power over *non*point-source regulation.

Correcting the Third Circuit's error as to that issue, before it becomes the basis for watershed-wide TMDLs over the Mississippi River and other multistate basins, is of the utmost importance—as the 22 States next in EPA's crosshairs have explained.[2]

At the same time, the Court need not be concerned that checking EPA's overreach will hinder progress in restoring the Bay. States had made significant improvements before measures taken under the TMDL had any impact. Overall water quality in the Bay has improved 40% since the early 1980s. *About CBF's State of the Bay Report*, perma.cc/68QN-ALML. A significant part of that reduction is the result of changes in agricultural practices. See USDA, *Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Chesapeake Bay Region*, perma.cc/3V26-U64K. Allowing the States greater flexibility to adapt their plans will strengthen their ability to achieve a healthy Bay at reduced cost to local economies. James Shortle, *et al.*, *Final Report* 45 (Aug. 2013), perma.cc/Z3CK-6F5T (Bay States could achieve same results as the TMDL at 30% lower cost through best management practices).

C. The lower courts are in need of this Court's guidance

Although EPA insists that "there is no conflict between the decision below and the decision of any other court of appeals" (U.S. Br. 22), it makes no effort to square the decision below with the Tenth Circuit's

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[2] Respondents note that none of the Bay States have filed in support of certiorari. They ignore the brief of affected rural counties. Besides, "it makes no difference to the *statute's* stated purpose of preserving States' 'responsibilities and rights' that some States wish to unburden themselves of them." *Rapanos* v. *United States*, 547 U.S. 715, 737 n.8 (2006) (plurality opinion) (citation omitted).

decision in *Defenders of Wildlife* or the Ninth's in *BayKeeper*. See Pet. 30. That is a telling omission.

We showed (Pet. 29-30) that the lower court's decision is also inconsistent with *Meiburg*, in which the Eleventh Circuit held that the CWA "leaves regulation of non-point source discharges through the implementation of TMDLs to the states," and that it is the States—not EPA—that must "designate the categories and subcategories of non-point sources that contribute to the pollution in those waters." 296 F.3d at 1026. Thus, according to the Eleventh Circuit, a TMDL by definition may not include any "statement of how the level of [a] pollutant can and will be brought down to or kept under the TMDL." *Id.* at 1030. That holding cannot be squared with the decision below.

EPA says there is no conflict with *Meiburg* because the TMDL merely "identifies maximum amounts of pollutants that can be discharged from various sources into the Bay waters" (U.S. Br. 23) and "does not impose any binding implementation requirements on the States." *Id.* at 9. If that were so, we would not be here. In fact, the TMDL dictates how States and local authorities must allot the burdens of compliance among different land uses and sets deadlines backed up by "rigorous accountability measures" that authorize "specific federal actions if the Bay jurisdictions do not meet their commitments." TMDL ES-1, 1-16. The TMDL thus includes an allocation-based implementation framework that, according to the Eleventh Circuit, cannot be considered part of a TMDL.

EPA attempts a dodge by noting (at 23-24) that the TMDL "does not specify the measures that the Bay watershed States should take to reduce pollutant levels in accordance with the TMDL," leaving it to the States to determine "best management practices" and "the

pollution controls that will apply to particular sources and sectors." But as we have explained (*supra*, 6-7) that is cold comfort to farmers in, for example, Virginia, where half a million acres of farmland must be taken out of production to meet the TMDL's federally-imposed agricultural load limits. See Pet. 12.

EPA fares no better when it asserts (at 24) that the conflict between the D.C. and Second Circuits over the word "daily" "has nothing to do with the question presented here." In fact, that conflict mirrors the conflict between the Third Circuit here and the Eleventh Circuit in *Meiburg*. The Second and Third Circuits found the statutory text ambiguous based upon what they believed would "best" achieve "effective regulation" (*NRDC* v. *Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001) or would "furthe[r] the Act's goal[s]" (Pet. App. 43a). By contrast, the D.C. and Eleventh Circuits focused, at *Chevron* step one, on the text of the statute. That the cases were addressed to "different EPA actions" (U.S. Br. 26) is beside the point. These are incompatible approaches to interpreting the CWA, which this Court should resolve.

D. The question is cleanly presented for review

This case presents the Court with a straightforward opportunity to clarify the meaning of "total maximum daily load" *and* give much-needed guidance on the relevance of an agency's policy arguments at step one of the *Chevron* analysis. It does so in a factual context that hardly could be more important.

EPA says (at 26) that this is a "poor vehicle" for addressing the question presented because the CWA "contains provisions that specifically address the Chesapeake Bay." But EPA's reliance on 33 U.S.C. § 1267 is misplaced.

Section 1267 does not amend Section 1313-(d)(1)(C)'s "total maximum daily load" requirement. And EPA has maintained all along that Section 1313-(d)(1)(C) *alone* authorizes it to set load allocations, establish deadlines, and extract compliance assurances. *E.g.*, U.S. Br. 14-15. EPA cannot change its tune now. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Even if that were not so, Section 1267(g) does not enlarge EPA's authority in any relevant way. Consistent with EPA's baseline authority under Section 1313, the Chesapeake Bay Agreement merely requires EPA to ensure that implementation plans "are developed and * * * begun" by the signatory States. 33 U.S.C. § 1267(g)(1). The true point of the agreement is to establish and fund the Chesapeake Bay Commission, which finances studies and programming grants (33 U.S.C. § 1267(b)(2), (j)), no more. That much is clear from the President's direction that the Bay TMDL should be "replicated" in "other bodies of water" (Executive Order 13508, § 301(e), 74 Fed. Reg. 23099, 23101 (May 12, 2009))—an instruction that would not make sense if Section 1267 had anything to do with it. Further review is accordingly warranted.

Respectfully submitted.

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