

No. 15-599

IN THE
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**BRIEF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, NATIONAL
ASSOCIATION OF MANUFACTURERS, AND
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS SMALL BUSINESS LEGAL CENTER
AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES..... | ii |
| STATEMENT OF INTEREST..... | 1 |
| INTRODUCTION..... | 3 |
| BACKGROUND..... | 4 |
| ARGUMENT..... | 9 |
| THE CHESAPEAKE BAY TMDL TAKES THE “COOPERATIVE” OUT OF “COOPERATIVE FEDERALISM”..... | 9 |
| A. The TMDL Will Adversely Affect NPDES Permits And Facility Opera- tions..... | 10 |
| B. The TMDL’s Offset Requirements Further Paralyze Growth and Inhibit Change..... | 12 |
| CONCLUSION..... | 16 |

TABLE OF AUTHORITIES

Page

CASES:

Rapanos v. United States, 547 U.S. 715
(2006) 9

*Solid Waste Agency of N. Cook Cty. v. U.S.
Army Corps of Engineers*, 531 U.S. 159
(2001) 5

STATUTES:

33 U.S.C. § 1251(b) 3, 5

33 U.S.C. § 1288(a)(2) 6

33 U.S.C. § 1288(b)(2)(A) 6

33 U.S.C. § 1288(b)(2)(B) 6

33 U.S.C. § 1288(c) 6

33 U.S.C. § 1313 6

33 U.S.C. § 1313(d)(1)(A) 6

33 U.S.C. § 1313(d)(1)(C) 6

33 U.S.C. § 1314(a) 6

33 U.S.C. § 1314(e) 6

33 U.S.C. § 1317(a)(2) 6

TABLE OF AUTHORITIES—Continued

| | Page |
|---|---------------|
| 33 U.S.C. § 1321(b) | 6 |
| 33 U.S.C. § 1329..... | 6 |
| 33 U.S.C. § 1342(b) | 6 |
| 33 U.S.C. § 1342(c)..... | 6 |
| EXECUTIVE AND LEGISLATIVE MATERIALS: | |
| EPA, Chesapeake Bay Total Maximum Daily Loads (Dec. 29, 2012) | <i>passim</i> |
| EPA, <i>Maryland’s Trading and Offset Pro- grams Review Observations</i> (Final Report) 8 (Feb. 17, 2012)..... | 13 |

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STATEMENT OF INTEREST¹

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct mem-

¹ This *amicus curiae* brief is filed with the written consent of the parties. Pursuant to Supreme Court Rule 37, no party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

bers and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files amicus briefs in cases raising issues of concern to the Nation's business community.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly \$2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the

typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business.

The Environmental Protection Agency has exerted control over land uses in the Chesapeake Bay watershed by dictating the minute details of the Chesapeake Bay Total Maximum Daily Load (TMDL) and reserving to itself authority to approve any future changes necessary to allow for State and local adjustments to alter the mix of land uses within their jurisdictions. Congress neither envisioned nor authorized this expansion of EPA's authority in the Clean Water Act. Amici are submitting this brief in support of certiorari because businesses nationwide will suffer the consequences of EPA's overreach.

INTRODUCTION

The Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous, and Sediment upends the cooperative federalism model Congress intended for the Clean Water Act. Local businesses throughout the Chesapeake Bay watershed must now comply with a regulatory scheme that imposes new federal burdens on businesses and industry formerly regulated by the States, impedes State programs to address State water quality issues, and limits opportunities for growth and innovation.

Congress intended that States would assume a significant role in addressing water quality issues within their borders through the management of land use. 33 U.S.C. § 1251(b). Congress further intended that States would lead in planning and

development in such a manner as to ensure the protection of the waters within a State's borders. *Id.* The TMDL, however, eliminates the ability of States to exercise these traditional powers with respect to businesses operating within their borders; instead, States must carry out a regulatory mandate that imposes federal limits on even those sources Congress intended for States alone to regulate. Thus, the TMDL micromanages discharge sources that by long tradition—and by statute—have been beyond EPA's reach. If the TMDL stands, EPA would have a green light to exercise significant power over land use decisions affecting local businesses throughout the nation.

BACKGROUND

Businesses seeking to site new operations or expand existing ones are best able to succeed when they can follow well-worn paths of state and local decisionmaking to secure the necessary approvals for such projects. They work with state and local jurisdictions to obtain bonding and authorization for infrastructure development (such as roads, pipelines, electrical service, wastewater treatment), and to address any necessary master plan amendments, zoning, environmental permitting, negotiation of tax incentives, and the like.

In the 1972 Federal Water Pollution Control Act, as amended by later adjustments and revisions to the Act over the ensuing years, Congress created a model of “cooperative federalism” pursuant to which the States and the federal government would address different aspects of the challenges presented by

discharges affecting surface water quality. Congress conferred on the federal government broad authority to affect water quality issues in a diverse number of ways. But the legislature specifically reserved to States “the primary responsibilities and rights * * * to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” 33 U.S.C. § 1251(b). As this Court has explained, Congress accordingly left in place “States’ traditional and primary power over land and water use.” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001).

The statute bears this out. It demonstrates a clear congressional philosophy in assigning certain types of functions to the States and quite different types to EPA across multiple aspects of the broad program for curtailing pollutant discharges. Congress assigned to the States three broad components of the strategy: (1) achieving a desirable level of ambient water quality by developing water quality standards, assessing the attainment of those standards, and developing location-based approaches—the TMDLs—to address shortcomings in specific water bodies; (2) developing and implementing strategies for addressing nonpoint sources of pollutant discharges resulting from local and regional land use choices; and (3) issuing and enforcing National Pollutant Discharge Elimination System (NPDES) permits to govern discharges from industrial and municipal point sources under a delegated NPDES program. Under these broad allocations of responsibility, the

individual States have the power to determine the control strategies for wastewater and nonpoint source discharges. 33 U.S.C. § 1288(a)(2), (b)(2)(A)-(B), (c) (wastewater); *id.* § 1329 (nonpoint sources). The States also implement the National Pollutant Discharge Elimination System by issuing permits to manage the operations of municipal and industrial dischargers within the borders of the respective state. *Id.* § 1342(b). Furthermore, the States retain the authority to develop water quality standards to protect state-identified water uses. *Id.* § 1313. When effluent limitations alone are insufficient to “implement any water quality standard applicable to such waters[,]” *id.* § 1313(d)(1)(A), the States lead in developing the “total maximum daily load” that they conclude will be “necessary to implement the applicable water quality standards[,]” *id.* § (d)(1)(C). A State’s TMDL is subject to EPA approval, but the States retain the responsibility to address and respond to water quality issues in the first instance.

Congress assigned quite different functions to EPA: (1) scientific analysis and standard setting (water quality criteria, toxic effluent standards, guidelines for acceptable disposal of dredged and fill material, and ocean discharge criteria), *see, e.g., id.* § 1314(a); (2) development of nationally uniform technology based standards for industrial sectors and municipal discharges, *id.* §§ 1314(e), 1317(a)(2); (3) addressing extreme dangers in specific locations (oil spills, toxic hotspots, and situations posing imminent and substantial endangerment), *id.* § 1321(b); and (4) overseeing and funding state programs to ensure consistency with broad policies and requirements, *id.* § 1342(b), (c).

These allocations of responsibility between the States and the federal government reflect Congress's recognition of the States' primary responsibilities to regulate land and water uses—as well as the reality that States possessed the necessary resources and familiarity to deal with local issues. EPA can identify scientific methods and engineering approaches to meet water quality objectives. But States have the lead in deciding how standards may apply in a given situation.

Then came the Chesapeake Bay TMDL. EPA's sprawling TMDL applies across 64,000 square miles of the Chesapeake Bay drainage—covering watersheds in Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia. EPA's Chesapeake Bay TMDL is actually *hundreds* of TMDLs in one: It establishes individual TMDLs for nitrogen, phosphorus, and sediment in 92 separate waters of the Bay, tidal tributaries, and embayments. TMDL xiii. These 276 individual TMDLs combine effluent limits for source-specific “wasteload allocations” applicable to point sources and for “load allocations” or “loading allocations” applicable to nonpoint sources. *See* TMDL 1-15.²

EPA began its development of the TMDL by identifying loading allocations for point sources and nonpoint sources in each Bay jurisdiction. TMDL ES-5.

² “Point sources” are sources regulated through the National Pollutant Discharge Elimination System. TMDL ES-8 “Nonpoint sources” are all sources that fall outside the National Pollutant Discharge System. *Id.* A “wasteload allocation” is the load allocated to point sources. TMDL 6-13. A “load allocation” is the load allocated to nonpoint sources. *Id.*

States (referred to as “jurisdictions” in the TMDL, TMDL ES-3) then developed watershed implementation plans (also called “WIPs”) which had to incorporate EPA’s loading allocations. EPA modified each watershed implementation plan, creating a “hybrid” of the States’ plans “modified by EPA allocations for some source sectors to fill gaps” that EPA perceived in the plans. TMDL ES-5.

Not only did EPA set the overall target allocations, but it also oversaw state adoption of the effluent targets assigned to specific facilities, “individual, significant wastewater treatment plant (WWTP) point sources; aggregate nonsignificant WWTPs, urban stormwater, and [animal feeding] point sources; and nonpoint source sectors draining to each of the 92 segments” of the Bay. TMDL 8-1. EPA also evaluated every jurisdiction’s suballocation contained in its respective WIP to determine, among other things, whether the WIP “met EPA’s expectations of providing reasonable assurance that nonpoint source reductions would be achieved and maintained[.]” *Id.* EPA then used the WIPs—and the “refinements [it] made thereto”—as the final allocations under the TMDL. TMDL 8-1-8-2.

The watershed implementation plans serve as the enforcement mechanism for the TMDL. States *must* incorporate EPA’s loading allocations, and EPA describes its role as overseeing the WIPs to ensure that each jurisdiction “achieve[s] necessary pollution reductions[.]” TMDL ES-8. EPA reserved to itself the authority to take any appropriate contingency action should a plan be “inadequate or its progress * * * insufficient[.]” *Id.*

ARGUMENT**THE CHESAPEAKE BAY TMDL TAKES THE
“COOPERATIVE” OUT OF “COOPERATIVE
FEDERALISM.”**

EPA’s broad exercise of authority pursuant to the TMDL empties of all meaning the statute’s “cooperative federalism” directive. The TMDL allows EPA to “function as a *de facto* regulator of immense stretches of intrastate land[.]” *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion). By subjecting State and local land-use decisions to a restrictive federal regulatory system, local businesses will suffer the most, since States no longer have the ability to develop local solutions to water quality issues through collaboration with local businesses.

Petitioners’ submission amply explains the legal reasons the TMDL should be vacated and set aside. This brief focuses on the TMDL’s practical impacts. The TMDL imposes significant constraints on state NPDES permit programs. The agency’s detailed waste load allocations and load allocations restrict new development. And its mandatory offset programs inhibit the ability of businesses to compete within the Bay watershed. Taken in their totality, the TMDL’s nest of requirements will paralyze State and local government land use programs with a detailed and rigid framework of federal zoning, imposing significant regulatory burdens that impede growth and discourage innovation.

**A. The TMDL Will Adversely Affect NPDES
Permits And Facility Operations.**

Each point source already operating pursuant to a NPDES permit must meet the allocations specified by EPA in the TMDL. TMDL Appendix R (Sheet Daily Individual WLAs). A total of 560 facilities within the Chesapeake Bay watershed already operate under NPDES permits, which require facilities to meet effluent discharge limits on an individual basis. Those hundreds of facilities now must also comply with the requirements of the Chesapeake Bay TMDL.

For example, one provision of the TMDL imposes aggregate daily WLA limits on agriculture, stormwater, and wastewater discharges for particular waterways in the subject States. *Id.* EPA combines sources in the stormwater category and applies a WLA to the group as a whole for a discrete stretch of waterway. *Id.* These aggregated sources must comply not only with the valid NPDES permit issued to them individually, but also with the aggregate WLA. TMDL 8-15. The scheme presents significant enforcement challenges, as it potentially leaves individual permit holders responsible for excess loadings of others. In addition, it complicates the ability of states to respond to loading issues or operational changes on an individual facility basis.

The TMDL also severely constrains the opportunity for permit holders to seek State approval for revisions to their NPDES permits. EPA candidly acknowledged, in fact, that the TMDL itself may impede revision of a NPDES permit: In its response to comments received on the draft TMDL, EPA explained that any permit must be “consistent with the assumptions and provisions of a TMDL.” TMDL

Appendix W 2743 (Comment ID 0300.1.001.008). Because limits in a NPDES permit must reflect the TMDL limits, if a permit change is needed in order to modify or expand a facility, the TMDL *itself* may well require revision—on top of the standard process a permit holder must follow in order to obtain a new or modified NPDES permit. Revising the TMDL, however, presents daunting challenges.

Before any change may be made to the TMDL, an applicant must first persuade the State to seek approval from EPA. If the State agrees, it must either initiate the process of revising the entire TMDL (including notice and comment procedures), or seek EPA's approval of a change to the TMDL within only that jurisdiction's boundaries. TMDL 10-5. Both situations involve significant administrative mechanisms designed to limit the potential for change: Where revision of the TMDL is necessary, EPA has reserved the approval of such revisions to itself. TMDL 10-4–10-5. EPA subjects such requests to notice-and-comment rulemaking procedures. TMDL 10-5. Any resulting revisions to the TMDL are subject to judicial review. To top it all off, EPA has stated that it will address *all* requests for revisions to the TMDL in its five-year review process—ensuring that even successful petitions for a change to the TMDL will be delayed significantly. *Id.*

The TMDL thus creates a federally controlled, static environment that disfavors innovation and growth. Such a glacial process for land use decisionmaking will curtail needed development, hamstring state and local governments, and subject communities in the Bay states to competitive disadvantages in

attracting business investments.³ It also will create an institutional bias (whether from favoritism, inertia, or both) toward preserving the existing mix of land uses recognized under the initial allocations of the TMDL.

B. The TMDL's Offset Requirements Further Paralyze Growth and Inhibit Change.

Even when revision of the Bay TMDL is *not* necessary, businesses wishing to locate in the Bay watershed or expand their existing operations will be required to secure “offsets,” or loading reductions, from other land users in their watersheds—and the legitimacy of these arrangements will be subject to EPA approval. TMDL 10-1 to 10-3. EPA requires that any new or increased loading from either non-point sources or point sources be offset through credits. TMDL 10-1. When a jurisdiction authorizes a new or increased discharge not already incorporated or reflected in the TMDL, the jurisdiction must offset the loadings such that there is a net-zero change to load allocations. TMDL 10-2.

In addition to the neutral loading requirement, EPA has reserved to itself the authority to audit and evaluate the states' trading programs. TMDL 10-3. EPA can review the offset and credit trading at the programmatic level, as well as conduct inquiries into specific trades and credits. *Id.* As the agency put it:

³ For instance, agriculture within the watershed will be subject to significantly increased regulatory burdens. In Maryland, where the average income per farm is roughly \$47,000, the TMDL will impose more costs through regulation of agricultural nonpoint sources, potentially threatening farms and farming communities.

“[w]hen questions or concerns arise, EPA will use its oversight authorities to ensure that offset programs are fully consistent with the CWA and its implementing regulations.” *Id.* If a regulated facility were to engage in a credit trade as part of a state-approved program, for example, EPA may retroactively review and unwind the trade. The potential for such a result adds tremendous regulatory uncertainty that in turn deters businesses from locating to the Bay watershed or expanding their existing operations.

And there are yet more requirements for offset programs. Under EPA’s guidelines, a source—whether point or nonpoint—generates offset credits by implementing controls that reduce the source’s load allocation after a baseline is determined for the source. TMDL Appendix S-2. The baseline equates to the water-quality-based effluent limit for a point source, or a limit calculated from the load allocations of an area for a nonpoint source.⁴ Among other requirements, a generator of credits must account for any changes in the form of the pollutant; account for uncertainty due to efficiency issues, lack of monitoring, or lack of regulatory oversight; and account for differences in water quality between the generating and acquiring sources. TMDL Appendix S-3–S-4. EPA may review and approve or reject each of these detailed elements of credit generation. EPA also requires that for nutrient-impaired segments of a

⁴ See, e.g., EPA, *Maryland’s Trading and Offset Programs Review Observations* (Final Report) 8 (Feb. 17, 2012), <http://www.epa.gov/sites/production/files/2015-07/documents/mdfinalreport.pdf> (explaining process through which Maryland calculates credits).

waterway, any offset must “[r]esult in progress toward attainment” of water quality standards. TMDL Appendix S-6. In practice, this last requirement inevitably inhibits any change in the area even if no further water quality degradation were to occur, because any change must “[r]esult in progress toward attainment.” *Id.*

It is no surprise, then, that only three states (Maryland, Pennsylvania, and Virginia) have yet so much as attempted to implement offset trading programs. That arduous process requires that EPA be satisfied that measures are in place to police the parties offering loading reductions, which will lead to federally imposed liability for any perceived shortcomings, federal audits of State programs and individual offsets, as well as the accompanying paperwork and reporting burdens. EPA’s review and approval process will undoubtedly move at the speed of other such processes—which is to say, at the pace of a snail. All of these bureaucratic burdens will reduce the willingness of offset generators to enter into credit trades, which in turn will artificially inflate the costs of securing their participation—all to the detriment of businesses and developers who wish to operate within the watershed.

* * *

In its implementation and in its application, the Chesapeake Bay TMDL effectively creates federal land-use rules. This state of affairs will have lasting ramifications for States’ rights and for the ability of local businesses to continue to operate within the jurisdictions subject to the TMDL. States and local jurisdictions regularly collaborate—nimble and

responsibly—with affected businesses to ensure that any changes to local land use will not affect water quality. EPA’s TMDL essentially converts EPA into a super-zoning authority, in conflict with the express terms of the Clean Water Act and its intricate cooperative federalism design. The consequence of EPA’s overreach is easy to predict: a de facto federal land-use regime that will limit growth, development, innovation, and change.

CONCLUSION

For the foregoing reasons, and for those in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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