

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**AMERICAN FARM BUREAU** )  
**FEDERATION, *et al.*,** )  
 )  
**Plaintiffs,** )  
 )  
**v.** )  
 )  
**UNITED STATES ENVIRONMENTAL** )  
**PROTECTION AGENCY, *et al.*,** )  
 )  
**Defendants.** )  
\_\_\_\_\_ )

**Case No. 11-cv-00067**  
**(Judge Rambo)**

**MEMORANDUM OF INTERVENORS CHESAPEAKE BAY  
FOUNDATION, CITIZENS FOR PENNSYLVANIA’S FUTURE,  
DEFENDERS OF WILDLIFE, JEFFERSON COUNTY PUBLIC SERVICE  
DISTRICT, MIDSHORE RIVERKEEPER CONSERVANCY, AND  
NATIONAL WILDLIFE FEDERATION IN RESPONSE TO PLAINTIFFS’  
OPPOSITION AND REPLY TO THE UNITED STATE’S CROSS-MOTION  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In their Opposition, Plaintiffs fail to adequately address the standing challenge raised by the United States and Intervenors because they fail to identify an immediate or threatened injury to a specific member. In addition, several of the declarations submitted by the Plaintiffs incorrectly state that the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) “assigned” loads to specific point sources when those assignments were made by the states.

Plaintiffs also continue to assert that by developing the Bay TMDL the United States Environmental Protection Agency (EPA) usurped the rights of the states to assign pollutant loadings. A more accurate view of reality can be found in how the states responded to EPA’s actions. While some of the states may have groused about a specific aspect of the Bay TMDL process or the model, all of the states participated in the development of the TMDL, none of the states rejected the allocations, and all of the states developed implementation plans. Proof of these points is found throughout the Phase I Watershed Implementation Plans (WIPs) drafted by the states to meet the Bay TMDL allocations.

Most importantly, the states all recognized that development of the Bay TMDL was a historic process based upon years of cooperative efforts. Thus, the TMDL should be viewed as a staircase of historic events and not a single step as

Plaintiffs suggest. Viewed in this manner, it is clear that EPA and its state partners afforded the public ample opportunity to examine and comment upon the TMDL.

Finally, Plaintiffs' arguments concerning the alleged lack of opportunity for the public to discern how the Chesapeake Bay Watershed Model and Scenario Builder were run are overwhelmed by the number of opportunities the public had to participate in the development of those models. Such informational opportunities are far more valuable to the public than the production of reams of coded information that the general public would not understand or care to read.

## ARGUMENT

### I. Plaintiffs Lack Standing

In our opening brief, Intervenor argued that Plaintiffs had failed to meet two aspects of standing: there is no causal connection between the alleged injury and the conduct complained of and, the injury is not imminent. [Intervenor's Brief](#) at pg. 12. In response, Plaintiffs state that their "members must incur significant expenses to comply with more stringent limitations on the discharge of nutrients as a result of the Final TMDL." [Plaintiff's Reply](#), pg. 4. In support, they cite the declarations of two of their members, Mr. Shafer of Pilgrim's Pride in West Virginia and Mr. Igli of Tyson Foods in Pennsylvania and Virginia. *Id.*<sup>1</sup> Each

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<sup>1</sup> The declarations should be given little weight because the information they contain in critical instances is not based upon personal knowledge. [Fed. R. Civ. P.](#)

declarant states that the TMDL “assigned” wasteload allocations for nitrogen and phosphorus for their facilities that will require new technology be installed.

[Plaintiffs’ Ex. 1](#), Shafer ¶¶5-6; [Plaintiffs’ Ex. 2](#), Igli ¶¶5-8. The Plaintiffs’ brief and the declarations are factually incorrect and fail to respond to Intervenors’ argument.

The Plaintiffs’ brief and the declarations imply that because their National Pollution Discharge Elimination System (NPDES) permit pollution loadings were listed in Bay TMDL Appendices Q and R that they had been set by EPA and were unlawful intrusions upon state authority. That is incorrect. The permit limits were set by the states and identified in their respective Phase I WIPs which were issued prior to the final Bay TMDL.

Mr. Shafer states that for two permits, WV0005495 and WV0047236,<sup>2</sup> the “TMDL assigned Pilgrim’s Pride individual wasteload allocations for nitrogen, phosphorous, and total suspended solids<sup>3</sup> for its discharges.” Shafer ¶5. However, West Virginia’s Phase I WIP, issued on November 29, 2010, a month before the final TMDL, identified the existing discharge limits for permit WV0005495 as: TN

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[56\(c\)\(4\)](#); [Brokenbaugh v. Exel Logistics N. Am., Inc.](#), 174 Fed. Appx. 39, 42-43 (3d Cir. 2006). See Igli ¶¶5-7; Shafer ¶5.

<sup>2</sup> Permit WV0047236 is identified in the TMDL Appendices as assigned to Hester Industries, Inc.

<sup>3</sup> Total Suspended Solids are not addressed here as it was derived in a different fashion than nutrients. TMDL, pp. 6-44 to 6-48 and Appendix P, AR0000240-AR0000244 and AR0000606.

(total nitrogen) .01309 mm#/yr (million pounds per year)<sup>4</sup>; TP (total phosphorous) .00131 mm#/yr. Appendix B.1, “Significant Industrial Facilities,” Pilgrim’s Pride. AR0026934. TMDL Appendix Q repeated the permit limits in pounds per year without rounding as EOS N (Edge of Stream Nitrogen) 13095.91 lbs/yr and EOS P (Edge of Stream Phosphorus) as 1309.59 lbs/yr.<sup>5</sup> West Virginia’s WIP identified the existing discharge limits for permit WV0047236 as: TN .00761 mm#/yr and TP .00076 mm#/yr. Appendix Q repeated those figures in pounds per year as: EOS N 7613.90 and EOS P 761.39. Thus, the limits listed in Appendix Q of the TMDL simply repeat the limits that had been previously set by the state of West Virginia by permit.

Mr. Igli states that TMDL Appendix Q “assigned” an annual individual wasteload allocation for discharges from Tyson’s Temperanceville, Virginia, facility (NPDES Permit VA0004049). Igli ¶5. Appendix Q identifies the annual EOS TN load for that facility as 22,842 pounds. TMDL Appendix Q, row 386. AR0000617. Appendix Q lists the annual EOS TP load as 1142 pounds. These limits were set in 2005 by Virginia regulation. 9 VAC § 25-720-110.<sup>6</sup>

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<sup>4</sup> To convert pounds to mm#, move the decimal point six places to the left.

<sup>5</sup> “An edge-of-stream load, as the term suggests, is the amount of pollutant that enters the stream in the locality of the pollutant source.” WVA Phase I WIP pg. 11, AR0026823.

<sup>6</sup> Mr. Igli also states that the Glen Allen and Temperanceville facilities were upgraded in response to the Bay TMDL. Igli ¶8. That statement is incorrect. The permit limits were set in 2005. Tyson’s began upgrading its plants to come into

With respect to Virginia point sources, the extent of the Plaintiffs' misrepresentation can be seen in **Exhibit B**. The exhibit summarizes the Virginia NPDES permits for significant dischargers whose TN and TP loads were set by permit and regulation and identified in Appendix Q of the Bay TMDL. Every single Virginia point source listed in Appendix Q except one has the exact same TN and TP load as set by Virginia regulation. The loads for that exception actually increased in Appendix Q thus, granting the facility a greater cap load than state law.

TN and TP wasteload allocations for non-significant dischargers were considered by Virginia to be aggregate allocations and were not included in individual NPDES permits. VA Final Phase I WIP, pg. 26, AR0026705. "All non-significant dischargers with individual permits in existence as of July 1, 2005 are covered by rule under the watershed general permit." *Id.* Thus, Mr. Igli's statement that EPA "assigned" Tyson's Glen Allen facility an aggregate wasteload allocation is also incorrect. Igli ¶6.<sup>7</sup>

Mr. Igli also states that Tyson's New Holland, Pennsylvania, facility was "assigned" an annual load by Appendix Q. Igli ¶7. In fact, those limits were assigned by Pennsylvania.

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compliance by 2008 and 2009, respectively. 2007 Exchange Compliance Plan, pgs. 5-197, 6-43. **Exhibit A**.

<sup>7</sup> Virginia considered TSS allocations to be aggregate allocations and included in the WIP, not Appendix R of the TMDL. VA Phase I WIP, pg. 26, AR0026705.

The permit number for the New Holland facility is PA0035092. Appendix Q identifies the loads for the facility as EOS TN 27396.90 and EOS TP 559.00. AR0000617. Pennsylvania assigned those same numbers in its Phase I WIP which was finalized on November 29, 2010 a month before the Bay TMDL. *See* PA Final Phase I WIP, Appendix 7, “Significant Industrial -Table B2 PA WIP 9-1-10”, AR0026671<sup>8</sup>.

The load limits identified in Appendix Q were set by Pennsylvania on the basis of existing NPDES permit limits. PA Final Phase I WIP, pgs. 24 and 46, AR0026421 and AR0026443.

That the states set discharge load limits for significant dischargers was readily apparent from the States’ Phase I WIPs, issued before the TMDL was final. For example, Virginia stated:

### ***3.1.5. Significant Wastewater Facilities***

Enforceable nutrient waste load allocations have been adopted under state law and regulations **promulgated in 2005-06** for Virginia’s bay wastewater treatment facilities, covering both municipal and industrial plants. Implementation is ongoing to comply with these requirements. Individual WLA were assigned to each of Virginia’s 125 bay watershed Significant Dischargers, and an allowance (“Permitted Design Capacity”) for the Nonsignificant Discharger’s was included

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<sup>8</sup> The last page of Pennsylvania’s Final Phase I WIP notes that this table is a part of their final WIP. It is available at [http://files.dep.state.pa.us/Water/Chesapeake%20Bay%20Program/ChesapeakePortaFiles/WIPs/Table\\_B2\\_PA%20WIP%209-1-10%20Significant%20Industrial.pdf](http://files.dep.state.pa.us/Water/Chesapeake%20Bay%20Program/ChesapeakePortaFiles/WIPs/Table_B2_PA%20WIP%209-1-10%20Significant%20Industrial.pdf)

in 2005 legislation establishing the Nutrient Credit Exchange Program ([VA Code §62.1-44.19:12](#))<sup>9</sup>.

(Emphasis added.) Commonwealth of Virginia Chesapeake Bay TMDL Phase I WIP, pg. 23, AR0026702. *See also*, Section 3.2, Table of Target Loads by Sector and Watershed, “Final Nutrient and Sediment Target Loads,” pg. 24, AR0026703; Section 4.1, Current Programs and Capacity, pg. 31, AR0026710.<sup>10</sup>

Pennsylvania’s “Phase I WIP divides nutrient and sediment loads by source sector, ..., NPDES permit loads, and major drainage basin.” (Emphasis added.) PA Final Phase I WIP, pg. 1, AR0026398. “The WIPs are part of the accountability framework, which is the method of implementing the TMDL but is (sic) not part of the Chesapeake Bay TMDL itself.” *Id.* pg. 17. AR0026414. A table entitled “Comparison of elements within the Chesapeake Bay TMDL and Phase 1, 2, and 3 Watershed Implementation Plans” provides that “[l]oads for individual significant point sources, or where appropriate, aggregate point sources” is to be determined in the WIPs. *Id.*<sup>11</sup>

Pennsylvania assigned the existing NPDES permit cap loads to the wastewater facilities. These allocations were developed in conjunction with the 2005 Tributary Strategy and were the basis for the individual cap loads that were

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<sup>9</sup> This statute specifically references the 2000 Chesapeake Bay Agreement as the impetus for the law, not the Bay TMDL.

<sup>10</sup> Virginia was emphatic that it reserved the right to adjust its WIP “based on new information.” Final Phase I WIP preamble, pg. iv. AR0026675.

<sup>11</sup> *See* Delaware Phase I WIP, pg. 30. AR0025011.

assigned in permits. “Retaining these point source cap loads maintains continuity with the permits and the implementation plans submitted to DEP to attain the required point source allocations.” *Id.* pg. 24, AR0026421. Thus, loads for individual NPDES holders were set by Pennsylvania, not EPA, and the declarants’ assertions of injury associated with the TMDL are incorrect.

Plaintiffs’ declarant Behrer admits that his permit was issued in 2008, well before the creation of the Bay TMDL. [Plaintiffs’ Ex. 3](#), Behrer ¶¶6. He also admits that activities on his farm are controlled by a state Nutrient Management Plan. *Id.* ¶¶7-8. Thus, while his permit number may appear on Appendices Q and R, those appendices do not set the permit limits for his farm nor does the TMDL control activities on his farm. Those limits and actions have been previously set by Pennsylvania. Accordingly, Mr. Behrer cannot identify a specific immediate or threatened injury engendered by the Bay TMDL.

The National Association of Home Builders, contends that its development may have to comply with new stormwater and septic system requirements and new state laws. [Plaintiffs’ Ex. 4](#), Kettler Dec. 13, 16; [Plaintiffs’ Ex. 5](#), Sowers ¶¶ 12-14. However, each of those requirements are not set by the Bay TMDL but by the states of Maryland and Virginia. Thus, the harm they claim to face is not one created by the Bay TMDL but, by the state WIPs and state laws.

Plaintiffs' declarants also state that the individual and aggregate WLAs cannot be changed without EPA approval. Igli ¶7; Shafer ¶¶5, 10; Behrer ¶10. Plaintiffs' assertion is misleading. All of the Bay jurisdictions except the District of Columbia have been delegated authority to administer the permitting provisions of the CWA. Thus, the states have authority to issue and set NPDES permit limits for facilities in their jurisdictions. [33 U.S.C. § 1342\(b\)](#). However, the statute grants EPA the authority to reject point source permits. [33 U.S.C. § 1342\(d\)](#). EPA's authority is not altered by the existence of the TMDL. Moreover, the states identified the Bay TMDL allocations as "reduction targets", not ironclad pronouncements from EPA. *See* Virginia Phase I WIP, pg. 15, AR0026694. Thus, the insinuation that EPA issued the allocations and solely holds the key to revising them is incorrect.

Plaintiffs all failed to identify a single member who they purport to represent. Through their respective declarants, Plaintiffs claim to have members who hold NPDES permits for the discharge of stormwater into waters of the Chesapeake Bay Watershed but, fail to name them, provide their permit numbers, or identify the specific body of water they discharge into. [Plaintiffs' Ex. 6](#), Herz ¶4; [Plaintiffs' Ex. 7](#), Dogget ¶¶3-4; [Plaintiffs' Ex. 8](#), Formica ¶¶4, 7; [Plaintiffs' Ex. 9](#), Parrish ¶¶6-7; [Plaintiffs' Ex. 10](#), Sallie ¶¶9-11; [Plaintiffs' Ex. 11](#), Ward ¶¶12-13; [Plaintiffs' Ex. 12](#), Starkey ¶¶5-6, 8-10; [Plaintiffs' Ex. 13](#), Picard ¶5, 6, 8. Thus,

Intervenors have no ability to assess the accuracy of Plaintiffs' assertions with respect to standing as was done with Mr. Shafer (US Poultry, National Chicken Council (NCC)) and Mr. Igli (US Poultry, National Turkey Federation and NCC), above. Moreover, as stated above, to the extent that they assert that their standing is predicated upon the fact that their members are identified in TMDL Appendices Q and R, their declarations are equally without merit.

In [Warth v. Seldin, 422 U.S. 490, 511 \(1975\)](#), the Supreme Court clarified the requirements of representational standing:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, *are suffering immediate or threatened injury* as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit.

(Emphasis added).

In [Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 \(1977\)](#), the Supreme Court developed a three-prong test for associational standing based on the holding in *Warth*. The Court stated an association has Article III standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Here, Plaintiffs have failed to identify specific members who would otherwise have standing to sue in their own right. Further, Plaintiffs have failed to identify a specific immediate or threatened injury that they would face as a direct result of the Bay TMDL. Instead, they have only identified injuries they might face as a result of state WIPs, permits, laws, or regulations. Thus, they allege no injury in fact with respect to the Bay TMDL and their claims must be denied.

Moreover, these facts eviscerate Plaintiffs' claim that EPA improperly usurped state authority and should be considered in evaluating whether EPA had sufficient authority to establish the Bay TMDL.

## **II. EPA Had Authority To Issue The Bay TMDL**

The United States, PMAA, and the Municipal Authorities<sup>12</sup> have thoroughly opposed the Plaintiffs' claim that setting allocations is equivalent to creating a state implementation plan. Intervenors concur in those arguments.

However, the point that the states were full partners in the development of the pollution allocations and developed their own implementation plans bears further elucidation. As West Virginia freely states on its TMDL website, it "helped to shape its own responsibilities under the TMDL by submitting to EPA a final Phase I Watershed Implementation Plan (WIP) on November 29, 2010." *See* <http://www.wvca.us/bay/tmdl.cfm>.

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<sup>12</sup> Intervenors disagree with the Municipal Authorities self-serving and unrelated assertion that MS4 permits may not be subject to numeric limits.

First, Plaintiffs' argument that state acquiescence in this process is not sufficient to provide EPA with authority to set upstream limits, in addition to being incorrect, is self-defeating. [Plaintiffs' Reply](#) p. 19. If, as Plaintiffs suggest, the states have sole authority to limit discharges to their respective waters then assuredly the states have the authority to ask EPA to develop those limits. There is no dispute that the states expected EPA to develop the Bay TMDL.

As West Virginia states in its Final Phase I WIP at p. 6 (AR0026818), the state and the other Bay Program partners –

[U]nderstood that failure to achieve the necessary reductions by 2010 would lead the U.S. Environmental Protection Agency to begin developing a Total Maximum Daily Load (TMDL) for the Chesapeake Bay, a process that would place significant additional restrictions on pollution sources in all the Bay States, including headwaters states like West Virginia.

*Id.* Like West Virginia, Virginia acknowledged that it was EPA's responsibility to develop the TMDL and Virginia's responsibility to develop its WIP. VA Final Phase I WIP, pg. 15. AR0026694.

Thus, contrary to Plaintiffs' argument, [Plaintiffs' Reply](#) pp. 26-30, the states recognized that the TMDL would set load limits to meet downstream water quality standards and that it was EPA's job to develop the allocations.

Further, Plaintiffs fail to recognize that the Clean Water Act is a national program and upstream state rights must yield to downstream water quality if Congressional intent is to be achieved. See [Nat'l Res. Def. Council v. U.S. E.P.A.](#),

[437 F. Supp. 2d 1137, 1153 \(C.D. Cal. 2006\)](#) (“Congress specifically designed the Act to address the problems inherent in differing state discharge limitations. By providing for uniform, national regulations, Congress attempted to prevent the transfer of pollution “from one area to another” as industries seek out less restrictive regulatory environments, reducing states' incentives to adopt stringent requirements.”); [Champion International Corp. v. EPA, 652 F.Supp. 1398 \(W.D.N.C 1987\)](#) (EPA is entitled to consider upstream state’s affect on interstate water bodies when setting pollution limits).

In addition, the states based their WIPs upon modeling information generated as part of their respective tributary strategies which they developed with EPA and completed in 2005. WVA Phase I WIP, p. 9, AR0026821; Virginia Phase I WIP sub-titled “Revision of the Chesapeake Bay Nutrient and Sediment Tributary Strategy” (WIP incorporated “the experience of [2005] tributary strategy development along with new knowledge and new tools.”), pg. 1, AR0026680.

Moreover, despite Plaintiffs’ claims, EPA did not bludgeon the states into accepting the loading allocations or into submitting WIPs. Virginia’s Phase I WIP is illustrative of this point. On page iii of the preamble, the Virginia’s Secretary of Natural Resources recounts the WIP development process and how one of the model runs was received close to the due date for the final WIP. AR0026674. Instead of strong arming Virginia into submitting a full plan on the due date, the

Secretary relates that in discussions with EPA and the Governor's Chief of Staff, the Agency agreed to work with the state after submission of its WIP to help it modify its final plan to close an unexpected gap in wastewater treatment plan load reduction. *Id.*

EPA's admonition to the states that the failure to develop a WIP could lead to cuts in government grants to the states does not eviscerate the TMDL.

[Plaintiffs' Reply](#) pp. 12-15. The United States relies upon [Pronsolino v. Nastri](#), [291 F.3d 1123, 1140 \(9th Cir. 2002\)](#) for the proposition that the federal government may withhold federal grant money as a means to achieve TMDL compliance. Intervenors concur and refer the Court to [Oregon Natural Desert Ass'n v. Dombeck](#), [172 F.3d 1092, 1096-97 \(9th Cir. 1998\)](#) (considering 33 U.S.C. § 1288, Area Wide Waste Treatment Management Plan), for additional support. There, the court held that the Clean Water Act promotes EPA's use of the "threat and promise" of federal grants to the states to control non-point source pollution.

Plaintiffs argue that CWA Section 117(g) does not grant EPA additional authority. The section imposes a mandatory obligation upon EPA for coordinating the development and implementation of a plan to restore and maintain the Chesapeake Bay. [33 U.S.C. § 1267\(g\)](#). Congress recognized the failed history of cooperative attempts to restore the Bay but also recognized that the Bay is framed by six states and each state would have to participate in any effort to address

pollution in the Bay watershed. Thus, Congress imposed additional responsibilities upon EPA to ensure that a plan is developed and implementation is begun. EPA's efforts to develop a Bay TMDL and insist upon reasonable state implementation plans are not inconsistent with that obligation.

### **III. Model**

In their response, Plaintiffs continue to assail the Chesapeake Bay Watershed Model (CBWM). [Plaintiffs' Reply](#) pp. 37-43. They challenge its accuracy as a Bay pollution modeling tool and urge the Court to reject the allocations in the TMDL because they were determined by the model. As with Plaintiffs' arguments concerning EPA's authority to develop the TMDL, the states rejected Plaintiffs' arguments.

West Virginia states in its Phase I WIP:

[T]his revised Phase I WIP is based upon allocation scenarios that the Chesapeake Bay Watershed Model (CBWM) predicts will achieve 2017 and 2025 goals for West Virginia. The CBWM uses mathematical models to simulate changes in the Bay ecosystem due to changes in population, land use, or pollution management. These simulations are not the same as actual conditions, but represent the best scientific estimate of what average loadings are likely to be.

Pg. 8 (emphasis added). AR0026820.

Virginia similarly recognized that the model was useful as a "management tool" and would "tailor [its] actions within real scientific, economic, social and political frameworks," not the model. VA Final Phase I WIP, p. 4, AR0026683.

However, instead of rejecting the model based allocations, Virginia recognized that the model was a “rough approximation” of actual conditions and vowed to work with EPA to improve the model and “continue to provide EPA with [Virginia’s] best information to ensure that the proper uses and limitations of the model are understood by citizens and stakeholders.” *Id.*

Courts reviewing an agency’s use of a model to reach a decision have examined whether the agency was conscious of the limits of the model, whether it invited the public to comment on the model, and whether the policy decision remained with the agency “rather than the computer.” [\*Sierra Club v. Costle\*, 657 F.2d 298, 334 \(D.C. Cir. 1981\)](#). See also [\*Sierra Club v. United States Forest Serv.\*, 878 F.Supp. 1295, 1310 \(D.S.D. 1993\)](#). As noted in our opening brief, EPA gave the public numerous opportunities to comment on the development of the model and incorporated those comments into model refinements. [Intervenors Memorandum in Support](#), pp. 19-22. Moreover, EPA openly acknowledged the limitations in the model and recognized the need to exercise best professional judgment in interpreting model results. TMDL pp. 5-1, 5-19, 6-10, 6-14-15; AR0000152, AR0000170, AR0000206, AR0000210-211. Because the decision on the level of allocation assigned to a given body of water ultimately rested with EPA staff in collaboration with the states and not the CBWM, EPA’s use of a model was not inherently flawed.

With respect to public notice and comment upon the model, Virginia, like other states, formed a Stakeholder Advisory Group (SAG) that granted a public forum for discussion during the development of the Chesapeake Bay TMDL and the WIP. Virginia's approach to engaging a wide variety of interested parties through the SAG resulted in critical feedback on the model inputs, outputs, and the abilities to implement a host of practices across Virginia's bay watershed.

Virginia Final Phase I WIP, p. 4, AR0026683. Among others, the SAG included the Homebuilders of Virginia, the Virginia Association of Commercial Real Estate, Virginia Agribusiness Council, Virginia Farm Bureau Federation, Virginia Poultry Federation, Virginia State Dairymen's Association, and the Virginia Small Grain Producers. *Id.* p. 130, AR0026809. Thus, Plaintiffs' argument that they were ill informed or had no opportunity to determine how the models were developed or run is incorrect. See [Intervenors' Memorandum in Support](#) at pp. 19-22.

In addition, EPA's public notice and comment procedures for the model must only comply with state Continuing Planning Process plans. *Id.* at 20. EPA complied with those terms and Plaintiffs have not stated otherwise.

Because a TMDL is not a formal rulemaking, EPA's public notice and comment procedures for issuance of a TMDL do not have to be perfect to survive judicial scrutiny. Thus, even if EPA's actions somehow violated the Administrative Procedure Act (APA) that would not require that the TMDL be vacated. Instead, "the decision whether to vacate depends on the seriousness of the

TMDL's deficiencies and thus the extent of doubt whether the agency made a decision correctly". See [\*Sugar Cane Growers Co-op. of Florida v. Veneman\*, 289 F.3d 89 \(D.C. Cir. 2002\)](#).

Since EPA made the modeling information public, any APA violation should not be considered serious enough to vacate the TMDL. See [\*Riverbend Farms, Inc. v. Madigan\*, 958 F.2d 1479, 1487 \(9th Cir. 1992\)](#). The failure to provide notice and comment is harmless where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached." [\*Sagebrush Rebellion, Inc. v. Hodel\*, 790 F.2d 760, 764-65 \(9th Cir.1986\)](#) (citation omitted)(Secretary's failure to provide notice and hold hearings as required by the Federal Land Policy and Management Act was harmless as the agency did provide an opportunity for comment). Thus, even if EPA failed to provide full documentation of the models prior to finalizing the TMDL, the error is harmless because EPA would not have changed its decision to issue the TMDL in its current form.

With respect to the Plaintiffs' claims that the model is flawed and thus the TMDL must be vacated, EPA pointed out the limitations in the model to the public and set the allocations not solely upon the model results but in consultation with the states. TMDL pp. 5-1, 5-19, 6-10, 6-14-15; AR0000152, AR0000170, AR0000206, AR0000210-211.

In addition, the CBWM was peer reviewed in 2008. The reviewers concluded that –

The CBWM represents a significant simplification of the CBW with significant compromises; however, we believe that the CBWM is appropriate given the scale, complexity and mechanistic basis of the modeling and management frameworks that are feasible with the current state-of-the-science of watershed modeling for management purposes.

Chesapeake Bay Watershed Model Phases V Review, Feb. 20, 2008, p. 1, AR0015010. *See also*

Chesapeake Bay Models Source Code, Calibration Results, and Databases

Documentation, Phase 5.3 Chesapeake Bay Watershed Model Calibration Results, FTPdirectory/Modeling/Upload/Administrative\_Record\_Model\_Files/Ph5.3\_CalibrationResults/ at ftp.chesapeakebay.net, identified in the Administrative Record.

Finally, Plaintiffs recognize that EPA did release full documentation for Scenario Builder on September 16, 2010. However, Plaintiffs later state that “[b]ecause EPA withheld such documentation, interested parties could not determine how exactly EPA used Scenario Builder.” [Plaintiffs’ Br.](#) p. 32. It is unclear how both statements can be true. If the documentation was available, as it was, then Plaintiffs could have determined how Scenario Builder was run.

## CONCLUSION

The size and scale of the Bay TMDL is such that EPA must be granted substantial deference in order to ensure that downstream states are not harmed by

pollution from upstream states. None of the alleged errors in EPA decision-making or notice and comment procedures justify vacating the TMDL. Thus, Plaintiffs' motion should be dismissed and the motion of the United States should be granted.

Respectfully submitted,

/s/ Jon A. Mueller

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## CERTIFICATE OF COMPLIANCE

Pursuant to the Case Management Order filed June 28, 2011, I hereby certify that the forgoing Intervenors' Memorandum complies with the word-count limit and does not exceed the allotted 5,000 words. *See* Order (Dkt. No. 65).

Certification is reliant upon the word count feature of the word-processing system used to prepare this brief which states that the Memorandum contains 4,548 words.

/s/ Jon A. Mueller  
Jon A. Mueller

## CERTIFICATE OF SERVICE

I certify that on July 20, 2012, a copy of the foregoing Reply Memorandum was electronically filed and served upon the following:

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