



## INTRODUCTION

1. Farm Plaintiffs challenge the final action of Defendant EPA in promulgating the Final Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment, signed by the EPA Regions II and III Regional Administrators on December 29, 2010 (“Final TMDL”). *See* 76 Fed. Reg. 549 (Jan. 5, 2011) (notice of availability of the Final TMDL); *available at* <http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html>. Although the lawful purpose of the Final TMDL is informational – to identify the maximum amount of nitrogen, phosphorus, and sediment that would achieve water quality standards in the Chesapeake Bay – this EPA action does much more. The Final TMDL assigns contributions of these substances to local waters among farms, cities, and businesses, as well as residential, agricultural, and undeveloped lands throughout the vast Chesapeake Bay watershed – in Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia (collectively the “watershed jurisdictions”) – a 64,000-square-mile area with a population of almost 17 million people.

2. EPA used an unprecedented process to micromanage waterways from Virginia to New York through the assignment of highly specific pollutant loads. That process unlawfully circumvented the Clean Water Act procedures that give primary authority to the states to protect water quality. The Clean Water Act

grants primary authority to the states to establish (a) water quality standards, then (b) (for waters that do not meet those standards) “total maximum daily loads” (“TMDLs”) representing the levels of pollutants the water body can receive and achieve those standards, and finally (c) a planning process to work toward achieving standards through practicable management practices for “nonpoint” sources and through individual discharge limits for point sources.

3. The Final TMDL is fatally flawed in four critical respects: (a) the “allocation” of pollutant loads among sources in a TMDL exceeds EPA’s authority under the Clean Water Act; (b) the assigned pollutant loads are based on erroneous information; (c) the erroneous information used to derive the assigned pollutant loads was fed into computer models that are unsuitable for deriving such loads – even with *accurate* information; and (d) during the comment period the public did not have access to the information it needed to comment effectively on the modeling results and the assumptions in the Final TMDL.

4. For each of the reasons, this Court should declare that the assigned pollutant loads are not legally enforceable, and it should vacate the Final TMDL.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action under 28 U.S.C. § 1331 because the claims arise under the laws of the United States, and under the Administrative Procedure Act, 5 U.S.C. § 702, providing for judicial review of

final agency action. The Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and under 5 U.S.C. §§ 701-706 for violations of the Administrative Procedure Act and the Clean Water Act.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because EPA is an agency of the United States, Plaintiff Pennsylvania Farm Bureau resides in this district, and Farm Plaintiffs' members affected by the Final TMDL reside in this judicial district.

#### **PARTIES**

7. Plaintiff American Farm Bureau Federation is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers. The American Farm Bureau Federation represents more than 6.2 million member families through member organizations in all fifty states and Puerto Rico, including each of the six states in the Chesapeake Bay watershed. These member organizations include the Pennsylvania Farm Bureau. Many of the American Farm Bureau Federation member families own and operate farms that produce the row crops, livestock, and poultry that provide safe and affordable food for Americans and a growing global population.

8. Some of these farms are located within the 64,000-square-mile Chesapeake Bay watershed. Some of these farms are livestock or poultry operations that hold (or will be required to obtain) individual or general permits issued pursuant to Clean Water Act Section 402, 33 U.S.C. § 1342, for point source discharges into these waters.<sup>1</sup> The terms and conditions of those permits will be improperly and adversely affected by the Final TMDL, and new permits will be more difficult to obtain as a result of the Final TMDL. As a result, the American Farm Bureau Federation member families are significantly and adversely affected by EPA's action, which will limit their ability to obtain Section 402 permitting for new or expanded operations and will require more stringent permit limitations for nitrogen, phosphorus, and sediment.

9. In addition, some of American Farm Bureau Federation's member families operate farms (livestock, poultry, or row crop production) that are not currently regulated under the Clean Water Act, but are subject to regulatory requirements for nutrients under state law, or participate in nutrient management programs supported by the state departments of agriculture or by the U.S. Department of Agriculture, or undertake voluntary action to control runoff of

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<sup>1</sup> The Clean Water Act and EPA rules generally prohibit discharges from livestock and poultry operations that qualify as "concentrated animal feeding operations" or "CAFOs," with the exception of discharges caused by certain extreme rainfall and authorized under a Section 402 permit. Most terms and conditions of such permits are designed to prevent any discharge from occurring.

nutrients and sediments without participating in or reporting to a formal state or federal program. These farms will be directly and adversely affected by the Final TMDL, which assigns pollutant loadings both for regulated “point sources” and for unregulated “nonpoint source” operations.

10. During the public comment period for the challenged action, the American Farm Bureau Federation provided detailed comments on EPA’s Draft Chesapeake Bay Total Maximum Daily Load (“Draft TMDL”).

11. Pennsylvania Farm Bureau is a general farm organization that has provided legislative support, information, and services to Pennsylvania’s farmers and rural families since 1950. Some of the Pennsylvania Farm Bureau members have farms located within the Chesapeake Bay watershed and will be subject to the same Clean Water Act permitting and regulatory impact from the Final TMDL as described in ¶¶ 8-9 above. The Pennsylvania Farm Bureau also provided comments to EPA on the Draft TMDL.

12. Defendant EPA is the federal agency charged with the administration and enforcement of the Clean Water Act, in accordance with the specific delegations of authority from Congress contained in that statute. EPA is headquartered in Washington, D.C.

## **STATUTORY AND REGULATORY FRAMEWORK**

13. Total maximum daily loads (“TMDLs”) are one element of a detailed statutory and regulatory framework under the Clean Water Act, which prescribes the following series of actions that are described in greater detail below: (i) establishment of water quality standards by the states under Section 303(c); (ii) identification by the states of certain waters that are not meeting water quality standards under Section 303(d) (commonly called “impaired” waters); (iii) calculation by the states of a total maximum daily pollutant load – a TMDL – for such impaired waters under Section 303(d); and (iv) a “continuous planning process” to generate plans for implementation of water quality standards by the states through a variety of regulatory and non-regulatory actions. Implementation actions include incorporation of assigned pollutant loads into individual Clean Water Act discharge permits, typically issued by the states under state permit programs approved by EPA, and which regulate pollutant discharges to such impaired waters from regulated point sources. Federal involvement in the above scheme is extremely limited, with statutory authority for EPA to act directly only in the form of federal disapproval of or objection to state action or inaction, and with no authority at all for EPA to develop a state’s planning process or implementation plans.

**A. Overview of Clean Water Act Regulation**

14. The Clean Water Act divides sources of pollutants to waterways into two major categories: “point sources” and “nonpoint sources.” “Point source” is defined at 33 U.S.C. § 1362 to mean “any discernible, confined, and discrete conveyance including . . . any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged.” The term also includes those livestock and poultry operations that qualify under EPA regulations as a “concentrated animal feeding operation.” Congress specifically excluded “agricultural stormwater discharges and return flows from irrigated agriculture” from the definition of point source. *Id.*

15. All pollutant discharges to waters of the United States from a point source are prohibited under the Clean Water Act unless otherwise authorized under several sections of the Act. One primary way in which discharges are authorized is under a Section 402 permit, known as a National Pollutant Discharge Elimination System (“NPDES”) permit.<sup>2</sup> *Id.* § 1342. The NPDES permitting system imposes limits on such discharges based on the application of technology, or the need to achieve water quality standards, whichever is more stringent. *Id.* §§ 1311(b), 1312. States assume primary responsibility for administration and enforcement of

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<sup>2</sup> Many non-industrial “stormwater” discharges are authorized under Section 402 even without a permit, unless EPA or the state permitting agency “designates” such a discharge for permitting. *See* 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(a)(1)(v).

the NPDES permitting program following EPA approval of a state's proposed program. *Id.* §§ 1342(b), 1342(c)(1). EPA retains authority, in specified circumstances, to object to a particular NPDES permit that authorizes discharges to waters within the statute's jurisdiction. *Id.* § 1342(d); 40 C.F.R. § 123.44.

16. Nonpoint sources are not defined at 33 U.S.C. § 1362 and are not regulated under the NPDES program. Indeed, the Clean Water Act does not provide any federal authority to regulate nonpoint sources of pollutants.

**B. Development of Water Quality Standards**

17. Consistent with express congressional policy, the Clean Water Act recognizes, preserves, and protects “the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b) (emphasis added). In accordance with that policy, the Clean Water Act places primary authority with each state to develop and implement water quality standards, consisting of designated uses and water quality criteria, for its water bodies. *Id.* § 1313(c)(2)(A).

18. Each state must designate one or more uses for its water bodies, and develop water quality criteria for each water body necessary to protect these designated uses, taking into account the water bodies' use and value for public water supplies, propagation of fish and wildlife, recreational, agricultural, and

industrial purposes, use for navigation, and other purposes. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10 and 131.11. These criteria can be expressed for a pollutant as specific numeric quantities or as general narrative statements, but in either case, must be based on “sound scientific rationale.” 40 C.F.R. § 131.11(a). The standards adopted by the states are subject to EPA review and approval to ensure that they are consistent with Clean Water Act requirements. 33 U.S.C. § 1313(c)(3)-(4).

19. The Clean Water Act and EPA regulations allow for changes to water quality standards when current standards are found to be unattainable or are attainable only through controls that would cause substantial and widespread economic and social impacts. EPA regulations provide for states to perform a “use attainability analysis” prior to changing a waterway’s designated use and the resulting water quality standards. 40 C.F.R. §131.10(g). Such an analysis allows policy makers to consider the human, economic, and social consequences of the controls necessary to attain a designated use.

**C. Development of TMDLs for Impaired Waters**

20. Section 303(d) directs each state (i) to identify those waters within its boundaries for which technology-based Section 402 permit limitations are not stringent enough to implement the applicable water quality standards and (ii) to establish a priority ranking of these waters, taking into account the severity of the

pollution and the waters' designated uses. 33 U.S.C. § 1313(d)(1)(A). The state must establish a TMDL for each listed water (commonly referred to as "impaired" waters) for pollutants identified by EPA as suitable for such calculation. *Id.* § 1313(d)(1)(C). This "total" maximum daily load is established "at a level necessary to implement the applicable water quality standards," accounting for seasonal variations and a margin of safety. *Id.*

21. A TMDL is a calculation – a number (or the sum of multiple numbers), which, as EPA acknowledges, is meant to be an "informational tool[]." Final TMDL at 1-15 (quoting *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002)). Under EPA regulations, a TMDL is the sum of both "wasteload allocations" ("WLAs") – the portions of a receiving water loading capacity allocated to each of its existing or future point sources of pollution – and "load allocations" ("LAs") – the loading capacity portions attributed to the water body's "existing or future nonpoint sources of pollution or to natural background sources." 40 C.F.R. § 130.2.

22. Like water quality standards, the listing of impaired waters and the establishment of TMDLs for those waters are subject to EPA review and approval. 33 U.S.C. § 1313(d)(2). If EPA disapproves of a TMDL submitted by a state, or if a state fails to establish a required TMDL, EPA has "backstop" authority to

establish a TMDL. The calculations used to establish TMDLs must be subject to public review. 40 C.F.R. § 130.7(c)(1)(ii).

**D. Implementation of TMDLs**

23. In keeping with congressional policy to preserve and protect the primary responsibilities and rights of each state over its planning for the development and use of its land and water resources, and in contrast to EPA's express authority for the review and approval of state water quality standards and TMDLs, the Clean Water Act does not provide EPA with authority over the *implementation* of TMDLs. How, when, and indeed whether a TMDL is ultimately achieved, including any imposition of enforceable pollutant load allocations among sources and sectors within a state, is placed exclusively in the hands of each state. State implementation plans are not part of the TMDL, are not required to be submitted to EPA, are not subject to EPA approval, and are not subject to unilateral modification by EPA.

24. The only statutory provision that addresses TMDL implementation provides that each state shall "have a continuing *planning process*" ("CPP") consistent with the statute, which is subject to EPA review and approval. 33 U.S.C. § 1313(e)(1)-(2). This provision further states that EPA "*shall approve* any [CPP] submitted . . . which *will result in plans* for all navigable waters within [the] state, which include . . . [TMDLs and] adequate implementation, including

schedules of compliance, for revised or new water quality standards.” *Id.* § 1313(e)(3). The Clean Water Act provides the sole remedy for a state’s failure to have an approved planning process: EPA shall not approve a state permitting program (under CWA Section 402) for any State which does not have an approved CPP. *Id.* § 1313(e)(2).

25. For states that have an approved CPP, this creates a framework for TMDL implementation. Once EPA either approves a TMDL submitted by a state, or itself establishes a TMDL, the state must incorporate the TMDL into its current CPP. *Id.* § 1313(d)(2).

26. In contrast with EPA’s express authority to directly establish water quality standards or TMDLs under certain circumstances, the Clean Water Act does not provide EPA with authority to *itself* prepare a TMDL implementation plan (or a CPP), even where a state fails to do so. EPA has no authority to cross the line between identifying *total pollutant levels* necessary to meet water quality standards and *specifying implementation requirements*, such as how that total should be allocated among sources. In addition, nothing in the Clean Water Act or EPA’s regulations authorizes EPA to demand “reasonable assurances” that the state will achieve sufficient load reductions to meet the TMDL.

**E. Addressing Impairment Caused by Nonpoint Sources**

27. Nonpoint sources are addressed in Clean Water Act Section 319, 33 U.S.C. § 1329, which was added to the Act in 1987 to require nonpoint source management programs for water quality impairment caused by these sources. Under Section 319, states must identify waters not meeting water quality standards due to nonpoint sources, prepare and submit plans to reduce nonpoint source pollution to the extent practicable, and then may receive federal grant money for implementation projects.

28. Nonpoint sources are also referenced in Clean Water Act Section 208, 33 U.S.C. § 1288, which directs states to develop area wide waste treatment plans that include “a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources.” 33 U.S.C. § 1288(b)(2)(F).

29. There is no federal implementation role for EPA in either Section 208 or 319 for nonpoint sources, which include runoff from manure disposal areas and land used for livestock and crop production. In particular, there is no “backstop”

authority for EPA to prepare plans or programs for nonpoint source control in the event that states fail to act or fail to adopt programs that meet with EPA approval.

## **FACTUAL BACKGROUND**

### **A. Chesapeake Bay Program and Tributary Strategies**

30. The Chesapeake Bay Program was established as a voluntary partnership in the 1980s. It comprises the seven watershed jurisdictions (six states and the District of Columbia), federal agencies including EPA, the United States Departments of Agriculture, Commerce, Defense, and Transportation, and other agencies, as well as academic and other partners. Each of the Chesapeake Bay Program partners has agreed to use its own resources to implement projects and activities that advance restoration of the Chesapeake Bay.

31. In 2000, the seven watershed jurisdictions signed the Chesapeake 2000 Agreement, which established a series of commitments, including a goal of correcting nutrient and sediment related water quality problems by 2010. EPA issued new water quality criteria for the Chesapeake Bay in 2003. The watershed jurisdictions cooperatively allocated pollutant loadings among the watershed jurisdictions in April 2003.

32. The seven watershed jurisdictions then adopted new water quality standards incorporating EPA's criteria and developed the Chesapeake Bay Tributary Strategies from 2004-2006, outlining by river basin their planned implementation activities to reduce nitrogen, phosphorus, and sediment levels in

the Chesapeake Bay and to achieve basin-wide cap loads agreed to by the jurisdictions. The cap loads were intended to be equivalent to the reductions required in a TMDL, and progress made towards reaching those cap loads was to be reported on a regular basis. These Tributary Strategies provided a framework for accelerating the protection and restoration of the Bay and were making progress to achieve those goals without a TMDL from EPA.

33. In 2007, the watershed jurisdictions changed the goal of achieving water quality standards by 2010 to a goal of implementing measures to achieve standards by 2025, and continued implementation of their Tributary Strategies to achieve this new goal. Current efforts are producing improvements in the water quality and overall health of the Chesapeake Bay. According to the Chesapeake Bay Program's assessment of the Bay and its watershed for 2009, the overall health of the Bay achieved a 6% improvement from 2008. *See* [http://www.chesapeakebay.net/content/publications/cbp\\_50513.pdf](http://www.chesapeakebay.net/content/publications/cbp_50513.pdf), at 3. For example, the adult blue crab population in 2009 achieved its highest level since 1993, increasing to 223 million. Nearly 3,000 acres of oyster reefs have received habitat restoration treatments through 2009, which surpassed the Chesapeake Bay Program's goals. In addition, the Bay's bottom-dwelling species achieved a 15% gain in overall health from 2008 to 2009.

**B. Success of Bay Watershed Agricultural Community in Reducing Pollution to the Bay**

34. Farmers in the Chesapeake Bay watershed have made major contributions to protecting the Bay through improved farmland practices in recent years, and these efforts continue to expand and strengthen. These contributions include consistent improvement in nitrogen use efficiencies, as well as increased adoption and continuous improvement of best management practices (“BMPs”) that are reducing runoff.

35. The Natural Resources Conservation Service of the U.S. Department of Agriculture released the review draft of a report in October 2010 that evaluated the conservation and natural resource performance of the agricultural community in the Chesapeake Bay region. *See* Natural Resource Conservation Service, Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Chesapeake Bay Region (October 2010) (“NRCS 2010”) (available at <http://www.regulations.gov/#!documentDetail;D=EPA-R03-OW-2010-0736-0482.2>). It found that farmers have adopted a wealth of conservation practices on the region’s 4.38 million acres of cropland that have dramatically reduced the nitrogen, phosphorus, and sediment loads to the Bay and the streams and rivers in its watershed.

36. The Natural Resource Conservation Service found that farmers were actively implementing erosion control practices on about 96% of the cropland

acres in production in the watershed over the 2003 to 2006 period. These practices included various forms of erosion control involving no-till or minimum tillage, and structural and vegetation management practices like contour farming, grass waterways, and filter strips. As a result of these and other nutrient management practices, the Natural Resource Conservation Service found that sediment contributions from cultivated cropland to the region's rivers and streams are being reduced by 64%, nitrogen by 36%, and phosphorus by 43%, and that these practices are responsible for reducing total loads of sediment, nitrogen, and phosphorus delivered to the Bay from all sources by 14%, 15%, and 15%. NRCS 2010 at 9-10.

37. EPA's own data show that since 1985 the agricultural community has dramatically reduced loading to the Chesapeake Bay for nitrogen (by over 27%), for phosphorus (by over 21%), and for sediment (by over 24%). *See* EPA Presentation at Draft TMDL Public Meeting, at 23-25 (Sept. 29, 2010) (*available at* [http://www.epa.gov/reg3wapd/pdf/pdf\\_chesbay/dcpblicmeetingrakmods.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/dcpblicmeetingrakmods.pdf)).

**C. Development of a Federal TMDL – Usurping State Implementation**

38. Despite what it acknowledges have been “extensive restoration efforts during the past 25 years,” EPA found it necessary to set a federal TMDL – a “historic and comprehensive ‘pollution diet’ with rigorous accountability measures to initiate sweeping actions to restore clean water” in the Chesapeake Bay

watershed. Final TMDL at ES-1. EPA set an arbitrary deadline of December 31, 2010, for completion of the Chesapeake Bay TMDL. This deadline required development of the TMDL before EPA's methods and models were ready to provide scientifically sound support. It also severely limited the time in which the public could review and provide meaningful comments on the Draft TMDL and the incomplete modeling on which it was based, as well as the time in which EPA could absorb and respond to those comments before issuing the Final TMDL. Moreover, because EPA ultimately demanded that the states submit draft implementation plans and revise those plans to EPA's liking *before* establishment of the Final TMDL, this schedule severely constrained the time in which states could prepare their implementation plans.

39. EPA originally assured the watershed jurisdictions that they would be responsible for implementation of its TMDL, including allocating load reduction responsibilities, at their discretion, consistent with the Clean Water Act. However, EPA has instead imposed what it calls an "accountability framework" on the states and individual sources within the watershed. EPA required states to submit to the agency their draft Watershed Implementation Plans ("WIPs") before the TMDL was even proposed, reversing the sequence for TMDL development and implementation planning provided for in the Clean Water Act and EPA's regulations. EPA then used the state WIPs to develop the assumptions that were

incorporated into the models used to establish the TMDL. According to EPA, these WIPs “played a central role in shaping the TMDL.” *Id.* at ES-1.

40. EPA “conducted an intense evaluation” of the draft state WIPs, “comparing the submissions with EPA expectations.” *Id.* at ES-9. EPA essentially disapproved the WIPs as submitted by all the states, concluding that the pollution controls identified in many of them were insufficient or that all of the draft WIPs failed to provide sufficient “reasonable assurance” that the identified pollution controls would be implemented to achieve nutrient and sediment reduction targets. As a result, the agency included “backstop measures” in the Draft TMDL, in excess of its authority under the Clean Water Act.

41. The unlawful backstop measures in the Draft TMDL were accompanied by threats of retaliatory actions by EPA to coerce watershed jurisdictions into revising their implementation plans to EPA’s satisfaction. For example, the threats included use of “residual designation” authorities to regulate sources in a state that are currently unregulated, such as smaller livestock and poultry operations, in direct contravention of EPA regulations at 40 C.F.R. § 122.23(c)(1). That regulation requires specific determinations before EPA or a state can designate any unregulated animal feeding operation as a regulated “concentrated animal feeding operation.”

42. EPA also threatened to take other actions to coerce the watershed jurisdictions into adopting EPA's preferred implementation plans. For example, EPA threatened to object to state-issued permits, even though disagreement with a state WIP is not one of the grounds specified for objections in EPA's regulations. *See* 40 C.F.R. § 123.44. EPA further threatened to require "net improvement offsets" for new or increasing discharges. But such a requirement by definition would require individual sources to over-control beyond what is needed to avoid causing or contributing to a violation of water quality standards – the only basis on which EPA could properly object to a permit. Moreover, EPA threatened (a) to promulgate federal numeric nutrient standards, even where not necessary under the Clean Water Act, (b) to require unreasonable additional point source reductions, (c) to engage in increased federal enforcement activity, and (d) to withhold grant money to states for reasons not intended by Congress, all because it did not agree with a state-submitted WIP.

43. Each of the jurisdictions revised their WIPs in an effort to avoid the threatened backstop measures in the Draft TMDL. *See generally* Final TMDL at Section 8. For example, in response to EPA's demands, Pennsylvania and Virginia "voluntarily" amended their WIPs to include changes in the regulatory status of livestock and poultry operations. *See id.* at 8-25 (Pennsylvania), 8-28 (Virginia). Among those threatened backstops that remain in the Final TMDL is a purported

change in the assumed regulatory status of 75% of the West Virginia livestock and poultry farms in the watershed. *See id.* at 8-31. In addition to those changes that are specific to the agricultural community, EPA left in place backstop measures affecting other sectors in New York and Pennsylvania. *See id.* at 8-22, 8-26.

44. Through this WIP revision process, which formed the basis for the Final TMDL, EPA has effectively overridden state implementation decisions. In doing so, EPA impermissibly crossed the line between establishing an informational tool authorized by the Clean Water Act and mandating a regulatory framework that Congress plainly did *not* authorize.

45. EPA's encroachment into state authority over TMDL implementation was not limited to the WIP revision process. EPA has established fine-scale pollutant loading allocations in the Final TMDL, including allocations to individual farms and businesses hundreds of miles upstream that do not discharge directly into the Bay or its tidal waters. *See id.* at Appendices Q, R. EPA assigned specific loadings despite its recognition that "there are limitless combinations of loadings." Draft TMDL at 6-18.<sup>3</sup> In doing so, EPA has effectively foreclosed future implementation options of the individual jurisdictions.

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<sup>3</sup> The sections and appendices of the Draft TMDL are available as "Supporting & Related Material" posted on September 24, 2010, Docket ID EPA-R03-OW-2010-0376 (*available at*

46. EPA's assigned pollutant loads are not geared toward achieving the water quality standards in the upstream waterways themselves, but are instead tailored to meet the water quality standards in the distant Chesapeake Bay, hundreds of miles away. EPA lacks statutory or regulatory authority to craft a TMDL that distributes pollutant loads among sources at distant upstream waters in order to meet a downstream water quality standard.

**D. Development of a Federal TMDL – Use of Flawed Model Networks**

47. The fundamental purpose of the Final TMDL is to establish maximum pollutant loading to the Chesapeake Bay at a level necessary to meet applicable water quality standards. The water quality standards addressed by the Final TMDL are expressed in terms of dissolved oxygen, water clarity, and chlorophyll-*a* (used as a surrogate for algae). The standards were established to protect and restore fish, other aquatic life (like oysters), and rooted aquatic plants (referred to in the Final TMDL as submerged aquatic vegetation).

48. The conditions that affect those water quality parameters include (among other factors) rainfall, stream flow, tidal influence, groundwater, wind, temperature, and sunlight. EPA has determined that nitrogen, phosphorus, and sediment loadings also influence the concentration of dissolved oxygen and

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<http://www.regulations.gov/#!docketDetail;dct=SR;rpp=100;so=DESC;sb=posted Date;po=0;D=EPA-R03-OW-2010-0736>).

chlorophyll-*a* in the Bay. Those loadings also influence water clarity, which in turn affects the growth of submerged aquatic vegetation. In fact, nitrogen and phosphorus are essential to plant growth and are critical to maintaining a healthy Bay ecosystem.

49. EPA does not know how much nitrogen, phosphorus, and sediment are actually being added to the Chesapeake Bay on a daily, monthly, or even annual basis. And when those pollutants get to the Bay, EPA does not know precisely how they influence clarity, the growth of aquatic submerged vegetation, or the concentration of dissolved oxygen and chlorophyll-*a*. Instead, EPA had to estimate the loading of these pollutants and their impact on water quality through the use of computer modeling techniques that attempt to simulate real-world conditions.

50. EPA developed a complicated network of interrelated models to try to accomplish that objective. The Final TMDL is based almost entirely on computer simulations, although EPA never adequately defined the level of uncertainty associated with its computer modeling. EPA's simulations are so interdependent that a fundamental flaw in one model can undermine the accuracy and validity of the entire network. As discussed below, that is precisely what has happened here – EPA's Final TMDL is fundamentally flawed because the models upon which it is based contain numerous errors and compounding uncertainties.

51. EPA began its modeling exercise by establishing a simulated “baseline” condition of the Bay, including the sources of pollutant loadings, volume, and concentration of nitrogen, phosphorus, and sediment in the watershed, tidal tributaries, and mainstem Chesapeake Bay.

52. To do that, EPA made a series of assumptions involving: land use in the entire 41 million acre watershed; background water quality concentrations in the various tributaries and streams; direct and indirect sources of the critical pollutants; existing control measures and the effectiveness of those controls; air to surface water deposition; groundwater and surface water interactions; tidal influence; and a host of other factors.

53. EPA then estimated how pollutants were conveyed throughout the watershed, from land and air to streams and rivers, estimating along the way how much settled to the bottom, how much was taken up or trapped by aquatic or wetland vegetation, and how much was converted through biological and chemical processes. It then estimated what concentrations enter the Bay and its tidal tributaries from thousands of entry points and how those concentrations affect water quality under a variety of environmental conditions.

54. To establish the TMDL, EPA then assumed what load reductions would be necessary to achieve the established water quality standards, again, without knowing precisely how the targeted pollutants actually influence

attainment of those standards. EPA made a series of assumptions about how the states planned to reduce and control the pollutants at various sources in the future. Finally, EPA again modeled the fate and transport of pollutants throughout the entire watershed, this time based on the presumed future management techniques employed by the states, with the added challenge of projecting land use changes years into the future. Through this process, EPA estimated the current pollutant loading to the Bay, the impact on water quality standards and how much reduction was necessary to meet those standards, and then, based on those projections, allocated future individual pollutant loading limitations to thousands of sources and source categories, in many cases hundreds of miles from the Bay.

55. EPA developed the followings series of computer models and tools to facilitate the development of the Final TMDL. First, it used a “Scenario Builder” model to estimate nutrient and sediment runoff from land based on assumptions about current and future management scenarios. The estimates from Scenario Builder were fed into a “Watershed Model” that simulated the loading and movement of nutrients and sediment from various sources in the watershed and calculated how much of those pollutants would reach the Bay. Next, that estimate was fed into a “Water Quality Model” that estimated the water quality, sediment transport, and changes to living resources (algae, submerged aquatic vegetation, and filter feeders) in the Bay that would result from the nutrient and sediment load

estimated by the Watershed Model. Finally, the estimate from the Water Quality Model was fed into an “Assessment Program” to estimate whether water quality standards in the Bay would be attained based on the future controls and management scenarios established by the upstream models.

56. EPA also developed: an airshed model to simulate air-to-water nitrogen deposition in the Bay; a future land use model to predict land use changes over the next thirty years; and a climate change model to assess future impacts to the Bay watershed based on potential climate variability in the future. Each of these additional models fed information into the three core models (Scenario Builder, Watershed Model, and Water Quality Model) to make estimates about the Chesapeake Bay ecosystem.

57. As with any modeling program, fundamental flaws in the inputs and assumptions will generate fundamental flaws in the results. This is particularly true where, as here, the various models are “linked together so that the output of one simulation provides input data for another model.” Final TMDL at 5-19. Thus problems in one model are carried over to another, and even minor errors in one can have profound effects on another downstream model. This is precisely what has happened in EPA’s Final TMDL, where multiple and compounding errors in EPA’s models undermined the allocations established in the Final TMDL.

58. For example, EPA estimated that 2,585,300 tons of sediment delivered to the Bay in 2009 (the baseline load year used in the Final TMDL) came from agriculture. Final TMDL at 4-30. This estimate is nearly *triple* that estimated by the U.S. Department of Agriculture Natural Resource Conservation Service in its October 2010 draft report regarding the effectiveness of conservation practices on cultivated cropland in the Chesapeake Bay region. EPA also estimated that 7.3 million pounds of phosphorus loaded to the Bay in 2009 came from agriculture. *Id.* This is 1.8 million pounds (roughly 25%) *greater* than the phosphorus load estimated by the Natural Resource Conservation Service.

59. The agencies also differ significantly in their estimates regarding the amount of acreage dedicated to agricultural use within the watershed and how the various crops are accounted for. EPA assigned 9.0 million acres to agriculture in its Watershed Model simulation that calculated the sediment, phosphorus, and sediment loads reported above. The Natural Resource Conservation Service attributed 12.12 million acres to agriculture in its estimates. That difference (3.12 million acres) represents a land area more than *twice* the size of the State of Delaware and the District of Columbia combined. Such differences fundamentally change the assumptions regarding the amount of nutrients and sediment entering the watershed and greatly change the simulations in all three of the linked main models (Scenario Builder, Watershed Model, and Water Quality Model) and the

results of those simulations. These differences undermine the allocations in the Final TMDL, particularly because EPA has failed to explain why its estimates of areas and loads related to agricultural land use are valid in light of the dramatically different estimates produced by the federal agency with the most knowledge and expertise about agriculture in the United States.

60. EPA has also failed to accept input from the agricultural community regarding key assumptions related to fertilizer utilization and manure management, among other factors. For example, the Agriculture Work Group, a part of the Chesapeake Bay Program's Water Quality Goal Implementation Team, warned EPA about errors in the way EPA's Watershed Model handles manure and nutrient application rates – in particular, by assuming that no excess manure is transferred out of the watershed, and that manure is applied at non-agronomic rates (beyond the level at which crops uptake nutrients). Both assumptions are patently wrong, but EPA has not corrected the deficiencies in the Final TMDL modeling framework. Moreover, at a December 11, 2009 public meeting, EPA acknowledged that its loading numbers for agriculture were based on “misinformation” about fertilizer application rates, yet those mistakes were not rectified.

61. The Watershed Model also relies on inaccurate assumptions regarding agricultural runoff. It inexplicably assumes that 15 to 21% of all manure at animal

feeding operations is left on impervious surfaces and managed so improperly that it runs off directly into Bay tributaries. *See* Final TMDL at 4-31. In other words, the Watershed Model treats hundreds of tons of animal manure at animal feeding operations like storm water flowing from impervious areas in cities, a totally implausible assumption for which EPA provides no support. EPA's modeling also includes inaccurate assumptions regarding the rate of implementation of agricultural best management practices ("BMPs"). EPA admits that only BMPs that are associated with cost-share programs are included in those assumptions, grossly underestimating current BMP implementation throughout the watershed.

62. Finally, the assumptions used in Scenario Builder to model soil loss and therefore sediment loadings in the Bay system are inaccurate. Empirical research has shown that the model used by EPA to estimate soil loss may produce results that are off by as much as 100%. *See* Boomer et al., USLE-Based Empirical Models Fail to Predict Sediment Discharges, *J. Environ. Qual.* 37:79–89 (2008).

63. Aside from using bad assumptions and flawed input data, the models themselves are unreliable. For example, when EPA's Watershed Model was independently tested, it produced different results when identical input data was run on different compilers, with variability as high as 36%. In other words, simply changing the machine changed the result. The model also mistakenly predicted

that in some cases the number of stream and bay segments failing water quality standards would *increase* as pollutant loads *decrease*.

64. EPA was also unable to get its models to predict that water quality standards would *ever* be achieved in certain segments, no matter what inputs EPA used. The modeling results simulated a persistent 1% nonattainment of dissolved oxygen or chlorophyll-*a* criteria for a number of water segments in the Bay no matter what assumptions are made. Rather than acknowledge that its models were flawed, EPA redefined the meaning of “attainment” for those particular circumstances. *See* Final TMDL at 6-10- 6-12. EPA did not, apparently, fully evaluate the assumptions in the network of models in assessing the re-definition of attainment. For example, EPA could have evaluated whether there were other management actions (such as slight increases in levels of menhaden, a species of fish, and oysters) that could bring these segments into attainment.

65. EPA’s approach not only defies common sense, but it runs counter to the fundamental principles of environmental modeling, which requires careful calibration and validation. “Calibration” tests the model to ensure that it is performing as intended. “Validation” compares the model simulations to real-world results to ensure that the model is performing accurately.

66. Multiple scientific reviews of EPA’s models have pointed to the lack of calibration as a concern. In fact, the chair of the National Research Council

committee tasked with evaluating Chesapeake Bay TMDL implementation asked EPA at a September 9, 2010 meeting why EPA had not followed the recommendations regarding model calibration raised in previous peer reviews.

67. Part of the calibration problem is lack of data. EPA attempted to calibrate the Watershed Model, for example, using monitoring data from only 200 sampling stations located sporadically throughout the approximately 1,000 stream and bay segments (each covering, on average, 64 square miles) subject to the Final TMDL. *See* Final TMDL, at 5-30. EPA also calibrated the Watershed Model using data from *another model* (the “SPARROW Model”). *See id.* at 5-28. Limitations on available data also inhibits EPA’s ability to verify the overall model results.

68. EPA’s modeling network is only useful if it accurately reflects the reality it purports to represent. EPA’s network fails that test. As a threshold matter, EPA is using the Watershed Model to establish pollutant load allocations on a scale far more precise than the model can validly predict. The lowest level of segmentation possible in the model is the “local watershed scale” (66 square miles), but as multiple peer reviewers have pointed out, the Watershed Model is only designed for full watershed or major tributary scale analysis, and that it would be “inappropriate to use the existing . . . subwatershed data sets for local-scale modeling applications.” Chesapeake Bay Program, Scientific and Technical

Advisory Committee, Chesapeake Bay Watershed Model Phase V Review (February 20, 2008), at 6 (available at <http://www.chesapeake.org/stac/Pubs/2ndPhaseVReportFinal.pdf>).

69. EPA itself has admitted that its Watershed Model is flawed and unfinished, and that it plans to make changes to the model in 2011 so that it can change its assumptions regarding both nutrient management and the extent of impervious surfaces in the watershed. *See* Letter from Shawn Garvin, Regional Administrator EPA Region III, to Principal's Staff Committee, at 2 (June 11, 2010) (available at [http://www.epa.gov/reg3wapd/pdf/pdf\\_chesbay/TMDLScheduleLetter.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/TMDLScheduleLetter.pdf)). In fact, on January 6, 2011, Mr. Gavin informed a meeting of state officials that EPA intends to redo certain aspects of its pollutant runoff modeling for agriculture and low-density development. And on January 11, 2011, EPA intends to discuss planned changes in the next version of Scenario Builder. The fact that EPA is already planning to redo its models underscores the fact that the Final TMDL is based on inappropriate and incomplete information.

**E. Development of a Federal TMDL – Inadequate Public Review and Comment**

70. EPA's Draft TMDL was released for a 45-day public comment period on September 24, 2010. 75 Fed. Reg. 57,776 (Sept. 22, 2010) (Docket No. EPA-R03-OW-2010-0736). Even though the Chesapeake Bay TMDL is the most

complex TMDL ever attempted – it is, in fact, 552 separate TMDLs – EPA provided only 45 days for public review and comment on the TMDLs and the models from which they are built. The Draft TMDL consisted not only of the two sets of wasteload and load allocations each for nitrogen, phosphorus, and sediment for 92 water body segments, it also consisted of the detailed implementation instructions directed at the watershed jurisdictions. All told, EPA presented for a mere 45-day review the 370 pages of the Draft TMDL document itself, 1,672 pages of 22 appendices, as well as the technical analysis and modeling information that is referenced throughout the Draft TMDL.

71. Plaintiff American Farm Bureau Federation, along with numerous other organizations and commentors, the Governor of Virginia, two Congressmen, and more than 20 local governments, requested EPA to delay the TMDL and provide additional time to comment. EPA denied all requests.

72. But worse than its failure to provide sufficient time for meaningful public review and comment on the Draft TMDL, EPA failed to provide the information necessary to provide meaningful comments during that period.

73. Only six days before the end of the brief 45-day comment period, on November 2, 2010, EPA staff provided to a limited number of recipients, in an e-mail communication, internet links to the scenario data and scenario results. These data and results are the inputs and outputs of the “Scenario Builder” model that

EPA relied on to determine the assumptions under which its overall modeling network predicts that water quality standards will be met and which it incorporated into the TMDL. In other words, these are the inputs and outputs that determined some of the key assumptions for the Final TMDL. In addition, the final documentation for Scenario Builder that EPA made available in conjunction with the release of the Final TMDL is dated December 2010, well after the close of the public comment period. *See* Final TMDL at 4-28.

74. The links to the scenario data and scenario results were not made available in the administrative record for the Draft TMDL or on EPA's website for the Draft TMDL. Thus, most of the public was unable to review and comment on this critical model. Even if this information had been made available more broadly, six days is clearly insufficient to review the code for the Scenario Builder model and the inputs to and outputs from the model that were used to develop the Final TMDL. No one outside EPA has had the opportunity to evaluate the Scenario Builder model by running it themselves.

75. Of equal significance is EPA's failure to provide adequate notice of and an opportunity for comment on the Watershed Model. EPA provides a link to a website containing information on the Watershed Model in the Final TMDL. *See* Final TMDL at 4-32. That website confirms that the model *was still changing after the close of the comment period* on the TMDL. *See*

[http://www.chesapeakebay.net/model\\_phase5.aspx?menuitem=26169](http://www.chesapeakebay.net/model_phase5.aspx?menuitem=26169). Indeed, that website openly declares that the “documentation will be finalized by December 2010,” and, in fact, portions of the modeling documentation were not posted on the website until December 31, 2010. Moreover, the website “warn[s]” users of the draft documentation it contains that the “information is *preliminary, subject to change, and unsubstantiated by full and final reviews.*” *Id.* (emphasis added).

76. EPA also did not provide the public the opportunity to review and comment on many of the other documents relied on to develop the Final TMDL before issuing it. EPA instead attempted to incorporate by reference a significant number of documents that “EPA and its seven watershed jurisdictions relied upon” in developing the Final TMDL, indicating only that access to this information “[would] be provided.” *See* Draft TMDL at Appendix B.

77. Because the significant policy choices embodied in the TMDL are based primarily on models, and not on actual data, and those models are based on assumptions, it was essential that the those assumptions, as well as any other information relied on by the agency, be subject to meaningful public review and comment, but they were not.

**F. EPA’s Final TMDL for the Chesapeake Bay Watershed**

78. EPA issued the Final Chesapeake Bay TMDL on December 29, 2010. *See* <http://www.epa.gov/chesapeakebaytmdl/>. It addresses the restoration of

aquatic life designated uses for the Bay, its tidal tributaries, and embayments, and is the “largest and most complex thus far” of the 40,000 TMDLs completed to date across the United States. Final TMDL at ES-3. The Final TMDL is in fact a combination of TMDLs, including daily and annual allocations for three pollutants for 92 individual water body segments in the Chesapeake Bay. The Final TMDL sets limits for the Bay watershed of 185.9 million pounds of nitrogen, 1.2 million pounds of phosphorus, and 6.45 billion pounds of sediment per year, which amounts to a 25% reduction in nitrogen, a 24% reduction in phosphorus, and a 20% reduction in sediment, intended to meet state water quality standards for dissolved oxygen, water clarity, and chlorophyll-*a*. These limits have been applied throughout the watershed based on the computer models discussed above. EPA’s Final TMDL also assigns pollutant loads specifically for the agricultural sector within each water segment and jurisdiction, and pollutant loads for individual sources, including those in the broader watershed far upstream from the 92 tidal waterways themselves. These detailed and specific pollutant loads are set forth in Section 9 of the Final TMDL and in the extensive spreadsheets appended thereto. *See* Final TMDL at Appendices Q and R.

79. The nitrogen limit for the Chesapeake Bay basin as a whole was driven by the need to achieve the dissolved oxygen standards in four deep channels in the main stem of the Bay and the lower Potomac River, resulting in a 50 million

pound reduction in nitrogen loading that would not be necessary for the other 88 waterways feeding the Bay. *See* Final TMDL at 6-14.

80. EPA performed no analysis of the costs of compliance with the Final TMDL and its multitudinal assigned pollutant loads that span the entire Mid-Atlantic Region, nor did EPA analyze the cumulative impact of such costs on the regulated community and society at large, as compared to the benefits of achieving dissolved oxygen water quality standards in the depths of four Bay water channels.

81. The Final Chesapeake Bay TMDL implements EPA's specific statutory "backstop" authority to issue TMDLs with respect to two TMDLs in the District of Columbia and 23 in Virginia. For all other states and water segments, EPA has not waited for the action by the states contemplated by the Clean Water Act before issuing the Final TMDL.

82. Even if EPA had authority to develop TMDLs for the 92 impaired segments of the Bay and its tidal waters in Maryland, Virginia, Delaware, and the District of Columbia, EPA cannot, acting in a backstop capacity, exercise authority that is not given to these jurisdictions under Clean Water Act Section 303(d). Section 303(d) does not grant any of these jurisdictions the authority to assign pollutant loadings to sources outside of their jurisdictions. The Clean Water Act also does not give this authority directly to EPA. Accordingly, EPA has no

authority to establish or enforce any pollutant loadings in the Chesapeake Bay TMDL for sources in Pennsylvania, West Virginia, and New York.

**G. Significant Impacts of EPA's Final TMDL on Farm Plaintiffs' Members**

83. EPA's Final TMDL will have a significant adverse impact on Farm Plaintiffs' members. As a result of EPA's inaccurate modeling, EPA assumes that specific changes in the operations of agricultural sources are necessary to achieve water quality standards in the Bay and its tidal tributaries. EPA incorporates assumptions regarding those specific operational changes into its assigned pollutant loadings for agriculture. *See* Final TMDL at Appendix V. EPA intends to force agricultural sources to adopt those changes through the permits held by regulated agricultural sources. *See* Final TMDL, at 8-12. EPA also intends to convert unregulated agricultural sources into regulated sources if they do not change their operations. Finally, EPA intends to take actions against states if the practices assumed by EPA in the TMDL do not occur. *See* Final TMDL, at 8-13; *see also*

[http://www.epa.gov/reg3wapd/pdf/pdf\\_chesbay/FinalWIPEvaluations/PortfolioofEPAWIPEvaluations.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalWIPEvaluations/PortfolioofEPAWIPEvaluations.pdf) (EPA evaluations of the state WIPs including additional actions to be taken by EPA if agricultural loads identified in the WIPs are not achieved).

**FIRST CLAIM FOR RELIEF**

**EPA's Final TMDL Is Arbitrary and Capricious**

84. Paragraphs 1-83 are realleged and incorporated by reference.

85. EPA's assigned pollutant loadings in the TMDL are based on models that used erroneous assumptions so the Final TMDL's pollutant load reductions are not justified by the evidence in the record.

86. EPA's models were not properly calibrated or validated, so the Final TMDL's assigned pollutant loadings are not justified by the evidence in the record.

87. EPA's models are not capable of assigning valid pollutant loadings to individual sources, so the Final TMDL's assigned pollutant loadings are not justified by the evidence in the record.

88. For these reasons, EPA's Final TMDL is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706.

**SECOND CLAIM FOR RELIEF**

**EPA Failed to Provide for Public Notice and Comment Required by the  
APA**

89. Paragraphs 1-88 are realleged and incorporated by reference.

90. Under the Administrative Procedure Act, an agency that intends to promulgate a rule or regulation must first provide the public with notice of, and an opportunity to comment on, a proposed version of the rule. *See* 5 U.S.C. § 553.

Such notice and opportunity to comment must include the data upon which the agency relies.

91. EPA's Final TMDL was issued in violation of 5 U.S.C. § 553 in that EPA failed to provide the public with a meaningful opportunity to comment on the Draft TMDL and to participate in this regulatory proceeding. EPA failed to provide the public with sufficient access to the models and other information on which it relied to develop the Final TMDL, and some of the most vital information that EPA relied upon continued to change even after the close of the brief comment period.

### **THIRD CLAIM FOR RELIEF**

#### **EPA's Final TMDL Violates the Clean Water Act and EPA Regulations**

92. Paragraphs 1-91 are realleged and incorporated by reference.

93. EPA's Final TMDL is arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitation in violation of 5 U.S.C. § 706 because EPA has exceeded its delegated authority under the Clean Water Act and otherwise violated the Act and its own regulations, as described in further detail below.

94. EPA exceeded its authority under Section 303(d)(2) of the Act, 33 U.S.C. § 1313(d)(2), which limits EPA's authority to establish a federal TMDL to instances of state action or inaction that is contrary to the Clean Water Act.

95. EPA exceeded its statutory authority when it established individual and aggregate pollutant loadings. If EPA has statutory authority to establish federal TMDLs for the Chesapeake Bay, that authority is limited to establishing a single TMDL for each constituent for each water body segment addressed by the Final TMDL. As evidenced by Table 8-5 and Appendices Q and R in the Final TMDL, EPA went much further and assigned hundreds of pollutant load allocations across the entire watershed from Virginia to New York. The assignment of these pollutant loads unlawfully usurps the states' primary Clean Water Act authority to implement the Final TMDL within their own borders.

96. Further, EPA exceeded its statutory authority under 33 U.S.C. § 1313(d) and violated its own regulations when it assigned pollutant loads aimed to achieve *the Bay's* water quality standards to point sources and nonpoint sources that discharge or send runoff to *other waterways that have their own water quality standards* and are far upstream of the Bay and its tidal segments. EPA's overreaching is unlawful.

97. The Final TMDL also violates EPA's implementing regulations by, *inter alia*, (i) failing to comply with 40 C.F.R. § 130.7(c)(1)(ii), which requires that calculations used to establish TMDLs be subject to public review; and (ii) encompassing nonpoint sources within point source wasteload allocations in contravention of the regulatory distinction in 40 C.F.R. § 130.2.

**FOURTH CLAIM FOR RELIEF**

EPA's Final TMDL is *ultra vires*

98. Paragraphs 1-97 are realleged and incorporated by reference.

99. To the extent not specifically alleged above, the Final TMDL is in excess of delegated statutory authority under the Clean Water Act and therefore is *ultra vires*, for the reasons set forth in ¶¶ 94-96, *supra*. Accordingly, and irrespective of federal court jurisdiction under any other statute, the Final TMDL is unlawful and should be set aside as *ultra vires*.

**PRAYER FOR RELIEF**

WHEREFORE, Farm Plaintiffs respectfully request this Court to enter judgment in their favor, and:

1. Declare that the Final TMDL is contrary to federal law, including the Clean Water Act, or is otherwise arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority, or limitations, or is *ultra vires*;
2. Declare that EPA violated the APA in issuing the Final TMDL without following APA procedures;
3. Vacate the Final TMDL;
4. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with it from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Final TMDL; and

5. Grant Farm Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

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