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

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 11-cv-0067**
	)	**(Judge Rambo)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

INTERVENOR
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SCOPE OF INTERVENTION

Intervenor, Pennsylvania Municipal Authorities Association (hereinafter "PMAA") hereby files this Reply Memorandum in support of Defendant's cross-motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

Since this Court granted PMAA leave to intervene on October 13, 2011, PMAA's intervention has been limited to Plaintiffs' specific challenge to the load reduction allocations in the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (hereinafter "TMDL"), said TMDL being established by the United States Environmental Protection Agency (hereinafter "EPA"). PMAA has taken no position and takes no position at this time as to the remainder of arguments made by Plaintiffs, EPA, or the other intervenors.

PMAA intervened only to address Plaintiffs' claims concerning the TMDL's current pollutant loading allocations and corresponding reductions. PMAA argues only that if EPA is found to have the authority to establish the TMDL, then the loading reductions found in the TMDL have been appropriately vetted, are lawful and should not be disturbed simply because some of the largest stakeholders do not want to address their fair share.

II. ARGUMENT

Although the Plaintiffs attempt to disguise their arguments and true intentions, Plaintiffs' position concerning the current allocations can be distilled into three components. First, Plaintiffs argue that the TMDL is contrary to law because it "encompass[es] nonpoint sources within point source wasteload allocations." *Plaintiffs' Amended Complaint*, ¶ 83.[1] Second, the Plaintiffs suggest that the allocation scheme in the TMDL violates the Federal Clean Water Act (hereinafter "CWA") because the allocations are "inflexibly locked in place." *Plaintiffs' Opposition to EPA's Cross Motion For Summary Judgment and Reply Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment* (hereinafter "Plaintiffs' Reply Brief") pg. 12. Third, Plaintiffs argue that "the requirement that states obtain EPA approval to revise any [load allocations (hereinafter "LAs")] in the…TMDL undercuts states' exclusive authority over nonpoint sources and effectively enhances EPA's authority beyond the limits set by Congress." *Plaintiffs' Reply Brief*, pg. 13.

[1] Although Plaintiffs maintain that they have not argued against "the propriety of dividing responsibility between nonpoint and point sources," their true intentions are plainly evident. *Plaintiff's Opposition to EPA's Cross Motion For Summary Judgment and Reply Memorandum in Support of Plaintiffs' Joint Motion for Summary Judgment*, pg. 9. Plaintiffs unquestionably want either (1) this court to shift the burden of cleaning up the Chesapeake Bay Watershed away from Plaintiffs; or alternatively (2) the states to have the ability to shift the burden away from Plaintiffs.

However, as articulated in PMAA's initial Memorandum of Law and in EPA's June 20, 2012 Memorandum in Support of EPA's Cross Motion for Summary Judgment (hereinafter "EPA's Reply Brief"), the current allocation of pollution load reductions between point sources (waste load allocations or WLAs) and nonpoint sources (load allocations or LAs) does not violate the CWA. Moreover the current allocations were generated by the states and are to be implemented by the states. For these reasons, the Plaintiffs' arguments fail.

A. If EPA Has The Authority To Establish The TMDL, Then Inclusion Of Load Allocations For Nonpoint Sources Was A Proper Exercise Of EPA's Authority.

First, the LAs assigned to nonpoint sources are not illegally binding, as the Plaintiffs suggest. To the contrary, and as articulated in EPA's Reply Brief, inclusion of measures designed to address pollution from nonpoint sources into a TMDL is lawful under the CWA. *See Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).[2]

In *Pronsolino,* an environmental group challenged an EPA established TMDL for the Garcia River in California. The TMDL sought to address pollution coming exclusively from nonpoint sources. *Id*. at 1130. The Court in *Pronsolino*, examined EPA's regulations and concluded that the Garcia River TMDL was a lawful exercise of EPA's power under the CWA, even though it addressed

[2] The *Pronsolino* case has been cited both by the Plaintiffs and by EPA for differing propositions.

nonpoint sources exclusively. *Id*. at 1131-1133 ("In short, EPA regulations concerning…TMDLs apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two") and 1139 ("Looking at the statute as a whole, we conclude that the EPA's interpretation of § 303(d) [of the CWA] is…entirely reasonable"). This Court should, respectfully, reach a similar conclusion. The simple fact that EPA included nonpoint sources in the TMDL does not, in and of itself, make the TMDL unlawful. Instead, it represents a proper sharing of the burden amongst all parties ultimately responsible for meeting load reductions necessary to achieve water quality standards.

Plaintiffs' attacks on the allocation of pollutant load reductions are without merit. The regulatory definition of TMDL includes both LAs and WLAs as sources of pollution. Federal regulation defines a TMDL as:

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

40 C.F.R. § 130.2(i). Thus, by definition, a TMDL must take into consideration pollution both from point sources and nonpoint sources. Therefore, the TMDL's allocation of load reductions is consistent with the CWA.

B. The TMDL's Current Allocations Are Not Inflexibly Locked Nor Are The Allocations An Intrusion Upon The States' Rights

Plaintiffs continue the argument raised in their initial brief by suggesting that the current allocations "intrude upon state implementation authority." *See Plaintiffs' Initial Memorandum*, pg. 34. In Plaintiffs' Reply Brief, the Plaintiffs suggest that the TMDL is unlawful because "states must retain flexibility to adjust allocations as they issue point source permits or impose nonpoint source pollution control measures." *Plaintiffs' Reply Brief*, pg. 14. Such an argument is completely belied by the record.

Simply stated, and as previously articulated, the events giving rise to EPA's establishment of the TMDL included input from the states and the states' cooperation. Plaintiffs' admit as much in the Introduction to their Reply Brief. There, the Plaintiffs state that:

> EPA demanded all seven states in the Chesapeake Bay watershed to provide EPA with "watershed implementation plans" ("WIPs") that included, among other things, detailed pollutant allocations to specific sources and source sectors.

Plaintiffs' Reply Brief, pg. 1. As the record makes clear:

1. EPA used modeling tools to develop WLA and LA for use in the TMDL. AR0000152-0000196.

2. EPA then gave these WLA and LA calculations to the states and asked for each state to prepare a strategy on how that particular state planned on meeting the required reductions. AR0000197-0000249.

3. DEP, acting for Pennsylvania, then prepared a strategy to meet those WLA and LA allocations within Pennsylvania by creating a Watershed Implementation Plan (hereinafter "WIP"). AR0000285-0000288, *and see also* AR0026393-0026671.

4. Based upon DEP's WIP, and the WIPs prepared by the other Bay states, EPA established the TMDL. AR0000017

Thus, Plaintiffs are incorrect in their argument that the allocation of pollutant load reductions was an unlawful intrusion on the states' implementation authority. To the contrary, no such intrusion took place because the states were involved in the process, and in Pennsylvania's instance, drafted the implementation strategy, or WIP.

According to the TMDL, "Pennsylvania's final Phase I WIP articulated a strategy to achieve its TMDL allocations." AR0000288. That strategy was chosen by Pennsylvania and is articulated in Pennsylvania's WIP, which addresses *both* nonpoint sources and point sources. Specifically, Pennsylvania's WIP provides

that the Commonwealth, not EPA, is "developing a nonpoint source compliance effort focused on two major sectors: agriculture and stormwater." AR0026404. Simultaneously, the Commonwealth has also developed a strategy to address point source dischargers:

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

AR0026405 (emphasis added). Therefore, the Plaintiffs' concern that states be brought into the decision making process has already been addressed. Pennsylvania was involved in the development of the strategy necessary to meet the requirements of the TMDL. Moreover, as EPA acknowledges, the "TMDL is shaped in large part by the jurisdictions' plans to reduce pollution…Now the focus shifts to the jurisdictions' implementation of the WIP policies and programs that will reduce pollution…." AR0000017 (emphasis added). While the Plaintiffs' may

argue that the TMDL intrudes upon the states' implementation authority, the simple fact of the matter is that the TMDL is based almost entirely on the Bay states' final Phase I WIPs. [3] The allocations provided in the various Bay states' WIPS, including the allocations found within Pennsylvania's WIP, which DEP has already stated it will stand behind as "the most cost effective and reasonable approach," should not be disturbed. AR0026405.

Lastly, the Plaintiffs are mistaken in their position that the TMDL's allocations are "locked in." The TMDL itself discusses situations under which the states have the flexibility to implement the TMDL's WLAs without necessitating a change to the final allocations. AR0000332. Pennsylvania has already demonstrated such flexibility by making it clear that it will stand behind the strategy it agreed to in the past because it believes it is the most cost effective and reasonable approach. AR0026405

EPA also has admitted that the states will have flexibility in implementing the TMDL. *EPA's Reply Brief*, pg. 5 ("states have flexibility to implement a TMDL as they deem appropriate"). Moreover, the "states, concurrently with the development of the TMDL, devised their own plans for implementing those

[3] Plaintiffs' attempt to argue that Pennsylvania's WIP is not evidence that the Final TMDL does not "usurp state authority and was the product of voluntary state cooperation." *Plaintiffs' Reply Brief*, pg. 22, fn.7. However in support of this argument, the Plaintiffs can point only to comments made by Pennsylvania concerning the *draft* TMDL.

allocations – the Phase I WIPs." *Id*., pg. 8. Lastly, as EPA argues, it is "simply not true that the states have no flexibility to make implementation decisions that may differ from the allocation choices reflected in the TMDL." *Id*. pg. 11.

Succinctly stated, the current allocations were shaped largely by input from the states. The implementation of the TMDL is now, as evidenced by the TMDL itself, shifted back to the states. In Pennsylvania's case, the Commonwealth established an allocation and decided to stand behind that allocation. AR0026405. These allocations, which have already been thoroughly vetted, should not be disturbed simply because the Plaintiffs do not want to contribute their fair share.

III. CONCLUSION

For the reasons articulated above, PMAA respectfully requests that this Honorable Court deny the Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2), the undersigned certifies that the foregoing Intervenor's Reply Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Joint Motion for Summary Judgment complies with the word count limit and does not exceed the allotted 5,000 words. According to the word count feature of the word-processing software used to prepare this Memorandum, the Memorandum contains 2,197 words.

/s/ Steven A. Hann
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CERTIFICATE OF SERVICE

I certify that on July 13, 2012, a copy of the foregoing Reply Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Joint Motion for Summary Judgment was served by electronic service via the Court's ECF system pursuant to Standing Order 03-1, ¶ 12 upon:

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