UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 11-cv-00067-SHR**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEF ON DEFERENCE

I. The Clean Water Act Plainly Does Not Authorize The Agency To Impose Allocations In A TMDL.

There is no real dispute that the *Chevron* framework applies here.[1] EPA acknowledges that the first step of this Court's analysis under *Chevron* is to evaluate whether the statute is clear using all of the traditional tools of statutory construction. *See* EPA Oppn. Br. 2.[2] The critical issue in this case – whether EPA can impose binding allocations in a TMDL – can be resolved at *Chevron* step one.

The Clean Water Act ("CWA") authorizes EPA to establish a "total maximum daily load." 33 U.S.C. §1313(d)(2) (emphasis added). Contrary to EPA's claim (EPA Oppn Br. 3), Congress did define the "necessary elements of a TMDL," by requiring that "such load shall be established at a level necessary to implement . . . water quality standards[.]" 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Thus, a TMDL is a "total" pollutant "load" set at "a level" necessary to

[1] CBF suggests that this Court need not resolve "the proper standard of deference" because "EPA did exactly what Plaintiffs suggest the statute requires." CBF Oppn. Br. 7. Not so. Had EPA simply set a total load for each segment of the Bay, and left the rest to the States, there would be no need to discuss deference. EPA, however, did much more than that: the Agency (i) locked in allocations as purported elements of the TMDL, thereby restricting the States' ability to decide *how* to achieve the "total" load; (ii) drove the States to set the allocations to EPA's liking through threats, demands, and rejection of State watershed implementation plans ("WIPs"); and (iii) even overrode allocations in some of the States' Final WIPs and locked in its own "backstop" allocations in the Final TMDL. *See* Pls.' Opening Br. 14-20.

[2] EPA begins by declaring that it has the authority to promulgate TMDL regulations, *see* EPA's Oppn. Br. 1-2, but that general authority is not at issue here.

implement water quality standards. Nothing in this language even hints at the possibility that EPA can also impose allocations of the total load.[3]

Another TMDL case is instructive on how to interpret the words in CWA § 303(d). *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). There, the court emphasized, in a *Chevron* step one analysis, that "[d]aily means daily, nothing else" and that there is "nothing ambiguous about this command." *Id.* at 142, 144. So too here. There is nothing ambiguous about Congress's use of the terms "total," "load," and "a level," each in the singular form. On its face, section 303(d) authorizes EPA to set a total load at a level necessary to meet applicable water quality standards.[4] It does not authorize EPA to set hundreds of allocations at various levels among sources throughout a watershed.

EPA does not dispute that, under the CWA, states are responsible for incorporating the total load into their planning processes and for deciding how to achieve that load. *See* 33 U.S.C. §§ 1313(d)(2), (e). Moreover, section 303 should

[3] If a manufacturer was required to set a "total" "load" capacity for an elevator at a "level" necessary to ensure proper functioning, one would expect a single number, *e.g.*, 1,000 pounds. One would not expect to see allocations of that total load among various people or objects.

[4] TMDLs "specify the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011) (citing 33 U.S.C. § 1313(d)(1)(C)) (emphasis added).

be read in conjunction with other provisions in the CWA expressly preserving state authority over land use planning and the control of nonpoint sources. Thus, the "traditional tools of statutory construction" bring into sharp focus Congress's clear intent not to empower EPA to assign pollution limits to farmers, forest landowners, homeowners, and towns across the landscape. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *see also* Pls.' Supp. Br. 6-7. For these reasons, the CWA does "unambiguously forbid[] the Agency's interpretation" that it can impose allocations of a total load. *See* EPA Oppn. Br. 3.

EPA relies on *Barnhart v. Wilson*, 535 U.S. 212, 218 (2002), to suggest that it may do anything not "forbid[den]" by the statute. EPA Oppn. Br. 3. But *Barnhart* dealt with an agency's interpretation of whether a specified temporal limit in a statute modified two different nouns, not with whether an agency can rely on the lack of an express prohibition to expand a limited grant of statutory authority. Here, Congress authorized EPA only to establish a total load, nothing more. As the D.C. Circuit observed, "[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (citing, *inter alia*, *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)); *see also* Pls.' Supp. Br. 5.

EPA also mistakenly cites *Arkansas v. Oklahoma*, 503 U.S. 91, 104-07 (1992), and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009), in advancing its *Chevron* step one argument. *Arkansas*, which was decided under *Chevron* step two, does not support the proposition that EPA may assume authority not expressly granted in the statute. In fact, with respect to intrusion on state authority, Congress said the exact opposite in the CWA in 33 U.S.C. § 1370(2): unless "expressly provided," nothing in the Act shall "impair[] or in any manner affect[] any right or jurisdiction of the States with respect to the waters . . . of such States." Such "right or jurisdiction" is plainly impaired when EPA assumes control over how to apportion a total load among sources in a watershed. *See* Pls.' Reply Br. 13-19. Moreover, *Arkansas* dealt with point source permitting for which (unlike TMDLs) Congress expressly authorized EPA to "prescribe conditions for such permits to assure compliance with . . . <u>such other requirements as [it] deems appropriate</u>." 33 U.S.C. § 1342(a)(2) (emphasis added). No such sweeping grant of authority exists in the TMDL context. Congress provided that even though EPA may set a "total" load in some instances, it is the <u>states</u> that must decide how to achieve that load. *See id.* §§ 1313(d)(2), (e).

EPA's reliance on *Entergy* is also misplaced. *See* EPA Oppn. Br. 3. *Entergy* involved 33 U.S.C. §1326(b) (cooling water intake structures), an entirely distinct CWA provision that does not implicate intrusion upon state authority.

Entergy reviewed EPA's interpretation that the term "best technology available" allows it to use cost-benefit analysis. This bears no similarity to EPA's interpretation here that the term "total maximum daily load" authorizes EPA to allocate the "total" among thousands of sources.[5]

II. Even If The CWA Were Ambiguous, EPA's Interpretation Would Not Be A Permissible Construction Of The Act.

If this Court reaches *Chevron* step two, it should nevertheless reject EPA's interpretation as contrary to the CWA. *See* Pls.' Supp. Br. 8-9. EPA relies on a handful of cases arising in the TMDL context, asserting that courts have deferred to EPA's TMDL regulations and, more specifically, "have upheld TMDLs that have included both WLAs and LAs." EPA Oppn. Br. 5-6. But those TMDLs were challenged on other grounds. No court has decided whether EPA has authority to impose not only a total load, but also binding allocations.[6]

[5] In making what appears to be a *Chevron* step one argument, CBF relies on CWA §§ 303(d) and 117(g). *See* CBF Resp. Br. 7. CBF's analysis of section 303(d) is wrong for the reasons set forth above. In addition, section 117(g) does not mention TMDLs at all, let alone authorize EPA to impose allocations or otherwise intrude upon land use planning. EPA cannot rely on that provision to invent new regulatory authorities. *See* Pls.' Opening Br. 29-30; Pls.' Reply Br. 23.

[6] That courts have upheld EPA approvals of state-established TMDLs that contain WLAs and LAs is also irrelevant. *See, e.g.*, *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210 (D.D.C. 2011); *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). None of those cases decided whether EPA can set allocations that only EPA can change.

EPA relies heavily on the two *Pronsolino* decisions in particular. *See Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1340 (N.D. Cal. 2000). Neither of those decisions, however, can bear the weight EPA places on them. *See* EPA Oppn. Br. 5-6. The *Pronsolino* case concerned whether EPA can establish TMDLs for waterbodies that are impaired only by nonpoint sources. Neither the district court nor the Ninth Circuit considered or addressed whether EPA can establish allocations as elements of a TMDL.

EPA suggests that the Ninth Circuit in *Pronsolino* found that "[l]oad allocations for nonpoint sources pursuant to the TMDL regulations are an acceptable part of th[e] [TMDL] process." *Id.* at 6. But EPA misleadingly draws its inference from quoted passages in two different sections of the court's opinion. The Ninth Circuit did not address the propriety of setting allocations as elements of a TMDL. EPA also mischaracterizes the Ninth Circuit's *Pronsolino* decision by suggesting that the court rejected a federalism claim that "WLAs and LAs intrude on state authority over land use." EPA Oppn. Br. 8. But that was not the issue presented. Rather, the issue was whether EPA upset the federal-state balance merely "by establishing TMDLs for waters impaired only by nonpoint source pollution." 291 F.3d at 1140.

EPA attempts to downplay the significance of sections 101(b) (declaration of policy) and 510(2) (state authority) of the CWA. *See* EPA Oppn. Br. 7-8 (citing 33 U.S.C. §§ 1251(b), 1370(2)). Curiously, EPA states that these provisions "must be read in light of the specific provisions" that "allow the use of WLAs and LAs in TMDLs." *Id.* at 7. But as EPA itself has recognized, the CWA "does not specifically mention WLAs or LAs." *Id.* at 4 (quoting 50 Fed. Reg. 1,774, 1,775 (Jan. 11, 1985)). Section 510(2), however, is clear: unless "expressly provided," nothing in the CWA "shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370(2) (emphasis added). Allocating pollutant loading among sources is an essential part of a state's exercise of jurisdiction over its own waters; consequently, only express language – lacking here – could confer allocation authority on EPA. *See* Pls.' Supp. Br. 8.[7]

EPA also claims that, for "technical reasons," WLAs and LAs are necessary to effectuate Congress's "explicit intent that TMDLs achieve water quality standards." EPA Oppn. Br. 4. EPA's claim for deference to its "technical determination" fails for two reasons. *See id.* First, Congress's "explicit intent"

[7] EPA only has authority to ensure that the total load is set at "a level" necessary to implement water quality standards. Leaving authority to the states to allocate, and ultimately achieve, the total loads, carries out Congress's intent; it does not "frustrate[] the ability of section 303(d) to help achieve water quality standards." EPA Oppn. Br. 7.

was that water quality standards would be achieved by the states, not by EPA. EPA is authorized to set the total at "a level," but not to decide how that level will be achieved. *See* 33 U.S.C. §§ 1313(d)(2), (e).

Second, allocations are unquestionably not necessary for EPA to determine whether the TMDL is, as a technical matter, set at the correct level to achieve water quality standards. In fact, in the Bay TMDL, EPA did not add up allocations to arrive at the "sum" or "total." Rather (as one would expect), EPA set the "total" loads first. Only after that did it demand to see how the States would allocate the total loads before EPA locked those allocations in place in the TMDL. CBF's lengthy re-recitation (at pp. 3-7) of this history belies EPA's position that allocations are needed in a TMDL for "technical reasons." The "total" is what the statute authorizes and what one must calculate first. As CBF reminds us, that is indeed what EPA did first. *See* CBF Oppn. Br. 2-3. Determining how that load is to be achieved – including how the total should be allocated among sources – occurred after the total loads were already set.

In sum, even if this Court reaches *Chevron* step two, it should still reject EPA's interpretation (and the allocations in the TMDL) as contrary to the Act.[8]

[8] If the Court finds, under *Chevron* step two, that EPA's interpretation is contrary to the CWA, *Skidmore* deference would not save that interpretation. *See Skidmore v. Swift*, 323 U.S. 134 (1944).

III. EPA's Regulation Does Not Authorize Its Action Here.

EPA argues that nothing in its regulation (40 C.F.R. § 130.2) suggests that allocations are binding, and EPA emphasizes that it interprets that regulation such that allocations are not binding. EPA Oppn Br. 8-9; *see also id.* at 10 (describing the allocations as "unenforceable"). EPA's assertions are contradicted by the plain language in the TMDL (Pls.' Reply Br. 12-13[9]); by EPA's permitting regulations (Pls.' Reply Br. 10-11); and by record evidence (Pls.' Reply Br. 20-22; AR0001709;[10] Pls.' Opening Br. 16-20), all of which demonstrate that the Bay TMDL's allocations are binding. In particular, EPA cannot credibly assert that its allocations are not binding given its demands that the States provide "reasonable assurance" that allocations will be achieved and that water quality standards will be attained, *see* Pls.' Opening Br. 37-38, and its imposition of "backstop" allocations. *See* Pls.' Opening Br. 35-36. EPA's denial of the "binding" nature of its allocations is merely a convenient litigation position unworthy of deference. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

[9] EPA agrees that the States must obtain its approval to change the allocations in the Bay TMDL. *See* EPA Reply Br. 14-15.

[10] Responding to comments on the allocations in the TMDL, EPA wrote: "We agree that the allocations will have significant regulatory consequences. That is, of course, the point. We expect that the TMDL will indeed have immediate and direct consequences on discharges in the watershed."

In fact, if this Court accepts EPA's position that, under 40 C.F.R. §130.2, allocations are not binding, then it should vacate the Bay TMDL's allocation scheme in its entirety as contrary to law. *See* 5 U.S.C. § 706(2). Because EPA agrees that the Bay TMDL precludes state revision of the allocations absent EPA's approval, *see* EPA Reply Br. 14, EPA has effectively conceded that the Bay TMDL violates 40 C.F.R. §130.2.

Finally, EPA claims deference for its interpretation that 40 C.F.R. §130.2 does not "limit[] allocations to a single state" and thus upstream allocations are lawful. EPA Oppn Br. 10. EPA has made no effort to refute our analysis that the Agency's unprecedented interpretation of its regulations is both contrary to its prior interpretations and facially implausible. *See* Pls.' Supp. Br. 10 & n.7; Pls.' Reply Br. 29; Pls.' Opening Br. 40. The Agency's interpretation is thus unworthy of deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). EPA's reliance on *Arkansas* remains misplaced for all of the reasons set forth in our prior briefs.[11] *See* Pls.' Reply Br. 29-30; Pls.' Opening Br. 43.

[11] *Arkansas* may support EPA's ability to issue nonbinding WLAs and LAs in a TMDL," EPA Oppn. Br. 10, but that is not what EPA did here.

Dated: November 2, 2012

Respectfully submitted,

By: /s/ Amanda J. Lavis
Robert J. Tribeck, PA I.D. No. 74486
Amanda J. Lavis, PA I.D. No. 308956
RHOADS & SINON LLP
One South Market Square, 12th Flr.
Harrisburg, PA 17108-1146
(717) 233-5731

Richard E. Schwartz *(Pro Hac Vice)*
Kirsten L. Nathanson *(Pro Hac Vice)*
David P. Ross *(Pro Hac Vice)*
David Y. Chung
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Attorneys for Plaintiffs American Farm Bureau Federation, Pennsylvania Farm Bureau, The Fertilizer Institute, National Pork Producers Council, National Corn Growers Association, National Chicken Council, U.S. Poultry & Egg Association, and National Turkey Federation

Of Counsel:

Ellen Steen
Danielle Quist
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000W
Washington, DC 20024
(202) 406-3600

Gregg I. Adelman
William D. Auxer
Kaplin Stewart Meloff Reiter & Stein
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422
(610) 941-2515

Attorneys for Plaintiff National Association of Home Builders

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2012, a true and correct copy of the foregoing document was electronically filed and served on the following in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania:

Kent Hanson
Kent.hanson@usdoj.gov
efile_eds.enrd@usdoj.gov

Stephen R. Cerutti, II
Stephen.cerutti@usdoj.gov
Cindy.Long@usdoj.gov,
dennis.pfannenschmidt@usdoj.gov,
mark.e.morrison@usdoj.gov

Brian G. Glass
glass@pennfuture.org

Carla S. Pool
carla@aqualaw.com

Christopher D. Pomeroy
chris@aqualaw.com

Lee Ann H. Murray
lamurray@cbf.org
lcorby@cbf.org

Jon A. Mueller
jmueller@cbf.org
Lcorby@cbf.org

Richard A. Parrish
rparrish@selcva.org

Lisa M. Ochsenhirt
lisa@aqualaw.com

Russell B. Stevenson
Law Office of Russell B. Stevenson, Jr.
733 Dividing Road
Severna Park, MD 21146
202.360.1144
rstevenson@pobox.com

Steven A Hann
shann@hrmml.com
rmuir@hrmml.com

/s/ *Amanda J. Lavis*