UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

PLAINTIFFS' SUPPLEMENTAL BRIEF ON DEFERENCE

Plaintiffs[1] file this supplemental brief pursuant to this Court's October 9, 2012 Order inviting the parties to address whether this Court should defer to EPA's interpretation of the Clean Water Act ("CWA"). EPA contends that when the Agency establishes a "total" maximum pollutant load under 33 U.S.C. § 1313(d), the CWA also authorizes it to impose binding allocations of that total load.[2]

[1] Plaintiffs are 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, National Turkey Federation, and National Association of Home Builders.

[2] As explained in Plaintiffs' Reply Brief, allocations included as components of a TMDL are, as a matter of law and fact, locked in because states cannot independently change them in deciding how to achieve the TMDL. *See* Pls.' Reply

For the reasons explained below, EPA's interpretation is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and its progeny, which prescribe a two-step analysis. The first step (*Chevron* "step one") requires this Court to "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Because the CWA plainly does not authorize EPA "allocations," but only a "total" load, this Court's inquiry should end there. If this Court determines that the CWA is ambiguous, however, it should nevertheless reject EPA's interpretation under *Chevron* "step two" because it is not "based on a permissible construction of the statute." *Id.*

Because EPA's interpretation should be rejected under the *Chevron* analysis, there is no need to decide whether EPA's regulation (40 C.F.R. § 130.2) purports to authorize binding allocations. Any such rule would be unlawful under the CWA.

ARGUMENT

It is axiomatic that "[a]n agency may not exceed a statute's authorization or violate a statute's limits." *EME Homer City Generation, LP v. EPA*, No. 11-1302, 2012 WL 3570721, at *12 (D.C. Cir. Aug. 21, 2012). In this Circuit, when cases involve claims that an agency has exceeded its statutory authority, courts "employ the analysis prescribed by *Chevron*[.]" *Prestol v. Atty. Gen. of the United States*,

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Br. 10-14. EPA agrees that its interpretation (and the Bay TMDL itself) requires EPA approval for any changes to its allocations. *See* EPA Reply Br. 14-15.

653 F.3d 213, 215 (3d Cir. 2011).[3] Under *Chevron* step one, courts use all "traditional tools of statutory construction" to determine whether Congress' intent is clear on the question at issue. *Chevron*, 467 U.S. at 843 n. 9. If Congress' intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, "the [C]ourt determines that Congress has not directly addressed the precise question at issue, . . . the question for the [C]ourt is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *Chevron* step two thus requires the Court to "determine whether the regulation harmonizes with the plain language of the statute, its origin, and purpose." *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005).

I. This Court Should Reject EPA's Interpretation Because The CWA Plainly Does Not Authorize EPA To Establish Loading Allocations.

The following legal principles are relevant to this Court's analysis of the CWA under *Chevron* step one:

First, EPA's interpretation of the CWA is *not* entitled to deference unless the Court, using traditional tools of statutory construction, is unable to clearly ascertain

[3] Notably, there is a deep circuit split on the issue of whether *Chevron* ever applies in the context of an agency interpreting a statute to determine the limits of its own jurisdiction. Although Plaintiffs do not agree that *Chevron* applies in such a context, the Third Circuit has held that it does. *See NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 355 (3d Cir. 2001). The Supreme Court granted certiorari on October 5, 2012 to address that issue in *City of Arlington, Tex. v. FCC*, No. 11-1547.

Congress' intent. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *see also Hagans v. Comm'r of Social Security*, No. 11-2526, 2012 WL 4040256, at *4 (3d Cir. Sept. 14, 2012) ("[O]ur initial inquiry requires us to determine whether [the statute] is ambiguous. We conduct this ambiguity analysis as a matter of statutory interpretation which is necessarily antecedent to our deference inquiry because we need reach the deference question only if we find the statutory language is ambiguous.") (emphasis in original). In other words, "[t]he first question" in a *Chevron* analysis "is for the court, and [the court] owe[s] the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

Second, in construing the CWA, the Court should consider the statute as a whole. *See Hagans*, 2012 WL 4040256, at *4. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Prestol*, 653 F.3d at 217 (discussing *Chevron* step one and emphasizing that "[t]he Supreme Court has instructed that 'we must not be guided by a single sentence or member of a

sentence, but look to the provisions of the whole law, and to its object and policy.'").

Third, statutory silence does not prove ambiguity. *See United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008); *see also Prestol*, 653 F.3d at 220 (rejecting the government's attempt to "manufacture[] an ambiguity from Congress'[s] failure to specifically foreclose each exception that could possibly be conjured or imagined" and concluding that such an "approach would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations"). Indeed, "[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) (emphasis in original).

Finally, if a court determines "that the statute is unambiguous, [it is] bound to give effect to the words of Congress." *Hagans*, 2012 WL 4040256, at *4. Importantly, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *NRDC v. EPA*, 790 F.2d 289, 297 (3d Cir. 1986) (quoting *Chevron*, 467 U.S. at 843 n.9).

Applying these principles here, this Court can ascertain that Congress did not authorize EPA to establish pollutant loading allocations. The CWA authorizes EPA to establish a "total maximum daily load" for a state, but it plainly does not authorize EPA to allocate that total load or to otherwise determine how the total is to be achieved. *See* Pls.' Br. 7, 32. EPA cannot dispute that the CWA says nothing about allocating the total load among point and nonpoint sources. *See* 50 Fed. Reg. 1,774, 1,775 (Jan. 11, 1985). This statutory silence does not prove ambiguity, nor can EPA derive the authority to impose allocations from the absence of an express prohibition. *See, e.g.*, *Geiser*, 527 F.3d at 294; *Prestol*, 653 F.3d at 220.

The CWA does, however, clearly provide that states are responsible for incorporating the total load into their planning processes and for deciding how to achieve it. *See* Pls.' Br. 3-4, 9-10, 26-28; Pls.' Reply Br. 17-18. Congress' decision to give EPA backup authority to establish water quality standards, identify impaired waters, and establish total loads, while omitting equivalent language with respect to loading allocations or other aspects of TMDL implementation, must be given effect. *See* Pls.' Br. 3-4, 26-28 (citing statutory provisions and cases).

Other provisions of the CWA also make plain Congress' intent to protect the states from EPA intrusions into their decision-making on how to achieve total loads. In no uncertain terms, Congress instructed that, 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 [their] waters." 33 U.S.C. § 1370(2); *see also* Pls.' Br. 3, 25-26. Congress further declared its policy to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources[.]" 33 U.S.C. § 1251(b). Finally, Congress gave EPA no authority whatsoever to regulate nonpoint sources or any backup authority over state nonpoint source control plans. *See* Pls.' Br. 9-10, 28-29.

Thus, by asserting the authority to impose loading allocations that cannot be changed without EPA's approval, EPA has unlawfully: (i) gone beyond setting the "total" load; (ii) assumed control over implementation;[4] (iii) interfered with land use decisions; and (iv) interfered with state decision-making involving nonpoint sources. *See* Pls.' Br. 26-29, 32-36; Pls.' Reply Br. 9-22. EPA's assumption of control over allocation decisions is contrary to Congress' clearly expressed intent and must be rejected.

[4] EPA's own reply brief leaves little doubt that locking in its allocations is TMDL implementation. EPA asserts that the Bay TMDL is both the total load and the allocations, whereas the states' watershed implementation plans ("WIPs") are the implementation plans. *See* EPA Reply Br. 8. But EPA *also* states that its Bay TMDL allocations "are based almost entirely on the" WIPs. *See* EPA Opp'n Br. 22 (citing AR0000263).

II. Even If This Court Finds That The CWA Is Ambiguous, It Should Nevertheless Reject EPA's Interpretation Under *Chevron* Step Two.

If the Court finds that the CWA is ambiguous on the question of EPA-imposed allocations, it should reject EPA's interpretation as an impermissible construction of the statute. *See Chevron*, 467 U.S. at 843. Under *Chevron* "step two," EPA's interpretation of the CWA is afforded deference only if it "harmonizes with the plain language of the statute, its origin, and purpose." *Zheng*, 422 F.3d at 119 (invalidating a regulation under *Chevron* step two).

As discussed above, EPA's interpretation of the CWA does not harmonize with the text of the statute or with Congress' emphasis on state authority – particularly regarding nonpoint sources. *See* Pls.' Br. 7, 32-33. Rather, EPA has attempted to expand its own authority beyond establishing a total load (meant to be an informational tool) to include how to apportion that load among individual farmers, forest landowners, homeowners, and towns – an integral part of determining how to achieve the TMDL. EPA's binding allocations impair the states' authority to decide how "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b); *see also* Pls.' Reply Br. 13-15, 17-19; Pls.' Br. 3-4, 9-10, 32-36; *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 ("reject[ing] the request for administrative deference" and explaining that the Court requires a clear indication from Congress before upholding an agency's interpretation of a statute that "permit[s] federal

encroachment upon a traditional state power," such as authority over land and water use). Finally, as a practical matter, EPA's interpretation that the "total" load somehow derives from the "allocations" is unreasonable because it inverts the TMDL process. *See* Pls.' Reply Br. at 14-15 (explaining that the total cannot be allocated before you know what it is). Tellingly, here, EPA in fact estimated the total load first. *See* AR0000197.

For these reasons, EPA's view that it has authority to establish binding allocations in a TMDL should be rejected because it is not based on a permissible construction of the CWA.

III. The Interpretation Of EPA's Regulatory TMDL Definition Is Immaterial To The Court's *Chevron* Analysis.

Should the Court reject EPA's interpretation of the CWA under either step of the *Chevron* analysis, that is the end of the matter, and there is no need to determine whether EPA's regulation at 40 C.F.R. § 130.2 should be interpreted to authorize binding allocations.[5] Any EPA regulation that attempts to establish such authority must be rejected as contrary to the CWA.[6] *See* Pls.' Br. 7, 32-33.

[5] If the Court were to review EPA's interpretation of its regulation, it would do so under *Auer v. Robbins*, 419 U.S. 452 (1997), as that doctrine is explained in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

[6] A claim that a regulation, as applied, would exceed an agency's statutory authority may be raised outside of the limitations period. *See, e.g., Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7-8 (D.C. Cir. 2009).

IV. Even If The Court Finds That EPA Can Issue Binding Allocations Of A Total Load, Not Even EPA's TMDL Regulation Authorizes The Imposition of Out-of-State Allocations.

Even if the Court were to uphold EPA's interpretation that it may establish binding allocations, the Court should nevertheless reject EPA's interpretation that 40 C.F.R. § 130.2 authorizes the imposition of out-of-state allocations in a TMDL. With regard to that discrete issue, EPA claims that its rule is ambiguous regarding the terms "its" and "receiving waters." *See* EPA Br. 42-43. In the decades of EPA-issued TMDLs, however, EPA has not interpreted its regulation to authorize binding allocations on upstream states. *See* Pls.' Reply Br. 29; Pls.' Br. 40. This novel interpretation of a decades-old regulation is simply a contrived litigating position unworthy of *Auer* deference. *See* Pls.' Reply Br. 28-29; *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).[7]

[7] Because it is contrary to the CWA and lacks any persuasive force, EPA's interpretation of its regulation is also not entitled to a different, lesser form of deference than *Auer* deference. *See Christopher*, 132 S. Ct. at 2169. It is implausible, for example, that Congress intended to allow a TMDL for Louisiana waters to impose binding allocations on sources throughout the 31-state Mississippi River Basin watershed. *See* Pls.' Reply Br. 28-29.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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:

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