No. 15-599

# In the Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, ET AL.,
PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals correctly upheld, as a reasonable and lawful exercise of agency authority under the Clean Water Act, the "total maximum daily load" of pollutants, 33 U.S.C. 1313, established by the United States Environmental Protection Agency for the Chesapeake Bay.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 792 F.3d 281. The opinion of the district court (Pet. App. 51a-157a) is reported at 984 F. Supp. 2d 289.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. On September 18, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 6, 2015, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Congress enacted the Clean Water Act (CWA or the Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of

the Nation's waters." 33 U.S.C. 1251(a). To accomplish that purpose, the Act "establishes distinct roles for the Federal and State governments" in addressing water quality in waters of the United States. *PUD No. 1 of Jefferson Cty.* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994); see, *e.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (explaining that the Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective").

a. Pursuant to 33 U.S.C. 1313, the Act requires the development of "water quality standards" to "establish the desired condition of a waterway." *Arkansas*, 503 U.S. at 101; see 33 U.S.C. 1313(a)-(c); see, *e.g.*, *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1137 (9th Cir. 2002), cert. denied, 539 U.S. 926 (2003). States must establish such standards, which "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. 1313(c)(2)(A). If the standards are sufficient to (*inter alia*) "protect the public health or welfare" and "enhance the quality of water," then the United States Environmental Protection Agency (EPA) approves them. 33 U.S.C. 1313(c)(2)(A) and (3)-(4); see 40 C.F.R. 130.3, 131.20-.21. If EPA determines that a State's water quality standards are not consistent with the Act, EPA must "promulgate such standard[s]" itself. See 33 U.S.C. 1313(c)(3)-(4).

b. With respect to discharges of pollutants into water from "point sources," which are "discernible, confined and discrete conveyance[s]" such as outflow pipes and channels, 33 U.S.C. 1362(12) and (14), the principal mechanism for controlling pollution is the National Pollutant Discharge Elimination System

(NPDES). 33 U.S.C. 1342; see *Arkansas*, 503 U.S. at 101-105. Under NPDES, "discharge" by a point source "of any effluent into a navigable body of water" is generally "prohibit[ed]" unless "the point source has obtained an NPDES permit." *Arkansas*, 503 U.S. at 102 (citing 33 U.S.C. 1311(a)). Any State may seek authorization to administer the NPDES permit program for point sources within the State, see 33 U.S.C. 1342(b); see also 33 U.S.C. 1251(b), and EPA has granted most States such authority, see EPA, NPDES State Program Information, http://www.epa.gov/npdes/npdes-state-program-information; see generally, *e.g.*, 33 U.S.C. 1342(b), (c), and (k) (federal approval of state programs); 33 U.S.C. 1319 (federal enforcement). Even when such authorization has been granted, however, EPA may object to particular State-issued NPDES permits, and in some circumstances may replace a State's permit with an EPA-issued permit that contains different terms. 33 U.S.C. 1342(d).

Pollutants may also enter a water segment from "nonpoint sources," a category that may encompass runoff from "farmlands, mining activity, housing construction projects, roads," and any other source that is not a point source. *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Section 1329 directs States to develop programs to control nonpoint source pollution if necessary to meet water quality standards. Those programs are subject to federal oversight, but the Act generally leaves their enforcement to the States. See 33 U.S.C. 1329; see also 33 U.S.C. 1288(b)(2)(F).

c. Section 1313 requires each State to specifically identify waters for which technology-based permit controls alone are insufficient to implement the appli-

cable water quality standards. See 33 U.S.C. 1313(d)(1)(A); see also 40 C.F.R. 130.2(j). As to each of those "impaired" waters, the State must establish "the total maximum daily load" (TMDL) for the pollutants causing the impairment. 33 U.S.C. 1313(d)(1)(C). "Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." *Ibid.*

The CWA does not define the term "total maximum daily load." In 1985, after a notice-and-comment process, EPA promulgated regulations that interpret that term. See Water Quality Planning and Management, 50 Fed. Reg. 1774 (Jan. 11, 1985); see also 33 U.S.C. 1361(a) (granting EPA rulemaking authority under the Act); 40 Fed. Reg. 55,346 (Nov. 28, 1985). The regulations state that "total maximum daily load" includes (1) the amount of pollutant that a water segment can receive from point sources ("wasteload allocations"); (2) the amount of pollutant that the segment can receive from nonpoint sources ("load allocations"); and (3) a margin of safety. 40 C.F.R. 130.2(i); see 40 C.F.R. 130.2(g) and (h), 130.7(c)(1). The "sum" of those components must not exceed the greatest amount of pollutant load the segment can bear without exceeding water quality standards. 40 C.F.R. 130.2(i), 130.7(c)(1); see 40 C.F.R. 130.2(f)-(h); see also 50 Fed. Reg. at 1775 (explaining that "it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve [water quality] standards without evaluating component" allocations and "how these loads were calculated").

The CWA requires a State to submit a TMDL to EPA for approval. 33 U.S.C. 1313(d)(2). If EPA cannot approve the TMDL, then it must act in the State's stead to establish one. *Ibid.*; see, *e.g.*, *Hayes* v. *Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001) (explaining that EPA must also act to establish TDMLs if the State fails to submit them). "Before EPA establishes a TMDL, or approves a state-drafted TMDL, it determines whether the state has provided a 'reasonable assurance'" that the TMDL will result in achievement of water quality standards. Pet. App. 58a; see C.A. App. 144, 163 (1991 EPA guidance discussing "reasonable assurance"). So long as "the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established" under the Act "may be revised only" under limited circumstances. 33 U.S.C. 1313(d)(4).

d. A TMDL is an "informational tool[] that allow[s] the states to proceed from the identification of waters requiring additional planning to the required plans." *Pronsolino*, 291 F.3d at 1129. Thus, with a TMDL in hand that identifies what level of pollution from a source or category would be consistent with water quality standards, a State can develop an implementation plan that identifies precisely how that source or category can reduce its discharge of a pollutant to the necessary level. See, *e.g.*, Pet. App. 59a ("Implementation mechanisms are available under other provisions of the CWA, as well as the Clean Air Act, state laws, federal and state regulations, and local ordinances."); *id.* at 131a-132a; 33 U.S.C. 1313(e). For example, when a State issues a permit to a point source, it can use the wasteload allocation in a TMDL

as a guide to establish an effluent limitation for that source that adequately accounts for water quality standards. See *Arkansas*, 503 U.S. at 105-107 (discussing 40 C.F.R. 122.4(d)). A State can also decide that certain nonpoint sources should be subject to greater control than others, or that particular pollution-reduction techniques should be employed in certain locales but not others. See, *e.g.*, 40 C.F.R. 130.2(i); *Meiburg*, 296 F.3d at 1025. In each of these situations, the TMDL helps to locate each pollution-reduction measure within the context of a larger plan—a function that is particularly important for large and complex watersheds.

2. a. The Chesapeake Bay is North America's largest and most diverse estuary. See Pet. App. 3a, 61a. Encompassing more than 11,000 miles of shoreline, it drains a watershed of 64,000 square miles—including territory in Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia (which is treated as a State under the CWA, see 33 U.S.C. 1362(3))—through 50 major tributaries. See Pet. App. 3a, 61a; see also *id.* at 134a. It is important both ecologically and economically, with an estimated value of more than $1 trillion. See *id.* at 61a-62a.

Pollutants entering the Chesapeake Bay have resulted in severely degraded water quality in the Bay. See Pet. App. 4a, 62a. Excess nitrogen, phosphorus, and sediment pollution have caused murky water, preventing the growth of underwater grasses, and have promoted algae blooms, depleting the aquatic oxygen available to fish and wildlife. See *ibid.* Nonpoint source agriculture is the single largest source of pollutants that reach the Bay. See *Chesapeake Bay*

*TMDL* 4-29 (Dec. 29, 2010) (Bay TMDL), http://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document.

Beginning in 1983, States in the Bay watershed attempted to address those problems, in cooperation with EPA, by developing a comprehensive Bay restoration plan through the Chesapeake Bay Partnership. See Pet. App. 63a-70a (discussing signing of various agreements and memoranda of understanding); *id.* at 134a; see generally, *e.g.*, *Arkansas*, 503 U.S. at 108. Those States recognized that water pollution in the Bay is a "tragedy of the commons," Pet. App. 48a: because the Bay is affected by so many sources of pollution throughout its watershed, each State has little incentive to reduce pollutant loads from its own sources unless it believes that other States will do likewise.

In 1987, after early efforts to carry out a comprehensive plan met with little success, Congress amended the CWA to ratify the Chesapeake Bay Partnership and establish a Chesapeake Bay Program Office at EPA to support the Partnership through grants and studies. See Pub. L. No. 100-4, § 103, 101 Stat. 10 (1987) (codified at 33 U.S.C. 1267). In 2000, Congress directed EPA to "ensure that [state] management plans are developed" and "implementation is begun" in order to achieve the "water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem" and to meet the Partnership's goals for reducing "the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed." Pub. L. No. 106-457, 114 Stat. 1957 (2000) (codified at 33 U.S.C. 1267(g)).

b. Under the water quality standards adopted by the States with tidal Bay waters, almost every segment of the Bay is listed as "impaired" by the relevant States, requiring a TMDL for nitrogen, phosphorus, and sediment. See 33 U.S.C. 1313(d). The States chose not to adopt their own TMDLs for those waters, but instead agreed in 2007 to assist EPA to establish a comprehensive TMDL for the entire Bay. See Pet. App. 69a-70a; see also 33 U.S.C. 1313(d)(2); Bay TMDL 1-3 to 1-14. Within the framework of the Chesapeake Bay Partnership, federal and state officials collaborated closely for several years to develop a Chesapeake Bay TMDL, through hundreds of public meetings and in close consultation with experts and representatives from many affected stakeholders. See Pet. App. 13a, 70a, 73a, 134a-135a.

On December 29, 2010, after extensive collaboration with the States (and others) and a formal notice-and-comment process, EPA established the final TMDL for the Chesapeake Bay. See Pet. App. 13a, 52a, 70a. That TMDL "includes point and nonpoint source limitations on nitrogen, phosphorous, and sediment for 92 segments of the Bay identified as overpolluted and further allocates those limits to specific point sources and nonpoint source sectors" (such as wastewater treatment or agriculture). *Id.* at 12a. To assist in the development of the TMDL, each State developed a "Watershed Implementation Plan" that allocated target loads among significant point sources and nonpoint sources and sectors. Each State focused on the sectors, strategies, and pollution controls that it deemed most effective and desirable. See *id.* at 11a-12a. With few exceptions, EPA found that the State's proposed allocations were adequate and feasible, and

EPA largely adopted them as wasteload and load allocations in the final TMDL. See *id.* at 12a, 73a-74a (explaining that EPA imposed a "backstop" adjustment with respect to Pennsylvania urban stormwater, West Virginia agriculture, and certain New York point-source limitations).

The TMDL does not impose any binding implementation requirements on the States. It discusses the Bay Partnership's target dates and milestones for measuring implementation progress, as well as the States' assurances about what headway they would make in reducing pollution, but the TMDL itself imposes no consequences for missing those milestones. Instead, if that circumstance arises, EPA may consider whether to exercise authority conferred by other CWA provisions, separate from its TMDL authority, to take additional measures. See Pet. App. 10a, 12a, 35a-37a; Bay TMDL 7-2 to 7-5, 7-10 to 7-12, 8-4.

The TMDL has now been in effect for more than five years, and the States are implementing it through various means of their choosing. See generally Pet. App. 35a. All of the Bay watershed States have signed the 2014 Chesapeake Bay Watershed Agreement, thus reaffirming their commitment to the TMDL. See http://www.chesapeakebay.net/chesapeakebaywatershedagreement/page. The TMDL, as implemented by the watershed States, has resulted in meaningful progress in reducing harmful levels of pollution in the Bay. See, *e.g.*, Chesapeake Bay Program, *Experts Consider Chesapeake Bay an Ecosystem in Recovery* (Feb. 3, 2015), http://www.chesapeakebay.net/blog/post/experts_consider_chesapeake_bay_an_ecosystem_in_recovery.

3. Petitioners—organizations that represent the interests of various sectors of the agriculture industry—filed suit against EPA in the Middle District of Pennsylvania to challenge the Bay TMDL. Pet. App. 51a-53a, 78a-79a. The district court granted summary judgment in favor of the government. *Id.* at 51a; see *id.* at 51a-157a.

The district court observed that "the statutory provisions at issue are precisely the type that Congress intended to leave to EPA for interpretation." Pet. App. 101a. Addressing the question whether the Act allows a TMDL to contain component parts, the court determined that EPA's use of a wasteload allocation and a load allocation was "entirely reasonable[] and consistent with Congress's goals." *Id.* at 107a; see *id.* at 107a, 110a-115a (same conclusion with respect to allocation "among various sectors"). The court recognized that "the calculation of a TMDL is a 'highly technical, specialized interstitial matter.'" *Id.* at 101a (quoting *Zuni Pub. Sch. Dist.* v. *Department of Educ.*, 550 U.S. 81, 90 (2007)). It further explained that the relevant EPA regulation had been in place for more than two decades and had dictated the content of tens of thousands of TMDLs without any objection from any court. *Id.* at 101a-107a. As to whether EPA could include "reasonable assurances" in the TMDL, the court explained that such a provision "does not require the states to undertake any particular implementation effort," but is simply "an attempt by EPA to clarify the basis upon which the proposed allocations are judged" under Section 1313(d). *Id.* at 118a; see *id.* at 125a.

The district court also rejected various arguments that the Bay TMDL unduly constrained the relevant

States and deprived them of their rightful role in reducing water pollution and making land-use decisions. The court explained that "this TMDL is not an implementation plan because it contains only allocations, and no formal statement of *how* the allocations are to be achieved. Indeed, the TMDL is silent as to methodology, strategy, and other implementation[] measures. Rather, implementation, in this regard, is left correctly to the states." Pet. App. 131a. The court noted that the TMDL left each State "free to propose modifications," *id.* at 121a-122a; to write a NPDES permit limit that is different from the wasteload allocation in the TMDL, *id.* at 123a; and to "trade pollution amounts without the need to revise or adjust the TMDL allocations," *ibid.* The court concluded that all involved parties "undertook significant efforts to preserve the framework of cooperative federalism" established by the CWA. *Id.* at 156a.

4. The court of appeals affirmed. See Pet. App. 2a-50a. The court ruled that the term "total maximum daily load" is ambiguous because it could reasonably mean both a single "level" and a "sum of constituent parts." *Id.* at 23a; see *ibid.* (stating that the former reading "makes the word 'total' redundant"). After examining the text of Section 1313 and other CWA provisions, as well the statutory structure and purpose, the court concluded that "total maximum daily load" is "a term of art meant to be fleshed out by regulation" and that "Congress wanted an expert to give meaning to the words it chose." *Id.* at 26a; see *id.* at 20a, 22a (recognizing "EPA's authority to fill the Clean Water Act's considerable gaps on how to promulgate a 'total maximum daily load,'" particularly in light of the "complex statutory scheme" at issue) (cit-

ing *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 1002-1003 (2005)). The court upheld as reasonable EPA's understanding that it may use load allocations and wasteload allocations, as well as target dates and "reasonable assurance[s]," in establishing a TMDL. *Id.* at 29a-30a; see *id.* at 30a; *id.* at 43a-49a (discussing enactment of 33 U.S.C. 1267).

The court of appeals rejected petitioners' contention that federalism concerns dictate a different result. The court stated that the "TMDL provision explicitly supplants state authority by *requiring* states to participate in pollution-reduction programs by, in part, submitting a TMDL, and the meaning of that phrase * * * is indisputably a question of federal law." Pet. App. 33a (citation and internal quotation marks omitted). The court further explained that the Bay TMDL "nowhere prescribes any particular *means* of pollution reduction to any individual point or nonpoint source," but rather "preserve[s] state autonomy in land-use and zoning." *Id.* at 34a-35a. The court also held that the Bay TMDL raises no constitutional concerns because "the Chesapeake Bay is a channel of interstate commerce" that is used for substantial commercial activity and has vast economic value. *Id.* at 39a.

## ARGUMENT

The court of appeals correctly held that Congress authorized EPA to elucidate the ambiguous concept of "total maximum daily load" through regulation. EPA promulgated such regulations (after notice-and-comment rulemaking) in 1985, has applied them regularly for thirty years, and followed them here. Congress directed EPA to cooperate with the States to

improve water quality through the use of TMDLs, and the Bay TMDL is the product of such cooperation. The decision below also does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As the court of appeals correctly held, the term "total maximum daily load" is ambiguous. EPA's interpretation of that term has been in place for decades, and it is reasonable both on its face and in its application to the Bay TMDL. Petitioners' attacks (Pet. 16-22) on the court's CWA analysis lack merit.

a. In just a few short subsections, Section 1313(d) establishes a complex, multi-step regulatory process to ensure the adoption and achievement of water quality standards. See Pet. App. 5a-8a, 54a-60a. Although the CWA defines many of the terms used in the Act, see 33 U.S.C. 1362, it does not define the terms "water quality standards" and "total maximum daily load," nor does it otherwise unambiguously convey Congress's intent as to the proper understanding of those terms, see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Thus, as the court of appeals recognized, Congress relied on EPA to define the terms and to provide details about how to carry out Section 1313(d)'s requirements. See Pet. App. 23a-29a; see generally, *e.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 107 (1992); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

Congress also spoke "in capacious terms," *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013), in Section 1267, a provision that dictates a particularly active role for EPA in coordinating state and federal efforts to protect the Chesapeake Bay. Section 1267

directs EPA to "ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement." 33 U.S.C. 1267(g)(1). Although the Bay TMDL is not itself an implementation plan, it reflects Congress's expectation that EPA would coordinate the States' efforts and seek reasonable assurance that state implementation plans would be feasible and effective.

b. Petitioners contend (Pet. 17-18) that the word "total" in Section 1313 unambiguously forecloses the Bay TMDL from including any allocation of the "total maximum daily load" as between point and nonpoint sources. Petitioners are incorrect. "Total" can mean "complete in all details," "a result of addition," or "a summation of factors." *Webster's Third New International Dictionary* 2414 (1993). Its verb form, meaning "to add up," *id.*, refers to the combining of subsidiary parts. Thus, "total" may reasonably be understood to permit a TMDL to include not only a bottom-line number, but constituent elements as well—here, the challenged allocations, which demonstrate that the number in question is adequate to implement water quality standards.

Other aspects of the statutory scheme confirm the reasonableness of EPA's interpretation. First, if Congress had wanted a TMDL to consist of only a single number, the phrase "maximum daily load" alone could have sufficed. See Pet. App. 23a; see generally *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). Petitioners argue (Pet. 19) that, if Congress had intended TMDLs to include allocations, it could have used the plural term "maximum daily loads." But there are numerous alternative versions of the statute that would unambiguously resolve the alloca-

tion issue in favor of one party or the other. Petitioners' example does not explain why Congress, having chosen to use the phrase "maximum daily load," further decided to add the word "total."

Second, Section 1313(d)(1)(C) indicates that a TMDL is subject to "calculation." EPA has simply defined "total maximum daily load" to include the components of that calculation, expressing both an overall number ("the sum," 40 C.F.R. 130.2(i)) and its constituent parts. See Bay TMDL 1-2 to 1-3.

Third, the term "level" in Section 1313(d)(1)(C), on which petitioners rely (Pet. 18), cannot be separated from the statutory phrase in which it appears: "a level necessary to implement the applicable water quality standards." 33 U.S.C. 1313(d)(1)(C). To determine whether a particular TMDL can "implement" the applicable standards, EPA must assess whether the TMDL can be effective in practice. To make that determination, EPA must consider how an overall load might be achievable through feasible reductions in pollutants from the variety of sources and sectors that contribute to water-quality impairment.

Finally, Congress has effectively ratified the longstanding EPA regulations that permit the use of allocations in a TMDL. In 1987, two years after EPA had promulgated those regulations, Congress amended Section 1313 by adding subsection 1313(d)(4). See Pub. L. No. 100-4, § 404, 101 Stat. 68 (1987). That amendment refers to "a total maximum daily load or *other waste load allocation established under this section*." 33 U.S.C. 1313(d)(4)(A) and (B) (emphasis added); see 33 U.S.C. 1342(*o*)(2). The term "waste load allocation" does not appear elsewhere in Section 1313, but it does appear in EPA's regulations (and did

so at the time the amendment was enacted). See 50 Fed. Reg. at 1774, 1780. And the wording of the 1987 amendment (and particularly the word "other") assumes that a "total maximum daily load" is one type of "waste load allocation." That phrasing provides strong evidence that allocations are an authorized part of the Bay TMDL. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632, 644-645 (1998); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983).

c. Petitioners assert (Pet. 21) that, in upholding EPA's authority to include target dates and milestones and to employ the concept of "reasonable assurance," the court of appeals "abandoned any pretext of textual analysis and turned instead to what it believed would best serve the statute's 'purpose.'" That characterization of the court's approach is unfounded. Although the court did not ground those aspects of its analysis in the term "total maximum daily load," it derived them from the statutory text, and specifically from the Act's requirement that a TMDL must be "established at a level necessary to implement the applicable water quality standards." 33 U.S.C. 1313(d)(1)(C); see Pet. App. 29a-30a. That provision authorizes EPA to gather the information it needs to make a "reasoned judgment" about whether a TMDL will be effective to meet that requirement. Pet. App. 30a (quoting *Center for Biological Diversity* v. *EPA*, 749 F.3d 1079, 1087 (D.C. Cir. 2014)); see *id.* at 29a ("if the target date is 100 years from now, more pollution per day will be allowable than if the target date is five years from now"); see also 33 U.S.C. 1267(g) (requiring EPA to "ensure that management plans are developed and implementation is begun" with respect to the Chesapeake Bay).

2. The court of appeals correctly rejected petitioners' argument that the Bay TMDL "offends the CWA's scheme of cooperative federalism." Pet. 22. As the court recognized, the development of the Bay TMDL was a model of cooperative federalism, and nothing in it trenches on any State's prerogatives. See Pet. App. 33a-35a. In this Court, none of the States that are covered by the Bay TMDL has supported petitioners' challenge to the Third Circuit's decision. Rather, all of those States are moving ahead with implementation plans under the TMDL as part of the Partnership that they willingly joined in order to solve a common problem.[1]

Section 1267 directs EPA to coordinate the development of a restoration plan specifically for the Chesapeake Bay, and the Bay TMDL is the product of extraordinary collaboration between EPA and the States. See, *e.g.*, Pet. App. 62a-74a. The States agreed through the Partnership that EPA, rather than the States, should formally establish the Bay TMDL, and they proposed their own allocations for sources and sectors, which EPA for the most part accepted. See *id.* at 7a, 11a-12a, 73a-74a. That procedure is consistent with the structure of Section 1313, which governs TMDLs more generally. Under that provision, if a State does not submit a TMDL that EPA can approve, EPA must establish a TMDL that satisfies the same statutory standard that would apply

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[1] West Virginia, one of the Bay watershed States, joined some States outside the watershed in an amicus brief in the court of appeals that supported petitioners' challenge to the district court decision. See Pet. 32. West Virginia has not supported petitioners' request for review by this Court, and it has signed the 2014 Chesapeake Bay Agreement. See p. 9, *supra*.

to the State's own submission. See 33 U.S.C. 1313(d)(2).

Thus, even without the consent of the affected State, EPA must establish a TMDL if the State fails to develop one that satisfies the CWA's requirements. That basic framework, under which the States are given the initial opportunity to implement the CWA, but EPA must step in if a particular state effort is deficient, governs other aspects of the CWA as well, such as the establishment of water quality standards and the issuance of NPDES permits. See pp. 2-3, *supra*. It follows *a fortiori* that EPA's decision to take the lead drafting role here, pursuant to the express agreement of the Bay watershed States, was consistent with the overall federal-state balance that Congress struck in the CWA.

Petitioners contend (Pet. 23) that "EPA's TMDL steps squarely into areas that Congress expressly reserved for the States" because States have "exclusive authority" with regard to "nonpoint source programs." Although EPA does not have authority to issue permits for nonpoint source activity, States have no such "exclusive authority" under the Act. See, *e.g.*, *Shanty Town Ass'n* v. *EPA*, 843 F.2d 782, 791-792 (4th Cir. 1988). For instance, while States have the responsibility to "propose[]" management programs for nonpoint sources, those programs are subject to EPA's approval. See 33 U.S.C. 1329(d); 33 U.S.C. 1288(b)(2)(F)-(K); Pet. App. 7a. The CWA likewise gives EPA significant responsibility for the development of TMDLs, see 33 U.S.C. 1313(d)(2), including TMDLs that solely address nonpoint source impairments, see *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002), cert. denied, 539 U.S. 926 (2003), and

for the development of the Bay TMDL in particular, see 33 U.S.C. 1267(g). The specific role that EPA played here in establishing the Bay TMDL clearly did not reflect a usurpation of state authority, since "for the Chesapeake Bay the relevant states and the EPA agreed that the EPA would draft the TMDL in the first instance." Pet. App. 7a.

Petitioners contend (Pet. 24, 27) that the Bay TMDL is problematic because EPA has "seize[d] super-zoning authority." That argument also lacks merit. Contrary to petitioners' contention (see Pet. 24), the allocations in the TMDL do not "specify the load of pollutants that may be received from particular parcels of land." *Pronsolino*, 291 F.3d at 1140. Rather, those allocations describe how much pollution particular water segments can bear from a group of sources, some of which are classified generally by sector. Within broad categories in the TMDL such as "agriculture" and "forestry," each State is free to determine how its sources will achieve the maximum permissible load and to choose its own suite of pollution-control measures or best practices. See Pet. App. 34a-37a; see also 33 U.S.C. 1251(b). As the court of appeals correctly recognized, under that arrangement land-use decisions remain "the prerogative of the States." Pet. 24; see Pet. App. 34a-35a (explaining that the TMDL "preserve[s] state autonomy in land-use and zoning," and characterizing petitioners' contrary argument as "long on swagger but short on specificity"); see also *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987).

In petitioners' view, the Bay watershed States' participation in the TMDL process and their acquiescence in its results is irrelevant to the existence of a

federalism problem, because the Bay TMDL "locks in a position to which the States acquiesced at a particular time, under threat of federal sanctions." Pet. 25. Petitioners are mistaken. The Bay TMDL was not arrived at under a threat to the States, as the courts below carefully explained. See, *e.g.*, Pet. App. 36a-37a; see also pp. 7-9, *supra*. Rather, it reflects choices that the States themselves made. Nor does the Bay TMDL create an unchangeable standard. Although EPA approval would be required for formal amendment of the TMDL, such approval could be sought if necessary, and "it may be possible to accommodate some * * * changes within the existing TMDL framework without the need to revise it in whole or in part." Bay TMDL 10-4. And even if such flexibility did not exist, the Bay watershed States' deep involvement in creating the TMDL would defeat any argument that their interests were insufficiently protected.[2]

3. There is no merit to petitioners' various arguments (Pet. 26-28) that deference to EPA's interpretation would be "inappropriate" even if the text of the Act were ambiguous. Deference is particularly appropriate here because Congress has entrusted to the agency the administration of a highly complex, technical statute, see, *e.g.*, *Babbitt* v. *Sweet Home Chapter*

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[2] The court of appeals correctly rejected petitioners' suggestion that a "clear statement" from Congress is required here to "avoid serious constitutional concerns." Pet. 26 (citation and internal quotation marks omitted); see Pet. App. 38a-42a. Unlike *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (see Pet. 25-26), this case involves a major channel of commerce that Congress has evident authority to regulate and protect. See 531 U.S. at 172-173; Pet. App. 39a.

*of Communities for a Great Or.*, 515 U.S. 687, 703-704, 708 (1985); *Pronsolino*, 291 F.3d at 1133, and has authorized EPA to implement the Act's provisions through regulation, see 33 U.S.C. 1251(d). Although the Act does not define the term "total maximum daily load" or specify what analysis EPA should undertake to determine whether a TMDL meets the statutory standard, that silence simply reinforces EPA's authority to address those issues. See, *e.g.*, *Chevron*, 467 U.S. at 843; *E.I. du Pont de Nemours* v. *Train*, 430 U.S. 112, 127-128, 133 (1977); see also *Entergy Corp.* v. *Riverkeeper*, 556 U.S. 208, 223 (2009).

Nor is this the sort of extraordinary case, as petitioners assert (see Pet. 26-28), in which a court should require an explicit delegation of authority to the responsible agency rather than applying the usual *Chevron* framework. Although the health of the Bay is undeniably important, see 33 U.S.C. 1267, EPA has not "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Rather, in establishing the Bay TMDL, EPA applied the same regulations that it has used to evaluate and establish thousands of TMDLs since 1985. And the Bay TMDL does not directly regulate any sources or require any permits. Like other TMDLs, it serves only as an "informational tool" to guide States in making their own regulatory decisions, and to guide EPA in performing NPDES permit oversight and in administering the District of Columbia's NPDES permit program. *Pronsolino*, 291 F.3d at 1129.

Finally, Congress's enactment of a spending prohibition to suspend temporarily a 2000 EPA rulemaking (see Pet. 28) does not cast doubt on the propriety of EPA's conduct here. The 2000 rule would have made wide-ranging changes to the TMDL and NPDES program regulations. See 65 Fed. Reg. 43,597-43,600 (July 13, 2000). In an appropriations rider, Congress barred EPA from implementing the entire rule during one fiscal year, and EPA ultimately withdrew the rule. See 68 Fed. Reg. 13,609 (Mar. 19, 2003). That sequence of events does not suggest that Congress objected to any particular provision of the rule regarding "reasonable assurances." See Pet. App. 46a-47a ("[Petitioners] give[] no reason to think that Congress blocked the rule *because* of the reasonable assurance requirement.").

4. Contrary to petitioners' argument (Pet. 28-31), there is no conflict between the decision below and the decision of any other court of appeals. Since EPA promulgated its regulatory definition of "total maximum daily load" in 1985, it has approved more than 70,000 State-submitted TMDLs and established more than 7000 TMDLs under its own authority. Cf. Pet. App. 48a. Petitioners cite no decision, and we are aware of none, in which a court has struck down any of those TMDLs on the ground that the Act precludes the use of load and wasteload allocations, or the use of "reasonable assurances," or the use of an anticipated timeline for state implementation. See, *e.g.*, *id.* at 20a (court of appeals characterizes petitioners' statutory-interpretation argument as raising "a question of first impression"); *id.* at 98a (same characterization by district court).

a. Petitioners contend (Pet. 29) that the decision below "square[ly] conflict[s]" with the Eleventh Circuit's decision in *Sierra Club* v. *Meiburg*, 296 F.3d 1021 (2002). That argument reflects a misunderstanding of the Bay TMDL. The parties in *Meiburg* had entered into a consent decree, which stated "that if Georgia failed to establish TMDLs, EPA was required to do so," and which "defin[ed] a TMDL as having the meaning provided at" Section 1313 and 40 C.F.R. 130.2(i). 296 F.3d at 1029-1030. EPA established TMDLs, but the district court ruled that the decree also required EPA to develop "implementation plans." *Id.* at 1027-1028. The Eleventh Circuit deemed that ruling to be a modification of the consent decree. The court explained that "an implementation plan is a formal statement of how the level of [a] pollutant can and will be brought down to or kept under the TMDL," and that "[n]either the referenced statutory provision nor the referenced regulation includes implementation plans within the meaning of TMDLs." *Id.* at 1030; see *id.* at 1031 ("[T]he Act itself * * * puts the responsibility for implementation of TMDLs on the states.").

As the Act requires, the Bay TMDL identifies maximum amounts of pollutants that can be discharged from various sources into the Bay waters. See 33 U.S.C. 1313. It therefore helps to "ensure that management plans are developed and implementation is begun" by the States themselves. 33 U.S.C. 1267(g)(1). But it does not specify the measures that the Bay watershed States should take to reduce pollutant levels in accordance with the TMDL. Rather, those States are carrying out their responsibilities in distinct ways, best suited to their particular needs,

through their own Watershed Implementation Plans. See, *e.g.*, *Maryland's Final Phase II Chesapeake Bay Watershed Implementation Plan* iii (Oct. 26, 2012), http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Pages/FINAL_PhaseII_WIPDocument_Main.aspx; *DC Watershed Implementation Plan—Phase 2—Chesapeake Bay* 1-3, http://doee.dc.gov/publication/dc-watershed-implementation-plan-phase-2. The States' plans address such issues as land-use decisions, best management practices for pollution reduction, and the pollution controls that will apply to particular sources and sectors. Contrary to petitioners' assertion (Pet. 30), nothing in *Meiburg* suggests that the Eleventh Circuit would view the Bay TMDL as an "implementation plan."

b. Petitioners contend (Pet. 30-31) that the decision below "adds to a conflict" between the Second and D.C. Circuits, and that the "D.C. Circuit's approach * * * would have produced a different result here." That argument also lacks merit.

A conflict does exist between *Natural Resources Defense Council* v. *Muszynski*, 268 F.3d 91 (2d Cir. 2001) (*NRDC*), and *Friends of the Earth* v. *EPA*, 446 F.3d 140 (D.C. Cir. 2006), but that conflict has nothing to do with the question presented here. In both those cases, the courts of appeals considered whether the requirement in Section 1313 for a "total maximum daily load" precludes expressing a TMDL solely in terms of an annual or seasonal load. The Second Circuit's answer to that question was no. The court stated that "the term 'total maximum daily load' is susceptible to a broader range of meanings" in light of the text and the "overall structure and purpose of the CWA." *NRDC*, 268 F.3d at 98-99. The D.C. Circuit's

answer was yes. That court reasoned that "[t]he law says 'daily,'" and it found "nothing ambiguous about this command." *Friends of the Earth*, 446 F.3d at 144-146. The D.C. Circuit did not, however, foreclose the possibility that a TMDL may include seasonal or annual loads *in addition to* a daily load. See Pet. App. 21a-22a.

This case does not implicate the dispute described above, since the Bay TMDL includes a daily load for the impaired waters that it encompasses. Petitioners contend (Pet. 31) that the Second and D.C. Circuits took different general approaches to the "question whether EPA's view of the best policy choices to implement the CWA can override plain statutory language." That is incorrect. Neither court suggested that an agency's policy preferences can supersede an unambiguous statutory directive; the two circuits simply reached different conclusions about whether Congress had unambiguously dictated the answer to the specific interpretive question the courts confronted. See *NRDC*, 268 F.3d at 98-99; *Friends of the Earth*, 446 F.3d at 144-145.

In *Friends of the Earth*, the D.C. Circuit examined text and "context" in ruling that Congress had required a "daily" load and that EPA could not stray from that requirement, even in service of the overarching goals of the Act. See 446 F.3d at 144-145, 147. Here, the Third Circuit ruled that the statute did not unambiguously resolve the question whether a TMDL may include allocations and be based on reasonable assurances and an anticipated timeline for implementation. In concluding that EPA's approach was permissible, the court consulted "traditional tools of statutory construction," *Chevron*, 467 U.S. at 844 n.9,

including the Act's structure and purpose. See Pet. App. 22a-31a. Both decisions thus applied the well-established *Chevron* framework, as explicated in this Court's precedents. The difference in outcomes between *Friends of the Earth* and this case reflects the fact that the courts were reviewing different EPA actions and construing different CWA provisions, not any disagreement about the proper analytic approach.

5. This case is a poor vehicle for consideration of the question presented, which asks this Court to construe and clarify the CWA provisions (see 33 U.S.C. 1313) that *generally* govern the establishment and permissible terms of TMDLs. See Pet. i. Although those generally applicable provisions afford sufficient legal authorization for EPA's establishment of the Bay TMDL, see Pet. App. 19a-20a, the CWA also contains provisions that specifically address the Chesapeake Bay. Congress has directed EPA to "ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain" various detailed goals and requirements that are specific to the Bay watershed. 33 U.S.C. 1267(g).

The Bay TMDL is the culmination of actions taken by EPA to obey the congressional command embodied in Section 1267(g). While the approach taken by EPA here (with the concurrence and cooperation of the Bay watershed States) would have been lawful even without regard to that provision, Section 1267(g) reinforces the conclusion reached by the court below. A decision of this Court upholding the Bay TMDL based in whole or in part on Section 1267 might provide little guidance as to the scope of EPA's authority to establish *other* TMDLs.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2016