IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH 1616 P Street, NW, Suite 300 Washington, DC 20036, and FRIENDS OF THE EARTH 1100 15th Street NW, 11th Floor Washington, D.C. 20005 PLAINTIFFS, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 1200 Pennsylvania Av., N.W. Washington, DC 20460, and BOB PERCIASEPE, Acting Administrator, United States Environmental Protection Agency, 1200 Pennsylvania Av., N.W. Washington, DC 20460 DEFENDANTS.	Case No. 1:12-cv-01639-RC

PLAINTIFFS' RESPONSE TO DEFENDANTS AND DEFENDANT INTERVENORS' MOTIONS TO DISMISS

INTRODUCTION

In December of 2010 EPA issued, in a final agency action, its Chesapeake Bay Total Maximum Daily Load, or TMDL, the latest in a string of failed plans designed to bring this threatened waterway into compliance with applicable water quality standards. The Bay TMDL is a highly detailed work plan created by EPA under court orders and legal settlements because the six Bay states have failed to adequately control pollution in the watershed, or design and implement a TMDL themselves as required under the Clean Water Act. EPA's 350 page Bay

TMDL, plus its 26 appendices, contains models, load allocations and mechanisms for sources of pollution to meet their goals, including the use of pollution trading among both nonpoint and point sources of pollution within the watershed. Despite the Agency's numerous attempts in its Motion to Dismiss to avoid taking any responsibility for, or ownership of, its Bay TDML, this Court should deny Defendants' and Defendant Intervenors' Motions to Dismiss Plaintiffs' Amended Complaint. Clearly, with EPA's Bay TMDL, the Agency has taken a leading role in enacting a final agency action that fundamentally alters the way the Clean Water Act functions, and the way water pollution is addressed in not only the Bay, but potentially in waterways across the country. To grant EPAs' Motion is to allow the Agency to avoid having to defend its actions and explain how the current provisions of the Act can be possibly reconciled with this new approach to pollution control.

Movants contend that (1) Plaintiffs lack Article III standing; that (2) EPA has not taken any final agency action; and that (3) Plaintiffs' claims are not ripe for review. *See* Motion to Dismiss ¶3.[1] Defendants and Defendant Intervenors are wrong on all three bases. Pollution

[1] It is important to note that none of the arguments Defendants or Defendant Intervenors raise in their Motions to Dismiss impacts upon the reasonable assurances claims in Plaintiffs' Amended Complaint. Amended Complaint ¶¶95-96. Plaintiffs allege that allowing point sources to avoid the technology and water quality-based limits contained in their permits through the purchase of discharge credits from nonpoint source operations undermines any reasonable assurances that water quality goals under the Bay TMDL will be met. *Id*. According to EPA, reasonable assurances for point sources are achieved by relying on the issuance of NPDES permits and compliance with the discharge limits contained therein because 40 C.F.R. 122.44(d)(1)(vii)(B) requires that effluent limits in permits be consistent with "the assumptions and requirements of any available wasteload allocation" in an approved TMDL. *See* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/final52002.cfm). EPA concedes that the "reasonable assurance" requirement arises from other statutory and regulatory provisions. *See* EPA's Memorandum in Opposition to Plaintiffs' Motions for Summary Judgment and in Support of EPA's Cross-Motion for Summary Judgment. Case no. 1:11-CV-0067, Fn 18, filed March 27, 2012 ("Without mentioning the term "reasonable assurance," EPA's TMDL regulations clearly embody the concept."). Plaintiffs contend that "[a]llowing point sources of pollution to engage in trading undermines EPA's ability to provide reasonable assurances that point sources will be able to meet the waste load allocations contained in the TMDL." EPA could not provide the requisite reasonable assurances that water quality would be attained before issuing the TMDL. Nowhere do the Motions to Dismiss address Plaintiffs' the allegations regarding reasonable assurances. Thus those claims survive any motion now pending.

trading under the TMDL is not an unfulfilled abstraction, as EPA would have the Court believe; it is a very real practice with equally real, harmful consequences for water quality and Plaintiffs. Plaintiffs have alleged facts sufficient to demonstrate a particularized injury to their members which are concrete and particularized. Plaintiffs' members' injuries are actual or imminent – not speculative. The TMDL, a final agency action, has and will cause Plaintiffs' members' injuries that are redressable by a favorable judicial ruling.

There is no question that Defendants' actions are final; the TMDL is a final action taken by EPA. It creates new legal rights or obligations and it authorizes, and effectively requires trading or offset programs. Moreover, Plaintiffs' claims are ripe. Trades and offsets have been implemented pursuant to the TMDL and others are imminent. These trades affect future water quality. *Id.* ¶ 25. Despite EPA's contentions, no further factual development is necessary for the Court's consideration of Plaintiffs' claims, but Plaintiffs will likely suffer hardship from delayed review.

Importantly, neither Defendants nor Intervenors address Plaintiffs' allegations in Count I of their Amended Complaint that Defendants' actions in adopting the TMDL without reasonable assurances that point sources, given the ability to purchase pollution credits to avoid permit limitations, will be able to meet the waste load allocations contained in the TMDL was arbitrary, capricious or otherwise in violation of law. Amended Complaint ¶¶95-97. Defendants' failure to make these assurances as required by the Clean Water Act is a separate basis for this Court to exercise its jurisdiction and there is no motion to dismiss that claim.

FACTUAL AND LEGAL BACKGROUND

I. LEGAL BACKGROUND

In 1972, Congress adopted amendments to the Clean Water Act in an effort "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the CWA expressly prohibits the "discharge of any pollutant" unless such discharges comply with the terms of any applicable National Pollution Discharge Elimination System ("NPDES") permit, and sections 301, 302, 307, 308, and 402 of the CWA. 33 U.S.C. §§ 1311(a)(1), 1342. "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernible, confined and discrete conveyance," 33 U.S.C. § 1362(14), and navigable waters are broadly defined as "the waters of the United States." 33 U.S.C. § 1362(7).

NPDES permits must include conditions that will ensure compliance with the CWA. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1342, 1311, 1318. Permits may be issued to individual facilities or as "general permits," which can apply to groups of dischargers that are the "same or similar" and "[d]ischarge the same types of wastes." 40 C.F.R. § 122.28.

States are authorized to adopt programs for issuing NPDES permits to point sources, 33 U.S.C. § 1342(b), but any such state permitting program must be administered in accordance with EPA regulatory guidelines pursuant to 33 U.S.C. § 1342(c)(2), currently codified in Parts 122 and 123 of Title 40, Code of Federal Regulations. The CWA requires all states to designate their bodies of water for specific uses and to issue water quality criteria based on those uses. 33

U.S.C. § 1313(c)(2)(A). More stringent limitations are mandated when necessary to meet "water quality standards, treatment standards, or schedules of compliance" established pursuant to any Federal or State law or regulation, or when they are required to implement any applicable water quality standard established pursuant to the CWA. 33 U.S.C. § 1311(b)(1)(C). These water quality-based effluent limitations (WQBELs) become enforceable parts of the NPDES permit when necessary to protect waterways.

After setting water quality standards, the states must identify those waters for which the technology-based pollution controls set forth in 33 U.S.C. § 1311(b)(1)(A) and (B) are not stringent enough to implement any applicable standard. 33 U.S.C. § 1313(d)(1)(A). For those waters, which are known as "impaired waters," states must set a "total maximum daily load" of pollutants "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). If EPA disapproves of the states' proposed loads for impaired waters, or if the states fail in their obligation to create the TMDL, the Agency shall establish such loads for such waters. U.S.C. § 1311(d)(2). EPA's CWA implementing regulations define "total maximum daily load" as "[t]he sum of the individual [waste load allocations] for point sources and . . . [load allocations] for non-point sources and natural background." 40 C.F.R. § 130.2(i). A TMDL specifies the maximum amount or "load" of a pollutant that can be discharged into the waters from all sources combined while still allowing that body of water to meet water quality standards. *Id.* Under a TMDL, point sources are assigned "waste load allocations" while nonpoint sources receive "load allocations." The waste load allocations for point sources are reflected in the NPDES permit as discharge limits. Effluent limits in permits must be consistent with "the assumptions and requirements of any available waste load allocation" in an approved TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B).

The CWA limits the ability of point sources to discharge into impaired waters in various ways. 33 U.S.C. § 1311(b)(1)(A). EPA's regulations for state NPDES programs prohibit the issuance of permits "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d). This prohibition applies to both federal and state NPDES programs. 40 C.F.R. § 123.25. EPA's regulations also prohibit the issuance of a permit to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). In addition, owners and operators of new sources discharging into impaired waters where a TMDL has been established must demonstrate that there are "sufficient remaining load allocations to allow for the discharge." 40 C.F.R. § 122.4(i)(1). Finally, the CWA's anti-backsliding provision provides that "a permit may not be renewed, reissued, or modified. . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o). .

II. STATEMENT OF FACTS

The Chesapeake Bay (the "Bay") is a body of water stretching from Havre de Grace, Maryland, to Norfolk, Virginia. The Bay is the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world. Exec. Order No. 13,508, 74 Fed. Reg. 23,099, 23,099 (May 12, 2009). Nutrient pollution, specifically nitrogen and phosphorus, discharged into the Chesapeake Bay and its tributaries is the main cause of the Bay's continued poor health. Most of the Bay and its tidal waters are listed as impaired waters due to excess nitrogen and phosphorus levels. These pollutants cause algae blooms that consume oxygen and create "dead zones" where fish and shellfish cannot survive, block sunlight that is needed for underwater Bay grasses, and smother aquatic life on the floor of the Bay. Achieving measurable reductions in nitrogen and phosphorus pollution

throughout the Bay and the approximately 76 impaired segments within it is critical to restoring water quality throughout the watershed.

In order to improve the health of the Chesapeake Bay and allow its residents to fully partake of its natural beauty, the states comprising the Chesapeake Bay watershed ("Bay states") agreed that EPA would establish a TMDL for the watershed by May 1, 2011. Amended Complaint ¶ 31; TMDL 1-9. EPA finally adopted the TMDL on December 29, 2010. Amended Complaint ¶ 65. The TMDL establishes final load allocations for the Bay as a whole, as well as specific load allocations by jurisdiction and river basin. TMDL at Table ES-1. The TMDL confers a legal obligation on states to develop Watershed Implementation Plans (WIPs) to implement the TMDL, 33 U.S.C. § 1267(g)(1); TMDL at ES-8, and EPA reviews those states' WIPs for compliance with the TMDL as part of its oversight duties.

Because the TMDL does not provide for a remaining pollutant load allocation for new sources or increased discharges from existing sources, TMDL at 10-1, EPA has authorized, and "expects," states to implement trading and offset programs. TMDL at 10-1 ("EPA expects the jurisdictions to develop offset programs that are credible, transparent, consistent with the definitions and common elements set out in Appendix S, and subject to EPA and public oversight."). Without these trading and offset programs, which Plaintiffs contend are a violation of the CWA, states would be unable to account for natural population and economic growth in the future.[2] By limiting pollution from all point sources across the board while failing to provide

[2] It is anticipated that the Chesapeake Bay region will grow substantially over the next few decades. For instance, "Maryland is expected to add an estimated 478,000 households by 2035," adding "more than 2 million pounds of nutrient pollution to the Bay per year." *Accounting For Growth*, Briefing to the AfG Work Group, January 18, 2013 (Robert M. Summers, Ph.D., Secretary, Maryland Department of the Environment) at 7, *available at* http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/Summers%20presentation%20for%201.18.13%20meeting%20FINAL.pdf.

any room for any new or increased discharges in the face of significant growth and development, EPA has effectively required states to implement trading and offset programs.

Moreover, EPA requires states' trading and offset programs to comply with EPA's trading program guidance, "the common elements," contained in Appendix S of the Bay TMDL. *See* TMDL 10-1 (The "common elements are important to ensure that offsets are achieved through reliable pollution controls" and to meet the goals of the TMDL); *see also* TMDL 10-4 ("EPA believes the definitions and common elements in Appendix S also constitute important components of trading programs in the Chesapeake Bay watershed. EPA anticipates using these Appendix S definitions and elements in reviewing jurisdictions' trading programs."). EPA's common elements are a model against which EPA has and will continue to judge states' trading and offset programs when conducting its reviews.

EPA's TMDL is rife with examples of the Agency's ultimate control of Bay trading programs. In addition to authorizing trading and providing guidance for those programs, "EPA will use its oversight authorities to ensure that offset programs are fully consistent with the CWA and its implementing regulations." TMDL at 10-3. EPA has a supervisory role over state trading programs. EPA retains final authority over state offset and trading programs to ensure that states comply with EPA's trading guidance in Appendix S. The "EPA encourages jurisdictions to consult with EPA throughout the development of their offset programs to facilitate alignment with the CWA and the Bay TMDL." TMDL at 10-3. EPA maintains "regular oversight of jurisdictions' offset programs through periodic audits and evaluations." TMDL at 10-3. "EPA reserves its authority . . . to review any individual offset (including an NPDES permit containing an offset) and to comment on, object to, or issue the permit as needed if EPA determines that the offset is not consistent with the Clean Water Act or EPA's

regulations." TMDL at 10-3. "The offsets . . . must be consistent with applicable federal and state laws and regulations." TMDL at 10-1. EPA has retained control of the overall program through its oversight authority and is ultimately responsible for the content of the state WIPs.

Although EPA claims not to have final approval authority for state trading and offset programs, EPA has reviewed the current trading activities and future trading plans of all states for compliance with its guidance in Appendix S. This review constitutes de facto approval authority. States submitted their draft Phase II WIPs on December 15, 2011, and EPA responded with formal comments on February 15, 2012. *See How Does It Work? Ensuring Results*, EPA.[3]

EPA's formal authorization of trading and offset programs in the TMDL was not the first time that it had cited such programs as methods for states to comply with the CWA. In 2003, EPA adopted an informal policy statement containing guidelines for the possible use of water quality trading by states and tribes. *See* EPA Water Quality Trading Policy (January 13, 2003). Some of the Bay states implemented trading programs in accordance with EPA's informal guidance, including Pennsylvania in 2004, Virginia in 2005, and Maryland in 2008. *See* EPA Comments on Pennsylvania's Trading Program at 4; EPA's Comments on Virginia's Trading Program at 3; EPA's Comments on Maryland's Trading Program at 3. Nevertheless, these trading and offset programs lacked formal legal authorization by EPA until adoption of the Bay TMDL in 2010, and some of these states have expressed intentions to expand their trading programs since then because of the TMDL's requirements. *See, e.g.*, EPA Comments on Virginia's Trading Program at 4 ("Virginia. . . is currently evaluating specific ways to expand its existing trading program in an effort to add flexibility and cost effectiveness in its efforts to be consistent with the Chesapeake Bay TMDL.").

[3] Available at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/EnsuringResults.html?tab2=1.

Further, West Virginia and the District of Columbia did not allow trading until the TMDL authorized them to do so. At times, EPA has simply not permitted new discharges where TMDL-consistent offsets have not been identified. Declaration of Paul Stern, Exhibit A. (Letter from Scott G. Mandirola, Acting Director of West Virginia Department of Environmental Protection (WVDEP), to Wade E. Clements ("West Virginia has recently been receiving objections from the United States Environmental Protection Agency (USEPA) on permits with any new or expanded discharges to the Potomac River watershed that do not require offsets to be identified and acquired as part of the permitting process.")). Moreover, the TMDL has caused the remaining Bay states of New York and Delaware to consider adopting trading programs by requiring all of the Bay states to submit reports on their states' progress in implementing trading programs as part of EPA's review of those programs. TMDL 10-3. EPA Comments on Delaware's Trading Program at 4 ("Delaware is in the process of developing an offset program and included a plan and timeline for doing so in its draft Phase II WIP."). New York has been required to submit comments on its non-existent trading program as part of EPA's review of all Bay state trading programs.

Since the TMDL was established in 2010, West Virginia has begun to implement trading and offsets in its state in order to comply with the TMDL. The "WV Phase II WIP does not provide specific reservations of load for future growth," but it describes "concepts . . . [that] may be used in case-by-case offset evaluations or as the foundation for a future comprehensive trading program." WV Phase II WIP 114. Accordingly, "the state is handling each permit action requiring offsets on a case-by-case basis." Declaration of Brent Walls ¶17, Exhibit A (Letter from Shawn M. Garvin, EPA Regional III Administrator, to Brent Walls). For example, West Virginia Department of Environmental Protection (WVDEP) has granted Mountain Springs

Public Utility, LLC a NPDES permit to operate a wastewater treatment plant. Walls ¶18, Exhibit B (WV/NPDES Permit Number WV0105911 (October 1, 2012) 10. Mountain Springs's permit allows construction of the facility but does not permit it to discharge nitrogen and phosphorous until it identifies an offset. *Id.* ("[T]he entire nitrogen and phosphorus loading . . . must be offset"). "The reason for limiting [the facility's discharges] is because the permitee has not yet provided offsets for TN or TP, which is a requirement of the Chesapeake Bay TMDL for new discharges." Walls, Exhibit A (EPA Region III letter).

West Virginia has also approved an offset for the Jefferson County Public Service District. The permitee purchases nitrogen and phosphorous credits from Red Barn Trading Company, which has acquired them from eight farms in the Bay watershed. The facility, which is located in Kearneysville, WV, has been permitted to increase its discharge to a maximum of 5000 lbs. per year of nitrogen and 500 lbs. per year of phosphorous. *Id.* ¶21at Exhibit C.

ARGUMENT

EPA has filed a motion to dismiss the Plaintiffs' Amended Complaint. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks committed) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). Plaintiffs adequately allege standing on behalf of their members, the finality of the TMDL, and the ripeness of their claims.

I. PLAINTIFFS HAVE ASSOCIATIONAL STANDING TO CHALLENGE THE TRADING PROVISIONS OF THE BAY TMDL ON BEHALF OF THEIR MEMBERS

Plaintiffs have adequately alleged associational standing to challenge the trading provisions of the Bay TMDL on behalf of their members. *See* Amended Complaint ¶ 7, 9. Under Article III of the Constitution, "the judicial power shall extend" only to "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1. Plaintiffs show standing on behalf of their members by meeting the Article III requirements of injury, causation, and redressability. First, trading and offset programs injure Plaintiffs' members by causing members to limit their use and enjoyment of the watershed due to their reasonable concerns about water quality creating; by creating "hot spots," areas in the Bay where water quality is particularly impaired and members' interests are especially adversely affected; and by delaying or decreasing statutorily required improvement in water quality that prevents members from making full use of the watershed, which they are entitled to do under the CWA. Second, EPA has caused these injuries by authorizing states to engage in a practice that harms Plaintiffs' members; by imposing the TMDL on the states and then providing them with only one feasible method to comply with its requirements; and by encouraging Bay states to use or expand existing trading and offset programs to meet their obligations under the TMDL. Finally, Plaintiffs' members' injuries are redressable by a declaratory judgment preventing implementation of the TMDL's trading provisions and a holding that trading and offsets are impermissible under the CWA.

"An association has standing to pursue litigation on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1011 (D.C. Cir.

2003) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs demonstrate that they satisfy each of these factors.

A. Plaintiffs' Members Have Standing to Sue on Their Own Because They Have Alleged Facts Sufficient to Establish an Imminent, Actual, and Redressable Injury Caused by EPA's Authorization of Trading in the Bay TMDL.

Associations are only required to demonstrate that one of their members has standing in order for the association to attain standing to sue. *Defenders of Wildlife*, 504 U.S. at 563. Here, Plaintiffs have members with standing to sue in their own right. In order for a member to have standing, he must have suffered 1) an "injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" 2) "there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;" and 3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560 (internal citations and quotation marks omitted). Plaintiffs have at least one member who meets the applicable injury, causation, and redressability requirements.

1. Plaintiffs' members have suffered an injury-in-fact which is concrete and particularized and actual or imminent.

EPA's authorization of trading in the Bay TMDL has caused Plaintiffs' members to suffer 1) an "injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations and quotation marks omitted). "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth,*

Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). An adverse impact on an individual's activities such as fishing, camping, swimming, picnicking, walking, and wading into the water have all been found to be adequate to confer standing on that individual. *Friends of the Earth*, 528 U.S. at 181-82.

Pollution trading and offsets adversely affect members' concrete interest in the use and enjoyment of the Bay watershed by causing members to limit their use and enjoyment of the watershed due to their reasonable concerns about water quality and "hot spots," areas in the Bay where water quality is particularly impaired and members' interests are especially adversely affected; and by delaying or decreasing statutorily required improvement in water quality that prevents members from making full use of the watershed, which they are entitled to do under the CWA.

EPA's authorization of trading under the TMDL fosters areas in the Bay, called "hot spots," where increased discharges of pollutants will occur resulting in water quality that is worse than other areas in the watershed. Hot spots are created when one source increases its discharges into a water body because it has purchased pollution credits from another source that has allegedly decreased its discharges. Any distance between the two sources results in an elevated pollution level in that space. For example, if Source A purchases a 100 pound nitrogen credit from Source B, which is 20 miles downstream from Plant A, then the 20 mile stretch of river between the two sources will contain an extra 100 pounds of nitrogen relative to the rest of

the river. Individuals living in this 20 mile stretch are adversely affected by the elevated contamination on their portion of the river.

Plaintiffs' members live, work, and recreate downstream from actual, imminent or potential credit purchasers. For example, Paul Stern, a Food & Water Watch member, lives near a new point source that will be allowed to discharge if and when it identifies offsets as required by the TMDL. Stern Dec. ¶ 6. Currently, he kayaks, walks alongside and in Sleepy Creek Lake and Sleepy Creek, a tributary to the Potomac River in the Chesapeake Bay watershed. Stern Dec. ¶ 8. Mr. Stern is concerned that increased pollution and sediments from new or increased discharges will impede his ability to enjoy these activities. Stern Dec. ¶ 11-12. Mr. Brent Walls, a member of Food & Water Watch and the Upper Potomac River Manager is also concerned about the impact of trades and offsets on his ability to boat, canoe, fish, swim and wade on the tributaries of the Potomac. The danger of hotspots and the already high levels of pollution in the Potomac River and the Chesapeake Bay that will result from trading will diminish Mr. Walls' use and enjoyment of these waters. Walls Dec. ¶ 17. Food & Water Watch member Fred Tutman, the Patuxent Riverkeeper, has lived in his ancestral home, 40 steps from a tributary of the Chesapeake for his entire life. Tutman Dec. ¶ 2-3. EPA's authorization of pollution trading has and will diminish his enjoyment of the beauty and natural resources of the Chesapeake Bay. Tutman Dec. ¶ 5. Mr. Tutman walks, kayaks and bird watches in the Merkle Wildlife Sanctuary and the Mattaponi. Tutman Dec. ¶ 9-10. He fishes and walks his dogs in Patuxent River Park and has eaten fish he caught in the Patuxent for his whole life. Tutman Dec. ¶ 9. At present an energy company, NRG Energy, has a pending permit modification request before the Maryland Department of the Environment in which they seek to purchase nutrient discharge credits from nonpoint source agricultural operations because of their inability to comply with the nutrient

discharge limits for their Chalk Point facility, which discharges into the segment of the river upon which Mr. Tutman recreates. The increased pollution loads from offsets and trading under the TMDL will limit his activities. In addition, Mr. Tutman uses water from the Chesapeake watershed to irrigate his farm, but given how polluted the water is, both he and his tenant farmers only use it in emergencies. Tutman Dec. ¶ 11. The need for alternative water sources with increased amounts of pollution will increase the costs to his farming operations. Tutman Dec. ¶ 12. Similarly, Friends of the Earth member and former president, Brent Blackwelder lives in the Chesapeake Bay Watershed and is concerned about the impact of the trading program on his use and enjoyment of his property. Blackwelder Dec. ¶ 4. He fishes and crabs in the area; watches wildlife and canoes in different tributaries of the watershed. Blackwelder Dec. ¶ 12, 14. These activities will be curtailed as trading and offsets increase the pollution in the waterways. Blackwelder Dec. ¶ 16. Plaintiffs' members' are all concerned about the creation of hot spots in the Bay watershed where high levels of pollution will exacerbate existing impairments.

Mr. Tutman, Mr. Walls, Mr. Stern and Mr. Blackwelder share concerns about the ability of the public to learn about proposed trades and offsets. Mr. Blackwelder is specifically concerned about the fact that the sale of pollution credits does not require any notification or meaningful involvement of the public. Blackwelder Dec. ¶ 15. They are unaware of public notification of trades and offsets. Tutman Dec. ¶ 21; Walls Dec. ¶ 15-16; . They do know, however, that much of the credit trading programs being implemented under EPA's Bay TMDL involve the sale of pollution credits by unmonitored and nontransparent nonpoint source agricultural operations to industrial point sources like coal-fired power plants. The lack of pollution reduction verification and transparency on the credit-generating side is in direct conflict with the sampling and reporting requirements for point source purchasers of credits. In addition,

they are concerned about the delay to the Bay's recovery that is likely to result from EPA's authorization of pollution trading since point sources can continue to proliferate and increase their discharge. Walls Dec. ¶22.

Finally, the injury requirement is satisfied when an agency has caused a delay or suspension of measures to remediate pollution in violation of a statutory duty to improve environmental quality. *See NRDC v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) ("[E]ven assuming that a resulting program were perfectly equivalent, the delay in improving air quality would still injure NRDC members."). In *NRDC*, EPA regulations caused certain non-attainment regions, regions that are not in attainment with a National Ambient Air Quality Standard (NAAQS), to delay their submission of air quality improvement plans to meet the NAAQS. *Id.* at 318. The court found an injury to plaintiffs' members because the states' delay in submission of their plans also delayed air quality improvement in non-attainment areas were plaintiffs' members lived. *Id.*

Like the plaintiffs in *NRDC*, Plaintiffs' members live near and recreate in impaired waters, areas that fail to attain applicable water quality standards. Under the TMDL, they have a statutory right to improved water quality so that they can fully enjoy these water bodies close to their homes. *See* TMDL ES-3; *see also* 33 U.S.C. § 1313(d)(1)(C). EPA's authorization of trading and offsets in the TMDL delays improvement in water quality by allowing plants to buy credits and increase or maintain their discharges instead of decreasing them in line with the CWA's technology-based limitations, water quality-based limitations, and waste load allocations under the TMDL. Without trading, all plants would be required to decrease their discharges, and water quality would be improved throughout the Bay[4]. EPA's authorization of programs that

[4] Whether the trading program is designed to accelerate Bay cleanup, as EPA may contend, is a triable issue and at this stage of litigation, the court needs to look at the facts in the light most favorable to

delay or thwart attainment of water quality standards injures Plaintiffs' members by preventing their full use and enjoyment of the watershed. Mr. Tutman would use the Patuxent as a water source for drinking and agricultural uses. Tutman Dec. ¶¶ 17-22. (. Mr. Blackwelder hesitates to catch crabs and fish in the area due to the amount of mercury and carcinogenic substances in the wildlife. Blackwelder Dec. ¶ 14. Mr. Walls now prohibits his children from recreating in certain rivers and has avoided boating in rivers where he knows pollution will be discharged or increase. Walls Dec. ¶ 11. Mr. Stern would refrain from recreating in the waterways due to increased pollution and sediments. Stern Dec. ¶ 9. He is also concerned that construction of a wastewater treatment plant dumping effluent 2 miles upstream would both ruin walks across or near Sleepy Creek with his family and friends, impair his enjoyment in showing his home and neighborhood to guests, and may make guests reluctant to return to the area. *Id.* ¶ 13.

Plaintiffs' members' injuries are not only concrete and particularized, they are also actual or imminent. Many states have begun granting permits that incorporate trading and offsets as a result of EPA's authorization.

WVDEP's grant of an NPDES permit to Mountain Springs Utility is one such offset that injures Plaintiffs' members. As WVDEP Acting Director Scott Mandirola explained in a letter to Mountain Springs Utility initially rejecting its application for the permit, "West Virginia has recently been receiving objections from the United States Environmental Protection Agency (USEPA) on permits with any new or expanded discharges to the Potomac River watershed that do not require offsets to be identified and acquired as part of the permitting process." Stern Dec., Exhibit A (Letter from Scott G. Mandirola, Acting Director of West Virginia Department of Environmental Protection (WVDEP), to Wade E. Clements.) In order to temporarily bypass the

---

Plaintiffs. Plaintiffs note however that EPA has pointed to no data to support their claim that trading cleans up waterways.

offset requirement, WVDEP decided, with EPA's blessing, to issue a fictional zero discharge permit to Mountain Springs Utility, which permits it to discharge once it identifies an offset and to construct the facility in the meantime. Walls Dec., Exhibit A, (Letter from Shawn M. Garvin, EPA Regional III Administrator, to Brent Walls ("EPA considers this permit to be in accordance with the requirements of the Chesapeake Bay TMDL.")). Plaintiff Food & Water Watch member Paul Stern will be harmed by Mountain Springs Utility's discharge facilitated by the offset authorized by the TMDL. Stern Dec. ¶ 7, 13.

WVDEP has also permitted a permit modification conditioned on an offset for the Jefferson County Public Service District, a facility that has purchased a nitrogen credit of 5000 lbs. per year and a phosphorous credit of 500 lbs. pound per year. WV/NPDES Permit Number WV0084361-B (May 16, 2006) 1B. The offset will permit as much as 500 lbs per year of nitrogen. Plaintiffs' members live, work, and recreate downstream from this facility and are adversely affected by the offset. Stern Dec. ¶ 11, 12; Walls Dec. ¶ 12-13

Subsequent to EPA issuing its Bay TMDL authorizing the sale of pollution credits from nonpoint to point sources in December 2010, Maryland began a process to certify farms for credit generation. In July 2011 the Maryland Department of Agriculture certified two agricultural operations for the sale of over 12,000 pounds of nutrient pollution. (See Maryland's Nutrient Trading \ site at http://nutrientnet.mdnutrienttrading.com/trade/projects.app?view=all) These credits are now available for purchase by other sources of pollution in the state.

Plaintiffs' members have demonstrated the injury prong of Article III standing because their injuries are concrete and particularized and actual or imminent.

2. Plaintiffs' members' injuries are fairly traceable to Defendant EPA's authorization of trading programs in the Bay TMDL and are likely to be redressed by a favorable opinion of this court.

In order to establish standing, "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Defenders of Wildlife*, 504 U.S. at 560 (citation omitted). Here, Plaintiffs' members' concrete and particularized injuries are caused by EPA's authorization of state trading and offset programs in the Bay TMDL.

Government agencies "do[] not have to be the direct actor in the injurious conduct. . . [I]ndirect causation through authorization is sufficient to fulfill the causation requirement for Article III standing." *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 827 (D.C. Cir. 2000). When government regulation of third parties is at issue, the question becomes whether the third party will make "choices. . . in such manner as to produce causation and permit redressability of injury" if the court invalidates the agency's action or inaction. *Defenders of Wildlife*, 504 U.S. at 562. Further, there is no requirement that the agency be the sole cause of the injury. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (rejecting the "erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." It is sufficient that EPA's action has "contributed" to Plaintiffs' injuries. *Id.* at 523.

In addition to causing an injury through contribution, the "fairly traceable" prong of Article III standing is satisfied when the defendant's conduct has resulted in an increased risk of injury to the plaintiff, provided that injury is not hypothetical. *NRDC v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006). "[T]he Circuit allows standing based on environmental harm 'when there was at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.'" *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp.

2d 245, 253 (D.D.C. 2011) (citing *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007).

Importantly, causation through authorization has always been held sufficient to confer standing on plaintiffs who have demonstrated a cognizable injury under Article III. In *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), members of an animal rights advocacy organization, who witnessed primates being exhibited by "primate dealers, exhibitors, and research facilities," sued the Department of Agriculture (USDA), alleging that the applicable regulations permitted the facilities to provide insufficient protection to animals as required under the statute. *Id.* at 428. Even though the USDA did not perpetrate the mistreatment of animals, the court found that it had caused the plaintiffs' injuries through authorization. *Id.* at 440. In *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109 (D.C. Cir. 2009), a trade organization challenged an EPA regulation that it claimed authorized the states to "impos[e] certain emissions-related regulations on various categories of engines and vehicles" in violation of § 209(e) of the Clean Air Act. *Id.* at 1110. The court found that injury was sufficiently traceable to EPA's authorization of the state to regulate. *Id.* at 1111. Finally, in *NRDC*, it was sufficient that EPA regulations caused non-attainment regions to delay their submission of air quality improvement plans, injuring plaintiff's members through delayed improvement in air quality. 643 F.3d at 318.

EPA's authorization of state trading programs in its Bay TMDL is a fairly traceable cause of Plaintiffs' members' concrete and particularized injuries to their recreational, professional, and religious interests. EPA has caused these injuries by authorizing states to engage in a practice that harms Plaintiffs' members by imposing the TMDL on the states and then providing them with only one feasible method to comply with its requirements, thereby effectively

mandating Bay states to use or expand existing trading and offset programs to meet their obligations under the TMDL.

EPA argues that since Bay states were already engaging in trading and offsets before the TMDL, the TMDL did not cause such injuries. EPA MTD at 22 ("[Plaintiffs'] theory ignores the fact that some states had already developed and implemented trading or offset programs before EPA even issued the Bay TMDL"). EPA's claims miss the point. The fact that some states had developed illegal trading and offset programs before the TMDL provided them the legal cover to continue to do so does not demonstrate that EPA did not cause or contribute to Plaintiffs' members' injuries. It only shows that EPA also failed to adequately enforce the CWA before the creation of the TMDL, and has simply perpetuated and amplified that failure in the Bay TMDL. By taking affirmative action in the TMDL to authorize states' harmful programs, EPA has injured Plaintiffs' members.

In addition to authorizing trading and offset programs, EPA essentially requires states to adopt such programs in order to comply with the TMDL. EPA's coercion of states into implementing the programs begins with the Agency's failure to allocate any room for increased loads by new or existing sources under the TMDL. TMDL 10-1 ("TMDL does not provide a specific allocation to accommodate new or increased loadings of nitrogen."). ("EPA expects that new or increased loadings of nitrogen, phosphorus, and sediment in the Chesapeake Bay watershed that are not specifically accounted for in the TMDL's [wasteload allocations] or [load allocations] will be offset by loading reductions and credits generated by other sources"). EPA has continued to apply its pressure on New York in order to coerce the state into implementing a trading program despite the state's unwillingness to create one. *See* EPA's Comments on New York's Trading Program 10 ("*EPA expects NY to develop and implement a credible offset*

program that addresses new and increased loads, including loads from septic systems and other on-site systems. EPA expects that NY will continue to work with and support the WQGIT Trading and Offset Workgroup as trading and offset programs continue to advance in the watershed.") (emphasis added). Further, EPA has used its backstop authority to reject permits in order to force states to implement trading programs. West Virginia, a state that has already agreed to grant offsets on a case-by-case basis, has received objections from EPA when its new permits do not incorporate offsets. *See* Stern Dec., Exhibit A (Letter from Scott G. Mandirola, Acting Director of West Virginia Department of Environmental Protection (WVDEP), to Wade E. Clements.)

EPA has strong-armed Bay states to adopt and expand trading and offset programs, and states have begun adopting or expanding such programs. EPA's expectation of trading programs in the TMDL is clear from a plain reading of document where EPA acknowledges that

> the Chesapeake Bay TMDL assumes, and EPA expects, that the jurisdictions will accommodate new or increased loadings of nitrogen, phosphorus, or sediment that do not have a specific allocation in the TMDL with appropriate offsets supported by credible and transparent offset programs subject to EPA oversight.

TMDL 10-1. But EPA does not just "assume" or "expect" that states will implement such programs, it regularly requests each state to provide it with information on the state's trading activities even when that state has not yet implemented a program. New York is the only Bay state that has provisionally decided not to create a trading program and grant offsets. In EPA's review of New York's lack of trading activities, EPA demonstrated that it would require a sufficient justification for New York's failure to engage in such activities. EPA's Comments on New York's Trading Program 7 ("If offset programs are not put in place to manage new sector growth, EPA expects a quantitative demonstration from those jurisdictions as to why those sectors either are not growing or do not contribute new loads even though they are growing.").

EPA has shifted the burden on Bay states by requiring them to justify why they have chosen not to develop an offset program. For example, as with New York, EPA instructed Maryland that if "it does not develop a credible offset program to manage growth from a particular source sector, EPA expects Maryland to make a quantitative demonstration as to why those sectors either are not growing or do not contribute new or increased loads even though they are growing…." EPA's Comments on Maryland's Trading Program at 18. EPA issued similar mandates to other Bay states. *See* EPA's Comments on Delaware's Trading Program at 9; EPA's Comments on Pennsylvania's Trading Program at 33.

In response to the TMDL, states have begun adopting trading programs or expanding existing such programs. *See, e.g.*, EPA Comments on Virginia's Trading Program at 4 ("Virginia. . . is currently evaluating specific ways to expand its existing trading program in an effort to add flexibility and cost effectiveness in its efforts to be consistent with the Chesapeake Bay TMDL."). West Virginia has begun to implement trading and offsets in its state in order to comply with the TMDL but is doing so on a case by case basis. EPA's authorization of trading and offsets in the TMDL has increased the likelihood that states will implement such programs thereby creating an increased risk of injury to Plaintiffs' members.

Since Plaintiffs' members' injuries were caused by Defendant EPA's authorization of trading and offset programs in the TMDL, their injuries are also likely to be redressed by a favorable decision of this court. *See Defenders of Wildlife*, 504 U.S. at 560 (holding that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision"); *Dynalantic Corp. v. Dept. of Defense*, 115 F.3d 1012, 1017 ("Typically, redressability and traceability overlap as two sides of a causation coin"). If the court grants Plaintiffs their requested relief - a declaratory judgment preventing implementation of the

TMDL's trading provisions - there will be no final agency action authorizing trading and offsets in the Bay. Further, the Court's holding that trading and offsets are impermissible under the CWA will make existing trades and offsets null and void. Without a legal basis for trading and offsets under the CWA, Plaintiffs members will no longer be injured by the actual and imminent trades.

B. Plaintiffs Seek to Protect Interests that Are Germane to Their Purposes, and Plaintiffs' Members Need Not Participate in This Lawsuit.

The interests at stake in this case are germane to the missions of Plaintiff Food & Water Watch and Plaintiff Friends of the Earth. Food & Water Watch is a consumer protection non-profit organization that "advocates for common sense policies that will result in healthy, safe food and access to safe and affordable drinking water." Amended Complaint at ¶ 6. It seeks to ensure compliance with the Clean Water Act to protect the food and water supply. It is concerned that pollution trading will lead to an increase in nutrient pollution and threaten its members' use and enjoyment of the watershed and the food and water that comes from it. Declaration of Wenonah Hauter ¶¶10-15.

Friends of the Earth is an environmental non-profit organization whose "mission is to defend the environment and champion a healthy and just world. Amended Complaint at ¶ 8.

The present case seeks to invalidate the trading and offset provisions of the Bay TMDL in order to ensure a cleaner environment, safer food and water, and foster a healthier world for the residents of the Bay watershed. Therefore, the interests at stake in this litigation are germane to Plaintiffs' missions. *See generally*, Blackwelder Dec. ¶4 and Hauter Dec. ¶¶3, 10-15.

Neither Plaintiffs' claims nor the relief requested requires the participation of Plaintiffs' members in the lawsuit. *Wash. State Apple Adver. Comm'n*, 432 U.S. at 344 (holding that individual participation in the claim was not necessary when it did not require individualized

proof). "If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Id.* at 343 (citation omitted). In the present case, Plaintiffs seek a "[d]eclaratory judgment that the trading and offset provisions of the TMDL are in violation of the CWA and notice and comment procedural requirements of the APA and are null and void." Amended Complaint at ¶ 124. Such prospective relief will inure to the benefit of Plaintiffs' members by preventing their injuries caused by EPA's authorization of trading and offset programs.

II. EPA'S PROMULGATION OF THE BAY TMDL IN THE FEDERAL REGISTER IS FINAL AGENCY ACTION REVIEWABLE BY THIS COURT

The Supreme Court has held that "two conditions must be satisfied for agency action to be 'final:'" 1) "the action must mark the consummation of the agency's decision-making process;" and 2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and quotation marks omitted).

A. EPA Consummated Its Decision-Making Process by Promulgating a Final Bay TMDL.

EPA does not dispute this Supreme Court standard referenced above, nor does it seriously argue that the first prong has not been satisfied in this case. EPA MTD at 22-23. EPA admits in its Motion to Dismiss that it "took final action to establish the Bay TMDL." EPA MTD at 5. EPA also states that it "does not contemplate any immediate further administrative action with regard to the Bay TMDL." *Id.* at 27 n.12. These statements alone should resolve the inquiry as to the first prong of the *Bennett* test. Even assuming that they do not do so, the facts clearly show that EPA has concluded its decision-making process.

There are several indicators for agency action that "mark[s] the consummation of the agency's decision-making process." One of those is that the action is no longer "tentative" or "interlocutory." *Bennett*, 520 U.S. at 178. Similarly, an agency has finished its decision-making process when the decision is "not subject to further agency review." *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

Here, EPA reached the end of its decision-making process on the Bay TMDL in general and the trading provisions in particular. The Bay TMDL itself discusses at length the process that was followed to develop the final TMDL. The process included lengthy negotiations between the EPA and the Bay states. TMDL at ES-3. The Bay states and the EPA have worked on the Bay TMDL since 2000, and the states agreed to a Bay-wide TMDL promulgated by EPA in 2007. *Id.* EPA initially provided the states with their TMDL allocations, and the states developed draft WIPs to implement those allocations. *Id.* at ES-5. EPA then evaluated those WIPs before issuing a notice of proposed TMDL. *Id.* Finally, after considering revised WIPs and public comments, EPA promulgated the TMDL as a final action. *Id.*; *see Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load (TMDL) for the Chesapeake Bay*, 76 Fed. Reg. 549, 549-50 (Jan. 5, 2011). As part of that final TMDL, the EPA "assume[d]" and "expect[ed] [] that the jurisdictions will accommodate new or increased loadings . . . with appropriate offsets"—in other words, through offset and trading schemes. TMDL at 10-1.

B. EPA's Promulgation of the Bay TMDL and its Trading Provisions Has Legal Consequences.

EPA's promulgation of the TMDL and its trading provisions is final agency action under the second prong of the *Bennett* test because: 1) it has the legal consequence of altering the

methods by which the states and regulated parties may conform their practices to the CWA; and 2) it is binding on the agency in its future review of the state WIPs.

The D.C. Circuit Court has elaborated on the second prong of the *Bennett* test:

> "In determining whether an agency has issued a binding norm or merely" an unreviewable "statement of policy, we are guided by two lines of inquiry." One line of analysis considers the effects of an agency's action, inquiring whether the agency has "(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." The language used by an agency is an important consideration in such determinations. The second line of analysis looks to the agency's expressed intentions. This entails a consideration of three factors: "(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."

Ctr. for Auto Safety, 452 F.3d at 806-07 (D.C. Cir. 2006) (citations omitted).

Applying these lines of analyses to the instant matter demonstrates that EPA's promulgation of the Bay TMDL has legal consequences. In *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir, 2011), the D.C. Circuit was faced with a nearly identical situation to the present one. There, EPA had promulgated rules to implement the nonattainment requirements regarding ozone that were added to the Clean Air Act ("CAA") by the 1990 Amendments. *NRDC v. EPA*, 643 F.3d at 316. Specifically, under §§ 172(e) and 185, the states or EPA were required to impose fees on sources that had not attained previous standards for attainment set by the EPA, when EPA raised those standards in a subsequent rulemaking. *Id.* at 314-15. EPA issued a "guidance document" allowing states to use alternatives to § 185 fees, as long as they are not less stringent. *Id.* at 316-17. EPA retained discretion to approve those alternatives on a case by case basis. *Id.* at 317. Several environmental groups brought challenges to this "guidance," claiming that it was a legislative rule requiring notice-and-comment rulemaking and that the rule was contrary to the CAA. *Id.* EPA moved to dismiss on standing, finality, and ripeness grounds. *Id.* On the issue

of finality, the court focused on the question of "whether the Guidance announces a binding change in the law." *Id.* at 319. The Court held that the language of the statute and EPA's interpretations of that language demonstrated that the EPA's "guidance" withdrew discretion that previously existed in the statute. *Id.* More particularly, before the "guidance," an EPA Administrator might have retained discretion to approve *or* disapprove a state implementation plan that included an alternative to § 185 fees; however, once the EPA issued this "guidance," the Administrator was bound to accept a state plan that included such alternatives. *Id.* The court noted that "the permissibility of alternatives is now a closed question, and the Guidance leaves to future rulemakings only the issue of whether a specific proposed alternative satisfies the program or attainment option." *Id.* at 320. The court also explained that "the Guidance altered the legal regime by resolving the question posed by the Clean Air Act Advisory Committee" and that, with the affirmative answer offered by EPA, the decision was final and bound all actors within EPA. *Id.*

NRDC v. EPA provides the closest analogue to the current case, and its reasoning is persuasive especially when applied to unquestionable final agency actions like the Bay TMDL, and not merely "guidance." In *NRDC*, the court found that EPA's "guidance document" withdrew discretion that it might have exercised previously. *NRDC v. EPA*, 643 F.3d at 319. While EPA might have reached a different conclusion in similar cases prior to the guidance, it was now bound by its definitive interpretation of the statute. Similarly, here states might not have known whether trading was permissible under the statute. EPA could (and should) have interpreted the statute to prohibit it. Yet, the agency, states, and regulated parties must now accept that trading is permissible. EPA no longer has discretion to determine otherwise. This is the essence of a "binding change in the law." *Id.* The regulation resulted in an "altered . . . legal

regime." *Id.* at 320. Most analogous is that, just as here, the guidance in *NRDC* was permissive. In other words, the guidance stated that states *could* use alternatives to § 185 fees, not that they *must*.[5] *See id.* at 316-17. In the Bay TMDL, states are allowed to include trading, but they are not explicitly required to do so.[6] Lastly, in *NRDC*, EPA claimed that its action was a "guidance document." *Id.* at 317. Here, EPA has promulgated a final Bay TMDL in the Federal Register.

Other precedents in this Circuit neither discussed nor cited by EPA and the Intervenors, also support the conclusion that EPA's approval of the Bay TMDL is a final action reviewable by this Court. In *Appalachian Power*, the court rejected EPA's assertion that the policy for periodic monitoring was merely a "policy statement" rather than a "legislative rule" and thus not subject to notice-and-comment requirements. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) . The court held that agency statements other than rules issued pursuant to notice-and-comment rulemaking may be binding. *Id.* at 1021. The court also noted that EPA considered the challenged regulations to be the "agency's settled position" and intended to

---

[5] EPA argues that "the Bay TMDL does not require states to use trading or offset programs." EPA MTD at 25. As *NRDC v. EPA* illustrates, the fact that the agency has determined it is a *permissible* alternative does not change the fact that it is a reviewable agency action. Although requiring states to include trading in their WIPs would also violate the CWA, merely *allowing* them to do so is sufficient to contravene the CWA.

[6] The Intervenors, similarly to the EPA, argue that "[t]he Bay TMDL authorized neither the state trading or offset programs themselves, nor their use by states during TMDL implementation." FB MTD at 18. Yet, in the very next sentence, the Intervenors state that the TMDL "acknowledge[s] that trading and offsets are permissible means for states to implement the Bay TMDL" and that the Bay TMDL "encourage[s] . . . states to develop trading and offset programs." *Id.* The Intervenors misuse the term "authorize" in this instance. The plaintiffs are challenging EPA's decision that trading is part of an acceptable interpretation of the CWA—that trading is "authorized" by the CWA. Plaintiffs are not challenging here an "authorization" of trading in a specific permit.

Moreover, when EPA "encourages" states to use trading, that *necessarily* carries with it EPA's determination that trading is permissible. That EPA decision is the basis of plaintiffs' challenge. Therefore, whether the action is characterized as "encouraging" or "authorizing" makes absolutely no difference to the plaintiffs' challenge.

enforce them against the state and local authorities. *Id.* at 1022. Finally the court concluded that the "guidance" was reviewable and noted that the policy had legal consequences *both* for the *states* and for the regulated parties. *Id.*

The Bay TMDL changed legal rights or obligations such that it is final agency action under the APA. First, the Bay TMDL is binding and does not "genuinely" leave "the agency and its decisionmakers free to exercise discretion." *See Ctr. for Auto Safety*, 452 F.3d at 806. The trading provisions of the Bay TMDL are determinations made through notice-and-comment procedures and publication of the final action in the Federal Register. EPA is now bound to follow those provisions and cannot act contrary to them without revising its determination through notice-and-comment. It would be arbitrary for EPA now to reject trading programs, without any further notice and comment proceedings. Moreover, the EPA in its final TMDL implies no discretion. EPA explicitly "assumes" and "expects" that the jurisdictions will use "appropriate offsets." TMDL at 10-1.[7] While EPA may have retained the ability to exercise discretion before it promulgated the trading provisions of the TMDL, it no longer may do so without acting in an arbitrary manner; it is thus bound by the plain language of the TMDL. Additionally, EPA published notice of its final TMDL in the Federal Register and linked to the

[7] It is not just a theoretical possibility that the EPA will approve permits that rely on trading in order to meet the requirements of the Bay TMDL. EPA has already put this policy into practice. For example, in response to a concern raised by the Potomac Riverkeeper regarding discharges from the Mountain Springs Public Utility LLC plant into Sleepy Creek, EPA responded that it "considers this permit to be in accordance with the requirements of the Chesapeake Bay TMDL." Letter from Shawn M. Garvin, Regional Administrator, Region III, U.S. EPA to Brent Walls, Upper Potomac River Manager, Potomac Riverkeeper. Walls Dec., Exhibit A. EPA based its finding of conformance in part on the fact that:

> Section 10 of the Chesapeake Bay TMDL (Implementation and Adaptive Management) states that although the TMDL does not provide a specific allocation to accommodate new or increased loadings of nitrogen, phosphorus, or sediment, the Chesapeake Bay TMDL assumes, and EPA expects, that the jurisdictions will accommodate new or increased loadings with appropriate offsets and transparent offset programs subject to EPA oversight.

Id.

TMDL's text on the website. *See Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load (TMDL) for the Chesapeake Bay*, 76 Fed. Reg. 549, 549-50 (Jan. 5, 2011). This factor weighs in favor of finding a binding effect of the Bay TMDL and its trading provisions. *See Ctr. for Auto Safety*, 452 F.3d at 806.

Finally, review of the Bay TMDL in this case will not frustrate any of the values and policies behind the finality doctrine. As the D.C. Circuit has explained, "[j]udicial review [prior to final agency action] improperly intrudes into the agency's decisionmaking process" and "squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind." *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986). These problems are not presented here. EPA has made its determinations regarding the legality of trading. These determinations were made during a lengthy negotiation process between the states and EPA that involved extensive public comments and public meetings. TMDL at ES-1-4. Thus, there is no ongoing process upon which the courts intrude by reviewing the TMDL at this time. Moreover, reviewing the TMDL now will, in fact, conserve judicial and administrative resources by eliminating early legal error in reading the statute.

C. The Bay TMDL Includes an Implementation Plan Unlike All Other TMDLs to Date.

The EPA repeatedly asserts in its Motion to Dismiss that "a TMDL is not self-implementing," that the trading provisions of the "Bay TMDL do not create any new legal rights or obligations," that the "Bay TMDL does not authorize trading or offset programs," and that "the Bay TMDL did not alter the legal landscape." EPA MTD at 25, 26. All of these assertions are incorrect as either a factual matter, a legal matter, or both.

EPA and the Intervenors have failed to cite any applicable case law that provides support for their views on the finality of the Bay TMDL. Unlike the TMDLs in the cases cited by the

EPA, the Bay TMDL extends far beyond simply defining a numerical quantity of pollutants allowed to be discharged into the waters of the United States, but also includes "the missing link of all other TMDL efforts to date" - an implementation plan. *See* Oliver A. Houck, *The Clean Water Act Returns (Again): Part I, TMDLs and the Chesapeake Bay*, 41 Envtl. L. Rep. News & Analysis 10208, 10221 (2011) ("The second achievement [of the Bay TMDL] was to blend the TMDL with implementation plans, *the missing link of all other TMDL efforts to date*." (emphasis added)). Thus, the Bay TMDL is unique, and the other TMDL cases EPA cites simply do not speak to the legal effects that the Bay TMDL, which encompasses both the numerical value of the TMDL as well as rules on what implementation plans can include, has on the state of the law.

Additionally, neither *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2003), nor *Sierra Club v. Meisburg*, 296 F.3d 1021 (11th Cir. 2002), cited by EPA, discusses final agency action. The *City of Arcadia* is factually and legally distinguishable from the present case. The TMDLs at issue in *City of Arcadia* addressed only numerical caps on pollution discharges that were promulgated by state agencies and approved by EPA, not EPA-promulgated, and were limited to the waters of the state of California. *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1147-48 (N.D. Cal. 2003). By contrast, here the TMDL is a multi-state TMDL, promulgated by EPA, that contains provisions concerning the implementation of the TMDL allocations, including trading.

Moreover, the *City of Arcadia* court only held that the "TMDL procedure" used by EPA and the state, as opposed to EPA's approval of a TMDL, was not challengeable final agency action. *City of Arcadia*, 265 F. Supp. 2d at 1154-55 (N.D. Cal. 2003). There, the plaintiffs challenged the *procedures* by which EPA first promulgated its own TMDL when the state failed to do so, then approved a subsequent TMDL promulgated by the State. *Id.* at 1153-55.

Tellingly, as to the other count in that case that in fact challenged EPA's action in approving the state TMDL, there was no challenge to the finality of EPA's action. *Id.* at 1152-53. Here, the Plaintiffs are challenging a concrete action by the EPA—the Bay TMDL, to the extent that it authorizes trading as a permissible means to meet the requirements of the CWA and the Bay TMDL. Thus, *City of Arcadia* is inapposite.

Finally, EPA cites *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420 (D.C. Cir. 2004) to support its position that an agency action that leaves the "world just as [the agency] found it" is not final. *See id.* at 427-28. However, *Independent Equipment* is entirely factually distinguishable from this case. There, the agency action was merely an EPA letter sent to a trade association in response to a letter to EPA asking about the meaning of one of its regulations. *Id.* at 424-25. The letter was not provided to multiple regulated parties, it was not published in the Federal Register or the Code of Federal Regulations, not offered for public comment, and it merely offered an explanation of a previously enacted regulation. *Id.* Here, the TMDL was a final action, published in the Federal Register, extensively discussed with the public, affected states, and the regulated community, that interpreted the CWA to permit trading—an interpretation never before embodied in an agency regulation. In addition, as referenced above with the expansion of Virginia's trading program, the forcing of trading and offsets on New York State, the offset approvals in West Virginia and all the other instances where offsets and trading are occurring under the auspices of EPA's TMDL, EPA's actions are far from leaving the Bay world, as least as far as CWA regulatory approaches, just as they found it.

For all of the forgoing reasons, EPA's promulgation of the Bay TMDL in the Federal Register is final agency action and should be reviewed by this court.

III. PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW UNDER *ABBOTT LABS*

The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In determining whether a claim is ripe, courts must consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Plaintiffs' claims are clearly ripe under both the fitness and hardship prongs.

A. Plaintiffs' Claims Are Fit for Judicial Review.

Courts have interpreted the *Abbott Labs* fitness prong as asking two questions: "whether the courts would benefit from further factual development of the issues presented," and "whether judicial intervention would inappropriately interfere with further administrative action." *See, e.g.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Only "taken together" do these considerations foreclose review. *Id*. at 726. Where the challenged final agency action presents a "purely legal" question of statutory interpretation, *Abbott Labs*, 387 U.S. 136, 149, the claim is "presumptively suitable for judicial review." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986).

The question raised by Plaintiffs' Complaint—whether EPA has properly construed the CWA to allow trading and offsets among different sources of pollution—is a purely legal question of statutory interpretation, and is thus presumptively fit for review. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless pursuant to the terms of a NPDES permit issued under Section 402 of the CWA, 33 U.S.C. § 1342. The CWA authorizes states to adopt programs

for issuing NPDES permits to point sources,[8] 33 U.S.C. § 1342(b), and requires point sources to achieve the technology-based pollution control standards set forth in 33 U.S.C. § 1311(b). The "best available technology economically achievable" to control discharges must be included in any new permits. 33 U.S.C. § 1311(d). In addition, the CWA requires point source permits to contain more protective Water Quality Based Effluent Limitations when these technology-based limits are insufficient to attain water quality in any given receiving water. 33 U.S.C. § 1311(b)(1)(C). EPA's regulations further prohibit the issuance of permits "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d)[9]. Finally, EPA's regulations prohibit the issuance of a permit to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). The question that the court is being asked to answer—whether the inclusion of a trade or an offset in a NPDES permit, authorized by the TMDL, can ever comply with the requirements outlined above—requires only an evaluation of such statutory and regulatory language.

EPA fails entirely to rebut the presumptive fitness of the purely legal questions presented by Plaintiffs' claims. As shown above, the Bay TMDL is a final agency action subject to judicial review under APA § 704, and judicial intervention would not inappropriately interfere with further administrative action. Indeed, EPA expressly concedes that the agency "does not contemplate any immediate further administrative action with regard to the Bay TMDL." MTD at 25, note 12. Nor would the Court benefit from further factual development of the purely legal

[8] Point sources are defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[9] 40 C.F.R. § 122.4(d) applies to both federal and state NPDES programs under 40 C.F.R. § 123.25.

issues presented. The Supreme Court in *Toilet Goods* concluded plaintiff's claim was not ripe because whether the agency had exceeded its statutory authority to promulgate rules required "for the efficient enforcement" of the Food, Drug, and Cosmetic Act necessarily hinged on the specific manner in which such regulations were implemented "in the context of a specific application". *Toilet Goods*, 387 U.S. 158, 163-4. Here, not only do Plaintiffs allege "specific application[s]", but the narrow statutory question presented—whether trading and offset provisions violate the Clean Water Act and implementing regulations—is substantially less amorphous than the question presented in *Toilet Goods*.

In contrast to *Toilet Goods*, answering the question presented here does not require an evaluation of *how* states will comply with the TMDL-imposed water quality standards. Plaintiffs take the position that pollutant trading is inherently antithetical to provisions of the CWA. That is, regardless of the exact manner in which state WIPs and NPDES permits implement trading and offsets, such trading and offsets cannot occur without violating the CWA.[10] Because trading is unavoidably designed and implemented to allow point sources to evade compliance with the technology and water quality standards that NPDES permits require, trading and offsets can never comply with the CWA, regardless of the permits' specific provisions. *See* 33 U.S.C. § 1311. Thus, the purely legal question of whether EPA's trading authorization in its TMDL is unlawful under the CWA is unaffected by how states implement the TMDL, and Plaintiffs' claims are fit for this Court's review.

EPA asserts that the factual development necessary to render Plaintiffs' claims fit are those that will occur after Bay states have acted to implement the TMDL by issuing NPDES permits. EPA Motion to Dismiss at footnote 7. EPA provides as examples of such factual

[10] In fact, EPA could not proceed with trading under the Clean Air Act until Congress amended it in 1990 to provide specifically for trading. See 42 U.S.C. 7651; Pub. L 101-549, November 15, 1990, 104 Stat. 2399.

development the "terms of a particular permit, or the pollutants discharged by a particular source." EPA Motion to Dismiss at 25. However, Plaintiffs allege that *any* trading or offset term or condition, and *any* pollutants discharged under such terms and conditions, violate the CWA. In *Time Warner*, the D.C. Circuit held plaintiff's First Amendment challenge ripe, even though the challenged FCC action would require implementation by local cable television franchise authorities. *Time Warner Entm't Co., L.P. v. F.C.C.*, 93 F.3d 957 (D.C. Cir. 1996). The challenged FCC regulations *authorized but did not require* local cable television franchise authorities to mandate certain public, educational, and governmental programming ("PEG" programming) as a franchise condition, which plaintiffs alleged was an unconstitutional, content-based speech requirement. The Court held the challenge ripe even though local franchise authorities had discretion whether to require PEG programming. *Id. at* 972. The court reasoned that "[b]ecause any difference in the ways in which franchising authorities might actually implement the requirement does not affect the First Amendment analysis of [the plaintiff's claim], 'the issue tendered is a purely legal one,' and is thus fit for judicial review." *Id.* 309 (citations and internal quotations omitted). Similarly here, the EPA's TMDL authorizes but does not require states to institute trading and offset provisions that will violate the CWA.[11] This case is indistinguishable from *Time Warner* and thus, the only conclusion is that Plaintiffs' claims are fit for review.

Similarly, EPA's reliance on *Ohio Forestry* for the necessity of "further factual development" is misplaced, and further illustrates the fitness of plaintiffs' claims. In *Ohio*

[11] The Time Warner court distinguished an earlier case, *Beach Communications, Inc. v. FCC*, in which plaintiffs' First Amendment challenge to the franchise requirement itself was held unripe "because of the broad discretion that local franchising authorities had in 'defin[ing] the [cable operators'] duty, and because the justification for that duty [would] depend on local facts." Id. at 974. Here, as in *Time Warner*, the state WIP's implementation of the trading and offset provisions is irrelevant—*any* implementation of trading and offset provisions is illegal under the CWA, and thus the claim is purely legal and fit for judicial review.

Forestry, plaintiffs challenged a land resource management plan ("LRMP") adopted by the United States Forest Service pursuant to the National Forest Management Act, alleging the plan permitted "too much logging and too much clearcutting." *Ohio Forestry*, 523 U.S. 726, 728. However, while the challenged plan set logging goals and selected areas that might be suitable for logging, it did "not itself authorize the cutting of any trees." *Id*. at 729. To actually commence site-specific timber production, the Forest Service was required to follow a series of further required procedures, which the Court held would be more fit for judicial review than the plan. *See id*. at 729-30. Here, in direct contrast, Plaintiffs do not claim a violation of the Clean Water Act when there occurs *too much trading*; the violation occurred when EPA authorized this illegal mechanism to allow point sources to circumvent the NPDES requirements under the Act. The TMDL itself authorizes states to implement trading and offset provisions, and no further agency action is required or even anticipated. Moreover, the Court in *Ohio Forestry* emphasized that the claim would only ripen with site-specific implementation of the LRMP because it was not unlawful as such for the Forest Service to authorize clearcutting and logging—only if "clearcutting on a particular site was improper" would a violation have occurred. *Id* at 736. In stark contrast, trading and offsets are in violation of the CWA irrespective of where or how they are actually imposed. For the same reasons that Plaintiffs' claims present a purely legal question, no further factual development is required to evaluate the legality of trading and offsets under the CWA.

Even if such factual development at the state level were necessary to review Plaintiffs' claim, it is already occurring and developed. NPDES permit holders have already applied for trading and offset privileges under the TMDL. *See* EPA Region III Letter re. Mountain Springs Public Utility LLC Permit. For example, the Maryland Department of Agriculture has already

certified farms as pollution credit generators. *See supra* at 18. Point sources are already proposing permit modifications to allow for the purchase of credits in lieu of permit compliance. Walls Dec., Exhibit C. Thus EPA is fundamentally mistaken when it asserts in its Motion to Dismiss that trading is speculative etc, because trading *is already occurring* pursuant to the TMDL. There is nothing speculative about trading and offsets and there need not be any further development of the facts for the Court to consider this obviously ripe issue. In fact, in its intervention papers, the National Association of Clean Water Agencies ("NACWA") conceded that "[n]early 20 of NACWA's clean water agency members are located within the Chesapeake Bay watershed, and many are actively involved in pollutant credit trading under the Chesapeake Bay TMDL's provisions authorizing trading, which are at issue in this litigation." December 4, 2012 Brief of National Clean Water Agencies et al. in support of Motion to Intervene. Trading and offsets are actually occurring in some areas and imminent in other areas of the Bay, and pose an actual and imminent injury to Plaintiffs' goals and values and their members' professional, commercial, scientific, and recreational enjoyment of the Chesapeake Bay and connected waterways. *See* Amended Complaint ¶¶ 82-83, 87; *see supra* at12-14, 16-17 and 22-24. . Because NPDES permit violations are inevitable, Amended Complaint ¶¶ 60-64, 79-81, plaintiffs' claims are fit for review.

The *Clean Air* court recognized that "[i]n the three decades since *Abbott Laboratories*, preenforcement review of agency rules and regulations has become the norm, not the exception," *Clean Air Implementation Project*, 150 F.3d at 1204 (internal citations omitted), but ultimately held that judicial review "would benefit from a more concrete setting." *Id*. at 1205. Where *Clean Air*, *Toilet Goods*, and *Cronin* were concerned that the alleged harm may never come to pass, the present case is clearly distinguishable. Because EPA's Bay TMDL entirely fails to

account for the load allocations that new point sources will require, TMDL at 10-1, any new point sources on the Bay will without question have to employ trading and offsets to be operational. In fact, EPA "encourages and expects" states to "develop and implement programs for offsetting new and increased loadings." TMDL at 10-3. As plaintiffs have demonstrated amply above, there is no question here that harm will come to pass, and thus plaintiffs' claims are fit for judicial review.

B. Plaintiffs Are Not Required to Show Hardship as a Result of the Withholding of Judicial Consideration Because EPA Has Not Shown an Institutional Interest in Postponing Review.

Only if a claim is found to be unfit will courts proceed to the hardship analysis. Hardship under *Abbott Labs* "is not an independent requirement divorced from the consideration of the institutional interests of the court and agency." *Payne Enterprises*, *837 F.2d 486, 493*. "Thus, where there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong." *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 700 (D.C. Cir. 2003). Because EPA concedes that it contemplates no further action relating to the Bay TMDL, EPA MTD at 27 n.12, it entirely fails to assert an institutional interest in postponing review. *See* supra. Nor does the court have an interest in delaying review because Plaintiffs' purely legal claims are clearly fit for review. *See supra* at 33-34. Thus, the Court need not consider hardship in concluding that plaintiffs' claims are ripe for judicial review.

Moreover, for the purposes of administrative consistency and judicial efficiency, the Court should review the TMDL's general authorization of trading and offsetting, rather than require Plaintiffs to challenge the trading and offsets through individualized, piecemeal claims. *Cf.* EPA MTD at 27. To deny review here would result in a balkanized regulatory regime, under which trading and offsets are permitted in some but not other areas of the Bay, and would require

substantial state and federal judicial and administrative resources. To the extent institutional interests weigh in one direction or another, institutional interests weigh in favor of immediate review of the TMDL itself.

C. Plaintiffs Will Suffer Hardship as a Result of the Withholding of Judicial Consideration.

Courts have interpreted the *Abbott Labs* test as a balancing of "the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review." *Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 492 (D.C. Cir. 1988) (internal citations omitted). In other words, "[t]he prospect of hardship is sufficient to make a claim fit for judicial review." *Harris v. F.A.A.*, 353 F.3d 1006, 1012 (D.C. Cir. 2004) (internal citations omitted). *See also Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010) (holding that "[hardship] alone can, if sufficiently weighty, render a claim ripe"). Thus, even if a court decides that "the agency or the court has a significant interest in postponing review," it will still hear the plaintiffs' claims if "the interest of those who seek relief from the challenged action's immediate and practical impact upon them outweighs the competing institutional interest in deferring review." *Askins v. Dist. of Columbia*, 877 F.2d 94, 97-98 (D.C. Cir. 1989) (citations omitted). Likewise, where it is not shown that "the agency or the court has a significant interest in postponing review," the court need not find hardship exceeding that necessary for Article III standing. *Payne*, 837 F.2d 493. *See also Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 335 (D.C. Cir. 1988). As EPA has not shown an institutional interest favoring postponement of review, Plaintiffs have already offered sufficient indicia of hardship and need not prove hardship beyond that already established for standing purposes. Nevertheless, Plaintiffs can establish not only that their claims are fit for review, but that delayed review would cause them significant hardship.

Unlike the injury requirement for Article III standing, in a ripeness inquiry, the hardship to Plaintiffs from withholding review is not about "whether they have suffered any direct hardship, but rather whether postponing judicial review would impose an undue burden on them or would benefit the court." *Harris*, 353 F.3d 1006, 1012 (internal citations omitted). "The granting of prompt court consideration on the basis of hardship is obviously supported by the APA's provision for review of final agency action for which there is no other adequate remedy in a court." *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 696 (D.C. Cir. 1971). Plaintiffs in the present case demonstrate that EPA's authorization of trading in its Bay TMDL inflicts adverse and widespread legal effects, that it causes immediate practical harms to them, and that future alternatives to review today are inadequate or extremely burdensome.

The TMDL's authorization of legal rights and imposition of duties under its TMDL is certain. Absent the TMDL, there would be no legal authorization under the CWA to trade or offset pollution discharges. While instances of state authorized trading and offsets had occurred before the TMDL was issued, the authorization of them within the final Bay TMDL gives the practice official legitimacy under federal law where they are in fact in violation of the CWA. Existing and imminent state WIPs and NPDES permits are all issued under the invalid premise that trading and offsets may be utilized to comply with the TMDL and with the CWA. Moreover, for new discharge sources, states will have no option *but* to permit trading and offsets, as the TMDL does not provide an allocation to accommodate new or increased loadings of pollutants. TMDL at 10-1. There exists no mechanism for Plaintiffs to legally challenge the trading implementation details contained in state WIPs, nor can Plaintiffs seek review of the final WIPs themselves. With respect to the issuance of NPDES permits that contain trading and offset provisions, Plaintiffs would face the undue and unnecessary hardship of challenging each and

every permit as it is issued by state agencies, forced to monitor hundreds, if not thousands of permits issued and reissued across six Bay states covering over 64,000 square miles. To deny hardship here would be to arguably deny Plaintiffs the ability to ever stop the harm caused by the EPA's authorization to trade and offset under the TMDL.

EPA misrepresents the hardship requirement in asserting that Plaintiffs "must demonstrate that an agency action inflicts adverse effects of a strictly legal kind." EPA Motion To Dismiss at 26 (citing *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 809 (2003)). On the contrary, Plaintiffs establish hardship not only because the TMDL imposes the adverse legal effects outlined above, but also because it has as a practical matter caused their members to "adjust [their] conduct immediately." *Lujan*, 497 U.S. 871, 891.

Plaintiffs have members who live in close proximity to point sources whose permits are conditioned on trading and offsets. One such member expressed that the knowledge alone of excessive nutrient and sediment pollution diminishes his ability to enjoy the recreational activities in which he regularly partakes, including kayaking and walking on trails that cross affected waterways. Stern Dec. ¶14 He further stated that the wastewater treatment plant two miles upstream from his home whose pollution discharges are permitted pending identification of an offset "will ruin [his] enjoyment of these walks with [his] family and friends and make them reluctant to walk across or near the affected waterway." *Id.*

Another member, who owns a home in Maryland, near the Chesapeake Bay, stated that "pollution allowed by the Chesapeake Bay TMDL trading program will impact the use and enjoyment, as well as the value of, [his] Maryland property." Blackwelder Dec. ¶14. He additionally stated that his "ability to enjoy the beauty and natural resources of the Chesapeake

Bay watershed is diminished by . . . the EPA's action in allowing the states to engage in pollution trading schemes without adequate safeguards for water quality." *Id.* ¶9.

These immediate and imminent practical effects on Plaintiffs' members who live and recreate on the Chesapeake Bay constitute real and significant hardship, satisfying the hardship requirement to render Plaintiffs' claims ripe.

If Plaintiffs are barred now from challenging the legality of the TMDL trading authorization itself, from which the harms stem, they are left with no adequate future alternative. As EPA notes, where the plaintiff has "ample opportunity later" to bring challenges, their claims may not be ripe. EPA Motion to Dismiss at 27. *See also Ohio Forestry*, 523 U.S. at 734. But the procedure for EPA review of state WIPs under the TMDL is not a formal approval process subject to a challenge. Nor does the NPDES permitting process afford Plaintiffs ample opportunity to bring challenges later, as EPA falsely asserts. *See* EPA Motion to Dismiss at 27. The NPDES permitting regulations provide for a 30-day public notice period, during which time written comments may be submitted, if a draft permit has been prepared, if a hearing has been scheduled, and when a new source determination has been made. 40 C.F.R. § 124.10. However, in some states, the public as a whole is not privy to such notice. Rather, the method of providing notice is via a mailing to specifically identified entities and individuals. For Plaintiffs to benefit from any 30-day notice and comment period, they would have to request in advance to be included on the mailing list of each NPDES permit-issuing authority. Even then, states are only required to issue a response to comments and requests for a public hearing after a final permit has been issued. 40 C.F.R. § 124.17. The Supreme Court has rejected the argument that the CWA mandates a public hearing for every NPDES permit application. *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980). A public hearing will only be held if "a significant

degree of public interest in a draft permit" is found, at the discretion of the issuing authority. 40 C.F.R. § 124.12.

As one of Plaintiffs' members stated in regard to Maryland's NPDES permitting practice,

> The state imposes a massive burden on citizens to determine fairly sophisticated provisions in new permits, and I feel deprived of adequate notice of new pollution that will impact the watershed. I am concerned that the current pollution trading system allows for the sale of pollution rights without a requirement to notify and meaningfully involve myself and ordinary citizens who lack the time or resources to find specific provisions in discharge applications and notices.

See Blackwelder Dec. ¶16. Even setting aside the administrative infeasibility of assessing and commenting on every draft NPDES permit submitted under the TMDL, it is absurd to suggest that the opportunity merely to comment on permits containing trading and offset provisions provides an equal alternative to challenging the TMDL now, especially when no response to such comments is required until after a permit has been issued. Moreover, as demonstrated by the Mountain Springs NPDES permit, the trade or offset may not even be identified in the draft permit. Walls Dec., Exhibit B. Challenges to individual permits granted by delegated state administrative agencies is simply no remedy to resolve the underlying legal question of whether trades and offsets are permissible under the Clean Water Act. The burden that delayed review places on Plaintiffs is a clear hardship that renders their claims ripe.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request this Court deny Defendants and Defendant Intervenors' Motions to Dismiss.

Dated this 22nd day of May, 2013

Respectfully submitted,

Susan Kraham
Edward Lloyd
Morningside Heights Legal Services
Columbia Law School
Environmental Law Clinic
410 W. 116th Street
New York, NY 10027
212-854-4291
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, a true and correct copy of the foregoing document was delivered to the Clerk of Court and via electronic mail at dcd_cmecf@dcd.uscourts.gov.

Dated this 22nd day of May, 2013

_____/s/_____
Susan J. Kraham
Morningside Heights Legal Services
Columbia Law School
Environmental Law Clinic
410 W. 116th Street
New York, NY 10027
212-854-4291
Attorneys for Plaintiffs