

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE WATER BALTIMORE)
3545 Belair Rd.)
Baltimore, MD 21213;)

CHESTER RIVER ASSOCIATION)
400 S. Cross St. #2)
Chestertown, MD 21620;)

GUNPOWDER RIVERKEEPER)
P.O. Box 156)
Monkton, MD 21111;)

MIDSHORE RIVERKEEPER)
CONSERVANCY)
23 N. Harrison St.)
Easton, MD 21601;)

POTOMAC RIVERKEEPER NETWORK)
1615 M St. NW, 2nd Floor)
Washington, DC 20036;)

and)

WATERKEEPERS CHESAPEAKE)
P.O. Box 11075)
Takoma Park, MD 20913,)

Plaintiffs,

v.

GINA McCARTHY, Administrator, U.S.)
Environmental Protection Agency, in her)
official capacity,)
1200 Pennsylvania Ave., NW)
Washington, DC 20460,)

Defendant.

Civil Action No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This suit challenges a final action by the United States Environmental Protection Agency and its Administrator (“EPA”) on November 9, 2012, approving the removal of 53 river segments from the list of water quality-impaired Maryland waters for which “total maximum daily loads” (“TMDLs”) must be completed, pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* See Ex. A, Letter from Jon M. Capacasa, Region III Director, EPA, to Marie Halka, Acting Director, Maryland Department of the Environment (Nov. 9, 2012) (“delisting action”).

2. EPA’s action affects creeks, wetlands, ponds, and rivers that run through nearly all of the watersheds in seventeen counties in Maryland (Anne Arundel, Baltimore, Calvert, Caroline, Cecil, Charles, Dorchester, Harford, Kent, Montgomery, Prince George’s, Queen Anne’s, Somerset, St. Mary’s, Talbot, Wicomico, and Worcester) and Baltimore City. See ¶ 85, *infra*.

3. The de-listed segments suffer localized water quality problems, including harmful algal blooms, excessive sediment plumes, oxygen depletion due to pollution from nitrogen and phosphorus (collectively, “nutrients”), and fish die-offs, that have not been considered or addressed in the adoption of other existing TMDLs.

4. EPA approved Maryland’s de-listing of the 53 impaired segments based on the 2010 Chesapeake Bay TMDL, which is designed to address pollution problems in Chesapeake Bay—not all localized contamination in each of the impaired segments. See Ex. A at 3. Neither EPA nor the Maryland Department of the Environment (“MDE”) – the state’s designated agency for implementing the Clean Water Act – made any finding that the Chesapeake Bay TMDL will in fact resolve the localized water quality impairment in those segments, nor did they conduct

any water quality assessments that would support such a finding. EPA's action conflicts with its own acknowledgment in the Chesapeake Bay TMDL that localized water quality impairments may require more stringent pollution reductions than those needed to protect the Chesapeake Bay.

5. EPA's action contravenes the agency's authority and duties under the Clean Water Act, 33 U.S.C. § 1313(d)(2), protect and restore water quality and to provide for adequate public participation in the development or revision of plans and programs for achieving that goal, *id.* § 1251(e), and is arbitrary and capricious, thereby warranting vacatur pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

PARTIES

6. Blue Water Baltimore is a not-for-profit corporation existing under the laws of the State of Maryland. Blue Water Baltimore is dedicated to achieving clean water in Baltimore area watersheds through community-based restoration, public education, and advocacy, including the enforcement of federal and state laws governing Maryland waters.

7. Chester River Association is a not-for-profit corporation existing under the laws of the State of Maryland. Chester River Association is dedicated to restoring the health of the Chester River through advocacy, restoration, and outreach. Chester River Association engages in water quality monitoring that informs its work to restore wetlands, shorelines, and native grasses; outreach to promote and facilitate river-friendly practices to reduce pollution from farms and other land uses; and advocacy to ensure that the Chester River is adequately protected under state and federal laws.

8. Gunpowder Riverkeeper is a not-for-profit corporation existing under the laws of the State of Maryland. Gunpowder Riverkeeper is dedicated to protecting, conserving, and

restoring the Gunpowder River and its watershed. Gunpowder Riverkeeper engages in active scientific monitoring of water quality and works to ensure that the polluting activities are properly regulated under applicable federal and state laws to protect the Gunpowder River watershed.

9. Midshore Riverkeeper Conservancy is a not-for-profit corporation existing under the laws of the State of Maryland. Midshore Riverkeeper Conservancy is dedicated to protecting, conserving, and restoring the Choptank River, Miles River, Wye River, Eastern Bay, and their watersheds. Midshore Riverkeeper Conservancy engages in active scientific monitoring of water quality and works to ensure that these waters are being properly regulated and protected by applicable federal and state laws.

10. Potomac Riverkeeper Network is a not-for-profit corporation existing under the laws of the State of Maryland. Potomac Riverkeeper Network is dedicated to protecting, conserving, and restoring the Potomac River and its watershed. Potomac Riverkeeper Network engages in active scientific monitoring of water quality and works to ensure that the Potomac River and its tributaries are being properly regulated and protected by applicable federal and state laws.

11. Waterkeepers Chesapeake is a not-for-profit corporation existing under the laws of the State of Maryland. Waterkeepers Chesapeake is dedicated to protecting, conserving, and restoring the waters in the Chesapeake Bay watershed. Waterkeepers Chesapeake engages in active scientific monitoring of water quality and works to ensure that the Chesapeake Bay is being properly regulated and protected by applicable federal and state laws.

12. Plaintiffs are membership organizations with members and staff residing in Maryland, Virginia, and the District of Columbia, including members who use and enjoy waters

impacted by EPA's delisting action for recreation, wildlife watching, aesthetic enjoyment and other purposes. Plaintiffs' members suffer recreational, professional, and aesthetic injury from pollution afflicting those waters, including pollution from phosphorus, nitrogen, and sediments. The acts and omissions of EPA alleged herein cause injury to plaintiffs' members by prolonging the unsuitability of the delisted segments for some or all of these uses. The physical well-being as well as recreational, aesthetic, and environmental interests of Plaintiffs' members have been and continue to be adversely affected by the EPA acts and omissions described herein. Granting the relief requested herein would redress the above-described injuries.

13. The EPA acts and omissions alleged herein have also deprived Plaintiffs and their members of information to which they would otherwise be entitled, specifically, a complete and accurate listing of Maryland stream segments for which additional TMDLs are still required. 33 U.S.C. § 1313(d)(1)(A). If Plaintiffs had access to such information, they would use it to educate their members and the public about the condition of Maryland's waters that violate water quality standards and that require additional TMDLs, and to advocate promulgation and enactment of measures to bring those waters into compliance with standards, including adequate TMDLs. The EPA delisting action challenged herein leaves Maryland with an inadequate and inaccurate listing of impaired waters requiring additional TMDLs under 33 U.S.C. §1313(d), thereby depriving Plaintiffs and their members of the informational benefits that an accurate, adequate listing would provide. This deprivation increases the difficulty of, and diminishes the effectiveness of, Plaintiffs' and Plaintiffs' members water quality educational and advocacy efforts, and thus causes them injury.

14. The EPA acts and omissions complained of herein further deprive Plaintiffs and their members of procedural rights and protections provided to them by the Clean Water Act. If

this Court vacates EPA's approval of the delisting action, Plaintiffs and their members will be afforded the procedural right to seek – through litigation if necessary – the promulgation of TMDLs for the affected segments sufficient to implement the applicable local water quality standards for which the waters are listed as impaired. Plaintiffs would further be afforded the right to publicly comment on any action proposed by the state and/or EPA for such purposes, and to advocate for more protective maximum loadings than those proposed. EPA's approval of the delisting action has denied Plaintiffs and their members those rights.

15. Defendant United States Environmental Protection Agency is the federal agency responsible for supervising the implementation of the Clean Water Act's requirements in Maryland.

16. Defendant Regina McCarthy is the Administrator of the United States Environmental Protection Agency. She is charged with the supervision and management of all decisions and actions of that agency, including those taken pursuant to the Clean Water Act with respect to Maryland. She is being sued in her official capacity only.

JURISDICTION AND RIGHT OF ACTION

17. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361. *Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) (“original jurisdiction over EPA actions not expressly listed in section 1369(b)(1) lies... with the district court”).

18. This Court can issue a declaratory judgment and grant further relief pursuant to 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 2201 and 2202. Plaintiffs have a right to bring this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 through 706.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendant's official residence is in the District of Columbia.

GENERAL ALLEGATIONS

I. REQUIREMENTS FOR TOTAL MAXIMUM DAILY LOADS UNDER THE CLEAN WATER ACT

20. Congress enacted the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The goal of the Clean Water Act is to eliminate “the discharge of pollutants into the navigable waters,” and in the interim, to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(1) and (2).

21. To achieve these ends, Section 1313 of the Clean Water Act requires each state and the District of Columbia to establish and implement water quality standards, subject to review and approval by EPA. 33 U.S.C. §§ 1313(a) to (c), 1362(3).

22. Water quality standards consist of the “designated uses” of a state’s waters (such as drinking water, swimming, and wildlife habitat) and “the water quality criteria for such waters based upon such uses,” and “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the Clean Water Act].” 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.2(d).

23. The Clean Water Act requires each State to “identify those waters within its boundaries for which the [technology-based] effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of [the Clean Water Act] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A).

24. For the waters thus identified, “[e]ach State shall establish... the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(C).

25. Pursuant to Section 1314(a)(2), EPA has identified “[a]ll pollutants” as being suitable for TMDL calculation. 43 Fed. Reg. 60665 (Dec. 28, 1978).

26. The Clean Water Act requires that “TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards....” 40 C.F.R. § 130.7(c)(1)(ii); *see also* 33 U.S.C. § 1313(d)(1)(C).

27. Section 1313(d) further provides that TMDLs “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C).

28. EPA regulations likewise provide that “TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical [water quality standards] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.” 40 C.F.R. § 130.7(c)(1).

29. A given water body can be listed as impaired by multiple pollutants and therefore subject to multiple TMDLs simultaneously, one for each pollutant for which it is water-quality impaired. Likewise, a single pollutant may be a cause or contributing factor in the impairment of several designated uses and water quality standards. As a result, a single river segment may

require multiple TMDLs to address each water body–designated use–pollutant combination for which the segment has been listed as impaired

30. Under EPA’s regulations, a TMDL is “[t]he sum of the individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.” 40 C.F.R. § 130.2(i). A “point source” is a discharge through a discrete pipe or conveyance, such as from industrial and sewage plants. “Nonpoint source” pollution generally results from diffuse sources like land runoff or drainage. A wasteload allocation is “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. [Wasteload allocations] constitute a type of water quality-based effluent limitation.” *Id.* § 130.2(h). A load allocation is “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” *Id.* § 130.2(g).

31. States are required to submit biennially to EPA a report on surface water quality, including a list of impaired waters and related TMDLs, sometimes referred to respectively as the “Integrated Report” and “Section 303(d) list” or impaired waters list. 40 C.F.R. §§ 130.0, 130.7(d)(1). Submission of an impaired waters list triggers EPA’s duty to “either approve or disapprove such identification and load not later than thirty days after the date of submission.” 33 U.S.C. § 1313(d)(2). “If the Administrator disapproves such identification and load, [she] shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as [she] determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.” *Id.*

32. TMDLs are implemented, *inter alia*, through incorporation into water quality management plans under Section 1313(e)(3)(C) of the Clean Water Act, and through point source discharge permits.

33. TMDLs are a crucial component of the framework established by the Clean Water Act to protect the nation's waters. In waters with ongoing water quality impairments, TMDLs provide an important technical basis for determining adequate effluent limits in Clean Water Act permits for point sources to ensure that discharges do not contribute to violation of water quality standards.

34. In addition to the actual "total maximum daily loads," the TMDL development process generates crucial information about an impaired water body's baseline conditions including its particular local needs and challenges. TMDLs serve as an essential tool for coordinating state efforts to reduce pollution from nonpoint sources, like farm runoff, which also cause or contribute to violation of water quality standards. TMDLs also provide a tool for independent third parties to monitor the status of water quality restoration efforts and to check compliance with Clean Water Act-mandated water quality standards.

35. The Clean Water Act mandates that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter" – such as programs and plans to develop and employ TMDLs – "shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e); 40 C.F.R. §§ 25.3-25.4. To this end, EPA's longstanding policy requires that states allow for "full and meaningful public participation in the [impaired waters] development process." Ex. B, EPA, *Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992* at 5 (May 20, 2002).

36. The TMDL development process enables members of the public to contribute relevant information to ensure that local conditions are accurately characterized and accounted for in calculating the final TMDLs.

II. MARYLAND'S HISTORY OF TMDL IMPLEMENTATION

A. Impaired Waters Lists and TMDL Development Prior to 2010

37. The Clean Water Act required that states submit their first impaired waters lists 180 days after EPA published its first identification of pollutants suitable for TMDLs. *Id.* EPA first published its identification of such pollutants on December 28, 1978, so the first impaired waters lists were due on June 6, 1979. 43 Fed. Reg. 60662, 60665 (Dec. 28, 1978).

38. MDE submitted the first impaired waters list for Maryland to EPA on November 5, 1992, more than thirteen years after the Clean Water Act's deadline. *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 412 (D. Md. 2001).

39. In 1997, citizen groups brought suit challenging the slow pace of TMDL development in Maryland, seeking a court order for EPA to step in and develop TMDLs for Maryland pursuant to its authority under the Clean Water Act, § 1313(d)(2). *Sierra Club*, 162 F. Supp. 2d at 411-12.

40. In 1998, as the legal challenge described in ¶ 37 was pending, EPA and MDE signed a Memorandum of Understanding establishing a schedule for MDE to develop TMDLs for the waters on its impaired waters list. Specifically, for impaired waters listed in 1996 and 1998, MDE agreed to establish TMDLs by 2008, and to establish TMDLs for all subsequent impairments within ten years of listing. Ex. C, *Memorandum of Understanding between The State of Maryland and The United States Environmental Protection Agency, Region III, regarding Sections 303(d) and (303)(e) of The Clean Water Act* at 5 (Nov. 1998).

41. The legal challenge described in ¶ 37 was dismissed in 2001. *Sierra Club*, 162 F. Supp. 2d at 417-18. In dismissing the citizen groups' challenge, the court relied in part on the 1998 Memorandum of Understanding under which MDE and EPA agreed to a schedule for TMDL development for all waters on MDE's impaired waters list. *Id.* at 417.

42. MDE developed a number of TMDLs for waters on its impaired waters list between 1998 and 2004, but it did not do so at a pace that would satisfy the schedule in the 1998 Memorandum of Understanding. In 2004, EPA and MDE agreed to revise the terms of the 1998 Memorandum of Understanding, extending the deadline for completion of TMDLs for impaired waters listed in 1996 and 1998 from 2008 to 2011. *See* Ex. D, Letter from Donald S. Welsh, Region III Regional Administrator, EPA, to Kendl P. Philbrick, Secretary, MDE (Nov. 1, 2004).

B. Maryland's Pre-2010 TMDLs Addressing Excessive Nutrients and Sediment

43. TMDLs developed by MDE and approved by EPA prior to 2010 provide an illustration of how local TMDLs are designed to address the particular water quality problems and unique local conditions that are specific to a listed impaired segment. The examples below also illustrate how local water quality problems may require greater pollution reductions than are needed to address downstream water quality problems in Chesapeake Bay. Similar analyses are needed for all the delisted waters to rationally determine whether local TMDLs are required in addition to the Chesapeake Bay TMDL in order to adequately address local impairments.

44. MDE's phosphorus TMDL for the Sassafras River in Cecil and Kent Counties, approved by EPA in 2002, provides a representative example of how the state developed TMDLs between 1998 and 2010. Ex. E, MDE, *Total Maximum Daily Loads of Phosphorus for the Sassafras River, Cecil and Kent Counties, Maryland* (Feb. 14, 2002) ("Sassafras TMDL").

45. MDE listed the Sassafra River as impaired by nutrients in 1996, due to signs of eutrophication in the river including recurrent seasonal algal blooms. *Id.* at 1.

46. The Sassafra TMDL rationale document evinces attention to the unique local conditions of the river in every key stage of the TMDL development.

47. To characterize the river's baseline conditions and understand the factors associated with its nutrient impairment, Maryland conducted site-specific sampling in various locations throughout the 97 square-mile Sassafra River watershed for chlorophyll *a* (a surrogate for algal blooms), dissolved oxygen, dissolved inorganic nitrogen, and dissolved inorganic phosphorus. *Id.* at 6.

48. The Sassafra TMDL uses a model calibrated with this data, gathered from 20 monitoring stations located throughout the 20.6 mile-long Sassafra River and its tributaries, including three sets of samples in the summer of 1999 and three sets of samples in the winter of 1999. *Id.*

49. In contrast, the modeling used to inform the 2010 Chesapeake Bay TMDL in many cases used data from one or two monitoring stations to represent much larger watershed segments than the Sassafra River watershed. *See* Ex. F, select portions from EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* at 5-2 to 5-14 (Dec. 29, 2010) (hereafter "Bay TMDL").

50. The Sassafra TMDL takes into account pollution from each of the known individual point sources for phosphorus in the Sassafra River watershed at the time of TMDL development: two municipal wastewater treatment plants. Ex. E at 12.

51. The Sassafra TMDL takes into account the distinctive hydrology of the Sassafra River. For example: "The tidal section headwater zones of the Sassafra River are characterized

by weak current activity, rendering the overall region quite stagnant. This atypical tidal exchange produces unusual salinity distributions within the Sassafra River as well as other related hydrologic anomalies. This particular characteristic of the Sassafra River is partially responsible for elevated chlorophyll *a* concentrations observed in the upper sections of the River.” *Id.* at 4.

52. The Sassafra TMDL also takes into account the distinctive variations in the river’s pollutant concentrations and related characteristics: “The concentration of inorganic nitrogen varies greatly throughout the length of the creek with values ranging between detection limits and 1.5 mg/L. These lower values indicate possible consumption of nutrients due to temperature increase and chlorophyll *a* growth. The highest values are located near the mouth of the river where the concentrations of chlorophyll *a* are low.” *Id.* at 9.

53. The Sassafra TMDL sets aside a portion of the river’s “loading capacity” as a margin of safety for seasonal low-flow conditions in the Sassafra River, as well as a separate margin of safety for average-flow conditions in the river. *Id.* at 22.

54. The Sassafra TMDL modeling simulated the river’s “critical condition,” identified as the period from May 1 to October 31 when the river system and its tributary creeks are poorly flushed and sunlight and warm water temperatures exacerbate the water quality problems associated with excessive nutrients. *Id.* at 20.

55. MDE’s 30-page report on its 1998 nitrogen and phosphorus TMDLs for the Port Tobacco River provides an additional representative example of how the state developed TMDLs before 2010. Ex. G, *Total Maximum Daily Loads of Nitrogen and Phosphorus for the Port Tobacco River* (Aug. 11, 1998) (“Port Tobacco TMDL”).

56. MDE listed the Port Tobacco River as impaired by nutrients in 1996 due to signs of eutrophication in the river. *Id.* at 3.

57. The model used to develop TMDLs for the 8.5-mile Port Tobacco River was calibrated with data from four water quality surveys that were conducted within the 44 square-mile Port Tobacco watershed in August 1984. *Id.* at 3, 7. Monitored data was collected from eight stations distributed across the watershed for chlorophyll *a*, ten stations for inorganic phosphorus, ten for nitrate, and eleven for dissolved oxygen. *Id.* at 8-10.

58. The Port Tobacco TMDL notes that August represents “critical conditions” for the river. *Id.* at 7. MDE came to this conclusion by examining evidence that included: “comprehensive” data on the river’s water quality from 1984 surveys; yearly observation (including photographic documentation) by the agency after 1984; and “several site visits” in August 1997. *Id.*

59. The model used to develop the Port Tobacco TMDL takes into account point source discharges from the four sewage treatment plants in the Port Tobacco watershed at the time the TMDL was developed. *Id.* at 12.

C. Maryland’s Adoption of a New Salinity-Based Segment Classification System and Water Quality Standards for the Chesapeake Bay

60. Each of the water bodies affected by EPA’s action challenged in this case are within the watershed of the Chesapeake Bay, the nation’s largest estuary, with a watershed of approximately 64,000 square miles that extends across six states and the District of Columbia.

61. In the 1987 amendments to the Clean Water Act, Congress authorized EPA to administer the “Chesapeake Bay Program,” an effort to “coordinate Federal and State efforts to improve water quality of the Bay.” 33 U.S.C. § 1267 (1987) (amended 2000).

62. In the mid-2000s, in cooperation with the Chesapeake Bay Program, MDE began to institute a new water body segmentation scheme and adopted new water quality standards

designed to protect water quality in the Chesapeake Bay. At no point during this process did MDE or EPA inform the public that these changes would enable or justify their later decision to forego developing local TMDLs to address localized problems in MDE's listed impaired waters.

63. In 2004, a notice of the 2004 agreement between MDE and EPA described in ¶ 40 was published in the Maryland Register. Ex. H, 31 Md. Reg. 231 (Feb. 6, 2004) (hereafter "2004 Notice"). That notice gave several reasons for delaying the deadlines for completing TMDLs for waters on MDE's impaired waters list, including the "need for consistency with the Chesapeake Bay Program." Ex. H at 232.

64. The 2004 Notice states that "MDE will devote resources to address 16 open water body segments listed for nutrients that are strongly coupled with Chesapeake Bay waters, and 66 tidal segments impaired by sediment. These 82 impairments will be addressed within the context of the regional Chesapeake Bay Program process and will be scheduled to take advantage of Chesapeake Bay technical efforts such as development of a revised watershed model." *Id.*

65. The 2004 Notice does not state that MDE's plans to coordinate with the Chesapeake Bay Program would enable or justify MDE's decision to forego developing local TMDLs for those waters. On the contrary, the 2004 Notice states that any remaining impairment listings not addressed by September 2006 "will be addressed in [the subsequent] 5 years (2007-2011)." *Id.*

66. In 2005, EPA began active consultations with Maryland and other states in the Chesapeake Bay watershed as well as the District of Columbia to develop a TMDL to address nitrogen, phosphorus, and sediment pollution in the Chesapeake Bay. Ex. F at ES-3.

67. In MDE's 2006 impaired waters list, MDE introduced its shift to a system of "salinity-based segment" classification developed through the Chesapeake Bay Program. Ex. I,

MDE, *2006 List of Impaired Surface Waters [303(d) List] and Integrated Assessment of Water Quality in Maryland* at 24 (Sept. 2006). The 2006 impaired waters list used both systems simultaneously to illustrate the relationships between the two systems and to allow time for transition, while stating that the newer classification system would eventually replace the previous classification scheme. *Id.*

68. Also as part of this coordination process, MDE adopted EPA-developed uniform water quality standards and designated criteria developed by EPA's Chesapeake Bay Program to protect the Chesapeake Bay and its tidal tributaries. *Id.* at 13-19.

69. MDE's 2006 report does not state that the changes adopted at that time for designated uses, water quality standards, or categorization would allow MDE to forego developing any local TMDLs to address MDE's existing impairment listings for the affected waters.

70. In its 2008 Integrated Report of Surface Water Quality in Maryland, which includes the state's impaired waters list for that reporting period, MDE completely replaced its older segmentation system for certain waters of the Chesapeake Bay and its watershed with the Chesapeake Bay Program's salinity-based segmentation scheme. Ex. J, MDE, *The 2008 Integrated Report of Surface Water Quality in Maryland* at 114 (July 28, 2008).

71. The 2008 Integrated Report does not state that MDE's transition to this new segmentation scheme was adopted to enable Maryland to forego developing local TMDLs, instead simply stating: "The 2008 [Integrated Report] has now fully phased in the salinity-based assessment units. In doing so, Maryland has been careful to retain all original listings and to continue to track TMDL development documented using the historical watershed-assessment units." *Id.* at 114.

D. The Chesapeake Bay Nutrient and Sediment TMDLs

72. EPA finalized the Chesapeake Bay TMDL on December 29, 2010. Ex. F.

73. As stated in the Bay TMDL's foreword, "[t]he purpose of the Chesapeake Bay TMDL is to identify the pollutant loading reductions needed to meet the applicable Bay water quality standards." *Id.* at xiii.

74. To this end, the Bay TMDL divides the roughly 64,000 square miles of the Chesapeake Bay watershed into 92 segments, and for each segment it establishes TMDLs for nitrogen, phosphorus, and sediment. *Id.* Of the Bay TMDL's 92 watershed segments, 53 are partially or wholly located in Maryland.

75. The Bay TMDL establishes pollutant loading allocations aimed at achieving applicable water quality standards *for the Chesapeake Bay*, but it does not purport to replace or obviate TMDL development to address impaired local water body segments within the Chesapeake Bay watershed. EPA noted that "[t]housands of previously approved TMDLs have been established to protect local waters across the Chesapeake Bay watershed.... For watersheds and waterbodies where both local TMDLs and Chesapeake Bay TMDLs have already been developed or established for nitrogen, phosphorus, and sediment, the more stringent of the TMDLs will apply. In some cases, the *reductions required to meet local conditions shown in existing TMDLs may be more stringent than those needed to meet Bay requirements*, and vice versa." *Id.* at 2–6 (emphasis added).

76. EPA did not state during the development, comment period, or publication of the Bay TMDL that the Bay TMDL would relieve states of their obligation to develop TMDLs for individual waters on states' impaired waters lists under the Clean Water Act, 33 U.S.C. § 1313

(d)(1)(A). Nor did EPA explain how the Chesapeake Bay TMDL addresses localized water quality problems in Maryland's listed impaired segments.

III. EPA'S APPROVAL OF MARYLAND'S 2012 IMPAIRED WATERS LIST

77. As described in ¶¶ 41-42, *supra*, the 2004 Memorandum of Understanding between MDE and EPA required Maryland to complete TMDLs for all impaired segments listed in 1996 and 1998 by 2011.

78. MDE's 2010 Integrated Report of Surface Water Quality contained impairment listings for 359 water body–designated use–pollutant combinations representing the need for a TMDL to address contamination by specific pollutants in individual water bodies. (For example, the Sassafas River's designated uses of swimming and fishing are impaired by excessive nitrogen and phosphorus). Ex. K, MDE, *The 2010 Integrated Report of Surface Water Quality in Maryland* at 8 (April 2, 2010).¹ As described below, MDE's reclassification of the 53 impaired segments eliminated 139 water body–designated use–pollutant combinations from Maryland's list of impaired waters requiring TMDLs.

79. On February 13, 2012, MDE released its Draft 2012 Integrated Report for public notice and comment, along with a fact sheet. Ex. L, *Draft 2012 Integrated Report of Surface Water Quality, Part F.4 Category 4a Waters* (Feb. 13, 2012) (undated); Ex. M, *Facts About: Maryland's Draft 2012 Integrated Report* (Feb. 13, 2012) (undated).

80. The Draft 2012 Integrated Report for the first time claims that the Bay TMDL “effectively achieves” MDE's obligation to establish TMDLs for 139 water body–designated

¹ Between 1998 and 2010, MDE had completed 196 TMDLs for waters on its impaired waters list. See Ex. I at 10; Ex. J at 9; Ex. K at 8; Ex. R at 11 (listing the number of TMDLs completed each biennial reporting cycle).

use–pollutant combinations that fall within the geographic scope of the Chesapeake Bay TMDL, by “setting TMDLs of nitrogen, phosphorus, and sediment for each Bay segment still identified as impaired by those pollutants on the State’s 2008 Integrated Report” Ex. L at 107.

Accordingly, the Draft Integrated Report shifts those impairment listings from Category 5 (water bodies that are impaired and require a TMDL) to Category 4a (water bodies that are impaired but a TMDL is not required). *See* Ex. L; Ex. M at 1.

81. The Draft Integrated Report and accompanying fact sheet provide no further details about this reclassification, and give no explanation of how the Bay TMDL actually ensures that the conditions causing water quality impairment in these local waters will be fully addressed by the Chesapeake Bay TMDL. The draft fact sheet contains only one obscure sentence about this major reclassification, stating: “[I]n December 2010, the Environmental Protection Agency (EPA), in cooperation with the Bay states, completed the Chesapeake Bay Total Maximum Daily Load, establishing a pollution diet (for nutrients and sediments) for the watershed and effectively addressing 139 of Maryland’s impairment listings.” Ex. M at 2.

82. On March 12, 2012, MDE held a public meeting on the 2012 Draft Integrated Report. After several of the Plaintiff groups objected to the lack of clear disclosure or explanation of the proposed de-listing, MDE agreed to hold a second public meeting on April 19, 2012, to discuss the groups’ concerns about the de-listing, and extended the public comment period to April 26, 2012. *See* Ex. N, Letter from Theaux M. Le Gardeur, Gunpowder Riverkeeper, to Matthew M. Stover, MDE (March 16, 2012).

83. On March 26, 2012, MDE posted a revised fact sheet on its website, ten days before the close of the public comment period for the Draft 2012 Integrated Report. Ex. O, MDE, *Revised Facts About: Maryland’s 2012 Integrated Report* (March 23, 2012) (undated). The

revised fact sheet includes a few additional words obliquely referring to the re-classification of the 53 segments:

Another major change to the [Integrated Report] was due to the completion of the Chesapeake Bay TMDL. The Chesapeake Bay TMDL established individual TMDLs for 53 of Maryland's tidal tributary segments *and caused 139 of Maryland's tidal nutrient and sediment impairment listings to be moved from Category 5 (impaired, requires a TMDL) to Category 4a (impaired, TMDL established)*. This represents a major step forward in bringing the Chesapeake Bay into water quality compliance.

Id. at 2 (emphasis added). The revised fact sheet provides no further substantive discussion of the re-classification, and no explanation of how the Chesapeake Bay TMDLs address the local needs of the 53 segments. *Id.*

84. On July 23, 2012, MDE submitted to EPA its Final 2012 Integrated Report of Surface Water Quality. Ex. R, MDE, *Maryland's Final Draft 2012 Integrated Report of Surface Water Quality* (July 23, 2012).

85. As proposed, the Final 2012 impaired waters list removes 53 segments impaired by sediments, phosphorus, or nutrients in the Chester River, Choptank River, Gunpowder River, Miles-Wye River, Potomac River, Patapsco River, and other watersheds from the list of impaired waters for which a TMDL must be completed. The removal of these 53 de-listed segments is the main reason for a dramatic reduction in the number of impairment listings in the 2012 Integrated Report compared to just two years earlier: from 359 Category 5 listings in 2010 to 195 listings in 2012. *Id.* at 9. A map prepared by plaintiff Potomac Riverkeeper illustrates the extent of the watersheds impacted by the de-listing. Ex. S, Potomac Riverkeeper, *MD Watersheds that have been re-characterized as having a completed TMDL*.

86. The Final Integrated Report does not respond substantively to comments filed during MDE's public comment period alerting it to methodological problems with relying on the

Bay TMDL to address water quality impairments at the local level. *See* Ex. P, Letter from Theaux M. Le Gardeur, Gunpowder Riverkeeper, to Matthew M. Stover, MDE (March 26, 2012); Ex. Q, Letter from Theaux M. Le Gardeur, Gunpowder Riverkeeper, to Matthew M. Stover, MDE (April 26, 2012). Nor does it indicate how the Bay TMDL meets the Clean Water Act's requirements that TMDLs take into account seasonal variation, a margin of safety, and "critical conditions for stream flow, loading, and water quality parameters" for those local waters, as required by federal regulations and the Clean Water Act. 40 C.F.R. § 130.7(c)(1); *see also* 33 U.S.C. § 1313(d)(1)(c).

87. Instead the Final 2012 Integrated Report offers only conclusory statements such as, "[the Bay TMDL] incorporated all aspects required for a scientifically rigorous TMDL." Ex. R at 124. In response to comments noting the lack of substantive information in the Integrated Report as to how the Chesapeake Bay TMDL adequately addresses localized water quality problems, the Final 2012 Integrated Report directs public commenters back to the Chesapeake Bay TMDL, stating: "Since the TMDL development process incorporates a public review component, there is no need to re-review the TMDL and the resultant category change during the development and finalization of the [Integrated Report]. Therefore, approval of the TMDL by EPA necessitates the category change from 5 to 4a." *Id.* at 123, 124.

88. While the Draft 2012 Integrated Report does not explain how the Chesapeake Bay TMDL adequately addressed the impairment listings for which no TMDL had previously been completed, it does discuss MDE's proposal to replace *pre-existing* EPA-approved TMDLs adopted prior to 2010 with the Bay TMDL. To summarize, MDE states: "Where it is determined that the previous TMDL was developed using standards, models or data that have since been revised, updated or replaced by those used in the development of the Bay TMDL, then the

individual Bay TMDL for the relevant corresponding Bay Water Quality Segment shall replace the previously developed TMDL as the newly applicable TMDL in force for that impaired segment and its associated drainage area....” Ex. L at 107.

89. However, EPA *did not* approve MDE’s proposal that the Bay TMDL automatically replace and supersede the pre-2010 TMDLs. Instead EPA referred to its statement in the Bay TMDL that “the reductions required to meet local conditions shown in existing TMDLs may be more stringent than those needed to meet Bay requirements.” Ex. R at 118. Accordingly, EPA directed Maryland to conduct “an assessment of each individual pre-existing TMDL... to compare the reductions required by both the Bay TMDL and the local TMDL.” *Id.* EPA further stated that it “is particularly interested in evaluating the reductions that may be required by permittees based on the individual or aggregated [wasteload allocations] provided in each TMDL.” *Id.*

90. The Sassafra River phosphorus TMDL described in ¶ 44 is an example of a pre-existing MDE-developed TMDL that overlaps with the Bay TMDL. Ex. R at 50. As described above, the Sassafra River phosphorus TMDL attends to local conditions in a number of ways. It is also considerably more stringent than the Bay TMDL: MDE’s Sassafra River phosphorus TMDL caps annual phosphorus loading at 13,875 pounds per year, compared to 30,180 pounds per year in the Bay TMDL. Ex. E at 20; Ex. F at 9-10.

91. Similarly, the Port Tobacco nitrogen and phosphorus TMDLs described in ¶ 55 take local conditions into account in a number of ways, and they too are more stringent than the Bay TMDL for the same area: MDE concluded that daily total nitrogen loads from the La Plata Waste Water Treatment Plant must be capped at 34.12 kilograms per day (75.22 pounds per day); the assumed load for all four significant wastewater sources on the stream is 53.20

kilograms per days (117.28 pounds per day). Ex. G, *Technical Memorandum* at 4. In comparison, the Bay TMDL allocation for just the La Plata Waste Water Treatment Plant is 147.84 lbs/day—nearly two times the allocation in the local TMDL. Ex. F, Appx. R, Daily Individual WLAs at 000023 (Permit MD0020524). In addition, the Bay TMDL contains no individual loading caps for at least three other permitted point sources in the “POTOH2_MD” segment in the Port Tobacco watershed. *Id.* at 000073.

92. On November 9, 2012, EPA approved MDE’s impaired waters list for 2012. EPA’s approval document makes no mention of the removal of the 53 segments from the list of impaired waters, except to note that MDE had held a “45 minute presentation as well as a question and answer session designed to address specific technical questions relating to the Chesapeake Bay TMDL and how it impacted the Draft 2012 Integrated Report of Surface Water Quality.” Ex. A at 3. With no further mention of its rationale for doing so, EPA’s approval of the 2012 Integrated Report provided final approval for MDE’s removal of 53 segments from its Category 5 list of impaired waters requiring TMDLs. *Id.*

93. EPA’s approval of the reclassification contravenes the advice of its own Scientific and Technical Advisory Committee appointed by EPA to review the Chesapeake Bay Watershed Model employed in the Bay TMDL. *See* Ex. T, Chesapeake Bay Program Scientific and Technical Advisory Committee, *Chesapeake Bay Watershed Model Phase V Review* (Feb. 20, 2008). In its report the Scientific and Technical Advisory Committee admonished:

[T]he current [Chesapeake Bay Watershed Model] implementation is not appropriate for development and implementation of TMDLs at the local watershed scale. A major barrier appears to be the scale of information built into the [Model], which is based on the county level data and river reach segmentation at the 100 [cubic feet per second] threshold and designed for full watershed or major tributary scale analysis.

Id. at 5. Instead the Committee advises that “local watershed managers could make use of additional modeling tools and data to resegment, recalibrate and implement the model at appropriate local scales using more site specific local information.” *Id.*

94. The Bay TMDL does not fulfill or purport to fulfill the function of TMDLs addressing water quality impairments at the local scale. The comparison with MDE’s Sassafra River phosphorus TMDL in ¶ 90 shows that the Bay TMDL allows *more than double* the phosphorous loading that MDE found is allowable consistent with local water quality standards and designated uses for the Sassafra River. Ex. E at 23; Ex. F at 9-10.

95. Similarly, the comparison with MDE’s nitrogen and phosphorus TMDLs for the Port Tobacco River in ¶ 91 shows that the Bay TMDL allows for more nitrogen loading from a single sewage treatment plant than the MDE TMDLs do for four sewage treatment plants. Ex. G, *Technical Memorandum* at 4; Ex. F, Appx. R, Daily Individual WLAs at 000023 (Permit MD0020524).

96. Plaintiffs are informed and believe that the other delisted stream segments require more stringent pollution controls than those required under the Bay TMDL, and that neither MDE nor EPA conducted analyses that would support a finding to the contrary. Further, neither MDE nor EPA articulated a rational basis or reasoned explanation that would support a finding that the Bay TMDLs satisfy requirements of the Clean Water Act for TMDLs for local water quality impairments in any of the delisted waters. To the extent that EPA’s decision promulgating the Bay TMDL could be construed as finding that the Bay TMDL is sufficient to protect against localized water quality impairments from nitrogen, phosphorus and sediment in the delisted segments (and Plaintiffs do not agree the Bay TMDL can be construed as so finding), Plaintiffs hereby challenge any such finding as arbitrary, capricious and contrary to law.

97. In its Final 2014 Integrated Report of Surface Water Quality, MDE attempts to retroactively justify the 2012 de-listing of impaired water bodies in response to public comments, claiming that “it has been demonstrated that the loads established in the Chesapeake Bay TMDL will fully address any local water quality impairments.” Ex. U, MDE, *Maryland’s Final 2014 Integrated Report of Surface Water Quality* at 113 (April 16, 2015). Not only was this assertion an impermissible post-hoc justification, but it was also arbitrary and capricious and lacking in any reasoned basis.

98. EPA’s letter approving Maryland’s 2014 Integrated Report endorses MDE’s claims regarding the permissibility of forgoing local TMDLs for the 53 de-listed waters and advances additional arguments in support of MDE’s position. Ex. V, Letter from Jon M. Capacasa, Region III Director, EPA, to D. Lee Currey, Director, MDE, at 3-5 (Oct. 16, 2015). EPA’s reliance on MDE’s claims is impermissible, arbitrary and capricious for the same reasons stated in the preceding paragraph, and EPA’s additional arguments in support of MDE’s position lack any reasoned basis and are arbitrary and capricious.

99. As a result of EPA’s approval of Maryland’s impaired waters list for 2012, MDE is not developing TMDLs for localized water quality impairment from nitrogen, phosphorus, and sediment in the 53 de-listed water quality-impaired segments. Failure to complete TMDLs for the 53 de-listed waters removes a necessary and legally required tool to achieving Clean Water Act-mandated water quality standards at the local level, making it more difficult to adequately address localized water quality impairments in these waters. In particular, the challenged action deprives the Plaintiffs of their ability to adequately assess whether local water quality will be adequately protected under proposed pollution discharge permits or proposed pollution trading

and offsets. Because of the challenged action, Plaintiffs will need to expend more of their own resources to develop the necessary information.

100. EPA's approval of the delisting action further injures the interests of the Plaintiffs and their members by depriving them of information and analyses to which Plaintiffs and their members are entitled, including analysis of the nature and causes of localized water quality problems in the delisted segments and a calculation of the maximum allowable pollution loads that can occur consistent with achieving water quality standards and designated uses in those local waters—information that would otherwise be available to the public as part of localized TMDLs. EPA's approval of the delisting action therefore impairs the Plaintiffs' ability to educate their members and the public about what actions are needed to restore and protect the delisted waters.

CLAIMS FOR RELIEF

First Claim For Relief: Arbitrary and Capricious Action

101. All preceding paragraphs are hereby incorporated by reference as if fully set forth below.

102. MDE failed to provide timely public notice of its decision to remove the 53 waters from its 2012 impaired waters list. As a result, interested members of the public did not have adequate opportunity to comment on MDE's removal of the 53 waters from Maryland's 2012 impaired waters list.

103. The 2012 Integrated Report that EPA approved failed to rationally explain how MDE's removal of the 53 waters from its impaired waters list without developing TMDLs for

those waters was consistent with the requirements of the Clean Water Act, containing instead only bare assertions that those waters were “addressed” by the Bay TMDL. Ex. R at 50.

104. EPA approved Maryland’s 2012 impaired waters list in a letter that provides no explanation whatsoever of how the removal of the 53 waters is consistent with the requirements of the Clean Water Act. EPA’s subsequent attempt to justify its approval of the delisting of those waters constituted an impermissible post-hoc justification and was arbitrary, capricious, and contrary to law.

105. The 53 waters were therefore removed from Maryland’s impaired waters list without adequate public notice, opportunity for comment, or explanation, contrary to the Clean Water Act and EPA’s implementing regulations. 33 U.S.C. § 1251(e); 40 C.F.R. §§ 25.3-25.4.

106. For all the foregoing reasons, EPA’s approval of Maryland’s removal of the 53 waters from its impaired waters list for 2012 constitutes agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C).

**Second Claim For Relief:
Violation of the Requirements for TMDLs Under the Clean Water Act**

107. All preceding paragraphs are hereby incorporated by reference as if fully set forth below.

108. EPA’s approval of the de-listing of the 53 waters from Category 5 in Maryland’s impaired waters list for 2012 leaves those water quality impaired waters without TMDLs required for nitrogen, phosphorus, and sediment in those waters, in contravention of Clean Water

Act, 33 U.S.C. § 1313(d). Accordingly, such approval was arbitrary, capricious, and contrary to law.

**Third Claim For Relief:
Violation of Public Participation Requirements Under the Clean Water Act**

109. All preceding paragraphs are hereby incorporated by reference as if fully set forth below.

110. Failure to complete TMDLs for the 53 de-listed waters deprives Plaintiffs and other interested members of the public of an essential tool for independently verifying that their local waters are meeting the water quality standards mandated by the Clean Water Act.

111. MDE and EPA's failure to provide adequate public information prior to de-listing the 53 waters deprived Plaintiffs and other interested members of the public of the opportunity to influence and strengthen essential pollution controls for water bodies they value.

112. EPA's approval action violated public participation requirements under the Clean Water Act, 33 U.S.C. § 1251(e).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare unlawful and arbitrary EPA's action approving Maryland's removal of 53 water body segments within the Chesapeake Bay watershed from the list of impaired Maryland waters for which TMDLs must be completed, for the reasons alleged herein;

2. Enter an order setting aside EPA's action approving Maryland's removal of 53 water body segments within the Chesapeake Bay watershed from the list of impaired Maryland waters for which TMDLs must be completed;

3. Award plaintiffs their costs of litigation (including attorneys' and expert witness fees);
4. Retain jurisdiction over this action to ensure compliance with the Court's decree; and
5. Grant such other relief as the Court deems necessary and proper.

DATED: March 8, 2016

/s/ Jennifer C. Chavez
JENNIFER C. CHAVEZ
DC Bar No. 493421
Earthjustice
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036
202-667-4500

Attorney for Plaintiffs