No. 13-4079

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Plaintiffs-Appellants,
v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee.

CHESAPEAKE BAY FOUNDATION, et al.,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMICUS BRIEF FOR THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF AFFIRMANCE

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Appellants focus their appeal on States' rights, contending that the Environmental Protection Agency (EPA) exceeded its authority under the Clean Water Act (CWA) by establishing pollution limits that interfere with State authority and by requiring States to provide assurances and to meet certain federal deadlines. (Opening Br. at 1-2, 3.) The State amici supporting Appellants also press States' rights, raising the specter of what "could be next," which they suggest will be extensive federal land-use decision-making and aggressive regulation of the Mississippi River Basin. (Br. of State Amici at 1.) Leaving aside such speculative forecasting, however, the only States that this appeal affects are the ones comprising the Chesapeake Executive Council and covered by the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous, and Sediment (the Bay TMDL). It is time for the voices of those States (the "Bay States") to be heard.

Virginia is one of three Bay tidal States, one of the original State participants in interstate efforts and agreements to protect the Bay, a member of the Chesapeake Executive Council, and one of six States covered by the Bay TMDL. (*See, e.g.*, JA 9 n.1, 16, 18, 75.) *See generally* 33 U.S.C § 1267(a)(5).

Congress's finding that "the Chesapeake Bay is a national treasure and a resource of worldwide significance" has special meaning for Virginia and other

Bay States.[1] In Virginia and other Bay States, the Chesapeake Bay gives rise to key industries, supports thousands of jobs, buttresses land values, provides recreational opportunities, and affects human health.[2] In short, Virginia's interests in the Chesapeake Bay are incalculably great.[3]

SUMMARY OF THE ARGUMENT

Virginia and Maryland have a history of agreements concerning the Bay that dates back to the Founding Era. The Bay TMDL continues the Bay States' long-running efforts to protect the Chesapeake Bay. Since 1983, other Bay States, the District of Columbia, and EPA have joined Virginia and Maryland in agreements that aim to achieve the comprehensive and coordinated regional efforts necessary to protect the Bay. In 2000, finding a need to expand federal support for those

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[1] Chesapeake Bay Restoration Act of 2000 § 202, Title II of 106 P.L. 457, 114 Stat. 1957 (codified in part at 33 U.S.C. § 1267); *see also* JA 15 (noting the Bay's great ecological, economic, recreational, historic, and cultural value to the region).

[2] *E.g.*, *Saving a National Treasure: Financing the Cleanup of the Chesapeake Bay*, A Report to the Chesapeake Executive Council from the Chesapeake Bay Watershed Blue Ribbon Finance Panel (Oct. 2004) at 9, *available at* http://www.chesapeakebay.net/publications/title/saving_a_national_treasure_financing_the_cleanup_of_the_chesapeake_bay (last visited April 8, 2014). The State amici supporting Appellants also cite this report, but they give it a costs-and-burdens-only slant. (Br. of State Amici at 18-19.) The panel that authored the report and the Bay States recognize that the economic costs of protecting the Bay are balanced by the tremendous economic benefits of the Bay.

[3] Protecting the Chesapeake Bay has received bipartisan support in Virginia for decades. *See* JA 135 & 143 (1983 & 1987 Bay agreements, signed by Democratic Governors Charles S. Robb and Gerald L. Baliles); JA 261 ("Chesapeake 2000" agreement, signed by Republican Governor James S. Gilmore III).

efforts, Congress specifically approved the goals of the Chesapeake Bay agreements and directed EPA to work in coordination with the Bay States to achieve them.

EPA has done what Congress directed. And the Bay States and EPA have achieved a TMDL that is based almost entirely on the Bay States' own plans. Appellants do not challenge the district court's findings regarding these issues or the few instances in which the EPA established backstop allocations. And Appellants acknowledge the Bay States' authority to commit to the TMDL allocations and deadlines at issue here. Appellants' claim that EPA coerced the Bay States into action ignores the uncontested facts.

The claim that EPA improperly invaded State authority is also premature and contingent. No justiciable controversy will arise unless and until (i) a Bay State pursues implementation of the Bay TMDL in a manner inconsistent with its terms, and (ii) EPA disapproves of its actions. That may never happen, and the absence of any current controversy renders Appellants' federalism arguments speculative and hypothetical. If EPA ever infringes upon State authority, Virginia or another proper plaintiff can challenge its action at that time.

Finally, applying the Clean Water Act to the Chesapeake Bay does not raise constitutional issues. The Chesapeake Bay is a navigable, interstate body of water well within Congress's traditional jurisdiction. Nor can it be said that EPA is

commandeering the States, in light of the Bay States' history of working to protect the Bay and the fact that the Bay TMDL is largely the product of the Bay States' own plans and authority.

ARGUMENT

I. The Bay TMDL addresses a unique resource that has long been the subject of agreements and concerted action among the States, with the express approval of Congress.

Since the founding of the United States, Bay States have recognized the importance of the Chesapeake Bay and its tributaries and have worked together to protect their mutual interests. In 1777, Virginia and Maryland appointed commissioners to try to resolve jurisdictional disputes over the Potomac River and the Chesapeake Bay. The commissioners included future Constitutional Convention delegate and Supreme Court Justice Samuel Chase, and the "Father of the Bill of Rights," George Mason.[4] Unfortunately, the "exigencies of war shoved the plan aside" for eight years.[5]

But Virginia's and Maryland's early efforts to work together became catalysts in the formation of this country. In 1781, Virginia offered to cede its claims to the Northwest Territory to the Confederation, leading Maryland to join

[4] See Journal of the House of Delegates of the Commonwealth of Virginia 74 (White ed. 1827) (1777); 1 Robert A. Rutland, The Papers of George Mason xlii, lxiv, cxix-cxxi (1970) ["Mason Papers"]; 2 Mason Papers, *supra*, at 812-14; 2 J. Thomas Scharf, History of Maryland 529-30 (Tradition Press 1967 reprint) (1879).

[5] 2 Mason Papers, *supra* n.4, at 813.

and allowing the Articles of Confederation to become legally effective.[6] Later, after teams led by Mason and Chase held a meeting at Mt. Vernon at the invitation of George Washington, Virginia and Maryland entered into the Compact of 1785, which established concurrent jurisdiction over the Chesapeake Bay and Potomac River and guaranteed to citizens of both States navigation, fishing, and other rights.[7] The success of the Mt. Vernon Conference led the Virginia General Assembly to call for a convention in 1786 in Annapolis to address the shortcomings of the Articles of Confederation, and the Annapolis Convention, in turn, led to the Philadelphia Convention in 1787.[8]

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[6] *See, e.g.*, National Archives – Founders Online, "From Thomas Jefferson to Samuel Huntington, 17 January 1781, enclosing Resolution of Assembly concerning the Cession of Lands, 2 January 1781," *available at* http://founders.archives.gov/documents/Jefferson/01-04-02-0481 (last visited April 8, 2014).

[7] *See* Maryland-Virginia Compact of 1785, 1785 Va. Acts ch. 27, *available at* http://law.lis.virginia.gov/compacts/maryland-virginia-compact-of-1785 (last visited April 8, 2014); 1785-86 Md. Acts ch. 1. Regarding Washington's role, see 2 John C. Fitzpatrick, The Diaries of George Washington 352-54 (Houghton Mifflin 1925). The Supreme Court upheld the Compact in *Wharton v. Wise*, 153 U.S. 155, 163-66 (1894).

[8] *See* 1 James Madison, The Debates in the Federal Convention of 1787 708 (Hunt and Scott eds. 1987) (1920) (in Madison's Preface to Debates in the Convention). The text of Madison's Preface is available at http://www.constitution.org/dfc/dfc_0001.htm (last visited April 8, 2014). Madison was not the only one to recognize the Mt. Vernon Conference as the precursor to the Philadelphia Convention. *See* 2 Mason Papers, *supra* n.4, at 812-14; Douglas Southall Freeman, Washington 532-33 (Richard Harwell ed., 1992 abridged) (1948); Helen Hill, George Mason: Constitutionalist 182-83 (1938); 2

Later agreements between Virginia and Maryland, in 1878 and 1958, settled boundary issues and took the remarkable step of creating a bi-state regulatory agency to oversee fishing and oyster harvesting in the tidal Potomac River.[9]

To be sure, peace and cooperation have not always prevailed among the Bay States on matters related to the Bay and its tributaries.[10] But the strong shared interest in the Bay has continued to foster interstate agreement and cooperation. More recently, the Bay States' focus has shifted from navigation and specific industrial concerns to protecting the Bay's watershed overall.

In 1980, recognizing that "the Chesapeake Bay, its tributaries, wetlands and

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Kate Mason Rowland, The Life of George Mason 93 (Russell & Russell 1964) (1892).

[9] *See* Va. and Md. Boundary Agreement of 1878, 1877-78 Va. Acts ch. 246, *available at* http://law.lis.virginia.gov/compacts/virginia-and-maryland-boundary-agreement-of-1878 (last visited April 8, 2014); Potomac River Compact of 1958, *codified at* Va. Code §§ 28.2-1001 – 28.2-1007, *also available at* http://law.lis.virginia.gov/compacts/potomac-river-compact (last visited April 8, 2014); Potomac River Fisheries Commission, "History and Mission Statement of the PRFC," *available at* http://prfc.us/history.html (last visited April 8, 2014). Legislative consents to the 1958 Compact may be found at 1958 Md. Acts c. 269, 1959 Va. Acts c. 28, and Pub. L. No. 87-783, 76 Stat. 797 (1962).

[10] *See, e.g.*, *Virginia v. Maryland*, 540 U.S. 56, 79-80 (2003) (holding that the Compact of 1785 invalidated Maryland laws that blocked Virginia from withdrawing water from the Potomac River or constructing improvements appurtenant to the Virginia shoreline); *Bostick v. Smoot Sand & Gravel Corp.*, 154 F. Supp. 744, 753 (D. Md. 1957) (describing relations in the late 1800s as including "frequent and violent" disputes and noting "the decidedly less than brotherly love of Maryland toward Virginia"), *rev'd on other grounds by* 260 F.2d 534, 537 (4th Cir. 1958).

dependent resources constitute a unified ecosystem" and that "utilization of the resources of the Bay, including . . . all actions which affect changes in water quality, substantially involve the joint interests of the State and the Commonwealth," Maryland and Virginia established the Chesapeake Bay Commission. 1980 Va. Acts ch. 662. (*See* JA 137.)[11]

In 1983, the first Chesapeake Bay Agreement brought together Virginia, Maryland, and Pennsylvania, along with the District of Columbia and EPA, to form the Chesapeake Executive Council and to recognize the need to "assess and oversee the implementation of coordinated plans to improve and protect the water quality and living resources" of the Bay. (JA 135.)

In 1987, the same Bay jurisdictions and EPA entered into another agreement toward "a more comprehensive and coordinated approach to restoring water quality in the Bay." (JA 16; *see* JA 137-43.) The 1987 Agreement both "propose[d] . . . objectives that will establish a policy and institutional framework for continued cooperative efforts to restore and protect Chesapeake Bay" and "commit[ted] to specific actions to achieve those objectives." (JA 137.) The 1987

[11] With the subsequent addition of Pennsylvania, the Chesapeake Bay Commission is now a tri-state legislative commission. Its purposes continue to include "promot[ing] intergovernmental cooperation," "encourag[ing] cooperative coordinated resource planning and action by the signatories and their agencies," and "recommend[ing] improvements in the existing management system for the benefit of the present and future inhabitants of the Chesapeake Bay region." Va. Code §§ 30-240, 30-247.

Agreement focused on nitrogen, phosphorus, and sediment (*see* JA 138), foreshadowing the Bay TMDL.

After further steps and evaluations (*see* JA 17-18), on June 28, 2000, the Bay States, the District, and EPA entered into the "Chesapeake 2000" Agreement, which set both broad goals and specific benchmarks to correct water quality problems in the Bay watershed. (JA 18-19; *see* JA 249-61.) Chesapeake 2000 committed to "continue our cooperative intergovernmental approach to achieve and maintain water quality goals through cost effective and equitable means within the framework of federal and state law." (JA 254.) With respect to land-use decisions and the goal of "limit[ing] and mitigat[ing] the potential adverse effects of continued growth," Chesapeake 2000 recognized the role of local governments and agreed that each signatory "will pursue this objective within the framework of its own historic, existing or future land use practices or processes." (JA 256.)

In the fall of 2000, Bay States, the District, and EPA entered into a further memorandum of understanding (the "2000 MOU"), which provided for "[w]ork[ing] cooperatively to achieve the nutrient and sediment reduction targets that we agree are necessary to achieve the goals of a clean Chesapeake Bay" and collaborating on specific implementation steps "to achieve the necessary

reductions."[12] As the court below noted, the 2000 MOU states that a Bay TMDL would be required if the Bay did not meet water quality standards by 2010. (2000 MOU, *supra* n.12, at 1; JA 19.)

Congress's passage of the Chesapeake Bay Restoration Act of 2000, on November 7, 2000, expressly recognized and approved the joint efforts of the Bay States, the District, and EPA. Congress passed that Act "to achieve the goals established in the Chesapeake Bay Agreement" and based on Congress's finding of a "need to expand Federal support for monitoring, management, and restoration activities in the Chesapeake Bay and the tributaries of the Bay in order to meet and further the original and subsequent goals and commitments of the Chesapeake Bay Program." Chesapeake Bay Restoration Act of 2000, *supra* n.1, § 202(b)(2), (a)(5). Congress specifically directed the EPA Administrator, "in coordination with other members of the Chesapeake Executive Council," to "ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain" the goals of that agreement and necessary water quality requirements. 33 U.S.C. § 1267(g)(1).

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[12] Mem. of Understanding Regarding Cooperative Efforts for the Protection of the Chesapeake Bay and Its Rivers, *available at* http://www.chesapeakebay.net/publications/title/memorandum_of_understanding_among_the_state_of_delaware_the_district_of_col (last visited April 8, 2014); *see* JA 19, 1158. Delaware, Maryland, Pennsylvania, the District, and EPA signed this MOU by October 2000, with Virginia and New York signing in November 2000. West Virginia signed later, in June 2002.

That history shows that the Bay States have led the charge to protect the Bay through concerted efforts by and among all concerned jurisdictions. To be sure, as Congress required, EPA has been an important participant in these efforts throughout recent decades (*see* JA 16-22), including since Chesapeake 2000. But it reshapes the facts beyond recognition to portray efforts to protect the Bay as anything other than an example of States and EPA working together to protect a regional and national treasure.

As the district court recognized, the Bay TMDL is a continuation of the Bay States and EPA acting in synchrony to achieve necessary, comprehensive progress to protect the Bay. Affirming the ruling below would not aggrandize the powers of the EPA; it would allow the Bay States and EPA to continue their work together.

II. The Bay TMDL is largely a product of the Bay States, and it emerged from cooperation between the Bay States and EPA.

As the district court found, the Bay TMDL is based almost entirely on the Bay States' Watershed Implementation Plans (the "Plans"), with only three "backstop" allocations determined by EPA. (JA 26; *accord* JA 63-64 ("[T]he court finds that most of the individual allocations were provided by the states, not EPA.").) The district court also found that Appellants' "characterization of [the Bay TMDL's] deadlines as 'EPA's deadlines' is misleading" and that "the record supports a conclusion that the timeline at issue was established by the Bay Partnership, which undermines the position that the timeline was a unilateral

federal dictate from EPA." (JA 73.) Neither Appellants nor their State amici challenge those findings in this appeal.[13] Neither Appellants nor their State amici challenge the three backstop allocations or the ruling below that those backstops were proper. (JA 65.) And neither Appellants nor their State amici challenge the authority of the Bay States to commit themselves to TMDL implementation details. (*See* Opening Br. at 3, 40-41 (describing State authority to set allocations and limits, "identify best management practices and measures that will be undertaken, identify programs to achieve implementation of those practices, and set a schedule containing milestones").)

It is therefore undisputed that the details in the Bay TMDL are an expression of the Bay States' own Plans and are creatures of the Bay States' authority.

Appellants try to undermine the undisputed facts by recasting cooperation as coercion. (*See* Opening Br. at 13-14, 53.) But they cannot obscure that the Bay TMDL arose through cooperative dialogue between the Bay States and EPA, not through some unilateral federal imposition. (*See* JA 59-64.) Nor do Appellants challenge the district court's findings that EPA had extensive meetings with and input from Bay jurisdictions and interested groups and persons. (*See* JA 81-82.)

A closer look at Virginia's own interactions with EPA shows that the district

[13] Indeed, Appellants now admit that the Bay TMDL allocations about which they complain "originated from 'watershed implementation plans' submitted to EPA by the Bay states." Opening Br. at 9.

court correctly found that the Bay TMDL was cooperative federalism in action. (*See* JA 62.) Appellants refer to a letter from Virginia Governor Robert F. McDonnell to EPA (JA 557-60) as Virginia's "objections," implying that Virginia's "strong objections" were overridden. (Opening Br. at 10, 53.) In fact, that letter was sent during negotiation of the Bay States' Watershed Implementation Plans and must be understood in that context. Governor McDonnell expressed "some concerns," asked only for "serious consideration to these issues," and expressed confidence that "[i]t [wa]s not too late" to address those concerns and issues. (JA 557, JA 560.) EPA, in fact, accepted Virginia's revised Plan and incorporated it into the Bay TMDL, thereby addressing Virginia's concerns.

The comments to EPA by the Virginia Association of Municipal Wastewater Agencies (VAMWA) in November 2010 (*see* excerpts at JA 863-76) provide another example. VAMWA argued that EPA should accept parts of Virginia's Watershed Implementation Plan and eliminate or modify certain EPA-backstop allocations. EPA ultimately accepted Virginia's revised Plan and removed all Virginia-related backstops in the final Bay TMDL. (*See* JA 26; JA 1393-95.)

In short, the cooperative process worked; EPA and Virginia reached agreement; and the Bay TMDL was the product of cooperation and balancing, not federal coercion. (*See* JA 74 ("The history of the Bay TMDL . . . represents the

[Chesapeake Bay] Partnership's efforts to resolve these issues without upsetting the balance of federal-state control established by the CWA.").) The Bay TMDL is the product of the Bay States' plans and facilitates ongoing concerted action by the affected States, in conjunction with EPA, to address complex, regional matters of mutual interest to all of them. This Court need not and should not interpret the Clean Water Act to prevent cooperative efforts by the Bay States and EPA.

III. The interplay between EPA and State authority is not justiciable here, but judicial review is available for any future disagreements with EPA.

Appellants' central contention—that EPA has improperly invaded areas of State authority (*e.g.*, Opening Br. at 3, 29)—should be rejected because it is premature and contingent, and because the Bay States retain their authority to challenge EPA's actions should a proper case arise in the future.

Given the lack of a current dispute or controversy between the affected Bay States and EPA, and given that the allocations, assurances, and deadlines that Appellants challenge are within the authority of the Bay States, this appeal involves a hypothetical controversy. For infringement of State authority to become a reality, a Bay state would need to pursue implementation of the Bay TMDL in a manner not specified by the Bay TMDL, and EPA would have to disapprove. Thus, Appellants' claims of infringement of State authority "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted).

Indeed, Appellants implicitly acknowledge the hypothetical nature of their arguments. (*See, e.g.*, Opening Br. at 53-54 ("if EPA's interpretation is permitted to stand, in the next TMDL, and every one thereafter, EPA could unilaterally prescribe the entire TMDL . . . ."); *id.* at 58 ("EPA is using those measures to prevent states from ignoring EPA allocations *even if* states develop alternative implementation plans . . . .") (emphasis added).)[14]

Possibilities and hypotheticals do not make a case justiciable. *Texas*, 523 U.S. at 300, 302; *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) (to have standing, "the plaintiff must suffer an injury-in-fact that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical"); *Pittsburgh Mack Sales & Serv. v. Int'l Union of Operating Eng'rs, Local Union No. 66*, 580 F.3d 185, 190 (3d Cir. 2009) (noting how "a potential harm that is 'contingent' on a future event" may not satisfy ripeness and declaratory judgment requirements).

This appeal is not a proper case for deciding the hypothetical federalism issues Appellants raise here. It is true that private litigants, "in a proper case," may

[14] Appellants' State amici likewise fear hypothetical future actions, worrying that EPA might take over State land-use decisions or interfere with State authority in the Mississippi River Basin. *See* Br. of State Amici at 17-18 ("By setting allocations for particular types or parcels of land low enough, EPA *could* require state and local governments to limit or prohibit the use of fertilizer . . . .") (emphasis added).

raise federalism arguments. *Bond v. United States*, 131 S. Ct. 2355, 2363-64 (2011). But this is not "a proper case." In *Bond*, the State had not criminalized the possession or use of certain chemicals, but the federal government had. The appeal of the resulting conviction presented a live controversy about actual infringement of the State's police power. *See id.* at 2360, 2366 ("The public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, *has been displaced* by that of the National Government.") (emphasis added). By contrast, it is undisputed that the Bay TMDL details at issue *originated* with the Bay States, and this appeal does not challenge any actual displacement of the public policy of the Bay States or federal infringement of their authority. To decide federalism issues while displacement and infringement are mere future contingencies would render justiciability meaningless. *Bond* did not go that far. Indeed, the Court emphasized that "[a]n individual who challenges federal action on [federalism] grounds is, of course, subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims." *Id.* at 2366.

Appellants fare no better with their related claim that EPA was not authorized to apply a "reasonable assurance" standard in assessing the Bay States' Watershed Implementation Plans, because the "reasonable assurance" issue is now moot. The final Bay TMDL is based on the Bay States' revised Plans, which EPA accepted. *See supra* at 10-11 & n.13. Because EPA accepted the Plans and the

Bay States do not challenge EPA's actions, there is no live controversy over the "reasonable assurance" standard. *See Donovan ex. rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) ("[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (*quoting Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

It is not clear how much authority EPA will claim over State implementation in the future.[15] But even if Appellants are correct that EPA will someday assert authority too broadly, that future controversy can be litigated when it arises. Virginia is no shrinking violet when it comes to challenging EPA when EPA has overstepped its authority. *See Va. Dept. of Transp. v. EPA*, No. 1:12-CV-775, 2013 U.S. Dist. LEXIS 981 (E.D. Va. Jan. 3, 2013) (sustaining Virginia's challenge to EPA's TMDL for Accotink Creek). *If* EPA should act improperly with respect to implementation (whether in exercising its permitting authority or otherwise), and *if* EPA's action infringes State authority, then Virginia or another proper plaintiff could challenge EPA's action at that time.

IV. This case does not implicate the Tenth Amendment.

The claim by Appellants' State amici that this case "raises serious Tenth Amendment concerns" (Br. of State Amici at 22-28) is wrong. Emphasizing cases

[15] EPA has stated in this litigation that the Bay TMDL is not binding on the Bay States. *See, e.g.*, JA 1758; EPA Mem. Supp. EPA's Cross-Mot. Summ. J. (June 20, 2012) [docket no. 110 below] at 10-11, 14.

that concern "wetlands . . . near ditches or man-made drains," and "an abandoned sand and gravel pit," the Appellants' State amici claim that EPA's interpretation in the Bay TMDL "presses the envelope of constitutional validity" and reaches "the outer limits of Congress' power" to regulate interstate commerce. (Br. of State Amici at 22, 24.[16])

The Chesapeake Bay is not a man-made drain or an abandoned sand and gravel pit. The Bay and its key tributaries are interstate bodies of water, and the Bay watershed spans multiple States. Protecting the Bay is unavoidably a regional State and federal task. (*E.g.*, JA 74-75 (noting that "Congress recognized and anticipated a watershed-wide approach" to the Bay and the likely practical impossibility of protecting the Bay without an interstate approach); 1980 Va. Acts ch. 662 ("the Chesapeake Bay, its tributaries, wetlands and dependent natural resources constitute a unified ecosystem shared and used by the State of Maryland and the Commonwealth of Virginia").)

The Bay and its tributaries, in fact, provide a textbook example of "what Congress had in mind as its authority for enacting the CWA: its traditional

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[16] Appellants' State amici rely on *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion), and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001) [hereinafter *SWANCC*]. Both *Rapanos* and *SWANCC* were statutory interpretation cases concerning what waters are covered by the CWA. Neither case reached or decided a constitutional question about the scope of Congress's Commerce Clause power. *See Rapanos*, 547 U.S. at 729; *SWANCC*, 531 U.S. at 162.

jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. Applying the Clean Water Act to the Bay comes nowhere near the limits of the Commerce Clause.

Nor can it reasonably be argued that the Bay TMDL raises Tenth Amendment issues by commandeering States and compelling them to enact and enforce a federal regulatory program. (Br. of State Amici at 25 (discussing *New York v. United States*, 505 U.S. 144 (1992)).) To the contrary, Virginia and Maryland have resolved matters concerning the Bay by agreement since before the Constitution existed, and they have been engaged in joint regulation of the Bay since before EPA's establishment in 1970. *See supra* at 5-6. The Bay States voluntarily have entered into more than 30 years of agreements focused on coordinated plans to improve and protect the water quality and living resources of the Bay. *See supra* at 6-9. The Bay TMDL is largely a product of the Bay States. *See supra* at 10-11. Claiming that this case involves federal commandeering of the type disapproved by the Supreme Court misunderstands the record and overlooks the history of the Bay States' cooperative efforts.

If some future controversy arises, in the Mississippi River Basin or elsewhere, in which EPA seeks to commandeer the States, there is every reason to believe that the affected States will object. But that is not the situation here. No such serious constitutional question is presented in this case.

CONCLUSION

In light of the Chesapeake Bay's unique circumstances, the undisputed facts about the Bay TMDL, the lack of a dispute or controversy between the Bay States and EPA, and the lack of a proper basis to complain about federal commandeering, the broad ruling sought by Appellants and their State amici is inappropriate.

The ruling of the district court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: /s/

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), Fed. R. App. P. 29(d) and 3d Cir. L.A.R. 31.0(b) because it contains 4,146 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the count of Microsoft Office Word 2007.

2. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

3. This brief has been scanned for viruses using McAfee Security-as-a-Service Endpoint Protection ver. 6.02.133, and no viruses were detected.

4. The text of this electronic brief is identical to the text in the paper copies that are being submitted to the Court.

5. Pursuant to 3d Cir. L.A.R. 46.1, Stuart A. Raphael has been admitted to the bar for the United States Court of Appeals for the Third Circuit.

/s/

Stuart A. Raphael

CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2014, I am electronically filing the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and that ten paper copies are being mailed on the same day as electronic transmission, as provided in Fed. R. Civ. P. 25(a)(2)(B) and 3d Cir. L.A.R. 31.1(b)(3). To my knowledge, counsel for all parties are registered to receive electronic service through the appellate CM/ECF system.

/s/

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