



High Expectations, No Excuses: A New Era of Federal Leadership in Chesapeake Bay Restoration

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As the first anniversary of President Obama's Executive Order on Chesapeake Bay Restoration and Protection approaches, EPA and the Federal Leadership Committee (FLC) have an unprecedented opportunity to alter the course of Bay restoration efforts. Since the issuance of the Order, the federal government has promised to take a strong leadership role in compelling state governments to fulfill a series of broken promises, even going so far as to demand that states establish deadlines for concrete action that would trigger economic consequences if missed. Given their stunning failures in 2000 and 2010 to meet pollution reduction goals, EPA's commitment to become the enforcer and not just the collaborator with respect to restoration efforts is a welcome—although long overdue—change. However, translating this commitment into action will prove challenging for EPA, which must stand ready to both provide assistance and impose tough consequences. With much of the economy in distress and a lack of resources across the board, it is difficult to imagine that Bay states will be able to consistently meet their commitments. In its new leadership role, EPA must distinguish between genuine efforts that fall short and intentional inaction that fails to meet negotiated commitments.

The coming months are crucial to the future of the Chesapeake Bay:

1. The FLC will release the final Strategy for Protecting and Restoring the Chesapeake Bay.
2. Bay jurisdictions will begin submitting their preliminary Phase I Watershed Implementation Plans (WIPs).
3. EPA will finalize the Bay-wide Total Maximum Daily Load (TMDL), the central source of pollution reduction requirements that must be implemented by 2025.

As these developments occur, EPA must undertake early and vigilant evaluation of WIP and assessment of whether jurisdictions have provided adequate reasonable assurances. EPA and the FLC must also establish the Office of the Independent Evaluator to provide clear, transparent, and real-time information about the progress toward Bay restoration. In the final Strategy, we urge the FLC to consider the following recommendations:

- EPA must carefully scrutinize Bay jurisdictions' WIPs and actions during each milestone period to ensure that together they include specific, targeted actions to reduce pollutant loadings and concrete deadlines and guaranteed funding for implementing these actions.
- In the Phase I WIPs, EPA must require Bay jurisdictions to submit clear, uniform, and comprehensive baseline information, including NPDES coverage rates, basic enforcement information, and triggers for implementing contingency measures.
- The final Strategy must align specific consequences with specific failures so that Bay jurisdictions and the public understand exactly what punitive actions EPA will take if a Bay jurisdiction fails to achieve a certain outcome. When imposing consequences, EPA must also follow the existing regulation that conditions the grant of new NPDES discharge permits on the availability of pollutant loads and the existence of a compliance schedule for all sources.

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- As the most severe consequence, EPA should exercise its existing authority to withdraw a jurisdiction's delegated permitting authority. The final Strategy should specify the criteria and timetable for exercising this authority
- As part of the Chesapeake Bay Compliance and Enforcement Strategy, EPA must develop a list of standard and uniform enforcement data and require Bay jurisdictions to submit this data on a regular basis. The enforcement data must include the permit coverage universe, the inspection rate, and enforcement actions conducted by local governments
- The final Strategy must clearly describe and define the role of the independent evaluator, whose duties must include developing and assessing Bay restoration progress against an accountability metric and keeping lawmakers, policymakers, and the public fully informed of this progress and the obstacles to Bay restoration.
- The final Strategy must clearly articulate concrete outcomes, milestones, and other objectives to be achieved through adaptive management in the context of Bay restoration. The FLC must ensure that adaptive management results in substantive achievement of goals instead of allowing it to become an excuse for delayed action.

RECOMMENDATION 1. EPA must carefully scrutinize Bay jurisdictions' Watershed Implementation Plans and actions during each milestone period to ensure that together they include specific, targeted actions to reduce pollutant loadings and concrete deadlines and guaranteed funding for implementing these actions so that Bay jurisdictions successfully meet the biennial milestones and interim and final Bay-wide TMDL goals.

Defining “reasonable assurance” is crucial to improving the health of the Bay watershed because it is one of the principal ways to address pollution reductions from nonpoint sources.¹ While Bay jurisdictions incorporate waste load allocations for point sources into their NPDES permits, EPA's expectation that Bay jurisdictions provide reasonable assurances that they will accomplish reductions to ensure that nonpoint sources achieve their assigned load allocation is crucial.

EPA must ensure that formulating “reasonable assurance” amounts to more than a paper exercise that fails to result in actual reductions in nutrient and sediment pollution in the Bay. EPA should specify that Bay jurisdictions must provide reasonable assurance that they will have pollution controls in place by 2025 that will achieve target loads and that, as an interim goal, they will have pollution controls in place by 2017 that will achieve a 60% reduction in pollution loadings needed to meet the final target load. However, because these goals are set in the distant future, EPA must also assess whether the achievement of biennial milestones demonstrate adequate reasonable assurances toward meeting the interim and final goals. It is

¹ U.S. EPA, “Guidance for Water Quality-Based Decisions: The TMDL Process” (1991), *available at* <http://www.epa.gov/waterscience/models/library/SASD0109.pdf>.

insufficient and unacceptable to set the interim and final goals without regular and more frequent assessments of reasonable assurance.

To date, EPA has not provided a clear definition of reasonable assurances in any of the Executive Order documents.² In the expectations letter, EPA states that the “jurisdictions’ Watershed Implementation Plans, two-year milestones, and EPA’s commitment to assess progress and take additional actions or consequences... will provide the necessary assurances that the Chesapeake bay TMDL nutrient and sediment allocations can and will be achieved.” The letter lists eight elements that EPA expects states to include in their WIPs, and these elements are:

- (1) Identification of interim and final target loads by source and sector;
- (2) Identification of baseline information including current pollutant loading and existing program capacity to achieve pollutant reductions;
- (3) Accounting for increased pollution due to future growth, development, and urbanization;
- (4) Analysis of gaps in existing program capacity to achieve interim and final target loads;
- (5) Commitment and strategy to fill gaps through goal-setting, new legislation or rulemakings, or dedicating new resources to address gaps;
- (6) Protocols for tracking, reporting, and assessing the effectiveness of actions;
- (7) Contingencies for slow or incomplete implementation; and
- (8) Appendix with detailed targets and schedule.

Among these eight elements, EPA must prioritize those that are most indicative of reasonable assurances and ensure that Bay jurisdictions fully and satisfactorily address those elements. For a stronger definition of reasonable assurances, EPA must focus on Elements 5, 6, and 7 as the crucial factors for assessing whether a WIP provides adequate reasonable assurances that that nonpoint sources will in fact meet the load allocations under the Bay-wide TMDL. For example, the strategy to fill gaps must consider how effective actions or practices are in reducing nitrogen pollution and how timely these practices can be implemented. EPA must require jurisdictions to not only provide qualitative markers for these elements but also provide quantitative measurements in the form of specific commitments and hard deadlines.

Collectively these elements provide the details and information regarding *how* Bay jurisdictions will meet their target loadings, and EPA must hold them accountable for providing clear, specific, and concrete actions to achieve these loadings.

RECOMMENDATION 2. In the Phase I Watershed Implementation Plans, EPA must require Bay jurisdictions to submit clear, uniform, and comprehensive baseline information, including NPDES coverage rates, basic enforcement information, and triggers for implementing contingency measures.

In the road to achieving the Bay-wide TMDL, WIPs are the maps that demonstrate how Bay jurisdictions will meet their pollutant reduction commitments. With the deadline for the

² These documents include the draft 202 reports, the expectations letter dated November 4, 2009, and the Phase I WIP Guidance dated April 2, 2010.

preliminary Phase I WIPs approaching, EPA must require states to provide clear, uniform, and comprehensive information about their current CWA programs. EPA's Phase I Guidance³ is a helpful checklist to ensure states' WIPs are complete, but it lacks necessary and basic information. Without this information, no entity—EPA, the independent evaluator, or the public—is able to hold Bay jurisdictions accountable.

To the existing Guidance, EPA should consider requiring the following additional information:

- The universe of coverage for NPDES permits and universe of participation for voluntary programs as part of the baseline information in WIP Element 2;
- Basic permit coverage rate, compliance rate, and enforcement actions for agriculture in Element 2(B);
- How jurisdictions will avoid localized impacts in permitting sources to generate offsets in Element 3;
- Gaps in permitting programs, enforcement actions, funding and personnel resources, and outreach activities in Element 4;
- Gaps in the exercise of existing state authorities and the extent to which exercising those authorities would fill gaps without the need for new regulations in Element 5;
- Methods to determine whether tracking protocols are effectively and accurately capturing pollution reduction activities in Element 6;
- The feasibility and effectiveness of contingency measures in Element 7; and
- Deadlines for requiring states to fully implement first-line pollution control measures, after which EPA will require states to implement their contingency measures in Element 8.

EPA must also require Bay jurisdictions to include basic enforcement information as part of their preliminary WIPs. This recommendation is further discussed in Recommendation 5.

RECOMMENDATION 3. The final Strategy must align specific consequences with specific failures so that Bay jurisdictions and the public understand exactly what punitive actions EPA will take if a Bay jurisdiction fails to achieve a certain outcome. When imposing consequences, EPA must also follow the existing regulation that conditions the grant of new NPDES discharge permits on the availability of pollutant loads and the existence of a compliance schedule for all sources.

In past Bay restoration efforts, jurisdictions' grand and voluntary promises amounted to very little because no accountability mechanism existed. Under the Executive Order, however, EPA has crafted a new accountability framework that calls for imposing consequences when jurisdictions fail to meet their commitments. These consequences are based on EPA's existing authority, and EPA must impose strict consequences on Bay jurisdictions that fail to meet EPA's expectations for the WIPs or fail to meet milestones.

³ U.S. Environmental Protection Agency, "A Guide for EPA's Evaluation of Phase I Watershed Implementation Plans" (April 2, 2010), available at http://archive.chesapeakebay.net/pubs/calendar/PSWG_04-22-10_Handout_3_10746.pdf.

The final Strategy must align specific consequences with specific failures, otherwise the consequences risk becoming empty threats. Aligning the consequences would motivate Bay jurisdictions to act with the knowledge that a particular consequence will be imposed and would help the public to keep Bay jurisdictions and EPA accountable for progress in Bay restoration.

RECOMMENDATION 4. When imposing consequences, EPA must also follow the existing regulation that conditions the grant of new NPDES discharge permits on the availability of pollutant loads and the existence of a compliance schedule for all sources.

Under existing regulations, EPA is prohibited from issuing NPDES permits for new discharges of pollution into impaired waters unless the permit applicant has demonstrated two conditions: (1) additional pollution loadings exist to accommodate the new discharge and (2) all existing dischargers are on a compliance schedule to meet the applicable TMDL.⁴ The Ninth Circuit Court of Appeals upheld these conditions in *Friends of Pinto Creek v. EPA*.⁵

For the first condition, the applicant must demonstrate that under the TMDL sufficient pollution load allocations exist to accommodate the discharge. For the second condition, the permit applicant must also demonstrate that existing dischargers are subject to a compliance schedule that will bring the impaired water body into compliance with the applicable water quality standard. The court in *Pinto Creek* noted that the plain language of the regulations meant that the compliance schedules apply to *any* point source, permitted or not.

Strikingly, the Ninth Circuit included nonpoint sources within the reach of the permit regulations. The court concluded that if the compliance schedule for both permitted and unpermitted point source dischargers remains insufficient to bring an impaired water into compliance with water quality standards, then a new permit cannot be issued “unless the state or [permit applicant] agrees to *establish a schedule to limit pollution from a nonpoint source or sources* sufficient to achieve water quality standards.”

In the Chesapeake Bay context, EPA cannot ignore this existing tool. The ruling in *Pinto Creek* means that the EPA and states are already prohibited from issuing permits to new dischargers or new sources if those dischargers or sources would cause or contribute to a violation of water quality standards. According to EPA expectations, the WIPs must include

⁴ No permit may be issued:

(i) 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*. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards... and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The *existing dischargers into that segment are subject to compliance schedules* designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. 122.4 (2010) (emphasis added).

⁵ *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007 (9th Cir. 2007).

reductions from all point and nonpoint sources that cause water pollution. This existing federal regulation already mandates protections from increased pollution discharges into the Bay and its waters, and the EPA must follow this regulation and prohibit new discharges the increase pollution discharge to the Bay if the two conditions are not met.

RECOMMENDATION 5. As the most severe consequence, EPA should exercise its existing authority to withdraw a jurisdiction's delegated permitting authority. The final Strategy should specify the criteria and timetable for exercising this authority.

To date, Bay jurisdictions have resented federal involvement in their permitting programs yet have simultaneously failed to administer adequate programs. These programs are in shambles, suffering from a lack of resources and personnel to conduct on-site investigations and a lack of genuine political leadership to bolster permit programs. In December 2009, a coalition of Waterkeepers petitioned EPA to withdraw Maryland's delegated authority on the basis of an utter failure to implement the CWA. In April 2010, the Center for Progressive Reform released a report that independently investigated the enforcement of CWA requirements in Maryland and found large gaps in enforcement resources and program design.

The defensive and hostile posture of Bay jurisdictions toward federal supervision of state NPDES permitting programs is troubling for the future of Bay restoration. However, this same territoriality suggests that the consequence of withdrawing this authority would be an extremely effective motivating factor for jurisdictions to meet their commitments. The final Strategy must include EPA's authority to withdraw this delegated authority as the most severe consequence for significant failures. As demonstrated by the Waterkeepers' petition in Maryland, the very suggestion of this consequence motivates jurisdictions to review their permit issuance, enforcement, and compliance with great vigor. More importantly, this consequence is effective as a political tool in shining a spotlight of unwanted attention on a state's failure to meet commitments to restore the Bay and in motivating a state to improve its NPDES program.

In addition, EPA must clearly spell out the conditions under which it would impose this consequence. As discussed above in Recommendation 3, EPA must give the criteria and information about the process for initiating a withdrawal of a jurisdiction's permitting authority.

RECOMMENDATION 6. As part of the Chesapeake Bay Compliance and Enforcement Strategy, EPA must develop a list of standard and uniform enforcement data and require Bay jurisdictions to submit this data on a regular basis. The enforcement data must include the permit coverage universe, the inspection rate, and enforcement actions conducted by local governments.

The draft Chesapeake Bay Compliance and Enforcement Strategy provides a strong roadmap for future EPA involvement in states' enforcement efforts. While many of the enforcement strategies for the key sectors could have been adopted prior to the Executive Order, this new opportunity to reinvigorate enforcement is welcome.

EPA has traditionally relied on deterrence-based enforcement as its approach to CWA enforcement. Deterrence-based enforcement is based on four elements: regular compliance monitoring to identify violations; timely initiation of enforcement actions against violators; a mandate to require compliance; and imposition of penalties that eliminate any economic benefit

derived from the violation and deter future violations. EPA should evaluate each jurisdiction's enforcement program to determine whether the programs meet these criteria.

As part of the Enforcement Strategy, EPA could develop a set of standard metrics that provide a snapshot of state and federal enforcement activities in each Bay jurisdiction. The metrics could include, among other factors:

- The number of NPDES permits issued or in effect;
- The number of facilities that are required to have NPDES permits or fall under EPA regulations;
- The number of physical, on-site inspections conducted by the state authority;
- The amount of penalties collected each year; and
- Enforcement activities conducted by local delegated authorities.

Other useful information includes the penalty and inspection policies of each jurisdiction. This basic information would help the public understand and compare enforcement efforts by each state and put a public spotlight on these efforts, motivating the Bay jurisdictions to improve their programs.

RECOMMENDATION 7. The final Strategy must clearly describe and define the role of the independent evaluator, whose duties must include developing and assessing Bay restoration progress against an accountability metric and keeping lawmakers, policymakers, and the public fully informed of this progress and the obstacles to Bay restoration.

Independent oversight is essential to ensuring Bay restoration. While the two-year milestones for both states and federal agencies are a crucial and new component of the entire accountability mechanism in the Bay, they lack the necessary, holistic review of Bay restoration progress. They also fail, particularly at the federal level, to provide a final review of restoration actions. Federal agencies are taking an unprecedented leadership role in Bay restoration, but ensuring that role amounts to progress would be one of the duties assigned to the independent evaluator.

Under the Executive Order, the overall mission of the independent evaluator should be to provide an overarching perspective on the progress of Bay restoration, considering the collective impact of actions or inactions by the state and federal jurisdictional partners. The independent evaluator should assess the most pressing pollution problems facing the Bay, to spotlight the responsibility of all jurisdictional partners for taking actions to solve the problems, and to recommend solutions that address the identified problems, make adjustments in Bay jurisdictions' actions, adopt additional incentives, and recommend necessary consequences.

In the final Strategy, the FLC should include the following as mandatory duties of the independent evaluator:

- Investigate and explore institutional barriers to achieving Bay restoration;
- Develop and implement an accessible "accountability metric" that identifies who is responsible for a particular action, what that action involves, when the action will be completed, why the action is important to Bay restoration, and if not completed why not;

- Conduct or supervise audits and evaluations of existing and prospective state and federal programs to restore the Bay;
- Evaluate state and federal levels of permitting, compliance, and enforcement;
- Identify and recommend policies, legislation, and regulations to improve Bay restoration programs; and
- Keep Congress, the EPA, the Executive Council, the Federal Leadership Committee, and the public fully informed and abreast of the progress and problems related to jurisdictional partners meeting milestones, overall Bay restoration goals, and corrective actions needed to ensure Bay restoration.

RECOMMENDATION 8. The final Strategy must clearly articulate concrete outcomes, milestones, and other objectives to be achieved through adaptive management in the context of Bay restoration. The FLC must ensure that adaptive management results in substantive achievement of goals instead of allowing it to become an excuse for delayed action.

In the draft Goals Framework, adaptive management (ADM) is listed as one of four supporting strategies. Adaptive management is heralded for its dynamic approach as information improves and progress is made, but implementation of ADM is challenging and requires significant design and resources. Section 203 of the Executive Order requires the final Strategy to “describe a process for the implementation of adaptive management principles, including a periodic evaluation of protection and restoration activities.”

While ADM brings the scientific method of developing and testing hypotheses and relying on those conclusions to drive future actions to Bay restoration, it can also give Bay jurisdictions the *appearance* of taking action while acting as a cover for delay. Delay by Bay jurisdictions—and pushing off responsibility for progress to the next governor—has characterized Bay restoration in the past but is unacceptable under the Executive Order. The responsibility for preventing delay and thereby ensuring actual progress rests squarely with the FLC, which should fully consider key aspects⁶ of adaptive management before launching into full implementation:

- ***Likelihood of Delay.*** A serious and significant concern with ADM is its potential for delaying decisions or actions on the pretense of needing more information than currently available. While ADM is driven by the continuous input of new information, there is no question that the level of science and data collected in the Chesapeake Bay, one of the world’s most studied ecosystems, is sufficient to commence actions now. The FLC must vigilantly guard against jurisdictions’ attempts to use ADM as a cover to delay necessary actions to restore the Bay.
- ***Existing Legal Framework.*** The FLC should assess how and whether ADM is compatible with the existing Bay restoration framework. Implementing true ADM—a nimble, dynamic, “learning while doing” approach—is often at odds with the traditional, bureaucratic process of natural resources management. Principles of ADM fail to integrate with existing law, agency regulations and procedures, and the

⁶ J.B. Ruhl, *Adaptive Management for Natural Resources—Inevitable, Impossible, or Both?*, in Rocky Mountain Mineral Law Institute Proceedings (2008). <http://ssrn.com/abstract=1337749>.

judicial system.⁷ The end result may be a form of adaptive management that fails to establish a framework for learning, adjusting, and improving and instead becomes a reactive, ad hoc process rather than a deliberate plan.

- ***Availability of Resources.*** To ensure that ADM is fully implemented, the FLC should ensure that the funding for data monitoring, personnel, and all other inputs are consistent, adequate, and reliable. ADM is a resource-intensive management process that requires continuous monitoring, evaluation, and adjustment. New information constantly affects the process and requires adjustment of the goals and the actions to achieve the goals.

Conclusion

President Obama's Executive Order on Protecting and Restoring the Chesapeake Bay marked a pivotal moment in Bay restoration. Together with the final Bay-wide TMDL and pending legislation to reauthorize the Chesapeake Bay Program, the Order marks a new era in federal leadership—one that recognizes that the voluntary commitments of the past do not work and that strong federal supervision and enforcement are needed to get the job done. EPA must hold jurisdictions accountable at every step along the way, and the independent evaluator and the public must play a large role in keeping both EPA and the jurisdictions on track in meeting these commitments. While the documents released in the past year establish this system of layered accountability, this report has identified gaps that jurisdictions may capitalize on to delay taking action. In the final Strategy, EPA and the Federal Leadership must close these gaps and demonstrate from the outset that they will accept nothing less than a restored, healthy, and vibrant Bay.

⁷ See Robert Fischman & J.B. Ruhl, *Adaptive Management in the Courts* (January 26, 2010). FSU College of Law, Public Law Research Paper No. 411; Indiana Legal Studies Research Paper No. 154. Available at SSRN: <http://ssrn.com/abstract=1542632>.