

A Watershed Moment For EPA's TMDL Program?

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This article was originally published on April 8, 2010 by Portfolio Media, Inc. in Environmental Law 360 (subscription required).

The U.S. Environmental Protection Agency is developing a total maximum daily load (TMDL) for nitrogen, phosphorus and sediments in the Chesapeake Bay Basin — a 64,000-square-mile watershed that receives water from five states and the District of Columbia and is home to over 17 million people. This Chesapeake Bay TMDL is attracting significant attention for two key reasons.

First, the TMDL will affect tens of thousands of point and nonpoint sources. In fact, according to the EPA, it will be the “largest and most complex TMDL ever.” EPA Web site, Bay TMDL Frequently Asked Questions (visited March 30, 2010).

Second, to meet the Bay TMDL’s pollution targets, the EPA is rolling out a novel “accountability framework” the agency has developed in response to a May 2009 Executive Order. The “accountability framework” includes new tools that the EPA believes will allow it to make progress on water quality improvements where past approaches have failed. These new tools include state-developed watershed implementation plans (WIPs), enforceable state-by-state biennial milestones, and federally-imposed consequences for the failure to take key actions or achieve pollution reduction targets.

The EPA has stated that these innovative approaches are designed to make states more accountable for both point and nonpoint source pollution management. It is also clear that, if the EPA’s new approaches are successful in the Bay, the agency intends to implement them in other watersheds.

The scope and complexity of the Bay TMDL make it remarkable in its own right. The potential that the innovations developed in the Chesapeake Bay will be applied to other large watersheds makes its development worthy of note far beyond the watershed’s boundaries.

Background: Bay TMDL

Under § 303(d) of the Clean Water Act (CWA), states must develop TMDLs to restore water quality in “impaired waters,” or those waters that do not meet state water quality standards. TMDLs first identify the maximum amount of a pollutant that a water body can accept from point

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and nonpoint sources and still meet water quality standards, then allocate that amount of pollution among point and nonpoint sources in the watershed. TMDLs create no independently enforceable standards. States utilize other regulatory controls (such as permits and non-point source pollution management) to meet the pollution reductions necessary to achieve the TMDL pollution load allocations.

While existing TMDLs developed by the states address pollution in select sub-watersheds of the Chesapeake Bay, none address pollution Bay-wide. EPA intends to apply the Bay TMDL to segments of the Chesapeake Bay and its tidal tributaries that are listed as “impaired waters” on the affected states’ 2008 CWA § 303(d) lists. EPA will also apply the TMDL to upstream segments that contribute pollution to impaired segments.

The Bay TMDL will address point and nonpoint source pollution in New York, Pennsylvania, West Virginia, Delaware, Maryland, and the District of Columbia. Sources of air emissions that add nitrogen to the Bay as the result of atmospheric deposition will also fall within the scope of the TMDL, according to EPA.

The Bay TMDL is intended to satisfy EPA’s obligations under consent decrees that settled two cases, *American Canoe Association Inc. v. EPA*, Civil No. 98-979-A (E.D. Va. 1999) and *Kingman Park Civic Assoc. v. U.S. Environmental Protection Agency* No. 1:98CV00758 (D.D.C. 2000). The EPA announced its intent to publish a Bay TMDL and sought preliminary comments in September 2009. 74 Fed. Reg. 47792 (Sept. 17, 2009).

The agency held public meetings and plans to open a second comment period once a draft TMDL is available — purportedly in summer 2010. Pursuant to its consent decree obligations in *American Canoe Association*, EPA must complete the TMDL no later than May 1, 2011. In response to a Chesapeake Bay Program request, however, EPA is working to meet an accelerated deadline of December 2010.

Background: The Bay TMDL and Executive Order 13508

The Bay TMDL also responds to a May 2009 Executive Order that called upon the agency to “make full use of its authorities under the Clean Water Act” to restore the Chesapeake Bay. Exec. Order 13,508, 74 Fed. Reg. 23,099 (May 15, 2009). The Order directs EPA to identify pollution control strategies that establish a clear path to meeting water quality and

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environmental goals, are performance-oriented, and establish a framework for public accountability. Id.

The Draft Strategy for Protecting and Restoring the Chesapeake Bay identifies the Bay TMDL as a centerpiece of the federal government's efforts to expand regulatory authority to increase accountability for pollution. Federal Leadership Committee, Executive Order 13508, Draft Strategy for Protecting and Restoring the Chesapeake Bay at 3; 74 Fed. Reg. 57675 (Nov. 9, 2009). According to the Draft Strategy, EPA "has built on the forthcoming Bay TMDL" by announcing its expectations with respect to WIPs, milestones, and the imposition of consequences for failing to comply with WIP expectations or to meet established milestones. Draft Strategy at 27-28.

As such, the Bay TMDL will identify the target loads EPA identifies as necessary to restore water quality in the Chesapeake Bay. Then, EPA will rely on the new tools in the "accountability framework" developed in response to Executive Order 13508—WIPs, milestones, and consequences—to hold states accountable for actually achieving the necessary reductions to comply with the TMDL.

EPA's Accountability Framework

Watershed Implementation Plans (WIPs). Relying on its authority under CWA § 117(g)(1),¹ EPA will require the identified Chesapeake Bay watershed states and the District of Columbia to develop and implement WIPs. The WIPs will be designed to function similarly to State Implementation Plans developed by states to achieve National Ambient Air Quality Standards under the Clean Air Act.

EPA has identified eight elements that must be included in WIPs: interim and final target loads for nutrients and sediments; an assessment of the jurisdiction's current legal, regulatory, programmatic, financial, staffing, and technical capacity; a strategy for closing any gaps in program capacity that would otherwise hamper the achievement of target loads; an accounting for future growth; tracking and reporting protocols; contingencies for slow or incomplete implementation of pollution reduction strategies identified in the WIP; and a detailed schedule for achieving reduction targets and other key actions. Nutrient and sediment load reductions must be achieved by 2025. Letter from W. Early (EPA) to L. Preston Bryant (Virginia Secretary of Natural Resources) (Nov. 4, 2009).

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WIPs are intended to serve as a “roadmap” to achieving and maintaining compliance with the TMDL load allocations. Chesapeake 2000 signatories (Maryland, Virginia, Pennsylvania, and the District of Columbia) must incorporate control actions based on regulations, permits, or otherwise enforceable agreements that apply to all major sources of pollutants, including nonpoint sources. Non-signatory states (New York, Delaware, and West Virginia) are not required to base their control actions on such enforceable agreements, but they must achieve necessary load reductions and demonstrate progress through two-year milestones. *Id.*

WIPs are subject to EPA review and approval. Failure to develop or implement a WIP is grounds for EPA imposition of “consequences,” as discussed below.

Biennial Milestones. According to the Chesapeake Bay Program, its previous approach to pollution reduction in the Bay “was like a ladder without rungs — it did not include the incremental, short term goals needed for steady progress in reducing pollution.” Chesapeake Bay Program, 2011 Milestones for Reducing Nitrogen and Phosphorus (May 2009).

In response to this shortcoming, the accountability framework for the Bay TMDL employs short-term goals to reduce nutrient pollution. For each affected state and the District of Columbia, EPA has identified two-year milestones related to total pollution load reductions, pollution reductions by source, and funding that will be used to implement pollution reduction measures during the two-year period. The deadline for meeting the first set of milestones, which were developed in 2009, is Dec. 31, 2011. *Id.*

Consequences for Failing to Meet Milestones. The final notable component in EPA’s accountability framework is the “consequences” EPA intends to pursue for a state’s failure to develop a WIP or make progress towards the two-year milestone commitments.

EPA identified the following potential actions as currently available under the Agency’s existing CWA authority: expansion of NPDES permit coverage to currently unregulated sources; objection to NPDES permits and increased program oversight; requirement of net improvement offsets; establishment of finer-scale pollutant load allocations in the Bay TMDL; requirement of additional pollution reductions from point sources; increased and targeted federal enforcement and compliance assurance;

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conditioning or redirecting EPA grants; and federal promulgation of local nutrient water quality standards. Letter from S. Garvin (EPA) to L. Preston Bryant (Virginia Secretary of Natural Resources) (Dec. 29, 2009) at 4.

Legal Status of EPA's Framework and Related Legislation

The accountability framework described above has been developed by EPA and its federal partners in response to Executive Order 13508; it is not the result of any new legislation enacted by Congress. As noted, the framework relies on EPA's assertions about the scope of existing CWA legal authorities. Without commenting on the Agency's assertions regarding its existing CWA authorities, it is safe to suggest that the framework and EPA actions taken pursuant to the framework may be subject to legal challenge by affected states and dischargers.

In October 2009, Sen. Ben Cardin, D-Md., introduced the "Chesapeake Clean Water and Ecosystem Restoration Act of 2009" (S. 1816). If passed, the bill will codify many of the elements of EPA's new accountability framework — including the requirement for WIPs, milestones, and consequences for shortfalls — along with EPA's obligations regarding the Bay TMDL. The act would also create several federal grant programs to assist with implementation of the TMDL. Both the bill and its companion bill in the U.S. House of Representatives (H.R. 3852) were referred to committees, but no further action has been taken.

Implications of EPA's Innovative Approaches

As noted above, TMDLs alone have no directly enforceable regulatory consequence. States may, and have, adopted a variety of means for addressing TMDL implementation. By contrast, the tools in EPA's "accountability framework" are designed to require states to identify how they will meet TMDL targets, and thereby force greater progress on approved TMDL load reduction requirements. The implications for Chesapeake Bay states, the point and nonpoint sources located in their boundaries, and the watershed are potentially significant.

The efforts described above currently affect only sources in the Chesapeake Bay watershed. If these tools prove effective, however, EPA will likely expand their use to other watersheds that face complex nutrient and sediment pollution issues such as the Great Lakes or the Mississippi River basin/Gulf of Mexico.

This prediction is not hypothetical. Executive Order 13508 specifically

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directed EPA to identify pollution control strategies that “can be replicated in efforts to protect other bodies of water, where appropriate.” Executive Order 13508, § 301(e).

The November 2009 Draft Strategy Report proposes that “the solutions to create cleaner water, healthy communities, thriving farms, protected habitats and abundant fish and wildlife in the Chesapeake Bay and its watershed can serve as a national model.” Draft Strategy at 3.

Whether this happens sooner rather than later likely hinges on the collective performance of the Chesapeake Bay states under the TMDL, any new legislation enacted to bolster EPA’s efforts, and any legal challenges that may arise in response to EPA’s ultimate implementation of the accountability framework.

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¹ EPA must “ensure that management plans are developed and implementation is begun by signatories of the Chesapeake Bay Agreement to achieve and maintain ... nutrient goals ... for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed, ... and the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystems.” CWA § 117(g)(1), 33 U.S.C. § 1267(g)(1). Nonsignatory states have entered into Memorandums of Understanding with EPA committing those states to help achieve the nutrient and sediment reductions necessary to achieve water quality goals of the Chesapeake 2000 Agreement.