

Metropolitan Washington Council of Governments
POLICY STATEMENT
on the
Draft Chesapeake Bay Total Maximum Daily Loads
and Watershed Implementation Plans

Prepared by Chesapeake Bay and Water Resources Policy Committee
Oct. 5, 2010

Background – On September 24, 2010, EPA issued draft pollution caps (the "Chesapeake Bay Draft TMDL") for 92 tidal segments of the entire 64,000-square-mile Chesapeake Bay watershed. This Total Maximum Daily Load (TMDL) sets individual targets for nutrient (phosphorus and nitrogen) and sediment loads for each of the 92 tidal segments that EPA has determined are necessary to achieve water quality standards in the Bay as a whole and within each of the major tributaries to the Bay, including the Potomac River. These loads come mainly from agriculture, wastewater treatment and urban stormwater. There is also a nitrogen load allocation for air deposition to the Bay waters for which EPA is responsible and that is based on implementation of pending federal air regulations. In early September, the six states in the Bay watershed and the District of Columbia submitted their draft Phase I Watershed Implementation Plans (WIPs) describing how they intend to reduce their respective loads to meet the EPA-prescribed target loads. Phase II WIPs will need to be submitted in 2011 (with loads sub-allocated to a local scale) and define how the "60% of implementation goal by 2017" will be achieved. The final Phase III WIPs are due in 2017 and will define how the states/District of Columbia will complete implementation beyond 2017 and therefore achieve the "100% of implementation by 2025" goal.

EPA has concluded that "*none of the draft [Phase I] WIPs provided full assurance*" that the target loads will be achieved "*in all respects.*" The TMDLs and the companion WIPs have significant implications for all parties responsible for controlling loads, including local governments, wastewater and stormwater utilities, and agriculture.

Themes for Comments and Recommendations – COG staff has drafted a set of "themes" based on an initial review of the draft TMDLs and WIPs. Each of these is a priority area for developing more detailed COG comments and recommendations.

COG's Four Policy Principles – On April 8, 2009, the COG Board passed Resolution R20-09 adopting four "Principles for Regional Water Quality Policies and Programs." The proposed comment themes are based on these principles and also reflect COG members' ongoing commitment to improving water quality.

Action - The Chesapeake Bay and Water Resources Policy Committee is hereby empowered to provide detailed comments and recommendations to EPA and the states on the Bay TMDLs and the related WIPs in the interest of COG's member governments and the region's wastewater utilities. The due date for these comments is Nov. 8, 2010. The final Phase 1 WIPs are due by November 29, 2010. The final Bay TMDLs are due by Dec. 31, 2010.

Policy Principle #1 – Holistic Requirements – *Programs and policies to restore and protect the Chesapeake Bay and its tributaries, whether regulatory or not, shall reflect a holistic, multi-sector analysis of environmental benefits and costs, as well as technical feasibility, before being established.*

- **Policy Theme #1A: EPA & States Should Address Financial Considerations** – Affordability, cost-benefit considerations, availability of necessary funding, and, hence, assessments of true feasibility

are largely absent from the WIPs and should be addressed. This is especially critical given that most implementation will need to occur at the local level and the Bay Partners' agreement to achieve 100% implementation by 2025. Additional funding and incentives will be needed if real change is to occur in many sectors (e.g., designated funding for stormwater, support for expanded agricultural practices).

- **Policy Theme #1B: EPA & States Need to Allow Maximum Implementation Flexibility for Local Governments and Wastewater Utilities** - It is not clear how much flexibility that local stakeholders will have in developing implementation plans; such as the ability to reallocate among different source sectors (e.g., between stormwater, wastewater, and air loads) or to continue to manage growth in the region (i.e., to reallocate/transfer wastewater contributions from different jurisdictions or by the same jurisdiction/utility among different plants).
- **Policy Theme #1C: EPA & States Need to Make Sure Growth Policies Support Infill Development** - We support elements of the WIPs that are designed to ensure that new development either does not increase loads or that the use of offsets does not work against smart growth policies. These growth policies will also need to provide local governments and utilities with the ability to manage wastewater loads that increase in response to growth.
- **Policy Theme #1D: EPA & States Must Ensure that Efforts to Meet Bay Water Quality Standards are Consistent with Meeting Other Environmental Objectives.** This will be critical as the entire Bay region deals with growth, cap loads, technological limitations, and the explicit assessment of Climate Change impacts during the 2017 re-evaluation process (as required under the President's Executive Order 13508 issued on May 12, 2009). This includes drinking water and reservoir protection efforts.

Policy Principle #2 –Equitable Responsibility – *Programs and policies to restore and protect the Chesapeake Bay and its tributaries shall strive for equity and cost-effectiveness in allocating responsibilities among regions, counties and municipalities and among the different sources of pollution.*

- **Policy Theme #2A: EPA Needs to Confirm Ability to Revise Deadlines and Allocations for the WIPs & TMDLs if Needed for Consistency with its Adaptive Management Principles** – We support Maryland and Virginia's intention to revisit the allocations during the development of the Phase II WIPs and EPA's willingness to change its TMDL numbers accordingly to account for more accurate pollution estimates.
- **Policy Theme #2B: EPA Needs to Build Flexibility into its Backstopping Approach** – Given the limited time available for states to revise their WIPs in response to public comment, it is unrealistic to expect that states will be able to address all of the potential gaps in their WIPs that EPA has identified. Accordingly, the use of federal backstopping actions to revise the allocations should be delayed. If EPA fails to meet its obligations for providing information under the current timeline, the deadlines for all other parties should be adjusted accordingly. EPA also should allow sufficient time for initiatives that address gaps to actually be implemented at the local level (e.g., state legislatures cannot approve programs and funding initiatives to assist local governments by December 31, 2010). EPA should also provide clarity and leadership to ensure that trading options can be implemented across the Bay watershed and provide viable economic options.

- **Policy Theme #2C: The TMDL/WIP Process Should Indicate What the Local Implications Are in a More Timely Fashion** - This will be especially critical as the Phase II WIPs are developed for submittal in 2011 because at that time sub-allocations to the local level are expected. Currently, local governments and utilities cannot assess the impact of implementation plans, evaluate potential budget needs or plan for future programs because the draft Phase I WIPs only allocate to the state/major tributary level. Both BMP installation and program implementation need adequate time for planning, funding, etc. to occur. EPA's TMDL and state WIPs also should allow local governments the opportunity to phase in such programs and actions.
- **Policy Theme #2D: EPA & States Should Require Greater 'Reasonable Assurance' from Agricultural Sources and Avoid Placing Undue Burden on Regulated Entities** - State WIPs should provide more reasonable assurance that agricultural-based load allocations can be met so as to avoid federal imposition of backstopping measures on regulated sources such as MS4 stormwater permittees and municipal wastewater treatment plants .
- **Policy Theme #2E: EPA & States Must Acknowledge Need to Enhance/Expand Funding if Current Deadlines Are to be Met** – The schedule and deadlines to augment existing state and federal funding mechanisms are either not discussed or are unrealistically ambitious. This risks setting up local governments and utilities for failure if necessary funding for implementation and related support functions cannot be found. If such funding requirements are not acknowledged, then current timelines and expectations are unrealistic and the consequences for the “failure” of local governments to meet these unobtainable targets must be adjusted accordingly.
- **Policy Theme #2F: EPA Needs to Require Federal Sector to Match or Exceed State and Local Standards** – Consistent with the President's Executive Order, the federal sector should “lead by example” and be held accountable to the highest overall reduction efforts. This goes beyond the currently defined air reductions and is particularly critical for federal facilities in urban areas that contribute stormwater-related loads to local waters (e.g., in the District of Columbia where federal facilities represent 30% of the land area). It should also be made clear that state facilities also must meet local requirements. Federal implementation efforts should be part of the formal 2-year milestone reporting process.

Policy Principle #3- Sound Science – *Programs and policies to restore and protect the Chesapeake Bay and its tributaries shall rely on a sound scientific foundation and shall be revised as needed, reflecting advances in that foundation.*

- **Policy Theme #3A: EPA's TMDL Should Clearly Portray Source Allocations as 'Preliminary'**- Source allocations for nonpoint sources (particularly agriculture and urban stormwater) should be regarded as preliminary to reflect the uncertainty inherent in the current version of the Bay Program's Watershed Model and questions about how loads were allocated among these sources. This will be a critical aspect of the Phase II WIPs when nonpoint loads are expected to be revised and sub-allocated to local levels. In addition, it is clear that the draft TMDL has made sub-allocations to various wastewater plants that are not consistent with the state WIPs and that there are other errors that will need to be reflected in revised TMDLs and WIPs.
- **Policy Theme #3B: EPA's TMDL & State WIPs Should Clearly Distinguish Between Achieving Water Quality Standards and Achieving the '60% & 100% of Implementation' Goals** – It has been known

for many years that actual water quality improvements lag behind BMP implementation. This is due in part to the gap in time between implementation of many land-based practices and their impact on surface water quality. The current TMDL language fails to make these distinctions clear, so that expectations of progress may not be realistic and or may be misunderstood by citizens.

Policy Principle #4 - Communication and Voice - *Programs and policies to restore and protect the Chesapeake Bay and its tributaries, whether regulatory or not, should be developed through a cooperative process among stakeholders including local governments and wastewater utilities. Given their implementation responsibilities, local governments and wastewater utilities shall be engaged at the earliest stages of these development processes.*

- **Policy Theme #4A: EPA & States Should Enhance Dialogue with Local Governments and Other Stakeholders.** Local governments and utilities were rarely consulted during development of the TMDL or state WIP documents and have little time in which to comment. As the process moves into Phase II WIP development, both federal and state officials need to do more to hear from local governments and utilities that will bear much of the burden of these implementation measures. Ultimately, all levels of government must work together to justify these efforts and the financial demands on ratepayers and the general public.
- **Policy Theme #4B: EPA & States Should Ensure that Local Governments and Utilities Have the Greatest Flexibility Possible to Achieve Their Portion of the Implementation Goals.** Flexibility will help ensure that local governments and utilities can pursue the most cost-effective solutions, effectively manage growth, and balance many competing funding needs – while doing their part to improve water quality. Options such as trading and the reallocation of loads should also be made available to local governments and utilities.