

COG Chesapeake Bay and Water Resources Policy Committee

Residual Designation Authority (RDA) in the Chesapeake Bay Watershed:

Implications for Localities

Presented by Lisa M. Ochsenhirt
AquaLaw PLC

January 21, 2011

Presentation Overview

- I. Defining the Issue
- II. Current Law on RDA
 - A. Clean Water Act
 - B. Federal Regulations
 - C. Prerequisites to Use
- III. Past Use of RDA (Outside Bay Watershed)
- IV. Possible Uses in the Bay Watershed
- V. Implications for Bay Localities

Defining the Issue

- Bay TMDL requires significant reductions by all source sectors (including stormwater)
- Phase II WIPs will allocate down to local level
 - By county (VA and MD) with county “target” allocation subdivided by point source and nonpoint source
- EPA has promised “consequences” if reductions are not achieved on time
 - Could negatively impact localities
 - Ex.: EPA threatens wastewater allocation cuts

Defining the Issue (cont.)

- Counties cannot be responsible for entire “target” allocation
 - Do not control all sources
 - Do not have authority to regulate all sources
 - New development may be addressed through state regulations (for ex., ESD in MD)
 - BUT, existing development is tougher
 - No authority to force management options on private property
- EPA’s threatened “consequences” mean counties have stake in seeing targets met by others
- Counties are considering whether RDA could be helpful or harmful

Defining the Issue (cont.)

- Also being discussed in National Stormwater Rulemaking
 - According to EPA, urbanized areas (subject to MS4 permits) only cover 2% of U.S.
 - Considering expanding areas subject to regulation
 - May be looking to regulate in small towns (under Phase II threshold) and/or in areas with “development pressures” (i.e., future growth?)
 - Ches Bay-specific rulemaking (Oct. 8, 2010 Fed. Reg. notice)

Clean Water Act

- Authority for EPA or State to regulate stormwater discharge if:
 - It is contributing to water quality standards violation or
 - “Significant contributor” of pollutants to waters of United States
- EPA must also issue regulations to designate discharges for regulation
 - Consult with State and local officials
 - Based on result of studies performed

Federal Regulations

- Builds on CWA Authority
- Part of Phase II Rulemaking (1999)
- Allows for future designations if needed on “localized or regional basis”
- Two new sections added in 1999:
 - Designation authority if controls are needed because of TMDL or
 - Discharge or category of discharges in a geographic area contributes to violation of water quality standards, etc.

Limitations and Conditions

- Limited to particular TMDL or “geographic area”
 - Geographic area includes “State-wide” or “watershed-wide”
- Based upon study of the issue in a particular situation
- Only for point sources
- Case-by-case or for category of dischargers

Past Use of RDA

- Massachusetts (2008)
 - Existing commercial developments of 2 or more impervious acres
 - Lower Charles River phosphorus TMDL
- Maine (2009)
 - Property owners with more than 1 acre of impervious surface
 - Long Creek Watershed
- Vermont (2008)
 - Identified, unregulated discharges must be covered under General Permit (requirements depend on size)
 - Not required for discharges already covered by permit

Possible Uses of RDA in Bay Watershed

- Preface re Possible Uses
 - Not a recommendation
 - Legality?
- EPA includes RDA as “backstop”:
 - In PA, EPA transferred 50% of unregulated stormwater load from load allocation to wasteload allocation
 - In WVa, EPA transferred 75% of animal feeding operation (AFO) load into wasteload allocation
 - EPA will designate these discharges if insufficient progress made on reducing loads from urban stormwater (PA) or agricultural (WVa) sectors
 - PA and WVa will issue the permits

Possible Uses (cont.)

- To expand regulation over municipal stormwater by:
 - Regulating currently unregulated (e.g., small towns)
- To require permits for private property:
 - Direct dischargers to a waterbody or
 - Dischargers into an existing MS4 system
- To address high growth areas
 - Legality?

Implications of Use in Bay Watershed for Localities

- Likely split of opinion on using RDA to designate additional MS4s for regulation or to expand existing regulated MS4s
 - Regulated jurisdictions may favor (level playing field)
 - Smaller towns, communities may not (lack resources, cost-effectiveness)

Implications of Use in Bay Watershed for Localities (cont.)

- Pros and cons of private property designations
 - Takes burden off local shoulders to consider lack of (or inadequate) stormwater controls in areas with existing development
 - May provide some relief from EPA's retrofit "mandate"
 - Retrofits very expensive, not cost-effective
 - If private property owner is addressing stormwater, dollars will not come from locality
 - Future responsibility for inspections, enforcement, etc.?

Implications of Use in Bay Watershed for Localities (cont.)

- Public response may be negative
 - Direct regulation of previously unregulated property owners
 - Equity concerns (for ex., choosing 2 acres vs. 1 acre for designation)
- Possible economic consequences
 - For businesses & other private property owners (for ex., strong push-back in Massachusetts because of economic development impacts)