

S.____ Chesapeake Bay Ecosystem Restoration Act Discussion Draft

September 1, 2009

The bill amends section 117 of the Clean Water Act, which governs the EPA Chesapeake Bay Program. Key provisions of the discussion draft are –

The legislation gives the states of the Chesapeake Bay strong new tools to restore the Bay and for the first time sets a firm deadline of 2020 for all restoration efforts to be in place. Unlike earlier, missed deadlines, this one will become **a legally binding part of the Clean Water Act.**

The bill also significantly expands federal grants. The Bay Restoration bill **authorizes a new \$1.5 billion grants program to control urban/suburban polluted stormwater,** the only pollution sector that is still growing. Grants to the states, small watershed organizations, and for comprehensive monitoring programs are all newly created or expanded in the draft bill.

The bill **codifies President Obama’s Chesapeake Bay Executive Order,** which requires annual Federal Action Plans across all federal departments to restore the Bay.

COG staff comment: The bill actually codifies much of what has heretofore been part of EPA guidance, such as specifying the content of implementation plans and the consequences of failing to achieve them. COG staff is seeking legal opinions on the consequence of spelling out these things directly in federal law. But inclusion of these requirements into the CWA would appear to provide third-parties the right to file citizen suits against EPA and the states for failure to fulfill their commitments – just as they do under the current CWA. This could potentially include actions by local governments and authorities.

Other Provisions: makes the ban on **Asian oysters** statutory; continues and expands the **nutria** eradication program on the Delmarva; places a moratorium on the **menhaden** reduction fishery; and allows for **citizen suits.**

The basic structure of the Bay Program (a federal-state partnership governed by the Executive Council and administered by EPA’s Chesapeake Bay Program Office in Annapolis) **is retained.**

SECTION-BY-SECTION

SECTION 1. SHORT TITLE.

This Act may be cited as the Chesapeake Bay Ecosystem Restoration Act of 2009.

SEC. 2. FINDINGS.

COG staff comments:

- Acknowledges agriculture as the largest source of nitrogen, phosphorus, and sediment.
- Acknowledges significant nitrogen contribution from air deposition.
- Acknowledges progress made by point sources in reducing nutrient loads.
- Acknowledges growth in the loads from stormwater.

SEC. 3. DEFINITIONS [*replaces current subsection 117(a)*]

[*current subsection 117(b) “Continuation of the Chesapeake Bay Program” and subsection 117(c) “Interagency Agreements” are both unchanged*].

SEC. 4. ASSISTANCE GRANTS.

Current subsection 117(d)(2)(B) is amended by renaming the “Small Watershed Grants Program” the “CHESAPEAKE BAY STEWARDSHIP GRANTS PROGRAM.”

SEC. 5. IMPLEMENTATION AND MONITORING GRANTS.

Current Section 117(e) is replaced with a new section on implementation and monitoring grants. Headwater states (DE, NY and WV) are made eligible for implementation grants for the first time. The monitoring program is broken into two parts: one for freshwater and one for estuarine. USGS and NOAA along with the River Basin Commissions are given roles in planning the monitoring programs. States implement the monitoring programs, supported by grants.

SEC. 6. FEDERAL ANNUAL ACTION PLAN AND PROGRESS REPORT.

Current Section 117 (f) “Federal Facilities and Budget Coordination” is deleted and replaced with “Federal Annual Action Plan and Progress Report.” This codifies the actions in President Obama’s Executive Order of May 12, 2009.

SEC. 7. CHESAPEAKE BAY PROGRAM.

Current Section 117(g) provides for the Management Strategies and Small Watershed Grants Program. The only changes are that the Small Watershed Grants Program name is updated to CHESAPEAKE BAY STEWARDSHIP GRANTS PROGRAM and the program is expanded to include activities now covered by the “large watershed grants” program. These changes simply reflect current practice.

COG staff comment:

- Has provisions that support ‘cooperative watershed strategies’ and other ‘cooperative projects’ with a preference for those that involve local governments. Could provide an opportunity for COG members to pursue regional opportunities.

SEC. 8. WATER QUALITY PROTECTION MEASURES—TMDLS.

Current Section 117 (h) regarding a “Study of the Chesapeake Bay Program” is deleted and replaced with language that requires EPA to establish a Total Maximum Daily Load (TMDL) for the Bay no later than December 31, 2010.

COG staff comments:

- Not clear that EPA can meet this deadline.
- Has a clause indicating that “daily” does not have to mean daily.
- Requires “enforceable or otherwise binding load allocations” for all nonpoint sources not covered under an NPDES permit. This presumably covers agriculture, air deposition, groundwater discharges and stormwater (not already covered under MS4 permit), but it is not clear what “enforceable and otherwise binding” means.
- Requires all wasteload allocations to be issued by May 2011 (i.e., current legal deadline).
- Has a “no net increase” provision to not allow new loads from development, redevelopment, transportation and septic, but a later section also allows for trading.

SEC. 9. WATER QUALITY PROTECTION MEASURES—ACTIONS BY STATES.

Current Section 117 (i) regarding a “Special Study of Living Resource Response” is deleted and replaced with a four-part section outlining specific state actions.

- (1) **TRIBUTARY IMPLEMENTATION PLANS.** To implement the TMDL.
(Presumably equivalent to WIPs)
- (2) **ISSUANCE OF PERMITS.**
- (3) **MUNICIPAL SEPARATE STORMWATER SEWER SYSTEM PERMITS.**
- (4) **PHOSPHATE BAN.**

COG staff comments re (1):

- Requires 1st plan to be adopted by May 2012 and to be designed to achieve half of the total needed load reduction within the first two years. This seems highly unrealistic and is not consistent with current CBP planning assumptions.
- Requires implementation schedule based on 2-year periods (i.e., the Milestones).
- Requires complete implementation of measures to achieve the load allocations by May 2020. This is 5 years earlier than the currently agreed upon Year 2025 full implementation deadline.
- Appears to maintain the distinction between currently permissible activities under federal law, such as WWTPs, CAFOs and MS4s and other activities to which voluntary action applies (presumably much of agriculture).

COG staff comments re (3):

- Includes specific baseline requirements for new and redevelopment for MS4 permits (new development must “control” 90% of the runoff from a site from a 2-year storm and redevelopment must control 85 % of the runoff). Does allow for offsets, although there has to be “compensation” both inside the MS4 (1:1) and outside the MS4 (2:1).

SEC. 10. WATER QUALITY PROTECTION MEASURES—FEDERAL ACTIONS.

Current Section 117 (j) “Authorization of Appropriations” is moved to a new Section (o). Sections (j) through (n) are new.

- (j) Outlines a series of actions EPA must take to improve water quality. They include:
- (1) Establish minimum criteria for the State Tributary Implementation Plans.
 - (2) Establish a process for approval/disapproval of plans and for up-dating plans
 - (3) Provide for federal tributary implementation plans and loss of state funds if states fail to act

COG staff comment:

- For states that fail to meet the implementation deadlines in their plans or that fail to submit an acceptable plan, the EPA Administrator must:
 - (1) Withhold all funding from the state under this act (which includes the implementation grant, funds for tidal and freshwater monitoring, and potentially grants to local governments and others);
 - (2) Take over management of that state’s tributary implementation plan; and
 - (3) Require a 2:1 offset for any new or expanded discharge of N, P or sediment.
- States may have to conduct a conformity analysis for some sectors (i.e., potentially similar to CAA requirements?). Need to confirm the scope and intent of such analysis.

- (4) Establish a nitrogen and phosphorus trading program

(5) Establish general watershed permits

COG staff comments:

- The language here appears to support the policy enunciated in the Pinto legal decision, i.e. that permits cannot be issued to a new source unless all existing regulated dischargers are subject to compliance schedules and there is excess load allocation available to be assigned to the new source.
- Again, no indication of any agricultural permitting scope beyond current CAFO program. But States will need to have enforceable and binding agreements. Unclear what that entails specifically.
- Not clear what the scope of these 'watershed' permits are.

(6) Establish guidance and model ordinances for managing stormwater runoff in municipal settings as well as a grants program for municipalities to meet the requirements

COG staff comment: Grants could be used for staff costs as well as project implementation

(7) Report to Congress on commercial products that impact water quality

SEC. 11. ADDITIONAL WATER QUALITY PROTECTION MEASURES.

Other additions to Section 117:

- (k) Prohibition on Introduction of Asian Oysters.
- (l) Chesapeake Nutria Eradication Program.
- (m) Prohibition on Commercial Harvesting of Menhaden.
- (n) Effect on Other Requirements.—
 - (1) All other Clean Water Act provisions remain in effect
 - (2) Citizen suit provisions are authorized for violations by states or EPA
- (o) Authorization of Appropriations.—
 - (1) Implementation Grants: \$80 million annually
 - (2) Monitoring Grants: \$5 million annually each for freshwater and estuarine
 - (3) MS4 Planning grants for municipalities: \$10 million
 - (4) MS4 Implementation grants for municipalities: \$1.5 billion
 - (5) Nutria Eradication Grants: \$4 million annually

COG staff comment re (o): These are authorizations; actual monies funded would depend on annual appropriation process.