

## Chesapeake Bay and Water Resources Policy Committee

Suggested framework for presentation by J. Charles Fox, Special Assistant to EPA Administrator Lisa Jackson, at COG Board Retreat Aug. 1, 2009

7/9/09 draft

Audience: Elected officials/COG Board members from COG's 21 local government members in the region. Only a handful of these attendees will be members of COG's Chesapeake Bay and Water Resources Policy Committee; do not assume more than a general acquaintance with Chesapeake Bay restoration issues

### **Suggested topics to be addressed:**

- A brief summary of the history of the restoration effort and your view of its current status. Does the effort deserve its current reputation in some circles that it has failed or is failing?

COG member background: The official Bay restoration effort is usually described as having been launched by the signing of the original Chesapeake Bay Agreement in 1983. There have been a number of significant developments and some notable progress in the following 25 years, but, in the past few years, various critics have claimed that progress has all ceased and the Bay Program is no longer working (See "Dirty Water," p. A12, Washington Post, Jan 2, 2008) After critical press and GAO reports, the Bay Program has undertaken a restructuring effort and President Obama named Mr. Fox as Special Assistant to EPA Administrator Lisa Jackson for the Chesapeake Bay and Anacostia River restoration efforts.

- A review of progress to date toward a series of Bay-wide TMDLs and their associated implementation plans. How will the Bay Program address the Clean Water Act requirement that TMDL implementation plans contain "reasonable assurance" that the needed pollutant reductions will be achieved? What are the potential consequences for state and local governments if implementation plan milestones are not met?

Background: The current schedule calls for EPA to issue its Bay-wide series of TMDLs by December 2010. Prior to that date, the Bay Program states have committed to developing state implementation plans (SIPs) that will detail how they will achieve needed reductions in nutrients and sediment to the Bay, including actions to be taken by local governments to address impacts from wastewater and urban stormwater. These SIPs will form the initial basis for the TMDLs and could be used to set regulatory permit limits. They also must demonstrate what the Clean Water Act called "reasonable assurance" that the specified reductions will be achieved within the allotted time frame. Failure to demonstrate reasonable assurance and failure to achieve the needed reductions in nutrient and sediment loads will subject the states and, by extension, local governments to potential federal consequences.

- A review of the Executive Order on Chesapeake Bay Protection and Restoration issued by President Obama on May 12, 2009, and the progress made to date by the new Federal Leadership Council. What changes will this process bring to the Bay restoration effort and, in particular, is EPA contemplating new regulatory actions?

Background: The Executive Order requires EPA to “examine how to make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters.” EPA and a number of other federal government agencies involved in the Bay restoration effort have 120 days (until approx. mid-September) to draft a report with recommendations for accelerating progress. A final strategy is due by mid-November.

- A brief discussion on prioritizing reduction efforts. How will the Bay Program and its state partners strike a balance between the need to achieve greater reductions in sediment and nutrient pollution from urban stormwater and the extremely high cost of a number of the practices that the states are listing for restoration measures in this sector?

Background: Although the Bay Program estimates that urban stormwater discharges account for about 15 – 30 percent of the overall nutrient loads and 25 percent of the overall sediment loads that reach the Bay on an annual basis, the Bay Program has singled out this sector for lack of progress and indicated it must do more to reduce these pollutants. (Agriculture accounts for about half of the nitrogen and phosphorus and ¾ of the sediment.) This is one of the major aims of the next generation of federal-state municipal permits addressing stormwater (known as MS4s) to which all of the local governments in the COG region are subject. The highest loads are thought to come from older developed areas that predate the stormwater quantity and quality control practices that are now universally required and applied, but “retrofitting” these areas with such controls today is extremely expensive. Member government experience to date in Montgomery and Prince George’s County indicate that it costs about \$100,000/acre to achieve retrofit goals. Thus, meeting the retrofit goal in Maryland’s first set of two-year milestones alone would cost about \$9.3 billion. On a cost per pound of pollution saved-basis, this is several orders of magnitude higher than comparable practices in agriculture.

- A review of funding/sector issues. How adequate is current funding? Does the federal government have an obligation to increase the amount of funds it spends on the restoration effort?

Background: The Bay Program has made its greatest progress, as in the wastewater sector, when ample funding is coupled with the potential for future regulatory action. The pending TMDL addresses the potential for future regulation, but funding remains inadequate. In 2004, the Chesapeake Bay Blue Ribbon Financing Panel, on which current COG Board Chair Penelope Gross served, estimated the full cost of meeting the water quality goals of the Chesapeake 2000 Agreement at \$28 billion. None of the Panel’s recommendations were adopted and since its report, the Bay Program and its partners has made only minor progress in coming up with new funding. A combination of state and local funds is paying for the upgrade of

wastewater treatment plants to ENR -- “enhanced nutrient removal” – status and the 2008 farm bill provided more than \$438 million for agricultural cost-share efforts in the Bay region over the next 5 years, but there are virtually no state or federal funds available for stormwater.

### **Potential questions from the audience:**

1. To the extent that EPA is looking at new programs and policies that relate to pollution sources from urban areas, principally wastewater and urban stormwater, what mechanisms, whether under the Federal Leadership Council or otherwise, is EPA employing to obtain local government input?

Background: Under Section 204, the Executive Order explicitly refers to collaboration with state partners (including the District of Columbia) in preparing a final strategy, but it assumes that such collaboration assures coordination with local governments. Section 302 does mention that an implementation schedule of key actions shall be established in coordination with state and local governments, but it is not clear how this is to be accomplished.

The necessity of having a local government voice in the decision-making process has long been a key component of COG’s Bay-related policies. It is one of the COG’s four Bay principles. COG’s experience to date has been that local governments are not adequately represented when they do not have a direct seat in the process. COG’s letter in response to the Executive Order explicitly asked for observer status on the Leadership Committee and the involvement of local governments in a number of other Bay forums.

2. Do you foresee a new federal funding source that could be used to assist municipalities in addressing the Bay water quality impacts of urban stormwater discharges? Is there any possibility for creating the Chesapeake Bay Financing Authority recommended by the Chesapeake Bay Blue Ribbon Financing Panel?

Background: State and federal cost-share funds have been available to make the wastewater treatment plant upgrades mentioned previously. The same is true for water quality practices sought from farmers and agribusiness. Of all the major sources of pollutants to the Bay, only the urban stormwater sector lacks a dedicated, consistent funding mechanism. Typically, local governments and developers and other businesses they regulate pay for stormwater practices on new development. But this system could impact redevelopment projects because of the high cost of retrofitting and does not account at all for permit requirements to retrofit even in the absence of redevelopment.

A number of Bay restoration supporters are advocating that a dedicated funding source for stormwater practices be created under the reauthorization of the federal transportation funding legislation. This would begin to address the funding gap in stormwater.

From a wider perspective, the Chesapeake Blue Ribbon Financing Panel proposed creation of a new vehicle, a federal-state financing authority, to increase funding support for implementation measures.

3. Will the pending Bay-wide series of TMDLs preserve the investments that state and local governments are currently making in technology upgrades to achieve “enhanced nutrient removal” at wastewater treatment plants? Are more stringent permit limits imminent, rendering existing planning, design, pre-construction, and construction work obsolete?

Background: Under agreements reached with state regulatory authorities on allowable future permit loads, the region’s wastewater treatment plants are in the process of building new equipment and developing new processes that will allow them to achieve even greater levels of nutrient removal for nitrogen. Previous investments in nutrient removal technology for both nitrogen and phosphorus are primarily responsible for the significant improvement in water quality in the upper Potomac estuary in recent years.

The latest round, designed principally to benefit Bay water quality, is based specifically on achieving the agreed-upon limits and, when fully implemented, will achieve reductions for this source of pollutants that are far beyond those achieved by any other sector. However, under a TMDL, state and federal regulators have a theoretical ability to require even greater reductions should other sectors not achieve the reductions that they have been allocated. Doing so would be likely to waste much of the current investment in new technology, which could not be used to achieve higher levels of treatment, and violate the equity principal that all sectors should be required to make the same level of effort in pursuing reductions.

4. How can local governments making significant investments in wastewater and stormwater pollution reduction measures be assured that their efforts will be matched by reductions in the agricultural sector?

Background: As noted previously, both wastewater plants and the municipalities that operate stormwater conveyance systems are subject to federal-state permits under the Clean Water Act that can incorporate pollution reduction requirements to meet both local and Bay water quality goals. Under TMDL requirements, non-regulated sources, such as agriculture, also receive an allocation for how much nutrient and sediment reduction must be achieved, but it is not clear how such reductions can be enforced. Lack of progress in reducing agricultural pollution could increase the requirements for reductions from regulated sources in urban areas, thereby violating the principle of equity.