

S. 1816 Chesapeake Clean Water and Ecosystem Restoration Act of 2009

COG Staff Initial Summary of Key Points Enrolled Version (10/20/09) (i.e., before mark-up) (as of 11/12/09)

BACKGROUND

- Introduced Oct. 20, 2009, by Sen. Ben Cardin (MD).
- Its House counterpart, H.R. 3852, is sponsored by Rep. Elijah Cummings (MD).

SUMMARY

- The bill would amend section 117 of the Clean Water Act, which governs the EPA Chesapeake Bay Program.
- Overall, the bill would codify the Bay TMDL development and implementation process into federal law, including such details as deadlines, the content of the state's watershed implementation plans (WIPs) and the process by which EPA reviews and approves or disapproves of those plans.
- In some aspects, it expands EPA powers compared to what currently exists within the Clean Water Act and, in other aspects, it makes explicit powers that have not been specifically defined before.

(For example, in the event of finding that a state is not achieving implementation of its milestones, the bill provides EPA with the authority to set new regulations "notwithstanding any other provisions of this act.")

- It also increases the ability of citizens or third-party groups to sue EPA and the states for the failure to meet their TMDL/WIP obligations.

KEY PROVISIONS

Section 2 - Findings

- This section still has the same language for two findings on which COG commented:
 - Describes runoff from urban and suburban development as "the only major source of pollution in the watershed that is increasing."
 - Notes of LID practices that they tend to be "less expensive than traditional pollution stormwater control management techniques."

Section 117 - Chesapeake Bay Program

(d) Definitions

- Defines "Point-of Regulation" as either entities "subject to a limitation on pollution or other regulation under this Act" or those that have "sufficient technical capacity and legal authority to meet the obligations of the entity under this Act."
- Defines TMDL as being able to include nitrogen, phosphorus, and sediment allocations in terms of units greater than daily duration if applicable (i.e., achieve water quality standards and don't exceed standards for local waters).

(g) Federal Annual Action Plan and Progress Report

- Documents EPA's obligations and deadlines in accordance with the President's Executive Order

(i) Total Maximum Daily Load

- Delineates the specific requirements of the Bay-wide TMDL, including:
 - Wasteload allocations for nitrogen, phosphorus, and sediment;
 - Enforceable or binding load allocations for all non-point sources – including atmospheric deposition, agricultural runoff, and stormwater sources when an NPDES permit is not required;
 - Margin of Safety; and
 - No net increase of pollutant loads from impervious surfaces, concentrated animal feeding operations (CAFOs), transportation systems and septic systems.

(Note: The latter provision would appear to conflict with the way in which EPA and the states are currently developing the TMDL, which would allow states – and hopefully local governments, to adjust their WLAs and LAs among the different sources and potentially allow increased pollution from a particular source if the increase is balanced by reductions from other sources.)

- Establishes the following deadlines:
 - Dec. 31, 2010, for EPA to issue a Bay-wide series of 92 TMDLs.
 - May 12, 2011, for the states to submit watershed implementation plans (WIPs) designed to achieve the water quality standards under the TMDLs.

(Note: These deadlines are not always consistent with the deadlines currently in the EPA/CBP guidance documents; and current text does not explicitly reference the ‘phased implementation’ Phase I and II of the proposed WIPs.)

(j) Actions by States

- Delineates the specific content of the state WIPs, including setting of targets on a biennial basis (e.g. the current milestones).
- Source targets include “point sources, including point source stormwater discharges.”

(Note: underline added for emphasis).

- Discusses need to include enforcement mechanisms, use of computer modeling to demonstrate projected reductions, and alternate actions as contingencies.
- Establishes the following deadlines:
 - May 12, 2017, for the states to achieve 60 percent of the implementation under their WIPS.
 - May 12, 2025, for the states to achieve 100 percent of the implementation under their WIPS.

(Note: Current EPA/CBP guidance documents cite December 31st vs. May 12th dates.)

- Requires progress reports every two years.
- Requires achievement of certain standards (federal benchmarks) under the stormwater permitting program.

- States must “assure” EPA that for any development or redevelopment site above certain thresholds (which are to be determined via EPA rulemaking), and as a condition of permitting, the owner or operator will need to:
 - Maintain or restore predevelopment hydrology for temperature, rate, volume and duration of flow to the maximum extent technically feasible (i.e., METF) versus current maximum extent practicable (MEP).
 - If not possible to do this, the owner could provide “compensation” both in and outside “jurisdictional boundaries” of permit.
- Final threshold rulemaking details to be determined by EPA by December 2012.

(Note: the stormwater language in H. R. 3852, derived from a bill introduced by Rep. Gerry Connolly (VA), is somewhat different. It would affect only new development sites and, on those, require that stormwater controls must “infiltrate,” “evapotranspirate,” or “harvest and use on site” the volume of the 95th percentile storm.)

- Includes phosphate ban requirements.

(k) Actions by EPA Administrator

- Delineates the specific content of a review and approval process for the state WIPs.
- Spells out the consequences of a state failure to submit its WIP, submit its biennial report, or meet its 2-year implementation milestones. These include:
 - Withholding Clean Water Act funding.
 - Taking over administration of the state program for implementing the WIP, enforcing permits and promulgating new point source and nonpoint source regulations as necessary.
 - Requiring 2:1 offsets for any new or expanding discharges if nitrogen, phosphorus, or sediment.
- Allows for the establishment of interstate nutrient (nitrogen and phosphorus) and sediment trading.

(q) Authorization of Appropriations

- The bill would authorize funding in the following categories:
 - Implementation Grants: \$80 million annually.
 - Monitoring Grants: \$5 million annually each for freshwater and estuarine.
 - MS4 Planning grants for municipalities: \$10 million.
 - MS4 Implementation grants for municipalities: \$1.5 billion.
 - Nutria Eradication Grants: \$4 million annually.

(Note: These are authorizations only; Congressional appropriation would be necessary for these funds to actually become available.)

(o) Effect on Other Requirements

- Notes that failure by the State to submit a WIP, or biennial report, or correct a previously missed 2-year commitment shall “constitute a violation of the Act” and subject the state to enforcement and civil actions.

(Note: Uncertain the extent to which these aspects may apply to local governments or other parties.)

Other provisions include a requirement for EPA to report to Congress on commercial products that impact water quality, a ban on the use of Asian oysters, an expansion of the nutria eradication program on the Delmarva Peninsula, and a study to evaluate the effects of commercial menhaden harvesting.