



Jan. 8, 2010

On behalf of Environment Maryland, Environment Virginia, PennEnvironment, and Environment America, we offer the following comments on the revised 202a Water Quality Report and the 203 Draft Strategy, in Docket ID No. EPA-HQ-OW-2009-0761.

Environment America is a national federation of state-based environmental organizations with staff in 28 states and over 700,000 members across the country. Nationally we work on a variety of issues related to clean air, clean water and preservation of open spaces. Restoring the Chesapeake Bay has always been a priority for our staff and more than 30,000 members in the bay region. For instance, Environment Virginia has advocated for and won funding for best management practices designed to limit runoff from agriculture. In 2007 Environment Maryland was instrumental in passing Maryland's Stormwater Management Act which set a standard of no net change in the hydrology of new construction sites.

As emphasized in the President's Chesapeake Bay Protection and Restoration Executive Order 13508, the bay is a national treasure. As such, it deserves national commitment to its restoration and health. State-led action has failed to heal the bay after 26 years, so we applauded the announcement in May 2009 of the Executive Order. It was a powerful show of federal leadership and a promise of a revitalized bay to all those who rely on its waters, and all the waterways that feed it, for their recreation, health and economic livelihood.

Now we are concerned that the Environmental Protection Agency appears to be backing away from some tough measures it had initially proposed. Pursuant to the Executive Order, the EPA had issued a draft 202a report in September 2009. Subsequent documents from the agency omit or modify key proposals, including

- **Regulating Concentrated Animal Feeding Operations (CAFOs) and Municipal Separate Storm Sewer Systems (MS4s).** Agriculture and urban development represent the largest sources of pollution into the bay, and states have proven themselves incapable of significantly curbing this pollution over the past 26 years. In September the EPA proposed to expand and strengthen CAFO and MS4 permits. However, in November they announced they would first wait to see state plans before acting. The EPA should not wait; they should immediately initiate new rulemakings to strengthen and expand CAFO and MS4 permit programs.
- **Denial of new or expanded permits.** By far one of the biggest sticks that the EPA carries is the ability to deny new pollution permits until adequate bay clean up is underway. The EPA's September report included this as a possible "consequence" for state failure. But the agency's latest "consequences" announcement omits explicit reference to this threat. The EPA should use every tool at its disposal. If states fail to sufficiently reduce pollution, the EPA should limit or prohibit new or expanded permits.

The following steps are essential to successful bay restoration: 1) the upcoming Total Maximum Daily Load must set numerical caps on all sources of pollution which will truly achieve a healthy bay, 2) the EPA must exercise its full authority to reduce pollution in the bay, including by expanding and strengthening CAFO and MS4 permits, 3) the EPA must only accept state pollution reduction plans that demonstrate how the reductions defined by the TMDL will be achieved, including robust “reasonable assurance” that all non-point load allocations will be achieved, and 4) the EPA must define and impose meaningful “consequences” on states that either write inadequate plans or fail to meet their biennial pollution reduction goals, and one of the potential consequence should be limiting or prohibiting new or expanded discharges.

The EPA has written separate letters to states discussing the TMDL wasteload and load allocations and the “consequences” for state failure. However, these documents must be seen in the full scope of the EPA’s actions pursuant to the Executive Order, and we believe those actions are not measuring up to the promise of the Executive Order. The TMDL pollution levels must be scientifically sound, since bold measures based on a faulty TMDL will do little to restore the bay. Another critical point is that the EPA and others in the Federal Leadership Committee should aim to restore the bay on the fastest possible timeline. The year 2025 should be seen as a hard, final deadline, rather than another soft target far in the distance.

We were encouraged with the release of the EPA’s initial 202a draft report on September 10, 2009. In that report, the EPA laid out a new accountability structure that would enforce sufficient pollution reduction in each of the bay states. They spoke of expanding and strengthening CAFO and MS4 permit programs. In addition, in the list they offered of possible “consequences” for states that fail to meet TMDL goals, or to write plans sufficient to meet those goals, the EPA included relatively bold actions such as limiting or prohibiting new or expanded discharges.

Since the September report, we’ve been disappointed to see backtracking on these core proposals. Regarding the CAFO and MS4 permits, a wait-and-see approach with the states has been proven unwise by the past 26 years of state failure. Furthermore, in the 202a Report the EPA admits that they “can only address a small portion of nutrients from animal agriculture pursuant to existing regulatory authority” (page A-7), so it is all the more urgent that every step be taken to curb pollution from animal operations. Likewise, since stormwater runoff is admittedly the only increasing source of non-point pollution, the EPA must make every action in its authority to bend back the curve and begin reducing stormwater pollution. History argues overwhelmingly against the wait-and-see approach. The EPA should immediately initiate rulemakings to strengthen and expand both the MS4 and the CAFO permitting programs.

The EPA has also pulled back on the matter of “consequences” for state failure. In a letter dated December 29, 2009, the EPA offered a revised list of possible “consequences,” but they omitted the potent September proposal to limit or prohibit new or expanded discharges. Instead, they propose “net improvement offsets” as a tool to manage new or expanded discharges. Such a measure lacks the significantly sharper teeth of the previous proposal, which the EPA should keep on the table as a possible “consequence.” The Executive Order calls for new tools to restore the bay, and limiting permits is one of the strongest tools in the EPA’s toolbox.

We also recommend the immediate implementation of two smaller proposals related to agriculture in the 202a Report. Namely, the EPA mentions the possibility of collecting “comprehensive information on the number, location, and nature of the entire universe of medium and large CAFOs,” as well as the option of “classifying CAFO permits as major NPDES permits so that all CAFO individual permits are routinely made available to the Agency” (p. 28). The EPA should immediately pursue both these measures.

The window of opportunity for game-changing federal action has not closed. However, the EPA should first return to and elaborate on the best proposals from the September 10, 2009 202a Report. The final strategy released in May 2010 will set the bar, either high or low, for whatever follows. If the Executive Order’s promise is to be kept, and if the bay is to be restored, the EPA must set the bar high this May by exercising its full authority and holding states accountable by means of effective “consequences” for failure.

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Sincerely,

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