



J. Charles Fox, Senior Advisor to the Administrator
U.S. Environmental Protection Agency
410 Severn Avenue, Suite 109
Annapolis, Maryland 21403

Re: Comments on the draft 202a Water Quality Report & 203 Strategy

January 8, 2010

Dear Mr. Fox:

The Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and educational organization with a network of Member Scholars working to protect human health and safety and the environment through analysis and commentary. We write to you today in response to the draft 202a Water Quality Report and the draft 203 Strategy for Protecting and Restoring the Chesapeake Bay issued pursuant to President Obama's Chesapeake Bay Protection and Restoration Executive Order. The order, together with the reports and EPA's letters detailing its expectations of and consequences for Bay jurisdictions, marks a new era in federal leadership for Bay restoration efforts. We commend you for spearheading the Environmental Protection Agency's work thus far on Bay restoration, and we support your efforts to bring accountability, transparency, and substance to the Chesapeake Bay Program.

We recognize that this new era of federal leadership does not and should not ignore the crucial role of states in restoring the Chesapeake Bay. We understand that the current economy has placed great burdens on all Bay jurisdictions and that, in light of these conditions, the EPA has attempted to provide the Bay jurisdictions with the greatest flexibility to meet the Bay-wide TMDL and individual tributary segment TMDLs. However, this approach must be tempered by a sobering lesson from past restoration efforts: voluntary commitments seldom work, and Bay past promises have amounted to little progress. While the jurisdictions themselves have agreed to set two-year milestones and have renewed their commitment to meeting the Bay-wide TMDL, federal agencies—particularly the EPA—should stand ready with assistance, enforcement, and consequences.

The comments below highlight specific issues related to standards, enforcement, consequences, and oversight in the 202a Water Quality Draft Report ("202a Report") and the 203 Draft Strategy for Protecting and Restoring the Chesapeake Bay ("draft 203 Strategy"). The EPA already has much of the authority needed to restore the Bay, and this existing authority must figure prominently in restoration efforts. The potential for delay caused by new rulemakings or new legislation should be viewed warily, and future restoration efforts should rely on the exercise of this existing authority. These comments suggest solutions to strengthen the final 202a Report and the final 203 Strategy, to be issued in May 2010.

- **The standard of reasonable assurances should be strictly monitored to achieve substantive pollution reductions from nonpoint sources.** In a letter dated November 4, 2009, the EPA details how it expects states to provide reasonable assurance that pollution load reductions needed from nonpoint sources will be achieved. In the final 202a Report, the EPA should explicitly incorporate this letter and should vigilantly monitor Bay jurisdictions’ submissions to ensure adherence to EPA’s requirements.
- **The EPA should rely primarily on existing authority in the Clean Water Act and federal regulations to achieve immediate pollution reductions and to ensure that Bay jurisdictions fulfill their commitments to Bay restoration.** The 202a Report overlooks important existing authority and case law to impose consequences against Bay jurisdictions that fail to meet commitments made in their watershed implementation plans or other submissions or agreements. In *Pinto Creek*, the Ninth Circuit upheld strict conditions that must be met prior to the issuance of permits for new discharges, and the EPA may initiate proceedings to withdraw NPDES permitting authority from Bay states. Together these existing legal authorities are powerful tools to motivate Bay jurisdictions to meet the pollution reduction targets set by the Bay-wide TMDL.
- **The EPA should articulate the duties, roles, and functions of the independent evaluator.** The independent evaluator is one of the primary means for the EPA and Bay jurisdictions to publicly and transparently account for their successes and challenges in Bay restoration efforts. This evaluator is required by the Executive Order, but neither the 202a Report nor the draft 203 Strategy provide sufficient detail. The EPA should ensure that the independent evaluator is sufficiently dynamic and responsive to assess restoration efforts until at least 2025.

Issue 1. The definition of reasonable assurance focuses on procedural assurances rather than assurance of substantive outcomes.

While the components of what constitutes reasonable assurance in the 202a Water Quality Report and in the EPA expectations letter are generally sound, they remain *procedural*, rather than *substantive*, standards that give little indication of when Bay pollution reductions will actually occur. “Reasonable assurance” is a key concept in the TMDL framework because it is used to address pollution reductions from nonpoint sources (NPS). Nonpoint source pollution is exempt from mandatory regulation under the Clean Water Act but remains one of the most persistent and problematic sources of pollution in the Bay and waters across the country. The expectations letter details the components of reasonable assurances. While fairly thorough, they remain procedural demonstrations rather than substantive benchmarks. To further strengthen the reasonable assurance standard, we suggest that:

- The EPA ensure that Bay jurisdictions submit watershed implementation plans that closely adhere to its expectations;
- The EPA ensure that the requirements for reasonable assurances translate into substantive outcomes for Bay restoration by using quantifiable and verifiable monitoring and measurements; and

- The EPA ensure that the watershed implementation plans (WIPs) and discussion of reasonable assurances are transparent and open to public comment and participation.

Defining “reasonable assurance” is crucial to improving the health of the Bay watershed because it is one of the principal ways to ensure reductions from nonpoint sources. Meeting the Bay-wide TMDL depends on pollution reductions from both point source and nonpoint sources. While waste load allocations for point sources can be incorporated into their NPDES permits, reasonable assurance is the primary mechanism to ensure that nonpoint sources achieve their assigned load allocation. Only when point and nonpoint sources meet their allocations is the TMDL achieved.

Overall, the expectations laid out by the EPA are fairly thorough and represent a strong step forward in achieving pollution reduction from nonpoint sources. The EPA should explicitly incorporate or include its expectations letter in the 202a Report. Unlike earlier proposals for the reasonable assurance standard, EPA’s new Bay expectations seem to focus more on performance outcomes rather than identifying specific practices. The two-year milestones and interim and final goals provide a clear timeline for progress. In addition, the process of developing the WIPs should be a useful exercise for jurisdictions to assess the state of their pollution control programs.

The EPA must review watershed implementation plans to ensure that they adhere strictly to these requirements. The EPA must not hesitate to critique WIPs that do not comply with EPA requirements. More importantly, the EPA must ensure that formulating “reasonable assurance” amounts to more than a paper exercise that fails to result in substantive outcomes: actual reductions in nutrient and sediment pollution in the Bay. For example, the EPA should emphasize both the commitment to fill gaps in capacity as well as the identification of contingencies for slow or incomplete evaluation. EPA should assist states by providing examples of the types of binding commitments it would approve of or provide resources to help assure greater participation and compliance.

In addition, the EPA should ensure, as requirements in the WIPs, that the contingencies are not empty measures but instead measures that would actually be enacted if the initial measures were not implemented. These contingencies must be effective practices or actions that will achieve the needed pollution reductions but also unpalatable enough to motivate states to implement their first-line pollution control measures. EPA should clarify how it will determine if Bay states are delaying implementation, and EPA should also provide strict deadlines for full implementation of first-line control measures, after which it will require states to implement the contingencies.

Issue 2. The 202a Report indicates that EPA is hesitant to take serious action in expanded enforcement for stormwater discharges.

In the 202a Report, the stormwater section timidly states that “EPA *would* consider using existing residual designation authority” for reducing pollutants from stormwater discharges from areas that are vulnerable to future development pressures. The exercise of residual designation authority (“RDA”) merits greater attention because it is a powerful, existing tool that EPA can use immediately and at its discretion. Use of this authority is an effective means to capture stormwater sources that are not specifically listed in the current regulatory framework. EPA

should affirm that it *will* seriously consider using this authority, provide more information regarding its use, and consider using this authority in areas not limited to those vulnerable to future development pressures. We suggest that:

- The EPA affirmatively evaluate the use of RDA as a means to reduce pollution from currently unregulated stormwater discharges;
- The EPA provide greater information regarding how it will determine whether or not to exercise RDA to require new stormwater permits and which areas are vulnerable to future development; and
- The EPA expand the use of RDA to *existing* areas with significant but unregulated stormwater discharge in addition to areas vulnerable to future development pressures.

The 202a Report estimates that 10 percent of the total nitrogen, 31 percent of the total phosphorous, and 19 percent of the total sediment discharged into the Bay result from stormwater from suburban and urban areas in the Bay watershed. In the Bay, impervious surface cover has increased disproportionately to the population increase: between 1990 and 2000, the human population increased by 8 percent while the impervious surface cover increased by 40 percent. By 2030, an estimated 20 million people will live in the Bay watershed, an increase of 4 million from today's population. Increased urbanization to accommodate the population will cause increased stormwater discharge. Notably, stormwater is the only *growing* source of pollution in the Chesapeake Bay.

A recent report evaluated the stormwater programs in five Bay jurisdictions, and the highest grade of a B+ was given to the District of Columbia while the lowest grade of a D+ was given to Maryland.¹ The report concluded that overall Bay jurisdictions “are not fully utilizing their existing regulatory programs to improve the quantity and quality of runoff generated from existing urban lands, despite the fact that most of these programs have been in place *for a decade or longer.*”

Under section 402(p) of the Clean Water Act, the EPA is explicitly given authority to regulate specific stormwater discharges that are known to present the most significant threats to surface water but that do not fall into predetermined categories. Thus, a discharge that is entirely composed of stormwater may require a NPDES permit if the Administrator or state agency determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. More generally, section 402(p)(6) also directs the Administrator to designate stormwater discharges that should be regulated in order to protect water quality.

EPA's own regulations provide further detail, allowing a permit writer to determine that stormwater controls are needed for a discharge if the controls are based on wasteload allocations

¹ The five bay jurisdictions evaluated in the report were the District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia. Tom Schueler, *First Annual Bay-Wide Stormwater Performance Scorecard 2009*, The Chesapeake Stormwater Network, available at http://www.chesapeakestormwater.net/storage/admin-files/csn-source-documents/2009_Baywide_Stormwater_Performance_Scorecard.pdf (last visited Dec. 23, 2009) [hereinafter *Stormwater Scorecard*]

that comprise a total maximum daily load for a pollutant found in the discharge. 40 C.F.R. 122.26(a)(9)(i)(C). A permit writer may also determine that stormwater controls are needed for a stormwater discharge or category of discharges within a certain geographic area if they contribute to a violation of an applicable water quality standard or if they are a significant contributor of pollutants to waters of the United States. 40 C.F.R. 122.26(a)(9)(i)(D). In making this determination, a permit writer may consider factors such as the location of the discharge, the volume of the discharge, the quantity and nature of pollutants, and other relevant factors.

To address stormwater, the 202a Report states that the EPA would “consider using existing residual designation authority and rulemaking options for reducing pollutants from stormwater discharges from areas that are vulnerable to future development pressures.” This language is problematic because it indicates that the EPA is hesitant to exercise RDA to bring more sources of stormwater under the NPDES program. Substantively, it also omits details concerning how EPA would determine whether or not to exercise RDA and it limits the exercise of RDA to areas vulnerable to future development pressures. RDA is a valuable *existing* authority to reduce nutrient and sediment pollution from stormwater. It ensures that additional pollution reductions from stormwater are achieved through the reliable and enforceable NPDES program, and it can apply to both present and future stormwater discharges.

In both the final 202a Report and the final 203 Strategy, the EPA must affirmatively consider using RDA to help further reduce pollution loadings from stormwater discharges. In the Chesapeake Bay, urban and suburban stormwater meets both categories of stormwater that may be subject to NPDES permitting through the exercise of RDA. It contributes to violations of water quality standards in the Bay mainstem and along the Bay tributaries. It is also a significant contributor of pollutants to the Bay. Once the Bay-wide TMDL and individual tributary TMDLs are finalized, the wasteload allocations will be divided among the primary sources of pollution to the Bay, which includes stormwater. Thus, the EPA or the permit writer may base controls on these allocations.

The EPA should articulate *how* it will determine whether or not requires NPDES permits for specific stormwater discharges. For example, if Bay states fail to make substantial progress toward meeting stormwater discharge reductions by 2017, will the EPA then exercise RDA to achieve further reductions? Or will EPA make a determination on a case-by-case basis, depending on a jurisdiction’s progress in meeting two-year milestones? Greater clarity would benefit both the potentially regulated community as well as environmental groups that may seek to petition the EPA or state agency to exercise RDA.

Finally, the EPA should not limit its exercise of RDA to areas vulnerable to future development. The Stormwater Scorecard estimates that at least 75 percent of the impervious surfaces in the watershed are either untreated or inadequately treated with stormwater management practices. As noted earlier, nutrient and sediment pollution from urban and suburban stormwater in the Bay watershed are the only *growing* source of pollution and is expected to only increase in the future. Part of managing the environmental impacts of stormwater is to address existing impervious surfaces. For example, the EPA or state agencies could use RDA to designate parking lots above a threshold area as requiring NPDES permits or to designate any property with impervious surface area totaling more than a certain acreage as requiring NPDES permits. In the Long Creek Watershed in Maine, the EPA’s exercise of RDA will cover 90 percent of the impervious surface in the watershed area. Stormwater pollution will

only become a greater problem in the future, and all parties in the watershed must play a part in its management.

Issue 3. The 202a Report overlooks additional sources of existing case law and authority to impose consequences against Bay jurisdictions.

In the 202a Report, the consequences section fails to refer to the existing prohibition on new permits for new dischargers or new sources that discharge into impaired waters if the discharge will cause a violation of water quality standards. It also fails to refer to the authority of the EPA to withdraw a state's delegated authority to administer the NPDES permitting program. Both these authorities are useful because they immediately applicable and provide significant motivation for states and the District of Columbia to reduce pollution from all sources.

Regarding the prohibition on discharges from new sources, we suggest that:

- The EPA recognize as an existing tool the existing federal regulation that mandates protections from new pollution discharges into the Bay and its waters;
- The EPA strictly scrutinize applications for new permits to ensure they meet the existing federal regulatory conditions; and
- The EPA clarify its asserted authority to permit increased discharge loads that are offset through other source reductions.

Regarding the withdrawal of states' delegated NPDES permitting authority, we suggest that:

- As its most severe consequence, the EPA list its authority to initiate the withdrawal of a Chesapeake Bay state's authority to issue NPDES permits that fail to comply with the Bay-wide TMDL.

Conditions for New Discharge Permits

In *Friends of Pinto Creek v. U.S. E.P.A.*, the Ninth Circuit Court of Appeals held that the EPA is prohibited, by its own regulations, from issuing NPDES permits for new discharges unless the permit applicant has fulfilled two specific conditions: that additional pollution loading exist to accommodate the new discharge, and that all existing dischargers are on a compliance schedule to meet the applicable TMDL. Critics of the *Pinto Creek* ruling raise the specter of a wholesale ban on issuing new permits and thus on new development, but this charge is unfounded. New dischargers are not banned from applying for new discharge permits, and the EPA is not banned from issuing permits for new discharges. Rather, existing EPA regulations simply require the fulfillment of two critical conditions to ensure that an impaired water body does not further deteriorate.

Under the Clean Water Act and existing regulations, the EPA and states with delegated NPDES permitting authority are already prohibited from issuing permits under certain conditions. For new dischargers or new sources that propose to discharge into existing impaired waters, the EPA regulation declares that no permit may be issued to a new source or a new

discharged if the discharge will cause or contribute to the violation of water quality standards. However, the regulations provide an exception if two conditions are met: the permit applicant must demonstrate that (1) there are sufficient remaining pollutant load allocations to accommodate the discharge and (2) the existing dischargers are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. 40 C.F.R. § 122.4.

Under the first condition, the applicant must demonstrate that, under the TMDL, sufficient pollution load allocations exist to accommodate the discharge. Section 122.4(i)(1) is a substantive condition that requires demonstrating that actual load allocations exist. Under the second condition, the permit applicant must also demonstrate that existing dischargers are subject to a compliance schedule that will bring the impaired water body into compliance with the applicable water quality standard. The court in *Pinto Creek* noted that the plain language of the regulations meant that the compliance schedules apply to *any* point source, permitted or not.

Strikingly, the Ninth Circuit included nonpoint sources within the reach of section 122.4. The court concluded that if the compliance schedule for both permitted and unpermitted point source dischargers remains insufficient to bring an impaired water into compliance with water quality standards, then a new permit cannot be issued “unless the state or [permit applicant] agrees to *establish a schedule to limit pollution from a nonpoint source* or sources sufficient to achieve water quality standards.”

Contrary to charges by critics, *Pinto Creek* does not translate into a wholesale ban on new permits and new development. The Ninth Circuit specifically declared that the requirement for compliance schedules represented a mere condition that must be fulfilled prior to issuing a new permit for pollution discharge into existing impaired waters. The ruling and existing federal regulations prevent further deterioration of impaired waters by requiring all pollution sources to follow compliance schedules that are designed to achieve the applicable TMDL.

The 202a Report’s consequences section fails to recognize the existing prohibition on new permits in impaired waters, recognized by the Ninth Circuit in *Pinto Creek*. While the ruling in *Pinto Creek* is only binding on states in the Ninth Circuit, it holds great precedential value for other states. The court’s rulings were based on the plain language of EPA’s own regulations, and other courts would likely reach the same verdict. In addition, the prohibition on new permit issuance likely applies to both individual and general NPDES permits.

Applied to the Chesapeake Bay, the prohibitions in section 122.4 mean that the EPA and states are already prohibited from issuing permits to new dischargers or new sources if those dischargers or sources would cause or contribute to a violation of water quality standards. If the Bay-wide TMDL, individual tributary TMDLs, and the watershed implementation plans fulfill the two conditions, then the EPA and states could still issue permits as long as they do not cause a violation of water quality standards. According to EPA expectations, the watershed implementation plans must include reductions from all point and nonpoint sources that cause water pollution. This existing federal regulation already mandates protections from increased pollution discharges into the Bay and its waters, and the EPA should recognize this prohibition as an existing tool to protect the Bay.

Pinto Creek may also undermine EPA’s imposition of consequences “if the jurisdiction has not demonstrated how the increased discharged loads will be offset through other source reductions.” The plain language of section 122.4 does not provide any exceptions for offsets. The court in *Pinto Creek* stated,

[T]here is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water.

It is questionable whether or not EPA has the authority to permit new discharges even if the discharged loads will be offset through other source reductions. EPA should clarify the basis of this asserted authority.

Withdrawal of Permitting Authority

In the 202a Report, the consequences section also fails to include EPA’s authority in CWA section 402(c) to withdraw a state’s delegated authority to administer the National Pollution Discharge Elimination System permitting program. The exercise of this authority is an effective political and legal tool to motivate states to administer their permit issuance, enforcement, and compliance with greater vigor.

In the Chesapeake Bay, the EPA could use this authority strategically. All Bay states have delegated NPDES permitting authority. As a threat or consequence to encourage Bay states to enforce and achieve federal standards in the Bay-wide TMDL, EPA could initiate withdrawals of delegated enforcement authority. EPA could impose this consequence immediately with existing legal authorization. More importantly, it is effective as a political tool in shining a spotlight of unwanted attention on a state’s failure to meet commitments to restore the Bay and in motivating a state to examine its permitting processes to determine adequacy.

We suggest that the EPA list as a consequence for a state’s failure to fully implement watershed implementation plans and NPDES permits derived from the Bay-wide TMDL, individual tributary segment TMDLs, and the WIPs the authority to withdraw a state’s delegated NPDES permitting authority. For example, Bay states that fail to issue the required permits for concentrated animal feeding operations or that repeatedly issue permits that fail to comply with the Bay-wide TMDL would be subject to having their authority withdrawn. While a severe and drastic consequence, the health of the Chesapeake Bay has suffered for far too long to warrant anything less.

Issue 4. The 202a Report fails to address the need and requirement for independent oversight to track restoration progress and to report on restoration obstacles.

Section 206 of the Executive Order requires periodic reports by an independent evaluator to the Federal Leadership Committee on the progress toward meeting the goals of the Order. Neither the draft 203 Strategy nor any of the 202 Reports elaborate on the role, duties, or functions of independent evaluator. The final Strategy and the final 202a Report should detail the functions of the independent evaluator, a key institution for accountability in the Bay restoration process. We suggest that:

- The final 202a Report and the final 203 Strategy identify or establish the office of the independent evaluator to monitor Bay restoration until at least 2025; and
- The EPA charge the independent evaluator with the explicit duty of providing a macroscopic, overarching evaluation of progress in Bay restoration.

Independent oversight is essential to ensuring Bay restoration. While the two-year milestones for both states and federal agencies are a crucial and new component of the entire accountability mechanism in the Bay, they still lack the necessary, holistic review of Bay restoration progress. They also fail, particularly at the federal level, to provide a final review of restoration actions. Federal agencies are taking an unprecedented leadership role in Bay restoration, but ensuring that role amounts to progress would be one of the duties assigned to the independent evaluator.

In the 202a Report, the EPA details its expectations for federal accountability, committing federal agencies to join the Bay jurisdictions in developing and implementing two-year milestones for necessary rulemakings and other key actions for reducing pollution to the Bay. The draft 203 Strategy further notes that the Federal Leadership Committee expects to establish a fully independent evaluation process that covers all aspects of the Executive Order requirements. Details of this process will be included in the final Draft Strategy, which will be published in May 2010.

The draft 203 Strategy identifies the National Academy of Sciences as the Bay Program's selected independent evaluator. It notes that the Bay Program has established a contract with the National Academy of Sciences to provide "a fully independent review of the water quality aspects of the Bay program." The review will be completed no later than April 2011. The Bay Program has charged the NAS with evaluating tracking and accountability efforts and the use of milestones, including whether current tracking and accounting efforts work and how they could be improved and whether milestones include strategies to meet pollution reduction goals in the Bay.

While the NAS is a highly respected institution, its operational structure is not sufficiently dynamic, nimble, or long-term to effectively ensure real progress and accountability. The work of an NAS panel is defined exclusively by the agency or entity it works for; the research and investigation of an NAS panel is limited to parameters set by that agency or entity. This initial project scope is commendable, but it is limited and subject to the Bay Program leadership. In addition, the NAS review for the Chesapeake Bay is only a one-time review. Because measures to ensure that the Bay-wide TMDL is met may not be fully implemented until 2025, an independent evaluator is needed throughout the Bay restoration process. Using the NAS as a one-time evaluator is problematic. An independent evaluator should be completely independent of the Bay Program rather than constrained from the outset by the Bay Program.

The overall mission of the independent evaluator should be to provide an overarching perspective on the Bay restoration progress, considering the collective actions or inactions of the state and federal jurisdictional partners. The independent evaluator should assess the most pressing pollution problems facing the Bay, to spotlight the responsibility of all jurisdictional partners for taking actions to solve the problems, and to recommend solutions that address the

identified problems, make adjustments in Bay jurisdictions' actions, adopt additional incentives, and recommend necessary consequences.

The EPA should include the following as mandatory duties of the independent evaluator:

- To investigate and explore institutional barriers to achieving Bay restoration;
- To develop and implement an accessible “accountability metric” that identifies who is responsible for a particular action, what that action involves, when the action will be completed, why the action is important to Bay restoration, and if not completed why not;
- To conduct or supervise audits and evaluations of existing and prospective state and federal programs to restore the Bay;
- To evaluate state and federal levels of permitting, compliance, and enforcement;
- To identify and recommend policies, legislation, and regulations to improve Bay restoration programs; and
- To keep Congress, the EPA, the Executive Council, the Federal Leadership Committee, and the public fully informed and abreast of the progress and problems related to jurisdictional partners meeting milestones, overall Bay restoration goals, and corrective actions needed to ensure Bay restoration.

Conclusion

The Chesapeake Bay Program has the potential to become a national model for interstate and intergovernmental watershed restoration. However, for the millions of people who live and work in the Bay watershed, the ultimate marker of success will be actual restoration with measurable and quantifiable results. Thank you for the opportunity to provide these comments, and we are happy to meet with you to discuss them in further detail.

Sincerely,



Yee Huang, J.D., L.L.M.
Policy Analyst
Center for Progressive Reform

yhuang@progressivereform.org
202.747.0698, ext. 6