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Chesapeake Bay TMDL Myths & Making WIPs Matter

American Farm Bureau Federation v. U.S. Environmental Protection Agency

Introduction:

Since the inception of the Clean Chesapeake Coalition (the “Coalition”) in 2012 we have been following the case of *American Farm Bureau Federation* (“AFB”) v. *U.S. Environmental Protection Agency* (“EPA”), 984 F. Supp.2d 289 (D.C. Pa. 2013), aff’d, 792 F.3d 281 (3rd Cir. 2015) challenging the 2010 Chesapeake Bay TMDL (“2010 TMDL”). In November 2015, AFB filed a Petition for Writ of Certiorari in the U.S. Supreme Court seeking a review of the decision of the Third Circuit Court of Appeals (a federal appellate court) upholding the 2010 TMDL.

The Coalition is not a party to the case. The Coalition is not at odds with the position taken by the AFB with respect to EPA’s overreaching in its promulgation of the 2010 TMDL – particularly to the extent EPA or any State agency tries to characterize the 2010 TMDL as a mandatory blueprint for achieving water quality improvement in the Bay watershed.

The *AFB v. EPA* cases decided by the Pennsylvania federal district court and the Third Circuit Court of Appeals provide a good overview of the TMDL process under the federal Clean Water Act (“CWA”)¹. An understanding of the cases and the TMDL process helps to appreciate the significance of the 2017 recalibration of the 2010 TMDL and the roles of the State and local governments in the Bay TMDL construct.

Overview of TMDL process – a process of “cooperative federalism”:²

The purpose of the CWA is to restore the water quality in tidal and navigable waterways by reducing the pollution loading to such waterways.³

¹ 33 U.S.C. §§1251-1387.

² 792 F.3d at 288, 302; *New York v. U.S.*, 505 U.S. 144, 168 (1992). The Third Circuit characterized cooperative federalism under the CWA as a combined **partnership** between EPA and the states animated by the shared objective of restoring and maintaining the chemical, physical and biological integrity of waterways. 792 F.3d at 298-99.

³ 792 F.3d at 288; 33 U.S.C. § 1251(a) & (g) (The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”)

Point source discharges (e.g., local government waste water treatment plants (WWTPs) and industrial/commercial businesses that discharge wastewater to navigable waterways through a pipe, ditch, channel or conduit (point source)) are regulated through the issuance of **National Pollution Discharge Elimination System (NPDES) permits**.⁴ A NPDES permit sets effluent limitations, which are the maximum amounts of specified pollutants allowed in the wastewater discharged by a permittee. A permittee is responsible for pretreating wastewater prior to discharge so the pollutants in the wastewater do not exceed the effluent limitations established by the NPDES permit.⁵ The amount of pollution NPDES permit holders may collectively discharge to a waterway is referred to as a **waste load allocation**.⁶ EPA has primary responsibility for establishing minimum effluent discharge limits on point-source dischargers.⁷ Effluent limits must be technology based.⁸ Regulation of point source discharges is the first method to be implemented to try to improve impaired waterways.⁹ A state, with EPA approval, may adopt more stringent effluent discharge limitations than EPA has adopted.

Nonpoint source discharges (e.g., stormwater that runs into waterways from diffuse sources such as agricultural fields) are regulated by the state, with EPA backstop approval of a state's program.¹⁰ EPA has not established discharge levels for pollutants in stormwater. The CWA leaves to each state the responsibility of establishing nonpoint source pollution requirements.¹¹ The amount of nonpoint source pollutants that a state decides to allow to enter an impaired waterway in stormwater is referred to as a **load allocation**.¹²

A state is responsible for identifying its **impaired waterways**.¹³ When regulation of point source discharges through the NPDES permit program fails to sufficiently improve an impaired waterway, then the state may list that waterway for further regulation of nonpoint source discharges pursuant to regulations established by the state.¹⁴ The list of such impaired

⁴ 33 U.S.C. §§ 1311(a), 1342(f) & (k). A “point source” is “a discernable, confined and discrete conveyance” and includes “any pipe, ditch, channel, tunnel or conduit.” *Id.* § 1362(14). 984 F.Supp.2d at 313.

⁵ 792 F.3d at 289.

⁶ *Id.* at 290.

⁷ *Id.* at 289, 299; 984 F.Supp.2d at 314; 33 U.S.C. § 1342(a)(1).

⁸ 33 U.S.C. §§ 1311(b)(1)(A)-(B), 1342(a)(3) & (b)(1)(A). *See, American Paper Inst. v. E.P.A.*, 882 F.2d 287, 288 (7th Cir. 1989).

⁹ 792 F.3d at 289.

¹⁰ *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (A nonpoint source discharge is all “pollution that does not result from the discharge or addition of pollutants from a point source.”).

¹¹ 792 F.3d at 289, 299; 984 F.Supp.2d at 314; 33 U.S.C. § 1329. *See Defenders of Wildlife v. E.P.A.*, 415 F.3d 1121, 1124 (10th Cir. 2005) (The CWA does not authorize EPA to regulate nonpoint source discharges); *Sierra Club v. Meilburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (The CWA does not authorize EPA to regulate nonpoint source discharges).

¹² *Id.* at 290.

¹³ 33 U.S.C. § 1313(d)(1)(A) (More specifically, each state must identify those waters for which the technology based limits in NPDES permits are not stringent enough to implement any water quality standard applicable to such waters.)

¹⁴ *Id.* at 289; 984 F.Supp.2d at 297. 33 U.S.C. § 1313(d) requires a state to submit a list to EPA of waterways for which point source effluent limitations/technology-based point source controls are insufficient to meet the applicable water quality standard – such waterways being referred to in the EPA regulations as “water quality limited segments.” 40 C.F.R. § 131.3(h).



waterways is often referred to as the “**303(d) list**” and such waterways are referred to in the CWA regulations as “**water quality limited segments**” (“WQLS”).¹⁵

If regulation of point-source discharges through NPDES permits fails to sufficiently improve the water quality of an impaired waterway, then the CWA calls for the state to develop a **TMDL**, which EPA then will either approve or disapprove (EPA has backstop authority, not primary authority to develop a TMDL).¹⁶ It is the state that is responsible for establishing TMDLs, *i.e.*, the maximum level of pollutants that may be discharged into an impaired waterway on a daily basis. The TMDLs for such impaired waterway are the levels at which, if daily discharges do not exceed such limits, the condition of the waterway should improve over time. Stated alternatively, the TMDLs are the maximum level of waste load allocations and load allocations that can be discharged into a waterway on a daily basis and still achieve improvement of the water quality of that waterway over time.¹⁷

EPA can influence state implementation of nonpoint source discharge requirements/limitations only by providing grant money for state nonpoint source pollution management programs.¹⁸ The CWA does not give EPA any express enforcement tools for compelling state implementation of TMDLs.¹⁹ “EPA’s implementation authority is limited to its authority over NPDES permitting for point sources and providing or withholding grant money to encourage implementation for non-point sources.”²⁰

Each state where impaired waterways are not improved solely through point-source controls (*i.e.*, NPDES permits), must have a continuing planning process for the reduction of load allocations to such impaired waterways.²¹

Lessons of Value from the AFB Cases:

Both the federal trial court and the federal appeals court recognized that states have traditional and primary power over land and water use.²² Land use law is an area typically within a state’s police power.²³ As the federal trial court stated, “It is logical for states to retain control over implementation of non-point pollution regulation because non-point pollution

¹⁵ *Id.* (“303(d) is a reference to the uncodified section of the CWA that authorizes a state to make such list” – 33 U.S.C. § 1313(d)).

¹⁶ *Id.* at 289-90, 300; 984 F.Supp.2d at 297. *See* 33 U.S.C § 1313. EPA’s regulations define “total maximum daily load” as the sum of “waste load allocations” and “load allocations.” 40 C.F.R. § 130.2(i).

¹⁷ 984 F.Supp.2d at 297; 40 C.F.R. § 130.2.

¹⁸ *Id.* at 314; 33 U.S.C. §§ 1311(b)(1)(C), 1342(d)(2).

¹⁹ *Id.* at 314 (“After reviewing Section 303(e) [*i.e.*, 33 U.S.C. § 1313(e)], the court agrees that EPA is not authorized to establish or otherwise take over TMDL implementation plans.”)

²⁰ *Id.* at 315. (Any enforcement tools beyond the use of federal grants probably would violate the 10th Amendment.)

²¹ 792 F.3d at 303; 984 F.Supp.2d at 313; 33 U.S.C. § 1313(e)(1) & (3).

²² 984 F.Supp.2d at 316. *Accord*, 792 F.3d at 301 (citing *Rapanos v. United States*, 547 U.S. 715, 757-58 (2006)).

²³ 792 F.3d at 301, 304; 984 F.Supp.2d at 316.



control measures often involve local land use and zoning decisions, activities which are generally within the well-protected province of state and local government.”²⁴

Even though logically, as the federal trial court observed, and as the federal regulations prescribe²⁵, Maryland should have developed TMDLs for its impaired waters, it did not. Instead, Maryland, in conjunction with the other states in the Bay watershed states, abdicated their right to develop a TMDL and ceded that right to EPA Region III.²⁶ Maryland ceded this right to EPA on October 1, 2007 when members of the agricultural, environmental and natural resources departments of each Bay watershed state agreed to allow EPA to promulgate a Bay TMDL with a target date of 2025 when all necessary pollution control measures would be implemented.²⁷ In January 2009, the Chesapeake Bay Foundation (“CBF”) sued EPA for failure to fulfill its duties under the CWA.²⁸ In May 2010 EPA settled the suit by agreeing to establish a nutrient and sediment TMDL for the Bay and its tidal tributaries by December 31, 2010.²⁹ EPA promulgated the 2010 Bay TMDL to fulfil its commitments under its settlement agreement with CBF.³⁰

A TMDL, through both statute and regulation, does not prescribe any particular means of pollution reduction for any particular point or nonpoint source.³¹ Any pollution limits and allocations contained in a TMDL constitute no more than an informational tool to aid a state’s effort to reduce water pollution.³² Stated another way:

TMDLs are not self-implementing, but rather are informational tools utilized by EPA and the states to **coordinate** necessary **responses** to excessive pollution in order to meet applicable water quality standards.³³

The CWA demands cooperative federalism, which requires significant levels of **communication and coordination** between EPA and state agencies.³⁴

EPA has no power to enforce a state to implement a TMDL; EPA can only influence a state to implement TMDLs through grant funding provided for CWA programs.³⁵ “EPA may not, for example, dictate to a state what measures the state must undertake to reduce pollution

²⁴ 984 F.Supp.2d at 315.

²⁵ 40 CFR § 130.7.

²⁶ 792 F.3d at 289.

²⁷ 984 F.Supp.2d at 302.

²⁸ *Id.* at 306.

²⁹ *Id.* at 306.

³⁰ *Id.* at 306-07.

³¹ 792 F.3d at 303.

³² *Id.* at 303.

³³ 984 F.Supp.2d at 297 (citing *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) & *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 216 (D.D.C. 2011).

³⁴ 984 F.Supp.2d at 295.

³⁵ *Id.* at 314 (“After reviewing Section 303(e) [*i.e.*, 33 U.S.C. § 1313(e)], the court agrees that EPA is not authorized to establish or otherwise take over TMDL implementation plans.); 33 U.S.C. §§ 1311(b)(1)(C), 1342(d).



from a particular source.”³⁶ “EPA’s implementation authority is limited to its authority over NPDES permitting for point sources, and providing or withholding grant money to encourage implementation of nonpoint sources.”³⁷

The federal appeals court found:

[T]he [2010] TMDL nowhere prescribes any particular means of pollution reduction to an individual point source or nonpoint source. Instead, it contains pollution limits and allocations to be used as an **informational tool** used in connection with a state’s efforts to regulate water pollution. This conclusion is confirmed by the [CWA; the CWA] requires states to have a continual planning process, which must include (but is not limited to) total maximum daily load[s].³⁸

The federal trial court found that neither the backstop measures inserted by EPA into the 2010 TMDL nor the waste load allocations and load allocations that EPA placed in the 2010 TMDL are binding on the states.³⁹ The federal trial court went further stating:

The mere practice of setting a standard [in the 2010 TMDL] upon which the proposed [load] allocations are judged is not, by itself, implementation. **The standard does not require the states to undertake any particular implementation effort.** Rather, the court finds that the ‘reasonable assurance’ standard was an attempt by EPA to clarify the basis upon which the proposed allocations are judged. Moreover, as stated above, Section 303(d) requires a TMDL be ‘established at a level necessary to implement the applicable water quality standards’ 33 U.S.C. § 1313(d)(1). EPA’s reasonable assurances requirement appears to be consistent with this provision.

It bears repeating that **a TMDL is an information document, not an implementation plan.** However, TMDLs provide crucial information for federal, state and local actors in furtherance of the cooperative efforts to improve water quality as envisioned by the CWA. Here, where the target water body is drained by a multi-state watershed, cooperation and **coordination** are all the more crucial to achieving the statutory goal of achieving water quality standards.⁴⁰

³⁶ *Id.* at 314.

³⁷ *Id.* at 315 and fn. 13 (citing *Pronsolino v. Nastro*, 291 F.3d 1123, 1127 (9th Cir. 2002)).

³⁸ 792 F.3d at 303 (citing 33 U.S.C §1313(e)(1) & (3)) (internal quotations omitted).

³⁹ 984 F.Supp.2d at 325.

⁴⁰ (Emphasis added.) *Id.* at 326.



The federal trial court went further in discussing why the load allocations in the TMDL are not binding.⁴¹ The court again observed that EPA has no ability to enforce a state to implement a TMDL, stating:

‘States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans [*i.e.*, TMDLs] or providing for their enforcement.’ In other words, nothing requires states to uncritically and mechanically implement each and every TMDL allocation. Rather, states are free to choose whether or not they decide to do so, subject only to the risk of losing federal grant money.⁴²

It is worth noting here that EPA’s Interim Evaluation of 2014-2015 TMDL Milestone Progress in the Chesapeake Bay Watershed (issued in June 2015)⁴³ confirms that the Commonwealth of Pennsylvania lags behind all the other Bay states in terms of progress towards achieving the 2010 TMDL targets and WIP milestone commitments:

Oversight Status (May 2015)

	Agriculture:	Urban/Suburban:	Wastewater:	Trading/Offsets:
DE	Ongoing Oversight	Ongoing Oversight	Enhanced Oversight	Ongoing Oversight
DC	Not Applicable	Ongoing Oversight	Ongoing Oversight	Ongoing Oversight
MD	Ongoing Oversight	Ongoing Oversight	Ongoing Oversight	Ongoing Oversight
NY	Ongoing Oversight	Ongoing Oversight	Enhanced Oversight	Ongoing Oversight
PA	Backstop Actions Level	Backstop Actions Level	Ongoing Oversight	Enhanced Oversight
VA	Ongoing Oversight	Enhanced Oversight	Ongoing Oversight	Ongoing Oversight
WV	Enhanced Oversight	Ongoing Oversight	Ongoing Oversight	Ongoing Oversight

Green fading to yellow indicates potential downgrade at end of 2014-2015 milestone period if specific actions are not taken

⁴¹ *Id.* at 327-329.

⁴² *Id.* at 328-29 (citing *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (11th Cir. 2002)).

⁴³ See <http://www2.epa.gov/chesapeake-bay-tmdl/epa-oversight-watershed-implementation-plans-wips-and-milestones-chesapeake-bay>.



Application of the lessons of value from the AFM cases:

1. Focus efforts to inform the General Assembly and the Administration.

As the AFB cases make abundantly clear, the 2010 TMDL does not require Maryland, or any local government within Maryland, to undertake or to implement any of the TMDLs discussed in the document. The document is nothing more than an informational document. The 2010 TMDL is a plan. Not only is the plan nonbinding, the CWA contemplates that the plan is fluid and is expected to be modified and revised.

Indeed, the Chesapeake Bay Foundation concedes this about the Bay TMDL in its brief filed with the U.S. Supreme Court in opposition to AFB's Petition for Certiorari:

“...[the TMDL] is largely the product of the State's own decisions about how to allocate the burden of cleaning up the Bay among each other and, within each State, among various sources of pollution. The TMDL itself is primarily an informational document; its implementation remains up to the States...the TMDL is not self-enforcing; if States fail to achieve their pollution limits, EPA's only recourse is to exercise powers it already has under other CWA provisions...”⁴⁴

This acknowledgement does not square with the intense lobbying efforts for certain State mandates that were enacted based on the premise that they are required by EPA and the TMDL, including the septic bill mandating tiered zoning, the BAT septic regulations, the stormwater management fee (“rain tax”) legislation and the phosphorus management tool regulations. As the AFB cases make abundantly clear, the 2010 Bay TMDL does not mandate any such legislative or regulatory actions.⁴⁵

Given the favorable pronouncements and findings contained in the AFB cases, the Coalition is undertaking a concerted effort to educate the delegates and senators that represent the Coalition counties and the members of the Maryland General Assembly at large, and to open minds in the Governor's office to the false narrative that has been repeatedly asserted; that is, that the TMDL mandates any specific state or local action.

Look carefully at who is promulgating the false narrative. It is the members of the State executive agencies that could lose a piece of their funding if they do not convince the Maryland General Assembly to require legislatively or through regulation that which neither EPA nor those agencies can require. It is the Chesapeake Bay Program (“CBP”) and its partners, *i.e.*, the federal agencies, the state agencies and the non-governmental organizations such as the

⁴⁴ See Chesapeake Bay Foundation Brief in Opposition at 3. (<http://www.cbf.org/document.doc?id=2428>)

⁴⁵ Likewise, the federal TMDL regulations do not include any federal requirements associated with “Accounting for Growth” yet this is an approach highly considered by Maryland regulators.



Chesapeake Bay Foundation, the “riverkeepers” and tributary associations, the Environmental Defense Fund, etc., which rely on federal funding for their agency/organization budgets. If such agencies/organizations cannot convince the Maryland General Assembly to require local governments to tax their local citizens more to pay for TMDL “mandated” projects, query how much federal funding would be applied to implement tangible water quality improvement projects, instead of funding such agency/organization budgets.

2. Inventory and address stormwater point source discharges and discourage the development of future stormwater point source discharges that ultimately could be (or will be) subject to regulation by EPA or MDE.

Local governments generally have two types of point source discharges:

- a. WWTP discharges; and
- b. Impervious surface stormwater discharges (*e.g.*, stormwater collected in street gutters and discharged through pipes, ditches, conduits and channels into local waterways).

In Maryland, counties and municipalities are responsible for funding the construction and operation of WWTPs. EPA can reject the issuance of an NPDES permit issued by MDE within 90 days after MDE issues the permit and impose more stringent effluent discharge limitations, to the extent that a technology exists that could feasibly be implemented to reduce the pollutants in such discharges. Any WWTP that has improved the treatment capabilities of its WWTP to meet the enhanced nutrient removal (“ENR”) standards required by MDE under WWTP NPDES renewal permits cannot have more stringent effluent requirements for nitrogen, phosphorus and total suspended sediments than MDE has already placed in those permits because the membrane filter systems that have to be installed to achieve ENR standards of treatment are the best (and most expensive) technology commercially available to treat sewage. Under the technology based standards on which NPDES permit effluent requirements must be predicated, EPA could not legally impose effluent limitations that are more stringent than those already imposed by MDE.

Furthermore, no other Bay watershed state or the District of Columbia imposes close to as stringent effluent discharge limitations for nitrogen, phosphorus and total suspended sediments as those already imposed by MDE. EPA could be successfully challenged for acting in an arbitrary and capricious manner if it attempted to impose effluent limitations as stringent as those imposed by MDE. Additionally, EPA has delegated its NPDES permitting programs to the states and District of Columbia because it does not have the budget or the manpower to operate such programs and could not operate such programs for the amount that EPA gives to MDE for the operation MDE’s NPDES program.



EPA and MDE have started regulating stormwater collected in curb and gutter systems that remove stormwater from streets through the municipal separate storm sewer system (“MS4”) permitting program. This program regulates stormwater under the NPDES program as a point source discharge. Any stormwater that is collected in a pipe, channel, ditch or similar conduit that conveys such stormwater to a waterway could be subject to an MS4 NPDES permit because such conveyances meet the statutory definition of a point source discharge under the CWA. We have recommended that Coalition counties, to the maximum extent practicable, eliminate such stormwater discharges and develop plans and requirements that preclude such stormwater collection in future public works projects or private development projects that will be conveyed to the County. Stormwater that is collected in pipes, channels and conduits should be diffused over land whenever possible, not conveyed by a pipe, channel or conduit to a waterway, so such stormwater will not be subject to regulation under the NPDES program.

The stormwater management environmental site design to the maximum extent practicable (“ESD to the MEP”) standards that the State, through MDE, now mandates may not be appropriate. To the extent that they are not or are otherwise problematic to a jurisdiction’s cultural, economic and/or social environments, that jurisdiction should use its WIP to raise and document such objections and concerns.

3. WIPs should be compatible with local land use plans and include the Bay clean up agenda that is harmonious with the human environment that the local government wants to promote.

The courts have stressed that the federal, state and local agencies responsible for improving water quality must coordinate their efforts. In various presentations, the Coalition has discussed the regulations promulgated by the Counsel of Environmental Quality in order to implement the National Environmental Policy Act. The coordination process requires equal deference to all components of the human environment, *i.e.*, the aesthetic, cultural, economic, natural or ecological and the social. Coordination makes all parties equal participants. The federal and state agencies cannot dictate to the local agencies; they have to give deference to local policies to the maximum extent practicable.

Coalition counties have been encouraged to prepare/retool their WIPs. MDE already has directed all county WIPs to be updated in anticipation of the 2017 recalibration of the 2010 TMDL. Local governments will not be entitled to coordination if they have not developed their own local policies for improving the water quality of impaired waters in and around their jurisdiction. A county does not have to structure its WIP in accordance with any MDE or EPA guidelines, including but not limited to the adoption of “ESD to the MEP” in the same manner as the State has set forth in its manuals. In its WIP, a county does not have to defer to the State’s tiered land use mapping process or give deference to what EPA or MDE designate as best management practices. The State’s mandate that each county prepare a WIP is an opportunity for the county to meet with businesses, local farm bureaus, local waterman groups, local real estate and homebuilder groups, and municipalities within the jurisdiction and to fashion a plan(s) that will accommodate the needs of all components of your human environment.



Below are just a few examples of alternative approaches that could be included in a local WIP in furtherance of improving water quality and meeting TMDL goals:

a. Some farmers and riparian property owners are concerned about maintaining a forested riparian buffer around waterways on their property. There is bank erosion from falling trees and limbs. The leaves and limbs wash into the waterways and dam up at congestion points causing bank erosion during storms. There is concern that leaves that wash into basins and anaerobically decay release sulfides/sulfuric acid that is toxic to aquatic flora and fauna. The farmers cannot move and turn their farm equipment on forested buffers and lose too much tillable/usable land by maintaining such buffers. The buffers serve as habitat for wild animals that damage farm crops and farm fields and eat landscape plantings around residences. We support programs that develop riparian and drainage ditch/channel buffers of switch grass, American water willow, or similar indigenous plants. They have deep root systems that will absorb nutrients from the groundwater. They can be cut and harvested. Farmers can operate equipment over them during the planting and harvesting seasons. They form a thick mat that captures eroding soil and plant debris before it reaches local waterways. They do not contribute significant quantities of plant debris to local waterways and they shore up banks to retard erosion with their dense root mats.

b. Many of the property owners in the county that have septic systems on their property do not have the financial ability to replace those septic systems with the new septic systems being pushed by MDE. (Have discussion of how little of a problem/threat septic systems are that are located outside of a critical area – or due to predominant soils in your county, etc. – *see* facts developed by the Coalition for handouts.) Discuss alternatives to the expensive BAT system that the State has mandated for addressing failing septic systems, *e.g.*, switch grass in drain fields, etc. Conclude with the measures you support for addressing failing septic systems.

c. Oysters are nature's best filter of the Bay. Have a discussion about moving historic natural oyster beds out of the Department of Natural Resources sanctuary programs, developing a rotational harvest program and supporting natural oyster bed cultivation through power dredging, shell replenishment and seeded shell relocation.

In short, the local WIP is a roadmap of programs, policies and practices that should improve water quality while also supporting all the components of the human environment. Discuss the need for federal and State funding and support of local policies and programs. Request that funds currently being given to non-governmental organizations be redirected to the county and municipalities within the county for use in implementing the WIPs (fewer brochures and glossy report cards and more tangible projects). Discuss the financial burdens on local taxpayers and the undesirableness of increasing local tax burdens to fund WIP programs, your policy against such taxation, and how such taxation will negatively impact your economic, cultural and social environments. Observe that the states neighboring your counties, which also



are in the Bay watershed, do not have, require or fund programs such as the State of Maryland has mandated for septic systems, WWTPs, and ESD to the MEP stormwater management. Discuss how the county has lost businesses and residents that are critical to maintaining your human environment to such neighboring jurisdictions. Discuss how essential businesses have been closed due to such requirements, how cultural institutions, *e.g.*, churches, are threatened by such requirements, etc.

Each Coalition county has resources that have been devoted to addressing watershed and water quality improvement. The Coalition counties are encouraged to share ideas and use the opportunity in developing local WIPs to impose their will into the process and to stake out a position that could be used to evoke coordination in order to avoid ill-conceived State and federal mandates that are sure to materialize as the ill-conceived programs from the last 30 years continue to fail to generate any meaningful improvement to the water quality of the Bay and its tributaries. Local WIPs are a tool to document what we know should be undertaken to make meaningful and measurable improvement to water quality and to document past failures, *e.g.*, the failure to take any action to reduce the devastating impact of sediment scour from the stormwater management ponds in the lower Susquehanna River.

Simply put, local government plans matter. MDE's directive to submit county WIPs is viewed as a golden opportunity to become an essential party entitled to equal deference in the "cooperative federalism" process that is the foundation of the TMDL planning process.

Along these lines, below is an excerpt from the Coalition's written comments submitted to the Governor's Regulatory Reform Commission in November 2015:

State and County WIPs

You may read or hear that the Septics Bill and the BAT septic regulations were necessary in order to comply with the State's WIP or that EPA and the Bay TMDL required Maryland to so regulate individual septic systems. Both defenses of septic regulation in Maryland are misleading and an affront to serious Bay cleanup efforts. Maryland's WIP, with a price tag of more than \$14 billion, is a product of the prior Administration and was not subject to the review and/or approval of the General Assembly. Maryland is the only Bay watershed state to require its county governments to prepare and fund local WIPs to address Bay TMDL goals. In doing so, the State prescribed certain measures and dictated local WIP focus on four main pollution "source" sectors: septics; stormwater; agriculture and wastewater treatment plants.

The WIP mandates were imposed with little regard to the economic costs or efficacy in overall Bay water quality improvement. When considered in combination with the other federal and State Bay cleanup requirements, the WIP costs are excessive (*e.g.*, \$3.7 billion related just to septics) and with marginal measurable benefits (*e.g.*, failing septics account for a miniscule fraction of nitrogen loading Bay wide and zero



sediment loading). The State WIP should be revisited and reprioritized in order to measurably improve Bay water quality in the most prudent and fiscally responsible manner possible, and without doing harm to local economies. It is shallow justification to say we must regulate septic systems the way we are doing so because we have a WIP that says we must do so. In the spirit of “adaptive management” (as we are always learning more about the Bay’s challenges) State and local plans are not chiseled in stone and WIPs are no different. Just as the prior Administration dictated the focus of local WIPs to fit their Bay cleanup “blueprint” narrative, the Hogan-Rutherford Administration can and should reprioritize the programs, policies and practices advanced by the State WIP in terms of cost-effectiveness, measurable water quality improvement and common sense. Here, for example, are Bay restoration activities that the Coalition counties believe will result in meaningful and lasting improvements to the water quality of the Bay in the most cost effective manner; with “cost-effective” meaning the public cost of the activity in relation to the amount of nutrients and/or sediments that will be removed, minimized or prevented from polluting the Bay and its tributaries:

- a. Dredge or otherwise address the 86+ years of sediments and nutrients accumulated in the reservoir above the Conowingo Dam and in other dam reservoirs in the lower Susquehanna River in order to regain trapping capacity and mitigate the scouring that flushes enormous amounts of pollution into the Bay during storm events.
- b. Restore natural oyster bars and propagate oysters; specifically Bay-wide oyster cultivation (dredging, shell replenishment, seeded shell relocation and rotational harvests) for the ecological benefits and positive economic impact, and as a best management practice to meet Bay TMDL goals.
- c. Devote public resources to agricultural BMPs recommended and proven by farmers to reduce nutrient runoff; and give credit to farmers for their voluntary efforts and expenditures to improve water quality.
- d. Invest in WWTP and sewer collection system upgrades for modernization and flood/overflow protection, before additional expenditures for ENR upgrades (raw sewerage discharges are under-reported and not accounted for in the Bay TMDL).
- e. Test and develop alternative BMPs for failing septic systems in the Critical Area and in the Coastal Plain geology.

Public attention, resources and accountability should be prioritized accordingly; and recognition must be made at the State level that a one-size-fits-all approach to urban/suburban stormwater retrofits and septic systems is cost-inefficient and doubtful of meaningful water quality improvement.

The State and local WIPs can and should be retooled in similar fashion.

