



## Response to Farm Bureau and National Home Builders' Claims Concerning the Pollution-Reduction Target for the Bay

The Farm Bureaus and the National Association of Home Builders allege that the science-based pollution-reduction target for the Bay, legally known as a Total Maximum Daily Load or TMDL, should be set aside because:

- (1) EPA does not have the authority under the Clean Water Act to develop a TMDL in the first instance;
- (2) EPA's pollution-load and waste-load allocations are based on erroneous information;
- (3) EPA's erroneous information was used in poorly designed computer models; and
- (4) EPA failed to provide the public with information necessary to comment effectively on the TMDL.

Why these allegations should fail:

### **False Claim:**

*EPA does not have the authority under the CWA to develop a TMDL.*

Numerous federal courts have ruled that a state's failure to develop a timely TMDL for an impaired body of water obligates EPA to generate a TMDL.

In the late 1990s, two federal courts ruled that such a condition occurred in the Bay watershed. *American Canoe v. EPA* (D.Va.) and *Kingman Park Civic Association v. EPA* (D. D.C.). These suits were resolved by consent decrees that required EPA to develop pollution-reduction targets for these jurisdictions if they failed to develop their own. The American Canoe decree required a TMDL for the Virginia portion of the Bay by May of 2011. Related suits were settled in a similar fashion in federal courts in Pennsylvania and Delaware, and a memorandum of understanding was signed between Maryland and EPA to address Maryland waters. In 2007, the Chesapeake Executive Council announced that the Chesapeake Bay Program (CBP) would not meet its water-quality goals by 2010. Thus, EPA was legally obligated to develop a TMDL for the Chesapeake Bay.

In 2000, Congress amended the CWA to improve the section of the Act addressing the Chesapeake Bay. That amendment required EPA, in conjunction with the Bay jurisdictions, to attain the goals of the Chesapeake Bay 2000 agreement. One of those goals was to reduce pollution to the Bay so that it would be removed from the CWA impaired waters list by 2010. When that

May 11, 2012

goal was not met, EPA was bound to develop a science-based pollution-reduction target for the Chesapeake Bay watershed.

Additionally, in June 2008, a committee of the CBP, which included representatives from each of the Bay jurisdictions, requested that EPA develop a science-based pollution-reduction target for the Chesapeake effective no later than December 31, 2010. Specifically, then Virginia Secretary of Natural Resources Preston Bryant, acting on behalf of then-Governor Tim Kaine, the Chairman of the Executive Council, wrote EPA asking the agency to undertake that task.

### **False Claim:**

*EPA's pollution-load and waste-load allocations are based on erroneous information.*

The development of a TMDL requires the assignment of pollutant loads for point sources (waste-load allocations) and for nonpoint sources (load allocations) plus a margin of safety "which takes into account any lack of knowledge concerning the relationship between pollution limitations and water quality." [40 C.F.R. § 130.7(c)(1)] The Farm Bureaus allege that EPA used erroneous information concerning, for example, the amount of cropland in the Bay watershed. This information allegedly led to the generation of an improper load allocation for the agricultural sector. Assuming that the Farm Bureaus' allegation is correct, which it is not, these kinds of errors are accounted for by the requirement that the final allocation include a margin of safety. EPA also has a good factual basis to dispute some of the alleged errors in the information used to generate the pollution-reduction target.

Moreover, the court must accord EPA deference in how it developed the pollution limits as it is the best equipped to evaluate conflicting information (*Chevron v. NRDC*). The alleged "errors" in information asserted by the Farm Bureaus are not of sufficient magnitude to permit the court to find EPA's decision to be arbitrary or capricious.

### **False Claim:**

*EPA's erroneous information was used in poorly designed computer models.*

EPA used a series of computer models to determine what reductions in pollution were necessary to meet water-quality stan-

dards in the Bay. These models were developed over decades after numerous technical meetings and rigorous peer review. (It is noteworthy that the Farm Bureaus were not involved in this effort until very late in the development of the models.) Several prominent scientists, such as Donald Boesch, Professor of Marine Science and President of the University of Maryland Center for Environmental Science (UMCES) of the University of Maryland, have stated that it is the best modeling effort ever performed for the development of a multi-pollutant, multi-jurisdictional TMDL. While some have agreed that there are concerns with certain aspects of the model, and EPA is working to meet these concerns, none of the flaws alleged by the Farm Bureaus undermine the final allocations. As discussed above, any concerns about the accuracy of the model are captured in the requirement for a “margin of safety.” Over the years of refinement, the modeled loads have not changed significantly and are not expected to change in great degree after this spring’s adjustments. If model revisions suggest changes in the allocated loads, those will be made. Further, given EPA’s extensive expertise in this area, its decision to accept the modeled allocations is entitled to deference.

**False Claim:**

*EPA failed to provide the public with information necessary to comment effectively on the TMDL.*

Prior to finalizing the TMDL, EPA spent months traveling throughout the watershed putting on public meetings designed to explain what a TMDL is and how the Bay pollution-reduction targets were being developed—including the models used to derive the allocations ([www.epa.gov/reg3wapd/tmdl/Chesapeake-Bay/CalendarOfEvents\\_2009.html?tab1=2&tab4=0](http://www.epa.gov/reg3wapd/tmdl/Chesapeake-Bay/CalendarOfEvents_2009.html?tab1=2&tab4=0)). These meetings and the public comment period provided the Farm Bureaus with sufficient opportunity and time to consider and comment upon the Bay TMDL. Their argument to the contrary is belied by their voluminous written comments submitted to EPA.

In addition, a TMDL is not a regulation; it provides a number for the amount of a pollutant that may be discharged within a body of water. As such, there is no specific timeline for public notice and comment. That said, federal regulation does provide that “[c]alculations to establish TMDLs shall be subject to public review as defined in the State CPP.” [40 C.F.R. § 130.7(c)(1)(ii)] The phrase “State CPP” refers to each state’s Continuing Planning Process documents. These are plans developed by the respective states to govern how they will develop TMDLs for their waters and meet applicable water-quality standards. [CWA Section 303(e)] None of the Bay-state CPPs set a time line for when pollution-target calculations are to be reviewed by the public that is greater than the 45 days EPA provided. 🐦

