Mon May 18 13:10:49 EDT 2020
"Hope, Brian" <Hope.Brian@epa.gov>
FW: Notice of Intent to Sue
To: "CMS.OEX" <cms.oex@epa.gov>

From: Amanda Van Houten <AVanHouten@cbf.org>
Sent: Monday, May 18, 2020 12:35 PM
Subject: FW: Notice of Intent to Sue

Good afternoon,

Attached is the revised Notice of Intent to Sue for failure to comply with the Clean Water Act and the 2014 Chesapeake Bay Agreement. The revision is adding David Ross, Assistant Administrator for Water, U.S. EPA to receive a copy of this Notice.

Thank you,

Amanda J. Van Houten,

Paralegal/Executive Assistant to Jon Mueller
Chesapeake Bay Foundation

6 Herndon Avenue,

Annapolis, MD 21403
443.482.2062

AVanHouten@cbf.org

cbf.org

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Saving a National Treasure

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May 18, 2020

By Certified Mail

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Notice of Intent to Sue for Failure to Comply With the Clean Water Act and the 2014 Chesapeake Bay Agreement

Dear Sirs:

Pursuant to Clean Water Act Section 505, 33 U.S.C § 1365, the following organizations, the Chesapeake Bay Foundation, Inc., Maryland Watermen's Association, and their respective members, along with, Robert Whitescarver and Jeanne Hoffman, and Anne Arundel County, Maryland hereby inform you of their intent to file suit against the United States sixty (60) days after the date of this letter if a satisfactory response to the claims discussed below is not provided. As discussed more fully below, we base our claims on the failure of the Administrator of the United States Environmental Protection Agency (EPA) to comply with the terms of the Clean Water Act, the Administrative Procedure Act, and the 2014 Chesapeake Bay Agreement. These failures jeopardize the success of the Chesapeake Bay Total Maximum Daily Load ("Bay TMDL") and prevent the attainment of state water quality standards in the Chesapeake Bay (Bay) resulting in the loss of blue crabs, fish, oysters, and underwater grasses. These natural resources fuel the economic engine of the Chesapeake Bay which is of significant importance to the region and the nation.

Specifically, the United States has failed to ensure that the Bay jurisdictions will meet their pollution reduction commitments by 2025. These failures have occurred despite repeated acknowledgements by the United States of its responsibility to the public and the environment throughout the TMDL development and implementation process, in the TMDL document and related correspondence, as well as before federal courts.

PHILIP MERRILL ENVIRONMENTAL CENTER
6 HERNDON AVENUE | ANNAPOLIS, MD 21403 | 410-268-8816 | CBF.ORG

The failure of the Administrator to comply with federal law and the interstate agreement designed to achieve and maintain essential water quality goals for the Bay will lead to the failure of the Bay jurisdictions and EPA to meet their water quality commitments by 2025 and leave the Bay impaired. With less than five years until the deadline, it is time for the Administrator to honor his commitment to the citizens of the United States.

THE SIGNATORIES TO THIS NOTICE LETTER

Organizations

The Chesapeake Bay Foundation, Inc. (CBF) is a regional, nonprofit, nonpartisan, public-interest advocacy organization with members throughout the nation. CBF was created in 1967 under the laws of the state of Maryland. CBF maintains regional offices in Annapolis, Maryland; Richmond, Virginia; Virginia Beach, Virginia; Harrisburg, Pennsylvania; and Washington, D.C.

CBF is the only independent organization dedicated solely to restoring and protecting the Bay and its tributary rivers. Its goal is to improve water quality by reducing pollution including nitrogen and phosphorous. CBF's vision for the future: a restored Bay with healthy rivers and clean water; sustainable populations of crabs, fish, and oysters; thriving water-based and agricultural economies; and a legacy of success for our children and grandchildren.

CBF has approximately 300,000 total members and during calendar year 2019, CBF had 4,810 active adult and student volunteers. Approximately 6,000 members reside in the District of Columbia, 109,100 in Maryland, 47,000 in Pennsylvania, and over 91,400 members reside in Virginia. The majority of CBF's remaining members living in the other Bay jurisdictions reside in the states of Delaware, New York, and West Virginia.

CBF operates fifteen (15) educational programs that conduct student leadership projects, in-the-field educational experiences, and other activities in and around the Chesapeake Bay. CBF operates several marine vessels in the Chesapeake Bay and its tributaries. During the last fiscal year, CBF spent approximately $4.3 million on these educational programs.

CBF also conducts numerous advocacy and restoration programs within the watershed designed to improve water quality in the Bay and its tributaries such as working with farmers to reduce runoff from agriculture, planting buffers along rivers and streams as well as growing oysters and underwater grasses for planting. This past fiscal year, CBF spent approximately $3.1 million on these programs in the Bay region.

Both CBF and its members are adversely affected by poor water quality in the Chesapeake Bay and its tidal tributaries. Thus, they are harmed by the failure of the Administrator to comply with the Clean Water Act, the Administrative Procedure Act, and the Chesapeake Bay Agreements.

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Since 1973, the Maryland Watermen's Association (MWA) has served the interests of watermen and the seafood industry throughout the state of Maryland. MWA works with state and federal regulators, environmental groups and business associations to ensure the economic future of independent watermen and seafood businesses throughout the state. Members of the MWA include working Maryland watermen who derive their living directly from the Chesapeake Bay and its tributaries. Polluted water flowing down the Susquehanna River adversely affects their jobs and economic viability. MWA and its members count on EPA and states to comply with their respective obligations under state and federal law as well as the Chesapeake Bay Agreement and the Bay TMDL.

Local Government

Anne Arundel County, Maryland, is a charter county in central Maryland that sits on the shores of the Chesapeake Bay. Anne Arundel County's 588 square miles of land includes over 500 miles of shoreline on the Chesapeake Bay and its tributaries. Its 580,000 residents and countless tourists are drawn to Anne Arundel County to enjoy the Bay, fresh seafood, and numerous water-based recreational opportunities. Travel and tourism spending in the County is estimated at over $3.5 billion annually, providing support for over 30,000 workers.

Anne Arundel County has invested more than $0.5 billion over the last decade to protect this vital natural, economic and cultural resource. The County's Watershed Protection and Restoration Program, established in 2016 and funded largely through a stormwater restoration fee charged to property owners, has invested $284 million to restore 13 stream channels, retrofit 85 stormwater ponds and repair 16 damaged stormwater outfalls. Since 2010, the County's Department of Public Works has invested $258 million to upgrade wastewater treatment plants to achieve enhanced nutrient removal, significantly lowering the amount of nitrogen and phosphorus entering the Chesapeake Bay. Each of these actions and related expenses were taken and incurred as a result of Maryland's Watershed Implementation Plans which are required by the Chesapeake Bay TMDL.

Individuals

Robert Whitescarver and Jeanne Hoffman own and operate a farm in Swoope, Virginia. Over the last 15 years, they have raised and sold livestock to food processors. Mr. Whitescarver is a former Natural Resource Conservation Service representative who spent his career educating farmers on the benefits of protecting farmland and improving water quality in local streams and rivers. He also teaches a class on sustainable agriculture at James Madison University. Ms. Hoffman is a member of the CBF board of trustees and, like her husband, is an advocate for sustainably operated farms and restored water quality in the Chesapeake Bay. Ms. Hoffman and Mr. Whitescarver are strong supporters of the Chesapeake Bay Total Maximum Daily Load and recognize that local water quality is inextricably tied to water quality in the Chesapeake Bay. They have spent considerable time and effort fencing their livestock out of tributaries to the Middle River and the river itself which flows through their farm. They have also installed and continue to maintain streamside buffers by planting trees and vegetation. They also utilize sustainable grazing practices including rotational grazing and nutrient management. Their advocacy and sustainable farming efforts are harmed by EPA's failure to

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require all of the Bay jurisdictions to meet their respective commitments under the Bay TMDL and the Chesapeake Bay Agreement.

MWA, Robert Whitescarver, and Jeanne Hoffman are represented by counsel for CBF: Jon A. Mueller and Paul W. Smail, 6 Herndon Ave., Annapolis, MD 21403; telephone – (410) 268-8816. Anne Arundel County is represented by Gregory J. Swain, County Attorney, Anne Arundel County Office of Law, 2660 Riva Road, Annapolis, MD 21401; telephone – (410)222-7888.

THE CHESAPEAKE BAY IS A NATIONAL TREASURE

The Chesapeake Bay is the largest estuary in the United States. Its watershed covers 64,000 square miles from Cooperstown, New York, in the north to Virginia in the south and from West Virginia in the west to Delaware in the east.

Congress has recognized that the Chesapeake Bay is a "national treasure and resource of worldwide significance." Chesapeake Bay Restoration Act of 2000, Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967. Each of the Bay jurisdictions and EPA have repeatedly recognized the cultural, economic, historic and ecological significance of the Bay. *See,* 1987 Chesapeake Bay Agreement; Chesapeake 2000 Agreement; 2014 Chesapeake Bay Agreement. The restoration and preservation of the Chesapeake Bay is essential for a healthy and vibrant economy. The economic value of a restored Chesapeake Bay has been estimated at over $22 billion annually.[1]

The Chesapeake Bay region is home to approximately 18 million people many of whom rely on the Bay and its tributaries as not only a source of income but as a place to recreate and commune with nature – a priceless commodity. The ports of Baltimore and Norfolk provide thousands of jobs and generate millions of dollars in revenue. The town of Reedville, Virginia, on the Bay's western shore consistently records the second largest catch of fish in the nation. Moreover, some of our nation's most treasured historical places are located within close proximity of the Chesapeake Bay and its tributaries – Antietam (Potomac River), Cooperstown (Susquehanna), Jamestown and Williamsburg (James River), Yorktown (York River), and Washington, D.C. (Potomac and Anacostia Rivers).

EPA has recognized that the value of the Chesapeake Bay is immeasurable. Thus, EPA has both a statutory and a moral obligation to ensure that and its virtues should not remain sullied by the federal government's failure to act.

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[1] In Maryland, for example, economists have measured recreational boating activity at some $2 billion a year. In Pennsylvania, the estimate is $4.7 billion a year for fishing activities across the whole state, resulting in 43,000 jobs outfitting, lodging and guiding anglers. "[T]he total economic benefit of the Chesapeake [Bay TMDL] is estimated at $22.5 billion per year (in 2013 dollars), as measured as the improvement over current conditions, or at $28.2 billion per year (in 2013 dollars), as measured as the difference between the [Chesapeake Bay TMDL] … and a business-as-usual scenario." Phillips, S. & McGee, B., "The Economic Benefits of Cleaning Up the Chesapeake", Oct. 6, 2014.

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THE CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD

On December 29, 2010, EPA established the Chesapeake Bay Total Maximum Daily Load with "rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region's streams, creeks and rivers." https://www.epa.gov/chesapeake-bay-tmdl, Executive Summary at i. See 76 Fed.Reg. 549 (Jan. 5, 2011). There, EPA stated:

> the TMDL will be implemented using an accountability framework that includes WIPs [Watershed Implementation Plans], two-year milestones, EPA's tracking and assessment of restoration progress and, as necessary, *specific federal contingency actions if the jurisdictions do not meet their commitments*. This accountability framework is being established in part to provide demonstration of the reasonable assurance provisions of the Chesapeake Bay TMDL pursuant to both the Clean Water Act (CWA) and the Chesapeake Bay Executive Order, but is not part of the TMDL itself.
>
> ...
>
> *If a jurisdiction's plans are inadequate or its progress is insufficient, EPA is committed to take the appropriate contingency actions to ensure pollution reductions.* These include expanding coverage of NPDES permits to sources that are currently unregulated, increasing oversight of state-issued NPDES permits, requiring additional pollution reductions from point sources such as wastewater treatment plants, increasing federal enforcement and compliance in the watershed, prohibiting new or expanded pollution discharges, redirecting EPA grants, and revising water quality standards to better protect local and downstream waters.

Id. at vii-viii (emphasis added).

EPA identified the WIPs as the "cornerstone" of the Bay TMDL accountability framework. Achieving basin-jurisdiction pollution allocations and meeting "EPA's expectations for providing reasonable assurance that reductions will be achieved and maintained" are the "two most important criteria for a WIP." *Id.* at viii.

EPA found the Bay jurisdiction's Phase I WIPs failed to provide reasonable assurance that pollution controls identified could meet pollution reduction targets by 2017 (the midpoint assessment) or 2025 (the deadline for compliance). *Id.* Thus, EPA took "backstop allocations" in all seven jurisdictions "where EPA has federal authority to control pollution allocations through NPDES permits ...." *Id.* In the final TMDL, EPA took specific backstop actions in New York's Wastewater, Pennsylvania's Urban Stormwater, and West Virginia Agriculture sectors along with "enhanced oversite and contingencies". *Id* at ix – xi.

While EPA believed the jurisdictions could meet their respective commitments, it was "prepared to take necessary actions in all jurisdictions for insufficient WIP implementation or pollution reductions." *Id.* at xii EPA, as it had done in earlier correspondence and meetings with

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the Bay jurisdictions, identified eight different actions it could take. *Id.* *See also*, Letter from Shawn Garvin to Preston Bryant, Chair of Principals' Staff Committee of the Chesapeake Executive Council, December 29, 2009; Letter from William Early to Preston Bryant, November 4, 2009.

In the Final TMDL, EPA made clear that Phase III WIPs were to be designed to provide additional detail of restoration actions beyond the 2017 Phase II WIPs "and to ensure that the 2025 goals are met." *Id.* The Bay TMDL specifically explained the Accountability Framework and "EPA actions designed to provide additional assurance that the Bay TMDL's allocations are achieved." *Id.* at 7-1. *See also*, Letter from Donald Welsh to John Griffin, September 11, 2008 (accountability framework established to implement reasonable assurance provisions of the Bay TMDL and pursuant to CWA Section 117(g)). EPA repeated its intention "to take additional federal actions, as determined to be appropriate to ensure implementation of the Bay TMDL, …." *Id.* at 7-2. *See also, Id.* at 7-11 – 7-12.

The Accountability Framework exists apart from the TMDL itself with a critical element being "EPA's commitment to take appropriate federal actions if the jurisdictions fail to develop sufficient WIPs, effectively implement their WIPs, or fulfill their 2-year milestones." *Id.* at 7-3. EPA specifically identified its expectations for each successive WIP: identify the controls needed to achieve allocations; identify the capacity to achieve the controls including funding, identify the gaps in current programs that must be filled, a commitment to work systematically to fill the gaps; a commitment to continued monitoring to asses effectiveness of implementation actions and; agreement that if a jurisdiction does "not meet the commitments, additional measures might be necessary." Id. at 7-5. As explained below, despite this commitment and these expectations, EPA has accepted Phase III WIPs, most notably Pennsylvania's and New York's, that do not provide reasonable assurance that the 2025 commitments will be met. Thus, EPA has failed to comply with the agreed upon Accountability Framework.

CLAIMS

EPA Accepted Phase III WIPs That Do Not Provide Reasonable Assurance of TMDL Compliance

EPA provided each jurisdiction with expectations for the Phase III WIPs.[2] EPA recognized that some jurisdictions may need to do more under their Phase III WIPs because they did not meet the 2017 pollutant load reductions under the Phase II WIPs.[3] EPA expected the Phase III WIPs to include "programmatic and numeric implementation commitments between 2018 and 2025 needed to achieve their Phase III WIP" pollution reduction targets."[4] EPA explicitly addressed what it expected from Pennsylvania in the Phase III WIP.

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[2] EPA, U.S. Environmental Protection Agency's Expectations for the Phase III Watershed Implementation Plans (June 20, 2018).
[3] *Id.* at 1.
[4] *Id.*

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As of 2018, Pennsylvania should have reduced its nitrogen load to the Bay by 28 million pounds, but only achieved a reduction of 14 million pounds. In order to meet its Bay TMDL nitrogen reduction commitment, EPA noted that Pennsylvania must reduce its loadings by 35 million pounds between 2018 and 2025.[5] EPA specifically found that Pennsylvania had not sufficiently addressed best management practice (BMP) implementation in both agriculture and urban stormwater sectors and had failed to ensure farms are implementing nutrient management plans.[6] EPA expressly stated that it expected Pennsylvania to include the technical details on BMP implementation and stakeholder engagement to show it will meet its Phase III WIP targets.[7] Additionally, EPA expected Pennsylvania to commit to programmatic, policy, legislative, and regulatory changes needed to implement the WIP and meet the Bay TMDL requirements, as well as commit to the level of staff, partnerships, and financial resources needed to implement its WIP.[8] These elements have consistently been identified by EPA as necessary to reasonably assure that TMDL allocations will be met.

Due to the deficiencies in Pennsylvania's WIP implementation as of 2018, EPA stated it would "enhance oversight" over Pennsylvania's WIP efforts, including requiring the Commonwealth to report on progress every six months and directing that any federal funds should be implemented in priority watersheds.[9] EPA also expressed that in its role to provide accountability it "will assess all potential and appropriate federal actions under its discretionary authority under the CWA as described in the EPA letter to the partnership Principals; Staff Committee in December 2009 and in the 2010 Chesapeake Bay TMDL Section 7.2.4."[10]

In April 2019, Pennsylvania published its draft Phase III WIP for public review and comment. CBF filed comments on the draft WIP, noting that Pennsylvania would fall short of its nitrogen reduction targets by approximately 34%, and the programs and measures to meet even these commitments were underfunded by $257 million dollars.[11]

On June 20, 2019, EPA published its evaluation of the draft Phase III WIP. EPA noted that under the Phase 6 modeling, the Phase III WIP only achieves 64% of the nitrogen reduction targets, and 76% of the phosphorus reduction targets.[12] The evaluation offered "potential enhancements" for Pennsylvania to include in its final Phase III WIP, which included providing additional information on how the Commonwealth would achieve BMP implementation for the agriculture sector, modifying regulations, and expressly including how non-regulated stormwater reductions would be achieved.

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[5] *Id.* at 14.
[6] *Id.*
[7] *Id.* at 15.
[8] *Id.* at 16.
[9] *Id.* at 17.
[10] *Id.*
[11] Letter from Harry Campbell, CBF Pennsylvania Executive Director, to Pennsylvania Department of Environmental Protection (June 7, 2019).
[12] EPA, Evaluation of Pennsylvania's Draft Phase III Watershed Implementation Plan 2 (June 21, 2019).

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Pennsylvania then issued its final Phase III Watershed Implementation Plan in August 2019.[13] Pennsylvania did not rectify the nutrient shortfall or the funding gap. Under the final Phase III WIP, the Commonwealth would only achieve roughly 73% of its 31-million-pound nitrogen reduction commitment, and the implementation plan would be underfunded by nearly $324 million dollars a year. Thus, EPA's and the Bay Partnership's requirements for Pennsylvania's Phase III WIP were not met.

On December 19, 2019, EPA issued its final evaluations of the Phase III WIPs.[14] EPA found that Pennsylvania's Phase III WIP would meet only 75% of the nutrient reduction requirements for nitrogen. EPA also found that the WIP would be underfunded, thus, there was no assurance Pennsylvania would meet even the 75% reduction. Instead of requiring Pennsylvania to amend the Phase III WIP, EPA only suggested that Pennsylvania "develop numeric 2020-2021 milestones that are based on implementing programs and practices to meet 100% of the planning target for nitrogen by 2025."[15] EPA provided "Recommended Enhancements" for the WIP, but suggested that Pennsylvania develop and incorporate the recommendations in the 2020-2021 Milestones, not through changes to the Phase III WIP itself.[16] There is no assurance that Pennsylvania will identify sufficient programs to meet its nitrogen commitment by 2025 or sufficient funding to undertake that work.

EPA also reviewed New York's draft Phase III WIP. In June 2019, EPA noted that New York's plan would only meet 61% of the state's nitrogen commitment by 2025. The shortfall was primarily from the agricultural and stormwater sectors.[17] EPA also noted that the WIP was unclear about where all necessary funding would be derived. New York revised its WIP; however, the final Phase III WIP did not resolve these shortcomings. In fact, EPA's final evaluation noted that the state's nitrogen shortfall exceeded 1 million pounds of nitrogen annually and failed to adequately identify funding sources for meeting agricultural or stormwater commitments.[18]

EPA did not utilize any of its enforcement tools in the Phase III WIP evaluation to ensure that either Pennsylvania or New York would meet their respective 2025 pollution reduction commitments. EPA's evaluation represents the end of the WIP development process under the Chesapeake Bay TMDL. By failing to undertake any significant backstop actions or "consequences" relative to Pennsylvania's and New York's facial deficient Phase III WIPs, EPA

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[13] Department of Environmental Protection, Pennsylvania Phase 3 Chesapeake Bay Watershed Implementation Plan (Aug. 2019). Pg. 6, 11, 85, 148-49 (funding).
[14] EPA, Evaluation of Pennsylvania's Phase III Watershed Implementation Plan (WIP), https://www.epa.gov/sites/production/files/2019-12/documents/pa.pdf (Dec. 19, 2019) ("WIP Evaluation"). For example, a state can designate a body of water for recreational swimming or fishing and certain pollution levels must be attained to achieve that standard.
[15] *Id.*
[16] *Id.* at 5-7.
[17] https://www.epa.gov/sites/production/files/2019-06/documents/epa_evaluation_newyork_draft_phase_iii_wip.pdf
[18] https://www.epa.gov/sites/production/files/2019-12/documents/ny.pdf

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has violated the Clean Water Act and acted arbitrarily and capriciously with respect to its obligations under the Bay TMDL Accountability Framework.

Clean Water Act Section 117(g)

The Clean Water Act contains a specific provision directing EPA to address pollution in the Chesapeake Bay in order to meet water quality standards. Section 117(g) requires EPA, in coordination with the Bay watershed jurisdictions, to "ensure that management plans are developed and implementation is begun [by those jurisdictions] to achieve and maintain…the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed; …[and] the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem…" among other things. The Chesapeake Bay Agreement is the "formal, voluntary agreement executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystems and the living resources of the Chesapeake Bay ecosystem signed by the Chesapeake Executive Council."[19] Each of the four Bay Agreements and related amendments have been signed by EPA on behalf of the United States. Thus, EPA is statutorily obligated to take actions necessary to ensure states achieve the goals of the Agreement.

The 2014 Chesapeake Bay Watershed Agreement is the most recent iteration of the Chesapeake Bay Agreement. Notably, the Agreement states a water quality goal: "2025 WIP Outcome → By 2025, have all practices and controls installed to achieve the Bay's dissolved oxygen, water clarity/submerged aquatic vegetation and chlorophyll a standards as articulated in the Chesapeake Bay TMDL document." Hence, the Agreement incorporated the Bay TMDL commitments for nitrogen, phosphorus, and sediment reduction. Thus, through Section 117(g), EPA was obligated to ensure that Bay jurisdictions achieve the TMDL goals.

The WIPs play a critical role in meeting the requirements of Section 117(g). As the EPA stated in its November 2009 letter establishing the expectation for WIPs:

> The WIPs are a key element of this new era of ecosystem restoration, greater transparency and accountability, and improved performance. The Plans, developed by each of six watershed States and the District of Columbia *pursuant to Section 117(g) of the CWA*, will provide a roadmap for how the States and the District, in partnership with federal and local governments, will achieve and maintain the Bay TMDL nitrogen, phosphorus, and sediment allocations necessary to meet the States' and the District's Bay water quality standards.[20]

Accordingly, the WIPs constitute the management plans the Bay jurisdictions must develop under section 117(g) of the Clean Water Act.[21] Therefore, the WIPs must be designed to achieve

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[19] 33 U.S.C. § 1267(a)(2).

[20] Letter from the EPA to the Principal Staff Committee, Enclosure B: Expectations for Watershed Implementation Plans 13 (Nov 4, 2009) (herein after "EPA WIP Expectations Letter").

[21] EPA WIP Expectation Letter, at 13 ("The Watershed Implement Plans are consistent with the management plans contemplated by Section 117(g) of the Clean Water Act").

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and maintain the nutrient reduction commitments for nitrogen, phosphorus, and sediment to meet the Bay TMDL pollution allocations.

The Bay jurisdictions have a duty to develop WIPs that will achieve nutrient reductions, and EPA has a duty to ensure such a plan is developed and implemented on time. Pennsylvania's and New York's Phase III WIPs will not achieve the necessary nitrogen reductions in order to achieve water quality standards for the Bay and, without adequate funding, the WIPs will not be fully implemented to achieve the reductions they are currently designed to achieve. EPA's acceptance of such WIPs, violates Section 117(g) of the Clean Water Act and is illegal.

Adoption of inadequate Phase III WIPs also violates the concept of "reasonable assurance" as articulated by the Third Circuit in the *American Farm Bureau Federation v. United States EPA*. In order to comply with the CWA and the APA, EPA cannot "blindly accept" a state's submission, but instead must exercise "reasoned judgment" in determining whether the WIP would actually implement the applicable water quality standards for the receiving water.[22]

Section 117(g) imposes on EPA the mandatory duty to ensure states develop and implement management plans to achieve and maintain goals of Chesapeake Bay Agreement. The current Bay Agreement incorporates the water quality allocations of the Bay TMDL. The legislative history of section 117(g) makes clear that Congress intended EPA to "achieve the goals established in the Chesapeake Bay Agreement"—not just develop plans and begin implementation.[23] Thus, EPA has a duty to ensure states' implement plans achieve and maintain Chesapeake Bay Agreement goals. This duty of the Administrator is non-discretionary and is subject to enforcement via the citizen suit provision of the CWA.

Administrative Procedure Act

The Administrative Procedure Act (APA) requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[24] The APA standard of review requires a "thorough, probing, in-depth review."[25] Agency decisions must be "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[26] A decision is arbitrary and capricious under the APA "if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[27]

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[22] *Am. Farm Bureau Fed'n*, 792 F.3d at 301.
[23] The Senate just recently passed legislation assigning new funding to the Bay Program under section 117.
[24] 5 U.S.C. § 706(2)(A).
[25] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).
[26] *Id.* at 416.
[27] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

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Here, EPA abused its discretion in accepting Pennsylvania's and New York's facially deficient final Phase III WIPs and ignoring EPA's own framework for WIP development and the requirements of the TMDL Accountability Framework. EPA's decision to accept a WIP that does not achieve the required nutrient reductions, and cannot fully be implemented because of inadequate funding, is arbitrary and capricious.[28] In approving the Phase III WIP, EPA failed to consider an important aspect of the problem and offered an explanation that runs completely counter to the evidence before it. EPA has a duty to ensure states develop plans that achieve the requirements of the TMDL. Instead, EPA accepted Pennsylvania's and New York's inadequate Plans, ignoring ample evidence from the states and commenters, as well as its own staff, that the Plans would not achieve the required nutrient reductions and water quality standards. As the Third Circuit held, "it would surely be arbitrary or capricious for the EPA to approve a plan that a state is incapable of following."[29] Neither Pennsylvania nor New York can follow a plan to meet their respective pollution reduction commitments without adequately identified sources of funding.

RELIEF

The signatories to this notice of intent letter ask the United States to take, among other things, the following actions:

1. Comply with the statutory requirements of Section 117 (g) of the Clean Water Act by:

    a. Requiring the Bay jurisdictions to complete and implement plans that will achieve and maintain the nutrient and sediment reduction goals of the 2014 Chesapeake Bay Agreement and the Bay TMDL;

    b. Developing legislative, regulatory, and funding mechanisms, s*ee* Executive Council Directive, No. 04-2, to ensure that the nutrient reduction plans not only achieve but maintain necessary reductions;

    c. Fully implementing the Bay TMDL by 2025;

    d. Requiring the states and federal agencies within the Chesapeake Bay watershed to implement plans to achieve and maintain the nutrient and sediment reduction goals of the 2014 Chesapeake Bay Agreement.

2. Comply with the water quality and living resource goals of the 2014 Chesapeake Bay Agreement by, among other things:

    a. Ensuring that all partners to the Agreement comply with its terms;

    b. Developing legislative, regulatory and funding mechanisms to insure that the nutrient reduction plans not only achieve but maintain necessary reductions.

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[28] *Am. Farm Bureau Fed'n,* 792 F.3d at 307.
[29] *Id.*

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3. Provide such other relief as is necessary and appropriate to achieve the water quality goals of the Clean Water Act and the Bay Agreements. For example: prevent backsliding on point source reductions via strong point source permits and enforcement; target agriculture conservation dollars by practice and geography; strictly regulate nitrogen oxide emissions from power plants including year round controls; reduce ammonia emissions from animal feeding operations; require pollution loads from new development be consistent with TMDLs; and adopt stringent loading limits, pollution prevention requirements, and TMDL linkage in all municipal separate storm sewer system permits.

CONCLUSION

Congress has recognized the Chesapeake Bay as a national treasure worthy of restoration and preservation. Congress empowered EPA to take a leadership role in cleaning up the Bay. EPA recognized its Congressional mandate by signing four Bay Agreements spanning over 30 years and issuing a Chesapeake Bay Total Maximum Daily Load. Progress has been made; however, without sufficiently robust and funded plans for achieving the commitments made in the Bay Agreement and the Bay TMDL the Chesapeake Bay will not be restored. Thus, EPA must take the actions identified in the Accountability Framework; actions Congress, the Bay jurisdictions, and the citizens of the United States asked EPA to take. Accordingly, we ask to meet with the Administrator or his designate to discuss this matter at his earliest convenience.

Sincerely,

Jon A. Mueller
Vice President of Litigation
Paul Smail
Director of Litigation
Brittany Wright, Esq.
Chesapeake Bay Foundation, Inc.
6 Herndon Ave.
Annapolis, MD 21403

Counsel for
Chesapeake Bay Foundation, Inc.
Maryland Watermen's Association
Jeanne Hoffman
Robert Whitescarver

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Gregory J. Swain
County Attorney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, MD 21401

Counsel for
Anne Arundel County, Maryland

Cc:
David Ross
Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Mail Code: 4101M
Washington, DC 20460

Dana Aunkst
Director of the Chesapeake Bay Program Office
U.S. Environmental Protection Agency
410 Severn Avenue, Suite 109
Annapolis, MD 21403

Cosmo Servidio, Regional Administrator
U.S. Environmental Protection Agency
Region III
1650 Arch Street (3PM52)
Philadelphia, PA 19103-2029

The Honorable Muriel Bowser
Mayor of the District of Columbia
Executive Office of the Mayor
1350 Pennsylvania Avenue, NW, Suite 316
Washington, DC 20004

The Honorable Larry Hogan
Governor of the State of Maryland
100 State Circle
Annapolis, MD 21401-1925

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The Honorable Tom Wolf
Governor of the Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, Pennsylvania 17120

The Honorable Ralph Northam
Governor of the Commonwealth of Virginia
Office of the Governor
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, Virginia 23219

The Honorable Gene Yaw
Chairman of the Chesapeake Bay Commission
60 West Street, Suite 406
Annapolis, MD 21401

William C. Baker
President
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, MD 21403

Lisa Feldt
Vice President of Environmental Protection and Restoration
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, MD 21403

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