Congress of the United States
Washington, DC 20510

January 10, 2020

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Wheeler:

We were deeply disturbed by reports that, at the January 3, 2020 meeting of the Chesapeake Bay Commission, EPA Chesapeake Bay Program Director Dana Aunkst reportedly said that the Bay Total Maximum Daily Load (TMDL) was "aspirational" and that the 2025 targets were "not enforceable." This is totally contrary to the intent of this decade-long effort and, if it is the position of the EPA, risks critical progress to restore the Chesapeake Bay.

On December 29, 2010, the U.S. Environmental Protection Agency established the Chesapeake Bay TMDL, a historic and comprehensive agreement that includes accountability features to restore clean water in the seven jurisdictions within the Chesapeake Bay watershed. The agreement is a national and indeed international model for watershed restoration. It sets limits for pollution that equate to a 25 percent reduction in nitrogen, 24 percent reduction in phosphorous, and 20 percent reduction in sediment.[1] As the Bay TMDL states, "The TMDL is designed to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025[.]"[2]

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] To that end, states are first required to set water quality standards for all waters within their boundaries regardless of the sources of pollution.[4] When those water quality standards cannot be met and maintained through effluent limitations and technology-based controls on point sources, water quality-based controls are required under Section 303(d) of the Act. States are required to identify waters within its boundaries that cannot achieve water quality standards based on effluent limitations, and then "shall establish for [impaired] waters [...] the total maximum daily load, for those pollutants

[1] Chesapeake Bay TMDL, Executive Summary, p. 1, December 29, 2010, https://www.epa.gov/sites/production/files/2014-12/documents/bay_tmdl_executive_summary_final_12.29.10_final_1.pdf
[2] *Id.*
[3] 33 U.S.C. § 1251(a).
[4] 33 U.S.C. § 1313(a)(3)(A).

which the Administrator identifies [...] as suitable for such calculation."[5] A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without violating water quality standards.[6] Such "load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge[.]"[7] Once the 303(d) list and any TMDLs are approved by the EPA, states must incorporate the list and TMDLs into its continuing planning process.[8]

The Courts have upheld the legality of the Bay TMDL. As the U.S. Court of Appeals for the Third Circuit has noted, the "Clean Water Act does not simply direct the publication of the TMDL; it is one step in a process with several layers, each placing primary responsibility for pollution controls in state hands with 'backstop authority' vested in the EPA."[9]

In addition to these requirements, Section 117(g) of the Act requires EPA to take certain actions regarding the implementation of the Chesapeake Bay Agreement and the Chesapeake Bay TMDL.[10] It states that the EPA Administrator, "in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to *achieve and maintain (A) the nutrient goals of the Chesapeake Bay Agreements for the quantity of nitrogen and phosphorous entering the Chesapeake Bay and its watershed*; (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem; [...] (D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for living wetlands, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; and (E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem." (emphasis added).[11]

The implementation of the Bay TMDL and the Bay jurisdiction's Watershed Implementation Plans are, therefore, part of EPA's legal obligation to achieve and maintain the nutrient goals of the Chesapeake Bay under the Clean Water Act.

Since the inception of the Chesapeake Bay TMDL – and through its Reasonable Assurance and Accountability Framework[12] – EPA has communicated its expectations for the Bay watershed states and the District of Columbia to develop Watershed Implementation Plans and two-year

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[5] 33 U.S.C. § 1313(d)(1)(C).

[6] *Id.* at 1313(d)(1)(C).

[7] *Id.*

[8] *Id.* at § 1313(e).

[9] *Am. Farm Bureau Fed'n v. United States EPA,* 792 F.3d 281, 289 (3rd Cir. 2015).

[10] In 2014, the Bay states signed the most recent iteration of the Chesapeake Bay Watershed Agreement, and included the goals and outcomes established for water quality in the Bay TMDL. One of the key goals of the Agreement is to "reduce pollutants to achieve the water quality necessary to support the aquatic living resources of the Bay and its tributaries and protect human health. *Chesapeake Bay Watershed Agreement*, p. 7, 2014, https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf

[11] *Emphasis added,* 33 U.S.C. § 1267(g).

[12] Chesapeake Bay TMDL, Section 7, December 29, 2010.

milestones and "demonstrate satisfactory progress toward achieving nutrient and sediment allocations established by EPA in the Chesapeake Bay TMDL."[13] In addition, the Agency laid out potential consequences the Bay jurisdictions would face if they failed to demonstrate progress on their obligations under the Bay TMDL,[14] noting that the "identification of possible federal actions is intended to strengthen our individual and collective resolve to make the difficult choices and decisions along the road to a restored Chesapeake Bay and watershed and fill in the gaps to aid States and the District to meet their commitments in order to ensure that the allocations in the TMDL are achieved."[15]

Time and again, EPA has demonstrated through its approach in establishing and implementing the Bay TMDL,[16] including its Reasonable Assurance and Accountability Framework, its view that the Bay jurisdictions are responsible for meeting the allocations in the Bay TMDL. Indeed, as recently as April of 2017, in laying out its expectations for Pennsylvania's Phase III Watershed Implementation Plan, EPA noted several examples of potential actions it could take specific to Pennsylvania if it determined that the state did not meet these expectations. Those consequences included: (1) Targeting federal enforcement and compliance assurance in the watershed; (2) Directing Chesapeake Bay funding to identified priorities; (3) Establishing finer scale wasteload and load allocations through a Pennsylvania state-specific proposed amendment to the Chesapeake Bay TMDL; (4) Requiring additional reductions of loading from point sources through a Pennsylvania state-specific proposed amendment to the Chesapeake Bay TMDL; and (5) Initiating a process to propose promulgating nitrogen and phosphorous numeric water quality standards for Pennsylvania applicable to streams and rivers in the Chesapeake Bay Watershed.[17]

EPA's defense of the Bay TMDL and its historic approach to the Bay jurisdiction's development of the Watershed Implementation Plans clearly indicates that it took its responsibilities under Sections 303d and 117(g) seriously and that it viewed achieving the allocations in the Bay TMDL as necessary to meet the requirements of the Clean Water Act. In your confirmation hearing before the Senate Environment and Public Works Committee, you stated that, "I am very much committed to the Chesapeake Bay and to the Chesapeake Bay Program."

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[13] Letter from Shawn M. Garvin, Regional Administrator, Region III, U.S. EPA, to the Honorable L. Preston Bryant, Secretary of Natural Resources, December 29, 2009, https://www.epa.gov/sites/production/files/2015-07/documents/bay_letter_1209.pdf

[14] *Chesapeake Bay TMDL*, Section 7, pp. 11 -12, December 29, 2010.

[15] *Id.* at p. 2.

[16] EPA successfully defended the Chesapeake Bay TMDL when it was challenged by the American Farm Bureau Federation, National Association of Homebuilders. The Third Circuit held that the EPA's approach in establishing the TMDL and its accountability framework were all within the agency's authority. *See Am. Farm Bureau Fed'n v. United States EPA,* 792 F.3d 281, 303-304 (3rd Cir. 2015).

[17] *EPA Expectations for Pennsylvania's Phase III Watershed Implementation Plan,* April 27, 2017, https://www.epa.gov/sites/production/files/2017-05/documents/final_pennsylvania_phase_iii_wip_expectations_4_27_17_508.pdf

Because the legislative, administrative, and judicial record on the Bay TMDL clearly conveys EPA's responsibility, we are extremely concerned by signals that EPA appears to be backing away from its statutory obligations and the Reasonable Assurance and Accountability Framework that it established to ensure the timely restoration of the Chesapeake Bay.

In addition to Mr. Aunkst's alarming comments last week, EPA has undertaken numerous regulatory rollbacks that will negatively impact the Bay. The Administration's proposed budgets have zeroed out or significantly reduced funding for the Chesapeake Bay Program, which Congress has had to restore. Moreover, EPA's recent response to Pennsylvania's Phase III Watershed Implementation Plan did not hold that state accountable despite the fact that EPA's prior evaluation noted that Pennsylvania is on track to meet only 75 percent of its nitrogen reduction targets and the Commonwealth itself identified a $324 million annual shortfall in their plan. EPA's evaluation fell short of providing meaningful requirements and steps for Pennsylvania to get back on track to meet their 2025 goals, and did not state whether backstop actions will be required and enforced.

These actions leave us very concerned that EPA is not fully committed to the restoration of the Bay. EPA is the key federal partner in this effort, and the Chesapeake Bay Program is the glue that keeps the partnership together. It's important that you take immediate steps to demonstrate EPA's commitment and accountability to the restoration of the Chesapeake Bay.

We request responses to the following questions within the next fourteen days:

1. Do Mr. Aunkst's comments that the TMDL is "aspirational" and "not enforceable" represent the Agency's position?
2. Do you agree that EPA has the authority to enforce the 2025 nutrient reductions assumed in the Bay TMDL?
3. Does EPA plan to fulfill its responsibilities under the Clean Water Act and use all tools available to hold jurisdictions accountable to meet the allocations agreed upon in the Bay TMDL by 2025?
4. Will EPA remain an active member of the partnership with the six states and Washington, DC by ensuring implementation of the Watershed Implementation Plans to achieve the nutrient reduction goals of the Chesapeake Bay Agreement?
5. What is your plan and timeline for enforcement, particularly for taking the backstop actions described in Section 7.2.4 of the Bay TMDL and other documents sent by EPA to the Chesapeake Bay states?

The Bay TMDL has made strong progress towards cleanup of this national treasure and economic engine in our region. We are at a critical moment, when all partners must step up their commitment to reach the 2025 goals. The EPA has a statutory obligation to be an enforcement backstop in this vital project, and we fully expect it to fulfill that role. We look forward to receiving your response by January 24, 2020.

Sincerely,

Chris Van Hollen
United States Senator

Benjamin L. Cardin
United States Senator

Tim Kaine
United States Senator

Mark R. Warner
United States Senator

Thomas R. Carper
United States Senator

Christopher A. Coons
United States Senator

John P. Sarbanes
Member of Congress

Steny H. Hoyer
Member of Congress

Robert C. "Bobby" Scott
Member of Congress

Donald S. Beyer, Jr.
Member of Congress

C.A. Dutch Ruppersberger
Member of Congress

Gerald E. Connolly
Member of Congress

Anthony G. Brown
Member of Congress

Elaine G. Luria
Member of Congress

Jennifer Wexton
Member of Congress

David Trone
Member of Congress

A. Donald McEachin
Member of Congress

Jamie Raskin
Member of Congress

Eleanor Holmes Norton
Member of Congress

Lisa Blunt Rochester
Member of Congress