



The Cost to Save the Bay: Proposed Chesapeake Bay TDML Rule

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Through its authority under the federal Clean Water Act, and in response to lawsuits against it by environmental groups, the Environmental Protection Agency (the "EPA") is taking strong steps to improve the water quality in the Chesapeake Bay. Public and private landowners are alarmed by the prospect of dramatic increases in regulatory requirements and associated development expenses. The EPA recently proposed the "Chesapeake Bay TMDL," which would establish stringent "pollution caps" limiting the amount of nitrogen, phosphorus and sediment that can be discharged into the Bay by the six states and the District of Columbia whose tributaries drain into it (Virginia, Maryland, Pennsylvania, West Virginia, New York, Delaware and the District of Columbia, known as the "Chesapeake Bay Watershed States"). These three pollutants -- nitrogen, phosphorus and sediment -- are commonly found in stormwater runoff, agricultural runoff and discharges from wastewater treatment plants. By capping discharges of these pollutants into the Bay and forcing the Watershed States to reduce discharges below the caps, EPA seeks to restore water quality and aquatic habitat throughout the Bay.

The pollution caps are created by establishing TMDLs, which stand for "Total Maximum Daily Loads," for each pollutant. A TMDL is the maximum amount of a pollutant that a water body can absorb and still meet higher water quality standards. TMDLs are frequently created to address pollution in local and state waterways. In this case, EPA is developing a regional TMDL specifically targeting the Chesapeake Bay and focusing on all sources of water pollution. Water pollution generally can be categorized as either "point source" (such as from a municipal waste water treatment plant) or "non-point source" (such as agricultural runoff, or rain washing across a paved parking lot).

As part of the TMDL process, EPA is requiring the Watershed States to develop an action plan that will enable each state, in partnership with local and federal governments, to achieve and maintain the nutrient and sediment reductions necessary to meet the TMDL over time. The Watershed States are in the process of developing these plans, known as "Watershed Implementation Plans" or "WIPs." If state actions fall short of stated goals in a WIP, EPA is prepared to implement stop-gap measures to ensure progress in achieving water quality goals. Such measures could include increases in federal enforcement and compliance, increases in

pollution reduction standards for point sources, and withholding, conditioning, or reallocating federal grant funds.

After EPA strongly criticized its draft Phase 1 WIP for not containing sufficient measures to reduce pollution, Virginia submitted its revised Phase 1 WIP to EPA on Nov. 29, 2010. In his cover memo that accompanied the revised plan, Virginia Secretary of Natural Resources Doug Domenech expressed concerns about the cost of implementing the plan, the EPA's reliance on computer modeling to measure progress, and the need for the plan to be "focused on flexibility and cost effectiveness."

EPA released the draft Chesapeake Bay TMDL in September 2010 and solicited public comment. It has stated its intention to release the final TMDL by Dec. 31, 2010. However, the program is scheduled to continue at least through 2025, when EPA expects all the Watershed States to achieve and maintain compliance with the TMDL caps. In the meantime, states will continue refining their WIPs with greater detail in subsequent phases, and EPA will assess the progress each state makes and impose additional requirements as necessary to achieve water quality improvement goals.

The requirements of the Virginia WIP and any EPA-imposed regulations will have a significant impact on the development community in Virginia due to the relationship between development and stormwater, a non-point source of the regulated pollutants. Both public and private development projects will face increased development costs, as the WIP will require the state to impose additional pollution controls beyond those already in effect to reduce the total discharge of each pollutant to the level of the TMDL. After these reductions have occurred, the program would prohibit any increases in discharges of the regulated pollutants, regardless of population growth or changes in land use over time. Thus, for additional development within the Bay watershed to be permitted, a developer or other landowner (including municipalities) would have to offset the resulting increases in discharges of nitrogen, phosphorus and sediment, and demonstrate that the project is "pollutant neutral." This will require landowners to spend more funds on stormwater management facilities, or to buy larger parcels of land to have sufficient areas for the new stormwater facilities, such as biofilters, dry swales, and ponds. Or, if the same size parcel is used, the additional stormwater facilities could take up land originally intended for parking spaces or buildings, further affecting the economics and likely viability of the project. These costs have an impact on private developers building neighborhoods, shopping centers, or research parks, as well as municipalities building schools and libraries and pursuing economic development projects.

The proposal would also affect the land use and development strategies that Virginia's local governments have established through their state-mandated Comprehensive Plans. Given that the stronger stormwater management regulations that likely would be required as part of Virginia's WIP will effectively require larger parcels to achieve the same level of density, it will be challenging for localities to concentrate development in "Urban Development Areas" where growth is focused and compact, in an effort to preserve green space and avoid sprawl.

Furthermore, the proposal contemplates that existing developments would have to retrofit stormwater controls where they are not currently in place, probably at considerable expense. Local

governments may have to implement significant infrastructure upgrades, which may have to be financed through increases in property taxes and utility fees.

Finally, local governments are concerned about the level of staff training and other resources they will require to implement the requirements of the Virginia WIP. Many are concerned that the program will operate as a long-term unfunded federal mandate if federal resources are not allocated to the states to implement the program. Landowners are concerned that local governments will pass on the costs of implementing the new regulations and programs to applicants, further increasing development costs.

In fine-tuning its Phase 1 WIP, Virginia is focused on these concerns, but, given the EPA's expectations for how effective the WIP must be in improving the Bay's water quality, and the reality that EPA can impose its own regulations if the Virginia WIP falls short of those expectations, the state faces a challenge in implementing a WIP that meets those expectations without crippling economic development and imposing significant burdens on localities throughout the state. In short, the Chesapeake Bay TMDL program will have a significant impact on private landowners, municipalities, and industrial facilities in the Watershed States, and all landowners should be prepared to address the new requirements for both future and existing developments.

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