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The “Chesapeake Clean Water and Ecosystem Restoration Act” (S. 1816 and H.R. 3852) Would Give EPA Sweeping New Authorities to Control Land Use

On October 20, 2009, Senator Cardin (D-MD) introduced, S. 1816, the “Chesapeake Clean Water and Ecosystem Restoration Act,” for himself and Senators Mikulski (D-MD), Carper (D-DE), and Kaufman (D-MD). On the same day, Representative Cummings (D-MD) introduced a companion bill in the House of Representatives, H.R. 3852, on behalf of himself and Representatives Connolly (D-VA), Van Hollen (D-MD), Sarbanes (D-MD), Moran (D-VA), Edwards (D-MD), Scott (D-VA), Hoyer (D-MD), Oberstar (D-MN), E.B. Johnson (D-TX), and Delegate Norton (D-DC). While the House bill includes a few technical changes and corrections, the major differences from the Senate bill are (1) the deletion of provisions related to menhaden and nutria, which would have triggered a referral of the bill to the House Committee on Natural Resources, and (2) more detail on the regulation of impervious surfaces. Major issues in the Senate and House bills are discussed below.

Major Legislative Issue

1. For the purpose of ensuring implementation of a Chesapeake Bay Total Maximum Daily Load (TMDL), the Cardin bill gives EPA the authority to promulgate **any regulations and issue any permit needed to control pollution to meet water quality goals, notwithstanding any other provision of the Clean Water Act**. In the Clean Water Act pollution is broadly defined to mean any man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water. Thus, this provision gives EPA the authority to regulate any activity that affects water quality, including the flow of water, any disturbance of land from development or farming, and any source of air deposition.
2. Similarly, States are given authority to issue permits under section 402 “for any **pollution** source the Chesapeake Bay State determines to be necessary.”
3. Although the bill grants EPA and States authority to issue permits to nonpoint sources, it does not establish any nonpoint provisions in section 402 explaining what kind of controls are intended, leaving open the interpretation that permits for nonpoint sources must include numeric limits instead of best management practices.
4. Both bills require regulation of development that increases impervious surfaces. The Senate bill leaves the details up to EPA, but requires offsets for unavoidable runoff. The House bill is requires municipal stormwater permits to include requirements that ensure that projects in the local jurisdiction that would develop land that is more than 1 acre in size must prevent 95 percent of the runoff, based on an average 24-hour storm event.

Summary of Major Provisions

The bills both strike and completely replace section 117 of the Clean Water Act. The major changes from current law are summarized below:

Findings:

- Finds that the largest land use and largest source of nitrogen, phosphorus, and sediment is agriculture.
- Finds that atmospheric deposition of nitrogen oxides and ammonia contributes 1/3 of nitrogen loadings to the Bay.
- Finds that suburban and urban stormwater runoff is the fastest growing land use and is the only major source of pollution in the watershed that is increasing.
- Finds that impervious cover increased by 250,000 acres between 1990 and 2000.
- Finds that 58% of the watershed is undeveloped and mostly forested, but that 100 acres of forest are lost to development each day.

Definitions -117(a)

- Adds new definitions, including a definition of Chesapeake Bay State, to make Delaware, New York, and West Virginia eligible for grants, even though they are not signatories to the Chesapeake Bay Agreement.
- House bill only: Defines “95th percentile precipitation event” as an event where the rainfall is greater than or equal to 95 percent of the average of all 24-hour storms in a year. This definition is included for the purpose of using municipal stormwater permits to impose runoff controls on development projects over 1 acre in size.
- Defines “Point-of-Regulation” as entity that is regulated under the Clean Water Act and that has the technical capacity and legal authority to meet its obligations under the Act. This definition is added to limit the entities that may participate in trading to entities that meet this definition.
- Defines “TMDL” as the total maximum daily load established or approved by EPA for nitrogen, phosphorus, and sediment loadings to the Chesapeake Bay and tributaries and allows TMDLs to be expressed as greater than daily loads for nitrogen, phosphorus, and sediments, as long as water quality standards are achieved.

Implementation and Monitoring Grants – 117(e)

- Broadens existing authority to provide implementation grants by expanding eligibility to all Chesapeake Bay States for the purpose of implementing a Bay TMDL and achieving the goals of the Chesapeake Bay Agreement. House bill also allows implementation grants to a designee of a Chesapeake Bay State, such as a soil conservation district, nonprofit, university, local government, basin commission, or interstate agency.
- Includes monitoring grants to Chesapeake Bay States or their designees; requires EPA consultation with USGS, interstate commissions, and States on the design and implementation of freshwater monitoring systems.
- Requires 10 percent of implementation grants to go to Delaware, New York, and West Virginia.
- Requires 20 percent of implementation grants to go toward technical assistance to agricultural producers and foresters.

Federal Facilities and Action Plan – 117(f)

- Requires EPA, with the concurrence of USDA, to maintain a database with comprehensive information on the implementation of conservation management practices. Data is to be aggregated, without identifying individual owners, operators, or producers.
- House bill only – requires Federal agencies to develop plans to maximize forest cover at their facilities in the watershed.

Chesapeake Bay Stewardship Grants – 117(g)(2)

- Replaces the existing Small Watershed Grants Program with Chesapeake Bay Stewardship Grants.
- Removes individuals as eligible grant recipients. In addition to currently eligible local governments and non-profits, the House bill adds States, universities, basin commissions, and interstate agencies to the list of eligible grant recipients. The Senate bill adds soil conservation districts.
- Establishes a preference for cooperative projects that include local governments.

Total Maximum Daily Load – 117(h)

- Directs EPA to establish a Chesapeake Bay TMDL by December 31, 2010, that includes limits on both point and nonpoint sources.
 - The TMDL must include enforceable or otherwise binding load allocations for all nonpoint sources, including atmospheric deposition, agricultural runoff, and

stormwater for which a permit under section 402 of the Clean Water Act is not required.

- In addition to meeting water quality standards, the TMDL also must prohibit any net increase in nitrogen, phosphorus, and sediment loadings above the allocations established in the TMDL, including (but not limited to) increases from new impervious surfaces, concentrated animal feeding operations, transportation systems, and septic systems. As a result, new sources will require offsets.
- Requires all new or renewed permits issued after January 1, 2011, to comply with the wasteload allocations in the TMDL. Also requires States to submit to EPA for review any permits for discharges of nitrogen, phosphorus, or sediment that have been administratively continued beyond the 5-year permit term, and allows EPA to object to the administratively continued permit.

Actions by States – 117(i)

- Requires States to adopt and submit to EPA for approval watershed implementation plans for each of the 92 segments that is in that State’s jurisdiction. The plans must have reduction targets, key actions, and schedules to attain water quality standards by reducing loads of nitrogen, phosphorus, and sediment from all sources, including agricultural runoff, point sources including stormwater point sources, nonpoint source stormwater runoff, and septic systems.
- Codifies in law the nitrogen, phosphorus, and sediment caps identified in a December 2003 EPA document, unless more stringent limits are established by a State or EPA.
- State-adopted control measures must be identified, and must include enforcement mechanisms.
- Implementation must be divided into 2-year periods with modeling to show reductions associated with each period. The plan must identify contingency measures if reductions are not achieved.
- The plan must address offsets for new or expanded sources.
- The plan is supposed to achieve 60% of the reductions by May 2017. Management measures to achieve a 50% reduction must be in place when the plan is submitted for approval.
- Full implementation must occur by May 2025.
- States are given authority to issue permits under section 402 “for any **pollution** source the Chesapeake Bay State determines to be necessary” notwithstanding any other provision of the Clean Water Act, including any specific exclusion or exemption, such as

the exemptions for agricultural stormwater or irrigation return flows. This provides authority to issue 402 permits to all nonpoint sources.

- In new section 117(i)(3) the House and Senate bills address runoff from impervious surfaces differently.
 - In the House bill, all local governments are required to obtain stormwater permits, no matter what their size. Those permits must include requirements to ensure that projects in the local government's jurisdiction that affect over an acre of land must capture runoff equal to 95 percent of an average 24 hour storm, if the land currently has less than 5 percent impervious surfaces.
 - In the Senate bill, EPA must issue regulations defining a threshold impervious surface, defining predevelopment hydrology, and establishing the amount of mitigation needed to compensate for unavoidable runoff. Each State must then provide assurances to EPA that development or redevelopment maintains or restores predevelopment hydrology with regard to temperature, rate, volume and duration of flow, to the maximum extent technically feasible. Unavoidable impacts to predevelopment hydrology must be compensated for with in-kind mitigation.

Action by EPA -- 117(j)

- EPA has the authority to approve or disapprove a State's implementation plan, based on minimum criteria established by EPA. Under this section the provisions of a State's plan take effect on the date of approval of the plan.
- If a State fails to submit an implementation plan or meet its 2-year milestones, EPA must:
 - In the Senate bill, withhold all Clean Water Act funds from the State; this includes State revolving fund (SRF) capitalization grants under section 601, and section 106 and section 319 funds, as well as funding under section 117. In the House bill, all funds except SRF capitalization grants are completely withheld. For the SRF grants, 75 percent of the grant is withheld and given to EPA to select projects and activities from among those eligible for SRF funding in that State.
 - Develop and administer an implementation plan in that State.
 - Require 2-1 offsets for all new or expanded sources of nitrogen, phosphorus, and sediments.
 - Promulgate any regulations or issue any permits as EPA determines are needed to control **pollution** to meet water quality goals, notwithstanding any other provision of the Clean Water Act and notwithstanding any existing exclusion or exemption. This provides EPA with blanket authority to do anything to meet water quality standards, not limited to issuing 402 permits. Under this authority, EPA could issue regulations

halting all development if the Agency determined that to be necessary to control pollution sufficient to meet water quality standards.

- Enforce any permits issued under a watershed implementation plan as if they were section 402 permits.
- Directs EPA to establish, by May 2012, an interstate nitrogen and phosphorus trading program.
 - Trading occurs among “points-of-regulation” which must be entities regulated under the Clean Water Act.
 - Given credits must arise in the watershed and all sources of pollution in the watershed would become regulated under the bill, the only cost-effective sources of credits may be the retirement of agricultural land, driving agriculture from the watershed.
- Directs EPA to establish guidance to help States regulate development to meet the requirement of maintaining predevelopment hydrology (Senate bill) or ensuring that runoff is limited to the “95th percentile precipitation event” (House bill). Also requires EPA to develop model ordinances and guidelines to help promote low-impact development. Authorizes a \$1.5 billion grant program for local governments to implement projects.

Additional Water Quality Protection Measures -- 117(k), 117(l), 117(m)

- A new section 117(k) prohibits the introduction of Asian oysters. In the Senate bill only, new section (l) and (m) include provisions to eradicate nutria and carry out a study of the commercial harvesting of menhaden.

Effect on Other Requirements -- 117(l)(House bill), 117(n)(Senate bill)

- Purports to authorize enforcement actions and penalties against States for failure to act, including citizen suits. However, since the Constitution precludes the Federal government from forcing States to take regulatory actions, these provisions would likely be found to be unconstitutional.
- Authorizes citizen suits against EPA for failure to act.

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