

## Merrill, Hannah

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**Subject:** DOE unanswered scientific questions  
**Attachments:** clouded\_waters.pdf

My SMP Comment

[Clouded Waters: A Senate Report Exposing the High - U.S. Senate ...](#)

### United States Senate Committee on Environment and Public Works

#### *Minority Staff*

Released: June 30, 2011

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Report Online at [www.epw.senate.gov/inhofe](http://www.epw.senate.gov/inhofe)

With this additional attached documentation, in it's entirety  
I am again, requesting the WA State DOE  
to respond to my questions.

#### DOE SMP GOES BEYOND EPA STANDARDS

Throughout the development of federal water laws it was the responsibility of states to achieve water quality,<sup>4</sup> and many of them have **continued to go above and beyond EPA's minimum federal standards**. Instead of acknowledging this progress and empowering it.

#### EPA NOT SCIENTIFIC FINDINGS (DOE not scientific)

These rulemakings **are not the result of legislation or the outcome of scientific findings**. Instead, these are the result of lawsuits by environmentalists and represent changes in long-held EPA positions, making discretionary duties non-discretionary. Additionally, in a rush to regulate, EPA/DOE is **moving ahead without solid science** and with **no input** from the communities who will shoulder the costs.

Pearl Rains Hewett Trustee  
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Jun 30, 2011 – **Clouded Waters**: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets ...

Pearl Rains Hewett

# UNITED STATES SENATE REPORT

## Clouded Waters:

**A Senate Report Exposing the High Cost of EPA's Water Regulations  
and Their Impacts on State and Local Budgets**



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## Executive Summary

This report examines the impacts on state and local governments of several water regulations that EPA is, or will shortly be, implementing: new water quality criteria in Total Maximum Daily Load (TMDL) and numeric nutrient criteria (NNC) for geographic locations, new stormwater rules, and the new Pesticide General Permit (PGP). These rules carry with them significant unfunded mandates that will cost state and local governments tens, if not hundreds, of billions of dollars.

Importantly, these new rules are not the outcome of legislation or rigorous scientific findings, but a direct result of a number of lawsuits with environmentalists. The agreements to regulate often did not include any meaningful opportunity for input from state and local entities.

- **Chesapeake Bay TDML:** In order to achieve nutrient and sediment limits, EPA has implemented a strict TMDL for the 6 states in the Chesapeake Bay watershed. It is not known whether this TMDL will achieve its intended purpose of a clean bay, and states are projecting billions in costs under the threat of an EPA takeover of state water programs.
  - **Maryland:** TDML is estimated to cost the state \$10 billion through 2017 and affected industries would collectively shrink by over \$10 billion over the same time.
  - **Virginia:** The state's TDML plan could cost \$7 billion.
  - **West Virginia:** Officials say it could cost \$240 million to upgrade 10 wastewater treatment plants for compliance.
- **Florida Numeric Nutrient Criteria:** Again, to limit nutrients, EPA has proposed strict limits on the amount in given water bodies. EPA is proposing to limit the nutrient flow from virtually all surface waters in Florida.
  - **Florida:** Compliance for agriculture will range from \$855 million to \$3.069 billion. An estimated 7,780 jobs will be lost in agriculture and 14,545 jobs will be lost in Florida.
- **Stormwater regulations:** These new rules will likely incorporate some measure of mandatory green infrastructure and increased permitting costs.
  - Green infrastructure will cost billions with uncertain benefits.
  - States will face enormous increases in costs to handle the new permits.
- **Pesticide General Permit:** The PGP will require, for the first time ever, duplicative CWA and pesticide permits for pesticides applied to water.
  - **Colorado:** is estimating a 25% increase in permit applications costing \$21 million.
  - **Maine:** will need to divert resources from existing programs to deal with the additional 5,000 to 6,000 new pesticide permittees.
  - **North Carolina:** One mosquito control program in the state estimates that its annual budget will have to increase from \$300,000 to over \$1.6 million in order to comply.

EPA's approach is a regulatory structure that involves costly mandates with uncertain environmental benefits. On the other hand, locally driven voluntary and partnership programs continue to achieve progress in water quality often in a highly cost-effective way. To ensure the health of our waters, the EPA should follow the Clean Water Act and allow state and local residents the flexibility and support to achieve their water quality goals.

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## Introduction:

When Congress passed the Federal Water Pollution Control Act, better known as the Clean Water Act (CWA), in the 1970s, it recognized the primary role of states in the protection of water bodies. The CWA clearly affirms that “it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”<sup>1</sup>

There is good reason for this: state and local officials have intimate familiarity with their waters and know how best to protect, maintain, and improve them. Unfortunately, most of the recent clean water policies coming out of Washington seek to strengthen federal control at the expense of local authority, placing an inordinate amount of power into the hands of the Environmental Protection Agency (EPA).

On April 15, 2010, EPA Administrator Lisa Jackson arranged a forum in order to “reinvigorate” the CWA. “I want to see a huge leap forward in water quality like we saw in the 70’s after the passage of the CWA,” Jackson said.<sup>2</sup> While many people would echo this sentiment, EPA has proposed to achieve this by aggressively moving forward with rules that will “increase the regulatory universe.”<sup>3</sup> EPA is working under the assumption that greater federal regulation produces greater environmental benefits.

Throughout the development of federal water laws it was the responsibility of states to achieve water quality,<sup>4</sup> and many of them have continued to go above and beyond EPA’s minimum federal standards. Instead of acknowledging this progress and empowering it, EPA is usurping state authority and instituting expensive regulations that will provide uncertain environmental benefits.

This report examines the increased regulatory universe and the impacts on state and local governments of several key regulations that EPA has either recently promulgated or is intending to implement in the next few months: new water quality criteria in Total Maximum Daily Load (TMDL) and numeric nutrient criteria (NNC) for geographic regions, new stormwater rules, and the new Pesticide General Permit (PGP) —all of which will impose costs on local communities and their residents.

Importantly, these rulemakings are not the result of legislation or the outcome of scientific findings. Instead, these are the result of lawsuits by environmentalists and represent changes in long-held EPA positions, making discretionary duties non-discretionary. Additionally, in a rush to regulate, EPA is moving ahead without solid science and with no input from the communities who will shoulder the costs. Limited state and federal assistance<sup>5</sup> leaves many communities with few options other than to pass the extra costs of these programs and mandates onto residents, and the benefits of regulation do not outweigh the costs. As this report also shows, they will likely be significant pain for little, if any environmental gain.

## I. New Water Quality Criteria:

EPA is currently implementing two water quality criteria rules that will have uncertain environmental benefits and high costs. These rules are the direct result of lawsuit settlements between EPA and environmental groups. Unfortunately, these rules will not be limited to the regions they currently impact. “This new approach will not end with the (Chesapeake) Bay; EPA has already revealed its plan to take similar action in other watersheds across the nation, including the Mississippi River watershed.”<sup>6</sup> These regulations are setting the stage for the entire country.

### A. Chesapeake Bay Total Maximum Daily Load

In response to a lawsuit settlement with the Chesapeake Bay Foundation and others (*Fowler v. EPA*),<sup>a 7</sup> EPA has begun the implementation of the Chesapeake Bay TMDL for nutrients being released into the bay. The goal of TDML is to lower the amounts of nitrogen, phosphorus, and sediment in the region’s waterways, thereby restoring clean water to the Chesapeake Bay.<sup>8</sup>

The Bay is indeed a national treasure with immense economic resources and, despite claims to the contrary, the health of the Bay has been improving significantly with minimal federal government mandates. Voluntary measures by the states, in conjunction with municipalities, the agricultural community, and private interests at state and local levels, have improved the health of the Bay over the past 25 years in the face of increasing population and development.<sup>9</sup> Unfortunately, EPA is minimizing these successful, cost effective measures and has instead set up a mandatory federal plan – a plan that has no guarantee of improving the current course.

Additionally, the science used by EPA to set the TMDL contains inconsistencies in the data and modeling. Some sectors may already be meeting their targets but are not being credited appropriately. The only thing certain about the TMDL is the cost. The price tag of this plan will be in the billions of dollars and will cost individual localities and states millions.

At a congressional briefing in January 2011, EPA outlined the improvements made in the bay over the past 25 years and the ultimate goals of the TMDL plan (see chart 1).<sup>10</sup> EPA admits, and their data shows, that voluntary measures have reduced nitrogen, phosphorus, and sediment enormously over the course of 25 years despite increases in population, development, and agricultural output in each of the 6 states that make up the Chesapeake Bay watershed.<sup>11</sup> The reductions made through voluntary measures over the past 25 years and the average reductions made per year are significant (see chart 2). If this long term, per year reduction

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<sup>a</sup> This lawsuit was filed in January 2009 by the Chesapeake Bay Foundation who claimed that EPA failed to take adequate measures to protect and restore the Chesapeake Bay. The settlement agreement included establishing “stringent” Chesapeake Bay TMDLs, creating an effective implementation framework, an expansion of EPA’s review Chesapeake Bay watershed permits, and initiating rulemaking for new regulations for concentrated feeding operations and urban and suburban stormwater. EPA also agreed to establish publically accessible tracking and accounting system to monitor progress in reducing pollution through the TMDL and two-year milestones. EPA agreed to announce its TMDL for the Chesapeake Bay by December 31, 2010.

trend continues, the nitrogen, phosphorus, and sediment goals written in the TMDL plan would be reached by years 2026-27, 2022-23, and 2035-36 respectively. This means that the Bay is on pace to reach the goals outlined in the TMDL regardless of TMDL implementation.

The goal of the TMDL is to have all pollution controls in place by 2025. This does not mean that the nutrient reduction goals will be met at that time, or that they will be met more quickly than the current trajectory. As EPA noted at the congressional briefing, there is no timeline for when the Bay will actually reach the nutrient goals or how long the lag time will be between implementation and restoration.<sup>12</sup> Because of scientific uncertainties and unknowns, there is no guarantee that the goals will ever be met.

Not only is the outcome of the TMDL uncertain, but the data and assumptions used to create it are also disputed. A report done by LimnoTech, one of the nation's leading water sciences and environmental engineering consulting firms, questions much of the data used by EPA in fixing pollution limits for the Bay.<sup>13</sup> The report compared EPA's TMDL with data from the U.S. Department of Agriculture.<sup>14</sup> In creating the TMDL, EPA looked to agriculture, wastewater treatment, and urban runoff to make the majority of reductions and assumed many potential reductions were not being made in these sectors. However, USDA's numbers show EPA is underestimating reductions already being made by the agriculture community. EPA estimates that only 50% of farmland in the watershed is using conservation tillage while USDA estimates that 88% of the cropped acres are already using conservation tillage (see chart 3).<sup>15</sup>

This variation is one of the many inconsistencies with EPA's data which will have a huge impact on the established TMDL level. "If USDA's numbers are correct, agriculture has already significantly surpassed EPA targets for reductions in sediment and phosphorus."<sup>16</sup> "Through the Bay TMDL, EPA is implementing a rule that will have a significant impact on economic growth and development, including food production, in the watershed. It is critical for EPA to get the facts right including providing an accurate accounting for existing management and conservation practices before it imposes potential economic disaster on agricultural producers in the Bay watershed."<sup>17</sup>

Furthermore, the accounting of nutrient load reduction practices is inconsistent across states in the Chesapeake Bay watershed, yielding inaccurate and unreliable reports to the Chesapeake Bay Program (CBP). Therefore, the accounting conducted by the CBP for nutrient load reduction is, at best, a guess.<sup>18</sup>

Prior to finalizing the TMDL, EPA requested that every state submit a Watershed Implementation Plan (WIP) which outlined how states will reach their allotted nutrient goals. If EPA found that the WIPs were insufficient in meeting water quality goals, they would seek to implement strict federal backstop measures through new National Pollutant Discharge Elimination System (NPDES) permit requirements and withholding of federal dollars to achieve satisfactory implementation. Unlike Clean Air Act permits, federal backstopping is unprecedented and not a legal requirement of the CWA. The legality of EPA's actions in setting the TMDL has been disputed<sup>19</sup> and runs contrary to EPA's own statements on TMDL's: "Neither



the CWA nor the EPA implementing regulations, guidance or policy requires a TMDL to include an implementation plan. EPA therefore does not approve or disapprove implementation plans as part of the TMDL process.”<sup>20</sup>

For select Virginia localities, the total cost of TMDL implementation is \$11.5 billion and the total annual cost is \$824.8 million, (see chart 4).<sup>21</sup> For a small locality like the City of Falls Church, with an annual budget of around \$60 million, the annual costs are 3% of its total budget.<sup>22</sup> Consultants have recommended a 26.9% rise in sewer rates for FY 2012 and a 9.5% rise for each of the following fiscal years for the City.<sup>23</sup> The Falls Church City Council recently adopted the consultant’s recommendations and as a result, “rates will jump an average of \$8 a month for city users, with the additional funds needed almost entirely to meet the City’s obligations for its share of massive water treatment plant upgrades...required by the federal EPA.”<sup>24</sup> This is almost \$100 per household for FY12 and this number will only increase in subsequent years. For the areas located within the Hampton Roads Planning District it is estimated that the annual cost will be \$679 million.<sup>25</sup> This is about 10% of total revenues for these localities.<sup>26</sup> The estimated cost for the rate payers in this district is staggering.

These costs to the rate payer will be compounded by the impact to jobs and the overall economy. A report by the Sage Policy Group quantified these costs for Maryland: “Impacted industries would collectively shrink by over \$10 billion over the course of implementation. Maryland’s economy would also support 65,000 fewer jobs (measured in job-years) over the course of implementation. These jobs would be associated with \$2.8 billion in lost wage/salary income. The average job lost would pay nearly \$43,000/year.”<sup>27</sup> And these are the losses for only the implementation of Phase I of the TMDL.

*The Chesapeake Bay Journal* noted other costs at the state and local level throughout the watershed, “Maryland’s plan could cost \$10 billion through 2017. Virginia said its state plan could cost \$7 billion...Lynchburg, VA, officials said they expected stormwater improvements needed to comply with the TMDL would cost \$120 million. Altoona, PA, is considering a 58 percent sewer rate increase to pay for a \$70 million wastewater treatment plant upgrade, mainly needed to meet Bay goals. West Virginia officials say it could cost \$240 million to upgrade 10 wastewater treatment plants in its portion of the watershed.”<sup>28</sup> These numbers are just a glimpse into the costs that will be shouldered by every person who lives and works in the Chesapeake Bay watershed. Some estimates have put watershed wide implementation anywhere from \$15 to \$30 billion, but by looking at the localities mentioned above the figure is most likely much higher.<sup>29</sup>

The affected parties are not taking the new TMDL without a fight. On January 10, 2010, The American Farm Bureau Federation (AFBF) sued EPA in a Pennsylvania Federal District Court alleging that the Agency’s promulgation of TMDL standards for the Chesapeake Bay region was legally defective.<sup>30</sup> The AFBF alleged that EPA’s TMDL standards exceeded its authority under the CWA, that the assigned pollutant loads are based on erroneous information, the information used to derive the assigned pollutant loads was fed into computer models that were unsuitable for deriving such loads, and that during the comment period the public did not

have access to the information it needed to comment effectively on the modeling results and the assumptions in the final TMDL.<sup>31</sup> EPA responded to these challenges claiming that its TMDL is on solid legal ground and within its authority provided by the CWA.<sup>32</sup>

## **B. Numeric Nutrient Criteria in Florida**

Similar to the Chesapeake Bay TMDL is EPA's proposed numeric nutrient criteria (NNC) for water bodies in the state of Florida. The Florida NNC also did not generate from a scientific evaluation of the best ways to protect waters in the state but, again, EPA agreed to set statewide standards to settle another court case with an environmental organization (*Florida Wildlife Federation v. Jackson*).<sup>b 33</sup> The NNC attempts to limit total nitrogen and total phosphorus in lakes, streams, springs, and canals throughout the state. Like the TMDL, the NNC is fraught with uncertainties in the creation and attainment of the nutrient levels set out in the proposal. This is another example of EPA ignoring state's efforts to manage their own waterways and instead establishing mandatory federal criteria. Ultimately, the only certainty associated with the NNC is the cost to Florida, agriculture, industry, water treatment facilities and the Florida citizens.

For each water body type, the NNC uses a different method to determine impairment. For lakes, EPA categorizes 3 types: "colored," "clear and alkaline," and "clear and acidic," and is proposing appropriate criteria levels for each type.<sup>34</sup> Waters could be considered impaired if they don't meet the proposed criteria. This method fails to take into account the biological diversity and natural lake variability in Florida, meaning, not all lakes fit into one of the three specific categories. If a lake does not fall within the narrow criteria of EPA's three types, a biologically healthy lake could be considered impaired.

The criterion for rivers and streams is based on the reference approach.<sup>35</sup> This approach identifies unimpaired waters and establishes nutrient criteria based on levels in those waters. Similar to lakes, this approach ignores cause and effect, may set criteria below background levels, and is not based on nutrient levels needed to protect designated uses. Through the NNC, a water body could be considered impaired because it does not meet EPA criteria but would, under closer inspection, actually be non-impaired. The criteria for springs, clear streams, and canals have similar issues that will possibly set nutrient levels below natural background.<sup>36</sup> Unfortunately, each method is scientifically uncertain and may have no environmental benefits. In fact, in some cases the NNC could lead to environmental degradation.

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<sup>b</sup> In July 2008, environmental groups brought suit against EPA, asserting that EPA was required to make a determination that Florida's narrative nutrient standard was inadequate, thus obligating EPA to propose new standards. EPA denied that it was required to make such a determination. However, before the conclusion of the suit, EPA proceeded to make a determination that Florida abandon the narrative nutrient standards and adopt a NNC for its lakes and flowing waters. As a result of this determination, the environmental groups and EPA reached a settlement that set deadlines for the publication and adoption of such standards.

EPA admits, in the notice of proposed rulemaking, that “its proposed lake criteria do not account for natural lake variability other than that provided by color and alkalinity classification and that its proposed streams criteria ‘may be either more stringent than necessary or not stringent enough to protect designated uses.’”<sup>37</sup> EPA’s Science Advisory Board (SAB) advised EPA that “numeric nutrient criteria developed and implemented without consideration of system specific conditions (e.g. from a classification based on site types) can lead to management actions that may have negative social and economic and unintended environmental consequences without additional environmental protection.”<sup>38</sup>

The NNC will have devastating impacts on Florida’s economy and nowhere is that more clear than agriculture. The initial costs for agriculture to implement all practices for compliance with the NNC will range from \$855 million to \$3.069 billion.<sup>39</sup> The annual costs are estimated to range from \$271 to \$974 million.<sup>40</sup> Lost revenues from land taken out of production in order to implement water treatment practices are estimated at \$631 million a year.<sup>41</sup> This lost revenue from converting agricultural land will have a trickledown effect on suppliers and employees at an expected cost of \$1.148 billion annually.<sup>42</sup> All of these economic losses within agriculture will be compounded by job losses. An estimated 7,780 full-time and part-time jobs will be lost in the agricultural sector and an estimated 14,545 jobs will be lost in the Florida economy.<sup>43</sup>

But the impact of the NNC does not end with agriculture. If EPA implements the stricter “end-of-pipe” criteria (requiring discharger effluent to be at or below NNC levels) the total annual costs could range from \$3.1 to \$8.4 billion.<sup>44</sup> Even under the less strict Best Management Practices and Limit of Technology standards, in which effluent is not at the proposed NNC, costs are estimated to range from \$1.0 to \$3.2 billion.<sup>45</sup>

With an estimated 5,147 water bodies affected by the NNC, many industries will be impacted. The pulp and paper industry predicts that water treatment will increase the cost of producing paper by \$5 to \$6 per ton.<sup>46</sup> The Phosphate industry estimates that compliance through reverse osmosis technology will increase CO<sub>2</sub> emissions by 31,000 tons per year, SO<sub>x</sub> emissions by 100 tons per year and NO<sub>x</sub> emissions by 50 tons per year.<sup>47</sup> The impacts of the NNC will also reach local residents through higher utility rates. Sewer rates could increase by as much as \$673 to \$726 per household in areas where tertiary upgrades are needed.<sup>48</sup> With more than 20 counties in Florida having poverty rates that exceed 20%, and the annual costs in these counties expected to total between \$256 and \$647, the impact to these residents will be significant.<sup>49</sup>

Estimates and assumptions by EPA have muddled the science, set unrealistic levels in the NNC, and ignored the true cost. In many cases, the removal of nutrients below natural background levels will be required and will have unintended negative environmental impacts. This will be done at the expense of the state’s economy and jobs. Additionally, it is unclear how EPA will measure compliance with the NNC or TMDL. Without acceptable ways to determine current water quality, an NNC or TMDL is a guess. Compliance with the NNC or TMDL is nearly impossible to demonstrate and selecting when and where to measure water quality is arbitrary. It becomes regulation for the sake of regulation.

In response to these staggering costs for uncertain environmental gain, the state of Florida is fighting to retain some authority over their water. The State of Florida and others<sup>50</sup> have filed lawsuits against EPA arguing that the Agency's actions are inconsistent with the intent of the CWA. They argue that the idea of cooperative federalism, whereby the States would be responsible for the control of water quality with oversight by the EPA, is being ignored.<sup>51</sup> In addition, the groups assert that the new rules are based on faulty scientific methodologies and given current technologies, contain criteria that are generally impossible for stormwater and wastewater systems to attain.<sup>52</sup> Further, officials believe that the impact to Florida's economy will be in the billions, costs which will ultimately be borne by the local users or in the case of government-owned utilities, by higher tax rates.<sup>53</sup>

### **C. Expansion of Water Quality Criteria**

Despite the clear problems with EPA's foray into statewide NNC, they are nonetheless, continuing to push other states to implement NNC. On May 16, 2011, a guidance memo went out to all EPA Regions, and State, interstate and tribal water program managers, outlining how to develop numeric nutrient criteria. The letter stated that "It has long been EPA's position that numeric nutrient criteria targeted at different categories of water bodies and informed by scientific understanding of the relationship between nutrient loadings and water quality impairment are ultimately necessary for effective state programs."<sup>54</sup> EPA also sent a letter to Illinois EPA, ordering Illinois to expeditiously adopt new or revised water quality standards for waterways in the Chicago area. EPA stated that if Illinois does not make changes to their water standards, EPA promptly will.<sup>55</sup>

Additionally, EPA has begun laying the foundation for other large scale TMDL's like Chesapeake Bay. Executive Order 13508 calls on EPA to develop pollution-control strategies in the Chesapeake Bay that "can be replicated in efforts to protect other bodies of water,"<sup>56</sup> and EPA has awarded a \$7.2 million contract to environmental modeling firm TetraTech to study and model the Mississippi River and Gulf of Mexico for nutrient criteria development.<sup>57</sup> EPA has been unclear when asked if they are currently developing a Mississippi River/Gulf of Mexico TMDL.<sup>58</sup>

Even if EPA doesn't act on their own accord to develop large watershed TMDLs and NNC, they may be compelled to set them by another lawsuit. EPA has not yet acted on a petition for rulemaking filed on July 30, 2008, by the Natural Resources Defense Council (NRDC) and other petitioners submitted to the EPA under section 4 of the Administrative Procedures Act. The petition requested that EPA "exercise its powers under Sections 303(c)(4) and 303(d) of the CWA . . . to prepare and publish numeric water quality standards and establish TMDLs needed to protect the nation's waters, or at least the waters in the Mississippi Basin."<sup>59</sup> On April 11, 2011, the Minnesota Center for Environmental Advocacy, on behalf of a number of groups, quietly sent a letter to EPA noting that officials have failed to respond to activists' 2008 petition within a reasonable amount of time, and if "EPA fails to respond to the petition by June 30, 2011, a full three years after it was filed, we will be forced to pursue legal remedies."<sup>60</sup>

## II. Stormwater Regulation:

Some of the most costly regulations set to be unveiled are EPA's new stormwater rules.<sup>61</sup> Stormwater is the result of rain or melting snow that runs off city surfaces; as it flows it picks up urban pollutants such as oil, fertilizers or other chemicals. This runoff could flow directly into a body of water or into a storm drain—also known as a Municipal Separate Storm Sewer System (MS4)<sup>62</sup>—until it is released into a water body.

Stormwater discharges are point sources under the CWA<sup>63</sup> and NPDES permits are required for MS4s, construction activities, and industrial activities.<sup>64</sup> States have had flexibility in regulating stormwater discharges and issuing NPDES permits. With diverse geography, climate, environment, and city planning across the country, regulatory flexibility has been key for state, city, and local communities that manage stormwater to tailor plans specifically suited to their situations. These factors combined with the complexity of stormwater management make federal regulation extremely difficult and potentially problematic.

EPA has authorized 46 states to issue NPDES permits. EPA is required to establish Effluent Limitation Guidelines (ELGs) — national standards for wastewater discharges to surface waters and municipal sewage treatment plants—and New Source Performance Standards (NSPSs)—pollution control standards issued by EPA for point sources.<sup>65</sup> State permitting authorities incorporate ELGs and NSPSs into their respective NPDES permits.

### A. Construction and Development Effluent Limitation Guidelines:

In 2004, EPA proposed a rule containing several options for ELGs and NSPSs to control stormwater discharges from construction sites.<sup>66</sup> Instead of finalizing the rule, however, EPA used their discretion to continue allowing authorized state NPDES permitting authorities to issue permits based on “best professional judgment.” NRDC sued EPA, arguing that EPA's duty to promulgate ELGs and NSPSs for the construction and development industry was nondiscretionary.<sup>67</sup> In *National Resources Defense Council vs. US Environmental Protection Agency*,<sup>c</sup> the US District Court for the Central District of California ordered EPA to issue a proposed regulation by December 1, 2008, and final rule by December 1, 2009.<sup>68</sup>

While EPA affirmed in 2004 that “construction site stormwater discharges are already being adequately addressed through the existing program”<sup>69</sup> as a result of the lawsuit EPA finalized their Construction and Development Effluent Limitations Guidelines (C&D ELG) rule in late 2009.<sup>70</sup> When the Associated General Contractors of America (AGC) first read the lengthy rule, they noted that “it appears to be extremely onerous and costly to industry.”<sup>71</sup> That prediction held true. EPA stated that the annual cost of the rule would be around \$953 million once fully

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<sup>c</sup> Here, the NRDC brought suit against EPA under the CWA seeking to compel EPA Administrator to promulgate ELGs and NSPSs for storm water pollution discharges caused by the construction industry. The district court agreed with the NRDC holding that EPA had failed to comply with the CWA by not performing its non-discretionary duty to promulgate ELGs and NSPSs for the industry, and issued a permanent injunction requiring EPA to issue final ELGs and NSPSs no later than December 1, 2009. This decision was affirmed by the Ninth Circuit in September 2008.

implemented.<sup>72</sup> At the time, the AGC argued that the expense of the rules would destroy contracting jobs and increase the unemployment rate above the industry's then 18.7%.<sup>73</sup>

One of the most costly factors was the imposition of an impossible-to-meet limit of 280 Nephelometric Turbidity Units (NTU) (a unit measuring the lack of clarity of water) for stormwater discharges from construction sites. Analyses conducted by the National Association of Home Builders (NAHB) and the U.S. Small Business Administration (SBA) revealed that this number was based on flaws in data collection and the misinterpretation of technology on the part of the EPA: the 280 NTU limit cannot be reached by conventional technologies—it would require the installation of expensive advanced treatment systems.<sup>74</sup>

Faced with impossible regulations, the NAHB and the Wisconsin Builders Association challenged EPA, and the SBA took legal action on the grounds that the 280 NTU standard was arbitrary and based on faulty analysis. As the SBA stated, because of the “flaws in data collection, manipulation of data, misinterpretation of technology, implementation difficulties, and unreasonable costs”<sup>75</sup> EPA should revise the standard.

In the end, EPA conceded that the estimated costs of compliance with the 280 NTU were more than twice the benefits. In a report on the rule EPA monetized the benefits to be “\$369 million per year, once fully implemented.”<sup>76</sup> EPA estimated the total costs to be \$953 million and the SBA's petition for reconsideration estimated that EPA's ELG rule would actually cost businesses over \$9.7 billion per year.<sup>77</sup>

The rules were scheduled to go into effect on February 1, 2010, but after admitting that the 280 NTU limit was too harsh,<sup>78</sup> EPA filed an unopposed motion to vacate the numeric limitation with a plan to issue a new rule that the construction industry could comply with in November 2012. The Seventh Circuit denied the motion to vacate the numeric turbidity standard but agreed to hold the suit in abeyance until February 2012. Effective January 4, 2011, EPA has stayed the numeric limitation of 280 NTU. EPA will propose a revised limit in a future rulemaking.<sup>79</sup> EPA announced updates to the Construction General Permit on April 15, 2011.<sup>80</sup>

## **B. New Stormwater Rulemaking:**

EPA is currently working on a series of new municipal stormwater regulations which are expected to be proposed in September 2011 and finalized by November 2012.<sup>81</sup> Importantly, EPA has self imposed a deadline as a result of a commitment with the environmental groups NRDC and Waterkeeper, and as a part of the Chesapeake Bay Settlement.<sup>d 82</sup>

EPA is considering a wide range of options for the 2012 stormwater rule which include:<sup>83</sup>

- Expanding the universe of federally regulated MS4s to include rapidly developing areas;

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<sup>d</sup> EPA is using a November 17, 2009 Letter from Asst. Administrator Pete Silva to Jon Devine, NRDC, and Scott Edwards, Waterkeeper Alliance, which states EPA's intent to use CWA §402(p) to regulate impervious surfaces and water flows, and part of the Chesapeake Bay Foundation settlement to justify advancing new nationwide stormwater rules by November 2012.

- Establishing first time standards for post-construction stormwater;
- Establishing first time retrofit requirements on MS4s – which could include mandates on cities to change existing buildings, stormwater sewers, and streets;
- Providing additional requirements for MS4s located in the Chesapeake Bay watershed;
- Requiring the use of expensive “green infrastructure” techniques to replace conventional stormwater management practices, e.g. “green roofs,” rain gardens, swales, bioretention, permeable pavement, porous pavers, and cisterns;<sup>84</sup>
- Potentially requiring municipalities to retrofit existing infrastructure, not just new construction projects, using green infrastructure.

In the wake of these announcements concern has been raised that EPA has decided on a course of action prior to seeking the input of the municipal stormwater community to evaluate what practices work well and what areas of stormwater management need to be improved.

In fact, instead of consulting those who work in stormwater management, EPA is using the National Research Council’s (NRC) *Urban Stormwater Management in the United States* as a guide.<sup>85</sup> The report finds that the current approach to stormwater management by EPA is unlikely to control pollution because the requirements leave the discretion to local dischargers to ensure compliance; it claims there is poor accountability and uncertain effectiveness. While this report has been heralded by environmental groups, it sparked criticism from those who manage stormwater because the NRC did not have meaningful stakeholder input from either municipalities or MS4 permit holders when developing the report.

The NRC report champions the use of “green infrastructure” techniques as the optimal method of stormwater pollution control. Such techniques shift stormwater management from the concept of moving stormwater as far away and as quickly as possible in large, buried collection, storage and conveyance systems, towards managing the water where it falls. Using the NRC report as a backdrop, EPA is now poised to transition stormwater regulation to a system reliant on green infrastructure techniques.

Comments received on the proposed rule lay out both areas of support and serious concerns. The National Association of Clean Water Agencies (NACWA) comments from February 26, 2010 explain that the success of a new stormwater program will depend heavily on EPA taking into account the “wealth of information and knowledge on the effectiveness of various stormwater management practices . . . at the local level.”<sup>86</sup> The document also explains that EPA should consider “the varying types of geography, climate conditions, and soil conditions across the country that will impact the effectiveness of stormwater management practices”—which will be a heavy lift for an agency that has to standardize regulations for the entire country.<sup>87</sup>

There is also a great deal of uncertainty about the logistics of implementation. For example, green infrastructure installed on private land:

cannot practicably be maintained by municipalities—even inspections and enforcements can be problematic if the systems are widely distributed across the

landscape. This lack of control means municipalities cannot be sure that such systems will either be maintained to preserve their functionality, or even be kept onsite. —e.g. rain gardens could be filled in, dispersion paths paved, or rain barrels discarded—even organic matter tilled into topsoil has a limited life and must be regularly replenished, something municipalities cannot guarantee will be done by property owners. To have a chance of being effective, the use of distributed systems on private lots will require a vigorous and sustained education program. However, such programs are currently being targeted for budget cuts in many municipalities during these tough economic times.<sup>88</sup>

This presents a wider problem of land use control: if infrastructure techniques such as rain gardens, permeable pavements, and cisterns are regulated by EPA, this means that EPA could also have influence over a city's design plan and land use—a great concern since the CWA clearly stated that the states are responsible for making decisions about land use planning.<sup>89</sup>

When first approached by Philadelphia to use green infrastructure as a way to control stormwater, EPA did not know how to permit it.<sup>90</sup> Despite original misgivings, green infrastructure is predicted to be a large component of EPA's new rules, and is expected to be forced on municipalities on a national level. While these techniques appear to be effective, one obstacle is the cost:

- **Philadelphia:** a study conducted by the Philadelphia's Triple Bottom line, which evaluates green infrastructure options over 40 years has determined that it could range from around \$1.9 billion for a 25 percent green infrastructure option to more than \$4.5 billion under a 100 percent green infrastructure option.<sup>91</sup> **New York City:** "Green Strategy" will cost up to \$1.5 billion over 20 years, including approximately \$187 million in capital funds over the next four years.<sup>92</sup>
- **Seattle:** "Natural Drainage Systems," projected costs in 2007 were \$7.4 million and \$68.2 million from 2000-2012.<sup>93</sup>
- **Milwaukee:** "Greenseams" plan's projected costs were **\$8.8** million in 2007 and \$47.7 million total.<sup>94</sup>

This is not to say that the use of green infrastructure is not warranted: if Philadelphia, New York, Seattle, Milwaukee or any other city determines that green infrastructure is the best method of stormwater management, this is a good locally driven solution. The problems begin when EPA changes voluntary approaches into mandatory programs and force such practices on municipalities at a national level: many cities cannot afford such mandates.

Additionally, states will face greater costs for enforcement and permitting and many states and municipalities are already bracing for the economic blow.<sup>95</sup> According to a report done by the Hampton Roads Planning District Commission, which represents sixteen local governments in Virginia, the cost of MS4 permits will be as much \$8,000 per permit, an increase of \$6,000 (see chart 5).<sup>96</sup>



Small municipalities across the country will be hit the hardest by these new mandates, and the criticism for stormwater regulation is already being seen in numerous local publications:

- “This is an unfunded mandate from EPA and DHEC. At this time we are being required to map the drainage of run-off into our lakes and waterways. I anticipate mapping of Central will cost \$30,000 to \$50,000. This is money the town cannot afford to spend at this time.” – Philip Mishoe, Town Administrator of Central, *SC Independent Mail*.<sup>97</sup>
- We feel we are doing a pretty good job of managing stormwater, but I am sure there are areas we can improve. From an economic standpoint this could not come at a worse time.” – Randy Hayes, Mayor of Central, *SC Independent Mail*.<sup>98</sup>
- The new rules could add “\$7,500 to the cost of building a simple deck; or \$15,000 to the cost of building an entire house.” – Jason Bobst, Borough Manager *Mercury*.<sup>99</sup>
- “The last thing Bluefield needs is another barrier to business growth and economic development. We must work now — both in Charleston and Washington — to get this unfair federal mandate overturned.” – Editorial *Bluefield Daily Telegraph*.<sup>100</sup>
- “We’ve got to make sure the people understand this is something we are not doing, but it is something that is being enforced.” – McKinley Price, Mayor of Newport News *James River Journal*.<sup>101</sup>

While it is unclear what EPA’s final stormwater rules will look like, given the experience with the C&D ELG, it is likely to be an extremely costly proposal. The CWA has no requirement that solutions to cleaning water are affordable or that the benefits must outweigh the costs of upgrades to infrastructure, and EPA’s use of cost benefit analysis in rulemaking is discretionary. Additionally, when dealing with runoff, EPA will likely be putting itself in the position of making land use decisions that should be left up to local governments by their ability to approve of the stormwater management plans.

### III. Pesticide General Permit

Pesticides are regulated in the U.S. through the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Through FIFRA, EPA has the authority to register pesticides and prescribe standards for their use in order to protect both the environment and public health. The application of pesticide products has never been subject to the CWA’s NPDES permit requirements.

Despite a separate regulatory structure for pesticides that takes into account environmental protection in pesticide use, the U.S. Court of Appeals for the 9th Circuit ruled in the 2001 “*Talent*”<sup>102</sup> decision that CWA NPDES permits were required for the use of aquatic herbicides to control weeds in waterways. In November 2002, the 9th Circuit ruled in *League of Wilderness Defenders v. Forsgren*<sup>103</sup> that aerial spraying of pesticides required an NPDES permit.

On November 21, 2006, EPA issued a rule clarifying two circumstances in which an NPDES permit is not required for pesticide applications: 1) when pesticides are applied directly to

water to control pests, including mosquito larvae, aquatic weeds etc. and 2) when pesticides are applied to control pests that are present over or near water.

Shortly after issuance of the final rule, a number of environmental advocacy, industry, and agricultural groups filed legal challenges in federal court. They were consolidated in *National Cotton Council v. EPA*.<sup>e 104</sup> The Sixth Circuit struck down EPA's interpretation of the CWA. This meant that pesticide application was now subject to two separate permit requirements.<sup>105</sup> EPA declined to advocate for appeal of the decision to the Supreme Court and instead began crafting an NPDES general permit for pesticides.<sup>106</sup>

The cost and regulatory burden of the PGP for EPA and states who implement NPDES permits will be massive. EPA estimates that the PGP will require an additional 365,000 "applicators" to seek permits for about 5.6 million pesticide applications per year.<sup>107</sup> This is almost a two-fold increase in the amount of NPDES permits issued.<sup>108</sup> The paperwork burden is estimated by EPA to be approximately \$50 million per year.<sup>109</sup> Estimates coming in from states show that this number may be several orders of magnitude greater.<sup>110</sup>

Former Congressman and current Commissioner of the Colorado Department of Agriculture, John Salazar (D-CO), testified that "the Department of Public Health and Environment, the regulatory authority for NPDES, estimates a 25 percent increase in permit applications because of these new requirements" and "at a minimum, the combined estimated annual costs for Colorado municipalities and the commercial industry for NPDES implementation is over \$21 million."<sup>111</sup> In Maine, the concern is that an additional 5,000 to 6,000 new pesticide permittees to their NPDES program will take additional declining resources away from currently regulated entities.<sup>112</sup> In North Carolina, one mosquito control program estimates that its annual budget will have to increase from \$300,000 to over \$1.6 million in order to comply with the PGP.<sup>113</sup> Further, for new applicators that have to comply with NPDES permitting, "it is not unreasonable to expect that a number of [them] could find themselves in situations where even minor paperwork violations that have no actual impact on environmental protection will lead to significant penalties under the CWA. Currently those penalties are \$37,500 per day per violation."<sup>114</sup>

State reduction in staff and increased permit needs will take permit writers away from dealing with other NPDES permits (including stormwater and wastewater) and because many states regulate pesticides under departments of agriculture and water permits under departments of environment, they will face additional staffing and state jurisdictional challenges.

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<sup>e</sup> Here the environmental groups argued that EPA exceeded its authority under the CWA by excluding pesticides from the definition of a CWA "pollutant," and EPA exceeded its authority under the CWA by determining that, while pesticides are discharged from a point source, the residue of such pesticides is a "nonpoint source pollutant," and that EPA may not exempt FIFRA compliant pesticide applications from the reach of the CWA. The Sixth Circuit found that "so long as the chemical pesticide is intentionally applied to the water to perform a particular useful purpose and leaves no excess portions after performing its intended purpose it is not a 'chemical waste'...and does not require an NPDES permit." The court vacated the EPA final rule finding that it was not a reasonable interpretation of the CWA since the plain language of the terms "chemical waste" and "biological materials" unambiguously include aquatic pesticides.

On June 4, 2010, EPA issued a draft Pesticides General Permit,<sup>115</sup> received comments, and on April 1, 2011, issued a tentative final Permit.<sup>116</sup> The effect of the *Cotton Council* decision was stayed until October 2011<sup>117</sup> to allow EPA time to finalize the permit and finish Endangered Species Act consultation with the Services.<sup>118</sup> In March 2011, the House of Representatives passed H.R. 872, the Reducing Regulatory Burdens Act of 2011 that would clarify that pesticides used in compliance with their FIFRA label are not subject to NPDES permits.<sup>119</sup> On June 21, 2011, the Senate Committee on Agriculture, Nutrition and Forestry passed H.R. 872<sup>120</sup> but, unless the full Senate acts, it will be illegal to spray pesticides into “waters of the United States” without NPDES permits on October 31, 2011.

Another problem with the PGP is concern over continued litigation due to the use of the terms “point source” and “waters of the United States.” “Activists and some courts take an extremely broad view of the scope of ‘waters of the United States’ encompassing many features that farmers generally would not recognize as ‘waters.’ For this reason, potential enforcement targets will include those who apply pesticide to farmed wetlands or near intermittent streams, grass waterways, ditches, or other conveyances that flow to navigable waters.”<sup>121</sup> The likelihood of continued litigation will lead some users of pesticides to stop using them altogether. This will have serious public health, environmental, and economic consequences.<sup>122</sup>

#### **IV. Locally Driven Approaches:**

While most impaired waters do not have strict TMDLs or strict NNC, water quality throughout the nation continues to improve. The most effective way to enhance the health of America’s waterways is to follow the CWA and allow states and local residents to set and achieve their water quality goals, and make sure that the federal government is supporting, rather than hindering their efforts. State and local entities understand their rivers and streams and are best qualified to make the development and water use decisions.

Examples of states and local governments working to find unique water quality solutions abound. Each and every city mentioned in the stormwater section of this report has developed a plan that works with their rainfall, hydrology, and citizens to attempt to clean up their waters. They didn’t need a prescription or an order from EPA to do it.

Voluntary cooperative programs such as the CWA §319 Nonpoint Source Pollution Control Grants<sup>123</sup> and §320 National Estuary Program<sup>124</sup> have also had tremendous success in improving water quality. The Oklahoma Conservation Commission using §319 authority, has eliminated nearly 440,000 pounds of nitrogen, 150,000 lbs of phosphorous and 6,000 tons of sediment runoff from Oklahoma’s waters in 2010.<sup>125</sup>

Public officials are supportive of local solutions to local water quality issues. According to Oklahoma State Representative Phil Richardson of Minco, OK, “By using the delivery system consisting of the Oklahoma Conservation Commission, local conservation districts and Natural Resources Conservation Service (NRCS), we have been able to use Federal CWA dollars to

partner with landowners in ways that are starting to turn the corner on some of our toughest water quality issues. We're not only controlling pollution, but we are also taking into consideration the financial situation of the local landowner-something that the EPA seems to be reluctant to do. Clearly we have a great model here in Oklahoma."<sup>126</sup> Unfortunately, EPA's FY12 budget request eliminated \$36 million in §319 grant monies, meaning states like Oklahoma will be less able to continue these successes.<sup>127</sup>

The National Estuary Program is another example of programs that work to balance the needs of the watershed users with the watershed protection. The program is "a unique partnership of the EPA and numerous federal, state, and local organizations working together to address coastal watershed management challenges."<sup>128</sup> The NEPs have succeeded because they have a local focus, involve the public and are able to bring together diverse groups of interests to help achieve meaningful water quality improvements. Simply passing down a mandate from Washington DC does not have the same long lasting effects.

## **Conclusion:**

The water quality criteria, stormwater regulations, and the pesticide general permits, as this report has shown, will extend EPA's regulatory reach. Not covered in this report, is the May 2, 2011 "Draft Clean Water Guidance"<sup>129</sup> that will have the effect of placing even more waters under federal jurisdiction. This guidance will fundamentally change the approach EPA and Army Corps take when making jurisdictional determination. Its effect will make even more waters, and the land that surrounds them, subject to federal jurisdiction.<sup>130</sup> If the guidance is implemented, the impacts of every rule in this report will be magnified as more waters are subject to federal jurisdiction. EPA has found yet another way to push the assumption that increased federal control is needed to execute the CWA properly, at the expense of the states authority.

This new, top down approach to regulating water is imposing huge financial costs without local input or any assurance of water quality improvements. The total cost for states, cities, industry, agriculture, utilities, and rate payers will be tens, if not hundreds, of billions of dollars. These are more expensive programs and unfunded federal mandates at a time when States don't have the money to comply.

Water quality decisions need to be returned to the States and local governments, like the CWA intended. That is the most effective way "to see a huge leap forward in water quality" for future generations.

## Appendix: Charts

### I. A. Chesapeake Bay TMDL:

**Chart 1: Total Pollutant Loads in the Chesapeake Bay<sup>131</sup>**

Pollutant (millions of pounds per year)	1985	2009	TMDL Allocation
<b>Nitrogen</b>	341.8	249.3	185.9
<b>Phosphorus</b>	24.1	16.5	12.5
<b>Sediment</b>	9643.6	8090.5	6453.8

**Chart 2: Pre-TMDL Improvements to the Chesapeake Bay<sup>132</sup>**

Pollutant (millions of pounds per year)	1985-2009 reductions	Reductions per year	TMDL Allocation	Reductions needed to reach TMDL allocation	Years to reach TMDL allocation (25yr trend)	Years to reach TMDL allocation (10yr trend)
<b>Nitrogen</b>	92.5	3.7	185.9	63.4	<b>17.14</b>	<b>57.64<sup>133</sup></b>
<b>Phosphorus</b>	7.6	0.3	12.5	4	<b>13.33</b>	<b>21.05<sup>134</sup></b>
<b>Sediment</b>	1553.1	62.1	6453.8	1636.7	<b>26.36</b>	<b>N/A</b>

**Chart 3: USDA vs. EPA Current Conservation Estimates in Agriculture<sup>135</sup>**

USDA	EPA
<ul style="list-style-type: none"> <li>• <b>7% of cropped acres under conventional tillage</b></li> <li>• <b>5% of cropped acres have a level of tillage between conservation tillage and conventional tillage</b></li> <li>• <b>88% of cropped acres are under conservation tillage</b></li> </ul>	<ul style="list-style-type: none"> <li>• 50% of cropped acres under conventional tillage</li> <li>• 50% of cropped acres under conservation tillage</li> </ul>

**Chart 4: Costs to selected localities in Virginia (Urban Stormwater Treatment)<sup>136</sup>**

Community	Total Cost of TMDL Implementation (Millions of \$)	Annual Cost based on 14 yr schedule (millions of \$)	Annual Per Capita Cost based on 14 yr schedule (hundreds of \$)
Falls Church <sup>137</sup>	25	1.8	400
Arlington <sup>138</sup>	500	36	N/A
Fairfax County <sup>139</sup>	1,500	107	600
Chesapeake	1,367	98	437
Hampton	1,053	75	509
Newport News	1,166	83	461
Norfolk	1,384	99	419
York	594	42	658
Portsmouth	666	48	472
Virginia Beach	1,737	124	284
Isle of Wight	231	17	460
James City	501	36	546
Poquoson	90	6	526
Suffolk	628	45	528
Williamsburg	94	7	510

## II. B. New Stormwater Rule Making

**Chart 5: New Program Costs<sup>140</sup>**

VSMP Municipal Stormwater	Current Application Fees	Proposed Application Fees	Current Maintenance Fees	Proposed Maintenance Fees
MS4 Phase I Individual (Large and Medium)	\$21,300	\$16,000 (- \$5,300)	\$3,800	\$8,500 (+ \$3,700)
MS4 Phase II Individual (Small)	\$2,000	\$8,000 (+ \$6,000)	\$400	\$6,000 (+ \$5,600)
MS4 Phase II General Permit (Small)	\$600	\$4,000 (+ \$3,400)	\$600	\$4,000 (+ \$3,400)

## NOTES

<sup>1</sup> Federal Water Pollution Control Act § 101(b), 33 U.S.C. § 1251-1387 (1972). It is also the purpose of the statute “to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.”

<sup>2</sup> Coming Together for Clean Water: EPA’s Strategy for Achieving Clean Water Public Discussion Draft, August 2010 *available at*

<https://blog.epa.gov/waterforum/wp-content/uploads/2010/08/Coming-Together-for-Clean-Water-Disc-Draft-Aug-2010-FINAL.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> 33 U.S.C. § 1251-1387 (2006).

<sup>5</sup> 83% of the savings EPA is proposing to achieve in FY12 budget ( - \$1.327 billion = FY 10 \$10.3 b – FY 12 proposed of \$8. 973 b) is cut from three water quality programs: SRF (-\$947 m) Great Lakes restoration (- \$125 m) and Nonpoint source §319 grants (- \$36.1 m) for a total of \$1.108 b in savings. U.S.

Environmental Protection Agency, FY 2012: EPA Budget in Brief, *available at*

<http://nepis.epa.gov/Exe/ZyNET.exe/P100A5RE.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Docs=&Query=190S11001&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=pubnumber^%22190S11001%22&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=pubnumber&IntQFieldOp=1&ExtQFieldOp=1&XmlQuery=&File=D%3A\zyfiles\Index%20Data\06thru10\T xt\00000025\P100A5RE.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h|-&MaximumDocuments=10&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p|f&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPage s=1&ZyEntry=1&SeekPage=x&ZyPURL>).

<sup>6</sup> Karl Blankenship, *EPA, in announcing New TMDL, Says it will finally clean up the Chesapeake Bay*, CHESAPEAKE BAY JOURNAL, (Jan. 2011) (quoting Bob Stallman, President of the American Farm Bureau Federation), <http://www.bayjournal.com/article.cfm?article=4002>.

<sup>7</sup> Press Release, EPA Reaches Settlement in Chesapeake Bay Lawsuit (May 5, 2011), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/ac46af32562521d48525772000591133?OpenDocument>

<sup>8</sup> *Id.*

<sup>9</sup> U.S. Environmental Protection Agency, Congressional Briefing, *The Chesapeake Bay TMDL: A Pollution Diet to Restore Clean Water to the Bay and the Region’s Waterways*, (Jan. 7, 2011),

<http://epa.gov/chesapeakebaytmdl>.

<sup>10</sup> *Id.*

<sup>11</sup> United States Department of Agriculture, National Agriculture Statistics Service,

<http://www.nass.usda.gov/>.

<sup>12</sup> United States Environmental Protection Agency Congressional Briefing, *The Chesapeake Bay TMDL: A Pollution Diet to Restore Clean Water to the Bay in the Region’s Waterways*, (Jan. 7, 2011), *available at* [http://archive.chesapeakebay.net/pubs/calendar/45645\\_01-18-11\\_Presentation\\_1\\_11135.pdf](http://archive.chesapeakebay.net/pubs/calendar/45645_01-18-11_Presentation_1_11135.pdf).

<sup>13</sup> Comparison of Draft Load Estimates for Cultivated Cropland in the Chesapeake Bay Watershed, LIMNOTECH, (Dec. 8, 2009), *available at*

<http://tfi.org/misc/LimnoTech%20usda%20epa%20bay%20load%20estimate%20comparison%20-%20dec%209%202010.pdf>.

<sup>14</sup> “Analysis Finds Numbers Behind EPA’s Nutrient Diet for the Chesapeake Bay Could be a Recipe for Disaster,” *The Fertilizer Institute Advocate*, (Dec. 2010/Jan. 2011) Vol. 10 Issue 1.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Quoting Ron Snyder, National Association of Corn Growers' Director of Public Policy.

<sup>17</sup> *Id.* Quoting Don Parrish, Senior Director of Regulatory Relations, American Farm Bureau Federation.

<sup>18</sup> National Research Council, *Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay: An Evaluation of Program Strategies and Implementation* [Prepublication Copy], May 4, 2011.

<sup>19</sup> Federal Water Quality Coalition, Comments of Federal Water Quality Coalition on the Draft Chesapeake Bay Total Maximum Daily Load, available at

<http://www.realtor.org/wps/wcm/connect/b62d6c8044a6c42e8180c35d6aeab3b5/Chesapeake+Bay+TMDL+comments.pdf?MOD=AJPERES&CACHEID=b62d6c8044a6c42e8180c35d6aeab3b5>.

<sup>20</sup> U.S. Environmental Protection Agency, Decision Rationale Total Maximum Daily Loads For Polychlorinated Biphenyls (PCBs) Tidal Potomac & Anacostia River Watershed in the District of Columbia, Maryland and Virginia, Oct. 31, 2011, available at

[http://www.epa.gov/reg3wapd/tmdl/dc\\_tmdl/PotomacPCB/PotomacPCBTMDLDR.pdf](http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/PotomacPCB/PotomacPCBTMDLDR.pdf).

<sup>21</sup> Hampton Roads Planning Dist. Comm'n Annual Meeting, Agenda Item #13, *Chesapeake Bay TMDL and Virginia Watershed Implementation Plan*, (Oct. 20, 2010); City of Falls Church FY12 Budget Planning, City Council and School Board Work Session, (Nov. 1, 2010), available at [http://fallschurch-va.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=200&meta\\_id=12027](http://fallschurch-va.granicus.com/MetaViewer.php?view_id=2&clip_id=200&meta_id=12027).

<sup>22</sup> City of Falls Church FY12 Budget Planning, City Council and School Board Work Session, (Nov. 1, 2010), available at [http://fallschurch-va.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=200&meta\\_id=12027](http://fallschurch-va.granicus.com/MetaViewer.php?view_id=2&clip_id=200&meta_id=12027).

<sup>23</sup> Nicholas F. Benton, *F.C. Council Begins Confronting Budget 'Armageddon' With Rate Hikes, Pay Cuts*, , FALLS CHURCH NEWS-PRESS, Feb. 8, 2011, available at <http://www.fcnp.com/news/8439-fc-council-begins-confronting-budget-armageddon-with-rate-hikes-pay-cuts.html>.

<sup>24</sup> Nicholas F. Benton, *F.C. Council Votes Hike in Sewer Rates Without Objections*, , FALLS CHURCH NEWS-PRESS, Feb. 14, 2011, available at <http://www.fcnp.com/news/8497-fc-council-votes-hikes-in-sewer-rates-without-objections.html>.

<sup>25</sup> Hampton Roads Planning Dist. Comm'n Annual Meeting, Agenda Item #13, *Chesapeake Bay TMDL and Virginia Watershed Implementation Plan*, (Oct. 20, 2010).

<sup>26</sup> *Id.*

<sup>27</sup> Sage Policy Group, Inc., *The Impact of the Phase I Watershed Implementation Plan on Key Maryland Industries*, (Apr. 2011), available at <http://www.sagepolicy.com/wp-content/uploads/2009/06/builders4-14.pdf>.

<sup>28</sup> Karl Blankenship, *EPA, in announcing new TMDL, says it will finally clean up the Chesapeake Bay*, CHESAPEAKE BAY JOURNAL, (Jan. 2011), available at <http://www.bayjournal.com/article.cfm?article=4002>.

<sup>29</sup> Karl Blankenship, *Local Governments Concerned about Funding as TMDLs Move Forward*, , CHESAPEAKE BAY JOURNAL, Apr. 2010, available at (<http://www.bayjournal.com/article.cfm?article=3816>).

<sup>30</sup> Daniel E. Estrin, *American Farm Bureau sues EPA over Chesapeake Bay TMDL*, GREEN LAW: PACE UNIVERSITY LAW SCHOOL, Jan. 14, 2011, <http://greenlaw.blogs.law.pace.edu/2011/01/14/american-farm-bureau-sues-epa-over-chesapeake-bay-tmdl/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Florida Wildlife Federation, Inc. v. Jackson, No. 4:08cv324-RH/WCS, 2009 WL 5217062 (N.D. Fla. 2009); EPA Publishes Final Numeric Nutrient Criteria for Florida's Flowing Waters, Dec. 2010, [http://www.martindale.com/members/Article\\_Atachment.aspx?od=113129&id=1203680&filename=asr-1203682.EPA.pdf](http://www.martindale.com/members/Article_Atachment.aspx?od=113129&id=1203680&filename=asr-1203682.EPA.pdf).



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<sup>34</sup> U.S. Environmental Protection Agency, Water Quality Standards for the State of Florida's Lakes and Flowing Waters, (Jan. 2010), [http://water.epa.gov/lawsregs/rulesregs/florida\\_factsheet.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_factsheet.cfm).

<sup>35</sup> Fertilizer Institute, *Joint Statement of Concerns and Principles on Proposed Nutrient Standards for Florida*, , Apr. 28, 2010, available at <http://www.tfi.org/issues/2010/comments/TFINutrientPrinciples.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; The SAB recommended the use of a tiered weight-of-evidence approach to criteria development. However, based on the language from EPA's November 2010 ruling, it is unclear whether EPA is committed to implementing a weight-of-evidence approach or adopting an alternative that responds to the SAB's concerns. Letter from Dr. Deborah L. Swackhamer, Chair of the Science Advisory Board, U.S. Environmental Protection Agency, to Lisa P. Jackson, Adm'r, U.S. Environmental Protection Agency (April 27, 2010), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/E09317EC14CB3F2B85257713004BED5F/\\$File/EPA-SAB-10-006-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/E09317EC14CB3F2B85257713004BED5F/$File/EPA-SAB-10-006-unsigned.pdf); Water Quality Standards for the State of Florida's Lakes and Flowing Waters, 75 Fed. Reg. 75,771 (Dec. 6, 2010) (to be codified at 40 C.F.R. pt. 131).

<sup>39</sup> Richard Budell et al., *Economic Impacts and Compliance Costs of Proposed EPA Numeric Nutrient Criteria for Florida Agriculture*, FL Department of Agriculture, University of Florida, Soil and Water Engineering Technology, Inc, Apr. 22, 2010, available at <http://freemarketflorida.org/wp-content/uploads/2011/03/Economic-impacts-of-EPA-Numeric-Criteria-FDACS-Report.pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Cardno Entrix Executive Summary, *Economic Analysis of the Proposed Federal Numeric Nutrient Criteria for Florida*, Nov., 2010, available at [http://www.cardnoentrix.com/documents/Final\\_NNC\\_Economic\\_Report\\_Executive\\_Summary.pdf](http://www.cardnoentrix.com/documents/Final_NNC_Economic_Report_Executive_Summary.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> The Florida Agricultural Commissioner, the Florida League of Cities, the Florida Stormwater Association, and numerous municipal and county groups, as well as members of affected industries.

<sup>51</sup> Press Release, Office of the Attorney Gen. of Fla., Florida Officials File Lawsuit Against EPA Over Federal Intrusion into State's Clean Water Program (Dec. 7, 2010) [hereinafter] *Attorney General's Lawsuit*, available at

<http://www.myfloridalegal.com/newsrel.nsf/newsreleases/7AF42E99BE18D24D852577F2006D5A2F>.

<sup>52</sup> Press Release, The Florida League of Cities, Inc., League Files Legal Action Against the EPA to Protect Cities from Colossal Unfunded Mandate available at

<http://www.floridaleagueofcities.com/News.aspx?CNID=4074>.

<sup>53</sup> *Attorney General's Lawsuit*, *supra* note 51.

<sup>54</sup> U.S. Environmental Protection Agency, Memorandum, from Nancy K. Stoner, Acting Ass't Adm'r, to Regional Administrators Regions 1-10, Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions, Mar. 16, 2011, available at

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[http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo\\_nitrogen\\_framework.pdf](http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo_nitrogen_framework.pdf).

<sup>55</sup> Letter from Nancy K. Stoner, Acting Assistant Adm'r, U.S. Environmental Protection Agency, to Lisa Bonnett, Interim Dir., Ill. Environmental Protection Agency (May 11, 2011), *available at* [http://www.epa.gov/region5/chicagoriver/pdf/CAWS\\_determination\\_letter-20110511.pdf](http://www.epa.gov/region5/chicagoriver/pdf/CAWS_determination_letter-20110511.pdf).

<sup>56</sup> Exec. Order No. 13,508, 74 Fed. Reg. 23,099 (May 12, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900352.pdf>.

<sup>57</sup> Susan Parker Bodine, National Conference of State Legislatures, *Agriculture & Energy Committee and Environment Committee*, Apr. 15, 2011, *available at* <http://www.ncsl.org/documents/standcomm/scagee/NCSLBodine.pdf>.

<sup>58</sup> *Jackson Downplays Chance EPA Sets Mississippi River TMDL Soon*, insideepa.com, Sept. 28, 2010, *available at* <http://insideepa.com/201009282339949/EPA-Daily-News/Daily-News/jackson-downplays-chance-epa-sets-mississippi-river-tmdl-soon/menu-id-95.html>.

<sup>59</sup> NRDC et al., *Petition for Rulemaking, Numeric Water Quality for Nitrogen and Phosphorus and TMDLs for the Mississippi River and the Gulf of Mexico* (Jul. 30, 2008), *available at* [http://www.iaenvironment.org/documents/EPAPetition\\_NutrientCriteria.pdf](http://www.iaenvironment.org/documents/EPAPetition_NutrientCriteria.pdf).

<sup>60</sup> *Under Threat Of Suit, EPA Readies Response On Mississippi Nutrient Petition* (June 30, 2011) <http://insideepa.com/Inside-EPA/Inside-EPA-06/03/2011/under-threat-of-suit-epa-readies-response-on-mississippi-nutrient-petition/menu-id-67.html>

<sup>61</sup> *Stormwater Management Including Dischargers From New Development and Redevelopment*, 74 Fed. Reg. 68,617 (Dec. 28, 2009).

<sup>62</sup> 40 C.F.R. § 122.26(b)(8) (2010) defines an MS4 as “[a] conveyance or system of conveyances (including roadswith drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains: (i) [o]wned or operated by a State, city, town, borough, county . . . or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, storm water . . . (ii) [d]esigned or used for collecting or conveying stormwater, (iii) [w]hich is not a combined sewer; and (iv) [w]hich is not part of a Publically Owned Treatment Works (POTW).”

<sup>63</sup> Pub. L. No. 100-4, 101 Stat. 7 (1987).

<sup>64</sup> Federal Water Pollution Control Act §402(p), 33 U.S.C. § 1342(p) (2006).

<sup>65</sup> Clean Water Act, 33. U.S.C. § 1311, 1316 (2006).

<sup>66</sup> *Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Category*, 69 Fed. Reg. 22,472 (Apr. 26, 2004) (to be codified 40 C.F.R. pt. 450).

<sup>67</sup> *NRDC v. EPA*, 542 F.3d 1235 (9th Cir. 2008).

<sup>68</sup> *Id.* at 1241.

<sup>69</sup> 69 Fed. Reg. 22,477 (Apr.26, 2004) (to be codified at 40 C.F.R. pt. 450).

<sup>70</sup> *Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category*, 74 Fed. Reg. 62,996 (Dec. 1, 2009) (to be codified at 40 C.F.R. pt. 450). This 2009 rule was the first mandated nationwide monitoring of the amount of sediment that can run off any construction site that impacts 10 or more acres of land at any one time. It was also the first time EPA mandated the specific types of erosions and sediment controls that contractors must use to control stormwater runoff on all construction sites that disturb one or more acres of land.

<sup>71</sup> *EPA Finalizes Nationwide Numeric Limit, Prescriptive Stormwater Controls For All Construction Sites*, AGC OF AMERICA, (Nov. 30, 2009), <http://newsletters.agc.org/environment/2009/11/30/epa-finalizes-nationwide-numeric-limit-prescriptive-stormwater-controls-for-all-construction-sites/>.

<sup>72</sup> *Id.*

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<sup>73</sup> *Id.*; See also, Construction Industry Adds 5,000 Jobs, but Unemployment Rate Remains Nearly Twice National Average, AGC OF AMERICA, May 6, 2011, available at

<http://news.agc.org/2011/05/06/construction-industry-adds-5000-jobs-but-unemployment-rate-remains-nearly-twice-national-average/> (explaining that unemployment in the construction sector climbed to 24.5% in March 2010 and is slowly rebounding, but is still twice the national average).

<sup>74</sup> Letter from Susan Asmus, Senior Vice President, Nat'l Ass'n of Home Builders, to Lisa P. Jackson, Adm'r, U.S. Environmental Protection Agency (June 10, 2010), available at [http://www.nahb.com/fileUpload\\_details.aspx?contentID=140510](http://www.nahb.com/fileUpload_details.aspx?contentID=140510).

<sup>75</sup> *Id.*

<sup>76</sup> Letter from Robert J. Cramer, Managing Associate General Counsel U.S. GAO, to Barbara Boxer, Chairman of the Seante Committee on Environment and Public Works (Dec. 16, 2009) available at <http://www.gao.gov/decisions/majrule/d10308r.pdf>.

<sup>77</sup> U.S. EPA Throws Out Numeric Stormwater Limit for Construction, Heads Back to Drawing Board, AGC OF AMERICA, (Aug. 16, 2010), available at <http://newsletters.agc.org/environment/2010/08/16/us-epa-throws-out-numeric-stormwater-limit-for-construction-heads-back-to-drawing-board/>.

<sup>78</sup> In the October 2010 document entitled, "Stay and Correction of the Numeric Limit for the Construction and Development ELGs" EPA admitted that the petitions "pointed out a potential error in the calculation of the numeric limit." EPA further stated "based on EPA's examination of the data set underlying the 280 NTU limit, EPA has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280 NTU numeric limit." U.S. Environmental Protection Agency, Office of Water, EPA-821-F-10-003, Stay and Correction of the Numeric Limit for the Construction and Development ELGs (Oct. 2010), available at [http://water.epa.gov/scitech/wastetech/guide/construction/upload/c\\_d\\_stay\\_factsheet.pdf](http://water.epa.gov/scitech/wastetech/guide/construction/upload/c_d_stay_factsheet.pdf).

<sup>79</sup> U. S. Environmental Protection Agency, Office of Wastewater Mgmt., EPA Construction General Permit (2011), <http://cfpub.epa.gov/npdes/stormwater/cgp.cfm>.

<sup>80</sup> *Id.*

<sup>81</sup> Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617 (Dec. 28, 2009).

<sup>82</sup> Letter from Jeffrey S. Longworth, Counsel to the Real Estate Stormwater Coalition, to EPA Water Docket, Agency Information Collection Activities, (June 9, 2010), available at <http://www.nmhc.org/Content/ServeFile.cfm?FileID=8187>. This letter was sent to the EPA Water Docket on behalf of a coalition of owners, managers, developers of offices, retail, multifamily units, and other properties to express concerns over the EPA's activities related to the promulgation of new stormwater rules. The industry groups asserted that the EPA exceeded its statutory authority under the CWA by; labeling developed land in the "point source" category, attempting to regulate impervious surfaces when no such authority exists, labeling releases into ms4s as discharges into waters of the U.S., and not meeting the statutory prerequisites necessary to exercise regulatory authority over such discharges. The industry groups concluded by stating that "[i]f EPA wishes to promulgate national regulations that would control stormwater runoff from developed property, EPA must first compile a record that supports its assertion that all developed property is a point source discharge of pollutants to the waters of the U.S."

<sup>83</sup> U.S. Environmental Protection Agency, Stormwater Rulemaking Consultation with State and Local Governments, (2010), available at <http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/EPA%20SW%20Rulemaking%20Briefing.pdf>.

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<sup>84</sup> Letter from Nathan Gardner-Andrews, General Counsel, National Ass'n of Clean Water Agencies, to Connie Bosma, U.S. Environmental Protection Agency (Jan. 21, 2011), *available at* [http://op.bna.com/env.nsf/id/jsun-8dfr98/\\$File/NACWA%20letter.pdf](http://op.bna.com/env.nsf/id/jsun-8dfr98/$File/NACWA%20letter.pdf).

<sup>85</sup> National Research Council, *Urban Stormwater Management in the United States*, NATIONAL ACADEMY OF SCIENCES, (2009).

<sup>86</sup> Letter from Keith Jones, General Counsel, National Ass'n of Clean Water Agencies, to Water Docket, U.S. Environmental Protection Agency (Feb. 26, 2010), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2009-0817-0168>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Federal Water Pollution Control Act §101(b), 33 U.S.C. § 1251-1387 (2006). "It is the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."

<sup>90</sup> EPA's model city for effective use of green infrastructure is Philadelphia. The city has unleashed a program, Green2015— a plan to implement green infrastructure to manage stormwater runoff, which will include rain gardens, green roofs, pervious pavements and trees to recycle and reuse water, and ensure that every city resident has a green park within a ten minute walk. Inga Saffron, *City Plans Proliferation of Small Parks*, THE PHILA. INQUIRER DIGITAL EDITION, Dec. 6, 2010, *available at* [http://articles.philly.com/2010-12-06/news/25292983\\_1\\_pocket-parks-passive-park-asphalt-covered/3](http://articles.philly.com/2010-12-06/news/25292983_1_pocket-parks-passive-park-asphalt-covered/3);

It is the first city to propose a green infrastructure solution to regulating stormwater to EPA, but as of December of 2009, EPA had not yet decided whether to approve Philadelphia's stormwater plan and even responded that there was no way to permit it. As Jon Capacasa, director of water protection for EPA's Region 3 office in Philadelphia put it: "The fact that they're proposing it to meet Clean Water Act regulatory requirements is fairly unique. I think one of the key challenges will be putting the institutional measures in place to ensure the good vision here can be achieved." Taryn Luntz, *City's 'All Green' Plan Raises Eyebrows at EPA*, N.Y. TIMES, Dec. 24, 2009, *available at* <http://www.nytimes.com/gwire/2009/12/24/24greenwire-citys-all-green-stormwater-plan-raises-eyebrow-45258.html?pagewanted=1>.

<sup>91</sup> U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, EPA-841-F-10-004, *Green Infrastructure Case Studies: Municipal Policies for Managing Stormwater with Green Infrastructure* (Aug. 2010), *available at* [http://www.epa.gov/owow/NPS/lid/gi\\_case\\_studies\\_2010.pdf](http://www.epa.gov/owow/NPS/lid/gi_case_studies_2010.pdf).

<sup>92</sup> NYC Green Infrastructure Plan, *A Sustainable Strategy For Clean Waterways*, *available at* [http://www.nyc.gov/html/dep/pdf/green\\_infrastructure/NYCGreenInfrastructurePlan\\_ExecutiveSummary.pdf](http://www.nyc.gov/html/dep/pdf/green_infrastructure/NYCGreenInfrastructurePlan_ExecutiveSummary.pdf).

<sup>93</sup> The Civic Federation, *Managing Urban Stormwater with Green Infrastructure: Case Studies of Five U.S. Local Governments*, Jul. 30, 2007, at 6, *available at* <http://www.cnt.org/repository/GreenInfrastructureReportCivicFederation%2010-07.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> For instance, in the state of Washington, the Governor's transportation budget for the 2009-2011 bienniums included \$1.5 million to begin implementing the requirements of the municipal stormwater permit. But as the Washington State Department of Transportation states, "Future projections for the 2011-2012 and 2013-2015 biennia indicate that costs to implement the new stormwater permit will significantly increase over the '09-11 levels." Washington State Dep't of Transp., *Stormwater Permit*

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Questions and Answers,

<http://www.wsdot.wa.gov/Environment/WaterQuality/StormwaterPermitQandA.htm#implement>.

<sup>96</sup> Julia B. Hillegass, Presentation to the Hampton Roads Planning Dist. Comm'n, *Stormwater Management Issues: A Regional Update*, Jan. 21, 2009, available at

[http://www.hrpdc.org/Presentations/PEP/2009/01\\_09/10\\_PDC\\_SW%20Briefing\\_012109.pdf](http://www.hrpdc.org/Presentations/PEP/2009/01_09/10_PDC_SW%20Briefing_012109.pdf).

<sup>97</sup> Vince Jackson, *Federal Stormwater Rules to Hurt, Town Officials Say*, Dec. 31, 2010,

<http://www.independentmail.com/news/2010/dec/31/federal-storm-water-rules-hurt-town-officials-say/>.

<sup>98</sup> *Id.*

<sup>99</sup> Evan Brandt, *New Federal Stormwater Rules Could Drain Wallets*, Apr. 12, 2010,

<http://www.pottsmc.com/articles/2010/04/12/news/srv0000007997453.txt>.

<sup>100</sup> *Unfair Mandate: New Stormwater Rules Hurt Bluefield*, BLUEFIELD DAILY TELEGRAPH, Jan. 4, 2011,

available at <http://bdtonline.com/editorials/x982169678/Unfair-mandate-New-stormwater-rules-hurt-Bluefield>.

<sup>101</sup> Daniel Curran, *Newport News Stormwater Bills May Increase By 35% or More in 2012*, JAMES RIVER

Journal, Jan. 25, 2011, available at <http://jamesriverjournal.com/news-archives/14627-newport-news-wastewater-bills.html>.

<sup>102</sup> *Headwaters Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). Headwaters, a non-profit environmental group, brought a suit against Talent alleging that Talent was discharging herbicides into nearby waters without a permit in violation of the CWA. The Ninth Circuit determined that Talent's discharges required a NPDES permit. The Court rejected Talent's claim that because EPA had approved Talent's label under FIFRA for the herbicides discharged, no permit was required under the CWA. The Court also rejected the Talent's claims that the herbicides did not qualify as a "pollutant" under the CWA, and that the irrigation canals were not "navigable waters" under the CWA. Thus, Talent's discharge of herbicides without a permit violated the CWA because it was a discharge of a pollutant into the navigable waters from a point source.

<sup>103</sup> *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). League of Wilderness, and other environmental groups, challenged a US Forest Service (USFS) aerial pesticide spraying program alleging that the USFS failed to obtain a proper NPDES permit under the CWA. USFS claimed that under 40 C.F.R. § 122.27 aerial spraying does not qualify as a point source because "silvicultural point source" activities do not include activities such as pest and fire control. The Ninth Circuit rejected this claim holding that a plane spraying pesticides is clearly a "point source" under the CWA. The Court found the intent of Congress was clear and an agency cannot circumvent that intent through interpretation of administrative regulations. The court also determined that a contextual reading of the statute indicated certain activities were listed to clarify what is subject to NPDES requirements, not to exclude other activities from being defined as a point source.

<sup>104</sup> *National Cotton Council v. EPA*, 555 F.3d 927 (6th Cir. 2009).

<sup>105</sup> Kevin Beaton, *Clean Water Act Permitting Required for Pesticide Applications*, AMERICAN COLLEGE OF ENVIRONMENTAL LAWYERS, May 19, 2009, available at

<http://www.acoel.org/2009/05/articles/water/clean-water-act-permitting-required-for-pesticide-applications/>.

<sup>106</sup> U.S. Environmental Protection Agency, *Pesticide News Story: Motion Filed to Stay Court Decision in Aquatic Pesticide Application Case*, April 10, 2009,

[http://www.epa.gov/oppfead1/cb/csb\\_page/updates/2009/aquatic-pesticide.html](http://www.epa.gov/oppfead1/cb/csb_page/updates/2009/aquatic-pesticide.html) "The Government will not be filing a Petition to Seek Rehearing in *National Cotton Council v. EPA*."

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<sup>107</sup> Dominick V. Ninivaggi, Superintendent Division of Vector Control, Suffolk County Dep't of Pub. Works, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, 553 F.3d 927(6th Cir. 2009), and to review related draft legislation (Feb. 16, 2011).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> John Salazar, Comm'r, Colo. Dep't of Agriculture, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, and to review related draft legislation (Feb. 16, 2011).

<sup>111</sup> *Id.*

<sup>112</sup> Dr. Andrew Fisk, ASIWPCA President, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, and to review related draft legislation (Feb. 16, 2011).

<sup>113</sup> Dominick V. Ninivaggi, Superintendent Division of Vector Control, Suffolk County Dep't of Pub. Works, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, and to review related draft legislation (Feb. 16, 2011).

<sup>114</sup> John Salazar, Comm'r, Colo. Dep't of Agriculture, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, and to review related draft legislation (Feb. 16, 2011).

<sup>115</sup> U.S. Environmental Protection Agency, Pesticide General Permit (PGP) for Point Source Discharges to Waters of the United States from the Application of the Pesticides (Draft), 2010, *available at* [http://www.epa.gov/npdes/pubs/proposed\\_pgp.pdf](http://www.epa.gov/npdes/pubs/proposed_pgp.pdf).

<sup>116</sup> U.S. Environmental Protection Agency, Pesticide General Permit (PGP) for Discharges from the Application of Pesticides, 2011 Pre-publication Draft, *available at* [http://www.epa.gov/npdes/pubs/draftfinal\\_pgp.pdf](http://www.epa.gov/npdes/pubs/draftfinal_pgp.pdf).

<sup>117</sup> U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System (NPDES), Pesticides, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=410](http://cfpub.epa.gov/npdes/home.cfm?program_id=410).

<sup>118</sup> U.S. Environmental Protection Agency, National Pollutant Elimination Discharge System (NPDES); Pesticides Overview, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=410](http://cfpub.epa.gov/npdes/home.cfm?program_id=410).

<sup>119</sup> Reducing Regulatory Burdens Act of 2011, H.R. 872, 112th Cong. (2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr872eh/pdf/BILLS-112hr872eh.pdf>. The U.S. House of Representatives passed H.R. 872 by a vote of 292-130 on March 31, 2011.

<sup>120</sup> *Id.*

<sup>121</sup> Norman Semanko, Executive Dir. Idaho Water Users Ass'n, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA*, and to review related draft legislation (Feb. 16, 2011).

<sup>122</sup> John Salazar, Comm'r, Colo. Dep't of Agriculture, Remarks before the House Subcommittee on Nutrition and Horticulture and the Subcommittee on Transportation and Infrastructure, Joint hearing to consider reducing the regulatory burdens posed by *National Cotton Council v. EPA* and to review related draft legislation (Feb. 16, 2011).

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<sup>123</sup> 33 U.S.C. § 1329 (2006).

<sup>124</sup> 33 U.S.C. § 1330 (2006).

<sup>125</sup> Oklahoma Conservation Comm’n, Oklahoma is a National Leader in Documented Water Quality Success Stories, [http://www.ok.gov/conservation/News/Conservation\\_Success\\_Stories/Water\\_Quality\\_Success\\_Stories/Water\\_Quality\\_Success\\_Stories at Ag Day 2011/](http://www.ok.gov/conservation/News/Conservation_Success_Stories/Water_Quality_Success_Stories/Water_Quality_Success_Stories_at_Ag_Day_2011/).

<sup>126</sup> *Oklahoma Recognized by EPA for Success in Reducing Nutrient Levels in Waterways*, Oklahoma Farm Report (Agriculture News), Apr. 18, 2011, [http://www.oklahomafarmreport.com/wire/news/2011/04/00534\\_ConservationSuccess04182011\\_052846.php](http://www.oklahomafarmreport.com/wire/news/2011/04/00534_ConservationSuccess04182011_052846.php).

<sup>127</sup> “The bottom line is that we have proven in Oklahoma that you can be successful in addressing nonpoint source pollution while respecting private property rights,” Pope said. “The big concern really is that if you don’t have programs like this, you have only two choices, either regulations that hurt agriculture or dirty water—either option leads to law suits and big political fights. While we understand the need to balance the budget, we have shown that there is a way forward on water quality that splits the difference between regulation and bad water with our work here in Oklahoma. Why in the world the federal administration would want to put programs like this that work at risk is beyond me. It really makes you wonder if folks are interested in solving problems cooperatively or if they simply have an agenda to push for more regulations that will only feed the current climate of distrust so many people have of the EPA and make it harder to get the work done on the ground that needs to happen if we are going to clean up and protect our water.” Clay Pope, Oklahoma Association of Conservation Districts Executive Director, North Canadian/Oklahoma River Protection Threatened by Federal Budget Cuts, OKLAHOMA FARM REPORT, June 28, 2011, *available at* [http://www.oklahomafarmreport.com/wire/news/2011/06/01777\\_NorthCanadianOklahomaRiver06282011\\_130808.php](http://www.oklahomafarmreport.com/wire/news/2011/06/01777_NorthCanadianOklahomaRiver06282011_130808.php).

<sup>128</sup> U.S. Environmental Protection Agency, Implementing a Community-Based Watershed Approach, [http://water.epa.gov/type/oceb/nep/commbased\\_app.cfm](http://water.epa.gov/type/oceb/nep/commbased_app.cfm).

<sup>129</sup> U.S. Environmental Protection Agency, Clean Water Definition of “Waters of the United States,” <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

<sup>130</sup> U.S. Environmental Protection Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction Apr. 27, 2011, [http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa\\_guidance\\_impacts\\_benefits.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf).

<sup>131</sup> U.S. Environmental Protection Agency, Congressional Briefing, *The Chesapeake Bay TMDL: A Pollution Diet to Restore Clean Water to the Bay and the Region’s Waterways*, (Jan. 7, 2011), <http://epa.gov/chesapeakebaytmdl>.

<sup>132</sup> Numbers calculated using EPA provided data from chart 1, note 8

<sup>133</sup> Chesapeake Bay Program, Nitrogen Loads and River Flow to the Bay, [http://www.chesapeakebay.net/status\\_nitrogen.aspx?menuitem=19796](http://www.chesapeakebay.net/status_nitrogen.aspx?menuitem=19796)

<sup>134</sup> Chesapeake Bay Program, Phosphorus Loads and River Flow to the Bay, [http://www.chesapeakebay.net/status\\_phosphorus.aspx?menuitem=19800](http://www.chesapeakebay.net/status_phosphorus.aspx?menuitem=19800)

<sup>135</sup> “Analysis Finds Numbers Behind EPA’s Nutrient Diet for the Chesapeake Bay Could be a Recipe for Disaster,” *The Fertilizer Institute Advocate*, (Dec. 2010/Jan. 2011) Vol. 10 Issue 1.

<sup>136</sup> Hampton Roads Planning Dist. Comm’n Annual Meeting, Agenda Item #13, *Chesapeake Bay TMDL and Virginia Watershed Implementation Plan*, (Oct. 20, 2010).

<sup>137</sup> “City of Falls Church FY12 Budget Planning,” City Council and School Board Work Session, (Nov. 1, 2010), ([http://fallschurch-va.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=200&meta\\_id=12027](http://fallschurch-va.granicus.com/MetaViewer.php?view_id=2&clip_id=200&meta_id=12027)).

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Julia B. Hillegass, Presentation to the Hampton Roads Planning Dist. Comm'n, *Stormwater Management Issues: A Regional Update*, Jan. 21, 2009, available at [http://www.hrpd.org/Presentations/PEP/2009/01\\_09/10\\_PDC\\_SW%20Briefing\\_012109.pdf](http://www.hrpd.org/Presentations/PEP/2009/01_09/10_PDC_SW%20Briefing_012109.pdf).