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### S. 1816 CHESAPEAKE CLEAN WATER AND ECOSYSTEM RESTORATION ACT

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SEPTEMBER 28, 2010.—Ordered to be printed

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Mrs. BOXER, from the Committee on Environment and Public  
Works, submitted the following

### R E P O R T

[To accompany S. 1816]

together with

### ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (S. 1816) to amend the Federal Water Pollution Control Act to improve and reauthorize the Chesapeake Bay Program, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended, do pass.

#### GENERAL STATEMENT AND BACKGROUND

The Chesapeake Bay encompasses 64,000 square miles. Its watershed is home to more than 17 million people, with tributaries in Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia.<sup>1</sup>

A recent report from the University of Maryland Center for Environmental Science finds that the ecological health of the Chesapeake Bay remains poor.<sup>2</sup> The Bay continues to have poor water quality, degraded habitats and low populations of many species of fish and shellfish. The primary stressors of the Chesapeake Bay

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<sup>1</sup>The Chesapeake Bay Watershed <http://www.chesapeakebay.net/watersheds.aspx?menuitem=14603>.

<sup>2</sup>Chesapeake Bay Health Report Card [http://www.chesapeakebay.net/news\\_umcesreportcard09.aspx?menuitem=35271](http://www.chesapeakebay.net/news_umcesreportcard09.aspx?menuitem=35271).

and its tributaries are pollution from excess nitrogen, phosphorus and sediment entering the water. Nutrient contamination contributes to algae blooms, which, when they decompose, deprive the water of the oxygen necessary to support diverse species. These algal blooms also impact water clarity, blocking sunlight from reaching bay grasses. Underwater grasses and wetlands are vital to juvenile fish and crabs, and the health and abundance of these animals and habitats are gauges of the Bay's health.

A number of critical measures have been identified to restore the Chesapeake Bay and its watershed, including reducing pollution, restoring habitats, managing fisheries, protecting watersheds and fostering stewardship.<sup>3</sup> In 1983 and 1987, the states of Virginia, Maryland, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission and the U.S. Environmental Protection Agency, representing the federal government, signed the Chesapeake Bay Agreement that established the Chesapeake Bay Program partnership to protect and restore the Chesapeake Bay's ecosystem. In 1987, the Congress formally authorized the Chesapeake Bay Program in section 117 of the Federal Water Pollution Control Act. By statute, the Chesapeake Bay Program is a joint federal-state partnership, predominantly led by states within the Chesapeake Bay Watershed. The governing Executive Council of the Program consists of the Governors of Maryland, Pennsylvania and Virginia; the Mayor of the District of Columbia; the Chairman of the Chesapeake Bay Commission (a tri-state legislative body); and the EPA Administrator, representing the entire federal government.<sup>4</sup>

In 1994, 25 federal agencies signed an Agreement of Federal Agencies on Ecosystem Management in the Chesapeake Bay, in which they agreed to coordinate Bay restoration efforts.

In 1998 the American Canoe Association, Inc., and others brought suit against EPA, alleging that the Agency had failed to perform a non-discretionary duty—the classification of the Virginia waters of the Chesapeake Bay and its tidal waters as impaired, as required under the Federal Water Pollution Control Act, section 303(d) (33 U.S.C. 1313(d)). In a 1999 consent decree, the civil action (*American Canoe Ass'n, Inc. v. EPA*, Civil No. 98-979-A (E.D. Va.)) was settled with an agreement that the Commonwealth of Virginia had until May 2010 to develop a Total Maximum Daily Load (TMDL), allocating load and wasteload pollution limits sufficient so that the Bay and tidal rivers in Virginia achieved water quality standards. In the event that the Commonwealth failed to do so, the Court agreed that EPA must develop the TMDL no later than May 2011.

Using the cooperative partnership that had been established under the Chesapeake Bay Agreement, the Commonwealth of Virginia, EPA and the other partners agreed to work together to remove the Bay and its tidal waters from the impaired waters list by 2010, thus avoiding the need to develop a TMDL.

Through a formal Memorandum of Understanding, the Governors of Delaware, New York and West Virginia committed to work with

<sup>3</sup> Bay Stressors <http://www.chesapeakebay.net/baypressures.aspx?menuitem=13959>.

<sup>4</sup> The 1983 Chesapeake Bay Agreement, The 1987 Chesapeake Bay Agreement, and the Chesapeake 2000 Agreement, [http://www.chesapeakebay.net/committee\\_ec\\_info.aspx?menuitem=16594](http://www.chesapeakebay.net/committee_ec_info.aspx?menuitem=16594).

the Executive Council in advancing water quality improvements in the Bay watershed.<sup>5</sup>

On June 28, 2000, the Chesapeake Bay Program adopted a new Bay agreement, “Chesapeake 2000: A Watershed Partnership,” that set Bay restoration goals for the year 2010. That new agreement, calling for the restoration of water quality to the Chesapeake Bay and its tidal segments, was a central element in the Congressional reauthorization of the Program in 2000. The current authorization of appropriations expired in 2005.

In recent years it became apparent that efforts outlined in the Chesapeake 2000 plan to restore water quality to the Chesapeake and its tidal segments would be unsuccessful. The principals’ staff committee of the Chesapeake Basin Program, consisting of officials from each Chesapeake Bay State, the District of Columbia, the Chesapeake Bay Commission, and the EPA, agreed that all Basin States would take all required actions to restore water quality within 15 years, i.e., by 2025. The Executive Council also requested a slightly accelerated schedule under which EPA should complete a Chesapeake Bay TMDL so that the States would have their assigned load and wasteload allocations and could begin the restoration work with clear requirements. The revised date for EPA to complete the TMDL is December 31, 2010. The Executive Council agreed that the Chesapeake Bay TMDL would address all segments of the Chesapeake Bay and tidal tributaries that are identified on the currently applicable lists of impaired waters for nitrogen, phosphorus and sediment under section 303(d) of the Federal Water Pollution Control Act (33 U.S.C. 1313(d)).

In a settlement agreement on a separate but related lawsuit, among other provisions, EPA agreed to meet the accelerated timetable of completing the Chesapeake Bay TMDL by the end of 2010 (Fowler v. EPA, 2010).

#### OBJECTIVES OF THE LEGISLATION

The purpose of S. 1816 is to amend the Federal Water Pollution Control Act to improve and reauthorize the Chesapeake Bay Program authorized in section 117 of the Act.

The bill has four primary objectives:

1. Establish a date-certain of 2025, along with appropriate milestones, for all restoration actions to be implemented throughout the Chesapeake Basin that will lead to attainment of water quality goals in the Chesapeake Bay and its tidal segments that are on the EPA list of impaired waters (Federal Water Pollution Control Act, Sec. 303(d));
2. Assure that the Basin States, as delegated authorities under the Federal Water Pollution Control Act, be given maximum authority and flexibility to meet the restoration load and wasteload allocation pollution limits;
3. Require that the Federal government be an active partner in the restoration effort, by developing the overall pollution reduction targets on a state-by-state basis through the Chesa-

<sup>5</sup>Memorandum of Understanding: Among the State of Delaware, the District of Columbia, the State of Maryland, the State of New York, the Commonwealth of Pennsylvania, the Commonwealth of Virginia, the State of West Virginia, and the United States Environmental Protection Agency Regarding Cooperative Efforts for the Protection of the Chesapeake Bay and Its Rivers [http://chesapeakebay.net/content/publications/cbp\\_12085.pdf](http://chesapeakebay.net/content/publications/cbp_12085.pdf).

peake Bay TMDL, implementing the terms of Presidential Executive Order and providing clear and meaningful accountability for the Basin States; and

4. Provide the States, municipalities, developers, and especially agricultural producers with significant new tools and financial resources to meet the restoration demands within the 15 year time frame contained in the legislation.

#### SECTION-BY-SECTION

##### *Sec. 1. Short title*

This Act may be cited as the “Chesapeake Clean Water and Ecosystem Restoration Act”.

##### *Sec. 2. Findings*

An extensive set of Findings details the pollutants that are affecting the Chesapeake Bay and its tidal rivers; the history of the Chesapeake Bay Program efforts to restore the Bay; and status of legal efforts to require stronger regulatory responses to enforce cleanup requirements, including EPA’s current drafting of the Chesapeake Bay Total Maximum Daily Load allocation for the entire watershed and the Basin States’ efforts to plan and adopt watershed implementation plans.

##### *Sec. 3. Chesapeake Basin Program*

This Section replaces the current Section 117 of the Federal Water Pollution Control Act in its entirety.

(a) Definitions. Replaces and expands the current set of definitions. Among the key definitions are:

*Chesapeake Basin State*—expands the program to include the “headwater” states of Delaware, New York, and West Virginia.

*Chesapeake Bay TMDL*—for the purposes of the legislation, defines the EPA-issued TMDL as including both the Bay and its impaired tidal segments and allows TMDLs to be expressed in temporal units other than daily.

*Baseline, Credit, Offset*—terms that are important to the functioning of the water quality trading program contained in the legislation are defined.

(b) Renaming And Continuation of Chesapeake Bay Program. The Chesapeake Bay Program is renamed the *Chesapeake Basin Program* to more accurately reflect its watershed-wide restoration efforts. This subsection largely duplicated the current subsection 117(b), which establishes a Program Office for the Chesapeake Basin and details its functions. The Program Office is responsible for:

- Implementing and coordinating scientific research, modeling, monitoring, and support services
- Providing information on the environmental quality of and living resources of the Basin ecosystem.
- Assisting the signatories to the Bay agreements in their efforts to restore water quality and the living resources of the Bay.
- Coordinating actions among the Basin States, Federal partners, and other stakeholders in improving water quality and living resources in the ecosystem.
- Implementing programs of public outreach.

This subsection also requires that the Chesapeake Executive Council meet at least once per year. Meetings will be open to the public, except when the Council meets in private executive session. Annual meetings with executive sessions are a long-established practice of the Chesapeake Bay program, but they have not previously been required.

(c) Interagency Agreements. This subsection is unchanged from existing law, allowing the Administrator to enter into interagency agreements to support restoration efforts. The Administrator has made extensive use of this authority in the past to fund staff from other Federal agencies including USDA Natural Resources Conservation Service, USDA Forest Service, the National Park Service, and the U.S. Army Corps of Engineers. The Committee expects this inter-agency collaboration to continue.

(d) Technical Assistance and Assistance Grants. This subsection largely retains the same language currently in subsection 117(d). The Administrator is authorized to provide *technical assistance and assistance grants* to advance the Chesapeake Basin restoration effort. Administrative costs associated with these grants cannot exceed 10 percent. The list of current eligible grantees is expanded to include soil conservation districts and basin commissions. Historically, the Administrator has made extensive use of this authority, providing assistance agreements to academic and non-profit organizations. The "Small Watershed Grants Program," first authorized in 2000, is renamed the "*Chesapeake Basin Stewardship Grants Program*." The federal share of these projects cannot exceed 75 percent. These grants have been extremely popular and have resulted in scores of individual projects that have leveraged their value many times over as they bring restoration efforts to local communities.

(e) Implementation, Monitoring and Centers of Excellence Grants. Current Section 117(e) is replaced with this new subsection (e). Existing authority to provide implementation and monitoring grants is continued, with changes. A new Centers of Excellence Grants program is authorized as is a Chesapeake Nutrient Trading Guarantee Pilot Program.

Implementation grants are to be used to enable Basin States to undertake Watershed Implementation Plans, which are designed to meet the water quality goals for the Chesapeake through load and wasteload pollution reductions contained in the Chesapeake TMDL. Grants are provided directly to the states or their designees, which can include non-profit organizations, among others. Headwater states (DE, NY and WV) are made eligible for implementation grants for the first time, and are allocated at least 10 percent of implementation grants. These headwater States are responsible for just under 10 percent of the pollution that is responsible for the impairments to the Chesapeake and its tidal segments. 20 percent of implementation grants are set aside so farmers and forest owners can receive technical assistance that will help them access Farm Bill funds for implementing conservation practices. The Committee believes that technical assistance is critical to helping local farmers understand conservation options and plan accordingly. These technical assistance requirements do not apply to implementation grants to the District of Columbia. Signatory States may also use

implementation grant funding to achieve the broader goals of the Chesapeake Bay Agreement.

For the first time, the monitoring program is divided into a program for freshwater segments and a program for estuarine segments. USGS and NOAA are given roles in planning the monitoring programs, and the Administrator must also consult with the Chesapeake Basin Program Scientific and Technical Advisory Committee, Basin commissions, the U.S. Department of Agriculture and other Federal agencies, and the States. Priority is given to measuring the water quality effectiveness of agricultural conservation program implementation of the Chesapeake Bay Watershed Initiative, authorized in the Food Security Act of 1985 (16 U.S.C. 3839bb-4).

Centers of Excellence grants are established. These grants are to be awarded to institutions or consortia of higher education institutions to focus on the areas of innovative agricultural practices, load reduction quantification, and formulation of recommendations for the widespread deployment of effective agricultural conservation technologies, policies and practices. Agricultural producers have requested assistance in identifying additional conservation practices and having those practices analyzed so that specific pollution reduction efficiencies can be assigned to them. Academic institutions with strong agricultural and clean water programs have both the expertise and the confidence of the producer community to make these recommendations with strong scientific backing and widespread acceptance among the agricultural community.

A Chesapeake Nutrient Trading Guarantee Pilot Program is established. The program is designed to leverage public funding to raise private capital to accelerate the restoration effort. A Guarantee Fund is established in the Treasury. The manager of the pilot program, supported by an EPA-funded cooperative agreement, can draw on the Fund to guarantee credit purchases in the nascent nutrient trading market for a minimum of five years. Venture capitalists, "green" investors, and a number of businesses offered strong support for a robust trading system. Providing a price guarantee in the early years of this program can provide the market with stability and certainty and will leverage private capital to come into the market.

(f) Federal Facilities Coordination. Federal Agencies with facilities within the Chesapeake Basin must participate in regional and sub-watershed planning and restoration programs. The Basin States are given the task of meeting the EPA-assigned load and wasteload allocations. Therefore, Federal property owners must coordinate with the States to achieve the required pollution reductions. They must also adhere to the goals of the Bay Agreement and other Program efforts. This subsection requires the Chief of the Forest Service to work with the EPA Administrator to coordinate efforts among Federal facilities in the Bay basin to maximize forest cover at their facilities.

(g) Federal Annual Action Plan and Progress Report. Current Section 117(g) is replaced with this new subsection codifying the actions in President Obama's Executive Order of May 12, 2009 (E.O. 13508, 74 Fed. Reg. 23099). This subsection requires the Administrator to provide an annual action plan, including budget, and report annually on efforts by the Federal government to protect

and restore the Chesapeake Bay during the upcoming fiscal year. In addition, by December 31, 2010, with the concurrence of the Secretary of Agriculture, the Administrator must create and maintain a Basin-wide database on the implementation of agricultural conservation management practices, which is to be updated at least once every two years. The database is to include all conservation practices, not simply those supported through public funds. Data are to be reported in aggregate form.

(h) Chesapeake Basin Program. The current subsection (h) regarding a Study of the Chesapeake Bay Program is deleted. This new subsection requires the Administrator to work cooperatively with Basin States to assure that management strategies are developed to meet the sediment and nutrient reduction requirements to restore the living resources in the Chesapeake Bay and its tidal tributaries. The Administrator is also required to work with the original Bay signatory states (MD, PA, VA and DC) on toxins reductions and prevention goals, habitat enhancements, and living resource restoration and protection.

This subsection establishes a *Chesapeake Basin Stewardship Grants Program*, which is focused on locally based protection and restoration programs or projects. A wide variety of entities are made eligible for grants. The grant program promotes local water quality and habitat restoration efforts, including activities for increased spawning and other habitat improvements for migratory fish. In addition, Stewardship Grants will give preference to cooperative projects involving local governments as well as soil conservation districts, sportsmen associations, and projects that involve public-private partnerships.

(i) Action by States. The current subsection (i) is deleted.

Modeled on the State Implementation Plans (SIP) in the Clean Air Act, the new subsection (i) establishes a flexible but rigorous system for each Chesapeake Basin State to design a Watershed Implementation Plan (WIP) that will direct its actions in providing the Chesapeake with clean water and helping to restore the Chesapeake ecosystem.

Under this subsection, Basin States are required to submit their Watershed Implementation Plan (WIP) to EPA no later than November 1, 2011. The WIP shall establish reduction targets, actions and schedules designed to meet the established point source and nonpoint source allocations. The allocations must be sufficient to meet Chesapeake Bay and Chesapeake Bay tidal segment water quality standards. Detailed WIP requirements are enumerated, including both regulatory and non-regulatory/voluntary components, compliance, and contingency plans and requirements to contain enforceable or otherwise binding commitments to meet water quality standards. The plans must be designed to have in place at least 60 percent of the required restoration actions no later than May 31, 2017 and full implementation by May 12, 2025.

This subsection establishes biennial reporting requirements for Basin States, including provisions to show how any shortfalls are being met through adaptive management approaches. The biennial reports must demonstrate “reasonable additional progress” in reaching the 2017 interim and 2025 final implementation requirements.

Basin States are given broad authority to add nonpoint sources that are causing water quality impairments in the Chesapeake Bay and its tidal segments to their National Pollution Discharge Elimination System programs under the Federal Water Pollution Control Act. Basin States are not limited to National Pollution Discharge Elimination System permits under the Federal Water Pollution Control Act in order to achieve these reductions. Other programs with enforceable provisions may also be used. The Committee expects Basin States to continue to make extensive use of State Department of Agriculture programs, for example, such as requirements for nutrient management plans. Federal regulators are expressly prohibited from taking enforcement actions against agricultural producers who are in full compliance with the State-designed, federally-approved WIP. States are also required to develop *de minimis* exemptions for new non-point source permits to implement the State's WIP.

Chesapeake Basin States that submit a WIP (WIP States) must implement stringent stormwater permits. By 2013, each WIP State shall require all major new developments and redevelopment projects to use a variety of techniques to maintain the original hydrology of the site, thus stemming the flow of new pollution into the Bay and its tidal tributaries. Any unavoidable impacts related to water temperature, rate, volume or duration of flow will require mitigation. Priority will be given to in-kind mitigation (e.g., water temperature increases above pre-existing hydrology must be offset by reductions of artificially elevated temperatures elsewhere in the same watershed). Out-of-kind (e.g., elevations in water temperature mitigated by reductions in flow) and out-of-subwatershed mitigation is allowed, but only if in-kind and in-watershed mitigation options are not available. Lowest priority is given to fees-in-lieu, and they must be set at a high enough level to allow the permitting agency sufficient funds to support other watershed mitigation efforts. EPA is required to develop appropriate regulations by May 12, 2011 to implement the stormwater permitting program. The Committee encourages EPA to ensure that states are given maximum flexibility and deference in making final choices on best ways to achieve pre-development hydrology and stormwater reduction goals.

To facilitate brownfields restoration and other redevelopment strategies, the Administrator must take into consideration, when developing regulations, the overall watershed protection and restoration that comes with redevelopment of brownfields or other previously developed sites. A WIP State that fails to implement the required stormwater permits is subject to the withholding of Federal Water Pollution Control Act funds.

WIP States are also required to implement a ban on phosphates in laundry and dish detergents. Most Basin States have already instituted such bans in phosphorus pollution prevention efforts. A WIP State that fails to implement the required phosphate ban is subject to the withholding of Federal Water Pollution Control Act funds.

(j) Action by Administrator. The current subsection (j), Authorization for Appropriations, is moved to subsection (p).

In the new subsection (j), the Administrator is required to provide guidance and prompt review of state WIPs. EPA is currently



working closely with Basin States and has provided written guidance to these States for over a year on what watershed implementation plans should encompass and how they can be fairly evaluated. The Committee expects EPA to continue dialoging with the states as watershed implementation plans are developed. The Administrator is required to establish minimum criteria that a WIP must meet and make a “completeness determination” as to whether each submitted plan meets those criteria. The Committee believes that these criteria should be based on the broad body of information already widely used and understood. For this reason, such criteria should be issued by the Administrator promptly.

This subsection outlines methods for the approval, conditional approval, corrections, plan revisions, and disapproval of WIPs. Basin States submitting WIPs are given up to one year to correct deficiencies. Failure to implement a WIP that will meet water quality requirements by meeting EPA load and wasteload allocations will result in the Administrator taking over the program and issuing a *Federal Watershed Implementation Plan*. In these circumstances, the Basin State is subject to losing its Federal Water Pollution Control Act funding.

All plans must contain 10 specified elements. Within this general constraint, States are empowered to develop their own suite of activities, programs and policies to meet their load and wasteload allocations. The Administrator’s role is to evaluate the completeness of the Plan and the effectiveness of the State-designed WIPs in meeting water quality standards, not to design or force specific policy choices on the Basin States.

If a Federal Watershed Implementation Plan is required, it will incorporate all applicable requirements for nonpoint sources included as part of the State’s most recently approved watershed implementation plan. The Administrator may not change the state’s nonpoint source requirements. Existing non-point source pollution control programs will continue, but under Federal direction so that there will be no backsliding in the nonpoint sector under a Federal Watershed Implementation Plan. This section gives the Administrator the authority to enforce such requirements under federal law in the same manner and with the same stringency as required in the most recently approved watershed implementation plan. The Administrator must issue and enforce NPDES permits under Federal Water Pollution Control Act authorities to the extent necessary to control pollution sufficient to meet the pollution reductions required to meet applicable water quality standards.

The Administrator is required to establish an interstate nutrient trading program by May 12, 2012 and a sediment trading program by May 12, 2014. Standards and procedures for the nutrient trading program are enumerated in this subsection. The methods by which trades can be incorporated into existing NPDES permits are specified. Permit compliance remains the responsibility of the permit holder, not the party with whom a trade is undertaken. This subsection also allows third parties to aggregate and bank credits for sale to permitted entities, the use of “banked” credits, and direct purchase of credits through an exchange. Safeguards are required to assure that trades do not result in pollution “hot spots” locally.

The sediment trading program will rely on the recommendations from a stakeholder-driven task force and the expertise of the Department of Agriculture. Every five years the Administrator must report to the Congress on the effectiveness of the trading program. State-run intrastate trading programs may continue without change.

The Administrator is required to establish guidance for commercial and residential development and redevelopment projects that impact water quality. In addition, The Administrator shall compile a database of model ordinances and guidelines that states, local governments, and private entities may choose to implement to ensure land maintains predevelopment hydrology with regard to the temperature, rate, volume and duration of water flow. EPA's role is to provide technical assistance. The database of model ordinances and the examples of how others are addressing stormwater issues is meant to facilitate the spread of best practices across the watershed. All decisions regarding land use and development remain solely in the hands of local governments.

To help local governments customize stormwater control programs to meet their unique needs, the Administrator is authorized to provide planning grants to local governments to develop, implement, and enforce stormwater control programs. The administrator is also authorized to provide grants to implement projects that are designed to reduce or beneficially reuse stormwater discharges. Local governments are facing extraordinary costs associated with dealing with this legacy pollution from an era when stormwater pollution was virtually uncontrolled. This new grants program is designed to help communities meet this funding need. Municipalities are encouraged to work with developers on in-fill and redevelopment projects in which public and private funds can be combined to improve water quality while benefiting the entire community.

The Administrator, with the Chesapeake Executive Council, is required to review consumer and commercial products such as lawn fertilizer, the use of which may affect the water quality of the Chesapeake. The Committee is aware of numerous reports of over-applying do-it-yourself lawn fertilizers, resulting in excess nitrogen and phosphorus runoff. The Administrator shall submit a report to Congress detailing the findings of this review.

The Administrator is authorized to implement a new agricultural animal waste-to-bioenergy deployment program. This grant program will be designed to assist agricultural animal producers reduce their water quality impacts while also generating beneficial bioenergy and generating credits for sale in a trading market.

(k) Prohibition on Introduction of Asian Oysters. Two diseases that have decimated the native oyster population in the Chesapeake were introduced into the ecosystem accidentally when a non-native oyster was introduced into the Bay. In order to avoid future such disasters, this subsection requires the Administrator to designate the Asian oyster as a 'biological pollutant' in the Chesapeake Bay, prohibit the issuance of permits for the discharge of Asian oysters in the Chesapeake Bay, and specify conditions under which scientific research on Asian oysters may be conducted in the Chesapeake Bay.

(l) Chesapeake Nutria Eradication Program. This subsection authorizes the Secretary of the Interior to provide financial assistance

to Delaware, Maryland and Virginia to eradicate and control the non-native, invasive nutria and restore marshland damaged by nutria.

(m) Review of Studies on the Impacts of Menhaden on the Water Quality of the Chesapeake Bay. This subsection directs the Administrator, in cooperation and consultation with the Administrator of the National Oceanic and Atmospheric Administration, to prepare a report that reviews and summarizes research on the impacts of menhaden on water quality. The Administrator must report to Congress within five years on any recommendations for additional research or study.

(n) Effect on Other Requirements. This subsection states that nothing in this section removes or otherwise affects any other obligation for a point source to comply with other applicable requirements under this Act. In addition, this subsection outlines enforcement actions that can be taken related to a violation under this section. In particular, failure of a Basin state to meet the terms of its WIP or to make needed changes in order to achieve the overall water quality goals of the Chesapeake TMDL constitutes a violation of the Federal Water Pollution Control Act. Citizens can also bring civil actions against the Basin State, seeking injunctive relief for such failures. Except for this new liability for Basin States to implement state WIPs, no other changes are made to the citizen suit provisions in current law.

(o) Evaluations. This subsection requires the Inspectors General of the EPA and Department of Agriculture to evaluate the implementation of this section and submit reports to Congress every three years. Independent reviews by the National Academy of Sciences or the National Academy of Public Administration are also required. These must include an assessment of progress made toward meeting the goals of this section, efforts by Federal, State, and local governments to implement this section, and the methodologies and data used to support implementation. The independent reviews by the Academies must be completed no later than May 12, 2015 for the first review and no later than May 12, 2020 for the second review.

(p) Authorization of Appropriations. Authorizations of appropriations are provided for the following:

- Chesapeake Basin Program Office (\$20 million annually FY11–FY15);
- Basin State Implementation Grants (\$80 million annually);
- Centers of Excellence for Water Quality and Agricultural Policies (\$10 million annually);
- Agricultural Animal Waste-to-Bioenergy grants (\$30 million over 5 years);
- Freshwater Monitoring (\$5 million annually);
- Chesapeake Bay and Tidal Water monitoring (\$5 million annually);
- Chesapeake Stewardship Grants (\$15 million annually);
- Stormwater Pollution Control Planning grants (\$10 million total);
- Stormwater Pollution Control and Reuse Implementation grants (\$1.5 billion total); and
- Nutria Eradication grants (\$4 million annually).

Cost share requirements are established and a general limitation on administrative expenses of 10 percent is established. All funds are available until expended.

(q) Severability. If any provisions of this section is invalid, unenforceable, or in conflict with any law, the validity, legality, or enforceability of remaining provisions are not affected.

*Sec. 4. Federal enforcement*

Section 4 is a conforming amendment to provide the appropriate cross-references to Section 309 regarding enforcement of the Federal Water Pollution Control Act. The cross-references are limited to civil penalties under Section 309.

*Sec. 5. Federal responsibility to pay for stormwater programs*

Section 5 amends section 313 of the Clean Water Act to clarify that federal facilities must pay customary stormwater management fees to local governments or authorities in the same manner that others are required to do so. Any claims of sovereign immunity are explicitly waived.

*Sec. 6. Relationship to National Estuary Program*

Section 6 amends section 320 to make Chesapeake Basin States eligible for the same flexibility afforded to National Estuary Program States for federal financial assistance programs.

#### LEGISLATIVE HISTORY

On April 20, 2009, the Water and Wildlife Subcommittee of the Committee on Environment and Public Works held a general oversight hearing on the Chesapeake Bay. Entitled “Chesapeake Bay Restoration: Status Report and Recommendations,” the field hearing was held at the Maryland Statehouse in Annapolis, MD—Joint Hearing Room.

On August 3, 2009, the subcommittee held a second oversight hearing. Entitled “A Renewed Commitment to Protecting the Chesapeake Bay: Reauthorizing the Chesapeake Bay Program.” Witnesses from the Chesapeake Basin States and other key stakeholders testified regarding the reauthorization of the Chesapeake Bay Program.

S. 1816 was introduced on October 20, 2009 by Senator Benjamin L. Cardin (D–MD), with original cosponsors Senator Ted Kaufman (D–DE), Senator Tom Carper (D–DE) and Senator Barbara A. Mikulski (D–MD). The bill was read twice and referred to the Senate Committee on Environment and Public Works.

On November 9, 2009, the Subcommittee on Water and Wildlife held a legislative hearing on two pending bills, S. 1816, The Chesapeake Clean Water and Ecosystem Restoration Act, and S. 1311, a bill to reauthorize the Gulf of Mexico Program.

On June 30, 2010 the Senate Committee on Environment and Public Works held a business meeting to consider a number of bills, including S. 1816. The Committee ordered S. 1816, with an amendment in the nature of a substitute, to be reported to the full Senate.

## ROLLCALL VOTES

On June 30, 2010 the Senate Committee on Environment and Public Works held a business meeting to consider a number of bills, including S. 1816.

*Amendments Accepted*

1. Senator Cardin (D–MD) offered an amendment in the nature of a substitute to S. 1816. The substitute amendment expanded the federal grant programs authorized under the bill, required all federal facilities to pay stormwater pollution fees to local utilities, added provisions related to interaction with agricultural producers, and required evaluation of the program by independent entities. The substitute amendment also corrected the constitutional concerns in the introduced bill. By unanimous consent, the substitute was considered as base text for the purpose of further amendment.

2. Senator Carper (D–DE) offered an amendment that would authorize \$30 million for fiscal 2010 through 2015 for a grant program to individuals and partnerships that carry out projects to deploy a technology for converting animal waste to bio-energy that has a significant potential to reduce agricultural animal waste volume, recover nutrients, improve water quality, decrease pollution and recover energy. The amendment was agreed to by voice vote.

3. Senator Cardin, on behalf of Senator Specter (D–PA), offered an amendment that would prohibit federal enforcement action from being brought against an agriculture producer that is in compliance with all applicable planning and scheduling requirements consistent with approved plans for watershed implementation, government-approved soil conservation, nutrient management, erosion control and other applicable requirements in approved State watershed implementation plans. The amendment was agreed to by voice vote.

4. Senator Gillibrand (D–NY) offered an amendment that would reduce the State and local cost-share requirement for Delaware, New York and West Virginia to 20 percent, and specify the share for Maryland, Pennsylvania, Virginia and the District of Columbia at 50 percent. Senator Gillibrand also offered an amendment to her amendment regarding cost-share requirements for the implementation grants authorized in the bill. The second-degree Gillibrand amendment would change the State and local share requirements for Delaware, New York and West Virginia in the underlying amendment to 25 percent. The second-degree amendment was agreed to by voice vote. The underlying Gillibrand amendment, as amended by the second-degree amendment, was agreed to by voice vote.

5. Senator Inhofe (R–OK) offered an amendment to limit the applicability of certain standards and requirements to Chesapeake Basin States. With the support of Senator Inhofe, Senator Cardin offered a second-degree amendment as a substitute to the Inhofe amendment. The second degree amendment struck subsection (i) of the bill regarding Total Maximum Daily Loads. Several subsequent references to the Chesapeake TMDL were replaced with language referring to “water quality standards” for the Chesapeake Bay and its tidal tributaries.

In addition, the second-degree amendment eliminated the unlimited ability of EPA to issue permits for all pollution sources if it should be required to administer the watershed implementation plan for a State. Instead, EPA is limited to continuing the nonpoint source programs included as part of the most recently approved watershed implementation plan of the State. EPA's ability to permit point sources is not limited. The Cardin second degree amendment was agreed to by voice vote. The Inhofe amendment, as amended, was also agreed to by voice vote.

#### *Amendments Rejected*

1. Senator Barrasso (R-WY) offered an amendment that would require nonpoint source permits issued to agriculture producers be approved by the State's or the federal Agriculture Department. A permit would only be granted if it is determined it would not result in harm to the food supply or create economic hardship for the agricultural producer. The amendment was rejected 8–11 with Senators Alexander, Barrasso, Bond, Crapo, Inhofe, Vitter, Voinovich and Klobuchar voting in favor of the amendment and Senators Baucus, Boxer, Cardin, Carper, Gillibrand, Lautenberg, Merkley, Sanders, Specter, Udall, and Whitehouse voting against.

This Committee ordered S. 1816, as amended, reported favorably by voice vote.

#### REGULATORY IMPACT STATEMENT

In compliance with section 11(b)(2) of rule XXVI of the Standing Rules of the Senate, the Committee notes that the Congressional Budget Office has found the bill would impose requirements on private entities by requiring certain States to develop Watershed Implementation Plans. However, CBO also notes that States required to develop these plans, "already comply with the underlying requirements of the plans." The bill will not affect the personal privacy of individuals.

#### MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the Committee notes that the Congressional Budget Office has concluded the bill will impose intergovernmental and private-sector impacts but CBO also notes that "Implementing [Watershed Implementation Plans] plans would impose requirements on public and private entities such as wastewater facilities and industrial plants that discharge water into the basin. Because those States already comply with the underlying requirements of the plans, CBO estimates that the cost of those mandates would fall well below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$70 million and \$141 million in 2010, respectively, adjusted annually for inflation)."







Intergovernmental and private-sector impact: S. 1816 would impose intergovernmental and private-sector mandates as defined in UMRA. The bill would require the states of Delaware, New York, and West Virginia to develop and implement plans for improving water quality and restoring living resources in the Chesapeake basin. Implementing those plans would impose requirements on public and private entities such as wastewater facilities and industrial plants that discharge water into the basin. Because those states already comply with the underlying requirements of the plans, CBO estimates that the cost of the mandates would fall well below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$70 million and \$141 million in 2010, respectively, adjusted annually for inflation).

*Other impacts*

The bill would authorize a number of grant and assistance programs that would be available to state and local governments. In some cases, those programs would have matching or administrative requirements, but the costs of such requirements would be incurred voluntarily as conditions of participation.

Estimate prepared by: Federal Spending: Susanne S. Mehlman; Impact on State, Local, and Tribal Governments: Ryan Miller; Impact on the Private Sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATORS JOHN BARRASSO AND  
DAVID VITTER

While we appreciate the unique pollution situation in the Chesapeake Bay, and the tremendous federal involvement and cooperation in putting together the plan that inspired this bill, we remain concerned about a number of provisions in S. 1816, the Chesapeake Clean Water and Ecosystem Restoration Act.

First and foremost, this bill was designed and tailored to meet the specific needs of the Chesapeake Bay, and not to serve as a model for the rest of the United States. In putting this bill together, Senator Cardin took input from all of the states within the Chesapeake Basin and provided for their unique needs. For example, New York, Delaware, and West Virginia, states that are traditionally outside of the Chesapeake Bay Program (which includes Virginia, Maryland, Pennsylvania, and the District of Columbia) have been given additional time and resources to meet the pollution goals of the aggressive 15-year timeline. During consideration of S. 1816, the Committee moved separate bills for the following water bodies: the Great Lakes, the Gulf of Mexico, Long Island Sound, Puget Sound, the San Francisco Bay, and the Columbia River.<sup>1</sup> Each of these approaches was also carefully discussed by local stakeholders and tailored to meet the needs of the particular water bodies they address.<sup>2</sup> The Committee believes that what works in one watershed should not be an automatic template that applies to other areas of the country.

By placing the unique approach S. 1816 takes to watershed restoration into Sec. 117 of the Clean Water Act, we are concerned that, either through creative rulemaking, or through court mandate, expanded EPA authorities in S. 1816 will inevitably be used for waters outside of the Chesapeake Basin. We do not believe that this is the intent of the author and co-sponsors of this bill, and we know it is not the intent of the Committee to allow this. However, in my view, it would set a troubling precedent if this bill became law.

On top of this, the bill's new EPA enforcement backstop will significantly shift the balance of power between the states and the federal government in dealing with regulation and management of water. For 38 years, the Clean Water Act and subsequent amendments have produced a federal-state partnership to clean up and properly care for our nation's navigable waters. This federal-state partnership has been a cornerstone of CWA legislation since its in-

<sup>1</sup>United States Senate Committee on Environment and Public Works, Full Committee Business Meeting, Wednesday, June 30, 2010, [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=7f356e9b-802a-23ad-45c5-6e51a788d6c2](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=7f356e9b-802a-23ad-45c5-6e51a788d6c2).

<sup>2</sup>"Each of the restoration efforts takes a somewhat different approach to deal with the specific concerns of that region. This is as it should be. Each of these great water bodies is unique, and each deserves its own restoration strategy developed by its own set of stakeholders." 111th Congress Congressional Record, S6046, July 21, 2010 (Statement of Sen. Cardin).

ception, successfully protecting waters of importance to the United States. The partnership has also given local and state governments important flexibility in meeting not only the goals of the CWA but the distinct needs of local residents. According to the CWA, “it is the policy of the 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.”<sup>3</sup> However, S. 1816 has the potential to shift a great deal of power away from the states and into the hands of EPA. This is primarily done through states giving EPA their watershed implementation plans for approval and expanded permitting authorities.

Section 3(i)(1) lays out the requirements for watershed implementation plans. This new scheme requires, in 3(i)(1)(A)(iv)(1), “State adopted management measures, including rules, or regulations, permits, consent decrees, and other enforceable or otherwise binding measures from point and nonpoint pollution sources.” The CWA has never been able to require that states adopt implementation plans that are wholly enforceable by permit or other binding measures. Currently states meet their water pollution control goals through a combination of both binding and voluntary measures. Additionally, states have made great progress in improving water quality through voluntary partnerships and programs. Under the Clean Water Act, funding is set aside for a number of cooperative, highly successful, voluntary programs, such as the nonpoint source management programs under Section 319<sup>4</sup> and the National Estuary Program under Section 320.<sup>5</sup> By requiring that any management measure be binding and enforceable, states will have to take on unnecessary regulatory burden, not just in writing the new permits, but also in enforcing them. Moreover, the requirement for binding, enforceable permits may prevent states from achieving greater participation through a voluntary program.

S. 1816 allows, for the first time ever, CWA 402 National Pollution Discharge Permits (NPDES) to be used and enforced for any pollution discharge or runoff the state would like to permit in order to meet their watershed implementation plans. 3(i)(2)(A) reads:

Notwithstanding any other provision of this Act (including any exclusion or exception contained in a definition under section 502) and in accordance with State laws (in-

<sup>3</sup> CWA 101(b).

<sup>4</sup> In 2008, Chugwater Creek, a tributary to the Laramie River, in the North Platte River Basin of Wyoming was removed from WYDEQ’s 303(d) list of impaired waters after a stakeholder group including local landowners, the local irrigation district, Platte County Resource District, Wyoming Game and Fish Department, and Pheasants Forever adopted numerous best management practices to reduce sedimentation. This successful project was made possible through CWA 319 program authorities. (see: [http://www.epa.gov/owow/NPS/success/state/wy\\_chug.htm](http://www.epa.gov/owow/NPS/success/state/wy_chug.htm)) For more EPA 319 success stories, including dramatic pollution reduction in Chesapeake Basin states, see EPA’s Office of Water’s 321 page report: [http://www.epa.gov/owow\\_keep/NPS/Success319/pdf/319\\_all.pdf](http://www.epa.gov/owow_keep/NPS/Success319/pdf/319_all.pdf).

<sup>5</sup> For reports regarding NEP successes, please look at testimony submitted for the June 26, 2008, the House Subcommittee on Water Resources and Environment held a hearing on “Protecting and Restoring America’s Great Waters, Part 1: Coasts and Estuaries.” <http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=686>. At that hearing, Richard Ribb, Director of the Narragansett Bay Estuary Program stated that “One of the successes of the program certainly is due to its non-regulatory approach. It provides a neutral forum for people to discuss issues and come to agreement on solutions.” Additionally, EPA’s website on the National Estuary Program boasts about their “. . . success stories demonstrate the significant work being done . . . the NEPs implement the Clean Water Act in Ways that are Effective, Efficient, Collaborative, and Adaptive.” <http://water.epa.gov/type/oceb/nep/action.cfm>.

cluding regulations), after providing appropriate opportunities for public comment, for the purpose of achieving the nitrogen, phosphorus, and sediment reductions required under a watershed implementation plan, a Chesapeake Basin State, or, if the State is not authorized to administer the permit program under section 402, the Administrator, may impose limitations or other controls, including permit requirements, on any discharge or runoff from a pollution source, including point and nonpoint sources, located within the Chesapeake Basin State that the program administrator determines to be necessary.

This is a tremendous expansion of the NPDES permitting authority. Under current law, NPDES permits are for discharges of pollutants from any point source into waters of the United States.<sup>6</sup> There is nothing in 3(i)(2)(A) that limits NPDES permits to just pollution of nitrogen, phosphorous, and sediment, as it allows any permits to be written for achieving the reductions required under the watershed implementation plan. For the first time, this bill allows permits to be written for nonpoint sources. This is a dramatic and fundamental expansion to the CWA permitting system.

Without limiting the kinds of discharges that can be regulated, conceivably any activity that involves water moving on a property could be regulated by an NPDES permit. It is unknown to what extent permitting could be used for existing sources, but it is safe to assume that, if the water quality goals set forth in the Chesapeake Bay TMDL are stringent enough, permits could be widely required for existing structures, not being currently developed or re-developed, including businesses, farms, and private residences. Furthermore, expanding the states use of 402 permits will inevitably result in more lawsuits, as all 402 permits written by states will be immediately enforceable through citizen suits.

The 402 universe is further expanded by the removal of the current 502 exemption. Under the S. 1816 regime, states may require NPDES permits for agricultural stormwater discharges and irrigation return flows, which have been specifically exempted from permit requirements.<sup>7</sup> NPDES permits traditionally contain strict numeric criteria that would be incredibly difficult to adapt to agricultural stormwater situations. Because agricultural runoff is largely dictated by rainfall, something that agricultural producers do not have control over, meeting numeric limitations will be extremely difficult and potentially costly.

Furthermore, it appears that the added provision against section 309 enforcement for farmers actually fails to provide any shield from enforcement actions. The protection in 3(i)(2)(C) only applies if the agricultural producer can prove he is in compliance with the permit and nutrient management plans and soil conservation plans, and every provision of the state watershed implementation plan. This provision does not stop EPA or an activist from filing lawsuits against agricultural producers. In fact, depending on interpretation, it may make it even harder for an agricultural pro-

<sup>6</sup>Water Permitting 101, USEPA Office of Wastewater Management—Water Permitting, <http://www.epa.gov/npdes/pubs/101pape.pdf>.

<sup>7</sup>CWA 502(14).

ducer to defend itself from a lawsuit because the section implies that a producer must not only comply with the terms of a Clean Water Act permit, but also any additional requirements found in nutrient management and conservation plans or in the watershed implementation plan itself. Thus, this provision provides no protection at all from lawsuits.

I am also concerned about how S. 1816 will impact farmers in the Chesapeake Bay region and how they could be the “camel’s nose under the tent” for regulating agriculture in the rest of the country. In testimony before the committee, the Honorable Gus Douglass, the Commissioner of the West Virginia Department of Agriculture argued against additional regulatory schemes for agriculture in the Chesapeake Basin. He testified: “Additional regulations at this time will be burdensome to both the agriculture community and the state as they try to implement regulations.” Instead, he argued for continued support for the successful voluntary incentive-based approach to helping farmers achieve water quality goals for the Chesapeake Bay.<sup>8</sup> Additional permit burdens will only further disadvantage family farmers who are struggling now.

In the event that states do not have 402 authority, 3(i)(2)(A) gives EPA the authority to write these permits. Currently, the District of Columbia does not have any delegated NPDES authority and Pennsylvania doesn’t have NPDES authority for the State Pretreatment Program.<sup>9</sup> Right now, EPA will have the sole authority to permit nonpoint sources in the District of Columbia, and, if EPA takes over any Chesapeake Basin state’s authority prior to S. 1816 becoming law, then EPA will have complete authority to permit nonpoint sources in that state. This is concerning because EPA has been petitioned by the Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition to begin formal proceedings to withdraw approval of West Virginia’s NPDES program.<sup>10</sup>

In the event that EPA utilizes the expanded 402 authority outside of the Chesapeake Basin, Idaho, Massachusetts, New Hampshire, New Mexico, American Samoa, Guam, Johnston Atoll, Midway Island, Northern Mariana Islands, and Wake Island would have EPA fully in control of their programs. Oklahoma and Texas would have to share authority with EPA to write nonpoint source permits for some of their programs, since they do not have NPDES authority to permit for activities associated CAFOs or with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline.<sup>11</sup>

S. 1816 also will alter the relationship between EPA and the states relationship for responsibilities for water will be altered by

<sup>8</sup> Testimony of the Honorable Gus Douglass, Commissioner West Virginia Department of Agriculture, Subcommittee on Water and Wildlife hearing entitled, “A Renewed Commitment to Protecting the Chesapeake Bay: Reauthorizing the Chesapeake Bay Program.” Monday, August 3, 2009. [http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=a0cc8539-a342-4fc9-bd6d-11d6cad46524](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a0cc8539-a342-4fc9-bd6d-11d6cad46524).

<sup>9</sup> EPA Office of Water: NPDES State Program Status: <http://cfpub.epa.gov/npdes/statestats.cfm> as of 15 September 2010.

<sup>10</sup> “EPA Petitioned to Revoke West Virginia’s Clean Water Authority” ENS News Service, June 22, 2009 <http://www.ens-newswire.com/ens/jun2009/2009-06-22-091.asp>.

<sup>11</sup> EPA Office of Water: NPDES Specific State Program Status [http://cfpub.epa.gov/npdes/statestats.cfm?program\\_id=45&view=specific](http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific) as of 15 September 2010.

S. 1816. There are two potential scenarios in terms of watershed implementation plans. States can submit their plans to EPA for approval, or they can choose not to. Once a state submits its plan for approval, if EPA believes the plan is inadequate, it can take over the entire program and issue permits for whatever it wants. Even if EPA chooses not to take over a plan, we remain deeply concerned that once a plan is submitted for approval, all the provisions in the plan are subject to second-guessing by activist groups through citizen suits and TMDL implementation by court order.

If a state submits a plan to EPA, and EPA approves it, any group that disagrees with that decision could bring an action against EPA to compel them to reconsider and disapprove it. Such speculation is not far-fetched. Current law already requires EPA to “ensure” that “management plans are developed and implemented” by Chesapeake Basin states. Even though the legislative history of that provision states that it confers no regulatory authority and is to be implemented by issuing grants, the Chesapeake Bay Foundation sued EPA for failing to meet that nondiscretionary duty and EPA settled that case by making many commitments related to the Chesapeake Bay TMDL.<sup>12</sup> This could happen as Phase I state watershed implementation plans are submitted to EPA in early September 2010 have already been criticized by environmentalists.<sup>13</sup> If S. 1816 were in effect and applied to those plans, these groups could challenge any EPA approval of those plans by alleging a failure to meet the many mandates in this bill.

Section (3)(j)(5) gives EPA authority to directly carry out a state watershed implementation plan if the state submitted that plan to EPA for approval and EPA decides that plan is inadequate. EPA can also carry out a state watershed implementation plan if the state fails to submit a required revised plan, fails to submit a biennial report, misses a 2-year milestone, or fails to remedy a disapproved plan. Again, citizen suits may force EPA to take over implementation of a plan on grounds that milestones are not being met or the plan is inadequate. Furthermore, in the event that a state fails to stay on its watershed implementation schedule, EPA has a judicially enforceable, nondiscretionary duty to withhold state funding, including SRF funds; develop and administer new watershed implementation plans; and require that any new or expanded discharges under 402 have stringent offsets. Essentially, by submitting a watershed implementation plan to EPA for approval, states will cede decision making authority over Chesapeake Basin water to the federal government.

If a state does not submit a watershed implementation plan to EPA for approval, then S. 1816 does not grant EPA new implementation or enforcement authority. However, EPA has already threatened to compel states to submit watershed implementation plans to EPA for approval, even though the Clean Water Act does not grant EPA that authority. In a letter dated December 29, 2009,

<sup>12</sup>Fowler v. EPA, see press release “EPA Reaches Settlement in Chesapeake Bay Lawsuit” March 2010 <http://yosemite.epa.gov/opa/admpress.nsf/0/ac46af32562521d48525772000591133?OpenDocument>.

<sup>13</sup>“States’ Bay Cleanup Plans Fall Short Of EPA-Mandated Pollution Reductions” Inside EPA 13 September 2010 <http://insideepa.com/Water-Policy-Report/Water-Policy-Report-09/13/2010/states-bay-cleanup-plans-fall-short-of-epa-mandated-pollution-reductions/menu-id-127.html>.

EPA threatened to take the following actions against states that do not submit their plans to EPA:

- Expanding coverage of National Pollutant Discharge Elimination System (NPDES) permits to sources that are currently unregulated.
  - Increasing oversight of state-issued NPDES permits.
  - Requiring additional pollution reductions from point sources such as wastewater treatment plants.
  - Increasing federal enforcement and compliance in the watershed.
  - Prohibiting new or expanded pollution discharges unless sufficient offsets are provided.
  - Redirecting EPA grants.
  - Revising water quality standards to better protect local and downstream waters.
  - Establishing finer scale load allocations in the Bay TMDL.<sup>14</sup>

S. 1816 contains additional citizen suits provisions. As citizen suits are already allowed in the Clean Water Act, a new citizen's suit right is not necessary in this bill. Rather than allowing special interest groups to sue for permit violators to be enforced upon, at a cost to the taxpayers, a better enforcement strategy would be to subject a state to an enforcement action by the Administrator when they are found to violate this act, which is a much more appropriate measure to help clean up the bay watershed. Allowing an expanded citizens suit provision will only get the states bogged down with unnecessary and potentially inappropriate litigations.

Finally, I am extremely concerned that provisions that compel states to take on the enforcement and enactment of a federal regulatory program may be unconstitutional. The Supreme Court has previously struck down<sup>15</sup> provisions of federal law that placed burdensome requirements on states. The Court held that Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."<sup>16</sup> Specifically the court pointed out that such detailed instructions to the states on how to implement federal programs are outside of Congress' purview. "While Congress has substantial power to govern the Nation directly, . . . the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instruction."<sup>17</sup> The severability clause that S. 1816 contains in Section (3)(q) "A determination that any provisions of this section is invalid, illegal, unenforceable, or in conflict with any other law shall not affect the validity, legality, or enforceability of the remaining provisions of this section," seems to prepare for this constitutional challenge.

Again, we sincerely respect the process that Sen. Cardin and the co-sponsors of this legislation have gone through to help the Chesapeake Bay. We believe from introduction through committee mark up on August 30, 2010, important, beneficial changes were made

<sup>14</sup>"EPA Outlines Framework for Holding States, D.C. Accountable for Reducing Chesapeake Bay Watershed Pollution; Additional \$11.2 Million Provided" Release date: 12/29/2009 <http://yosemite.epa.gov/opa/admpress.nsf/e51aa292bac25b0b85257359003d925f-aa36226e613bfb9e8525769b005d85b2!OpenDocument>.

<sup>15</sup>New York v. United States, 505 U.S. 144 (1992).

<sup>16</sup>Id. at 161.

<sup>17</sup>Id. at 162.

to this bill that allowed for its smooth passage through committee, and we sincerely hope more will be done before this sees further Congressional action.

JOHN BARRASSO.  
DAVID VITTER.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

\* \* \* \* \*

**FEDERAL WATER POLLUTION CONTROL ACT**

\* \* \* \* \*

**SEC. 117. CHESAPEAKE BAY.**

[(a) DEFINITIONS.—In this section, the following definitions apply:

[(1) ADMINISTRATIVE COST.—The term “administrative cost” means the cost of salaries and fringe benefits incurred in administering a grant under this section.

[(2) CHESAPEAKE BAY AGREEMENT.—The term “Chesapeake Bay Agreement” means the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council.

[(3) CHESAPEAKE BAY ECOSYSTEM.—The term “Chesapeake Bay ecosystem” means the ecosystem of the Chesapeake Bay and its watershed.

[(4) CHESAPEAKE BAY PROGRAM.—The term “Chesapeake Bay Program” means the program directed by the Chesapeake Executive Council in accordance with the Chesapeake Bay Agreement.

[(5) CHESAPEAKE EXECUTIVE COUNCIL.—The term “Chesapeake Executive Council” means the signatories to the Chesapeake Bay Agreement.

[(6) SIGNATORY JURISDICTION.—The term “signatory jurisdiction” means a jurisdiction of a signatory to the Chesapeake Bay Agreement.

[(b) CONTINUATION OF CHESAPEAKE BAY PROGRAM.—

[(1) IN GENERAL.—In cooperation with the Chesapeake Executive Council (and as a member of the Council), the Administrator shall continue the Chesapeake Bay Program.

[(2) PROGRAM OFFICE.—

[(A) IN GENERAL.—The Administrator shall maintain in the Environmental Protection Agency a Chesapeake Bay Program Office.

[(B) FUNCTION.—The Chesapeake Bay Program Office shall provide support to the Chesapeake Executive Council by—



[(i) implementing and coordinating science, research, modeling, support services, monitoring, data collection, and other activities that support the Chesapeake Bay Program;

[(ii) developing and making available, through publications, technical assistance, and other appropriate means, information pertaining to the environmental quality and living resources of the Chesapeake Bay ecosystem;

[(iii) in cooperation with appropriate Federal, State, and local authorities, assisting the signatories to the Chesapeake Bay Agreement in developing and implementing specific action plans to carry out the responsibilities of the signatories to the Chesapeake Bay Agreement;

[(iv) coordinating the actions of the Environmental Protection Agency with the actions of the appropriate officials of other Federal agencies and State and local authorities in developing strategies to—

[(I) improve the water quality and living resources in the Chesapeake Bay ecosystem; and

[(II) obtain the support of the appropriate officials of the agencies and authorities in achieving the objectives of the Chesapeake Bay Agreement; and

[(v) implementing outreach programs for public information, education, and participation to foster stewardship of the resources of the Chesapeake Bay.

[(c) INTERAGENCY AGREEMENTS.—The Administrator may enter into an interagency agreement with a Federal agency to carry out this section.

[(d) TECHNICAL ASSISTANCE AND ASSISTANCE GRANTS.—

[(1) IN GENERAL.—In cooperation with the Chesapeake Executive Council, the Administrator may provide technical assistance, and assistance grants, to nonprofit organizations, State and local governments, colleges, universities, and interstate agencies to carry out this section, subject to such terms and conditions as the Administrator considers appropriate.

[(2) FEDERAL SHARE.—

[(A) IN GENERAL.—Except as provided in subparagraph (B), the Federal share of an assistance grant provided under paragraph (1) shall be determined by the Administrator in accordance with guidance issued by the Administrator.

[(B) SMALL WATERSHED GRANTS PROGRAM.—The Federal share of an assistance grant provided under paragraph (1) to carry out an implementing activity under subsection (g)(2) shall not exceed 75 percent of eligible project costs, as determined by the Administrator.

[(3) NON-FEDERAL SHARE.—An assistance grant under paragraph (1) shall be provided on the condition that non-Federal sources provide the remainder of eligible project costs, as determined by the Administrator.

[(4) ADMINISTRATIVE COSTS.—Administrative costs shall not exceed 10 percent of the annual grant award.

[(e) IMPLEMENTATION AND MONITORING GRANTS.—

[(1) IN GENERAL.—If a signatory jurisdiction has approved and committed to implement all or substantially all aspects of the Chesapeake Bay Agreement, on the request of the chief executive of the jurisdiction, the Administrator—

[(A) shall make a grant to the jurisdiction for the purpose of implementing the management mechanisms established under the Chesapeake Bay Agreement, subject to such terms and conditions as the Administrator considers appropriate; and

[(B) may make a grant to a signatory jurisdiction for the purpose of monitoring the Chesapeake Bay ecosystem.

[(2) PROPOSALS.—

[(A) IN GENERAL.—A signatory jurisdiction described in paragraph (1) may apply for a grant under this subsection for a fiscal year by submitting to the Administrator a comprehensive proposal to implement management mechanisms established under the Chesapeake Bay Agreement.

[(B) CONTENTS.—A proposal under subparagraph (A) shall include—

[(i) a description of proposed management mechanisms that the jurisdiction commits to take within a specified time period, such as reducing or preventing pollution in the Chesapeake Bay and its watershed or meeting applicable water quality standards or established goals and objectives under the Chesapeake Bay Agreement; and

[(ii) the estimated cost of the actions proposed to be taken during the fiscal year.

[(3) APPROVAL.—If the Administrator finds that the proposal is consistent with the Chesapeake Bay Agreement and the national goals established under section 101(a), the Administrator may approve the proposal for an award.

[(4) FEDERAL SHARE.—The Federal share of a grant under this subsection shall not exceed 50 percent of the cost of implementing the management mechanisms during the fiscal year.

[(5) NON-FEDERAL SHARE.—A grant under this subsection shall be made on the condition that non-Federal sources provide the remainder of the costs of implementing the management mechanisms during the fiscal year.

[(6) ADMINISTRATIVE COSTS.—Administrative costs shall not exceed 10 percent of the annual grant award.

[(7) REPORTING.—On or before October 1 of each fiscal year, the Administrator shall make available to the public a document that lists and describes, in the greatest practicable degree of detail—

[(A) all projects and activities funded for the fiscal year;

[(B) the goals and objectives of projects funded for the previous fiscal year; and

[(C) the net benefits of projects funded for previous fiscal years.

[(f) FEDERAL FACILITIES AND BUDGET COORDINATION.—

[(1) SUBWATERSHED PLANNING AND RESTORATION.—A Federal agency that owns or operates a facility (as defined by the Administrator) within the Chesapeake Bay watershed shall participate in regional and subwatershed planning and restoration programs.

[(2) COMPLIANCE WITH AGREEMENT.—The head of each Federal agency that owns or occupies real property in the Chesapeake Bay watershed shall ensure that the property, and actions taken by the agency with respect to the property, comply with the Chesapeake Bay Agreement, the Federal Agencies Chesapeake Ecosystem Unified Plan, and any subsequent agreements and plans.

[(3) BUDGET COORDINATION.—

[(A) IN GENERAL.—As part of the annual budget submission of each Federal agency with projects or grants related to restoration, planning, monitoring, or scientific investigation of the Chesapeake Bay ecosystem, the head of the agency shall submit to the President a report that describes plans for the expenditure of the funds under this section.

[(B) DISCLOSURE TO THE COUNCIL.—The head of each agency referred to in subparagraph (A) shall disclose the report under that subparagraph with the Chesapeake Executive Council as appropriate.

[(g) CHESAPEAKE BAY PROGRAM.—

[(1) MANAGEMENT STRATEGIES.—The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain—

[(A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed;

[(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;

[(C) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health;

[(D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for wetlands, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; and

[(E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem.

[(2) SMALL WATERSHED GRANTS PROGRAM.—The Administrator, in cooperation with the Chesapeake Executive Council, shall—



[(D) recommend management actions to optimize the return of a healthy and balanced ecosystem in response to improvements in the quality and character of the waters of the Chesapeake Bay.

[(j) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section \$40,000,000 for each of fiscal years 2001 through 2005. Such sums shall remain available until expended.]

SEC. 117. CHESAPEAKE BASIN PROGRAM.

(a) DEFINITIONS.—In this section:

(1) ADMINISTRATIVE COST.—The term ‘administrative cost’ means the cost of salaries and fringe benefits incurred in administering a grant under this section.

(2) ASIAN OYSTER.—The term ‘Asian oyster’ means the species *Crassostrea ariakensis*.

(3) BASELINE.—The term ‘baseline’—

(A) means the basic standard or level of the nutrient control requirements a credit seller shall achieve to be eligible to generate saleable nutrient credits; and

(B) consists of the nutrient load reductions required of individual sources to meet water quality standards and load or waste load allocations under all applicable total maximum daily loads and watershed implementation plans.

(4) BASIN COMMISSIONS.—The term ‘basin commissions’ means—

(A) the Interstate Commission on the Potomac River Basin established under the interstate compact consented to and approved by Congress under the Joint Resolution of July 11, 1940 (54 Stat. 748, chapter 579) and Public Law 91–407 (84 Stat. 856);

(B) the Susquehanna River Basin Commission established under the interstate compact consented to and approved by Congress under Public Law 91–575 (84 Stat. 1509) and Public Law 99–468 (100 Stat. 1193); and

(C) the Chesapeake Bay Commission, a tri-State legislative assembly representing Maryland, Virginia, and Pennsylvania created in 1980 to coordinate Bay-related policy across State lines and to develop shared solutions.

(5) CHESAPEAKE BASIN.—The term ‘Chesapeake Basin’ means—

(A) the Chesapeake Bay; and

(B) the area consisting of 19 tributary basins within the Chesapeake Basin States through which precipitation drains into the Chesapeake Bay.

(6) CHESAPEAKE BASIN ECOSYSTEM.—The term ‘Chesapeake Basin ecosystem’ means the ecosystem of the Chesapeake Basin.

(7) CHESAPEAKE BASIN PROGRAM.—The term ‘Chesapeake Basin Program’ means the program, formerly known as the ‘Chesapeake Bay Program’, directed by the Chesapeake Executive Council in accordance with the Chesapeake Bay Agreement (including any successor programs).

(8) CHESAPEAKE BASIN STATE.—The term ‘Chesapeake Basin State’ means any of—

- (A) *the States of Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia; or*  
 (B) *the District of Columbia.*
- (9) **CHESAPEAKE BAY AGREEMENT.**—*The term ‘Chesapeake Bay Agreement’ means the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Basin ecosystem and the living resources of the Chesapeake Basin ecosystem and signed by the Chesapeake Executive Council.*
- (10) **CHESAPEAKE BAY TIDAL SEGMENT.**—*The term ‘Chesapeake Bay tidal segment’ means any of the 92 tidal segments that—*  
 (A) *make up the Chesapeake Bay; and*  
 (B) *are identified by a Chesapeake Basin State pursuant to section 303(d).*
- (11) **CHESAPEAKE BAY TMDL.**—  
 (A) **IN GENERAL.**—*The term ‘Chesapeake Bay TMDL’ means the total maximum daily load (including any revision) established or approved by the Administrator for nitrogen, phosphorus, and sediment loading to the waters in the Chesapeake Bay and the Chesapeake Bay tidal segments.*  
 (B) **INCLUSIONS.**—*The term ‘Chesapeake Bay TMDL’ includes nitrogen, phosphorus, and sediment allocations in temporal units of greater-than-daily duration, if the allocations—*  
 (i) *are demonstrated to achieve water quality standards; and*  
 (ii) *do not lead to violations of other applicable water quality standards for local receiving waters.*
- (12) **CHESAPEAKE EXECUTIVE COUNCIL.**—*The term ‘Chesapeake Executive Council’ means the signatories to the Chesapeake Bay Agreement.*
- (13) **CLEANING AGENT.**—*The term ‘cleaning agent’ means a laundry detergent, dishwashing compound, household cleaner, metal cleaner, degreasing compound, commercial cleaner, industrial cleaner, phosphate compound, or other substance that is intended to be used for cleaning purposes.*
- (14) **CREDIT.**—*The term ‘credit’ means a unit provided for 1 pound per year of nitrogen, phosphorus, or sediment that is—*  
 (A) *delivered to the tidal portion of the Chesapeake Bay; and*  
 (B) *eligible to be sold under the trading programs established by this section.*
- (15) **DIRECTOR.**—*The term ‘director’ means the Director of the Chesapeake Basin Program Office of the Environmental Protection Agency.*
- (16) **LOCAL GOVERNMENT.**—*The term ‘local government’ means any county, city, or other general purpose political subdivision of a State with jurisdiction over land use.*
- (17) **MENHADEN.**—*The term ‘menhaden’ means members of stocks or populations of the species *Brevoortia tyrannus*.*
- (18) **NUTRIA.**—*The term ‘nutria’ means the species *Myocaster coypus*.*

(19) *OFFSET.*—The term ‘offset’ means a reduction of loading of nitrogen, phosphorous, or sediment, as applicable, in a manner that ensures that the net loading reaching the Chesapeake Bay and the Chesapeake Bay tidal segments from a source—

- (A) does not increase; or
- (B) is reduced.

(20) *SIGNATORY JURISDICTION.*—The term ‘signatory jurisdiction’ means a jurisdiction of a signatory to the Chesapeake Bay Agreement.

(21) *TRIBUTARY BASIN.*—The term ‘tributary basin’ means an area of land or body of water that—

- (A) drains into any of the 19 Chesapeake Bay tributaries or tributary segments; and
- (B) is managed through watershed implementation plans under this Act.

(b) *RENAMING AND CONTINUATION OF CHESAPEAKE BAY PROGRAM.*—

(1) *IN GENERAL.*—In cooperation with the Chesapeake Executive Council (and as a member of the Council), the Administrator shall—

(A) rename the Chesapeake Bay Program, as in existence on the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, as the ‘Chesapeake Basin Program’; and

(B) continue to carry out the Chesapeake Basin Program.

(2) *MEETINGS.*—

(A) *IN GENERAL.*—The Chesapeake Executive Council shall meet not less frequently than once each year.

(B) *OPEN TO PUBLIC.*—

(i) *IN GENERAL.*—Subject to clause (ii), a meeting of the Chesapeake Executive Council shall be held open to the public.

(ii) *EXCEPTION.*—The Chesapeake Executive Council may hold executive sessions that are closed to the public.

(3) *PROGRAM OFFICE.*—

(A) *IN GENERAL.*—The Administrator shall maintain in the Environmental Protection Agency a Chesapeake Basin Program Office.

(B) *FUNCTION.*—The Chesapeake Basin Program Office shall provide support to the Chesapeake Executive Council by—

(i) implementing and coordinating science, research, modeling, support services, monitoring, data collection, and other activities that support the Chesapeake Basin Program;

(ii) developing and making available, through publications, technical assistance, and other appropriate means, information pertaining to the environmental quality and living resources of the Chesapeake Basin ecosystem;

(iii) in cooperation with appropriate Federal, State, and local authorities, assisting the signatories to the Chesapeake Bay Agreement in developing and imple-

menting specific action plans to carry out the responsibilities of the signatories to the Chesapeake Bay Agreement;

(iv) coordinating the actions of the Environmental Protection Agency with the actions of the appropriate officials of other Federal agencies and State and local authorities in developing strategies to—

(I) improve the water quality and living resources in the Chesapeake Basin ecosystem; and

(II) obtain the support of the appropriate officials of the agencies and authorities in achieving the objectives of the Chesapeake Bay Agreement; and

(v) implementing outreach programs for public information, education, and participation to foster stewardship of the resources of the Chesapeake Basin.

(c) **INTERAGENCY AGREEMENTS.**—The Administrator may enter into an interagency agreement with a Federal agency to carry out this section.

(d) **TECHNICAL ASSISTANCE AND ASSISTANCE GRANTS.**—

(1) **IN GENERAL.**—In cooperation with the Chesapeake Executive Council, the Administrator may provide technical assistance, and assistance grants, to soil conservation districts, nonprofit organizations, State and local governments, basin commissions, and institutions of higher education to carry out this section, subject to such terms and conditions as the Administrator considers appropriate.

(2) **FEDERAL SHARE.**—

(A) **IN GENERAL.**—Except as provided in subparagraph (B), the Federal share of an assistance grant provided under paragraph (1) shall be determined by the Administrator in accordance with guidance issued by the Administrator.

(B) **CHESAPEAKE BASIN STEWARDSHIP GRANTS PROGRAM.**—The Federal share of an assistance grant provided under paragraph (1) to carry out an implementing activity under subsection (h)(2) shall not exceed 75 percent of eligible project costs, as determined by the Administrator.

(3) **NON-FEDERAL SHARE.**—An assistance grant under paragraph (1) shall be provided on the condition that non-Federal sources provide the remainder of eligible project costs, as determined by the Administrator.

(4) **NUTRIENT TRADING GUARANTEE PILOT PROGRAM.**—The project manager of the Chesapeake nutrient trading guarantee program established under subsection (e)(1)(D) shall be eligible to receive technical assistance or technical assistance grants under this subsection.

(e) **IMPLEMENTATION, MONITORING, AND CENTERS OF EXCELLENCE GRANTS.**—

(1) **GRANTS.**—

(A) **IMPLEMENTATION GRANTS.**—The Administrator shall make an implementation grant to the Chesapeake Basin State, or a designee of a Chesapeake Basin State (including a soil conservation district, nonprofit organization, local



government, institution of higher education, basin commission, or interstate agency), for the purposes of implementing an approved watershed implementation plan of the Chesapeake Basin State under subsection (i) and achieving the goals established under the Chesapeake Bay Agreement, subject to such terms and conditions as the Administrator considers to be appropriate.

(B) **MONITORING GRANTS.**—The Administrator may make a monitoring grant to—

(i) a Chesapeake Basin State, designee of a Chesapeake Basin State, soil conservation district, nonprofit organization, local government, institution of higher education, or basin commission for the purpose of monitoring the ecosystem of freshwater tributaries to the Chesapeake Bay; or

(ii) any of the States of Delaware, Maryland, or Virginia (or a designee), the District of Columbia (or a designee), nonprofit organization, local government, institution of higher education, or interstate agency for the purpose of monitoring the Chesapeake Bay, including the tidal waters of the Chesapeake Bay.

(C) **CENTERS OF EXCELLENCE GRANTS.**—The Administrator, in consultation with the Secretary of Agriculture, may make grants to institutions of higher education, consortia of such institutions, or public, non-affiliated nonprofit organizations for the purpose of establishing and supporting centers of excellence for water quality and agricultural practices—

(i) to develop new technologies and innovative policies and practices for agricultural producers to reduce nitrogen, phosphorous, and sediment pollution;

(ii) to quantify the expected load reductions of those pollutants to be achieved in the Chesapeake Basin through the implementation of current and newly developed technologies, policies, and practices; and

(iii) to provide to the Administrator and the Secretary recommendations for—

(I) the widespread deployment of those technologies, policies, and practices among agricultural producers; and

(II) the application of those technologies, policies, and practices in Chesapeake Basin computer models.

(D) **CHESAPEAKE NUTRIENT TRADING GUARANTEE PILOT PROGRAM.**—

(i) **IN GENERAL.**—The Administrator, in consultation with the Chesapeake Basin States and the Secretary of Agriculture, shall establish a Chesapeake nutrient trading guarantee pilot program (referred to in this subparagraph as the ‘guarantee pilot program’) to support the interstate trading program established under subsection (j)(6).

(ii) **PURPOSES.**—The purposes of the guarantee pilot program are—

(I) to develop innovative policies and practices to more efficiently and effectively implement best management practices, primarily on agricultural land;

(II) to leverage public funding to raise private capital to accelerate the restoration of the Chesapeake Bay by providing a Federal guarantee on nutrient credit purchases; and

(III) to support nutrient trading throughout the Chesapeake Basin.

(iii) PROJECT MANAGER.—

(I) IN GENERAL.—The Administrator shall designate a project manager to carry out the guarantee pilot program.

(II) QUALIFICATIONS.—The project manager shall be an institution of higher education, a nonprofit organization, or a basin commission that—

(aa) demonstrates thorough knowledge and understanding of best management practices that result in nutrient reductions in the Chesapeake Basin;

(bb) demonstrates thorough knowledge and understanding of the Chesapeake watershed computer model of the Environmental Protection Agency;

(cc) demonstrates thorough knowledge and understanding of the relevant environmental regulations relating to the Chesapeake Basin;

(dd) has a demonstrated history of discharging fiduciary responsibilities with transparency and in accordance with all applicable accounting standards; and

(ee) has relevant experience with pollution offsets and transactions involving pollution offsets.

(III) DUTIES.—

(aa) IN GENERAL.—The project manager shall provide guarantees to purchasers of nutrient credits under the interstate trading program established under subsection (j)(6).

(bb) MANAGERIAL DUTIES.—In carrying out the guarantee pilot program, the project manager shall—

(AA) identify best management practices that result in the greatest reduction in pollution levels;

(BB) establish offset metrics for calculation, verification, and monitoring protocols in collaboration with Federal and State programs;

(CC) manage and oversee project verification and monitoring processes;

(DD) establish procedures that minimize transaction costs and eliminate unneces-

sary or duplicative administrative processes;

(EE) take ownership of the nutrient reduction offsets from any private funding source for an activity carried out under this subparagraph;

(FF) enter into agreements with private funding sources that enable a private funding source, at the conclusion of a project, to sell the verified nutrient reduction offset to the program manager at an agreed upon price, or to sell the verified nutrient reduction offsets; and

(GG) manage the Chesapeake Nutrient Trading Guarantee Fund.

(iv) **CREDIT PURCHASER REQUIREMENTS.**—As a condition of receiving a guarantee under this subparagraph, a purchaser shall comply with—

(I) the regulations promulgated by the Administrator under subsection (j)(6);

(II) any application procedure that the Administrator, in consultation with the project manager, determines to be necessary; and

(III) any other applicable laws (including regulations).

(v) **TERMINATION.**—The guarantee pilot program shall terminate on the date that is 5 years after the date of the establishment of the interstate trading program under subsection (j)(6).

(vi) **REPORTS.**—

(I) **IN GENERAL.**—The project manager shall—

(aa) ensure public transparency for all nutrient trading activities through a publicly available trading registry; and

(bb) submit an annual report to the Administrator, the Committee on Environment and Public Works of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives.

(II) **CONTENTS.**—A report under subclause (I)(bb) shall include a description of—

(aa) the activities funded by the guarantee pilot program;

(bb) the nutrient reductions achieved by each project carried out under the guarantee pilot program;

(cc) the efficiency of each project carried out under the guarantee pilot program, measured in pounds of pollution reduced per dollar expended;

(dd) the total quantity of nitrogen, phosphorus, and sediment reduced; and

(ee) the total amount of private funds leveraged.

**(E) CHESAPEAKE NUTRIENT TRADING GUARANTEE FUND.—**

(i) **ESTABLISHMENT OF FUND.**—*There is established in the Treasury of the United States a fund to be known as the ‘Chesapeake Nutrient Trading Guarantee Fund’ (referred to in this subparagraph as the ‘Fund’), to be administered by the Administrator, to be available for 5 years after the date of the establishment of the interstate trading program under subsection (j)(6) and subject to appropriation, for the purposes described in subparagraph (D)(ii).*

(ii) **TRANSFERS TO FUND.**—*The Fund shall consist of such amounts as are appropriated to the Fund under subsection (p)(2)(v).*

(iii) **PROHIBITION.**—*Amounts in the Fund may not be made available for any purpose other than a purpose described in clause (i).*

(iv) **TERMINATION.**—*Subject to clause (v), the Fund shall terminate on the date that is 5 years after the date of establishment of the interstate trading program under subsection (j)(6).*

(v) **UNOBLIGATED AMOUNTS.**—*On the termination of the Fund, the Administrator shall—*

(I) *require the return of any unobligated amounts in the Fund to the Secretary of the Treasury; or*

(II) *reauthorize the use of the Fund for the purposes described in clause (i).*

(vi) **ANNUAL REPORTS.**—

(I) **IN GENERAL.**—*Not later than 60 days after the end of each fiscal year beginning with the first fiscal year after the date of the establishment of the interstate trading program under subsection (j)(6), the Administrator shall submit to the Committee on Appropriations of the House of Representatives, the Committee on Appropriations of the Senate, the Committee on Environment and Public Works of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives a report on the operation of the Fund during the fiscal year.*

(II) **CONTENTS.**—*Each report shall include, for the fiscal year covered by the report, the following:*

(aa) *A statement of the amounts deposited in the Fund.*

(bb) *A description of the expenditures made from the Fund for the fiscal year, including the purpose of the expenditures.*

(cc) *Recommendations for additional authorities to fulfill the purpose of the Fund.*

(dd) *A statement of the balance remaining in the Fund at the end of the fiscal year.*

**(2) ADMINISTRATION.**—

(A) **IN GENERAL.**—*Subject to subparagraph (C), in making implementation grants to each of the Chesapeake Basin*

*States for a fiscal year under this subsection, the Administrator shall ensure that not less than—*

*(i) 10 percent of the funds available to make such grants are made to the States of Delaware, New York, and West Virginia (or designees of those States); and*

*(ii) 20 percent of the funds available to make such grants are made to States (or designees of the States) for the sole purpose of providing technical assistance to agricultural producers and forest owners to access conservation programs and other resources devoted to improvements in, and protection of, water quality in the Chesapeake Bay and the tributaries of the Chesapeake Bay, in accordance with subparagraph (B).*

*(B) TECHNICAL ASSISTANCE.—A State (or designees of a State) may use any soil conservation district, nonprofit organization, private sector vendor, or other appropriately qualified provider to deliver technical assistance to agricultural producers and forest owners under subparagraph (A)(ii).*

*(C) NONAPPLICABILITY TO DC.—This paragraph shall not apply to any implementation grant provided to the District of Columbia.*

**(3) PROPOSALS.—**

**(A) IMPLEMENTATION GRANTS.—**

*(i) IN GENERAL.—A Chesapeake Basin State described in paragraph (1) may apply for a grant under this subsection for a fiscal year by submitting to the Administrator a comprehensive proposal to implement programs and achieve the goals established under the Chesapeake Bay Agreement.*

*(ii) IMPLEMENTATION GRANT CONTENTS.—A proposal under clause (i) shall include—*

*(I) a description of the proposed actions that the Chesapeake Basin State commits to take within a specified time period, including 1 or more of actions that are designed—*

*(aa) to achieve and maintain all applicable water quality standards, including standards necessary to support the aquatic living resources of the Chesapeake Bay and related tributaries and to protect human health;*

*(bb) to restore, enhance, and protect the finfish, shellfish, waterfowl, and other living resources, habitats of those species and resources, and ecological relationships to sustain all fisheries and provide for a balanced ecosystem;*

*(cc) to preserve, protect, and restore those habitats and natural areas that are vital to the survival and diversity of the living resources of the Chesapeake Bay and associated rivers;*

*(dd) to develop, promote, and achieve sound land use practices that protect and restore wa-*

*tershed resources and water quality, reduce or maintain reduced pollutant loadings for the Chesapeake Bay and related tributaries, and restore and preserve aquatic living resources;*

*(ee) to promote individual stewardship and assist individuals, community-based organizations, businesses, local governments, and schools to undertake initiatives to achieve the goals and commitments of the Chesapeake Bay Agreement; or*

*(ff) to provide technical assistance to agricultural producers, forest owners, and other eligible entities, through technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses;*

*(II) except with respect to any implementation grant proposal by the District of Columbia, a commitment to dedicate not less than 20 percent of the grant funding for the Chesapeake Bay under this subsection to support technical assistance for agricultural and forest land or nutrient management practices that protect and restore watershed resources and water quality, reduce or maintain reduced pollutant loadings for the Chesapeake Bay and related tributaries, and restore and preserve aquatic living resources; and*

*(III) the estimated cost of the actions proposed to be taken during the year.*

**(B) MONITORING GRANTS.—**

*(i) IN GENERAL.—An eligible entity described in paragraph (1)(B) may apply for a grant under this subsection for a fiscal year by submitting to the Administrator a comprehensive proposal to monitor freshwater or estuarine ecosystems, including water quality.*

*(ii) MONITORING GRANT CONTENTS.—A proposal under this subparagraph shall include—*

*(I) a description of the proposed monitoring system;*

*(II) certification by the Chesapeake Basin Program Director that such a monitoring system includes such parameters as the Chesapeake Basin Program Director determines to be necessary to assess progress toward achieving the goals of the Chesapeake Clean Water and Ecosystem Restoration Act; and*

*(III) the estimated cost of the monitoring proposed to be conducted during the year.*

*(iii) CONCURRENCES.—The Administrator shall—*

*(I) obtain the concurrence of the Director of the United States Geological Survey regarding the design and implementation of the freshwater moni-*

toring systems established under this subsection;  
and

(II) obtain the concurrence of the Director of the Chesapeake Bay Office of the National Oceanic and Atmospheric Administration regarding the design and implementation of the estuarine monitoring systems established under this subsection.

(iv) CONSULTATION.—The Administrator shall—

(I) with regard to the freshwater monitoring system, consult with the basin commissions, institutions with expertise in clean water and agricultural policy and practices, and the Chesapeake Basin States regarding the design and implementation of the monitoring systems established under this subsection—

(aa) giving particular attention through fine scale instream and infield stream-edge and groundwater analysis to the measurement of the water quality effectiveness of agricultural conservation program implementation, including the Chesapeake Bay Watershed Initiative under section 1240Q of the Food Security Act of 1985 (16 U.S.C. 3839bb-4); and

(bb) analyzing the effectiveness of stormwater pollution control and mitigation using green infrastructure techniques in subwatersheds that have high levels of impervious surfaces;

(II) with regard to the estuarine monitoring system, consult with institutions of higher education with expertise in estuarine systems and the Chesapeake Basin States regarding the monitoring systems established under this subsection;

(III) consult with the Chesapeake Basin Program Scientific and Technical Advisory Committee regarding independent review of monitoring designs giving particular attention to integrated freshwater and estuarine monitoring strategies; and

(IV) consult with Federal departments and agencies, including the Department of Agriculture, regarding cooperation in implementing monitoring programs.

(f) FEDERAL FACILITIES COORDINATION.—

(1) SUBWATERSHED PLANNING AND RESTORATION.—A Federal agency that owns or operates a facility (as defined by the Administrator) within the Chesapeake Basin shall participate in regional and subwatershed planning and restoration programs.

(2) COMPLIANCE WITH AGREEMENTS AND PLANS.—The head of each Federal agency that owns or occupies real property in the Chesapeake Basin shall ensure that the property, and actions taken by the agency with respect to the property, comply with—

(A) the Chesapeake Bay Agreement;

(B) the Federal Agencies Chesapeake Ecosystem Unified Plan;

(C) the Chesapeake Basin action plan developed in accordance with subparagraph (g)(1)(A); and

(D) any subsequent agreements and plans.

(3) *FOREST COVER AT FEDERAL FACILITIES.*—Not later than January 1, 2012, the Administrator, with the advice of the Chief of the Forest Service and the appropriate Chesapeake Basin State forester, shall coordinate with the head of each Federal agency that owns or operates a facility within the Chesapeake Basin (as determined by the Administrator) to develop plans to maximize forest cover at the facility through—

(A) the preservation of existing forest cover; or

(B) with respect to a facility that has been previously disturbed or developed, the development of a reforestation plan.

(g) *FEDERAL ANNUAL ACTION PLAN AND PROGRESS REPORT.*—The Administrator, in accordance with Executive Order 13508 entitled ‘Chesapeake Bay Protection and Restoration’ and signed on May 12, 2009 (74 Fed. Reg. 23099), shall—

(1) make available to the public, not later than March 31 of each year—

(A) a Chesapeake Basin action plan describing, in the greatest practicable degree of detail, how Federal funding proposed in the annual budget of the United States submitted by the President to Congress will be used to protect and restore the Chesapeake Bay during the upcoming fiscal year;

(B) an annual progress report that—

(i) assesses the key ecological attributes that reflect the health of the Chesapeake Basin ecosystem;

(ii) reviews indicators of environmental conditions in the Chesapeake Bay;

(iii) distinguishes between the health of the Chesapeake Basin ecosystem and the results of management measures;

(iv) assesses implementation of the action plan during the preceding fiscal year;

(v) recommends steps to improve progress in restoring and protecting the Chesapeake Bay and tributaries; and

(vi) describes how Federal funding and actions will be coordinated with the actions of States, basin commissions, and others; and

(C) an annual report, detailed at the State and sector level where applicable, submitted by the Administrator to the Chesapeake Basin States and the public on specific recently completed, pending, or proposed regulations, guidance documents, permitting requirements, enforcement actions, and other activities carried out in accordance with the Executive Order, including actions relating to the Chesapeake Bay TMDL and State watershed implementation plans.

(2) create and maintain, with the concurrence of the Secretary of Agriculture, a Chesapeake Basin-wide database containing comprehensive data on implementation of agricultural con-



conservation management practices in the Chesapeake Basin that—

(A) includes conservation management practice implementation data, including, to the maximum extent feasible, all publicly and privately funded conservation practices, as of the effective date of the Chesapeake Clean Water and Ecosystem Restoration Act;

(B) includes data on subsequent conservation management practice implementation projects funded by, or reported to, the Department of Agriculture, the appropriate department of any Chesapeake Basin State, a local soil and water conservation district, or any similar institution;

(C) except with respect to data associated with a permit or recorded in the trading registry, as provided in subsection (j)(6)(B)(viii), presents the required data to the Administrator in statistical or aggregate form without identifying any—

(i) individual owner, operator, or producer; or

(ii) specific data gathering site;

(D) is made available to the public not later than December 31, 2010; and

(E) is updated not less frequently than once every 2 years.

(h) CHESAPEAKE BASIN PROGRAM.—

(1) MANAGEMENT STRATEGIES.—The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implemented by Chesapeake Basin States to achieve and maintain—

(A) for each of the Chesapeake Basin States—

(i) the sediment and nutrient goals of the Chesapeake Bay Agreement for the quantity of sediment, nitrogen, and phosphorus entering the Chesapeake Bay and the tidal tributaries of the Chesapeake Bay; and

(ii) the water quality requirements necessary to restore living resources in the Chesapeake Bay and the tidal tributaries of the Chesapeake Bay; and

(B) for the signatory States—

(i) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Basin ecosystem or on human health;

(ii) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement for wetland, riparian forests, and other types of habitat associated with the Chesapeake Basin ecosystem; and

(iii) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement for living resources associated with the Chesapeake Basin ecosystem.

(2) *CHESAPEAKE BASIN STEWARDSHIP GRANTS PROGRAM.*—*The Administrator, in cooperation with the Chesapeake Executive Council, shall—*

(A) *establish a Chesapeake Basin Stewardship Grants Program; and*

(B) *in carrying out that program—*

(i) *offer technical assistance and assistance grants under subsection (d) to States (or designees of States), local governments, soil conservation districts, institutions of higher education, nonprofit organizations, basin commissions, and private entities in the Chesapeake Basin region to implement—*

(I) *cooperative watershed strategies that address the water quality, habitat, and living resource needs in the Chesapeake Basin;*

(II) *locally based protection and restoration programs or projects within a watershed that complement the State watershed implementation plans, including the creation, restoration, or enhancement of habitat associated with the Chesapeake Basin ecosystem;*

(III) *activities for increased spawning and other habitat for migratory fish by removing barriers or constructing fish passage devices, restoring streams with high habitat potential for cold water fisheries such as native brook trout, or other habitat enhancements for fish and waterfowl;*

(IV) *activities for increased recreational access to the Chesapeake Bay and the tidal rivers and freshwater tributaries of the Chesapeake Bay; and*

(V) *innovative nitrogen, phosphorus, or sediment reduction efforts; and*

(ii) *give preference to cooperative projects that involve local governments, soil conservation districts, and sportsmen associations, especially cooperative projects that involve public-private partnerships.*

(i) *ACTIONS BY STATES.—*

(1) *WATERSHED IMPLEMENTATION PLANS.—*

(A) *PLANS.—*

(i) *IN GENERAL.—Not later than November 1, 2011, each Chesapeake Basin State, after providing for reasonable notice and 1 or more public meetings, may submit to the Administrator for approval a watershed implementation plan for the Chesapeake Basin State.*

(ii) *TARGETS.—The watershed implementation plan shall establish reduction targets, key actions, and schedules for reducing, to levels that will attain water quality standards, the loads of nitrogen, phosphorus, and sediment, including pollution from—*

(I) *point sources, including point source stormwater discharges; and*

(II) *nonpoint sources.*

(iii) *POLLUTION LIMITATIONS.—*

(I) *IN GENERAL.*—The pollution limitations shall be the nitrogen, phosphorus, and sediment load and wasteload allocations sufficient to meet Chesapeake Bay and Chesapeake Bay tidal segment water quality standards.

(II) *STRINGENCY.*—A watershed implementation plan shall be designed to attain, at a minimum, the pollution limitations described in subclause (I).

(iv) *PLAN REQUIREMENTS.*—Each watershed implementation plan shall—

(I) include State-adopted management measures, including rules or regulations, permits, consent decrees, and other enforceable or otherwise binding measures, to require and achieve reductions from point and nonpoint pollution sources;

(II) include programs to achieve voluntary reductions from pollution sources, including an estimate of the funding commitments necessary to implement the programs and a plan for working to secure the funding;

(III) include any additional requirements or actions that the Chesapeake Basin State determines to be necessary to attain the pollution limitations by the deadline established in this paragraph;

(IV) provide for enforcement mechanisms, including a penalty structure for failures, such as fees or forfeiture of State funds, including Federal funds distributed or otherwise awarded by the State to the extent the State is authorized to exercise independent discretion in amounts of such distributions or awards, for use in case a permittee, local jurisdictions, or any other party fails to adhere to assigned pollutant limitations, implementation schedules, or permit terms;

(V) include a schedule for implementation that—

(aa) is divided into 2-year periods, along with computer modeling, or other appropriate analysis, to demonstrate the projected reductions in nitrogen, phosphorus, and sediment loads associated with each 2-year period; and

(bb) demonstrates reasonable additional progress toward achievement of the goals described in—

(AA) subclause (VIII)(aa); and

(BB) clauses (i) and (ii) of subparagraph (B);

(VI) include the stipulation of alternate actions as contingencies;

(VII) account for how the Chesapeake Basin State will address additional loadings from growth through reserved allocations, offsets, planned future controls, implementation of new technologies, or other actions;

(VIII) provide assurances that—

(aa) if compared to an estimated 2008 baseline based on modeled loads, the initial plan shall be designed to achieve, not later than May 31, 2017, at least 60 percent of the nutrient and sediment reduction requirements described in clause (iii)(I)(bb);

(bb) the Chesapeake Basin State will have adequate personnel and funding (or a plan to secure such personnel or funding), and authority under State (and, as appropriate, local) law to carry out the implementation plan, and is not prohibited by any provision of Federal or State law from carrying out the implementation plan; and

(cc) to the extent that a Chesapeake Basin State has relied on a local government for the implementation of any plan provision, the Chesapeake Basin State has the responsibility for ensuring adequate implementation of the provision;

(IX) include adequate provisions for public participation; and

(X) upon the approval of the Administrator, be made available to the public on the Internet.

**(B) IMPLEMENTATION.—**

(i) **IN GENERAL.**—In implementing a watershed implementation plan, each Chesapeake Basin State shall follow a strategy developed by the Administrator for the implementation of adaptive management principles to ensure full implementation of all plan elements by not later than May 12, 2025, including—

(I) biennial evaluations of State actions;

(II) progress made toward implementation;

(III) determinations of necessary modifications to future actions in order to achieve objectives including achievement of water quality standards; and

(IV) appropriate provisions to adapt to climate changes.

(ii) **DEADLINE.**—Not later than May 12, 2025, each Chesapeake Basin State shall—

(I) fully implement the watershed implementation plan of the State; and

(II) have in place all the mechanisms outlined in the plan that are necessary to attain the applicable pollutant limitations for nitrogen, phosphorus, and sediments.

**(C) PROGRESS REPORTS.**—Not later than May 12, 2014, and biennially thereafter, each Chesapeake Basin State shall submit to the Administrator a progress report that, with respect to the 2-year period covered by the report—

(i) includes a listing of all management measures that were to be implemented in accordance with the approved watershed implementation plan of the Chesapeake Basin State;

peake Basin State, including a description of the extent to which those measures have been fully implemented;

(ii) includes a listing of all the management measures described in clause (i) that the Chesapeake Basin State has failed to fully implement in accordance with the approved watershed implementation plan of the Chesapeake Basin State;

(iii) includes monitored and collected water quality data;

(iv) includes appropriate computer modeling data or other appropriate analyses that detail the nitrogen, phosphorus, and sediment load reductions projected to be achieved as a result of the implementation of the management measures and mechanisms carried out by the Chesapeake Basin State;

(v) demonstrates reasonable additional progress made by the State toward achievement of the requirements and deadlines described in subparagraph (A)(iv)(VIII)(aa) and clauses (i) and (ii) of subparagraph (B);

(vi) includes, for the subsequent 2-year period, implementation goals and Chesapeake Basin Program computer modeling data detailing the projected pollution reductions to be achieved if the Chesapeake Basin State fully implements the subsequent round of management measures;

(vii) identifies compliance information, including violations, actions taken by the Chesapeake Basin State to address the violations, and dates, if any, on which compliance was achieved; and

(viii) specifies any revisions to the watershed implementation plan submitted under this paragraph that the Chesapeake Basin State determines are necessary to attain the applicable pollutant limitations for nitrogen, phosphorus, and sediments.

(2) ISSUANCE OF PERMITS.—

(A) *IN GENERAL.*—Notwithstanding any other provision of this Act (including any exclusion or exception contained in a definition under section 502) and in accordance with State laws (including regulations), after providing appropriate opportunities for public comment, for the purpose of achieving the nitrogen, phosphorus, and sediment reductions required under a watershed implementation plan, a Chesapeake Basin State, or, if the State is not authorized to administer the permit program under section 402, the Administrator, may impose limitations or other controls, including permit requirements, on any discharge or runoff from a pollution source, including point and nonpoint sources, located within the Chesapeake Basin State that the program administrator determines to be necessary.

(B) *ENFORCEMENT.*—The Chesapeake Basin States and the Administrator shall enforce any permits issued in accordance with the watershed implementation plan in the

same manner as permits issued under section 402 are enforced.

(C) *ADDITIONAL ENFORCEMENT STANDARDS.*—No Federal enforcement action shall be brought pursuant to section 309 against an agricultural producer that is in compliance with all of the applicable planning and scheduled implementation requirements of the following, as required by Federal, State, or other locally-applicable law and consistent with an approved State watershed implementation plan:

(i) State permits issued pursuant to section 402.

(ii) A soil conservation plan approved by the Federal Government or a State or local government, soil conservation district, or other applicable agency.

(iii) A government-approved nutrient management plan.

(iv) A State or locally approved erosion and sediment control plan.

(v) Any other applicable requirement described in an approved State watershed implementation plan.

(D) *DE MINIMIS EXEMPTIONS.*—The Administrator (with respect to the District of Columbia) or a Chesapeake Basin State that is authorized to administer a permit program under section 402, after consultation with stakeholders (including wastewater utilities, municipalities, developers, agricultural producers, institutions of higher education, and other interested parties) shall establish de minimis exemptions for permits issued under this paragraph.

(3) *STORMWATER PERMITS.*—

(A) *IN GENERAL.*—Effective beginning January 1, 2013, the Chesapeake Basin State shall provide assurances to the Administrator that—

(i) the owner or operator of any development or redevelopment project possessing an impervious footprint that exceeds a threshold to be determined by the Administrator through rulemaking, will use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow, using onsite infiltration, evapotranspiration, and reuse approaches, if feasible; and

(ii) as a further condition of permitting such a development or redevelopment, the owner or operator of any development or redevelopment project possessing an impervious footprint that exceeds a threshold to be determined by the Administrator through rulemaking will compensate for any unavoidable impacts to the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow, such that—

(I) the compensation within the affected sub-watershed shall provide in-kind or out-of-kind

mitigation of function at ratios to be determined by the Administrator through rulemaking;

(II) the compensation outside the affected sub-watershed shall provide in-kind or out-of-kind mitigation, at ratios to be determined by the Administrator through rulemaking, within the tributary watershed in which the project is located; and

(III) if mitigation of unavoidable impacts is not feasible, the Administrator may approve stringent fee-in-lieu systems.

(B) REGULATIONS.—

(i) IN GENERAL.—Not later than May 12, 2011, the Administrator shall promulgate regulations that—

(I) define the term ‘predevelopment hydrology’ for purposes of subparagraph (A);

(II) establish the thresholds under subparagraph (A);

(III) establish the compensation ratios under items (I) and (II) of subparagraph (A)(ii); and

(IV) establish the fee-in-lieu systems under subparagraph (A)(ii)(III).

(ii) REQUIREMENT.—In developing the regulations under clause (i), including establishing minimum standards for new development and redevelopment, the Administrator shall take into consideration, based on an evaluation of field science and practice, factors such as—

(I) the benefit to—

(aa) overall watershed protection and restoration of redevelopment of brownfields or other previously developed or disturbed sites; and

(bb) water quality improvement through lot-level stormwater management.

(iii) TREATMENT OF PENDING STORMWATER PERMITS.—In consultation with the Chesapeake Basin States and interested stakeholders, and taking into consideration any compliance schedules developed by any Chesapeake Basin State prior to June 30, 2010, the Administrator shall develop guidance regarding the treatment of pending stormwater permits for the Chesapeake Basin States.

(C) FAILURE TO PROVIDE ASSURANCES.—If a Chesapeake Basin State that submits a Watershed Implementation Plan under this subsection fails to provide the assurances required under subparagraph (A), effective beginning on May 12, 2013, the Administrator may withhold funds otherwise available to the Chesapeake Basin State under this Act, in accordance with subparagraphs (A) and (B) of subsection (j)(5).

(4) PHOSPHATE BAN.—

(A) PHOSPHORUS IN CLEANING AGENTS.—Each Chesapeake Basin State shall provide to the Administrator, not later than 3 years after the date of enactment of the Ches-

peake Clean Water and Ecosystem Restoration Act, assurances that within the jurisdiction, except as provided in subparagraph (B), a person may not use, sell, manufacture, or distribute for use or sale any cleaning agent that contains more than 0.0 percent phosphorus by weight, expressed as elemental phosphorus, except for a quantity not exceeding 0.5 percent phosphorus that is incidental to the manufacture of the cleaning agent.

(B) *PROHIBITED QUANTITIES OF PHOSPHORUS.*—Each Chesapeake Basin State shall provide to the Administrator, not later than 3 years after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, assurances that, within the jurisdiction, a person may use, sell, manufacture, or distribute for use or sale a cleaning agent that contains greater than 0.0 percent phosphorus by weight, but does not exceed 8.7 percent phosphorus by weight, if the cleaning agent is a substance that the Administrator, by regulation, excludes from the limitation under subparagraph (A), based on a finding that compliance with that subparagraph would—

(i) create a significant hardship on the users of the cleaning agent; or

(ii) be unreasonable because of the lack of an adequate substitute cleaning agent.

(C) *FAILURE TO PROVIDE ASSURANCES.*—If a Chesapeake Basin State that submits a Watershed Implementation Plan under this subsection fails to provide the necessary assurances under subparagraphs (A) and (B) by not later than 3 years after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator may withhold funds otherwise available to the Chesapeake Basin State under this Act, in accordance with subparagraphs (A) and (B) of subsection (j)(5).

(j) *ACTION BY ADMINISTRATOR.*—

(1) *IN GENERAL.*—Not later than 60 days after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator shall establish any minimum criteria that the Administrator determines to be necessary that any proposed watershed implementation plan must meet before the Administrator may approve such a plan.

(2) *COMPLETENESS FINDING.*—

(A) *IN GENERAL.*—Not later than 60 days after the date on which the Administrator receives a new or revised proposed watershed implementation plan from a Chesapeake Basin State, the Administrator shall make a completeness determination based on whether the minimum criteria for the plan established under paragraph (1) have been met.

(B) *EFFECT OF FINDING OF INCOMPLETENESS.*—If the Administrator determines under subparagraph (A) that all or any portion of a submitted watershed implementation plan does not meet the minimum completeness criteria established under paragraph (1), the Chesapeake Basin State submitting the plan shall be treated as not having made the submission.



## (3) APPROVAL AND DISAPPROVAL.—

(A) DEADLINE.—Not later than 90 days after determining that a watershed implementation plan meets minimum completeness criteria in accordance with paragraph (2)(A), the Administrator shall approve or disapprove the plan.

(B) FULL AND PARTIAL APPROVAL AND DISAPPROVAL.—In carrying out this paragraph, the Administrator shall—

(i) approve a watershed implementation plan if the Administrator determines that the plan meets all applicable requirements under subsection (i)(1); and

(ii) approve the plan in part and disapprove the plan in part if only a portion of the watershed implementation plan meets those requirements.

(C) CONDITIONAL APPROVAL.—The Administrator shall—

(i) conditionally approve the original or a revised watershed implementation plan based on a commitment of the Chesapeake Basin State submitting the plan to adopt specific enforceable management measures by not later than 1 year after the date of approval of the plan revision; but

(ii) treat a conditional approval as a disapproval under this paragraph if the Chesapeake Basin State fails to comply with the commitment of the Chesapeake Basin State.

(D) SCOPE OF REVIEW.—In reviewing watershed implementation plans for approval or disapproval, the Administrator shall—

(i) limit the scope of the review to the adequacy of the plan to attain water quality standards; and

(ii) not impose, as a condition of approval, any additional requirements.

(E) FULL APPROVAL REQUIRED.—An original or revised watershed implementation plan shall not be treated as meeting the requirements of this section until the Administrator approves the entire original or revised plan.

(F) CORRECTIONS.—In any case in which the Administrator determines that the action of the Administrator approving, disapproving, or conditionally approving any original or revised State watershed implementation plan was in error, the Administrator shall—

(i) in the same manner as the approval, disapproval, conditional approval, or promulgation, revise the action of the Administrator, as appropriate, without requiring any further submission from the Chesapeake Basin State; and

(ii) make the determination of the Administrator, and the basis for that determination, available to the public.

(G) EFFECTIVE DATE.—The provisions of a State watershed implementation plan shall take effect upon the date of approval of the plan.

(4) CALLS FOR PLAN REVISION.—In any case in which the Administrator determines that watershed implementation plan for

any area is inadequate to attain or maintain applicable pollution limitations, the Administrator—

(A) shall notify the Chesapeake Basin State of, and require the Chesapeake Basin State to revise the plan to correct the inadequacies;

(B) may establish reasonable deadlines (not to exceed 180 days after the date on which the Administrator provides the notification) for the submission of a revised watershed implementation plan;

(C) shall make the findings of the Administrator under paragraph (3) and notice provided under subparagraph (A) public;

(D) shall require as an element of any revised plan by the Chesapeake Basin State that the State adhere to the requirements applicable under the original watershed implementation plan, except that the Administrator may adjust any dates (other than attainment dates) applicable under those requirements, as appropriate; and

(E) shall disapprove any revised plan submitted by a Chesapeake Basin State that fails to adhere to the requirements described in subparagraph (D).

(5) **FEDERAL IMPLEMENTATION.**—If a Chesapeake Basin State that has submitted a watershed implementation plan under (1)(A)(i) fails to submit a required revised watershed implementation plan, submit a biennial report, correct a previously missed 2-year commitment made in a watershed implementation plan, or remedy a disapproval of a watershed implementation plan, the Administrator shall, by not later than 30 days after the date of the failure and after issuing a notice to the State and providing a period of not less than 1 year during which the failure may be corrected—

(A) notwithstanding sections 601(a) and 603(g), reserve up to 75 percent of the amount of the capitalization grant to the Chesapeake Basin State for a water pollution control revolving fund under section 603 for activities that are—

(i) selected by the Administrator; and

(ii) consistent with the watershed implementation plans described in subparagraphs (B) and (C);

(B) withhold all funds otherwise available to the Chesapeake Basin State (or a designee) under this Act, except for the funds available under title VI;

(C) develop and administer a watershed implementation plan for the Chesapeake Basin State until the Chesapeake Basin State has remedied the plan, reports, or achievements to the satisfaction of the Administrator;

(D) in addition to requiring compliance with all other statutory and regulatory requirements, require that all permits issued under section 402 for new or expanding discharges of nitrogen, phosphorus, or sediment shall acquire offsets that exceed, by a ratio to be determined by the Administrator through rulemaking, the quantities of nitrogen, phosphorus, or sediment that would be discharged under the permit, taking into account attenuation, equivalency, and uncertainty; and

(E) for the purposes of developing and implementing a watershed implementation plan under subparagraph (C)—

(i) continue all applicable requirements for nonpoint sources included as part of the most recently approved watershed implementation plan of the Chesapeake Basin State;

(ii) issue such permits to point sources as the Administrator determines to be necessary to control pollution sufficient to meet the pollution reductions required to meet applicable water quality standards;

(iii) enforce such nonpoint source requirements in the same manner and with the same stringency as required under most recently approved watershed implementation plan of the Chesapeake Basin State; and

(iv) enforce such point source permits in the same manner as other permits issued under section 402 are enforced.

(6) NITROGEN, PHOSPHORUS, AND SEDIMENT TRADING PROGRAMS.—

(A) ESTABLISHMENT.—Not later than May 12, 2012, the Administrator, in cooperation with each Chesapeake Basin State, shall establish, by regulation, an interstate nitrogen and phosphorus trading program for the Chesapeake Basin for the generation, trading, and use of nitrogen and phosphorus credits to facilitate the attainment and maintenance of water quality standards in the Chesapeake Bay and the Chesapeake Bay tidal segments.

(B) TRADING SYSTEM.—The trading program established under this subsection shall, at a minimum—

(i) define and standardize nitrogen and phosphorus credits and establish procedures or standards for ensuring equivalent water quality benefits for all credits;

(ii) establish procedures or standards for certifying, verifying, and enforcing nitrogen and phosphorus credits to ensure that credit-generating practices from both point sources and nonpoint sources are achieving actual reductions in nitrogen and phosphorus, including provisions for allowing the use of third parties to verify and certify credits sold within and across State lines;

(iii) establish procedures or standards for generating, quantifying, trading, and applying credits to meet regulatory requirements and allow for trading to occur between and across point source or nonpoint sources, including a requirement that purchasers of credits that propose to satisfy all or part of the obligation to reduce nitrogen and phosphorus through the use of credits shall compensate, through further limitations on the discharges of the purchaser or through a new trade, for any deficiency in those reductions that results from the failure of a credit seller to carry out any activity that was to generate the credits;

(iv) establish baseline requirements that a credit seller shall meet before becoming eligible to generate saleable credits, which shall be at least as stringent as ap-

*plicable water quality standards, total maximum daily loads (including applicable wasteload and load allocations), and watershed implementation plans;*

*(v) ensure that credits and trade requirements are incorporated, directly or by reference, into enforceable permit requirements under the national pollutant discharge elimination system established under section 402 or the system of the applicable State permitting authority for all credit purchasers covered by the permits;*

*(vi) ensure that private contracts between credit buyers and credit sellers contain adequate provisions to ensure enforceability under applicable law;*

*(vii) establish procedures or standards to ensure public transparency for all nutrient trading activities, including the establishment of a publicly available trading registry, which shall include—*

*(I) the information used in the certification and verification process; and*

*(II) recorded trading transactions (such as the establishment, sale, amounts, and use of credits);*

*(viii) in addition to requiring compliance with all other statutory and regulatory requirements, ensure that, in any case in which a segment of the Chesapeake Basin is impaired with respect to the nutrient being traded and a total maximum daily load for that segment has not yet been implemented for the impairment—*

*(I) trades are required to result in progress toward or the attainment of water quality standards in that segment; and*

*(II) sources in that segment may not rely on credits produced outside of the segment;*

*(ix) require that the application of credits to meet regulatory requirements under this section not cause or contribute to exceedances of water quality standards, total maximum daily loads, or wasteload or load allocations for affected receiving waters, including avoidance of localized impacts;*

*(x) except as part of a consent agreement, consent judgment, or enforcement order, prohibit the purchase of credits from any entity that is in significant non-compliance with an enforceable permit issued under section 402;*

*(xi) consider and incorporate, to the extent consistent with the minimum requirements of this Act, as determined by the Administrator, in consultation with the Secretary of Agriculture, elements of State trading programs in existence on the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act;*

*(xii) allow for, as appropriate, the aggregation and banking of credits by third parties; and*

(xiii) provide for appropriate temporal consistency between the time period during which the credit is generated and the time period during which the credit is used.

(C) **FACILITATION OF TRADING.**—In order to attract market participants and facilitate the cost-effective achievement of water-quality goals, the Administrator, in consultation with the Secretary of Agriculture, shall ensure that the trading program established under this paragraph—

(i) includes measures to mitigate credit buyer risk;

(ii) makes use of the best available science in order to minimize uncertainty and related transaction costs to traders by supporting research and other activities that increase the scientific understanding of nonpoint nutrient pollutant loading and the ability of various structural and nonstructural alternatives to reduce the loads;

(iii) eliminates unnecessary or duplicative administrative processes; and

(iv) incorporates a permitting approach under the national pollutant discharge elimination system established under section 402 that—

(I) allows trading to occur without requiring the reopening or reissuance of the base permits to incorporate individual trades; and

(II) incorporates any such trades, directly through a permit amendment or addendum, or indirectly by any appropriate mechanism, as enforceable terms of those permits on approval of the credit purchase by the permitting authority, in accordance with the requirements of the Chesapeake Basin Program, this Act, and regulations promulgated pursuant to this Act.

(D) **SEDIMENT TRADING.**—

(i) **IN GENERAL.**—Not later than 180 days after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator, in consultation with the Secretary of Agriculture, shall convene a task force, to be composed of representatives from the Chesapeake Basin States and public and private entities—

(I) to identify any scientific, technical, or other issues that would hinder the rapid deployment of an interstate sediment trading program; and

(II) to provide to the Administrator recommendations to overcome any of the obstacles to rapid deployment of such a trading system.

(ii) **INTERSTATE SEDIMENT TRADING PROGRAM.**—

(I) **ESTABLISHMENT.**—Based on the recommendations of the task force established under clause (i), the Administrator, in cooperation with each Chesapeake Basin State, shall establish an interstate sediment trading program for the Chesapeake Basin for the generation, trading, and use of sedi-

ment credits to facilitate the attainment and maintenance water quality standards in the Chesapeake Bay and the Chesapeake Bay tidal segments.

(II) *REQUIREMENT.*—The interstate sediment trading program established under subclause (I) shall include, at a minimum, definitions, procedures, standards, requirements, assurances, allowances, prohibitions, and evaluations comparable to the interstate nitrogen and phosphorus trading program established under subparagraph (A).

(III) *DEADLINE.*—Upon a finding of the Administrator, based on the recommendation of the task force established under clause (i), that such a sediment trading program would substantially advance the achievement of Bay water quality objectives and would be feasible, the interstate trading program under this clause shall be established by the later of—

(aa) May 12, 2014; and

(bb) the date on which each issue described in clause (i) can be feasibly overcome.

(E) *EVALUATION OF TRADING.*—

(i) *REPORTS.*—Not less frequently than once every 5 years after the date of establishment of the interstate nitrogen and phosphorus trading program under this paragraph, the Administrator shall submit to Congress a report describing the results of the program with respect to enforceability, transparency, achievement of water quality results, and whether the program has resulted in any localized water pollution problem.

(ii) *IMPROVEMENTS.*—Based on the reports under clause (i), the Administrator shall make improvements to the trading program under this paragraph to ensure achievement of the environmental and programmatic objectives of the program.

(F) *EFFECT ON OTHER TRADING SYSTEMS.*—Nothing in this paragraph affects the ability of a State to establish or implement an applicable intrastate trading program.

(7) *AUTHORITY RELATING TO DEVELOPMENT.*—The Administrator shall—

(A) establish, for projects resulting in impervious development, guidance relating to site planning, design, construction, and maintenance strategies to ensure that the land maintains predevelopment hydrology with regard to the temperature, rate, volume, and duration of flow;

(B) compile a database of best management practices, model stormwater ordinances, and guidelines with respect to the construction of low-impact development infrastructure and nonstructural low-impact development techniques for use by States, local governments, and private entities; and

(C) not later than 180 days after promulgation of the regulations under subsection (i)(3)(B), issue guidance, model ordinances, and guidelines to carry out this paragraph.

(8) ASSISTANCE WITH RESPECT TO STORMWATER DISCHARGES.—

(A) GRANT PROGRAM.—*The Administrator may provide grants to any local government within the Chesapeake Basin that adopts the guidance, best management practices, ordinances, and guidelines issued and compiled under paragraph (7).*

(B) USE OF FUNDS.—*A grant provided under subparagraph (A) may be used by a local government to pay costs associated with—*

*(i) developing, implementing, and enforcing the guidance, best management practices, ordinances, and guidelines issued and compiled under paragraph (7); and*

*(ii) implementing projects designed to reduce or beneficially reuse stormwater discharges.*

(9) CONSUMER AND COMMERCIAL PRODUCT REPORT.—*Not later than 3 years after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator, in consultation with the Chesapeake Executive Council, shall—*

*(A) review consumer and commercial products (such as lawn fertilizer), the use of which may affect the water quality of the Chesapeake Basin or associated tributaries, to determine whether further product nutrient content restrictions are necessary to restore or maintain water quality in the Chesapeake Basin and those tributaries; and*

*(B) submit to the Committees on Appropriations, Environment and Public Works, and Commerce, Science, and Transportation of the Senate and the Committees on Appropriations, Natural Resources, Energy and Commerce, and Transportation and Infrastructure of the House of Representatives a product nutrient report detailing the findings of the review under subparagraph (A).*

(10) AGRICULTURAL ANIMAL WASTE-TO-BIOENERGY DEPLOYMENT PROGRAM.—

(A) DEFINITIONS.—*In this paragraph:*

*(i) AGRICULTURAL ANIMAL WASTE.—The term ‘agricultural animal waste’ means manure from livestock, poultry, or aquaculture.*

*(ii) ELIGIBLE TECHNOLOGY.—The term ‘eligible technology’ means a technology that converts or proposes to convert agricultural animal waste into—*

*(I) heat;*

*(II) power; or*

*(III) biofuels.*

*(B) GRANT PROGRAM.—The Administrator, in coordination with the Secretary of Agriculture, may provide grants to any person or partnership of persons for the purpose of carrying out projects to deploy an eligible technology in agricultural animal waste-to-bioenergy treatment that has significant potential to reduce agricultural animal waste volume, recover nutrients, improve water quality, decrease pollution potential, and recover energy.*

(C) PROJECT SELECTION.—

(i) *IN GENERAL.*—In selecting applicants for grants under this paragraph, the Administrator shall select projects that—

(I) reduce—

(aa) impacts of agricultural animal waste on surface and groundwater quality;

(bb) emissions to the ambient air; and

(cc) the release of pathogens and other contaminants to the environment; and

(II) quantify—

(aa) the degree of waste stabilization to be realized by the project; and

(bb) nutrient reduction credits that could contribute to the nitrogen and phosphorus trading program for the Chesapeake Basin under this subsection.

(ii) *PRIORITIZATION.*—The Administrator shall prioritize projects based on—

(I) the level of nutrient reduction achieved;

(II) geographic diversity among the Chesapeake Basin States; and

(III) differing types of agricultural animal waste.

(D) *FEDERAL SHARE.*—The amount of a grant awarded under this paragraph shall not exceed 50 percent of the cost of the project to be carried out using funds from the grant.

(k) *PROHIBITION ON INTRODUCTION OF ASIAN OYSTERS.*—Not later than 2 years after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator shall promulgate regulations—

(1) to designate the Asian oyster as a ‘biological pollutant’ in the Chesapeake Bay and tidal waters pursuant to section 502;

(2) to prohibit the issuance of permits under sections 402 and 404 for the discharge of the Asian oyster into the Chesapeake Bay and Chesapeake Bay tidal segments; and

(3) to specify conditions under which scientific research on Asian oysters may be conducted within the Chesapeake Bay and Chesapeake Bay tidal segments.

(l) *CHESAPEAKE NUTRIA ERADICATION PROGRAM.*—

(1) *GRANT AUTHORITY.*—Subject to the availability of appropriations, the Secretary of the Interior (referred to in this subsection as the ‘Secretary’), may provide financial assistance to the States of Delaware, Maryland, and Virginia to carry out a program to implement measures—

(A) to eradicate or control nutria; and

(B) to restore marshland damaged by nutria.

(2) *GOALS.*—The continuing goals of the program shall be—

(A) to eradicate nutria in the Chesapeake Basin ecosystem; and

(B) to restore marshland damaged by nutria.

(3) *ACTIVITIES.*—In the States of Delaware, Maryland, and Virginia, the Secretary shall require that the program under this subsection consist of management, research, and public education activities carried out in accordance with the document published by the United States Fish and Wildlife Service



entitled 'Eradication Strategies for Nutria in the Chesapeake and Delaware Bay Watersheds', dated March 2002, or any updates to the document.

(m) **REVIEW OF STUDIES ON THE IMPACTS OF MENHADEN ON THE WATER QUALITY OF THE CHESAPEAKE BAY.**—

(1) **RESEARCH REVIEW.**—*The Administrator, in cooperation and consultation with the Administrator of the National Oceanic and Atmospheric Administration, shall—*

(A) *prepare a report that reviews and summarizes existing, peer reviewed research relating to the impacts of menhaden on water quality, including the role of menhaden as filter feeders and the impacts on dissolved oxygen levels, nutrient levels, phytoplankton, zooplankton, detritus, and similar issues by menhaden at various life stages;*

(B) *identify important data gaps or additional menhaden population studies, if any, relating to the impacts of the menhaden population on water quality; and*

(C) *provide any recommendations for additional research or study.*

(2) **REPORT AND RECOMMENDATIONS.**—*Not later than 5 years after the date of enactment of the Chesapeake Clean Water and Ecosystem Restoration Act, the Administrator shall submit the report and recommendations required in paragraph (1) to—*

(A) *the Committee on Commerce, Science, and Transportation and the Committee on Environment and Public Works Committee of the Senate; and*

(B) *the Committee on Natural Resources and the Committee on Transportation and Infrastructure Committee of the House of Representatives.*

(n) **EFFECT ON OTHER REQUIREMENTS.**—

(1) **IN GENERAL.**—*Nothing in this section removes or otherwise affects any other obligation for a point source to comply with other applicable requirements under this Act.*

(2) **VIOLATIONS BY STATES.**—

(A) **ENFORCEMENT ACTION BY ADMINISTRATOR.**—*The failure of a Chesapeake Basin State that submits a watershed implementation plan under subsection (i) to submit a biennial report, meet or correct a previously missed 2-year commitment made in a watershed implementation plan, or implement a watershed implementation plan or permit program under this section shall—*

(i) *constitute a violation of this Act; and*

(ii) *subject the State to an enforcement action by the Administrator.*

(B) **ENFORCEMENT ACTION BY CITIZENS.**—

(i) **IN GENERAL.**—*The failure of a Chesapeake Basin State that submits a watershed implementation plan under subsection (i) to meet or correct a previously missed 2-year commitment made in a watershed implementation plan or permit program under this section shall subject the appropriate State officer to a civil action seeking injunctive relief commenced by a citizen on behalf of the citizen.*

(ii) *JURISDICTION, VENUE, NOTICE, AND LITIGATION COSTS.*—

(I) *IN GENERAL.*—A citizen may commence a civil action on behalf of the citizen against a State under clause (i), subject to the requirements for notice, venue, and intervention described in subsections (b) and (c) of section 505 for a suit brought under section 505(a)(1)(A).

(II) *JURISDICTION.*—Jurisdiction over a suit brought under subclause (I) shall be the district courts, as described in section 505(a).

(III) *LITIGATION COSTS.*—The court may award litigation costs for suit brought under subclause (I), as described in section 505(d).

(iii) *SAVINGS CLAUSE.*—Nothing in this subsection affects the ability of a citizen to bring an action for civil enforcement on behalf of the citizen under section 505.

(o) *EVALUATIONS.*—

(1) *IN GENERAL.*—The Inspectors General of the Environmental Protection Agency and the Department of Agriculture shall jointly evaluate and submit to Congress reports describing the implementation of this section not less frequently than once every 3 years.

(2) *INDEPENDENT REVIEWS.*—

(A) *IN GENERAL.*—The Administrator shall enter into a contract with the National Academy of Sciences or the National Academy of Public Administration under which the Academy shall conduct 2 reviews of the Chesapeake Basin restoration efforts under this section.

(B) *INCLUSIONS.*—Each review under subparagraph (A) shall include an assessment of—

(i) progress made toward meeting the goals of this section;

(ii) efforts by Federal, State, and local governments and the private sector in implementing this section;

(iii) the methodologies (including computer modeling) and data (including monitoring data) used to support the implementation of this section; and

(iv) the economic impacts, including—

(I) a comprehensive analysis of the costs of compliance;

(II) the benefits of restoration;

(III) the value of economic losses avoided; and

(IV) a regional analysis of items (I) through (III), by Chesapeake Basin State and by sector, to the maximum extent practicable.

(C) *REPORTS.*—The National Academy of Sciences or the National Academy of Public Administration shall submit to the Administrator a report describing the results of the reviews under this paragraph, together with recommendations regarding the reviews (including any recommendations with respect to efforts of the Environmental Protection Agency or any other Federal or State agency required to implement applicable water quality standards in the Chesapeake Basin).

apeake Basin and achieve those standards in the Chesapeake Bay and Chesapeake Bay tidal segments), if any, by not later than—

(i) May 12, 2015, with respect to the first review required under this paragraph; and

(ii) May 12, 2020, with respect to the second review required under this paragraph.

(p) *AUTHORIZATION OF APPROPRIATIONS.—*

(1) *CHESAPEAKE BASIN PROGRAM OFFICE.—*There is authorized to be appropriated to the Chesapeake Basin Program Office to carry out subsection (b)(2) \$20,000,000 for each of fiscal years 2010 through 2015.

(2) *IMPLEMENTATION, MONITORING, AND CENTERS OF EXCELLENCE GRANTS.—*

(A) *AUTHORIZATION OF APPROPRIATIONS.—*In addition to amounts authorized to be appropriated or otherwise made available to carry out this section, there are authorized to be appropriated to the Administrator—

(i) to carry out a program to establish and support centers of excellence for water quality and agricultural policies and practices under subsection (e)(1)(C), \$10,000,000 for each of fiscal years 2010 through 2015;

(ii) to provide implementation grants under subsection (e)(3)(A), \$80,000,000 for each of fiscal years 2010 through 2015, to remain available until expended;

(iii) to carry out a freshwater monitoring program under subsection (e)(3)(B), \$5,000,000 for each of fiscal years 2010 through 2015;

(iv) to carry out a Chesapeake Bay and tidal water monitoring program under subsection (e)(3)(B), \$5,000,000 for each of fiscal years 2010 through 2015; and

(v) to carry out the Chesapeake nutrient trading guarantee pilot program under subsection (e)(1)(D), \$20,000,000 for the period of fiscal years 2010 through 2015.

(B) *COST SHARING.—*The Federal share of the cost of a program carried out using funds from a grant provided—

(i) under subparagraph (A)(ii) shall not exceed—

(I) 80 percent, with respect to funds provided for the provision of technical assistance to agricultural producers and forest owners; and

(II) with respect to all other activities under that subparagraph—

(aa) for the States of Delaware, New York, and West Virginia, shall not exceed 75 percent; and

(bb) for the States of Maryland, Pennsylvania, and Virginia and for the District of Columbia, shall not exceed 50 percent; and

(ii) under clauses (i), (iii), or (iv) of subparagraph (A) shall not exceed 80 percent.

(3) *CHESAPEAKE STEWARDSHIP GRANTS.*—*There is authorized to be appropriated to carry out subsection (h)(2) \$15,000,000 for each of fiscal years 2010 through 2015.*

(4) *STORM WATER POLLUTION PLANNING AND IMPLEMENTATION GRANTS.*—

(A) *AUTHORIZATION OF APPROPRIATIONS.*—*In addition to amounts authorized or otherwise made available to carry out this section, there are authorized to be appropriated to the Administrator—*

*(i) to carry out subsection (j)(8)(B)(i), \$10,000,000; and*

*(ii) to carry out subsection (j)(8)(B)(ii), \$1,500,000,000.*

(B) *COST-SHARING.*—*A grant provided for a project under—*

*(i) subsection (j)(8)(B)(i) may not be used to cover more than 80 percent of the cost of the project; and*

*(ii) subsection (j)(8)(B)(ii) may not be used to cover more than 75 percent of the cost of the project.*

(5) *NUTRIA ERADICATION GRANTS.*—

(A) *IN GENERAL.*—*There is authorized to be appropriated to the Secretary of the Interior to provide financial assistance in the Chesapeake Basin under subsection (l) \$4,000,000 for each of fiscal years 2010 through 2015.*

(B) *COST-SHARING.*—

*(i) FEDERAL SHARE.*—*The Federal share of the cost of carrying out the program under subsection (l) may not exceed 75 percent of the total costs of the program.*

*(ii) IN-KIND CONTRIBUTIONS.*—*The non-Federal share of the cost of carrying out the program under subsection (l) may be provided in the form of in-kind contributions of materials or services.*

(6) *AGRICULTURAL ANIMAL WASTE-TO-BIOENERGY DEPLOYMENT GRANTS.*—*There is authorized to be appropriated to carry out the agricultural animal waste-to-bioenergy deployment program under subsection (j) \$30,000,000 for the period of fiscal years 2010 to 2015, to remain available until expended.*

(7) *LIMITATION ON ADMINISTRATIVE COSTS.*—*Not more than 10 percent of the annual amount of any grant provided by the Administrator or Secretary under any program described in this subsection may be used for administrative costs.*

(8) *AVAILABILITY.*—*Amounts authorized to be appropriated under this subsection shall remain available until expended.*

(q) *SEVERABILITY.*—*A determination that any provisions of this section is invalid, illegal, unenforceable, or in conflict with any other law shall not affect the validity, legality, or enforceability of the remaining provisions of this section.*

\* \* \* \* \*

SEC. 309. (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act in a permit issued by a State under an approved permit program under [section 402] section 117,402, or 404 of this Act, he shall proceed under his au-

thority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of *federally assumed enforcement*"), *except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—*

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under *section 117 or section 402 of this Act* by him or by a State or in a permit issued under section 404 of this Act by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

\* \* \* \* \*

(d) Any person who violates section 301, 302, 306, 307, 308, 311(b)(3), 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under *section 117 or section 402 of this Act* by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single oper-

ational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

\* \* \* \* \*

(g) ADMINISTRATIVE PENALTIES.—

(1) VIOLATIONS.—Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 301, 302, 306, 307, 308, 318, or 405 of this Act, or has violated any permit condition or limitation implementing any of such sections in a permit issued under *section 117* or section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 by a State, or

\* \* \* \* \*

(7) EFFECT OF ACTION ON COMPLIANCE.—No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this Act or with the terms and conditions of any permit issued pursuant to ~~section 402~~ *section 117, 402, or 404* of this Act.

\* \* \* \* \*

SEC. 313. (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with 28 U.S.C. 1441 et seq. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.

The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

(b)(1) The Administrator shall coordinate with the head of each department, agency, or instrumentality of the Federal Government having jurisdiction over any property or facility utilizing federally owned wastewater facilities to develop a program of cooperation for utilizing wastewater control systems utilizing those innovative treatment processes and techniques for which guidelines have been promulgated under section 304(d)(3). Such program shall include an inventory of property and facilities which could utilize such processes and techniques.

(2) Construction shall not be initiated for facilities for treatment of wastewater at any Federal property or facility after September 30, 1979, if alternative methods for wastewater treatment at such property or facility utilizing innovative treatment processes and techniques, including but not limited to methods utilizing recycle and reuse techniques and land treatment are not utilized, unless the life cycle cost of the alternative treatment works exceeds the life cycle cost of the most cost effective alternative by more than 15 per centum. The Administrator may waive the application of this paragraph in any case where the Administrator determines it to be in the public interest, or that compliance with this paragraph would interfere with the orderly compliance with the conditions of a permit issued pursuant to section 402 of this Act.

(c) *REASONABLE SERVICE CHARGES.*—*Reasonable service charges described in subsection (a) include any requirement to pay a reasonable fee, assessment, or charge imposed by any State or local agency to defray or recover the cost of stormwater management in the same manner and to the same extent as any nongovernmental entity.*

(d) *NO TREATMENT AS TAX OR LEVY.*—*A fee, assessment, or charge described in this section—*

- (1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity; and
- (2) may be paid using appropriated funds.

\* \* \* \* \*

**SEC. 320. NATIONAL ESTUARY PROGRAM.**

- (a) MANAGEMENT CONFERENCE.—
- (1) NOMINATION OF ESTUARIES.—\* \* \*

\* \* \* \* \*

(b) PURPOSES OF CONFERENCE.—The purposes of any management conference convened with respect to an estuary under this subsection shall be to—

- (1) assess trends in water quality, natural resources, and uses of the estuary;
- (2) collect, characterize, and assess data on toxics, nutrients, and natural resources within the estuarine zone to identify the causes of environmental problems;
- (3) develop the relationship between the in-place loads and point and nonpoint loadings of pollutants to the estuarine zone and the potential uses of the zone, water quality, and natural resources;
- (4) develop a comprehensive conservation and management plan that recommends priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution to restore and maintain the chemical, physical, and biological integrity of the estuary, including restoration and maintenance of water quality, a balanced indigenous population of shellfish, fish and wildlife, and recreational activities in the estuary, and assure that the designated uses of the estuary are protected;
- (5) develop plans for the coordinated implementation of the plan by the States as well as Federal and local agencies participating in the conference;
- (6) monitor the effectiveness of actions taken pursuant to the plan; and
- (7) review all Federal financial assistance programs and Federal development projects in accordance with the requirements of Executive Order 12372, as in effect on September 17, 1983, to determine whether such assistance program or project would be consistent with and further the purposes and objectives of the plan prepared under this section.

For purposes of paragraph (7), such programs and projects shall not be limited to the assistance programs and development projects subject to Executive Order 12372, but may include any programs listed in the most recent Catalog of Federal Domestic Assistance which may have an effect on the purposes and objectives of the plan developed under this section or *section 117*.

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CHAPTER 11 OF TITLE 31, UNITED STATES CODE

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**SEC. 1105. BUDGET CONTENTS AND SUBMISSION TO CONGRESS.**

(a) On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year. Each budget shall include a budget message and summary and supporting information. The President shall include in each budget the following:

(1) \* \* \*

\* \* \* \* \*

[(33)](35)(A)(i) a detailed, separate analysis, by budget function, by agency, and by initiative area (as determined by the administration) for the prior fiscal year, the current fiscal year, the fiscal years for which the budget is submitted, and the ensuing fiscal year identifying the amounts of gross and net appropriations or obligational authority and outlays that contribute to homeland security, with separate displays for mandatory and discretionary amounts, including—

(I) summaries of the total amount of such appropriations or new obligational authority and outlays requested for homeland security;

(II) an estimate of the current service levels of homeland security spending;

(III) the most recent risk assessment and summary of homeland security needs in each initiative area (as determined by the administration); and

(IV) an estimate of user fees collected by the Federal Government on behalf of homeland security activities;

(ii) with respect to subclauses (I) through (IV) of clause (i), amounts shall be provided by account for each program, project and activity; and

(iii) an estimate of expenditures for homeland security activities by State and local governments and the private sector for the prior fiscal year and the current fiscal year.

(B) In this paragraph, consistent with the Office of Management and Budget's June 2002 "Annual Report to Congress on Combatting Terrorism", the term "homeland security" refers to those activities that detect, deter, protect against, and respond to terrorist attacks occurring within the United States and its territories.

(C) In implementing this paragraph, including determining what Federal activities or accounts constitute homeland security for purposes of budgetary classification, the Office of Management and Budget is directed to consult periodically, but at least annually, with the House and Senate Budget Committees, the House and Senate Appropriations Committees, and the Congressional Budget Office.

[(35)](36) as supplementary materials, a separate analysis of the budgetary effects for all prior fiscal years, the current fiscal year, the fiscal year for which the budget is submitted, and ensuing fiscal years of the actions the Secretary of the Treasury has taken or plans to take using any authority provided in the Emergency Economic Stabilization Act of 2008, including—

(A) an estimate of the current value of all assets purchased, sold, and guaranteed under the authority provided in the Emergency Economic Stabilization Act of 2008 using methodology required by the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.) and section 123 of the Emergency Economic Stabilization Act of 2008;

(B) an estimate of the deficit, the debt held by the public, and the gross Federal debt using methodology required by the Federal Credit Reform Act of 1990 and section 123 of the Emergency Economic Stabilization Act of 2008;

(C) an estimate of the current value of all assets purchased, sold, and guaranteed under the authority provided in the Emergency Economic Stabilization Act of 2008 calculated on a cash basis;

(D) a revised estimate of the deficit, the debt held by the public, and the gross Federal debt, substituting the cash-based estimates in subparagraph (C) for the estimates calculated under subparagraph (A) pursuant to the Federal Credit Reform Act of 1990 and section 123 of the Emergency Economic Stabilization Act of 2008; and

(E) the portion of the deficit which can be attributed to any action taken by the Secretary using authority provided by the Emergency Economic Stabilization Act of 2008 and the extent to which the change in the deficit since the most recent estimate is due to a reestimate using the methodology required by the Federal Credit Reform Act of 1990 and section 123 of the Emergency Economic Stabilization Act of 2008.

[(36)](37) information on estimates of appropriations for the fiscal year following the fiscal year for which the budget is submitted for the following medical care accounts of the Veterans Health Administration, Department of Veterans Affairs account:

(A) Medical Services.

(B) Medical Support and Compliance.

(C) Medical Facilities.

(38) *a separate statement for the Chesapeake Nutrient Trading Guarantee Fund established under section 117(e)(1)(E) of the Federal Water Pollution Control Act (33 U.S.C. 1267(e)(1)(E)) (as amended by the Chesapeake Clean Water and Ecosystem Restoration Act), which shall include the estimated amount of deposits into the Fund, obligations, and outlays from the Fund.*