

Pennsylvania Adopts New Chesapeake Bay Restoration Strategy

By: Alison Lecker, *The Legal Intelligencer*

Pennsylvania's ongoing efforts to meet its pollution reduction targets established by the U.S. Environmental Protection Agency's (EPA) 2010 Total Maximum Daily Load (TMDL) for the Chesapeake Bay continue to fall short. Despite investing over \$4 billion in restoration efforts, Pennsylvania will fail to meet the important milestone of 60 percent (of 2009 levels) pollution reductions by 2017. The mandatory reductions established by the TMDL must be achieved by 2025.

Pennsylvania has been successful in reducing point source pollution, but continues to struggle with nonpoint sources, including agriculture and urban stormwater runoff. Pennsylvania's pollution reduction efforts are critical to restoring the water quality in the bay because the Susquehanna River is the largest source of fresh water as well as nitrogen pollution to the bay. Overall, agricultural operations are the largest source of nitrogen, phosphorous and sediment contamination in the bay. Pennsylvania has successfully reduced its phosphorous pollution and is on track to meet its phosphorus reduction target. However, Pennsylvania is far from meeting its nitrogen and sediment pollution reduction goals.

Pennsylvania's lack of attainment has been attributed to a number of factors. First, Pennsylvania believes that the implementation of best management practices (BMPs) on farms and other nonpoint sources are not accurately accounted for in the EPA's modeling. Additionally, the large volume of agricultural operations in Pennsylvania coupled with a dearth of agency resources to conduct inspections results in a lack of implementation.

The EPA has been closely monitoring and evaluating Pennsylvania's progress toward meeting its TMDL goals. In February 2015, the EPA reviewed Pennsylvania's animal agriculture program and found that additional implementation of BMPs were needed to achieve the required TMDL - reductions. For additional background, see my article published June 12, 2015, in *The Legal*, titled "EPA Reviews Pa. Animal Agriculture Program for Bay TMDL Compliance." This past September, the EPA withheld nearly \$3 million in funding because of Pennsylvania's failure to meet its pollution reduction targets and stated its willingness to increase federal compliance oversight, if necessary.

In January, the Wolf administration announced Pennsylvania's new strategy for addressing nonpoint source pollution in the Chesapeake Bay watershed. This strategy aims to correct inspection and verification shortfalls to better account for Pennsylvania's pollution reductions and create a "culture of compliance." Working collaboratively, the Pennsylvania Department of Environmental Protection (DEP), the Department of Agriculture (PDA) and the Department of Conservation and Natural Resources (DCNR) developed a new strategy for meeting Pennsylvania's pollution reduction goals in the bay watershed. The DEP also finalized a new Nonpoint Source Management Plan in November 2015, which is supportive of the Chesapeake Bay TMDL compliance goals.

Pennsylvania's new strategy consists of six main recommendations. First, in order to address Pennsylvania's failure to achieve the required pollution reductions, the agencies will increase inspections of agricultural operations. The EPA recommends inspecting approximately 10 percent of farms annually for compliance. Today, less than 2 percent of Pennsylvania's 33,610 farms in the bay watershed are inspected. The agencies intend to accomplish the goal of increased inspections by funding county conservation districts (CCDs) to conduct farm inspections for regulatory compliance with Manure Management and Agricultural Erosion and Sediment Control Plan requirements, in addition to annually inspecting 10 percent of all farms in the bay watershed.

Another key recommendation involves additional accountability through identifying previously undocumented BMPs and increasing the quantity of low-cost, high-impact BMP implementation. The agencies believe that Pennsylvania's pollution reductions have not been accurately measured and accounted for in EPA's progress tracking model because only those BMPs that utilized federal or state cost-sharing were included. In order to give Pennsylvania credit for its progress toward meeting its pollution reduction targets, documentation and verification of BMP implementation must improve.

Targeted high-impact BMP implementation will be accomplished by shifting state water quality funding to bay restoration work and partnering with local agencies to implement BMPs. DCNR strongly advocates for increased installations of riparian stream buffers as a highly effective BMP. The average cost per farm for BMP installation is \$45,000, with the average cost share of 75 percent government funding.

The fifth recommendation is for improved reporting and recordkeeping, including consideration of mandatory reporting requirements for the agricultural sector for Manure Management and Agricultural Erosion and Sediment Control Plans.

The strategy also calls for additional funding and department staff, necessary to achieve Pennsylvania's 2025 TMDL reduction targets. The DEP will also open a new Chesapeake Bay office to ensure proper development and implementation of the new strategy. A Pennsylvania State University study provided two estimates of the additional resources necessary to meet Pennsylvania's milestones by 2025. The first estimate projects needing \$3.6 billion in capital costs to implement all necessary nonpoint source BMPs. The second annualizes costs through 2025, including operation and maintenance, resulting in an amount of \$378.3 million per year. The DEP anticipates needing up to 40 additional employees and an annual budget increase of \$7.3 million in order to fully implement the new strategy. Recognizing that these resources may not be available, the strategy calls for additional collaboration among the various agencies and bay stakeholders. The strategy also includes an implementation schedule and additional longer-term recommendations. If funding hurdles can be overcome, this new strategy promises significant improvement in achieving necessary pollution reductions.

Pennsylvania's renewed compliance efforts are occurring against the backdrop of ongoing efforts by the agricultural sector to strike down the TMDL on the basis that the states, not the EPA, have the responsibility and authority to set limits to reach water quality standards under the Clean

Water Act. In July 2015, the U.S. Court of Appeals for the Third Circuit affirmed the EPA's authority to establish the TMDL and the case is now on appeal before the U.S. Supreme Court. •

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