



Center for Progressive Reform Editorial Memorandum:

A Focus on Accountability: What the O'Malley Administration and the State Legislature Can Do to Save the Chesapeake Bay

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The Chesapeake Bay is the largest estuary in North America, home to more than 3,600 species of plants and animals. The Bay watershed – the area that drains into the Bay – encompasses most of Maryland, as well as parts of five other states and Washington, D.C. A national treasure and economic engine though it may be, the Bay has been deteriorating since the 1930s, as a result of pollution in the form of excess nutrients (phosphorus and nitrogen) and sediment runoff from agriculture, urban and suburban development, and sewage treatment plants. One of many telling indications of the problem is the health of the Bay's signature shellfish populations. Oyster populations are up modestly this year by comparison to recent years, but oyster harvests have dropped from 2.5 million bushels annually in the 1960s to just over 100,000 bushels a year over the last decade. Similarly, blue crab populations are about 30 percent lower than their average between 1968 and 2002.

A primary reason for this steady deterioration of the Bay is the failure of public officials across the region to follow through on commitments they made in a series of interstate agreements over the years. Finally in 2009, the U.S. Environmental Protection Agency took a lead role, working with Bay states and the District of Columbia to create Bay-specific and state-specific pollution standards, holding out the promise of real progress at last. But now comes the real challenge: making sure that Maryland and the other Bay states achieve the standards by holding them accountable.

While Maryland's record on Bay clean-up and other environmental matters is generally better than the other states in the watershed, the state still has much work to do to meet the new standards. My colleagues at the Center for Progressive Reform and I have been working on Bay issues for several years, and recently cosponsored a forum on the problem at the University of Maryland Francis King Carey School of Law. Following are a number of Maryland-specific policy recommendations we have identified.

- Neither Maryland law nor explicit Maryland Department of the Environment (MDE) policy requires that polluters who violate the law surrender any economic benefit their environmental law-breaking brings them. As a result, polluters can rationally approach the decision of whether or not to stay within legal standards as a simple business decision, asking themselves whether breaking the law is more profitable than following it. For the law to have full deterrent effect, penalties for violating pollution standards should **recover any economic benefit from noncompliance** that a violator receives. Such windfalls also give lawbreakers an unfair advantage over their law-abiding competitors. Therefore, the Maryland General Assembly should amend the list of penalty considerations to explicitly include recovery of any benefit from noncompliance. Other Bay states do,

and the EPA guidance already supports this, and it's one area where Maryland actually needs to catch up.

- Under Maryland law, MDE is authorized to charge polluters a fee to cover the costs of developing, administering, and monitoring permits that allow the polluters to emit certain amounts of pollution. The fees should reflect the state's actual costs; otherwise the state is effectively subsidizing pollution and sparing polluters' from the full cost of their operation. However, the Department's chronic resource shortfalls indicate that the current fee levels fall short. **Maryland should increase permit fees so that they accurately reflect the cost of developing permits, monitoring and regulating facilities with permits, and managing pollutant discharges.** Only the General Assembly has the authority to raise certain fees, including fees charged to municipalities. Maryland does not charge fees for either general or individual municipal permits, in contrast to neighboring Pennsylvania and Virginia. Municipal facilities such as sewage treatment plants, or publicly owned treatment works (POTWs), should be included in these changes because they contribute nearly [28 percent of the nitrogen](#) and more than 20 percent of the phosphorus discharged into the Bay.
- The agriculture sector contributes nearly 44 percent of the total nitrogen and phosphorus to the Bay and nearly 65 percent of the total sediment. Some estimates suggest that half of this nitrogen and phosphorus comes from animal manure, particularly from areas with many concentrated animal feeding operations (CAFOs), such as the eastern shore of Maryland. These CAFOs are massive chicken farms that allow manure to seep into waterways. Often these operations are owned by individual farmers, working on contract with large companies – Perdue, for example – that dictate practically every significant aspect of the operation. Under the Clean Water Act, pollution permits apply to “owners or operators,” but so far, MDE has declined to assert in its regulations that such companies are “operators.” MDE should clarify that such “vertical integrators” are “operators” for the purpose of CAFO permits. Poultry companies like Perdue should not be allowed to evade pollution standards and should fairly shoulder the responsibility of dealing with the chicken manure produced by its contract farmers.
- **MDE lacks the resources to enforce its own regulations and standards**, and has insufficient staff to oversee permit holders and bring enforcement actions against those who break the law. In 2010, the Center for Progressive Reform [analyzed the effectiveness of the MDE's Clean Water Act enforcement](#) program and concluded, consistent with MDE's analyses, that the agency is drastically underfunded to fulfill its basic mission. Between 2000 and 2009, overall funding for the enforcement workforce of the Water Management Administration (WMA) declined from \$3.39 million to \$3.16 million, a nearly 25-percent decline when adjusted for inflation. During the same period, the number of active, full-time inspectors in the WMA also decreased by 25 percent. The cuts coincided with a doubling of pollutant-discharge permits in effect – meaning the agency had to do more monitoring, with less budget. Although these statistics improved during fiscal year 2010, the funding shortage has a crippling effect on MDE's resources needed to protect the air, land, and water in Maryland. The legislature should increase MDE's appropriation for Clean Water Act enforcement.

I hope you'll be able to find space on your editorial pages for these topics. I'd be happy to speak with you and your colleagues to discuss these issues.

The [Center for Progressive Reform](#) is a nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. Visit CPR on the web at www.progressivereform.org and read CPRBlog at www.progressivereform.org/cprblog. For more

information or to arrange interviews, contact Ben Somberg at 202.747.0698 or at bsomberg@progressivereform.org.

For more information:

- Visit the CPR website's Chesapeake Bay page at <http://www.progressivereform.org/chesbay.cfm>.
- Read a new article in *The Abell Report*, the Abell Foundation's monthly newsletter, by CPR's Rena Steinzor, Aimee Simpson and Yee Huang on a recent Chesapeake Bay clean-up conference co-sponsored by CPR and the University of Maryland Francis King Carey School of Law, at <http://www.abell.org/pubsitems/arn212.pdf>.

Other Links in this memo:

- Chart of nitrogen levels by contributor: <http://www.baystat.maryland.gov/sources2.html>
- CPR 2010 analysis of effectiveness of the MDE's Clean Water Act enforcement: http://www.progressivereform.org/articles/mde_report_1004FINALApril.pdf