



C H E S A P E A K E
L E G A L A L L I A N C E

Clean Water Act

and the Chesapeake Bay

June 2026



Bay and CWA origins intertwined

- ❖ CWA and Bay restoration efforts born of the same moment in early 70's
- ❖ Common explanation for this movement are environmental catastrophes like the Cuyahoga River fire and Santa Barbara spill; Potomac had its own
- ❖ Within months of CWA enactment, Sen. Mathias (R-Md) began his famous boat tour to drum up Congressional support for Bay funding and science
- ❖ Given proximity to DC, influence of Mathias and others, the Bay's plight influenced the CWA, and the CWA in turn has shaped Bay restoration
- ❖ *"As [goes] the Chesapeake, so will go the future of clean water..."* – Prof. Houck, calling Bay *"ground zero"* for the CWA. So, how'd we do??



Bay restoration history and timeline

1976: Congress mandates scientific study of the Bay, which led to...

1983: ... creation of Bay Agreement; ironically, same year as the fishable/swimmable goal. “Framework for Action” relies strongly on CWA.

1987: CWA Amendments establish § 117, mostly improves CWA, but also marks end of major grants program; Bay Agreement amended with 40% goal

2000: failed to meet 40% goal; commits to end nutrient impairments by 2010; Congress amends § 117 to give it more teeth; Bay restoration still voluntary

2007: acknowledging voluntary approach would fail again, TMDL prep begins

2011: after 5 years of development, the TMDL commences with 2025 end date

2025: modelling shows most states didn’t achieve reductions, overall halfway

Beyond 2025: new Agreement signed, but little clarity on fate of TMDL



What Makes the Bay TMDL Unique?

- ❖ Despite statutory requirement, EPA and states ignored **TMDLs** for decades
- ❖ Starting in the mid-80's a "flurry" of **citizen suits** helped jumpstart program
- ❖ Now there are far more than 70,000 TMDLs, but none more visible and seemingly ambitious as Bay TMDL.
- ❖ Circa 2000, there was fighting in DC and in courts over scope of TMDLs, particularly the **reasonable assurance** standard and **implementation plans**
- ❖ So, what makes TMDL unique? The Accountability Framework:
 - Watershed implementation plans ("WIPs")
 - 2-year milestones
 - Backstop actions



TMDL Litigation

- ❖ A decade later, as soon as the ink was dry on this TMDL, the lawsuits began
- ❖ TMDL's exceptional exertion of cooperative federalism spurred the suit.
- ❖ Both District and Circuit Court upheld TMDL
- ❖ But would *Loper Bright* or “major questions doctrine” change the outcome today?
- ❖ And was it only a pyrrhic victory? It seems the lawsuits caused a pull back from TMDL

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Fall In For The Nutrient Wars



Source Sectors – What's Killing the Bay?

- ❖ Five main sources of nitrogen, phosphorus, and sediment; 4 controllable:
 - (1) Controllable via WIPs: Agriculture, Wastewater, Stormwater, Septics
 - (2) Not part of the WIPs: Atmospheric deposition (nitrogen only)
- ❖ To what extent does the CWA impact these sources of nutrients/sediment?
 - (1) *Wastewater*: yes, via § 402 and the Revolving Loan Funds
 - (2) *Agriculture*: somewhat, but it's complicated (CAFOs, yes; runoff, no)
 - (3) *Stormwater*: also complicated (MS4s and industrial sw via § 402)
 - (4) *Septic Systems*: no



Pollution Source Sectors

- ❖ As with any TMDL, considerable discretion over allocation of reductions between the **point (wasteload)** sources and **nonpoint (load)** sources
- ❖ For Bay, § 402 NPDES program capable of solving half the problem
- ❖ The WIPs represent more extreme version of “**cooperative federalism**”
 - goes well beyond the mix of § 402 and **§ 319** that CWA contemplates
- ❖ The basic understanding of TMDL is states are to step up to develop extra-CWA policies
 - if not, CWA contemplates shift back to point source allocation



TMDL Lessons Learned: *What Worked?*

- ❖ **POTW** (sewage treatment plant) upgrades – billions spent by DC, MD, VA
- ❖ Sidebar: for about a dozen years, **CWA construction grant program** created massive subsidies for local upgrades of wastewater infrastructure; its replacement with the revolving funds has been a central failure of CWA. Effectively, DC/MD/VA turned back the clock to the 70s to great effect!
- ❖ Conservation / land use – some debate here, but the fact is we've held the line on Bay pollution despite big population growth over last two decades
- ❖ Nutrient management (e.g., manure transport, phosphorus indices)
- ❖ Clean Air Act caused major reductions in atmospheric deposition of TN



TMDL Lessons Learned: *What Did Not?*

- ❖ The Accountability Framework – the very foundation of the TMDL failed
 - The backstops stopped; the states called EPA's bluff
 - ex: EPA called for bold action on growth offsets, was ignored
- ❖ Permitting and compliance – maybe the biggest misunderstanding between the establishment and advocates is on the state of point sources
- ❖ **General permits** control much of the point source pollution (e.g., CAFOs, industrial and construction stormwater) but broadly fail to regulate
- ❖ Stormwater is a large source but expensive to control
- ❖ “Random acts of restoration” – scientific consensus is we cannot “BMP” our way to a restored Bay; we have to address pollutants at their source



Beyond 2025

- ❖ So, we failed again. Was a little forthright acknowledgement initially.
- ❖ Multi-year “Reaching 2025” and “Beyond 2025” planning frameworks
- ❖ There is now a widespread feeling of apathy; that the goal is either physically or practically unreachable (those are two very different things!)
- ❖ Climate changes everything
- ❖ New leadership incoming? In addition to 7 states, we now have 7 nations!



Things I Wish I Knew About the CWA

- #1 – The CWA is an incredibly ambitious law**
- #2 – Yet Congress still voted 440-11 in favor of this extraordinarily bold law**
- #3 – Sounds shocking today, but clean water has always topped polling**
- #4 – The vast majority of CWA implementation happens at the state level**
- #5 – The history of the CWA (case law) is written by the actions of the public**
- #6 – No one knows about the environmental rights we have under the CWA**
- #7 – While there are many causes behind the stagnation of the law, the biggest might be the cessation of CWA construction grants (an opportunity!)**