

The Abell Report

What we think about, and what we'd like you to think about

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Getting Serious About Saving the Chesapeake Bay:

After decades of broken promises, the EPA and the other Bay states now say they're serious about cleaning up the Bay. The key will be holding them accountable.

ABELL SALUTES:

CARES – For the promise of its offerings of emergency services, and the fulfillment of that promise one-on-one in Govans

Just off the 5500 block of York Road at Harwood Avenue is a parking lot in the rear of the St. Mary of the Assumption Church in Govans. Posted on a door leading to the church's basement are four signs, each on a simple index card. The signs, though plain and ordinary, make up a directory rich with promise: "Financial Assistance," "Food Assistance," "Rental Eviction," "Job Assistance." Located inside the basement are the facilities of CARES (Civic And Religious Emergency Services), which operates under the umbrella of GEDCO (Govans Ecumenical Development Corporation). It is here where the promise of the signs is carried out.

In 2011, CARES addressed more than 600 requests for financial assis-

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By **Rena Steinzor, Aimee Simpson, and Yee Huang**

In October 2011, the Center for Progressive Reform (CPR) and the University of Maryland Francis King Carey School of Law hosted a day-long forum focused on creating a new era of accountability for states responsible for cleaning up the Chesapeake Bay. At the event—the Carey School's annual Ward Kershaw Forum—environmental advocates joined with senior officials from the Environmental Protection Agency (EPA), the Maryland Department of the Environment (MDE), and the Maryland General Assembly to explore ways to hold polluters accountable, including reinvigorated government oversight and enforcement, with participants considering what these concepts really mean in the Bay context, why their achievement has proved so elusive, and how we might do better. This article draws on those discussions. The conference agenda is available at www.progressivereform.org. Questions or comments should be addressed to Yee Huang at yhuang@progressivereform.org or Aimee Simpson at asimpson@progressivereform.org.

The Chesapeake Bay—and the

rivers, creeks, streams, and lakes that comprise it—has long defined the mid-Atlantic region, providing residents with jobs and recreation, powering the region's economy, and providing a distinctive identity. Despite the billions of dollars spent to study and implement clean-up strategies for this invaluable national treasure, extensive impairments of water quality remain the same as they were two decades ago. Fully aware of the Bay's precarious state, policymakers, residents, and industries nevertheless remain gridlocked.

The reasons are obvious to any objective observer. For more than two decades, the primary Bay states (the District of Columbia, Maryland, Pennsylvania, and Virginia) have engaged in a series of round-robin consultations held under the auspices of the Chesapeake Bay Program. Progress was made in diagnosing the causes and implications of dead zones; diminishing crab and fish populations; algal blooms; and pollution that made rivers, lakes, creeks, and streams unusable for drinking, swimming, and boating. Individual states implemented innovative and effective pollution-control programs; glossy reports were produced; and every year, governors and the administrator

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of the EPA gathered for a photo op on the banks of picturesque Bay waterbodies. Despite the analyzing, meeting, planning, and talking, the Bay's health remains tenuous, and the Bay states have repeatedly failed to meet the pollution-reduction goals set during these appearances.

The gist of these failures was not the weakness of the laws and rules written to bring about critical improvements but rather the lack of follow-through and accountability. Quite simply, the states haven't lived up to their commitments, and the EPA hasn't offered any reprimand. Too much pollution flows into the Bay—more than its natural ecology can filter. The disappointing truth is that existing law has not been enforced aggressively enough, and federal and state regulators have not been held accountable for meeting tangible yet adequately stringent goals.

In 2009, recognizing that action was long overdue, President Barack Obama issued an Executive Order on Chesapeake Bay Protection and Restoration. The order ushered in what many hope will be a new era of federal leadership—leadership that has been sorely lacking in the past. Rather than host a forum where states are encouraged to confer and volunteer, the President mandated the EPA to set up a system that compels all of the Bay's stakeholders—including and especially the factories, sewage treatment plants, and farms that use it as a dumping ground—to become

accountable, with real consequences imposed for noncompliance.

The federal plan commands that states live within customized pollution “diets”—diets designed by the states themselves with EPA oversight. Participants at the Ward Kershaw Forum heard first-hand from Jeff



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Corbin, the EPA's senior advisor on Chesapeake Bay restoration, and Robert Summers, secretary at the MDE, about how the EPA and Maryland have responded to the reinvigorated Total Maximum Daily Load (TMDL) “diet” standards. However Maryland and the other Bay states choose to meet these TMDL goals, they will be held accountable for failures along the way.

How Accountability Benefits Maryland

Nearly the entire state of Maryland lies within the Chesapeake Bay watershed, and Maryland contributes about 20 percent of the Bay's pollution. Other states, primarily Virginia and Pennsylvania, contribute the remaining 80 percent. The principal pollution is in the form of excess nitrogen, phosphorus, and sediment, and they are introduced into the Bay from a number of sources. The major sources of nitrogen, for example, are agriculture (approximately 32 percent in 2009); wastewater treatment plants (about 19 percent in 2009); urban and suburban development sources, such as septic systems and chemical fertilizer application (about 14 percent in 2009); and atmospheric deposition (about 32 percent in 2009). The remaining nitrogen pollution stems from naturally occurring sources.

Because of Maryland's geological proximity to the Bay, the state is commonly perceived as the primary beneficiary of a clean and healthy watershed. Conversely, Maryland also feels many of the direct impacts of a polluted Bay, such as declines in the fish and crab populations (and livelihoods that depend on them), and negative impacts on tourism that other states may not feel as directly. Although it is in Maryland's best interest to insist that the federal government protect the bay and thus ensure consistent pollution controls regardless of the state in which the pollution origi-

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nates, past reliance—overreliance, really—on state “volunteerism” has prevented any significant progress.

Tools to Protect the Bay

Now marking its 40th birthday, the Clean Water Act (CWA) is the principal federal law that provides for the protection of the Bay and other bodies of water. Passed in 1972, it prohibits certain sources of water pollution from discharging that pollution unless they have a permit. These permits, called National Pollution Discharge Elimination System (NPDES) permits, specify that the source must treat the pollution to certain levels, based on technological standards, before the pollution enters waterways. In this way, the CWA focuses on preventing pollution at its source, rather than simply cleaning up what enters the Bay.

The CWA also considers the health of the waterbody that receives the pollution by setting a limit on the total amount of a certain pollution that can be discharged from all sources, including those without permits. This secondary, water-quality consideration comes into play when, for example, a permitted industrial source meets all of the technological standards and discharge limits but the waterbody is still suffering from unhealthy levels of pollution. At this point, the EPA or the state is required to set a total limit on pollution, or the TMDL, that can enter the waterbody.

In the Bay, the technological standards for regulated sources of pollution have proved inadequate. It has been so sickly, unhealthy, and polluted for such a long time that in 2010, as part of the President’s Executive

Order from the previous year, the EPA at last established a Bay TMDL—a “pollution diet” for the region. This diet caps the amount of nitrogen, phosphorous, and sediment that can enter the Bay, and it parcels the cap among the Bay states and the District of Columbia, and then among specific sectors of pollution sources. The EPA’s development of the Bay TMDL, along with other steps taken pursuant to the President’s Executive Order on Chesapeake Bay Protection and Restoration, is the

most promising development for the Bay in decades.

Permitting Pollution

It’s one thing for the EPA to establish a pollution diet in the form of a TMDL, and it is another for the states to actually achieve it. The chief tool for ensuring accountability is the Clean Water Act’s NPDES permits, which in Maryland are written, developed, monitored, and enforced by the MDE. Of course, Maryland and the other states are free to go beyond the

Clear or Not? Standards for the Cost-Share Program

The need for clarity applies equally to voluntary programs such as the Maryland Department of Agriculture (MDA) Cost-Share Program. At the forum, Jane Barrett, head of the University of Maryland Environmental Law Clinic, cited the program as an example of how vague standards lead to inadequate compliance and enforcement. Under the Cost-Share Program, Maryland farmers can receive a state grant to implement certain nutrient management practices to prevent water pollution run-off. One condition for receiving a grant is that the farm must have a nutrient management plan (NMP) in place and must follow the NMP. This condition is a specific requirement and a good example of a clear, black-and-white standard: The farmer must follow the explicit directive in order to receive funding.

On the other hand, the program is not so clear in its description of the end goal of the nutrient management practices: “The practice must significantly reduce erosion.” Unfortunately, what the farmer views as significant may not be what the MDA views as significant. Without a clear number, ratio, percentage, or otherwise objective standard, the task of achieving and enforcing this goal becomes a contest of opinions and subjective determination, and ultimately undermines the ability of the Cost-Share Program to reduce pollution in the Chesapeake Bay.

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NPDES permit system and establish stronger standards and programs to provide even greater protection for the Bay, thus speeding its recovery. Unfortunately, political considerations in each state make that unlikely. Ultimately, the federal government holds the tools and has the capacity to make each individual state toe the line.

In some ways, Maryland outshines its neighboring states for having passed legislation to provide these stronger protections. Examples include restrictions on development in sensitive areas around the Bay; the state's "flush tax," which is assessed on sewer and utility bills to help fund water-pollution treatment and prevention; and the Healthy Air Act, which reduces air pollution (specifically, nitrous oxide). Each of these laws, however, was adopted only after huge political battles. As Brian Frosh, a state senator from Maryland, noted at the forum, these laws reflect the intensity of those battles. "They are not as strong as they could be," he said, "or even as strong as they need to be to achieve their ultimate goals." Frosh went on to characterize today's political environment as largely informed by self-interest, with the opponents of Bay protection measures claiming that the government is launching "a war on rural Maryland." In this battle, he said, "give me a horror story [like an emergency or a health scare], and then I can get some [environmental legislation] passed. Short of that, the clash of political and economic interests means that people don't want to take steps to protect the environment."

For that reason, the federal

NPDES permit program needs to succeed. The permits are the basis for accountability, serving as both the yardstick by which to measure actions, progress, and failings, and the means of enforcing pollution limits. Toward that end, the permits must have clear and understandable requirements, and those requirements must be explicit and quantifiable. While Maryland can claim to have stronger permit requirements for certain sources of water pollution than its neighbor states, its permit program is not without its weaknesses.



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First, an NPDES permit must have clear and understandable standards—a problem area in Maryland. A potential polluter needs to know the rules in order to follow them, as well as the potential consequences of failing to follow the rules. When the time comes for inspection or enforcement actions, for example, it is unfair for the industrial facility to be charged

with a violation that was not part of its permit. On the other hand, it is perfectly fair for that facility to be charged with a violation of a requirement that is clearly and explicitly stated in its permit. Clarity is necessary not only to assess whether a violation occurred but also to determine the enforcement action that might follow a violation. In a hearing at the MDE or a court case, an enforcement attorney needs to be able to explain a standard to a judge and jury.

Second, clarity relates to another aspect that weakens the NPDES permits in Maryland: the lack of numerical standards. Standards in Maryland and in states around the country are made up of lyrical, narrative prose such as: "The waters of this State may not be polluted by any material... in amounts sufficient to be unsightly, change the existing color to produce objectionable color for aesthetic purposes... [or] create a nuisance."¹ Such uncertain and vague language is wholly subjective and difficult to implement and enforce.

A third weakness in Maryland's regulatory program has to do with the permits issued to smaller, minor sources of pollution. Forum participant Eric Schaeffer, director of the Environmental Integrity Project and a former EPA official, commended the MDE for doing a "pretty good job" of issuing and reviewing these minor-source permits, but he also noted that "pretty good is not good enough" when the cumulative pollution from these minor sources amounts to a significant portion of the pollution that goes into the Bay. If every source of pollution in the Bay needs to be accountable in order for the clean-up effort to succeed, then the law will need to include small sources, such as

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recreational parks and camps, and other sources that do not normally leap to mind in discussions about major polluters. Here, as with the major sources, numbers are important because they show clear, objective compliance or violations.

Better Monitoring: A Prerequisite to Stronger Enforcement

Clear, valid, and wiggle-averse permits are one part of the foundation for a Bay accountability and enforcement program. Consistency and accuracy are another. In the absence of reliable monitoring data, the entire accountability framework collapses. “We are not going to trust what we can’t see” and “there is no substitute for the numbers,” Schaeffer explained during the forum. Federal and state authorities need up-to-date and accurate monitoring data to keep tabs on the Bay, and to guide more effective permitting and enforcement actions. From a citizen advocacy perspective, such data matter as well because their absence creates an information vacuum that exaggerated claims can quickly fill, complicating advocacy and citizen-suit enforcement efforts.

Several elements of Maryland’s data-collection program need to be strengthened, including:

- **Improved Monitoring.** The starting place for collecting accurate data is monitoring, an area in which Maryland needs to improve. The state’s current monitoring methods are inconsistent, with different data-collection methods in use in different settings. One solution suggested at the forum by Steven Johnson, principal counsel

for the MDE, is to implement in-stream monitoring to estimate loading numbers, similar to the approach used in air-quality monitoring. Other approaches include increased field monitoring both before and after permits are issued, and making sure that monitoring and reporting requirements are in place and being followed.

- **Understandable and User-Friendly Data.** Once consistent and accurate monitoring is established, the data that follow are of little value if they cannot be analyzed in a relatively easy fashion. Currently, much of the data collected are poorly organized and incomprehensible even to a knowledgeable Bay advocate. Even EPA officials have a difficult time understanding and adapting data provided by the states. While some recent Internet-based tools aim to assist government authorities, pollution sources, and Bay advocates to better understand and organize the permitting, pollution, and enforcement data (e.g., the EPA’s ECHO and Chesapeake Commons), these tools, and the diligent staff behind them, only offer one level of translation and organization. More needs to be done to set universal collection and reporting standards.
- **Disclosure and Access to Data.** After data are collected and organized in a comprehensible and user-friendly manner, they should be made available to the public. For most Bay advocates, obtaining information on permits, monitoring data, enforcement actions, or other related data involves a long

and tortuous road of dead ends and detours. Maryland is no exception. Several of the speakers at the forum identified data collection and data sharing as key areas in which the MDE needed to improve. “Facts are important for accountability,” one of the speakers noted, and gathering such information requires performing more compliance sweeps to make sure that data are accurate and then making sure to share the data with the public. Data and information are useless if they sit on the shelves of government agencies under lock and key. Transparency of information is critical for accountability and for facilitating trust among Bay citizens, regulators, and regulated entities that want to do their part.

- **Environmental Groups as Data Translators.** Even with gains in monitoring consistency, data organization, and information accessibility, there will always be a gap between what the numbers indicate and what the general public perceives. Part of the role environmental and Bay advocates can play is to act as the translators of the data for the public. The advocacy community must use its expertise to help communicate what the numbers mean in real-world terms for the Bay and all those who depend on it.

The Role of Oversight in Ensuring Accountability

If efforts to clean up the Bay over the past 20 years have demonstrated anything, it is that, left to their own devices, the states will make little, if any, progress. Good intentions give

way to stern choices and hard politics. So, just as vigorous oversight by the states is critical to keeping polluters' discharges within acceptable limits, vigorous oversight by the EPA is crucial to making sure the states are holding up their end.

Such oversight by the states includes monitoring, reporting, and frequent inspections to ensure permitted facilities are complying with the law. When violations are found by inspectors, enforcement actions must follow in a timely, predictable, and credible manner in order to ensure that such violations do not recur at the violating facility, and to create a deterrent for other, similarly situated facilities. Oversight also involves a layer of review above the state: The EPA must act to ensure that states are carrying out their responsibility to implement the Clean Water Act and the Bay TMDL. A final layer of review involves citizen groups and the public working to make sure that all involved are doing their part.

Inspections are the visual proof necessary to establish accountability. They are the most direct way to determine if a facility is complying with the requirements in its permit. Currently, the MDE relies heavily on paperwork reviews and audits of facility-submitted reports, which offer little opportunity for true verification. Although they may be resource- and time-intensive, on-site inspections are crucial and more effective than determining compliance or violations from self-monitoring reports or other paperwork.

Enforcement. If, after inspection, the MDE finds that a facility has violated its permit, enforcement actions

come into play. Such action is the very substance of accountability: When a polluter has failed to comply with its permit and failed to take responsibility for the pollution it has created, enforcement establishes basic accountability and makes the polluter responsible not only for its pollution but also for the harm its pollution has caused.

Civil enforcement serves two distinct purposes. It deters the specific violator from future violations, and more generally, it deters similarly situated facilities from violating their permits. This deterrence effect operates on the premise that a permit holder, subject to legal requirements in the permit, weighs the cost of complying with those requirements against the cost of not complying with the requirements. For example, if a company can save \$10,000 by not treating wastewater and thus illegally discharging water pollution into the Chesapeake Bay, but it knows that it will face stiff penalties that far exceed \$10,000 for this discharge, the company may—at least from a monetary standpoint—be deterred from violating environmental laws.

Part of the calculation, therefore, is not only assessing the likelihood that the MDE or others will detect the violation and bring an enforcement action, but also assessing the size of the penalties that may result from the enforcement action. The deterrence effect is greatest, then, when the MDE conducts regular, consistent, and frequent compliance monitoring to identify violators and initiates timely and meaningful enforcement actions that require compliance with the permit standards or other laws.

The tipping point of the calculation, however, is frequently the mon-

etary penalty. The MDE must assess penalties that are severe enough to deter future violations, to clean up the environmental harm, and to recover any windfall a facility received from its noncompliance. Although Maryland has a long-held reputation as a regional and national leader in environmental protection, that reputation warrants scrutiny when it comes to assessing penalties. As Senator Brian Frosh ruefully noted, "It pays to pollute because fines are not enough of a deterrent." The state penalties for violating the Clean Water Act have remained chronically below the level allowed under federal law. For example, Maryland's maximum penalty per violation per day is \$5,000, whereas the federal maximum penalty per violation per day is \$16,000. More importantly, Maryland law does not require the MDE to penalize polluters for the full amount of the economic gain they achieved by flouting the law.² The result is that for some companies in some instances, violating the law is a rational business decision.

Recovering the Economic Windfall. This upside-down economic dynamic is particularly relevant in instances where noncompliance leads to an economic windfall for the polluter. Whether it is the cost of implementing new pollution controls, reduced production levels because of pollution limits, maintenance and monitoring costs, or staffing and labor allocation costs, businesses and individuals alike will often choose the bottom line over meeting pollution limits and the health and environmental well-being of the region's most precious natural resource. In today's economic climate, the motivations to reduce costs are strong and the environmental enforcement staffs at the

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MDE and other Bay states are overworked and underfunded—a combination that does not bode well for water quality and permit compliance in the Bay and elsewhere. These economically challenging times, however, make it even more critical for environmental regulators to send a strong enforcement message to potential violators with every enforcement penalty they levy so as to achieve maximum deterrence. At the very least, state regulators need to make sure that a polluter does not walk away in a better financial position than if it had followed the law and met its pollution limits. Otherwise known as the “economic benefit of noncompliance”—but what amounts to a polluter’s windfall—this critical penalty factor must be a part of the penalty equation.

If state authorities, including the MDE, lack funding and initiative to develop their own calculation model for assessing delayed or avoided expenditures like putting in place pollution-control equipment, setting up a reporting system, or calculating pollution-control operating and maintenance costs, then they can turn to the EPA’s “BEN Model.” The BEN Model is a penalty policy and computer program that calculates the economic benefits gained from delaying and avoiding required environmental expenditures. If state authorities want to go one step further than the BEN Model, they can also consider the economic windfall that a violator might receive through its competitive advantage in delaying pollution controls. For example, if a manufacturer achieves a higher production output by violating its effluent limitations, it

may be able to gain a greater share of the market.

Whatever level of economic windfall recovery a state chooses to implement, the point is that it needs to be a standard part of the calculation. In an ecosystem as diverse and relied upon as the Bay, polluters should not reap economic rewards from polluting and breaking the law, while their responsible competitors do their part and follow the law.



Bay polluters should not reap economic rewards from polluting and breaking the law, while responsible competitors follow the law.



Mandatory Minimum Penalties (MMPs). One way to streamline the enforcement process and to promote consistency is through a mandatory minimum penalty for specified violations, such as certain pollution discharges or minor but chronic violations. A briefing paper by the CPR, *Back to Basics: An Agenda for the Maryland General Assembly to Protect the Environment*, highlights the benefits of these penalties: They automate part of the enforcement process by identifying certain violations that result in a predetermined penalty

assessment, saving agency resources and time. They also provide clarity to the regulated community and are immune to interference.

New Jersey and California have both enacted mandatory minimum penalties for certain violations committed by companies that have a history of noncompliance with the law, and evidence suggests that these penalties have led to increased compliance. For example, in the first decade after New Jersey enacted its minimum penalty statute, effluent violations decreased by 87 percent.³ In a review of California’s mandatory minimum penalty statute, the EPA noted that the “ongoing and nondiscretionary nature of the MMPs provides both a motivation to resolve violations and a strong deterrent against violation.”⁴

What are the lessons from these states? First, mandatory minimum penalties must clearly identify the violations to which they apply and clearly state any exemptions. Second, the penalty amount should have a deterrent effect for the wealthiest polluters but also be fair to small businesses or operations, and the amount should adjust with inflation. Third, state agencies should assess the penalties in a timely and prompt manner to provide the maximum deterrent effect. Finally, publicly owned treatment works (POTW) facilities should be authorized to assess penalties against those facilities that discharge water pollution into the POTW system.

Obstacles to Civil Enforcement

Speakers at the forum noted two important obstacles to effective enforcement: judicial interference with the MDE’s penalty assessments and the permit application shield.

Anecdotal evidence suggests that, when the MDE brings a civil enforcement case into state court, judges often reduce the total penalty amount dramatically. While the ability to reduce penalties is within a judge's discretion, this simple interference ignores the MDE's careful and hard work in bringing the case and can all but eliminate the deterrent effect of the civil enforcement action.

Another obstacle is the permit application shield, a legal defense that protects a polluter that has disclosed in its permit application all the pollution it discharges. If the polluter gives an inventory of what they're discharging and it includes such a small amount of something that the MDE doesn't see the need to write a specific figure into the permit, but later discovers that the applicant was discharging more than disclosed, the MDE cannot then bring an enforcement action for this excess discharge. The polluter is essentially shielded from enforcement. Loopholes in the enforcement process such as the permit application shield not only encourage large and burdensome applications that may disclose extraneous information, but they may also result in low estimates of discharges.

Criminal Enforcement

At the forum, environmental advocates and state regulators agreed that a key part of accountability for the Bay was criminal enforcement. Jane Barrett—a former environmental prosecutor and private counsel, and current Bay litigation advocate—recalled that in her days in private practice, the clients always asked the same question: “Could I go to jail?”

Her point was that criminal enforcement offers the greatest opportunity for deterrence. Barrett clarified that she is not suggesting that state authorities round up every violator and press charges, but that the most severe violators should face the prospect of criminal charges, and possible time in prison. This ensures that potential polluters factor the possibility of facing criminal charges into the “should I pollute?” equation.

Johnson, counsel for the MDE, agreed that a call for more criminal enforcement was warranted, but pointed out the unique challenge of using this enforcement tool in a Maryland state court: Most of Maryland's environmental laws do not offer the option to prosecute violations as a felony, limiting the MDE's ability to deter violations with criminal charges. Because of this statutory limitation, Johnson explained that the MDE often works jointly with the EPA to pursue criminal enforcement in federal court for increased deterrent effect. While this enforcement approach should be maximized, the full deterrent effect can only be achieved if the threat of criminal sanctions is in place at both the state and federal levels. Criminal enforcement at the state level needs to play a greater role in Maryland's environmental enforcement and thus legislators need to revisit the criminal penalties available to state regulators.

EPA Enforcement

Although the MDE plays the primary role in enforcement, thus ensuring accountability for polluters in Maryland, the EPA has the authority to oversee the MDE's effort and can cooperate on enforcement actions with the state agency or take its own

enforcement actions. The EPA's oversight and enforcement role is another layer of accountability—and arguably the most important. In May 2010, the EPA laid out its Chesapeake Bay Compliance and Enforcement Strategy, committing to focus on the key sectors that are regulated under the Clean Water Act: concentrated animal feeding operations (CAFO) facilities in specific geographic regions, significant wastewater treatment plants, areas where urban runoff is increasing or expected to increase, and sources of air emissions across the Bay watershed.

During the forum, Corbin, the EPA's senior advisor, highlighted some of the EPA's recent successes in the CAFO and animal agriculture sector, including inspections of 24 dairy operations in Lancaster County, Pennsylvania. The inspections revealed the presence of pathogens and high nitrate levels in wells, and have led to efforts to implement nutrient practices to minimize these problems. More recently, the EPA has required four turkey and chicken operations in West Virginia to apply for CAFO permits after determining that their operations constituted CAFOs.

In the view of many, the EPA's efforts are a good start. But the agency's ability to hold polluters accountable is still in question. For example, the enforcement actions against the West Virginia CAFOs demonstrate that the EPA and the states often do not know what operations are out there, so part of the task is simply finding out where these operations are. But a long-term task is ensuring fair, consistent, and targeted enforcement against sources that discharge pollution into the Chesapeake Bay and its waterways. A recent report

by the EPA's inspector general found that the "EPA does not administer a consistent enforcement program" at the same time that "state enforcement programs are underperforming." Forum speakers Schaeffer and Barrett suggested that to remedy part of this problem, the EPA should use "letter sweeps" to notify minor sources that they are in violation. If, after receiving these notices, the sources remain out of compliance, the EPA could bring

more formal enforcement actions to resolve the violations.

Citizen Suits

Citizen-suit enforcement provisions are found in nearly all of the major federal environmental statutes, including the CWA. In the environmental context, a citizen suit is a civil action initiated by a private citizen (or group of citizens) against a violator of an environmental statute or administrator (state or federal) failing to perform mandatory duties imposed by

the environmental statutes. A citizen-suit provision places environmental enforcement authority directly in the hands of the people and creates a third "branch" of accountability and enforcement beyond that of the usual federal agencies and state authorities. In other words, citizen suits empower the individuals in a community to play an active role in ensuring environmental accountability.

The legislative record of the law makes clear that citizen-suit provisions were included in the CWA—and for that matter, in other environmental statutes—because Congress recognized that government simply could not be everywhere at all times. Congress also recognized that this supplemental support to the environmental accountability system was not an unfettered grant of authority and put in place specific procedures that every citizen suit had to go through (on top of the usual data- and evidence-gathering requirements) before any civil enforcement or litigation could occur. Examples of these procedures include a detailed notice letter that must be provided to the polluter 60 days before any civil claim can be filed, laying out the specific violations that the citizen is alleging. If the polluter corrects the alleged violations within 60 days, no suit can be filed—no matter how much time, energy, and resources have been spent in identifying the violations. This prohibition is one of many procedural checks aimed at providing polluters, as well as state and federal authorities, every opportunity to do the right thing while enforcing the environmental laws as they should be enforced.

Barrett was one of many speakers at the forum emphasizing the valuable and critical role that citizen suits and

Accountability in Context: Water-Quality Trading on the Horizon

All the components of accountability come into context with the developing offsets and water-quality trading proposals in Maryland and other Bay states. Even though the economic benefits of these exchanges are highly touted, whether or not they are accountable and can actually lead to improved water quality is less clear. What is clear, however, is that accountability in these programs is paramount. Without adequate monitoring and clear, objective requirements, these exchanges have the potential to become shams that exist on paper but not in practice. Without provisions that are enforceable not only by the credit generator and credit purchaser but also by the MDE, MDA, and EPA, these exchanges may prove to be a loophole through which polluters escape their obligations to contribute to Bay restoration. Without transparency, these exchanges risk alienating an already skeptical public that has seen various creative schemes to restore the Bay with few actual outcomes. Without resources to administer these programs, all the time and resources spent developing them will go to waste.

The use of offsets and water-quality trading in Maryland are on the horizon, and the MDE can rest assured that many eyes—especially those of forum attendees—are scrutinizing each step to make sure accountability is an integral part of these programs.

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community engagement play in environmental accountability. “Citizen suits can be incredibly effective and are a critical piece in achieving consistent enforcement,” Barrett commented. Jon Mueller, an experienced environmental advocate and vice president of litigation for the Chesapeake Bay Foundation, agreed with Barrett and pointed to the critical role that community enforcement plays in encouraging more robust action for Bay restoration, such as the ongoing litigation to clean up the Sparrows Point steel facility. Mueller also noted that citizen advocacy acted as a “truthing” mechanism for all facts and assessments, even those provided by the government.

Despite the difficulties inherent in any civil action, citizen suits promote citizen engagement and participation in the Bay accountability process. Making sure that everyone does his/her part in cleaning up the Bay should not fall solely on underfunded and overworked government entities. Just as citizens and citizens groups need to do their part in conducting environmental studies, organizing clean-up efforts, and raising awareness about the critical role that the Bay plays in the life of the region, they also need to share in the responsibility of ensuring fairness and collaboration in working toward a better Bay.

Moving Toward Solutions

Throughout the forum, a few overarching needs for the Bay repeatedly rose to the top.

1. Transparency

Transparency at all levels would make sure that time and resources

are spent appropriately and in the most value-maximizing manner. Information transparency not only inspires honest and effective participation from government authorities and regulated entities, but it also allows citizens to share in the accountability and enforcement burden. On the whole, transparency inspires trust while making everyone’s jobs a little eas-



“Citizen suits can be incredibly effective and are a critical piece in achieving consistent enforcement,” says Jane Barrett of the University of Maryland Environmental Law Clinic.



ier and maximizing the value of public and private resources. As noted earlier in the context of improved monitoring and data sharing, a major problem facing Bay accountability stems from the lack of coherence in pollution data, enforcement data, and general enforcement information. John Dawes, lead developer of the latest Bay data-transparency tool, provided forum participants with a

demonstration of The Chesapeake Commons. This geo-spatial data-analysis tool acts as a kind of Google Earth for Bay data, allowing users to analyze and compare datasets from multiple sources while also creating mapping visuals. Bay advocates, government officials, and regulated entities have access to downloadable data in multiple formats and metadata information (i.e., who, where, what, and when information) about any dataset selected.

The Chesapeake Commons tool offers one example of a significant step toward true transparency; however, the main efforts must come from the authorities in charge of collecting the data and documenting what is being done. Both the MDE and EPA have made strides toward better transparency but more needs to be done to foster a trusting and collaborative accountability program.

2. Resources

Unfortunately, the difficult economic times threaten the reinvigorated Bay clean-up efforts and leave both the EPA and state environmental agencies in a sort of funding dead zone—deprived of resources and surrounded by a hostile, antiregulatory sentiment. Maryland is no exception and with political lines being drawn, there is little hope for legislative relief.

Maryland stakeholders repeatedly cite the need for additional funding to hire the staff necessary to oversee permit holders and bring enforcement actions against those who break the law. In 2010, the Center

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for Progressive Reform analyzed the effectiveness of the MDE's Clean Water Act enforcement program and concluded, consistent with the MDE's analyses, that the agency is drastically underfunded to fulfill its basic mission.⁵ 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. Adjusted for inflation, that decline was nearly 25 percent and coincided with a doubling of pollutant-discharge permits in effect. During the same period, the number of active, full-time inspectors at the WMA also decreased by 25 percent. Although these statistics improved during FY 2010, the funding shortage has had a crippling effect on the MDE's resources and, as a consequence, on its ability to protect the air, land, and water in Maryland. Despite implementing cost-saving measures, the MDE is faced with the same budget restrictions as other agencies across the state and is increasingly relying on special funds to operate its clean-water and other environmental programs.

3. Expanding Maryland Special Funds and Increasing Permit Fees

One source of special funds comes from fees associated with the various permits issued by the MDE. For the polluter, permit fees account for the additional work that a regulated facility generates for the MDE by discharging pollution into the environment. These permit fees allow the MDE to develop permits and permit standards, and to monitor a facility for

potential harm to the environment. Ultimately, permit fees promote fairness by ensuring that the regulated entity that releases pollution into Maryland's water or air shoulders the full cost of its operations, rather than the public.

Maryland law requires that permit fees be based on the anticipated cost of monitoring and regulating the permitted facility and programmatic needs related to the prevention of pollution discharge into the waters of Maryland. Thus, permit fees should cover the cost of developing the permits as well as much of the agency's operating costs for administering the water program. The fee amounts are set by both the General Assembly and the MDE.

Surprisingly, the General Assembly does not authorize the MDE to charge fees for either general or individual municipal permits, in contrast with neighboring Pennsylvania and Virginia. Municipal facilities, such as POTWs, contribute nearly 28 percent of the nitrogen⁶ and more than 20 percent of the phosphorus discharged into the Bay. Without these fees, the Maryland General Assembly deprives the MDE of a significant resource needed to administer the water pollution prevention program.

4. Communication

During the forum, participants from all backgrounds and positions commented on the communication disconnect surrounding Bay restoration efforts. Instead of sending a message of unity and

fairness in an effort to preserve a valuable natural resource, one that we all depend on, Bay advocates have been struggling to fend off overheated rhetoric about "wars on rural Maryland" and undue regulatory burdens. Bay advocates know that these claims are often attempts by polluters to obscure the fact that all citizens have to do their part in restoring the Bay and controlling the pollution for which they are responsible, but the problem is that not enough Bay advocates are speaking up.

Those who are speaking up, observed secretary Summers, need to be louder. People, especially in rural areas, are questioning the costs associated with Bay restoration, so advocates in favor of these efforts, especially at the local level, must turn up the volume. "Your commissioners, your senators, your delegates need to hear from you," Summers instructed. This means showing up at local and federal meetings concerning Bay issues. It means going beyond local politics and improving the communication among Bay advocates so that the messages presented come across consistently and clearly. The Ward Kershaw Forum is a fine example of a gathering that allows Bay advocates to touch base, listen, brainstorm, and move forward as a collective unit.

Conclusion

Gone are the days when we can afford to have elected officials pose for the cameras, hoping that the public, the media, and environmental groups will ignore their long-term failures to make progress on restoring a vital nat-

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ural resource that is not just Maryland's pride, but the backbone of its economic future. Breaking the vicious cycle of inaction on the Bay means both applying and maintaining pressure on industrial dischargers, agribusiness, and wastewater treatment plants to live within the rigor-

ous new pollution diets set by the EPA and state experts.

Endnotes

¹ COMAR 26.08.02.03.

² Md. Env't. Code § 9-342 (2011).

³ William Coyne & Luke Metzger, *Mandatory Minimum Penalties: An Effective Tool for Enforcement of Clean Water Laws* (May 2004) at 13.

⁴ U.S. EPA Region 9, *2007 State Review Framework Report for the State of California Clean Water Act Compliance and Enforcement Activities* (Jan. 28, 2008) at 15.

⁵ Robert L. Glicksman and Yee Huang, *Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short*, CPR White Paper No. 1004 (April 2010).

⁶ BayStat, <http://www.baystat.maryland.gov/sources2.html>.

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ABELL SALUTES

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tance and more than 4,000 requests for food, representing an average of 151 individuals receiving food each week. Volunteers, working in two- to four-hour shifts, help to meet the needs of clients one-on-one. One of those volunteers is 21-year-old Megan Peterson. Following a week's training, she and each of her colleagues from Loyola and other nearby colleges—as many as eight—come into CARES a few days a week to interview clients. Much of these volunteers' work involves accessing data on one of the six computers—searching for job postings, sources to assist clients with rent-eviction problems, and resources leading to food contributions for distribution on Saturday mornings. (Current contributors include Mars and Giant super markets.) CARES keeps a well-stocked pantry, and offers its clients canned vegetables, meat and fish, bread and rolls, and fresh produce.

Janice Lawson, a 58-year-old resident of Govans, feels such a connection to CARES that although she lives a few blocks away, she considers the CARES offices, located at 5502 York Road, her home because, she says with unabashed enthusiasm, she has spent so much time there. "Most every day of the week, months on end," Lawson says. "I was out of work and down on my luck, and I needed a job. Working with CARES I got a job. My luck turned! Is it any wonder I call the CARES offices my 'home?'"

At any given time, the CARES student coordinator works with eight to 10 unemployed persons in need of emergency services. Approximately 55 percent of those served have criminal records. Because many, if not most, of the clients do not have regular access to a computer, the student volunteers establish e-mail accounts for each of them. These accounts are checked regularly and the volunteers meet with each client individually.

In 2011, CARES helped 148 per-

sons complete their résumés and of those, CARES estimates that more than 60 percent found jobs in these difficult economic times. With an average hourly wage of \$11.52, CARES participants are employed as van drivers, certified nursing assistants, warehouse workers, housekeepers, and retail sales clerks. After six months, 60 percent of those placed into jobs are still employed in the same job.

Seventeen of the participants who were placed into jobs had been coming to CARES for food or emergency services regularly; of those, nine—or 52 percent—no longer require food or emergency assistance because they are now self-sufficient through employment income. CARES boasts a cost-per-person served at \$1,145.

The Abell Foundation salutes CARES for the promise of its offerings of emergency services, and the fulfillment of that promise one-on-one in Govans.