



Final Phase I Chesapeake Bay TMDL Legal Review and Assessment for the Hampton Roads Planning District Commission

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HRPDC Comments

- Comment #1:** Failure to provide reasonable assurance for the urban runoff sector
- Comment #2:** Legal authority to establish a deadline in the TMDL
- Comment #3:** Failure to provide reasonable opportunity to comment
- Comment #4:** Flaws in the Phase 5.3 model
- Comment #5:** Modeling predictions do not justify use of James River chlorophyll-a criteria

Relevant Considerations

- **Issues and Standards on Review**
 - Did EPA abuse its discretion by acting arbitrarily and capriciously?
 - Did EPA act in excess of its legal authority?
 - Did EPA commit procedural error?
- **Factors to Consider in Deciding Whether to Appeal**
 - Likely impact of EPA's action
 - Likelihood of success on appeal
 - Remedy if successful on appeal
 - Litigation costs weighed against above factors
 - Political considerations

EPA's Responses to HRPDC's Comments

Comment #1: EPA has not provided reasonable assurance that the urban runoff sector allocations can be achieved.

EPA's Response:

- Allocations have been revised significantly based on Virginia's final WIP and in response to comments.
- EPA is confident that its comprehensive, iterative process for determining allocations and making needed adjustments will be successful.
- EPA's Accountability Framework will also help to ensure that the allocations are achieved.

Legal Analysis - Comment #1

EPA's Responses to HRPDC's Comments

Comment #2: EPA does not have the legal authority to establish a deadline in the TMDL.

EPA's Response to Comment #2

–“In light of the Bay's importance, the delays so far in reaching those targets, and EPA's belief that this job can be done in the projected time, the staged 2017/2025 implementation framework is both lawful and reasonable.”

–The TMDL by itself is not a self-implementing mechanism and does not contain an implementation plan.

–The implementation plan is set forth in the WIPs and the Accountability Framework.

Legal Analysis - Comment #2

EPA's Responses to HRPDC's Comments

Comment #3: EPA failed to provide a reasonable opportunity to review and comment on the basis for the proposed allocations.

EPA's Response to Comment #3

–EPA believes that the public was given an adequate opportunity to participate and comment considering “all the circumstances of this TMDL, including the considerable transparency of the process to date and EPA's considerable efforts to engage in public outreach.”

–EPA believes it made information on the Scenario Builder and other essential models available.

Legal Analysis - Comment #3

EPA's Responses to HRPDC's Comments

Comment #4: The Phase 5.3 model and model inputs are not sufficiently developed to produce reliable predictions.

EPA's Response to Comment #4

–The models have been thoroughly reviewed and vetted and are fully capable of supporting the TMDL.

–Five generations of the watershed model have been applied to management decisions in the Chesapeake Bay region for over two decades.

–Fluctuations in the extent of developed lands in different versions of the model are due to changing technology and methods for mapping developed lands.

Legal Analysis - Comment #4

EPA's Responses to HRPDC's Comments

Comment #5: The modeling predictions do not justify use of the chlorophyll-a criteria as the basis for the James River basin allocations.

EPA's Response to Comment #5

- The model is well calibrated and appropriate for application to assess the James chlorophyll-a standards.
- The model can't be “unstable.” There is no “unstable” programmed in its code.
- While a “knee of the curve” analysis is interesting, it has no standing unless its recommended loads achieve Virginia's water quality standards, and the Tributary Strategy loads fail to do so.

Legal Analysis - Comment #5

Summary

- **Timeframe**
 - No hard deadline to file an appeal
 - Recommend filing by the end of March or soon thereafter if you wish to appeal



Discussion