Attorneys General of Maryland, Virginia, and the District of Columbia

May 18, 2020

BY CERTIFIED MAIL

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U.S. Environmental Protection Agency
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Peter D. Lopez
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Cosmo Servidio
Regional Administrator
U.S. Environmental Protection Agency
Region 3
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William Barr
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Notice of Intent to Sue: Failure to Ensure That the Phase III Watershed Implementation Plans of Pennsylvania and New York Meet the Chesapeake Bay TMDL

Dear Administrator Wheeler, Regional Administrators Lopez and Servidio, and Attorney General Barr:

The State of Maryland, the Commonwealth of Virginia, and the District of Columbia hereby give notice of their intent to sue the Administrator of the United States Environmental Protection Agency ("EPA") for failing to ensure that the Commonwealth of Pennsylvania and State of New York develop Phase III Watershed Implementation Plans ("WIPs") that achieve and maintain the nutrient reductions required of those states to meet the Chesapeake Bay Total Maximum Daily Load ("Bay TMDL"). 33 U.S.C. § 1365(b)(2). That failure constitutes a breach of the Administrator's nondiscretionary duty to "ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain" the Bay TMDL. *Id*. § 1267(g)(1).

The Chesapeake Bay is the largest estuary in the United States and is among the world's most productive and valuable ecosystems. The Bay is home to thousands of plant and animal species, and is an invaluable cultural and economic resource for Maryland, Virginia, and the surrounding region. Indeed, Congress has declared that the "Bay is a national treasure and a

resource of worldwide importance."[1] But because the Bay's watershed spans 64,000 square miles over six states and the District of Columbia (collectively the "Bay States"), efforts to protect it present unique challenges. Water from each of the Bay States flows into the Bay, bringing with it significant amounts of pollution. Over decades, the Bay's water quality—and hence its productivity—has severely diminished, primarily as a result of nitrogen, phosphorus, and sediment pollution.

In light of the complex problems posed by water pollution over a huge geographic expanse in multiple jurisdictions, the Bay States and the federal government have long recognized the need to work together to restore and protect the Bay. In 1983, the governors of Maryland, Virginia, and Pennsylvania, as well as the Mayor of the District of Columbia, the chairman of the Chesapeake Bay Commission, and the EPA Administrator, signed the first Chesapeake Bay Agreement, representing the first multi-state coordinated effort to restore water quality in the Bay. These efforts led to the Chesapeake 2000 Agreement and subsequent Memoranda of Understanding in which all of the Bay States and EPA committed to reduce pollution in the Bay. Congress, for its part, passed the Chesapeake Bay Restoration Act of 2000, which reauthorized § 117(g) of the Clean Water Act with an express purpose of achieving "the goals established in the Chesapeake Bay Agreement,"[2] defined as "the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council."[3]

In 2007, the Bay States and EPA agreed that EPA would establish a TMDL for the entire Bay Watershed with a target date of 2025 when all pollution control measures necessary to meet water quality standards would be in place. Pursuant to that agreement, on December 29, 2010, EPA established the Bay TMDL, a comprehensive "pollution diet" aimed at restoring clean water in the Bay States. The Bay TMDL sets limits for pollution that equate to a 25 percent reduction in nitrogen, a 24 percent reduction in phosphorus, and a 20 percent reduction in sediment.[4] The Bay TMDL further allocates these pollution reductions to the respective Bay States, including Pennsylvania and New York, with a 2025 deadline to achieve the reductions. The Bay TMDL explains that it "identifies the *necessary* pollution reductions of nitrogen, phosphorus and sediment across Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia and sets pollution limits necessary to meet applicable water quality standards in the Bay

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[1] Chesapeake Bay Restoration Act of 2000, Pub. L. No. 106-457, Title II, § 202(a)(1) (Nov. 7, 2000).

[2] *Id*. § 202(b)(2).

[3] 33 U.S.C. § 1267(a)(2).

[4] Chesapeake Bay TMDL, Executive Summary, ES-1.

and its tidal rivers and embayments."[5] In 2014, the Chesapeake Executive Council—which includes representatives of the Chesapeake Bay Commission, all of the Bay States, and the federal government—signed the Chesapeake Bay Watershed Agreement, which embraces the Bay TMDL and its goals.[6]

To ensure they met the Bay TMDL's goals, EPA required each Bay State to submit a series of WIPs detailing how it would achieve its allocated pollution reductions over the course of the Bay TMDL's term. EPA received the third and final WIP (the "Phase III WIP") for each Bay State on August 23, 2019.

On December 19, 2019, EPA released its evaluation of each jurisdiction's Phase III WIP. EPA concluded that the Phase III WIPs submitted by Maryland, Virginia, and the District of Columbia met those jurisdictions' "numeric planning targets for nitrogen and phosphorus" at the state and state basin levels through the submission of best management practices and wastewater reductions.[7] EPA went on to conclude that Maryland, Virginia, and the District of Columbia "will attain the necessary load reductions by 2025" through the suite of BMPs and wastewater reductions proposed.[8] EPA similarly concluded that Delaware and West Virginia had submitted Phase III WIPs that met their respective numeric planning targets and would attain the necessary load reductions by 2025. Each of these jurisdictions invested significant resources in its efforts, and each relied on the other Bay States to achieve their respective fair shares of reductions in the pollution entering the Bay.

Pennsylvania and New York, however, submitted Phase III WIPs that failed to meet their planning targets. The Bay TMDL requires Pennsylvania to reduce its nitrogen pollution by about 33.8 million pounds per year. Its Phase III WIP, however, reflecting significant deficiencies in funding, shows anticipated reductions of only 24.8 million pounds per year. Thus, Pennsylvania's Phase III WIP leaves the Bay with an excess of approximately 9 million pounds of nitrogen per year. EPA's own evaluation concluded that Pennsylvania's Phase III WIP would meet only 75% of its numeric planning target for nitrogen and, thus, that "Pennsylvania's current planned efforts

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[5] *Id*. (emphasis added).

[6] 2014 Chesapeake Bay Watershed Agreement, 7 (explaining that the Bay TMDL "establishes the foundation for water quality improvements embodied in this Agreement").

[7] EPA Evaluation of Maryland's Phase III Watershed Implementation Plan (WIP), 1; EPA Evaluation of Virginia's Phase III Watershed Implementation Plan (WIP), 1; EPA Evaluation of the District of Columbia's Phase III Watershed Implementation Plan (WIP), 1.

[8] EPA Evaluation of Maryland's Phase III Watershed Implementation Plan (WIP), 1; EPA Evaluation of Virginia's Phase III Watershed Implementation Plan (WIP), 1; EPA Evaluation of the District of Columbia's Phase III Watershed Implementation Plan (WIP), 1.

do not achieve the nitrogen Phase III WIP planning target."[9] Nonetheless, EPA has not required Pennsylvania to prepare a Phase III WIP that remedies this deficiency.

The Bay TMDL requires New York to reduce its nitrogen pollution by about 2.74 million pounds per year.[10] The Chesapeake Assessment Scenario Tool, the watershed model used by the Chesapeake Bay Program, shows that New York's Phase III WIP achieves a nitrogen reduction of only 1.74 million pounds per year, or only 64% of its required nitrogen reduction. In its evaluation of NY's Phase III WIP, EPA concluded that New York's "nitrogen reduction resulting from full implementation of the programs and practices detailed in the Phase III WIP falls short of the planning target by a total of almost one million pounds per year."[11] Still, EPA has not required New York to prepare a Phase III WIP that remedies this deficiency—which, like Pennsylvania's deficiency, reflects deficient funding.

The obligations of Pennsylvania and New York in the Bay Agreement and Bay TMDL are critical to restoring clean water in the Chesapeake Bay and its streams, creeks, and rivers. Yet in failing to ensure that these jurisdictions develop management plans to achieve and maintain the pollution reductions required by the Bay TMDL, EPA has allowed these jurisdictions to send approximately ten million excess pounds of nitrogen into the Chesapeake Bay and its watershed every year, and threaten the success of efforts to restore the Bay.

Section 117(g)(1)(A) of the Clean Water Act provides that "[t]he Administrator, in coordination with other members of the Chesapeake Executive Council, *shall ensure* that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to *achieve and maintain* . . . the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed."[12] Here, the Administrator has failed to ensure that New York and Pennsylvania develop Phase III WIPs that achieve and maintain those goals, as elaborated in the Bay TMDL. The Administrator therefore has breached the nondiscretionary duty set forth in the language of Section 117(g)(1)(A) quoted above. Consequently, the State of Maryland, the Commonwealth of Virginia, and the District of Columbia intend to sue the Administrator pursuant to 33 U.S.C. § 1365(a)(2), and this letter constitutes notice of such suit.

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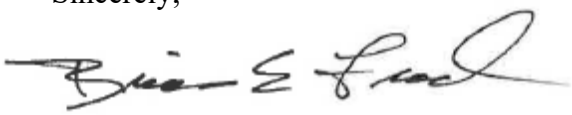
[9] EPA Evaluation of Pennsylvania's Phase III Watershed Implementation Plan (WIP), 1.

[10] New York's Final Phase 3 Watershed Implementation Plan, 14.

[11] EPA Evaluation of New York's Phase III Watershed Implementation Plan (WIP), 1.

[12] 33 U.S.C. § 1267(g)(1)(A) (emphasis added).

Sincerely,



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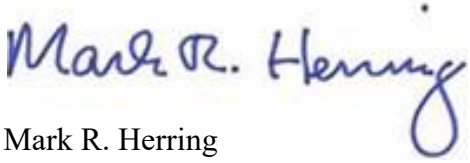

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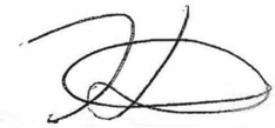

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cc (by e-mail): The Honorable Larry J. Hogan, Governor of Maryland
The Honorable Ralph S. Northam, Governor of Virginia
The Honorable Benjamin H. Grumbles, Maryland Secretary of the Environment
The Honorable Matthew J. Strickler, Virginia Secretary of Natural Resources
The Honorable Muriel Bowser, Mayor of the District of Columbia
The Honorable Tommy Wells, Director, District of Columbia's Department of Energy and Environment