

Congress of the United States
Washington, DC 20515

October 13, 2010

The Honorable Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Docket ID No. EPA-R03-OW-2010-0736

Dear Administrator Jackson:

We write today to share our grave concerns with the draft Chesapeake Bay Total Maximum Daily Load (TMDL) allocations that were recently issued by the Environmental Protection Agency (EPA). We are all strongly committed to the goal of restoring and ensuring the long-term health of the Chesapeake Bay ecosystem. The Bay and its tributaries are national treasures that are suffering from desperately poor conditions and in need of significant restoration and protection. However, we believe that the draft TMDL allocations released by EPA will not achieve the goal of cleaning up the Bay because they place unattainable pollution reductions on New York and other headwater states, according to state and local officials. In addition, the drastic reductions that would be required to attain these draft allocations, if finalized, will jeopardize the economic well-being of communities within New York's Bay Watershed and the agricultural industry on which the entire state relies.

New York is an important partner in achieving a healthy and restored Chesapeake Bay. Approximately ten percent of the total Bay watershed lies in New York, including its northern-most headwaters, the Susquehanna and Chemung River systems. New York has made significant improvements in water quality since the mid-1980s. Our state's water quality, in terms of per acre loads of nitrogen and phosphorous, far surpasses that of any other jurisdiction within the Bay watershed – both when measured at the edge of the stream in New York and as load actually delivered to the Bay. New York's current edge of stream load is 6.06 pounds of nitrogen and less than half a pound of phosphorous per acre per year.

This exemplary water quality is no coincidence. It flows from a strong commitment by the state's agencies to enforcing some of the strongest environmental protections in the nation and the widespread, voluntary adoption of responsible agricultural practices by New York's farmers. Unlike EPA's national minimum standards, New York's regulation of stormwater discharges from construction activity requires a broad range of post-construction water quality and quantity controls on nearly all sites over one acre. New York has also been working with its farmers to implement a practical, programmatic, state-wide approach to nutrient and sediment reduction since 2004. As part of this effort, many local farmers have already adopted best management practices (BMPs) and certified nutrient management plans to eliminate the use of excess nutrients in their operations. In addition, farmers across the state, working with Cornell Cooperative Extension and local conservation districts, have begun employing prescribed grazing and precision feeding practices, which further reduce nitrogen and phosphorus pollution within the Bay watershed.

According to the draft TMDL, of the seven watershed jurisdiction partners (the six states plus the District of Columbia), none of the draft Phase I Watershed Implementation Plans (WIPs) submitted by non-tidal jurisdictions could meet EPA's nitrogen and phosphorus allocations. This result might have been avoided, had EPA retained the principle for allocating load caps to jurisdictions that stated: "States that benefit most from the Chesapeake Bay recovery must do more." This principle was included in EPA's formal 2003 Allocation Document,¹ but was later removed from the allocation methodology without prior notice or explanation.

Instead of requiring greater reductions by jurisdictions that will realize greater benefits from a restored Bay, the draft TMDL requires New York to reduce its total phosphorus load by more than 34% of EPA's calculated 2009 baseline, while Maryland, a tidal state, is required to reduce its phosphorus load by only 18.89%. Even if Maryland is successful in making these reductions by 2025, its per acre, per year delivered load of nitrogen will still be greater than New York's current edge of stream measurements – and only slightly less than New York's current average edge of stream load for phosphorous, according to EPA's own analysis. In fact, if the water quality of the entire Bay watershed had the same phosphorus, nitrogen, and sediment concentrations that New York's portion of the watershed currently has, then the Bay would not be impaired.

The inequity and limitation of the draft TMDL allocations is further compounded by the geography of New York's portion of the watershed and already high water quality. The vast majority, more than seventy-five percent, of the Bay watershed in New York is forested; twenty-one percent is agricultural; and only three percent is classified as urban or suburban. EPA has indicated that it will use federal backstop authorities to require further reductions by states, like New York, that submitted a Phase I WIP that did not meet their pollutant allocations under the TMDL. However, because of New York's geography, these federal backstop measures will fall disproportionately on agricultural resources within New York. In fact, the draft TMDL proposes to require additional reductions from New York agricultural nonpoint sources necessary to meet nitrogen, phosphorus and sediment allocations and also proposes to apply Concentrated Animal Feeding Operations (CAFO) standards to AFOs not subject to CAFO permits. New York's already high water quality means these further improvements will have significantly higher marginal cost than additional improvements in other states, specifically in tidal states that have not already implemented agricultural BMPs. In contrast, placing these additional costs on New York farmers, as the draft TMDL proposes to do, would not only be unjust, but a death knell to scores of New York farms.


Throughout the development of the draft TMDL, New York has remained a good faith participant, despite raising these and other objections. New York identified large erroneous assumptions within the EPA model that assumed too high a rate of nitrogen fertilization on hay land and provided the Bay program with more accurate figures for New York fertilization (80 instead of 200 pounds per acre). Unfortunately, EPA responded by lowering New York's 2009 baseline delivered nitrogen load, instead of crediting New York toward achieving its allocations.

¹ "Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The Collaborative Process, Technical Tools and Innovative Approaches," December 2003. Available at: http://www.chesapeakebay.net/content/publications/cbp_19713.pdf.

We commend EPA for taking serious actions to restore the health and vitality of the Chesapeake Bay and we support this ultimate goal. However, we fear that as issued, the draft TMDL has absolutely no chance of success because it is inequitable, unattainable and threatens to be punitive to New York's economy, residents and communities. If the final TMDL is to succeed in achieving actual restoration of the Bay, all watershed jurisdictions partners must be fully invested. In order for that to happen, the TMDL load allocations must not only be theoretically attainable for all jurisdictions, but they must appear equitable and just to all parties. The allocations contained in the draft TMDL issued by EPA are neither. For all of these reasons, we strongly urge you to amend the draft allocations to require greater reductions by the tidal states that will benefit the most from the improved health of the Bay, and to those jurisdictions that currently contribute the highest amount of annual, per acre, pollutant load to the Bay.

We thank you for your consideration of this request and look forward to working with you on this important matter.

Sincerely,



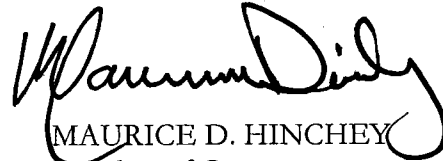
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United States Senator



MICHAEL A. ARCURI
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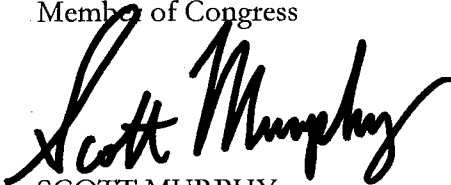
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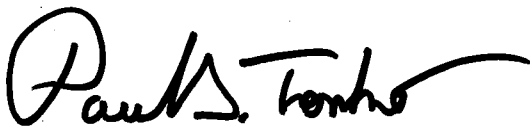
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