

Water Docket
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Ave, NW.
Washington, DC 20460

Re: Comments on Draft Chesapeake Bay Draft Strategy and Water Quality Report; Docket ID No. EPA-HQ-OW-2009-0761

Dear Sir or Madam:

These comments are submitted by the US Poultry & Egg Association (USPOULTRY), the National Turkey Federation (NTF) and the National Chicken Council (NCC) in response to EPA's solicitation for comments on the "Draft Strategy for Protecting and Restoring the Chesapeake Bay," ("Draft Strategy"). 74 FR 57,675, Nov. 9, 2009; 74 FR 63752, Dec. 4, 2009

I. INDUSTRY OVERVIEW

The U.S. Poultry & Egg Association is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. The Association focuses on research, education and technical services, as well as communications to keep members of the poultry industry current on important issues.

The National Turkey Federation is the national advocate for all segments of the turkey industry. NTF provides services and conducts activities which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products.

The National Chicken Council is a nonprofit member organization representing companies that produce and process over 95 percent of the broiler/fryer chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry.

The associations together have affiliations in the majority of U.S. states and member companies worldwide, and include many members within the Chesapeake Bay Watershed in Virginia, Maryland, Delaware, West Virginia and Pennsylvania. Of the approximately 1,700 poultry growers and 5,000 poultry houses in the Delmarva region, it is estimated that 1,300 are within the Bay watershed. The average family-run broiler farm has 2-3 houses with 25,000 birds per house. The average turkey farm has two houses with 12,000 birds per house. There is some variability in the size and number of broiler and turkey houses on these farms.

The poultry industry remains committed to being good stewards of the environment and to minimizing the impact of the land. The majority of poultry growers are small family farms.

These families frequently live in close proximity to the poultry houses they own. This substantiates that poultry producers have a vested interest in taking care of the environment and protecting their communities.

II. EPA REQUEST FOR COMMENT ON THE DRAFT STRATEGY

EPA requested interested parties submit comments on the “Draft Strategy for Protecting and Restoring the Chesapeake Bay,” in the November 9, 2009 Federal Register notice. The following are comments on the “Draft Strategy for Protecting and Restoring the Chesapeake Bay,” (“Draft Strategy”), and “The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay: A Revised Water Quality Report Fulfilling Section 202a of Executive Order 13508” (“Water Quality Report”). (74 FR 57,675, Nov. 9, 2009; 74 FR 63752, Dec. 4, 2009). The Water Quality Report is important because it is intended to explain some of the actions outlined in the Draft Strategy. EPA did not specifically request comment on the Water Quality Report, but because it is so important in relation to the Draft Strategy, and in fact the Draft Strategy cannot be read without the Water Quality Report, we have included comments on the Water Quality Report as well.

As noted in the November 9, 2009 Federal Register notice,

The document was prepared pursuant to Executive Order (E.O.) 13508 of May 12, 2009, Chesapeake Bay Protection and Restoration. This E.O. requires that the draft strategy be published for public review and comments.

We strongly support the objective of restoring the Bay; however, we have serious concerns about the process laid out in the Draft Strategy and Water Quality Report. We believe the Draft Strategy attempts to establish a federal program where congress through the Clean Water Act intended a state directed program. The Draft Strategy and Water Quality Report clearly lay out a plan for increase federal control despite clear expectations by congress that states would have responsibility for water quality standards, total maximum daily loads (TMDLs) and National Pollutant Discharge Elimination System (NPDES) permits.

Below we have cited examples from the Draft Strategy and the Water Quality Report where EPA has clearly exceeded its authority or has been excessively vague or obtuse in explaining its intent. These examples are not a complete accounting of all the instances.

III. STATUTORY AUTHORITY

A key component of the Draft Strategy is the Total Maximum Daily Load (TMDL) to control nutrients and sediment in the Bay. In previous Federal Register notices, and summarized in the Draft Strategy, EPA explains its intent to develop the TMDL and require the states to provide the bulk of the data through development of watershed implementation plans, waste load allocations, load allocations and demonstrate reasonable assurance. This strategy departs from the process delineated in the Clean Water Act. . This process is not at all consistent or compliant with the requirements in the statute or the regulations. EPA must provide a clear and accurate explanation

concerning how EPA has authority to develop the TMDL, require states to develop watershed implementation plans or require states to demonstrate reasonable assurance.

In the Draft Strategy, EPA cites CWA section 303(d) as authority but does not explain *how* section 303(d) of the Act actually provides the necessary authority for EPA to develop the TMDL. Section 303(d) clearly explains it is the responsibility of the state, not EPA to conduct the TMDL, “Section 303(d) of the CWA requires that each State identify those waters within its boundaries for which existing technology-based pollution controls required by the CWA are not stringent enough to attain or maintain State water quality standards. States are required to establish TMDLs for those “impaired” waters.”

The statutory requirement to develop TMDLs is found in section 303(d) of the Act. It states,

(d) IDENTIFICATION OF AREAS WITH INSUFFICIENT CONTROLS; MAXIMUM DAILY LOAD; CERTAIN EFFLUENT LIMITATIONS REVISION

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

The Act is very clear; it is the responsibility of the state to establish TMDLs following its identification of impaired waters. EPA’s role is to review and approve the TMDLs after they have been developed by the state. If the EPA disapproves the TMDL set by the state, then EPA

must establish the TMDL. The statute does not provide authority for EPA to initiate the process of establishing the TMDL. Nor does it provide the authority for EPA to develop the TMDL while forcing the state to develop wasteload allocations with the threat of “consequences”.

This is a clear departure from the process clearly identified in Section 303(d) of the Act. It is imperative that EPA details how the Act provides authority for the modified process EPA is proposing. If EPA cannot clearly explain the statutory authority it asserts, it must cease the process and return to the process identified in the Act.

EPA has indicated that it has regulatory authority to require states to develop “watershed implementation plans,” to calculate waste load allocations and load allocations for sources within the Bay watershed, and to require states to document there is “reasonable assurance” the wasteload and load allocations will be met. Further, EPA indicates it has authority to threaten states with “consequences” if the plans are not developed and implemented to EPA’s satisfaction. Again, neither the Draft Strategy nor the Water Quality Report includes any specific regulatory citations for EPA’s authority to require the states to carry out all of these actions. In fact the authority granted to the EPA through the Clean Water Act requires the administrator to ...

“establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters,...”

In 2000, EPA issued regulations modifying the regulations at 40 CFR part 130 and 40 CFR part 122 related to the TMDL program which included requirements for reasonable assurance and implementation plans. However, those regulations never went into effect and were subsequently revoked. If EPA already had this regulatory authority, why did it attempt this regulation change in 2000?

In numerous instances in the Draft Strategy and the Water Quality Report, EPA cites to authority provided by CWA section 117. For instance, in the Draft Strategy - Pg 27

Pursuant to section 117(g) of the Clean Water Act (CWA) and other authorities, EPA has built on the forthcoming Bay TMDL and announced its “expectations” for Watershed Implementation Plans to be developed by the six watershed states and the District of Columbia to achieve the pollutant reductions needed to restore the Bay. In brief, EPA expects the six watershed states and the District of Columbia to commit to establish and implement:

This language is included in both the Draft Strategy and the Water Quality Report, however, EPA does not explain what the authority in 117(g) actually covers, nor does EPA provide any reference to or explanation of “other authorities.” In the Water Quality Report (page 2), EPA does footnote this to clarify it may only apply to the states that signed the 2000 Agreement, but the footnote then goes on to indicate it may also apply to the other states due to signing Memorandum of Understanding. Later in the Water Quality Report (page 13), in the section “Current Legal and Policy Framework” EPA states,

This section contains legal and policy background information that is useful for understanding key elements of EPA's section 202(a) Water Quality Report and, in particular, how EPA intends to use its existing CWA authorities to set new expectations for states to control discharges of nutrient and sediment sources to the Bay.

Nowhere in this section does EPA ever explain its statutory or regulatory authority. EPA must provide a clear explanation of its authority. For instance, in the Draft Strategy on page 28 EPA states its intent to initiate rulemaking directed at restoring the Bay. EPA states,

B. New rulemakings/actions under the Clean Water Act, Clean Air Act, and other authorities. *To lead by example, EPA will initiate several actions to establish transparent accountability and set strong performance standards for restoring the Bay. EPA will initiate rulemakings under the Clean Water Act to reduce nitrogen, phosphorus, and sediment pollution in the Chesapeake Bay watershed from the following sources. However, if the Chesapeake Bay states and D.C. strengthen their pollution control programs to achieve the reductions in nutrient and sediment pollution needed to meet Bay water quality standards, EPA does not expect that it would promulgate new Chesapeake Bay-specific regulations.*

Concentrated animal feeding operations (CAFOs): *Expand coverage and set stronger minimum performance standards for permits, including for the land application of animal manure.*

Stormwater: *Expand the coverage of the regulatory municipal separate storm sewer system (MS4) program to include high-growth areas and strengthen minimum performance standards within permits consistent with Bay water quality goals.*

New or expanded discharges of nutrients and/or sediment: *Ensure that new or expanded discharges are offset by appropriate reductions when needed to meet Bay water quality goals. Such offsets would account for scientific uncertainty and would be in addition to existing reductions necessary to achieve Bay water quality goals*

EPA will propose and finalize its rulemakings as expeditiously as possible pursuant to authority provided in CWA sections 117 and 402 and other relevant statutory provisions.

Here again, EPA makes reference to authority under CWA section 117. In the Water Quality Report on page 15, EPA provides some additional information about section 117. However, it fails to explain how section 117 actually provides “rulemaking authority.” CWA section 402 does provide EPA certain authority, however it is not clear how EPA would use that authority in this case and the Draft Strategy does not elaborate.

In the case of CAFOs, there is clear authority in sections 301 and 304 of the Act related to development of Effluent Limitation Guidelines to control the discharge of pollutants from point sources; however these are technology-based controls and would not be applicable in the context of meeting water quality standards or a TMDL.

EPA must clarify what its authority is and how it intends to use that very limited authority.

IV. UNNECESSARY FOCUS ON ENFORCEMENT AND INCREASED REGULATION

The Draft Strategy and Water Quality Report indicate that the Municipal and Industrial Wastewater Discharger sector contributes approximately 20% of the phosphorus and nitrogen loads to the Bay. The Draft Strategy and Water Quality Report also state that the Municipal and Industrial Wastewater Discharger sector has made significant progress towards meeting goals for phosphorus and nitrogen reduction (as of 2008, this sector met the phosphorus goal and actually has room to increase, 67% complete with respect to meeting nitrogen goals). This sector is also noted as being a negligible contributor to the sediment loading. The Draft Strategy and Water Quality Report acknowledge this progress and the limited opportunities for further cost-effective reductions from this sector. However, the Draft Strategy includes an apparent threat to place the burden of further reductions on municipal and industrial point source sector, even below stated goals for this sector to account for deficiencies in other sectors. As noted, on page 28 EPA threatens additional regulation of CAFOs unless the states perform as EPA dictates. The Draft Strategy then emphasizes enforcement as the preferred method of accomplishing load reductions in this sector, rather than a more cooperative and supportive relationship.

This approach is counterproductive and does not acknowledge the gains made in specific industry sectors such as poultry. For example, the following provides a partial accounting of accomplishments in the poultry sector in Virginia. These kinds of activities need to be recognized in the Strategy and built upon. Threatening enforcement and additional regulatory action will not help the Bay.

Virginia's poultry industry has been a responsible and proactive environmental steward on a voluntary basis and through compliance with existing government regulations. The industry has long been part of the solution to a cleaner Bay and local waterways. Please consider the following:

- In 1995, Virginia's poultry industry received a "Friend of the Bay" award from the Commonwealth of Virginia for its voluntary initiative to implement nutrient management plans (NMPs) on all Valley poultry farms by the year 2000, a goal largely achieved.
- About 80 percent of poultry producers in the Shenandoah Valley have constructed sheds for storing poultry litter before it is utilized. (Those with or without sheds must store litter according to state regulatory criteria.)
- VPF and poultry processors provide educational programs for growers, litter brokers and end-users of litter:
 - ✓ Sponsored operator training program for growers.
 - ✓ Sponsored educational meetings for poultry litter brokers.
 - ✓ Sponsored educational materials for end users.

- VPF and poultry processors are contributing to programs that facilitate transport of poultry litter from concentrated production areas to farmland that can utilize additional nutrients:
 - ✓ Poultry litter hotline and marketing program.
 - ✓ Provided grants to Louisa, Madison, and Fauquier County Farm Bureaus to rent manure spreaders for facilitating poultry litter applications outside of concentrated production regions.
 - ✓ Helped fund transport subsidy pilot project.
- Research:
 - ✓ More than \$160,000 provided to Virginia Tech water quality research projects since 2000.
 - ✓ Provided funds for research and pilot projects to convert poultry litter to energy.
- Feed management:
 - ✓ Phytase phosphorus reduction enzyme incorporated in poultry feed mills, resulting in a more than 20 percent, on average, reduction in phosphorus in Virginia poultry litter.
- Collaboration:
 - ✓ VPF participates in the Virginia Waste Solutions Forum, a collaboration of agriculture, environmental groups, academia, government agencies, and others that have worked since 2004 to identify economically viable solutions for surplus animal manure. Several of the above initiatives evolved from the Forum.
 - ✓ VPF was a founding member of the Shenandoah Valley Pure Water Forum, another group of diverse interests working collaboratively toward improved water quality.
 - ✓ VPF participated in a coalition of agricultural and conservation groups that worked successfully together to obtain increased funding for the Virginia Agricultural BMP cost-share program.

Aside from the above voluntary efforts, Virginia's poultry industry is already heavily regulated.

In 1999, the Virginia General Assembly enacted the Poultry Waste Management Program (House Bill 1207). This law charged the State Water Control Board with developing a regulatory program requiring a general permit, incorporating a state-approved, phosphorus-based, nutrient management plan and mandating adequate waste storage, for growers. The program requires tracking and accounting of litter transferred off poultry farms. Growers with

20,000 or more broilers or laying hens or 11,000 or more turkeys were required to obtain a state-approved nutrient management plan and file for the general permit by October 1, 2001.

Furthermore, the State Water Control Board recently adopted amendments to the Virginia Poultry Waste Management Program to impose additional regulatory requirements upon litter transporters and non-poultry farmers that receive poultry litter for use on their farm. The regulation now imposes enforceable requirements governing “end-users” land-application and storage of poultry litter.

In addition, poultry processors have been required to spend millions of dollars on wastewater treatment plant and storm water upgrades.

As you can see, Virginia’s poultry industry has been a responsible and proactive environmental steward on a voluntary basis and through compliance with government regulations.

V. VAGUE AND UNCLEAR STATEMENTS

The Draft Strategy includes lengthy discussions of efforts that EPA and other entities will “explore” or “promote”. For example, the Draft Strategy states on Page 10 of the Executive Summary that EPA will “explore” the development of a Chesapeake Conservation Corps. The Draft Strategy also includes similar efforts for other federal agencies such as *“DOT will work with the DOE to explore opportunities for a project in the Chesapeake Bay watershed to support the transition to electric plug-in hybrid passenger vehicles and urban buses.”*

There is also the discussion of efforts related to working with nongovernmental organizations to launch efforts such as an “ongoing, watershed-wide social marketing campaign”. If the intent is for this Draft Strategy to be implemented, there must be clear measures. Given the numerous instances where the Draft Strategy describes initiatives for which the federal government is responsible, how will these “soft” actions be evaluated? Further, if an action is merely just “explored” (as these initiatives are written) is that considered to be an implemented action? It is recommended that the Final Draft Strategy include more concrete language as to what is required of the federal government, what the expectations are, and how implementation will be measured.

On page 5 of the Executive Summary of the Draft Strategy (reiterated on page 28) EPA states: *“if the Chesapeake Bay states and D.C. strengthen their pollution control programs to achieve the reductions in nutrient and sediment pollution needed to meet Bay water quality standards, EPA does not expect that it would promulgate new Chesapeake Bay-specific regulations.”*

It is not clear how this will be carried out by EPA. Does EPA mean strengthen programs further than what has been done recently? It looks like the metric for this is “achieve the reductions in nutrient and sediment pollution needed to meet Bay water quality standards.” Given this is all connected to EPA’s threat to “initiate rulemaking”, EPA must clarify when it would make the determination that additional or expanded programs would be evaluated (for example sometime before 2025), or how EPA would determine if current programs were strong enough.

In this same section, regarding the new or expanded discharges, EPA notes, *discharges are offset by appropriate reductions*. This is very vague. Is EPA referring to “trading”? Is the expectation that the only possible way to allow development is through implementation of some trading program? Who would be the trading partners? How will the offsets be accomplished? Trading is also alluded to on Page 31

Development of market-based tools and technologies.

Essentially, markets can connect the critical ecosystem services provided by farms and forests to beneficiaries who are willing or required to pay for their stewardship—such as urban water utilities, industrial polluters and land developers who need to mitigate unavoidable negative impacts to the watershed. These buyers could pay landowners for stewardship activities that result in nutrient or sediment reductions, or wetlands and habitat creation.

Given the fact trading has been discussed by the Agency for close to 20 years, and very few trades have been conducted especially trades that include nonpoint sources; EPA must provide significantly more discussion of this part of the Strategy. EPA must explain how this will work if the offsets are to come from nonpoint sources, given the fact nonpoint sources must first meet the load allocation before trading can take place.

This is also a good place to note the use of inappropriate terminology. Why did EPA choose to refer to industrial sources as “industrial polluters”?

VI. EXPECTATIONS FOR FEDERAL ENTITIES

EPA has repeatedly made it clear that there will be “consequences” for jurisdictions (states) that do not develop and/or sufficiently implement watershed implementation plans or meet milestones. EPA’s intent is for these “consequences” to be placed on the Bay States and District of Columbia, but in reality most of the consequences will impact point sources and the general public. The Executive Summary (page 6) states that this TMDL is different than others in part because “new emphasis is placed on improving practices on federal land”. The Draft Strategy (as well as the E.O. and recent guidance for Federal Facilities¹), however, does not include any information on what “consequences” EPA or federal facilities or agencies will face for not meeting their goals.

As an example, EPA states (on Page 45) that “DOT and EPA will work together to encourage State Departments of Transportation and Metropolitan Planning Organizations to use federal transportation program funding to retrofit existing federal-aid highways to address stormwater and other water quality issues caused by transportation, and will encourage airports to implement mitigation measures”. Please explain what the “consequences” are at the federal level if these goals are not accomplished. Also, please explain how “encouraging” these agencies will provide results. Additionally what is meant by “mitigation measures”?

Also under the section dealing with Federal entities,

Federal Lands

Initiatives

A. Strengthen stormwater management from new development and redevelopment, existing facilities, and undeveloped federal lands.

- ***Adopt agency-specific policies that define the administrative and management controls needed to comply with stormwater requirements for new development and redevelopment projects in accordance with Section 438 of the Energy Independence and Security Act.***
- ***Investigate opportunities for installing innovative stormwater management retrofits at existing facilities and on existing lands and for installing best practices to manage stormwater from existing paved roads on federal land, as funding permits.***

EPA must clearly explain what is meant by “Investigate opportunities” otherwise it is a meaningless statement.

It is also worth pointing out that the phrase “as funding permits” is used only in the discussion of federal lands and federal projects. This phrase is used in numerous sections and would seem to indicate EPA and other federal agencies will only implement actions if money is readily available. This luxury is not available to other entities; in fact the states and District of Columbia will face “consequences” regardless of funding being available. An evaluation on the total costs should be completed before new requirements are put in place.

¹ EPA. 2009. Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act.

VII. ADDITIONAL OBSERVATIONS

The following are observations that did not fit into categories above.

One of the threats EPA has proposed is to object to permits if the states do not follow EPA's mandates. EPA states,

EPA could ensure, through a permit objection, that the requirement in 40 CFR 131.12(a)(2) (as reflected in state antidegradation regulations) is met (i.e., that "all cost-effective and reasonable best management practices for nonpoint sources are achieved" when a Tier 2 antidegradation review is done for the issuance of a CWA point source permit)

It is not clear how this would work. Tier 2 waters are generally waters that exceed the existing uses,

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained

As noted in the Draft Strategy and the Water Quality Report, the reason for the TMDL is because the Bay water quality does not support propagation of fish, shellfish, and wildlife and recreation. Given the Bay is not a Tier 2 water, how would a Tier 2 antidegradation review be done?

Another example of language that is designed to paint an unfavorable picture of a specific sector includes, (note some of the words have been emphasized)

*Many of the Chesapeake's treasured landscapes **are threatened**. Development has increasingly altered both natural and cultural landscapes, **tearing at the very fabric** that defines the region and supports our way of life. Forests in the region **fall** at the rate of 100 acres each day. More than 90,000 farm acres are **lost** each year. Fifteen years after a theme park **threatened** the Manassas battlefield, concerns rise over a planned shopping center on land important to the 1864 Battle of the Wilderness. Many of the region's important places may soon be **altered irreversibly or lost** forever. Moreover, converting forests and open spaces to development simply **exacerbates pollution** problems now harming the Bay and its rivers. On average, an acre of forest delivers just 3.3 pounds of nitrogen to streams annually; an acre of developed land delivers 32.9 pounds of nitrogen annually.*

Page 20-21 of the Draft Strategy – Figures 2 and 4 are not referenced or explained in the text in and around pages 19-22.

In the Water Quality Report, phosphorus is misspelled in a number of places.

VIII. SUMMARY

US Poultry & Egg Association, the National Turkey Federation and the National Chicken Council appreciate the opportunity provided by EPA to comment on the Draft Strategy and the Water Quality Report. As noted earlier, we strongly support the goals and objectives of the Draft Strategy; however as explained above we have serious concerns regarding the approach that is

presented in the Draft Strategy and whether EPA has the authority to carry out the actions outlined in the Draft Strategy. EPA must re-draft the Draft Strategy to clearly explain its planned methodology and how the Agency is going to carry out the methodology within the existing authority provided by the Act. The Agency must clarify whether the federal government as a source of pollution to the Bay will be a full participant in reducing pollution or only participate at its convenience. We are also concerned with the apparent threat to place the burden of further reductions on point sources, and the emphasis on enforcement as the preferred method of accomplishing load reductions in this sector, rather than a more cooperative and supportive relationship.

If you have any questions or would like additional information about the comments, please contact Paul Bredwell at (770) 493-9401 or pbredwell@poultryegg.org.