

National Conference of State Legislatures

Agriculture & Energy Committee and
Environment Committee



April 15, 2011

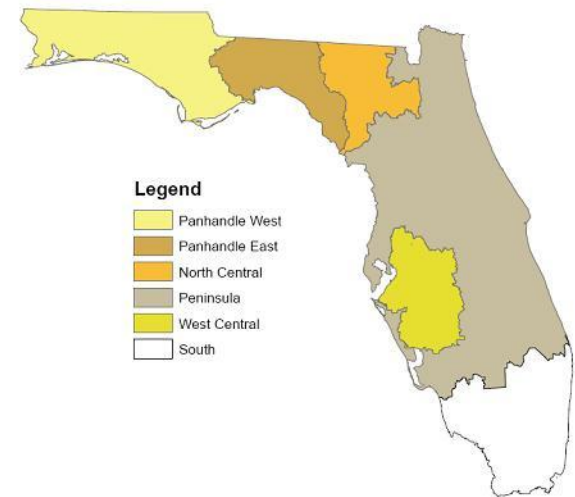
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Nutrients: Federal numeric nutrient criteria for Florida Lakes and Flowing Waters

- Signed November 14, 2010.
- Multiple challenges filed by the State of Florida and the Florida Department of Agriculture and Consumer Services (FDACS), cities, counties, environmental groups, and industry.
- Criteria for FL estuaries and coastal waters next (proposal by November 2011 and final by August 2012).
- FDACS cost estimate:

\$902 million to \$1.605 billion
annual costs to the agriculture industry.

- EPA just agreed to ask the National Academy of Sciences to do an independent cost estimate.

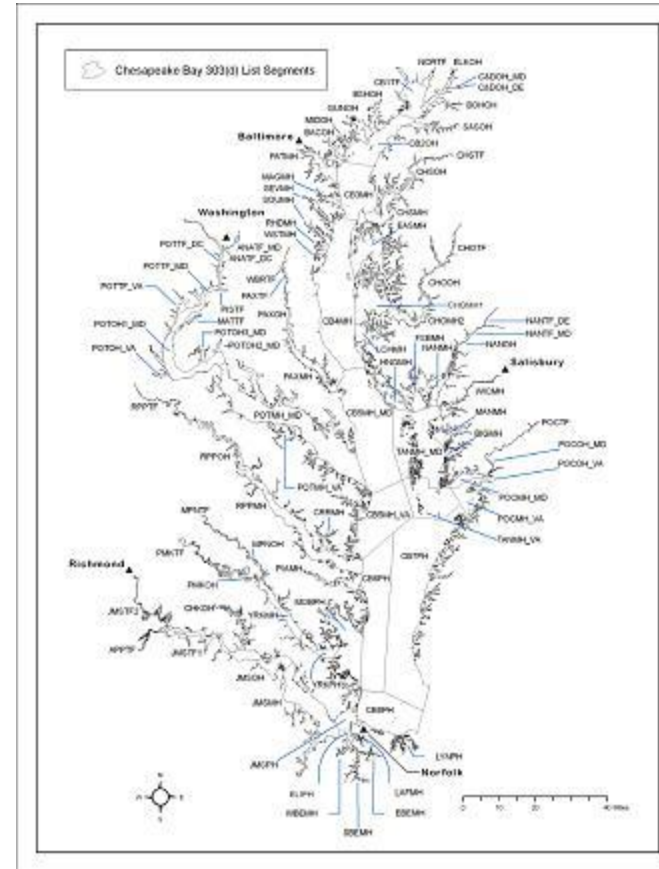
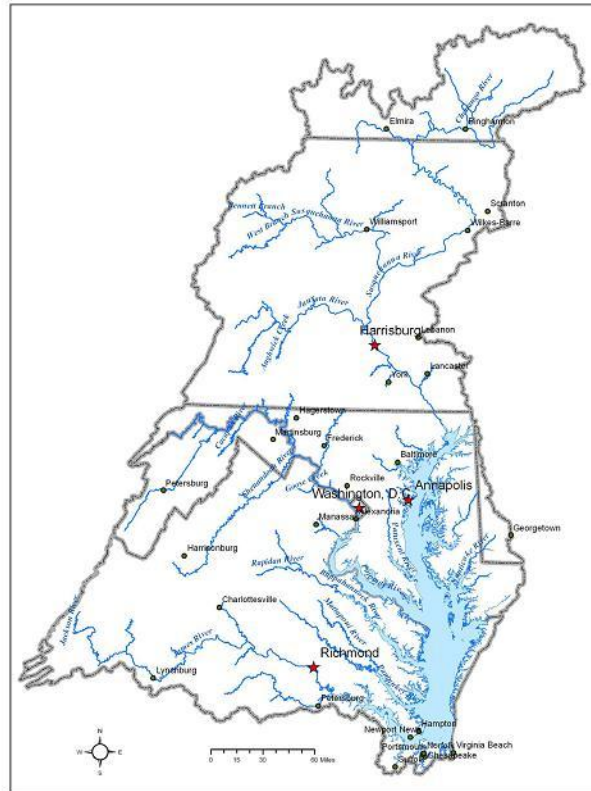


Increasing EPA Regulation of Agriculture

- Nutrients
- Animal Feeding Operations
- Pesticide Applications

Nutrients: Chesapeake Bay TMDL

Signed: December 29, 2010

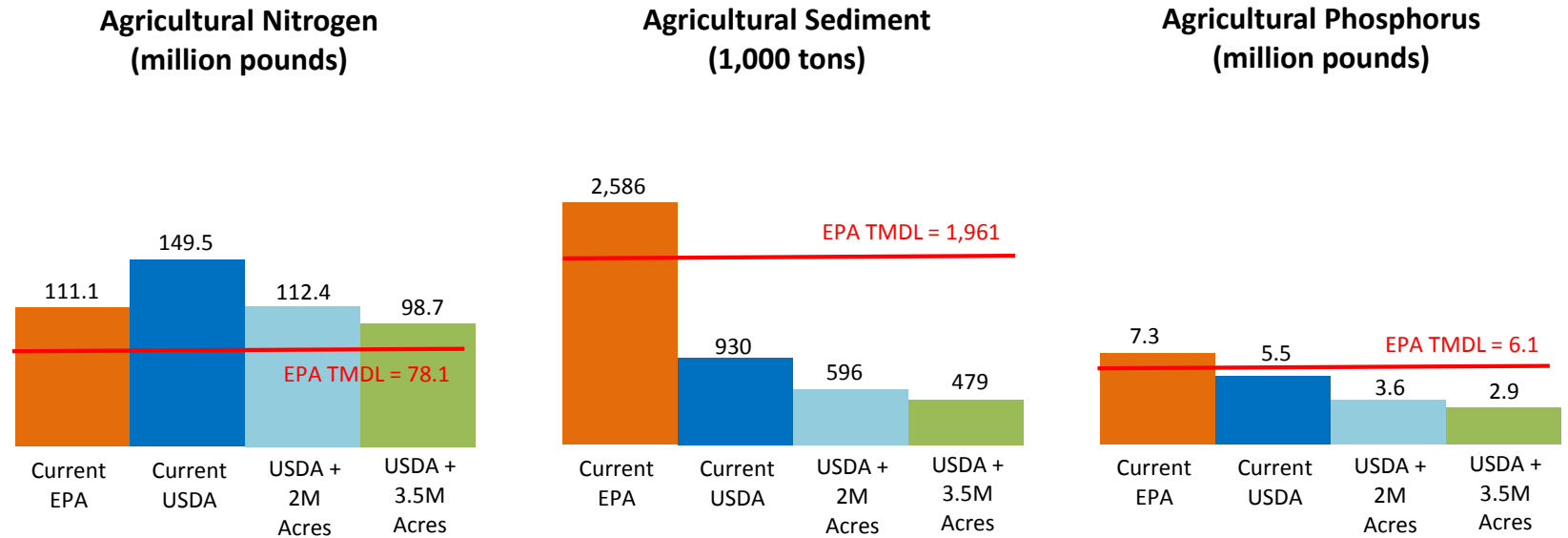


Chesapeake Bay TMDL Legal Issues

- EPA's authority to establish the TMDL for the entire watershed.
- EPA's authority to assign allocations of loadings to individual sources and source categories.
- EPA's authority to assign allocations of loadings to the Bay to upstream sources.
- EPA's insistence that a TMDL must be based on reasonable assurance that nonpoint source allocations will be met and that EPA has authority to mandate reasonable assurance.
- EPA's threats against states to compel submission of and changes to state implementation plans.
- Flaws in EPA's modeling.
- Deficiency in notice to the public of the significant assumptions used in EPA's modeling and the opportunity for the public to comment on EPA's modeling.

Chesapeake Bay TMDL

Comparison of USDA's CEAP Study and EPA Draft TMDL

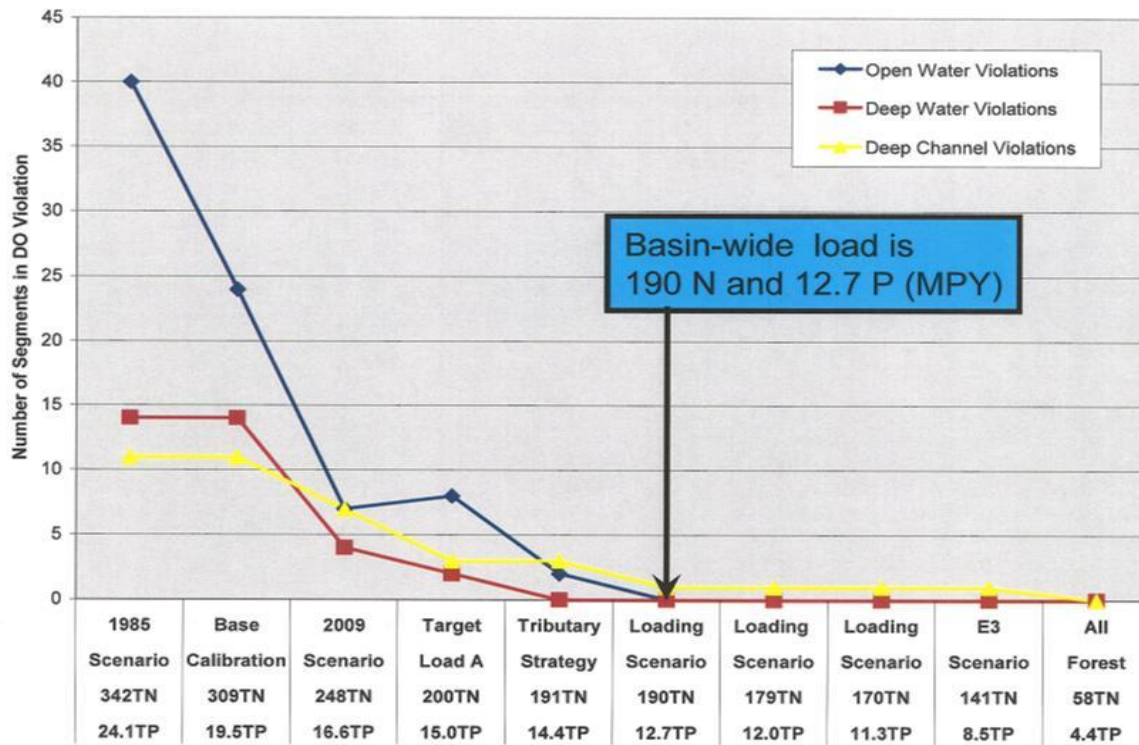


LimnoTech, Comparison of Draft Load Estimates for Cultivated Cropland in the Chesapeake Bay Watershed, available at http://nutrientpolicy.org/ANPC_News.html

Chesapeake Bay TMDL

No Cost Estimate so No Evaluation of How to Maximize Net Benefits

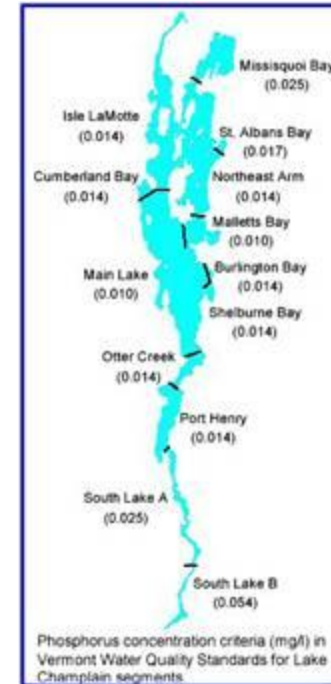
Dissolved Oxygen Criteria Attainment



EPA Revoked Approval of the 2002 Lake Champlain Phosphorus TMDL

Using the Chesapeake Bay TMDL as the Model

The Lake Champlain Basin



Nutrients – Mississippi River Watershed



EPA Actions – Mississippi River Watershed

- On October 10, 2010 EPA awarded a \$7.2 million contract to TetraTech with 9 tasks.
- **Task 7: Scientific Study and Modeling for Mississippi River and Gulf of Mexico Nutrient Criteria Development**
 - By November 2011, the contractor shall develop a hydrodynamic and water quality model of the near-coastal Gulf of Mexico. Specifically, the model will establish the concentrations of nitrogen and phosphorus at the mouth of the MS River necessary to protect DO standards in the state waters of the NGOM.
 - By April 2012, the model will also include a component to establish concentrations of nitrogen and phosphorus at strategic points along the main-stem of the MS River (including the mouth of significant tributaries) to ensure that the protective concentration at the mouth of the MS River is met.
- According to the contract, EPA already developed new dissolved oxygen criteria for Louisiana coastal waters, without sharing their work with the State.
- President's 2012 Budget Request includes a request for \$6.6 million for nutrient work in the Mississippi River Basin.

EPA is Refusing to Approve Nutrient Standards for New England States If They Do Not Follow the Florida Model

- EPA Region 1 rejected ME's numeric nutrient criteria because they relied on a determination of whether a water body is biologically healthy, using a weight of the evidence approach.
- New England states objected as a group in a letter to EPA.
- Response from EPA says nutrient criteria must be independently applicable.



EPA Recently Issued “Nutrient Framework”

- On March 16, 2011, EPA issued a “framework” whereby states would develop numeric nutrient criteria under a work plan and a schedule to be approved by EPA. EPA promises a longer schedule if a state agrees to reduce nonpoint source loadings.
 - “The timetable reflected in the State’s criteria development schedule can be a flexible one provided the state is making meaningful near-term reductions in nutrient loadings to state waters while numeric criteria are being developed.”
- EPA's draft 2012 Office of Water National Program Guidance includes the same requirement.
 - This draft guidance includes as part of its performance measures, the expectation that in 2012, 56 states and territories will supply "a full set of performance milestone information to EPA concerning development, proposal, and adoption of numeric water quality standards for total nitrogen and total phosphorus for each waterbody type within the State or Territory."
 - The draft guidance also includes as part of its performance measures, the expectation that in 2012, 89 numeric water quality standards for total nitrogen and total phosphorus for all waters within the State or Territory will be proposed by States and Territories or by EPA, and 69 will be adopted by States and Territories and approved by EPA, or promulgated by EPA.

Other Water Issues: CAFO regulations

- EPA agreed (in a settlement with NRDC) to propose by May 26, 2011, and finalize by May 26, 2012, a rule that would give EPA the authority to collect information from CAFOs whether or not they discharge. However, the 5th Circuit just vacated EPA's regulation requiring CAFO's that "propose to discharge" to obtain a permit.
- EPA agreed (in a settlement with Chesapeake Bay Foundation) to propose by June 30, 2012, and finalize by June 30, 2014, new CAFO regulations that will
 - make it easier to designate an AFO as a CAFO or will expand the number of AFOs that qualify as CAFOs.
 - impose more stringent requirements for the land application of manure, considering "next generation" nutrient management plans and off-site manure transfer reporting and recordkeeping.

Other Water Issues: Pesticide Application Clean Water Act Permits

- The 6th Circuit vacated EPA's rules that exempted FIFRA-compliant pesticide applications from Clean Water Act permitting. The decision would add 650,000 permittees to state Clean Water Act permit programs.
- Initially, the vacature was to go into effect on April 9, 2011. On that date, NPDES permits would have been required for discharges to waters of the U.S. from the application of biological pesticides and chemical pesticides that leave a residue.
- The court granted a 6 month extension, until October 31, 2011.
- On March 31, 2011, the House of Representatives passed H.R. 872, which would amend the Clean Water Act to exempt pesticide application from the Clean Water Act by a vote of 292 to 130. A companion bill, S. 718, is pending in the Senate.

Questions?

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