

# Enforcement of The Chesapeake Bay Agreements and the Bay Total Maximum Daily Load

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**Chesapeake Bay Total Maximum Daily Load  
for Nitrogen, Phosphorus and Sediment**

Established by the U.S. Environmental Protection Agency



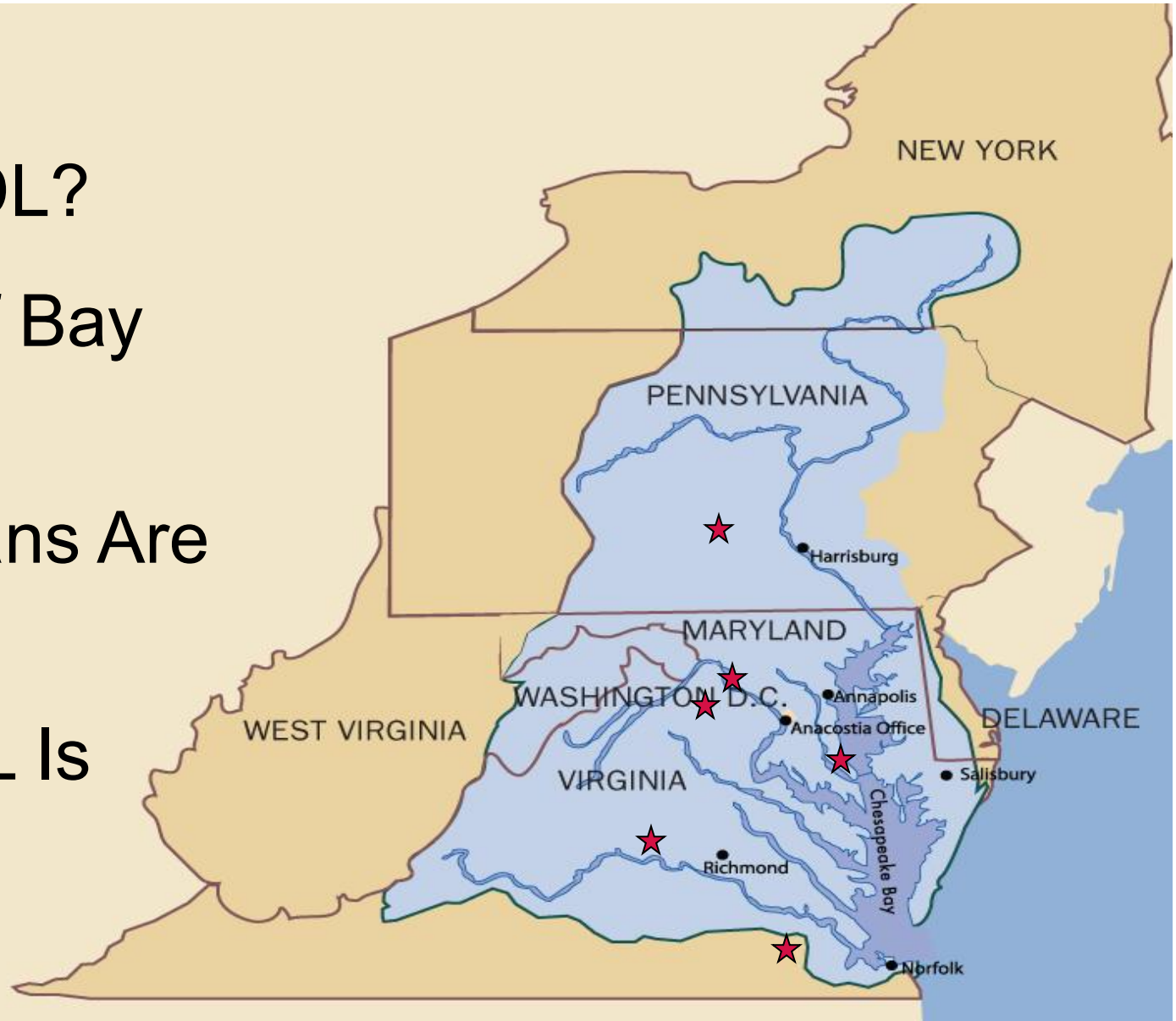
Shawn M. Garvin, Regional Administrator  
U.S. Environmental Protection Agency  
Region 3

Judith A. Enck, Regional Administrator  
U.S. Environmental Protection Agency  
Region 2

DATE

12/29/10

- What is a TMDL?
- Background of Bay TMDL
- NY and PA Plans Are Deficient
- The Bay TMDL Is Enforceable





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# Clean Water Act Enacted 1972

# Clean Water Act, 33 U.S.C. § 1251(a)

*The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.*



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## Clean Water Act - Purpose



**State environmental agencies must:**

- **SET water quality STANDARDS (WQS)**
- **Annually ASSESS waterbodies**
- **LIST impaired waters**



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**Clean Water Act - Standards**

## Section 303(d): For Impaired Waters

- Develop TMDLs **by 1979**

Waste Load Allocations (**point sources**)

+ Load Allocations (**non-point sources**)

+ Natural Background

+ Margin of Safety

= **TMDL**



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# Clean Water Act - TMDLs

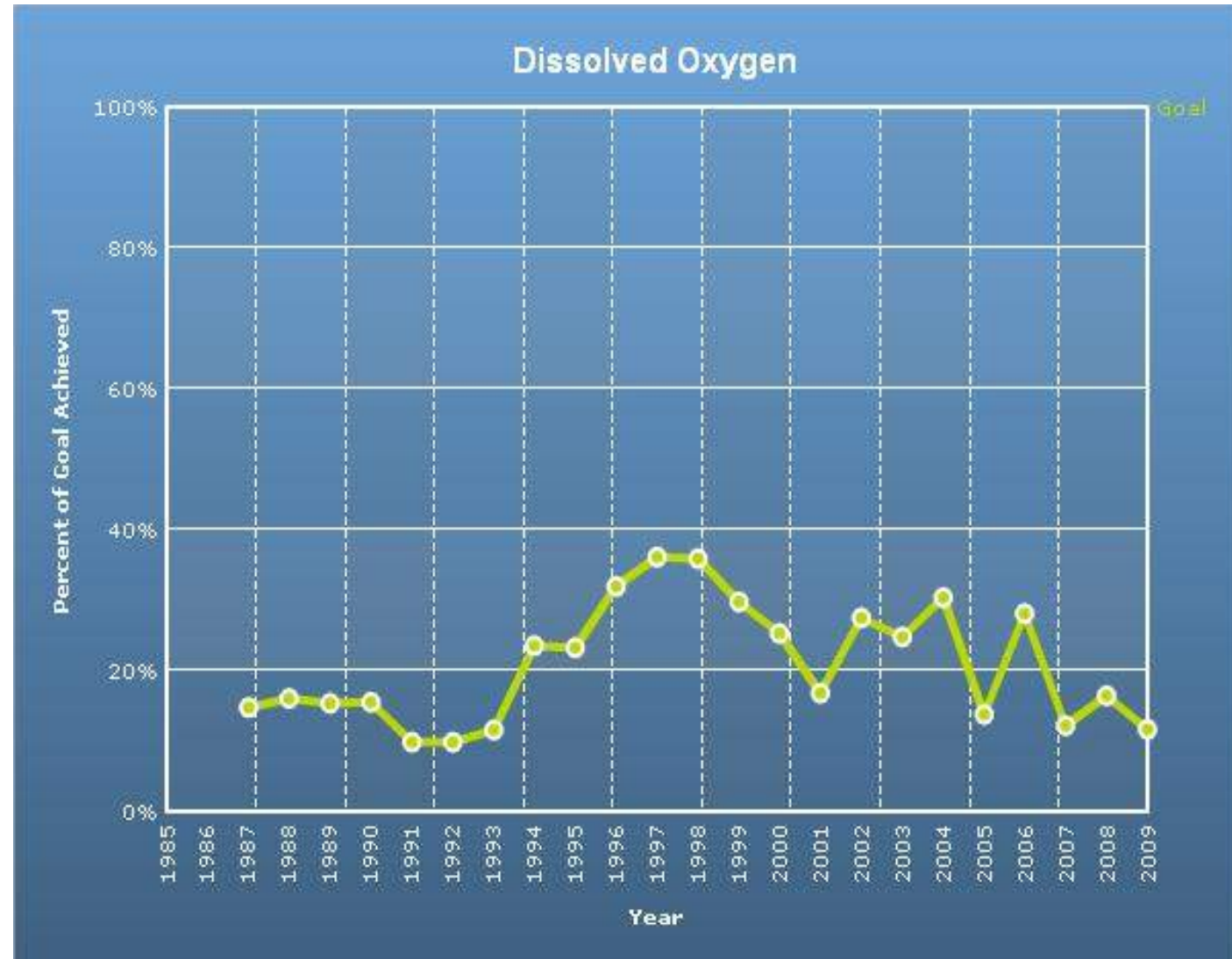
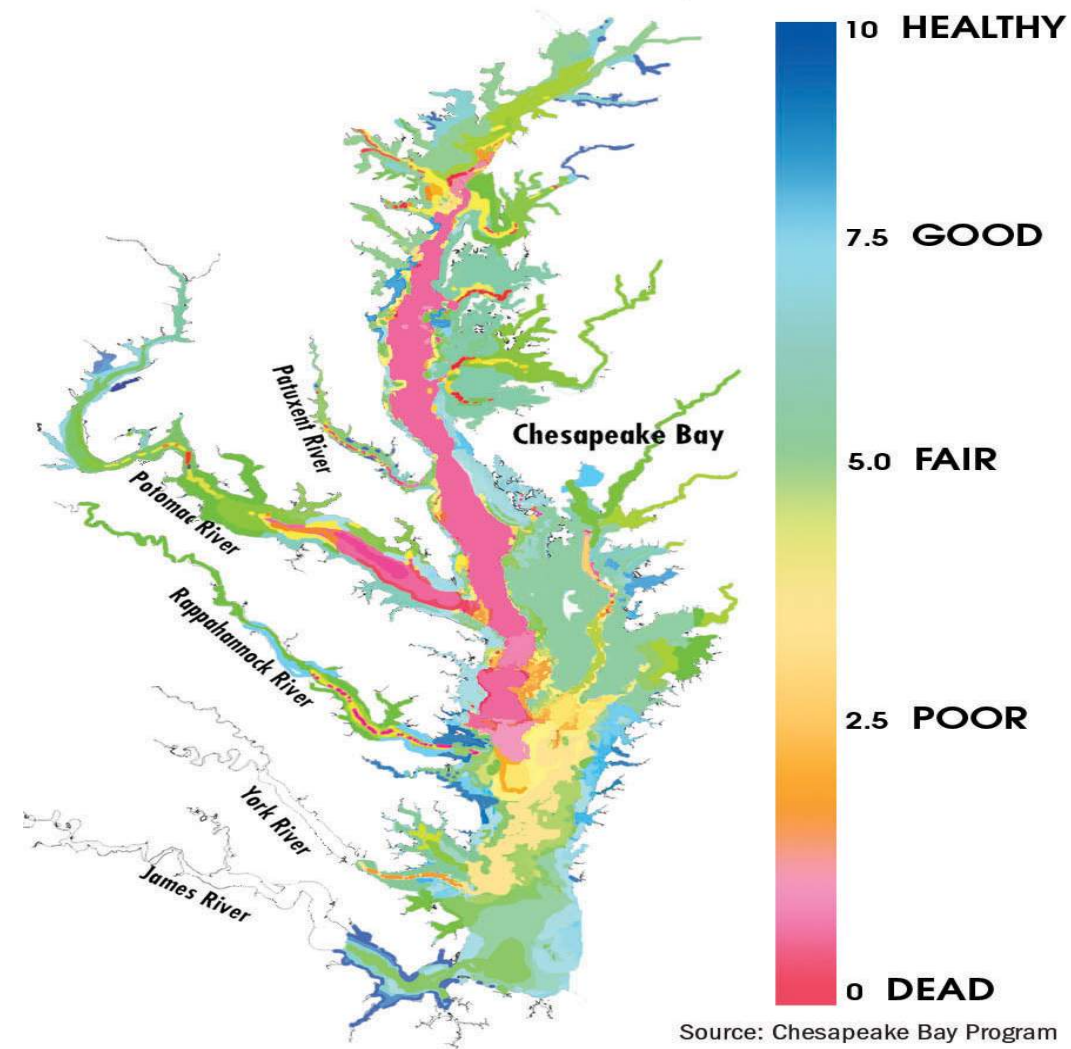
# Constructive Submission

- Environmental organizations sued EPA
  - *Scott v. Hammond*, 7<sup>th</sup> Cir. 1984 – constructive submission; EPA required to develop TMDLs if the states did not.
  - *Kingman Park Civic Ass'n v. EPA* - DC;
  - *American Littoral Society v. EPA* - DE, PA, and WVA.
- ***American Canoe v. EPA* (1998) - VA - May 2010 deadline for Virginia's portion of the Bay.**



AUGUST 2005

Milligrams of Oxygen  
per liter of water:



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**Goal Not Achieved –  
DC, DE, MD, VA**

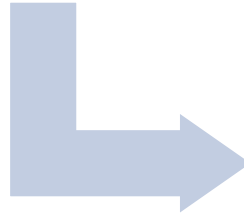


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# Voluntary Efforts

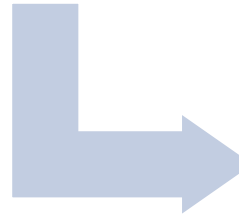
**1983  
Agreement**

Congressionally-ordered study:  
too much nitrogen, phosphorous, and sediment!



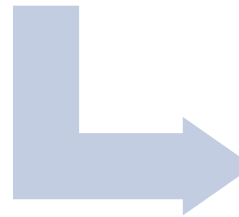
**1987  
Agreement**

40% Nutrient Reduction Goal



**1992  
Amendment**

“Tributary Strategies”



**2000  
Chesapeake  
Agreement**

“Bay section” § 117  
added to CWA (2010  
deadline)



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## **Federal-State Bay Agreements**

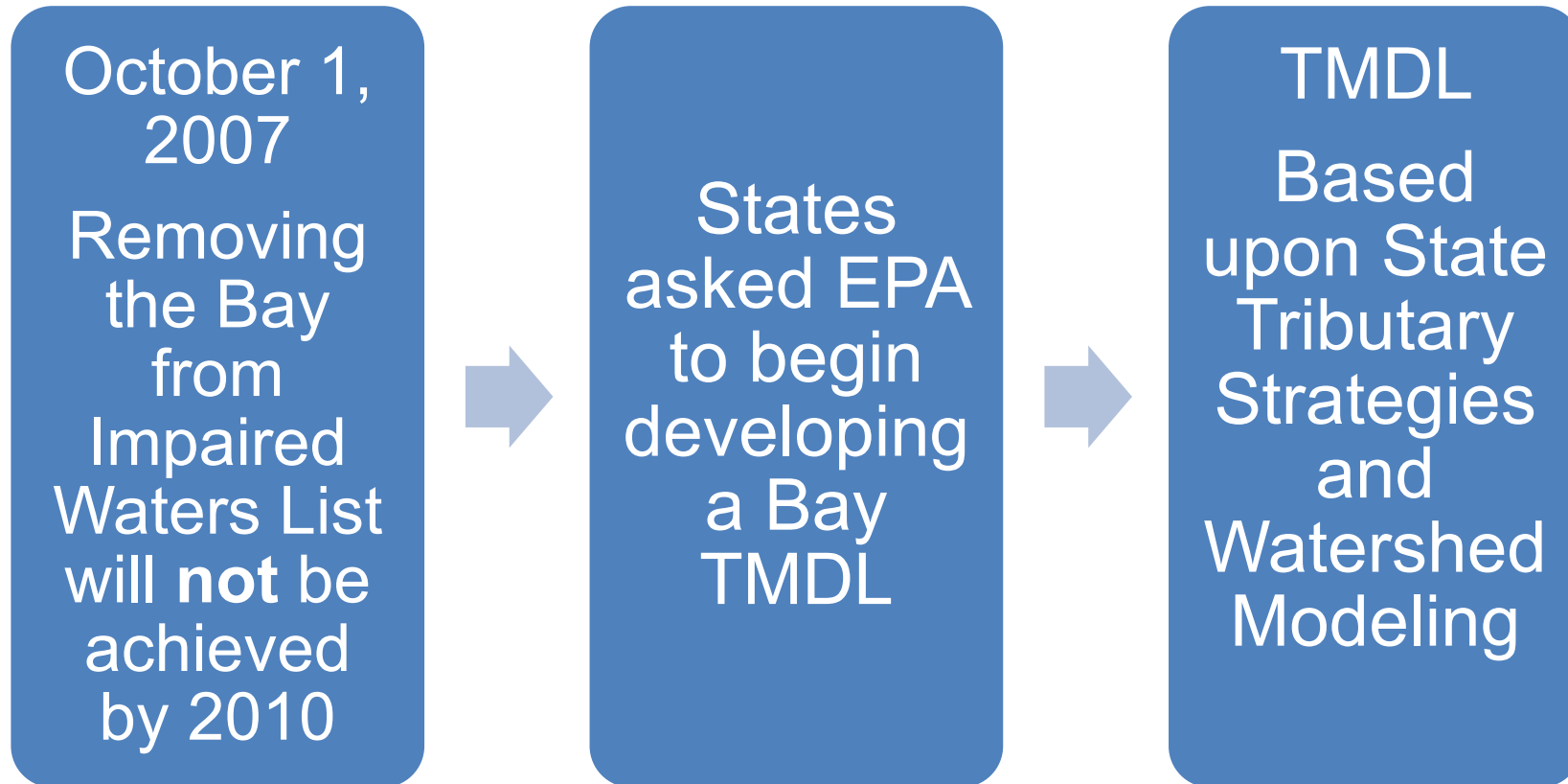
## Section 117(g)

EPA, ..., **shall** ensure that management plans are developed, and implementation is begun to achieve and maintain:

- The **nutrient reduction** goals of the **Bay Agreement**
- **Water quality** necessary to restore living resources in the Bay



# The Chesapeake Bay Executive Council





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**Fowler v. EPA - Jan. 5. 2009**

# Settlement Agreement, May 11, 2010

EPA will establish a Bay TMDL by December 31, 2010

EPA will require Watershed Implementation Plans

EPA will require “reasonable assurances” that goals will be met

EPA may exact consequences if States fail



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## Fowler v. EPA



For Immediate Release

May 12, 2009

EXECUTIVE ORDER

- - - - -

CHESAPEAKE BAY PROTECTION AND RESTORATION

By the authority vested in me as President by the Constitution and the laws of the United States of America and in furtherance of the purposes of the Clean Water Act of 1972, as amended (33 U.S.C. 1251 et seq.), and other laws, and to protect and restore the health, heritage, natural resources, and social and economic value of the Nation's largest estuarine ecosystem and the natural sustainability of its watershed, it is hereby ordered as follows:

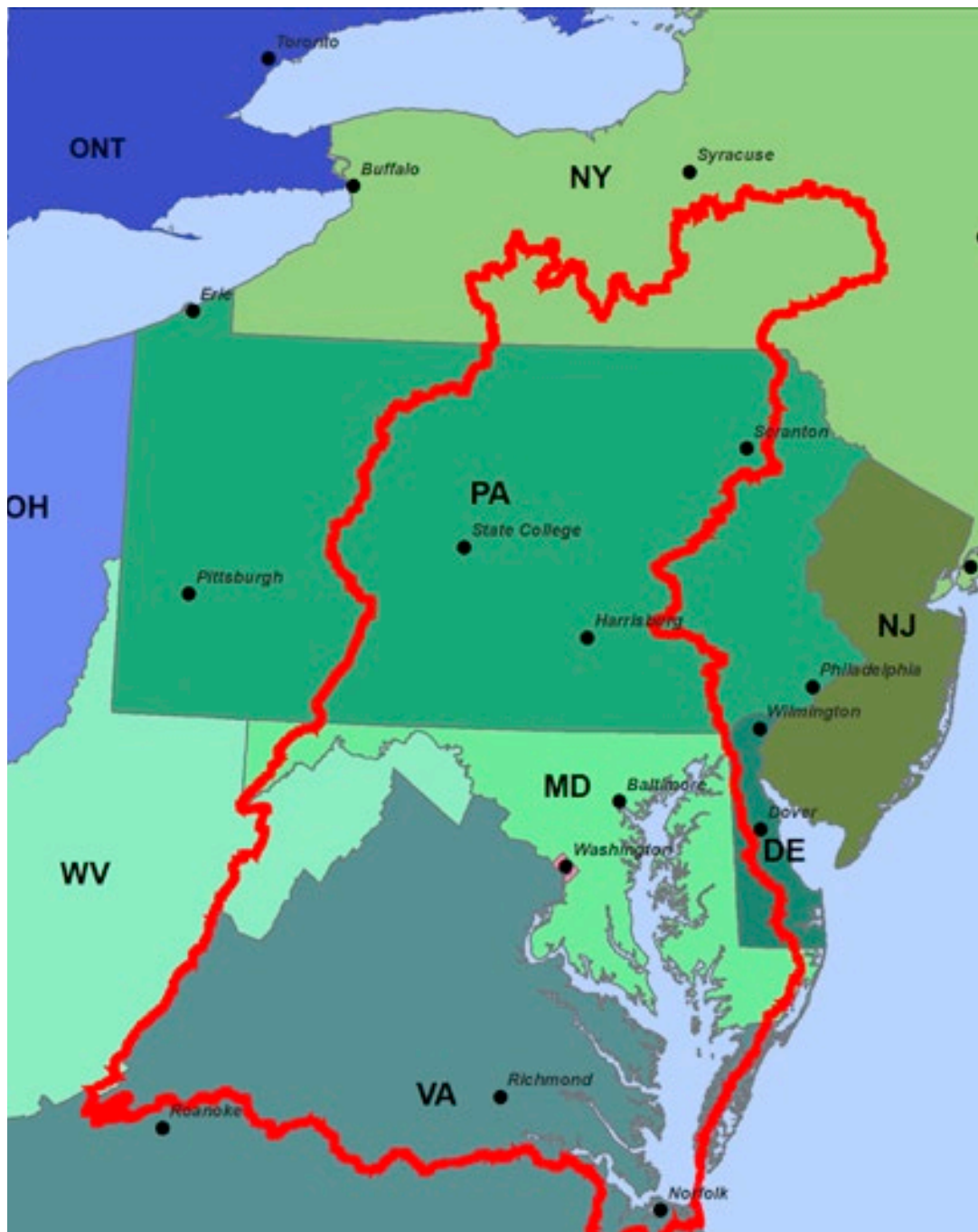


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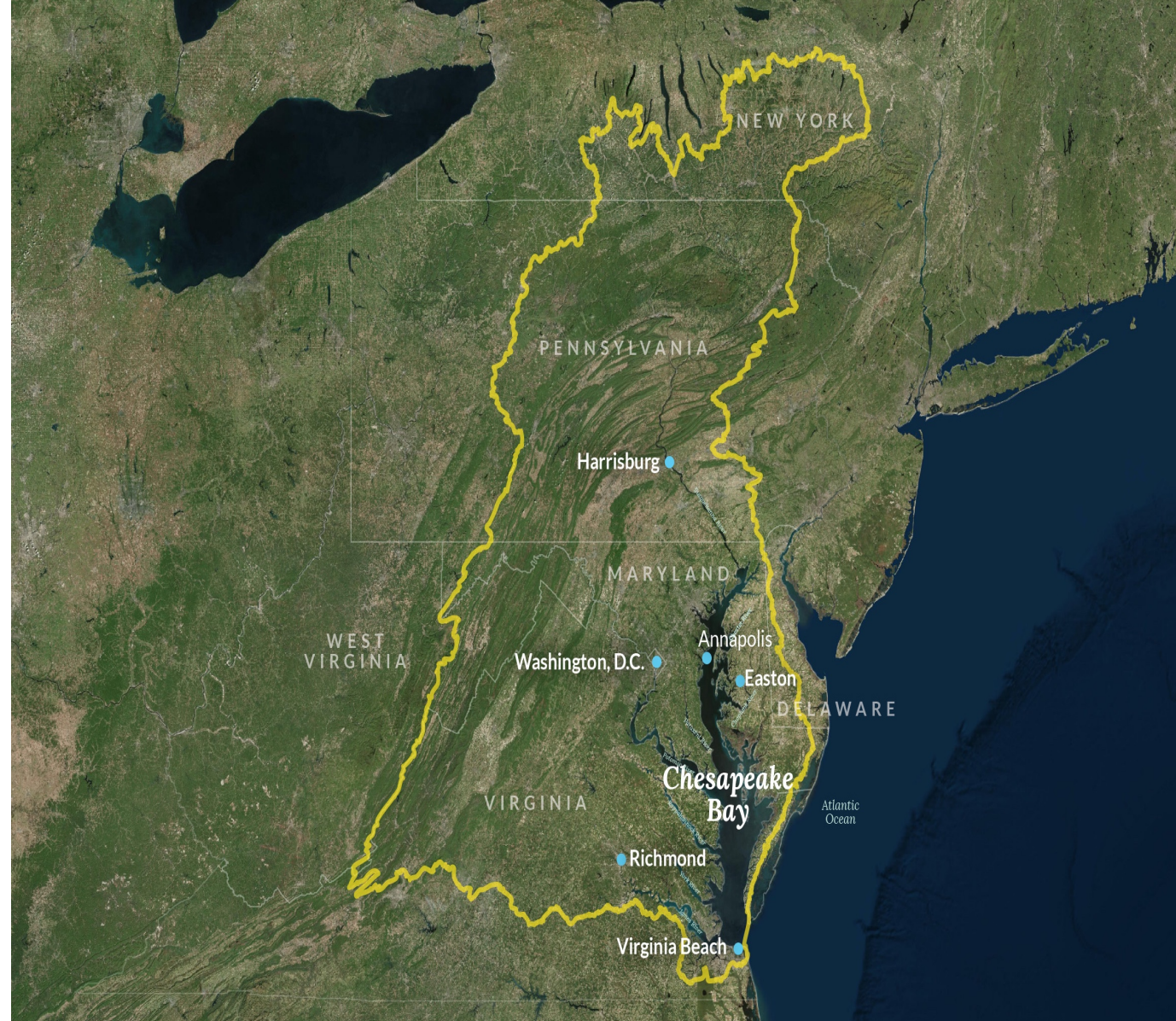
# Executive Order

# Chesapeake Bay TMDL

December 29, 2010

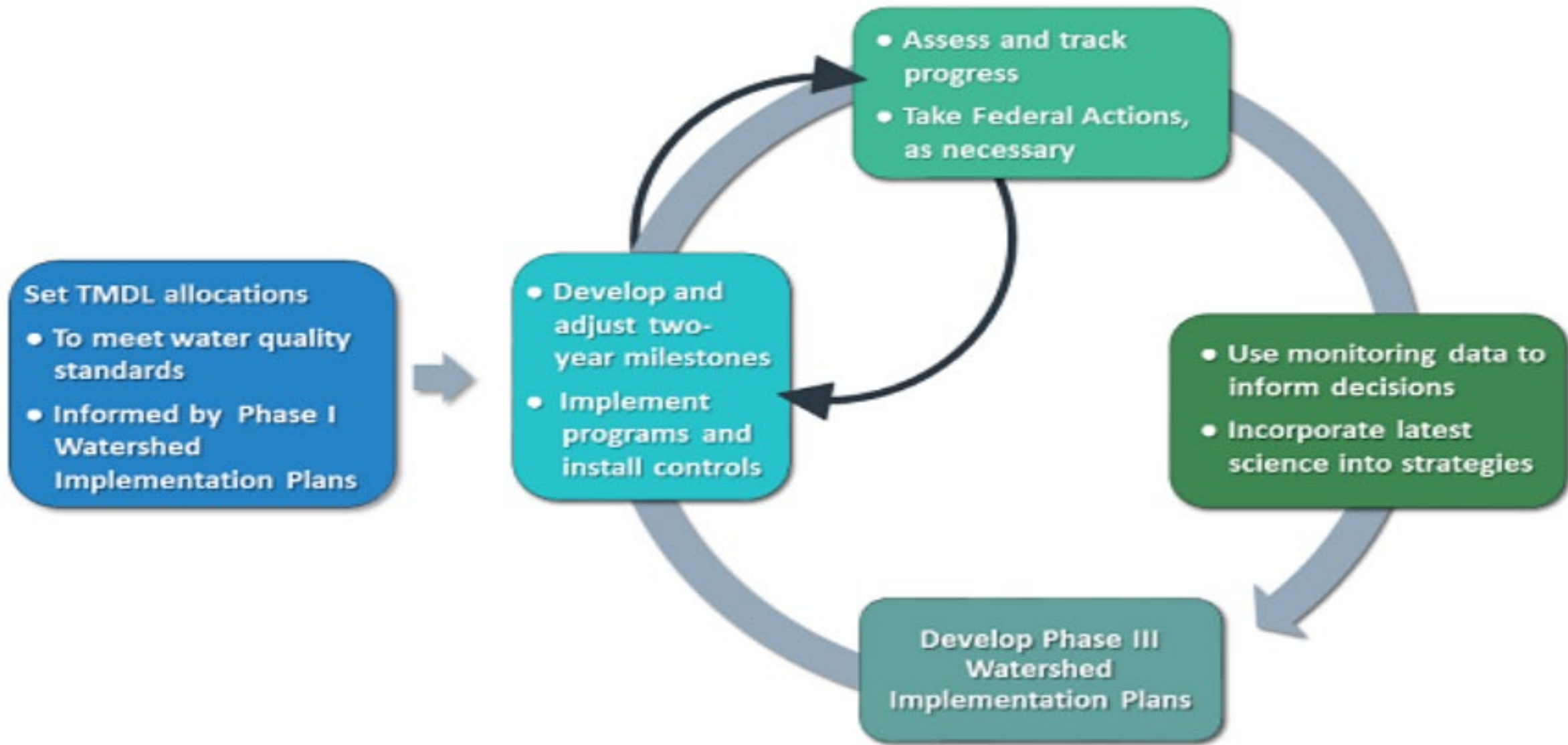


- Allocations for 92 Segments
- Accountability and Goals
  - Watershed Implementation Plans
    - Three Phases
  - Two Year Milestones
  - EPA Tracking and Assessment
  - Deadline for Completion – 2025
  - Federal Consequences for failure



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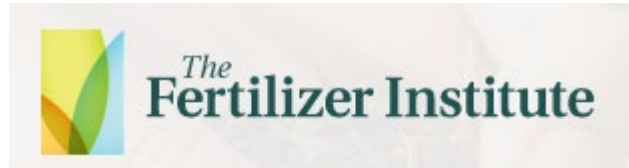
# Unique Features



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# The Bay TMDL Accountability Framework

# *American Farm Bureau Fed'n v. EPA*

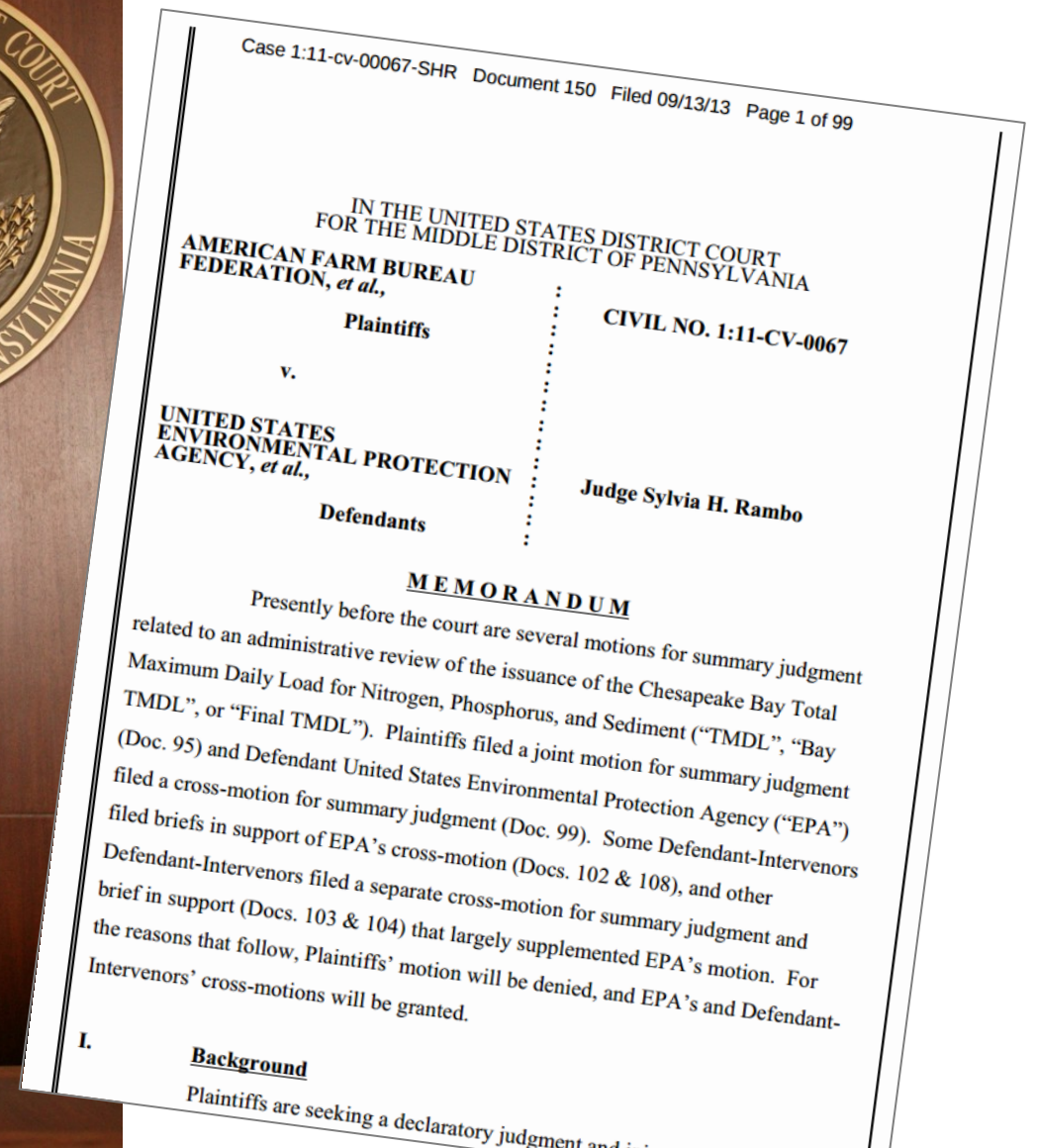


**v.**



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**Chesapeake Bay Blueprint**



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Eastern District of Pennsylvania



- TMDLs = Point and Non-Point Sources
- Reasonable Assurance is Justified
- Example of Cooperative Federalism



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**Third Circuit Court of Appeals**



No. \_\_\_\_\_

**In the Supreme Court of the United States**

\_\_\_\_\_

AMERICAN FARM BUREAU FEDERATION, ET AL.,  
*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

\_\_\_\_\_

**Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Third Circuit**

\_\_\_\_\_

**PETITION FOR A WRIT OF CERTIORARI**

\_\_\_\_\_

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**U.S. Supreme Court**

MONDAY, FEBRUARY 29, 2016

CERTIORARI DENIED

14-8112	VIALVA, CHRISTOPHER A. V. UNITED STATES
14-10247	BODDIE, ANTHONY J. V. DEPT. OF TREASURY
15-195	DOE, JOHN, ET AL. V. CHRISTIE, GOV. OF NJ, ET AL.
15-222	BARNES, LARRY W., ET UX. V. UNITED STATES, ET AL.
15-293	BURGOS, CHRISTOPHER, ET AL. V. NEW JERSEY, ET AL.
15-371	ESCOBAR, JORGE V. CELEBRATION CRUISE OPERATOR
15-592	STC, INC. V. GLOBAL TRAFFIC TECHNOLOGIES
15-595	SORENSEN, JEROLD R. V. UNITED STATES
15-597	WAL-MART STORES, INC. V. PHIPPS, CHERYL, ET AL.
15-599	AM. FARM BUREAU FED'N, ET AL. V. EPA, ET AL.
15-608	OLSON, EDWARD D. V. SMITH, JOHANNA, ET AL.
15-611	FIRST AMER TITLE INSURANCE CO V FDTG




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**SCT Appeal Denied = Bay TMDL Upheld**

# 2009–2019 Blueprint Progress

Individual sectors compared  
to 2025 Phase III WIP

Total compared to EPA  
Planning Target

 Projected loads more than  
25% off target or pollution  
is increasing

 Projected loads within  
10–25% of target

 Projected loads within less  
than 10% of target

 No contribution from this  
source sector

Any increasing trendline is red,  
regardless of percentage.

		AGRICULTURE	URBAN & SUBURBAN POLLUTED RUNOFF	SEPTIC	WASTEWATER & COMBINED SEWER OUTFALLS	TOTAL
 MARYLAND	NITROGEN					
	PHOSPHORUS			N/A		
 PENNSYLVANIA	NITROGEN					
	PHOSPHORUS			N/A		
 VIRGINIA	NITROGEN					
	PHOSPHORUS			N/A		

## NY and PA Final Phase III WIP's Are Deficient

- NY's Phase III WIP is One Million Pounds Short of its Nitrogen Goal
- PA's Phase III WIP Meets Only 73% of its Nitrogen Goal and is \$364 M Short in Funding, Annually
- EPA Accepted the WIPs Without Imposing Consequences



# EPA Says The Bay TMDL Is Not Enforceable

- **A TMDL is a number - it sets pollution targets**
  - **The 2025 deadline is an aspirational goal**
- 
- Section 303(d) says nothing about implementation or deadlines for implementation
  - Citizens cannot sue to enforce the overall nutrient and sediment reduction goals
  - US Brief in American Farm Bureau Federation v. EPA agrees



# The Bay TMDL Is Enforceable

- **The Bay TMDL is not your Grandfather's TMDL**
  - **Section 117(g) compels implementation**
  - **American Farm Bureau v EPA supports reasonable assurance**
- 
- The history of the Bay TMDL is unlike any other
  - Section 117g incorporates the 2014 Bay Agreement – signed by EPA – adopts Bay TMDL goals
  - The TMDL sets a deadline – upheld by Third Circuit



## Third Circuit *American Farm Bureau* Decision

- ▶ It “defies common sense and experience” to believe that the Bay would be cleaned up in the absence of aggressive intervention by EPA.
- ▶ It would be arbitrary for EPA to approve a WIP that could not be met.



- **May 18, 2020**  
**Notice Of Intent to Sue Issued**
- **Sept. 10, 2020**  
**Complaints Filed in DC DCT**
  - **CBF, Anne Arundel County,  
MWA, Bobby W and Jeanne H**
  - **DC, DE, MD, VA**
- **US Must Respond by November 20**



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**EPA Must Act**



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*cbf.org*



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