



Senator Ben Cardin (D-Maryland) has recently proposed the “Chesapeake Clean Water and Ecosystem Restoration Act” to amend the Clean Water Act and to address the continuing decline of the Bay watershed. The Waterkeepers listed below believe that the Cardin Bill is not what the Bay needs. A clean and healthy Bay watershed can best be achieved by strict enforcement of the Clean Water Act as currently written and strong federal leadership that steps in when states continue to fail to carry out their obligations. Below is a comparison of some the key provisions of the Act and the Cardin Bill.

	<b>CLEAN WATER ACT</b>	<b>CARDIN BILL</b>
<b>TMDLs</b>	<p>CWA section 303(d) requires states to develop lists of impaired waters - waters for which technology-based regulations and other required controls are not stringent enough to meet the water quality standards set by states. The law requires that states establish priority rankings for waters on the lists and develop Total Maximum Daily Loads (TMDLs), for these waters. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards. Under a TMDL, point sources are assigned Wasteload Allocations and nonpoint sources Load Allocations to limit discharges. The mandated TMDLs provide a solid mechanism where states can control both point and nonpoint sources of water pollution and force every polluter on every polluted waterway in the state to take action to control their discharges, on a focused water segment by water segment approach.</p>	<p>EPA is under a current directive to issue a Bay-wide TMDL for all currently listed impaired segments of the Bay and tidal tributaries. EPA is under no obligation to create TMDLs for impaired waterway segments that states have failed to list as impaired under the 303(d) list. Under the Bill, Watershed Implementation Plans (WIPs) need only contemplate limitations on pollution to meet the EPA Bay water quality standards. That, presumably, means the Bay TMDL. WIPs do not, therefore, need to look to control pollutants in the many waterways on states have failed to add to 303 (d) list. It remains unclear whether the states will consider compliance with the WIPs to mean compliance with the CWA, and continue to fail to create TMDLs for waterways that are impaired (see Timeline section below).</p>

<p><b>Non-point Source Controls</b></p>	<p>The CWA allows control of nonpoint sources by states through the TMDL process. Once a state establishes its required TMDL for impaired waterways, it has a number of options. It can allocate pollutant loads to the nonpoint source and force compliance with Best Management Practices whereby nonpoint sources of pollution will have to reduce discharges. There is nothing in the CWA which prevents states from creating state permitting schemes for nonpoint sources.</p>	<p>The Cardin Bill does nothing to control nonpoint sources that the CWA doesn't already provide for. Though the Bill expressly allows for states to establish a 402-type permitting system for nonpoint sources, there is nothing currently stopping the states from doing so already. What the Bill does allow nonpoint sources to do, which the CWA does not, is sell the right to pollute to point sources (see the Nutrient Control section below).</p>
<p><b>Point Source Controls</b></p>	<p>Under the CWA no one is allowed to discharge a pollutant into waterways without complying with a section 402 discharge permit. These permits create a highly transparent, enforceable mechanism to limit point source discharges and provide clear remedies. With 402 permits, dischargers are required to reduce pollution using the "Best Available Technology." This means that permit writers create discharge standards that reflect the best performance that a facility can possibly achieve using the latest technology. These standards are adjusted every 5 years through the issuance of new permits to match improvements in technology and control capability. This "technology forcing" approach works towards the overall CWA goal of eliminating pollution to our waterways.</p> <p>The 402 permitting process is the main tool for citizen enforcement, allowing those impacted by the failure of point source dischargers to meet permit limits to go into court and enforce those permits.</p>	<p>The Cardin Bill introduces a fundamental change to point source control. Now point sources of nutrients and sediments will be able to purchase the right to discharge above and beyond the limits in their permit by purchasing credits. The ability to ignore the technological standards in the permits means that point sources will no longer be required to limit their discharges to the "Best Available Technology" standards which have been the backbone of the CWA for almost 40 years.</p> <p>In addition, the Bill allows, for the first time, exemptions from 402 permitting for "de minimis" point sources. States will now have the discretion to allow point sources to avoid the 402 permitting process that has proven to be the biggest tool in cleaning up watersheds across the country. Collectively, the pollution credit purchasing provision and the "de minimis" exemption ability creates significant roadblocks to the ability of citizens to enforce permit standards.</p>

<p><b>Nutrient and Sediment Control</b></p>	<p>Nutrients and sediment are CWA pollutants, subject to all the CWA controls of any pollutant. That includes point source permitting and nonpoint source BMP controls. For almost 40 years, the CWA has looked to control each source of pollution, on a source-by-source approach and has not allowed market forces to play a part in who gets to pollute.</p> <p>The reason to keep the market and trading out is obvious. Water pollution tends to act very differently from some of the long range transportation of some of the air pollutants where trading has become the norm. Water pollutants tend to create localized “hotspots” of pollution.</p> <p>For many water pollutants, this “source-by-source” control is the only way to achieve local water quality standards.</p>	<p>The Bill will amend the CWA to mandate a pollutant trading scheme whereby any source of nutrient pollution will be able to sell pollution credits to any other nutrient polluter. It is anticipated that the dominant flow of trading will occur with nonpoint agricultural sources selling credits to industrial and municipal point sources. As one ag industry trade paper puts it, trading is “a program [that] has been created to help farmers earn money while providing polluters with the opportunity to increase their pollution to the Chesapeake Bay and its tributaries.”</p> <p>Farmers can generate credits simply by claiming that they’ve discharged less pollution than they’re allocated under any watershed plan. The states do not currently monitor nonpoint source discharges and there is nothing in the Bill which requires them to do so.</p> <p>Nutrient trading has been tried on other watersheds in the country and has failed to result in reductions in overall nutrient levels largely because of the unwillingness of states to verify nonpoint source reductions.</p> <p>In addition to nutrient trading, the Bill also paves the way for mandatory sediment trading in the coming few years. Sediments are even more problematic because of the proven localization of deposition and the creation of sediment rich “hotspots.”</p>
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<p><b>EPA Authority</b></p>	<p>EPA currently has the authority to strip away CWA 402 permitting authority from any state that does not meet its obligations under the Act. States are also required to submit for approval various plans to create and adhere to water quality standards, including TMDLs, antidegradation and water quality criteria and use plans. EPA may disapprove any state water quality plan that is not designed to attain and protect water uses and designations, and substitute its own plan, thereby forcing the state to implement measures to clean up their waterways. EPA may withhold federal funding for any state that fails to meet applicable federal standards. It does so in many areas on a regular basis, including air quality provisions, transportation infrastructure, educational systems, etc.</p> <p>To date, EPA has failed to exercise its authority to force Bay states to address water quality in the Bay watershed. Given EPA's failure, and the lack of political will among the Bay states, there has been a continuing degradation of the Bay watershed.</p>	<p>In short, there is nothing in the Bill that increases EPA authority over the states or better motivates the states to clean up the Bay, or achieve water quality standards. Though the Bill does place some additional paper-submission compliance schedules on the states, there is nothing in the Bill that binds the states to any real results in Bay restoration.</p> <p>The Bill does not require EPA to withhold money from states that fail to attain water quality standards, nor does it require EPA to exercise its authority to take over failed state programs.</p>
<p><b>CWA Enforcement</b></p>	<p>The power of the CWA is in enforcement – by both the federal government and private citizens. Under current CWA provisions, citizens can take polluters to court to enforce against any violations of any standards of the Act. Typically, these citizen suit provisions have been used to force point source polluters to comply with the permitting requirements of section 402. They have also been used frequently to make EPA comply with nondiscretionary duties. As explained above, citizen suit enforcement has been the only mechanism that has given any hope to the current TMDL process.</p> <p>No polluters in the country are immune from compliance with the Act and all are equally susceptible to enforcement provisions when they violate the CWA standards.</p>	<p>In another first, the Bill creates a “safe harbor” from enforcement for agricultural producers that are in compliance with non-enforceable provisions of the state Watershed Implementation Plan. That means that if a farm is in compliance with a soil conservation plan, or a nutrient management plan, the federal government cannot enforce the CWA even where the ag producer illegally discharges pollutants into waterways.</p> <p>Where the 402 “de minimis” exemption protects some point sources from enforcement, the general enforcement shield provides potentially broader protections for the highly polluting ag industry. It means that ag polluters will have little to fear from their continuing discharges of pollutants into the Bay watershed.</p>

<p><b>Clean Water Goals</b></p>	<p>The overall goal of the CWA is to “eliminate” pollution in our waterways. Point source pollution was to be ratcheted down to zero as improving technologies captured and/or treated all harmful discharges, while Best Management Practices were implemented and improved to make nonpoint sources negligible. An admittedly lofty goal, it still remains as the ideal that the CWA strives for as the Act approaches its 40 birthday.</p>	<p>The Cardin Bill represents an abandonment of the overall goal of the CWA through its point source exemption and pollutant trading approaches. With this amendment to the CWA, we can no longer claim that we look to eliminate pollutants as our ultimate goal. Our new goal is to bring pollution down to levels that state and federal governments deem acceptable.</p>
<p><b>Funding</b></p>	<p>Under the CWA states can apply for EPA funded grants, called section 319 grants. These grants can be used to fund state programs for nonpoint source assessment and control as well as individual clean water projects.</p> <p>In the past 20 years, Maryland has received over 41 million dollars in 319 grant money. The other Bay states have likewise received 10s of millions of dollars.</p>	<p>Under the Bill, EPA “shall” fund states with approved WIPs, but there are no provisions preventing EPA from funding states that choose not to submit WIPs for approval or fail to maintain WIPs or meet most other applicable deadlines. The only mandatory withholding of funds to states attaches only to states that submit plans for approval. In the case of states that fail to submit revisions to plans that are rejected by EPA, the Agency “shall” withhold funding. This mandatory withholding of funds does not attach until EPA has given the state one year to correct deficiencies. Given that states are no longer required to submit WIPs for EPA approval, the Bill creates an incentive for states not to submit plans.</p>

<p><b>Citizen Participation</b></p>	<p>Under the Administrative Procedure Act (APA) citizens can challenge final agency actions undertaken by EPA. The final actions include EPA's approval of state water quality standards, TMDLs, antidegradation policies, etc. The ability to challenge these final approvals gives citizens the right to participate in and counter any attempt by the states to implement non-protective standards. Citizens may also weigh in on any point source permit issuance, renewal or modification and challenge any permit which they consider deficient.</p>	<p>Recent changes to the Cardin Bill make the submission of Watershed Implementation Plans to EPA for approval voluntary. This means that states can avoid subjecting their primary mechanism for achieving state water quality standards to a potential citizen challenge under the APA by simply not submitting the plan to EPA for approval. Proponents of the Bill claim that states will submit the WIP regardless in order to acquire federal funding. However, while EPA "shall" make Implementation Grants to states that do have approved plans, there is nothing in the Bill which prohibits EPA from funding states that choose not to submit WIPs for approval. In addition, citizens can participate in, comment on and legally challenge any point source permit issued by a state. Under the Bill's nutrient trading provisions, the state can now modify permits without reopening the permit and making them subject to the public participation requirements that now attach to permit modifications.</p>
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<p><b>Time Line</b></p>	<p>The CWA was enacted in 1972. Unfortunately, there was little implementation of the 303(d) provisions until 1992 when EPA issued regulations requiring states every two years to list waters that do not attain water quality standards and establish TMDLs to restore water quality.</p> <p>It wasn't until environmental groups filed lawsuits in 38 states in the mid 1990's that EPA and the states began to take the 303(d) process seriously. Of the suits tried or settled, 22 resulted in court orders requiring expeditious TMDL development by states or EPA. Because of the lawsuits and existing requirements of the law, in August 1997, EPA issued interpretive guidance which for the first time called on states to develop long-term schedules for implementing TMDLs. Under that guidance, EPA directed states to establish TMDLs in order to meet water quality standards within 8 to 13 years. In August 1999, EPA proposed revisions to the TMDL regulations to clarify and strengthen the program. By the time the final rule was signed in July 2000, the rule had been weakened significantly because of interference from forestry and the ag industry. The Bush Administration announced in October 2001 that it would delay the effective date of the rule until May 2003, to allow for further review. In March 2003, EPA withdrew the 2000 rule in order to consider initiating an entirely new rule or other options. And that's where we sit today.</p> <p>Simply put, if the CWA were fully and properly implemented in the Bay states today, every polluted waterway would be on the impaired 303(d) list, each of these would have TMDLs were waste load allocations were apportioned among point and nonpoint source polluters and state environmental agencies would be out enforcing the law against those dischargers who exceeded their limits. In short, we'd have a clean and healthy Chesapeake Bay.</p>	<p>The Bill does require states who choose to submit their WIPs for approval to EPA to do so no later than November 1, 2011. Contrary to popular belief, there is no deadline in the Bill for states to achieve any reduction in pollutant loads or attain water quality standards. By May 12, 2025, states need only "ensure full implementation of the plan." In fact, 15 years from now, states may simply submit "determinations of future actions in order to achieve . . . water quality standards."</p>
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<p><b>Summary</b></p>	<p>The primary reason for the downward spiral of the Chesapeake Bay is the lack of state political will. Bay state political leaders have proven to be more concerned with the financial health of its corporate citizens than the health of the Bay and the communities who rely on it for their recreational, commercial and sustainable livelihood.</p> <p>The CWA as currently written has provided an invaluable tool to clean up watersheds across the country. It contains all the mechanisms necessary to empower citizens, force states to clean up the Bay and, when they continue to fail to do so, it allows EPA to step in and correct the problem.</p> <p>The CWA has not failed the Bay – it’s the Bay states that have failed.</p>	<p>The Cardin Bill does nothing to fix the inherent lack of state political will and their incessant failure to repair the Bay. Indeed, the Bill represents some major steps backwards in clean water protection. For the first time, it suggests exemptions to point source 402 permitting, and mandates a cherry-picked market approach to benefit an Ag industry that already benefits immensely from the most anti-market mechanisms available- subsidies and cost shares and other corporate welfare programs.</p> <p>Passage of the Cardin Bill ensures two things. First, it allows for billions more taxpayer dollars to pour into an area where billions have already been spent with little or no headway. Second, it will help ensure that 15 years from now we will still be looking at a highly polluted Bay because there is nothing in the Bill which forces states to clean up the watershed.</p>
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**For more information, please contact:**

Dottie Yunger, Anacostia Riverkeeper, (202) 391-9807

Kathy Phillips, Assateague Coastkeeper, (443) 235-2014

Eliza Steinmeier, Baltimore Harbor Waterkeeper, (410) 366-3038

Drew Koslow, Choptank Riverkeeper, (410) 745-8341

Michael Helfrich, Lower Susquehanna Riverkeeper, (717) 779-7915

Fred Tutman, Patuxent Riverkeeper, (301)-249-8200

Ed Merrifield, Potomac Riverkeeper, (202) 222-0707

Jamie Brunkow, Sassafras Riverkeeper, (410) 708-3303

Fred Kelly, Severn Riverkeeper, (410) 849-8540

Diana Muller, South Riverkeeper, (410) 224-3760

Jeff Kelble, Shenandoah Riverkeeper, (540)-837-1479

David Burden, Virginia Eastern Shorekeeper, (757) 678-6182

Chris Trumbauer, West/Rhode Riverkeeper, (410)-867-7171