

**Questions & Answers for the
Chesapeake Clean Water and Ecosystem Restoration Act of 2009
(the “Cardin Bill”)**

1. What is the “Cardin Bill”?

On October 20th, 2009, Senator Ben Cardin, Chairman of the Senate Environment and Public Works Committee's Water and Wildlife Subcommittee, and three other senators introduced the **Chesapeake Clean Water and Ecosystem Restoration Act of 2009** to amend the Clean Water Act. The Bill purports to address the continuing decline of the Chesapeake Bay watershed by introducing some very fundamental changes to the way the Clean Water Act has functioned for almost 40 years.

2. Which Waterkeepers in the Chesapeake and Coastal Bays Region oppose the Bill?

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3. Why do Waterkeepers oppose the Bill?

Waterkeepers oppose the Cardin Bill, because it fundamentally weakens the Clean Water Act, fails to set an enforceable clean-up deadline, and relies on voluntary measures on the parts of the states when those same Bay states have demonstrated that they lack the political will to enforce the existing mandates of the Clean Water Act. In addition, it will set a bad precedent for the rest of the country.

If passed, the Cardin Bill will fail to restore and protect the Bay in the following ways:

- Exempts polluters from CWA permitting: Under the CWA, no “point sources” are allowed to discharge pollution into waterways without complying with a permit. These permits create a highly transparent mechanism to limit pollution and are enforceable by regulatory agencies and by citizens. The Cardin Bill *requires* states to create undefined “de minimis” exemptions from permitting. These

exemptions could apply to sources such as developers, wastewater utilities, and agricultural producers that are required to have permits under current law. The end result of these exemptions is that the most powerful tool for cleaning up watersheds- government and citizen enforcement of CWA permit standards- will be lost.

- Shields Biggest Polluters from Enforcement: Although it is widely recognized that agricultural operations are the number one source of both nutrient and sediment pollution, the Cardin Bill provides a safe harbor from EPA and State enforcement for agricultural producers that does not exist under current law. Under the Bill, agricultural producers who should have CWA permits are shielded from enforcement by simply complying with unenforceable planning documents such as state soil conservation plans and nutrient management plans.
- Mandates an Unproven Market-Based Approach: The Bill will amend the CWA to mandate a pollutant trading scheme whereby polluters that are able to reduce their nutrient pollution (thus generating “credits”) will be able to sell those credits to other nutrient polluters in the Bay. However, there is nothing in the Bill that requires the credit generators to monitor their practices and verify that their practices are in fact reducing nutrient loads. Therefore the entire trading program is based on good-faith, as opposed to verified, nutrient reductions. Nutrient trading has been tried in 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.

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 agricultural industry trade newsletter 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.” Instead of working towards eliminating their pollution, point sources will now have the right to discharge above their permit limits by purchasing credits.

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.”

- Fails to Establish a Clean-Up Deadline: Despite common misrepresentations that the Bill will result in a clean and healthy Bay by 2025, nowhere does it contain an enforceable deadline for meeting its water quality goals. Rather, the Bill gives states until May 12, 2025 to implement a plan for clean-up. In fact, on that date, the Bill allows states to simply submit “determinations of future actions in order to achieve...water quality standards” somewhere down the road.

Instead of weakening current Clean Water Act protections, Waterkeepers believe that 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 takes control in when states fail to carry out their obligations (See below).

4. Aren't there some good things in the Bill that make it worth supporting?

The Bill does have some good provisions, such as:

- **the creation and submission of Watershed Implementation Plans (WIP) by the Bay states to EPA** → BUT while in earlier versions of the Bill, the submission of Watershed Implementation Plans was mandated, in the latest version, WIP submission is voluntary.
- **the ability of states to create a nonpoint source permitting scheme** → BUT this is an option being offered to states who have simply refused to take on the biggest non-point source polluters in their states, agriculture, for decades. That is not likely to change under the Cardin Bill.
- **the ability of EPA to withhold federal taxpayers' dollars from states that fail to adhere to some of the standards and timelines laid out in the Bill** → BUT, despite popular messaging, the Bill only contains one narrow example of where EPA may not fund Bay states: when states do submit their Watershed Implementation Plans for approval and then fail to revise deficient plans within a year.
- **The authorization of \$2.5 billion over 6 years to help local jurisdictions take the necessary steps to reduce agricultural and urban stormwater pollution to the Chesapeake** → BUT, while this is a step in the right direction to assist with the massive undertaking needed to restore the Bay, this is merely an *authorization* of the needed funds, not an *appropriation*. These dollars need to be appropriated for on-the-ground practices that will immediately begin reducing pollutant loads.

Unfortunately, these few good things about this Bill are voluntary, requiring affirmative, but purely discretionary acts by states that have proven that they're unwilling to do the job. This fact, coupled with the provisions of the Bill that weaken the current Clean Water Act, makes this Bill unsupportable.

5. But hasn't the Clean Water Act as written failed the Bay?

No. Although the Clean Water Act has been in place since 1972, the Bay's health has declined over the past 30 years. Therefore, people assume that existing law isn't strong enough. We disagree. The Clean Water Act, as currently written, contains all the tools necessary to clean up the Bay – without bringing point source exemptions, polluter safe harbor provisions and the market into it. The current CWA contains protective point source permitting programs, incentives for non-point source controls, requirements to attain water quality standards through TMDL implementation, and enforcement

mechanisms that allow states and citizens to force polluters to reduce or stop their pollution. And when states fail to make these difficult decisions that would protect water resources, the law allows EPA to step in and strip away the state's delegated authority and to administer the Act itself.

The reason why the Bay isn't clean today is not because of deficiencies in the CWA. It's because of decades-long lack of political will at both the state and federal level to enforce our environmental laws. For example, Waterkeepers in MD recently submitted a petition to EPA that documents the systematic failure of the Maryland Department of the Environment to administer and enforce the Clean Water Act. Of course, a failure of state permitting and enforcement is also a failure of EPA to monitor the adequacy of state programs. We need both to save the Bay.

The CWA has been effectively used to clean up waterways across the country through state and federal resolve, industry compliance, citizen oversight, and diligent enforcement. The present state of many of our lakes and rivers, when compared to their conditions in 1972, illustrates the Clean Water Act's effectiveness.

- Lake Erie was proclaimed dead in 1970. The pollution had reached such high levels in Erie and other waterways in the Great Lakes system that it led to a ban on fishing in certain parts of the system. Now, thirty-eight years after the passage of the Clean Water Act, the fish population of Lake Erie has improved significantly – and the numbers of fish – particularly walleye and bass have increased.
- The Hudson River has seen dramatic recovery since the 1960s, when, at that time, the River was considered an open sewer. Today, it is the only large river in the North Atlantic that retains strong spawning stocks of its entire collection of historical migratory species. These fish support recreational and commercial fisheries along the Atlantic coast worth hundreds of millions of dollars.
- During the 60's and 70's wastewater and industrial plants were discharging large amounts of harmful pollutants and nitrogen into Tampa Bay. The pollution damaged the bottom sediment and killed many organisms essential to a healthy ecosystem. Since then, thousands of acres of sea grass on the Bay floor have been recovered. An estimated fifteen hundred acres of marsh and mangrove habitats have been restored, including 250 acres of tidal marshes that are critically important for fish.

Enforcement in the Chesapeake Bay Region has not been at the forefront of restoration efforts. Therefore, by pushing EPA and states to enforce the Clean Water Act, and by supplementing those efforts with targeted citizen efforts, we hope that the Chesapeake

can be added to the list of success stories above. And it can be done without the harmful weakening of the Act that the Cardin Bill brings with it.

6. What is the history and current status of the Bill?

After the Cardin Bill was introduced in October, 2009, it was amended before the June mark-up of the legislation due to concerns from Senator James Inhofe (R-OK), the ranking member of the full Senate Environment and Public Works Committee. A few other amendments were offered as well. The new bill, as amended, was passed by voice vote and reported out of the Environment and Public Works Committee. The most likely scenario now is that the Cardin Bill will be bundled with other water and land bills, and put before the entire Senate in September or October, 2010, and then moved to the House.