



CLIENT ALERT

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Chesapeake Bay Developments

President Obama Wades into the Bay Restoration Effort

Last week President Obama issued an Executive Order calling for an increased effort by the federal government to protect and restore the Chesapeake Bay (http://www.whitehouse.gov/the_press_office/Executive-Order-Chesapeake-Bay-Protection-and-Restoration/). Calling the Chesapeake Bay a “national treasure” and recognizing that the federal government has significant assets in the Bay watershed, the May 12th Executive Order states that the federal government will now lead the restoration effort. The Order establishes a “Federal Leadership Committee for the Chesapeake Bay” of agencies that will participate in the protection and restoration of the Chesapeake Bay and oversee the development and coordination of programs and activities, including data management and reporting. The following federal agencies will have representatives serving on the Committee: the Environmental Protection Agency (EPA) and the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Homeland Security (DHS), Transportation (DOT), and the Interior (DOI).

Up until this point, EPA has maintained the position that the Bay restoration effort has been a partnership with the six Bay states (“Bay States”) and the District of Columbia. That partnership appears to have changed, with EPA clearly assuming the lead role. The current draft of the public notice for upcoming public meetings says “[w]here consensus cannot be reached on key decision points, EPA has the ultimate responsibility to make the final decisions.” The recent

appointment of Chuck Fox to the newly created position of Senior Advisor to the Chesapeake Bay and the Anacostia River within the EPA Administrator’s Office is another sign of EPA’s increased role in the Bay restoration effort and the greater emphasis being placed on the Bay restoration. It is expected that EPA will set more demanding timetables for the restoration than the Bay States had previously committed to and will penalize Bay States that fail to meet the timetables.

While the Executive Order is short on specifics about how it will achieve its stated goals, it promises that EPA will “make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters” and that the agency will strengthen existing permit programs. While the expanded use of its authorities under the Clean Water Act is first expected to be used in the Chesapeake Bay watershed, EPA has made it clear that it sees the Bay as a model or test case to be followed in other watersheds around the country.

The announcement of the Executive Order came at an annual Chesapeake Bay Executive Council meeting of the governors of the Bay States held at historic Mount Vernon, Virginia, and was timed to coincide with other planned activities by EPA and the Bay States.

Other Recent Developments and Upcoming Actions Affecting Builders, Developers, and Industry

In conjunction with the Executive Council meeting at Mount Vernon, EPA and the Bay States announced time frames for several upcoming actions:

- May 2009 — the publishing of the first Federal Register Notice announcing the opening of the public comment process on the Chesapeake Bay TMDL
- June 2009 — the first public meetings with “key stakeholders” on the TMDL
- June 2010 — the proposed Chesapeake Bay TMDL will be published

Significantly, for the home building industry and other commercial industries, EPA’s planned “key stakeholder” meetings include five groups the agency identifies as key stakeholders in this process, but fails to include the home building industry or commercial industries as key stakeholders.

News Summaries

- “EPA Squashed Review of How Realistic Cleanup Expectations Are.” This was the headline in a *Washington Post* article on May 4, 2009. When new EPA models showed that the previously set Bay goals and cleanup strategies would fall well short of their targets, officials from Pennsylvania and West Virginia asked EPA to conduct a use attainability analysis to determine whether the water quality goals set for the Bay are achievable. Even though new evidence from more recent computer models showed that several current assumptions were flawed, EPA officials refused to conduct the requested use attainability analysis and change the current goals, although acknowledging that “we cannot describe at this time precisely how [the goals] may be accomplished.”

- *CBF Calls for EPA to Issue Moratorium on New Permits for Development.* The *Chesapeake Bay Journal* reported on May 6, 2009, that the Chesapeake Bay Foundation (CBF) was calling on EPA to “clamp down on new development in the watershed” to reduce nutrient pollution to the Bay. CBF suggested that the only way new permits should be issued would be if the developers were to offset new discharges by a two-to-one ratio. CBF did not state what authority EPA has to require such an offset.

- *Environmental Groups Continue to Organize and Push Agenda.* More than 60 environmental groups from the Bay States announced on May 18 that they had formed a coalition to push for stronger federal government efforts to clean up the Bay. Their website (<http://www.choosecleanwater.org>) identifies their top priority as seeking increased use of existing federal authority and requesting new authority under the Clean Water Act to give the federal government the power to presumably establish new programs to regulate and control development. Efforts by industry to organize to protect their interests are not matching the efforts by the environmental groups.

- *Update on CBF suit against EPA.* CBF for months has been touting the fact that it sued EPA to force the agency to do more to restore the Bay. Though publicly proclaiming that it was getting tough with EPA, CBF never actually served the lawsuit on EPA until the U.S. District Court for the District of Columbia issued an order telling CBF to serve the complaint on the government or the

case would be dismissed. Faced with dismissal, CBF served the complaint (http://www.cbf.org/site/DocServer/1015C2K_Complaint_FINAL.pdf?docID=13843). CBF has taken no other action to pursue the case.

- *PBS Frontline Special: “Poisoned Waters.”* On April 21, 2009, one day before Earth Day, PBS aired a two-hour special discussing pollution of American waterways that focused on the Chesapeake Bay and the Puget Sound. As expected, journalist Hedrick Smith pointed to development, industry, and agriculture as the sources of pollutants and toxins threatening our nation’s waters. Smith called for Congress to give EPA additional authority to control water pollution.

What’s Ahead?

The Bay Alliance for Responsible Growth and the Environment (BARGE) and Hunton & Williams continue to actively participate in the issues related to the Chesapeake Bay restoration process on behalf of builders, developers and allied industries. Our goal is to advocate approaches to development that are protective of the Bay but do not unfairly impede growth and development.

BARGE intends to hold another meeting this summer to bring interested parties up to speed on recent developments and to chart a course for participating in the upcoming federal regulatory process leading to the publishing of the final Chesapeake Bay TMDL, which will set the rules for development in the watershed for years to come.

Please contact any of the attorneys listed on page one of this alert with any questions you have.