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January 8, 2010

RE – Comments on Executive Order 13508 Draft Strategy for Protecting and Restoring the Chesapeake Bay (Docket # EPA-HQ-OW-2009-0761)

Submitted via Regulations.gov

Dear Administrator Jackson:

American Rivers is a national river conservation organization that works to protect and restore America's rivers for the benefit of people, wildlife, and nature. Founded in 1973, American Rivers has more than 65,000 members and supporters, with offices in Washington, DC and nationwide, including active river restoration and clean water programs in the Chesapeake Bay region. We are extremely supportive of the Administration's commitment to protect and restore the Chesapeake Bay through Executive Order 13508 and the associated Draft Reports and Draft Federal Strategy ("Strategy"). .[1] However these comments detail our concerns and specific recommendations.

Need to Incorporate Planning for Climate Impacts

Overall, the Chesapeake Bay and all of our water resources will be affected by climate change, and all future decisions must incorporate planning for climate impacts. If climate adaptation is to be successful, it must be thoroughly integrated into all water management decisions at every level of government. Too often, adaptation is viewed as an additional set of policies and programs rather than a key element of every water resource management decision. This perspective is reflected in the Strategy that takes this same approach, addressing climate change adaptation primarily in one stand-alone report.[2]

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[1] Federal Leadership Committee for the Chesapeake Bay, *Executive Order 13508 Draft Strategy for Protecting and Restoring the Chesapeake Bay* (Nov. 9, 2009).

[2] U.S. EPA, *The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay, A Draft Report Fulfilling Section 202d of Executive Order 13508* (Sept. 9, 2009, revised Nov. 24, 2009) ("Report 202d").

Viewing adaptation as a separate set of programs and projects is a dangerous misconception. Climate impacts have to be integrated into every decision – land use planning, infrastructure and restoration investments, regulations, and enforcement – because each of these decisions will influence the ability of communities and ecosystems to withstand floods, droughts, water pollution and other climate impacts. Effective adaptation efforts will be of limited value if other important decisions are not made with a mind toward the increasing vulnerabilities brought about through climate change.

To be sure, new explicit funding for adaptation is needed, but we must also begin to incorporate adaptation into the complex web of ongoing decisions that will affect the ability of communities to withstand the impacts of a changing climate for years to come. A good example is stormwater infrastructure – built today it will have to be able to handle more intense storms and changing precipitation patterns. If such an investment is not made with changing conditions in mind, this infrastructure will be unable to manage stormwater runoff and protect local waterways in a warmer world. The Strategy misses an important opportunity to place stormwater management in this context.

How we choose the right solutions given the uncertainty of local impacts and limited resources must not cause inaction. Scientific uncertainty is a challenge, but rather than waiting for absolute certainty, we must act today by adopting the most flexible, scalable and cost effective solutions. In most cases, this means favoring non-structural water management strategies that protect, restore and replicate the natural infrastructure that provides clean water, flood control and many other benefits. In urban environments we must build green roofs, stream buffers and other vegetated systems that will manage more extreme rainfall and provide numerous other benefits ranging from increased property values to reduced energy costs. Everywhere, we must preserve and restore wetlands, floodplains, forests, rivers and streams. These solutions often cost far less than gray infrastructure approaches and can handle a wide range of conditions. A wetland, for example, can absorb rainfall and prevent flooding, and it can also buffer against droughts by releasing water gradually. Furthermore these decentralized strategies can be scaled up according to need as conditions change. They are no-regrets solutions that will help protect human health and safety, enhance ecosystems and wildlife habitat and provide numerous other benefits to communities.[3]

While the Strategy includes a strong individual section on climate science and outreach, this overarching issue should also be integrated into the regulatory considerations throughout the Strategy and Reports. For instance, it is our understanding that the Environmental Protection Agency (EPA) did not model the uncertainties associated with climate when developing nutrient allocations under the Baywide Total Maximum Daily Load (TMDL). Given the predictions of warming waters, the load allocations may well need to be more stringent to meet water quality standards under these conditions. Likewise, all federal funding in the Bay should integrate planning for climate, whether for restoration or clean water infrastructure.

[3] See e.g. American Rivers, *Natural Security: How Sustainable Water Strategies Prepare Communities for a Changing Climate* (2009) http://www.americanrivers.org/our-work/global-warming-and-rivers/infrastructure/natural-security.html.

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American Rivers encourages a thorough review of the Draft Strategy and Draft Reports to ensure that all overarching goal statements include the term "restoration" as well as "protection" (e.g., it is missing in places on pages 4 and 9). We believe the Federal Leadership Committee would agree that both activities are necessary to achieve the goals of the Executive Order.

In addition to the "extensive ecosystem restoration experience" of the Army Corps of Engineers (p. 8), there are a number of state agencies and private partners that have amassed considerable restoration experience and significant successes in the Basin. The Federal Leadership Committee is strongly encouraged to look outside the federal family for entities that are capable of planning, designing and implementing high-quality restoration activities. Experience to date has shown that utilizing these entities is generally far less expensive and more efficient. In addition, investing in the private sector creates and supports jobs, including sectors that have been hardest hit in recent years such as heavy construction and engineering services. Further investments in the private sector will expand the strong base of knowledge that currently exists for implementing restoration work, resulting in an increased capacity for more projects to be conducted in coming years.

American Rivers strongly supports the examination of mechanisms to strengthen permit reviews and consultation authorities (p. 8). However, we were disappointed to see minimal references to transportation agencies' responsibilities in meeting the goals of the Executive Order throughout the Draft Strategy and Draft Reports. Specifically, the phrase "transportation agencies" should be added to the list of those "who must mitigate negative impacts to the watershed" (p. 10, 1st complete paragraph). This is particularly important in light of the thousands of road crossings that pose impassable barriers to aquatic organisms throughout the Bay Basin.

Water Quality – Comments on Draft Strategy for 202a

Report 202a addresses water quality from all sources and through a variety of mechanisms.[4] American Rivers' comments focus primarily on stormwater management and federal funding. On the whole, we applaud EPA for beginning to make better use of its regulatory authority to protect clean water throughout the Bay watershed. One specific overarching concern is the requirement stating that "*technologies and management practices* needed to restore Bay water quality are implemented no later than 2025" without any reference to when Baywide water quality standards must be achieved.[5] This goal must be accompanied by a timeline with benchmarks specifying when water quality standards will actually be met.

[4] U.S. EPA, *The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay, A Draft Report Fulfilling Section 202a of Executive Order 13508* (Sept. 9, 2009, revised Nov. 24, 2009) ("Report 202a").
[5] Strategy, p.27 (emphasis added).

Create New Accountability Programs

Under this initiative, we have two comments. First, one consequence of a state failure to meet the two-year milestones is that EPA could use existing authority to deny or limit state-issued National Pollutant Discharge Elimination System (NPDES) permits that expand the discharge of nutrients or sediment.[6] This should be changed to reflect EPA regulations that prohibit new permits in impaired waters if the discharge will cause a violation of water quality standards unless certain conditions are met.[7] These conditions include the existence of additional pollution capacity available to accommodate the new load and that all existing permits are on an enforceable compliance schedule to achieve water quality standards.[8] Thus, EPA is already authorized and in fact, required, to deny issuing new permits that meet the above conditions.[9]

A second proposed consequence is the withholding or reallocating of federal funds under sections 117 and 319 of the Clean Water Act (CWA).[10] EPA should apply similar consequences to all CWA funds, especially the Clean Water State Revolving Fund (SRF). The SRF provides an important source of water infrastructure funding and can be used broadly to address traditional infrastructure as well as green infrastructure to reduce stormwater and for stream restoration. As a result of a 20% set-aside for green infrastructure and water efficiency in the economic stimulus, Chesapeake Bay states have significantly increased their SRF spending on these types of projects that provide clean water as well as other benefits such as reduced flooding, energy savings and temperature reductions.[11] While EPA should not withhold SRF funds, the agency should condition a state's SRF grant on a plan to integrate green infrastructure, water efficiency and environmental innovation into water infrastructure funding priorities to ensure that projects selected achieve the most overall environmental benefit, including climate adaptation. Additionally, SRF funds should be prohibited from causing sprawl development that would cause further environmental problems.

New Rulemakings and Actions

First, EPA must not back away from a new rulemaking to reduce stormwater pollution in the Bay watershed. The Strategy repeatedly makes the case that polluted stormwater runoff is the only growing source of pollution to the Chesapeake Bay, and yet states that EPA does not expect to undertake a rulemaking if the Chesapeake Bay states and D.C. strengthen their pollution control programs.[12] Because there is no associated time frame or milestones to evaluate this condition to trigger such a rulemaking, this makes it even

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[6] Report 202a, p.16.
[7] See, Yee Huang, Center for Progressive Reform, *Implications of Pinto Creek for the Chesapeake Bay* (Dec. 18, 2009) and 40 CFR §122.4.
[8] *Id*.
[9] *Id*.
[10] Report 202a, p.18.
[11] See, Katherine Baer, *Green Infrastructure and Water Efficiency Funding in the Chesapeake Bay* (Dec. 15, 2009) www.americanrivers.org/greenfunding.
[12] Strategy, p.28.

more unlikely. Increasingly, it is recognized that strategies to reduce stormwater through infiltration, evapotranspiration and reuse are the most sustainable and treat water on-site rather than sending it untreated downstream. As an example, EPA recently adopted final technical guidance to implement Section 438 of the Energy Independence and Security Act that requires maintenance or restoration of predevelopment hydrology for federal facilities.[13] This standard, translated into managing on-site the total volume of rainfall from the 95th percentile storm, should be more broadly applied. In fact, EPA suggests such an approach in the Report, but fails to follow through in the Strategy by recommending a rulemaking or integrating this standard into stormwater permits.[14]

Second, the use of Residual Designation Authority (RDA), existing authority under the CWA, should be maximized, and American Rivers endorses the recommendations made by the Center for Progressive Reform on this topic.[15] Specifically, EPA should evaluate and maximize the use of RDA to reduce stormwater from existing sources, provide clear information as to how EPA will evaluate where to require new stormwater permits, and consider using RDA to require stormwater permits from existing areas in addition to those vulnerable to future development.[16] RDA is being used successfully, for example, in Massachusetts and should be applied robustly in the Chesapeake Bay where stormwater has been identified as a significant problem.[17]

Third, the strategy recommends working with Bay states on the SRF to encourage investments in restoration projects and to better market the program.[18] While a good start, there is much more that EPA should do to maximize the effectiveness of SRF dollars in the Bay, including integrating climate planning and adaptation into SRF funding decisions. As mentioned above, the "green reserve" portion of stimulus funding and FY10 SRF appropriations is dedicated to sustainable infrastructure approaches. This represents a huge opportunity as the Bay states and D.C. will have approximately $126 million of these green reserve funds in FY10 that can immediately be applied for clean water and climate adaptation. EPA should first evaluate all Bay states SRF programs to determine if states include all federally eligible activities as eligible for state funding. For example, some Bay states prohibit the use of SRF funds to reduce stormwater runoff although this is eligible under the Clean Water Act.[19] Next, EPA should review state criteria and make recommendations as to how states should revise their criteria to better evaluate and prioritize projects that integrate green infrastructure with traditional infrastructure and weigh climate adaptation benefits given that such projects provide multiple benefits to communities and the Bay. Finally, EPA should provide technical

[13] U.S. EPA, Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act (Dec. 2009) http://www.epa.gov/oaintrnt/documents/epa_swm_guidance.pdf.
[14] Report 202a, p.24.
[15] Yee Huang, Center for Progressive Reform, *Enforcement – Use of Residual Designation Authority* (Dec. 31, 2009).
[16] *Id*.
[17] See e.g. http://www.crwa.org/articles/2008/agenciesinMA.html.
[18] Strategy at 29.
[19] U.S. EPA, Green Infrastructure Approaches to Managing Wet Weather with Clean Water State Revolving Funds (July 2008) http://www.epa.gov/npdes/pubs/gi_cwsrf.pdf.

assistance to the states and communities about how to design and build green infrastructure projects and work with the Environmental Finance Center on how best to finance green infrastructure loans.

Green Infrastructure

Protecting, restoring and replicating natural function throughout the watershed must be a key strategy to restore the Bay. The Strategy specifically notes that "[a]t least 36 percent of all forestland is at high risk to development over the next five to 10 years…" causing a "permanent loss of air and water filters, [and] wildlife habitat."[20] Yet, the Strategy fails to address and prioritize existing tools the federal government can use to achieve green infrastructure. One good example is the CWA's 404 permitting process, which allows the destruction of many miles of streams and acres of wetlands every year. To address this, the federal agencies should issue new guidance for 404 permit review, emphasizing the need to "avoid" wetland destruction and reduce the need for mitigation, which is only partially effective. EPA should also aggressively use its 404(c) veto authority to protect valuable wetlands. American Rivers listed the Mattawoman Creek as one of the nation's Most Endangered Rivers in 2009 due to the pending Cross County Connector, which would cut through and spur development in one of the Chesapeake's most productive and pristine tributaries. Already the U.S. Fish and Wildlife Service has weighed in against issuing the permit.[21] The Strategy should elevate similar objections, and if necessary veto by EPA, automatic. Otherwise, the goal to protect the watershed and meet Total Maximum Daily Loads will remain elusive.

Another opportunity to increase effective green infrastructure through the Bay is by integrating these techniques into stormwater and combined sewer overflow permits. EPA has already made clear that green infrastructure can be used in NPDES permits and enforcement actions.[22] The Strategy should build on this by providing consistent outreach and technical assistance to states on how to integrate green infrastructure into permits. Moreover, when reviewing state stormwater permits, EPA should require the use of green infrastructure and low impact development as a viable stormwater control strategy following the example set in EPA Region IX.[23] For instance, while Philadelphia has recently submitted an innovative Long Term Control Plan that largely relies on these techniques, Pennsylvania has drafted an MS4 permit renewal that fails to incorporate any meaningful green infrastructure provisions and EPA should reject the permit until such changes are made.[24]

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[20] Strategy p.23.
[21] See http://weblogs.baltimoresun.com/features/green/2010/01/wildlife_agency_opposes_charle.html.
[22] U.S. EPA, Memo to Water Division Directors regarding Use of Green Infrastructure in NPDES Permits and Enforcement (Aug. 16, 2007) http://www.epa.gov/npdes/pubs/gi_memo_enforce.pdf.
[23] U.S. EPA, letter to San Francisco Bay Regional Water Quality Control Board from Chief NPDES Office EPA Region IX re MS4 permit (April 3, 2009).
[24] American Rivers, letter to Barry Newman, Pennsylvania DEP from Liz Garland regarding Draft MS4 permit (July 9, 2009), arguing that .low impact development should be incorporated into permit terms

Additional Items

There are two additional sources of existing authority that EPA should use to better protect water quality. The first is the more aggressive use of Tier III waters under the CWA. The Tier III designation, for outstanding waters, provides a higher level of protection and yet few states use the designation. Because EPA's guidance on Tier III is extremely vague, EPA should issue new guidance for defining and designating Tier III waters.[25] Second, all of the Bay states have committed to develop numeric nutrient criteria for their streams and rivers. However, the majority of states are well behind schedule according to their own self-imposed schedules.[26] Setting a deadline in the Strategy for adoption of numeric nutrient criteria would be consistent with the overall approach of the Executive Order to set firm deadlines for water quality improvement. Moreover, a recently released report, *An Urgent Call to Action: A Report of the State-EPA Innovations Task Group,* co-chaired by the Association of State and Interstate Water Pollution Control Associations, listed development and adoption of numeric nutrient criteria as one of the top five strategies to reduce nutrient pollution.[27] Without state action, EPA will be forced to promulgate these criteria at some point.[28]

Comments on Habitat and Research Activities to Protection and Restore Chesapeake Bay Living Resources and Water Quality: Revised Report Fulfilling Section 202g of Executive Order

As an active member of the Atlantic Coastal Fish Habitat Partnership (ACFHP), American Rivers thanks the Federal Leadership Committee for the numerous statements in support of ACFHP in the report document. This highly productive public-private partnership has made significant progress in just two years; we look forward to serving a strong role in identifying and implementing projects that restore and protect Atlantic coast species and habitats for years to come.

Prioritize Action to Maximize Ecological Benefits

There is a great wealth of existing information to prioritize species and habitats; American Rivers strongly encourages the Federal Leadership Committee to dedicate resources associated with this objective to collating the extensive existing databases rather than embarking on a wholly new research, assessment and analysis effort. Once the existing data are collated, a gap analysis should be conducted to determine the need for original research and assessment. For instance, as stated previously, transportation agencies are notably absent from Section 202g. It is imperative that the thousands of

[25] Chilson, J. *Keeping Clean Waters Clean: Making the Clean Water Act's Antidegradation Policy Work.* U. Mich. J. of Law Reform (1998.) **32**:549.
[26] U.S. EPA, State Development of Numeric Nutrient Standards (1998-2008) (Dec. 2008) http://www.epa.gov/waterscience/criteria/nutrient/files/report1998-2008.pdf.
[27] U.S. EPA, An Urgent Call to Action: A Report of the State-EPA Innovations Task Group, p. 31 (Aug. 2009) http://www.epa.gov/waterscience/criteria/nutrient/nitgreport.pdf.
[28] See e.g. Florida Department of Environmental Protection, FAQ Related to Development of Numeric Nutrient Criteria http://www.dep.state.fl.us/WATER/wqssp/nutrients/faq.htm.

road crossings are incorporated in analyses that prioritize actions to maximize ecological benefits.

American Rivers encourages the Federal Leadership Committee to dedicate the vast majority of funding available to implementing and monitoring on-the-ground restoration and protection efforts, as opposed to still more planning and analysis. To prevent backsliding, guidance should be established to ensure that this data is consulted during relevant Federal and state permit review processes.

Accelerate Habitat Protection and Restoration - Fish Passage

Restoring aquatic habitat connectivity in the Bay Basin must remain a priority for the Federal family. It is clear that considerable effort has been invested in establishing prioritization methods for addressing dams and other structures that fragment tributaries to the Bay. The four bullets (p. 19 of the 202g strategy) are logical and appropriate. However, the most fundamental criterion of any effort to address a stream barrier is glossed over in the following paragraph -- owner concurrence. When the Federal family and/or the relevant state lacks the authority, resources and/or political will to require and enforce provision of fish passage (fishway or barrier removal), the restoration of access to tens, hundreds, even thousands of miles of river habitats will be a completely voluntary activity.

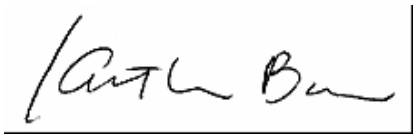
Therefore, the Federal Leadership Committee should strongly encourage the establishment of consistent fish passage laws and policies in the relevant states, and facilitate the enforcement of such laws through provision of necessary resources. Such policies should extend not only to dams, but also to stream barriers such as impassable road crossings and utility lines. The Federal Leadership Committee should also evaluate adoption or improvement of stream crossing standards in the applicable Army Corps of Engineers' State Programmatic General Permits, applicable Regional Permit, or similar regulatory document. These standards should apply to all new and replaced crossings, and should not be restricted to waterbodies supporting migratory fishes at the time of construction, but to all crossings in fish-bearing streams.

American Rivers strongly supports reinstated funding for Fish Passage Coordinators in Maryland, Virginia and Pennsylvania, and encourages the initiation of such a position in New York. We also support the additional listed recommendations.

In closing, American Rivers could not agree more with the Federal Leadership Committee's statement that "[t]he first signs of improvement should be in the freshwater streams and rivers that flow into the Bay."[29] . We look forward to working with the Federal family, states and private partners in achieving this critical goal.

[29] Strategy p.14.

Sincerely



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