

**Statement of Alan L. Wurtzel**  
**Before the Subcommittee on Water and Wildlife**  
**Senate Environment and Public Works Committee**  
**at a hearing entitled**  
**“A Renewed Commitment to Protecting the Chesapeake Bay:**  
**Reauthorizing the Chesapeake Bay Program”**  
**August 3, 2009**

Good afternoon. My name is Alan Wurtzel. I am a lawyer by training, a businessman by profession and a resident of Virginia. For more than twenty years I was an officer and director of Circuit City stores. I took over a family business and built it to a billion dollar corporation before I retired to do other things. They include private investing and serving on a number of not for profit boards, including the Chesapeake Bay Foundation, the Virginia Council on Higher Education, the Phillips Collection in Washington DC and Oberlin College. My residence in Virginia is in Fauquier County, along Goose Creek, which flows into the Chesapeake Bay. I very much appreciate your invitation to be here today.

Chairman Cardin and other distinguished members of the Committee, as you well know, a generation ago Senator Ed Muskie sat in this room chairing hearings of the Subcommittee on Air and Water Pollution. Senator Muskie and a small handful of others in this body believed that the federal government had a strong obligation to its citizens to provide them with a clean, healthy environment. These days we take that pretty much for granted, but at the time it was controversial. However, thanks to the vision of that small group of legislators, today we have the Clean Air Act, the Clean Water Act, and many other environmental laws that have dramatically improved our national quality of life.

The Chesapeake Bay Foundation has been working to “Save the Bay” since 1967. We were instrumental in bringing attention to deplorable state of the Bay long before government got actively involved in trying to solve its problems, and we have been there every step of the way as

the states and the federal government created new agreements and new programs. Our annual State of the Bay report became the standard by which the health of the Bay was tracked, and has been, as the old saying has it, imitated but never duplicated. We currently have about 225,000 members spread across the watershed and the nation, and talented policy, education, and restoration staff members working out of several locations in Pennsylvania, Maryland, Virginia, and the District of Columbia.

Before I speak specifically about the Chesapeake Bay, I ask you to return for a moment to the vision that Ed Muskie and a handful of other Senators had for one of the most fundamental elements of a decent quality of life in the nation's communities: clean water. The first twenty words of the 1972 Clean Water Act are straightforward and completely impossible to misinterpret:

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

Mr. Chairman, thirty seven years after Congressional passage of those words, we have largely failed to honor them. Take hypoxia – dead zones – as just one example. According to the NOAA Administrator, there are now about 250 regions around the country where, during warmer months, there isn't enough dissolved oxygen in the water for aquatic life to prosper, or even, in some cases, to survive. Though the biochemistry of the dead zones is complex, the principal man-made input that causes the dead zones is too much nitrogen and phosphorus which enters the water from many land-based sources.

In the Chesapeake Bay, the observed volume of the hypoxic zone last year (2008) was significantly bigger than it was in 1972, or in any measured year before that. Significant variations occur from one year to the next depending on weather conditions and freshwater flows, so comparing two particular years doesn't provide a scientifically fair picture. However, there is wide scientific agreement that as far as hypoxic and anoxic volumes in the Bay are concerned, there has been no trend in the direction of improvement over the past two decades or more.

The Chesapeake Bay Program is the principal means through which the federal government, in cooperation with the states, has tried to address the dead zones and other Bay issues of concern. During the 1980s, after many years of study, a federal-state Chesapeake Bay Program partnership was created to try to improve the deteriorating condition of the Bay. The 1987 amendments to the Clean Water Act, Public Law 100-4, passed over President Reagan's veto, formally authorized the Chesapeake Bay Program and created the Chesapeake Bay Program Office of the US Environmental Protection Agency to provide it with support (§117; 33 USC §1267). Section 117's authorities were considerably strengthened during its reauthorization as part of the Estuaries and Clean Water Act of 2000, and its authorized funding level was raised from \$13,000,000 annually to \$40,000,000 annually. The current authorization formally expired in 2005.

Good work has been done by the Chesapeake Bay Program partnership over the years, but the hard truth is that the partnership has not solved the problem of water quality in the Bay. A recent report from the EPA to this Committee honestly characterized the overall performance of the Chesapeake Bay Program as "unsatisfactory". Time after time, the partnership has made agreements to substantially reduce the nitrogen and phosphorus pollution that is the Bay's main problem, only to fail to achieve that end. There has been undeniable progress in some areas, but as far as the big stuff is concerned, the problem has not gotten better and may well have gotten worse.

Let me highlight but one example. On June 28, 2000, the Administrator of the EPA, on behalf of the United States, signed the Chesapeake 2000 agreement with the Chesapeake Bay Commission, Maryland, Pennsylvania, Virginia, and the District of Columbia. The 2000 agreement incorporated and reaffirmed earlier commitments made in 1983, 1987, and 1992, and outlined specific targets in five areas including the protection and restoration of the Bay's living resources, vital habitat, and water quality. The 1987 commitment to reduce point and nonpoint nitrogen and phosphorus pollution by 40%, which had not been met, was repeated, and a new commitment was made: to reduce nitrogen, phosphorus, and sediment pollution to the Bay and its tidal tributaries sufficient to remove the Bay from the Clean Water Act section 303(d) impaired water list by 2010.

The nitrogen, phosphorus, and sediment commitments in that agreement are not even close to being met, just as earlier commitments were not met. The 2008 “Bay Barometer” published by the Chesapeake Bay Program includes the line “the overall health of the Bay did not improve in 2008” and notes that only 47% of the 2010 goal for nitrogen reduction has been reached.

The consistent inability of the EPA and the states to achieve the changes necessary to get the Bay cleaned up, or to even get close to meeting their agreed goals, may indicate a serious system failure that goes beyond simple management issues. The Chesapeake Bay Foundation has argued elsewhere that the EPA, particularly under the previous administration, has not been doing its job sufficiently and needs to improve its accountability and overall performance. The recent Executive Order on the Chesapeake Bay requires EPA and other federal agencies to seriously evaluate and publicly report on how they can do a more effective job. We are hopeful that we will see significant changes after the new plan required by the Executive Order is delivered and implemented.

However, Mr. Chairman, the challenge may well be more fundamental. Allow me to revert back to a national perspective for a moment. The Clean Water Act, for all the good that it has done, has only been substantially updated twice in 37 years, most recently nearly a quarter of a century ago. The tools that the Act provides for point source pollution reduction are reasonably strong and effective, but the tools that it provides for nonpoint pollution reduction are simply not. The latest water quality inventory report submitted to Congress (National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle; EPA 841-R-08-00) summarizes the situation neatly:

*In 2004, states reported that about 44% of assessed stream miles, 64% of assessed lake acres, and 30% of assessed bay and estuarine square miles were not clean enough to support uses such as fishing and swimming. Less than 30% of U.S. waters were assessed by the states for this report. Leading causes of impairment included pathogens, mercury, nutrients, and organic enrichment/low dissolved oxygen. Top sources of impairment included atmospheric deposition, agriculture, hydrologic modifications, and unknown or unspecified sources.*

Two of the sources of impairment listed above are significant for nitrogen and phosphorus loading to the Bay. 43% of the nitrogen and 45% of the phosphorus delivered to tidal waters comes from agricultural sources, and as much as 33% of the nitrogen comes from atmospheric deposition. In addition, 16% of the nitrogen and 31% of the phosphorus comes from urban and suburban runoff. Almost all of this is nonpoint pollution, which should not be surprising given the Clean Water Act's primary focus on point source tools.

In fact, a recent submission from the EPA to this Committee notes EPA's conclusion that 60% of the nitrogen load delivered to the Bay, 65% of the phosphorus load, and 96% of the sediment load is "not subject to federal regulation." (Underlining in original EPA document.)

Mr. Chairman, it is now time for Congress to do something dramatically different to improve the tools available to clean up the Chesapeake Bay, and eventually, other streams, rivers, lakes, bays, and estuaries around the nation. We simply cannot tolerate more wasted years of agreements being made and broken, federal and state dollars being spent ineffectually, and the biggest problem of the Bay going unresolved. As EPA Administrator Jackson wrote recently

"The American public has a right to expect their water will be clean, and EPA has an obligation to use its resources and authorities to the fullest to ensure this result. Despite the successes we have achieved over the years, water in the United States is not meeting public health and environmental goals. Too many of our streams, lakes and rivers do not meet our water quality standards."

I believe that the best example of how the United States might approach this problem can be found in the Clean Air Act. As you well know, the Clean Air Act establishes an overall "cap" on the amount of pollution that we put in the air (the National Ambient Air Quality Standards) and requires any state that has designated non-attainment areas to submit an enforceable plan explaining how a state will come into compliance. The State Implementation Plan leaves the states a good deal of flexibility to deal with local circumstances on their way to achieving federal air quality standards. While the Clean Air Act could certainly see some improvement, I am told that the basic framework has helped to reduce the six major air pollutants by more than 50% since the Act was passed.

There is no good reason that such a framework should not be incorporated into the Clean Water Act as well. There is no reason, of course, to revise parts of the Clean Water Act that are working, but rather to add analogs to the Clean Air Act's State Implementation Plans – to the basic framework of the Clean Water Act to make it more effective in the weakest parts. I further want to suggest that the model be tried first in the Chesapeake Bay watershed before being evaluated for the entire country.

I therefore want to use the rest of my statement to make some respectful recommendations for a new and far more effective approach to the challenges of the Chesapeake Bay that have been developed by the Chesapeake Bay Foundation in cooperation with many other partner organizations.

- 1) Rewrite section 117 of the Clean Water Act – the Chesapeake Bay section – to create a national pilot program in improving the Clean Water Act. Don't eliminate the Chesapeake Bay Program partnership, but fundamentally change the responsibilities of the parties. Monitor the results, and if it looks promising, use it as a basis on amending the Clean Water Act in the next Congress.
- 2) Require the Baywide TMDL that is currently under development to contain wasteload allocations for all permitted activities (to be incorporated into such permits no later than May 2011) and load allocations for all unpermitted, significant sources of nitrogen, phosphorus, or sediment. The TMDL should only be approved after a finding of reasonable assurance that the load allocations can be met, and must not allow any net increase in pollution above the caps for new activities.
- 3) Require the states of the Chesapeake Bay watershed to submit to EPA State Water Quality Implementation Plans, analogous to the Clean Air Act's State Implementation Plans, to achieve the TMDL wasteload and load allocations by a specified date. Require EPA to provide minimum criteria and to establish approval and revision procedures for the plans as is done in the Clean Air Act. Such minimum criteria might include enumeration of state-

adopted control measures requiring reductions from pollution sources; state programs to achieve reductions through enforceable of otherwise binding funding commitments; enforcement mechanisms for when a party fails to meet an assigned pollution cap, implementation schedule or permit terms; a requirement for a 2:1 offset for all § 402 NPDES discharge permits to new sources; and assurances that the state will have adequate resources to carry out such implementation plan.

- 4) Require the states to submit reports every two years detailing progress made on achieving pollution caps, as well as any revisions to the plan necessary to meet the caps.
- 5) Provide consequences for a state failing to meet the requirements of the section or making inadequate progress. Such consequences might include the explicit authority for EPA to withhold certain Clean Water Act funds; develop and administer a federal implementation plan; put a moratorium on NPDES permits to new sources; or require permits for currently unpermitted stormwater discharges if they are found to contribute to violations of water quality standards.
- 6) Authorize citizen suits under Clean Water Act section 1365 against states for failure to comply with requirements and against EPA for failure to respond appropriately if the states' progress is inadequate.
- 7) Authorize and set minimum criteria for an interstate nutrient trading program to be available under certain conditions, to allow for possible cost efficiencies.
- 8) Authorize a new competitive grant program to support local governments by facilitating pollution reduction measures required of local governments as part of the Chesapeake Bay State's Water Quality Implementation Plan.

Back in 1972, Ed Muskie was working in the realm of big ideas as he argued for the Clean Water Act. His ideas are equally true today, especially as more and more news emerges about the effect on humans and animals of minute amounts of “emerging contaminants” in our water:

*“It is imperative that we attempt to stop pollution and to restore the quality of our environment. I suggest that we begin by adding to our approach some humble ideas about ourselves and our place upon the planet.*

*“It may be, as some argue, that man is the most adaptable of Earth's creatures. It may be that he can remain essentially the same, changing only slightly as he adjusts to higher levels of pollution.*

*“But what we do not know, and what we cannot predict accurately, are the long-range effects upon man of prolonged exposure to bigger and bigger doses of pollution. Man, no less than the peregrine falcon and the mountain lion, is an endangered species.*

*“He is also the principal danger to himself, the principal polluter of his environment. Foul air, dirty water, ravaged land, are more than complex problems in resource management. What must be managed, and properly managed for our own protection, are our activities within our environment.”*

Mr. Chairman, I want to encourage you and other Senators to take hold of the legacy of Senator Muskie and the other environmental visionaries of the past generation and to move their work substantially forward. You should not let down on your efforts on climate change and biodiversity and all the rest, of course, but neither should you neglect the streams, rivers, lakes, bays and estuaries that are a critical component of the quality of life in nearly all of America's communities. As Administrator Jackson said, the public has a right to expect that their water will be clean. I know that Administrator Jackson will act aggressively as she can to clean up the Chesapeake Bay and the rest of the nation's waters, but the tools that she has at her disposal may just not be up to the job. The federal Clean Air Act provides a useful model to incorporate into the nation's water quality efforts, and the Chesapeake Bay, one of America's great National Treasures, is an appropriate place to start.