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September 15, 2004

Mr. Robert Koroncai
Chesapeake Bay Permitting Workgroup
EPA Region 3
1650 Arch Street
Philadelphia, PA 19103

**Re: EPA Regions II and III Draft NPDES Permitting Approach for Discharges of Nutrients to the Chesapeake Bay; Petition by the Chesapeake Bay Foundation to Compel EPA Rulemaking and other Agency Actions Relating to the Chesapeake Bay.**

Dear Mr. Koroncai:

Please accept the following comments on behalf of the Virginia and Maryland Associations of Municipal Wastewater Agencies, the West Virginia Municipal Water Quality Association, and the Association of Metropolitan Sewerage Agencies.

Please contact me at 804-716-9021 if you would like to discuss this matter.

Sincerely,

Christopher D. Pomeroy

Enclosure

**COMMENTS OF:**

**THE VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES**
**THE MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES**
**THE WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION**
**THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES**

## I. Comments on the Draft NPDES Permitting Approach for Discharges of Nutrients into the Bay

**EPA's July 16, 2004 Letter to CBF**

1. The Associations note that the Update Letter correctly highlights, but in our opinion understates, the substantial nutrient reduction progress of point sources including municipal wastewater treatment plants ("publicly owned treatment works" or "POTWs"). We wish to note that progress has actually been even greater and more praiseworthy in Maryland (where point source nitrogen is down 55% and phosphorus down 65%), Virginia (nitrogen down 37% and phosphorus down 57%) and the District of Columbia (nitrogen down 42% and phosphorus down to near limit of technology levels).

2. The Associations agree with EPA's assessment that point source reductions can only do so much to restore the Bay because in an average year, point sources comprise only about one-fifth of the total nitrogen and phosphorus loads – a small fraction compared to the non-point source inputs that have a far greater impact on the Bay's health.

3. The Associations believe EPA has overlooked a critical point in the Update Letter and one of particular relevance in 2003 and 2004 is that point sources contribute one-fifth of the total load only in years with average precipitation. In years with above average precipitation such as 2003 and 2004 – the worst times for the Bay – point sources are a much smaller percentage of the total load. The extraordinarily high non-point source loads in 2003 and 2004 followed with so-called "dead zones" and algal blooms are a stark reminder that no permit strategy for point sources can address the worst part of the problem because the worst is overwhelmingly caused by non-point sources.

4. The Associations believe the Update Letter fails to address or even acknowledge the critical role of living resources in achieving a restored Bay. Oysters and menhaden once provided an enormous water quality benefit by filtering the Bay's waters and removing algae and sediment. We believe that restoring these species would not only enhance the Bay's fisheries, but would improve water quality at a much lower cost to the public than other strategies focused excessively on constructing ever larger and more complex treatment plants to address just one-fifth of the load or less. EPA should recognize in the final document the significant, multi-faceted benefits these organisms would provide as compared to over-reliance on treatment plant upgrades. Given the

reported lack of water quality improvements from the significant point source reductions noted above, as well as the disappointing reductions from non-point sources, the Bay's best hope for improved water quality may lie in a massive restoration of the filter feeder stocks.

Our comments regarding additional issues raised in both the Update Letter and the Draft Permit Strategy are addressed in the following section.

**EPA's Draft Permitting Approach (Undated)**

1. General Comment. At the outset, we must express our disappointment that despite MAMWA and VAMWA's participation in the CBP's Permitting Workgroup, we first receive the Draft Permitting Approach as an attachment to EPA's letter to CBF. To our knowledge, the Draft had not even been circulated or discussed within the Workgroup notwithstanding its direct responsibility on this topic. We suggest that any future proposals by EPA and the CBP be shared first with the CBP's Permitting Workgroup.

2. Section III, 1st bullet. Consistent with the Clean Water Act, the regulated community desires a logical "ready, aim, fire" approach to water quality investments including (1) setting scientifically sound water quality standards for surface waters, (2) fairly allocating cleanup responsibility to all sources of the pollutant of concern, and (3) issuing and complying with permit limits consistent with the standards and allocations.

Indeed, this general issue is one of the most significant Clean Water Act regulatory issues nationally. To its significant credit, the CBP is generally taking this approach as mentioned in this section of the Draft Permitting Approach. More specifically, we support these efforts by the CBP and the individual states to revise or refine their inaccurate and inappropriate water standards to provide what to this day simply does not exist – a scientifically sound basis for establishing water quality goals in the Bay and its tidal tributaries. This is an essential prerequisite to issuing the permit limits contemplated by the Draft Permitting Approach. The Associations urge EPA and the Bay states to continue this work.

3. Section III, 2nd bullet. Once proper water quality standards are adopted, they alone would not provide a reasonable basis for establishing any particular permit limit. Instead, this requires a determination of how to equitably allocate the environmentally acceptable amount of nitrogen and phosphorus among the various sources in the Bay watershed. This allocation decision is critically important. It drives the level of investment by each source (and, in the case of a POTW, by its ratepayers). It could also limit the ability of a POTW to serve future population growth and economic development. Again, to the CBP's credit, it has developed cap load allocations which (subject to the adoption of state water quality standards, the 2007 reevaluation, and sub-allocation to various point and non-point sources) should provide a foundation for a reasonable and appropriate permitting program.

4. Section III, 3rd bullet. The Associations disagree with EPA's blanket assertion regarding the basis for the James and York River allocations and tributary strategies. As even EPA acknowledges, these rivers are exceptional cases. There has been no demonstration at this point of the environmental and public benefits that would result from massive additional investments beyond the levels called for in the original tributary strategies for these rivers. We urge EPA and Virginia to work together to provide this explanation well in advance of the public comment period for Virginia's proposed water quality standards.

5. Section IV. As a general comment, we firmly support the water quality-based approach reflected through the Draft Permitting Approach as opposed to a "one-size-fits-all" technology-based approach that requires public expenditures on treatment technologies without a direct relationship to attainment of water quality standards. EPA's approach is more cost-effective and is consistent with the Clean Water Act. Notably, the approach builds on the water quality standards development process in which EPA and the Bay states have invested substantial resources. In contrast, a departure from that approach and investment by switching to a technology-based approach would be inconsistent with the Clean Water Act in the case of POTWs. An across-the-board technology-based approach would not be cost-effective and would impose unnecessary treatment obligations on dischargers who have little or no impact on the Bay.

In addition, justifying public expenditure on water quality projects is, rightly so, difficult in the absence of a good reason for making the expenditures. Conversely, it can be significantly more supportable by and acceptable to the public – our citizens and ratepayers - when the real benefits of the investments can be demonstrated. Like the regulatory agencies, POTW operators will be called upon to justify expenditures of public funds with meaningful benefits. The technology-based approach simply fails to make this important connection, and could undermine public support for sewer rate increases where tenable by the underlying rate base, as well as the availability of necessary (state and federal funding), not to mention the restrictions on sewer service extensions and treatment plant expansions for community development that CBF seeks to trigger through its formal Petition filed EPA.

6. Section IV.B and IV.E, Effect of Maryland Water Quality Standards. Notwithstanding the role of Maryland's water quality standards, proper procedures must be followed in establishing permit limits in other states. This is true whether such limits are established by a state or EPA as the permitting authority, and regardless of whether pursuant to state laws or through a TMDL rulemaking by EPA. For example, in Virginia, while reductions in the Potomac and Rappahannock Rivers and on the Eastern Shore are expected by EPA to assist in meeting Maryland water quality standards, Virginia laws and regulations employ a certain process for assigning wasteload allocations to individual facilities. These allocations are in the process of being adopted through revisions to Virginia's Water Quality Management Planning regulations. While Virginia completes this regulatory process, it is inappropriate (and illegal) for EPA to suggest circumventing

it (as the Draft Permitting Approach proposes) by assigning the tributary strategies a regulatory role without observance of the basic Administrative Process Act ("APA") public protections. These APA steps provide important safeguards to the public including, among other things, an economic impact review by the Virginia Department of Planning and Budget and oversight by various policymakers including the Virginia General Assembly. The Associations recommend that EPA revise the Draft Permitting Approach to reflect and respect these long-established public processes of Virginia, and similar requirements in other states.

7. Section IV.B, York and James Rivers. The Associations agree that the York and James Rivers are exceptional cases, and strongly encourage EPA and Virginia to work together to explain how these rivers will be significantly improved through significantly higher expenditures compared to the levels already called for in the original York and James tributary strategies. This demonstration simply has not been made.

8. Section IV.C, Annual Loading Limits. The Associations strongly support the use of annual load limits rather than (1) shorter durations and (2) concentration limits for many of the very same technical and policy reasons outlined in the Draft Permitting Approach and its attached March 3, 2004 EPA memorandum. The Associations urge EPA (and the states) to adopt this approach. In the process, the Associations request that EPA work with the states to develop permit language that provides for how compliance will be assessed and provides a more reasonable scope of liability exposure as compared to that for 365 days of noncompliance – for a single POTW this exposure is $11,862,500 in civil penalties for even one slight exceedance of an annual mass load limit for just one parameter.[1] Multiply by two for nitrogen and phosphorus and that equates to over $23 million in liability exposure each and every year.

This amount is far more than the cost to build many of the existing treatment plants in the watershed. Consistent with the concept in the Draft Permitting Approach of checking compliance with the mass load annual limit on a monthly basis, EPA could recommend an approach that limits liability exposure to the individual days or month(s) after which the annual limit is exceeded. This would still represent a significant potential civil penalty in appropriate cases and one at least as high as applied in various circumstances, while addressing this unintended consequence of the proper shift to the annual average mass load limit approach.

9. Section IV.C, Watershed Permits. The Associations strongly agree that watershed permits should be considered. Watershed permits have been demonstrated to be an effective and efficient method for implementing permit limits as compared to individual permits. They can be especially effective for facilitating compliance in a cost-effective manner, which we believe has been the experience in Connecticut with its general permit for nutrient discharges in the Long Island Sound watershed. We urge EPA and the states to explore how the permit program can be implemented most efficiently for POTWs in

[1] Statutory penalty (as escalated by EPA) to $32,500 per day of violation times 365 days per year.

the Bay watershed so that the citizens of this region can achieve better water quality cost-effectively. Particular attention should be given to establishing a watershed permitting approach for the Potomac River, which presents a significant opportunity to achieve multi-state benefits through trading.

10. Section IV.D, Compliance Schedules. EPA has recommended that regulatory compliance schedules not extend beyond 2010 on the basis that the non-regulatory Chesapeake 2000 Agreement set 2010 as a goal for meeting water quality objectives. However, EPA does not claim to have made any analysis of whether this is a practical target that can be met in the real world. The Associations believe EPA has a responsibility to evaluate the major implications of this suggestion before proposing an approach that risks putting local governments in noncompliance in 2010, exposing them to significant monetary liability, and needlessly increasing the costs to taxpayers and ratepayers for achieving environmental goals.

There are some 350 significant point sources designated Bay-wide. The Associations believe it is impractical for all these facilities to upgrade to meet new wasteload allocations by 2010. Even if it were practical, it would not be in the public interest to have a significant number of upgrades undertaken at the same time in a race to finish by 2010 because the public cost would escalate significantly due to excessive bid prices. We request that EPA investigate what is feasible and practical in terms of a construction schedules Baywide *before* finalizing a Permitting Approach recommending to the states that compliance schedules should terminate in 2010. If EPA has already performed such an analysis, the Associations request a copy.

It would be helpful, for example, for EPA to coordinate with Maryland on the subject of a compliance schedule. With the passage of the flush fee legislation in Maryland, it can be said that "money is no object" now that the state has a mechanism for providing 100% grant funding for completing enhanced nutrient removal projects at Maryland's POTWs. This seems a good starting point for evaluating how quickly a large number of POTW upgrades (albeit only a subset of those to be required throughout the Bay region) can be accomplished.

Federal law allows for compliance to extend for the length of time that is appropriate. That option should not be foreclosed here if it would be benefit to the public, and EPA should not advise the states do so either.

We wish to point out that a compliance schedule extending past 2010 under the regulatory program would not be backsliding on the non-regulatory 2010 goal. Instead, it would be a backstop on the non-regulatory program and one that balances ambitious goals established in the context of an aggressive, non-regulatory program with the practicality of a massive public works program across several states and involving hundreds of projects under a regulatory program. Even with a regulatory compliance schedule extending somewhat past 2010, if warranted, we believe that point sources will still do their share for water quality improvements well before the non-point source

reductions necessary to meet the Bay goals. This means that point sources will not be source of delay in the meeting the new water quality standards.

Put another way, given the lack of water quality response to the point source reductions to date, while we should move expeditiously, there is no justification for unreasonably trying to compress what would otherwise be a reasonable construction schedule. Poor construction at higher prices is all that will result. The apparent fact that there has been little or no water quality response to the substantial point source reductions to date should give all of us some perspective as we proceed with the smaller remaining reductions. EPA and the states should develop aggressive, yet realistic schedules for point source upgrades that do not abandon notions of cost-effectiveness and quality of construction. Even a standard construction schedule will put the point source reductions in place well ahead of the non-point and other reductions that are the real key to restoring the Bay.

11. Section IV.D, Other Technology Requirements and Barriers to Trading. Considering that the states will be issuing permits with protective mass load limits, EPA should delete the recommendation that states consider imposing a new, additional permit requirement for significant point sources to minimize the discharge of nitrogen and phosphorus. Once water quality-based limits are met, such a requirement represents simply another technology-based limit, with added costs, that are unnecessary to meet water quality goals. Furthermore, such a technology-based requirement is likely to undermine other EPA recommendations, for example, by creating a regulatory obstacle to trading. We note that all NPDES permit programs require proper operation and maintenance and that many Association members have a proven track record of outperforming regulatory requirements, especially with regard to nutrient removal in the Bay watershed. We simply see no justification for EPA to impose another permit requirement to optimize nutrient removal. This is akin to hitting an ant with a sledge hammer. The few additional pounds that might be captured under this additional requirement are insignificant. Let's focus on establishing the key pieces to facilitate the major point source reductions and deal with individual operational issues through the existing permit language as we have successfully done for decades.

## II. Comments on the CBF Petition to EPA

### A. General Comments

On December 1, 2003, CBF submitted a petition to EPA asking the agency to take broad regulatory action to address the discharge of nutrients from point sources in the Chesapeake Bay watershed. In support of its petition to EPA, CBF contends that it is "compelled to bring this petition on behalf of the Chesapeake Bay." On behalf of the local governments that have been leading the efforts to restore the Chesapeake Bay, we are compelled to oppose CBF's ill-timed and poorly focused petition.

In essence, CBF would have EPA interfere and interrupt years of work by the Bay states and innumerable stakeholders who have developed tributary strategies and state-based approaches to achieve the new Bay water quality standards. For example, CBF's

call for a technology-based approach is unnecessary and inconsistent with the water quality-based tributary strategies. Moreover, CBF's demands for no new or increased public wastewater plants in the Bay watershed is clearly counter-productive in terms of protecting public health and the environment.

CBF's petition also seeks to disrupt EPA's Action Plan for point source controls in which EPA has set forth a detailed plan for establishing additional controls from point sources. See EPA letter of July 16, 2004, to Roy A. Hoagland of the Chesapeake Bay Foundation, p. 3. EPA and the states should move forward with a rationale approach to guide further reductions from point sources, which represent only one-fifth of the nutrient in an average year and even less in the critical years with above average precipitation.

Finally, the relief that CBF seeks will not solve the Bay's problems. The lack of water quality response being asserted by the U. S. Geological Survey and the Bay Program recently, despite significant point source reductions, compels a conclusion that the further point source reductions sought by CBF alone will not have a major beneficial impact.

It is also time for the Bay Program to make a major effort to restore nature's filtering system for the Bay. While additional (and unprecedented) point source controls will be implemented under the state tributary strategies, we need to accelerate and significantly expand the return and preservation of filter feeders in the Bay. Instead of petitioning EPA and threatening the agency with litigation, and actually litigating against local governments in the Bay, CBF should re-join the regulatory agencies and other Bay stakeholders to work together on reasonable plans to meet the Bay goals.

**B. Legal Considerations**

In addition to the many factual reasons why CBF's petition is improper or unnecessary, CBF's petition is also legally flawed. CBF tells EPA that it must undertake a host of measures including, but not limited to: amending current regulations, issuing new regulations, requiring certain conditions in new permits, reviewing current permits for specific items, and revisiting signed agreements with Maryland and Virginia. CBF not only tells EPA it must do these things, it tells EPA exactly how they should be done, for example, telling EPA the exact numeric limits it should place in permits and even telling EPA the percentage of federal grant money EPA should allocate to the implementation of nutrient reduction technology by significant sewage treatment plants. CBP Pet. at 11, 25.[2] In short, CBF wants to tell EPA exactly how to run the Chesapeake Bay Program and suggests that it will sue EPA if the agency does not adopt these measures.[3] Rather than allow EPA to listen to the stakeholders and interested parties that

[2] On page 25, CBF states that EPA must require that at least 25% of federal CWA grant money be used for nutrient reduction measures.

[3] See CBF press release dated August 6, 2004 stating that because EPA had not agreed with its demands "litigation appears inevitable." Exhibit A.

seek to achieve better water quality in the bay, CBF tells EPA it need only to listen to CBF.

CBF's petition is legally flawed for a number of reasons. First, some of the actions CBF asks EPA to take involve rulemaking procedures such as issuing new rules or amending or repealing existing rules.[4] While a party may seek to have an agency institute rulemaking procedures, such a remedy is appropriate "only in the rarest and most compelling of circumstances." WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C.Cir. 1991); International Union v. Chao, 361 F.3d 249, 255 (3rd Cir. 2004). A party has a "heavy burden" to meet to show that a rulemaking should be ordered. Western Fuels-Illinois, Inc. v. ICC, 878 F.2d 1025, 1031 (7th Cir. 1989). In this case, CBF cannot come close to demonstrating that this is a rare and compelling circumstance requiring agency action. Courts that have taken the extraordinary remedy of compelling agencies to initiate rulemakings have done so only in the face of complete agency inaction and when grave public health consequences are at stake. Public Citizen v. Chao, 314 F.3d 143, 153 (3rd Cir. 2002). In this situation, EPA is committed to restoring the Chesapeake Bay, has committed significant resources to doing so, is working in cooperation with states and other groups to achieve these goals, has set forth a plan to do so and continues to monitor the progress of its plan.[5] This is simply not an appropriate circumstance for a court to compel an agency to undertake rulemaking procedures. Finally, CBF seeks to amend secondary treatment – a national technology based requirement – but does not limit the relief sought to just the Bay states. This approach would undermine the whole structure of the CWA which is based on national technology-based standards for dischargers in addition to necessary, site and water-body specific water quality based limitations. See 33 U.S.C. § 1301(b)(1)(B) and (b)(1)(C).

CBF also asks EPA to take a broad range of other non-rulemaking actions which CBF contends are necessary to meet CBF's own timetables. The types of actions CBF tells EPA it must take include, for example, requiring EPA to breach signed agreements with the states of Maryland and Virginia. CBF Pet. at 24. These actions, however, are all actions which are "committed to agency discretion" and cannot be compelled by CBF. 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821 (1985). CBF acknowledges that the actions it wishes EPA to take are discretionary actions well within the agency's expertise when it criticizes EPA for its "lack of political will." CBF Pet. at 20. This statement is a recognition that the actions CBF seeks to compel the agency to take are not actions that are compelled by law but rather are within the agency's discretion.

In essence, CBF is telling EPA how to conduct its business and is attempting to run the agency on these matters. This approach is contrary to law. Challenges may be brought to specific agency decisions, but not to agency activities as a whole. Florida Power & Light C. v. Lorion, 470 U.S. 729,744 (1985). CBF is trying to usurp the agency's function and substitute its judgment for that of the agency. The courts have consistently held that certain matters lie within the expertise and judgment of an agency

[4] CBF Pet. at II A, B, C and E.

[5] EPA letter of July 16, 2004, to Roy A. Hoagland of the Chesapeake Bay Foundation.

and those matters are to be resolved by the agency. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

### C. Responses to Specific Arguments in CBF Petition

#### 1. Contrary to CBF's Contention, the Agreed Upon Nutrient Loading Allocations Will Achieve Significant Reductions.

CBF attacks the Chesapeake 2000 Agreement ("C2K") that was signed by Maryland, Virginia, Pennsylvania, the District of Columbia, the United States and the Chesapeake Bay Commission. In particular, CBF assails the Water Quality Steering Committee ("WQSC"), the primary vehicle created by C2K for the discussion of water quality and nutrient pollution, for not adopting a greater goal for the reduction of annual nitrogen loadings. CBF Pet. at 8-9. While noting that the goals were set after a great deal of deliberation and many meetings and after reviewing the input from representatives of the Bay states, CBF alleges that the goals were a "political compromise" and do not achieve enough reductions. CBF Pet. at 9.

CBF's contention that the 175 million pound nitrogen reduction goal for the Bay is under-protective of Bay water quality is wrong. This goal, which the states are committed to achieving, will require tremendous nitrogen reduction and will be extremely costly to implement. Implementation of these reductions is estimated to cost in excess of $10 billion in Maryland and between $3-4 billion in Virginia. To put this in perspective, this level of nutrient reduction has never been achieved for any major waterbody in the Country, let alone on the scale of the Bay watershed. This goal calls for twice the tremendous reductions achieved to date, but in half the time. By any measure, the new Bay goals are extremely challenging.

If a problem exists with the 175 million pound goal, it is that the goal may not be attainable – a critical issue that EPA deferred in its standards adoption activities with the Bay states. Before EPA even considers injecting a federal technology-based requirement for POTWs in the Bay watershed, it should first evaluate the attainability of the water quality goals that would drive the EPA action.

The petition also suggests that the current standards of 5.0 mg/l DO baywide must be met and that anything less is unacceptable. CBF Pet. at 10. The reality, which is well known to CBF, is that the deep waters of the Bay, as well as some other areas, have never met the 5.0 standard -- even back in colonial times. Moreover, it is undisputed that these waters never will meet a 5.0 mg/L standard. The 5.0 mg/l DO standard is not naturally attainable and, therefore, not appropriate or even necessary for many areas of the Bay. Because CBF bases its petition on the achievement of an impossible standard, EPA must reject it.

### 2. CBF's Command to EPA to Issue New Regulations to Specify a Technology-Based Effluent Limit of 3 mg/l for Total Nitrogen is Unwarranted.

There is simply no need for EPA to inject a technology-based approach when the Bay has a much more targeted and efficient approach connected directly to water quality goals as implemented through the locally-developed tributary strategies consistent with the Clean Water Act statutory scheme. See 33 U.S.C. § 1301(b)(1)(B) and (b)(1)(C). We cannot understand why CBF would try to compel broad federal mandates to tell citizens of the Bay states how best to achieve the desired reductions. Significantly, CBF does not allege that the tributary strategies are inadequate or even dare to suggest that a crude technology-based approach is in any way superior to the tributary plans which have been painstakingly developed by local stakeholders.

Even if the tributary plans were inadequate, CBF is wrong in its contention that a technology-based requirement for total nitrogen of 3 mg/l (annual average) is both achievable and affordable. It is neither. We note that CBF elected not to provide any information with its petition to support the achievability of 3 mg/l on an annual average basis by POTWs in the Bay watershed. Moreover, CBF's argument that the requirement is achievable is directly contrary to their position on the recent Maryland flush fee legislation. During the debate over that legislation, CBF acknowledged that some Maryland POTWs may not be able to meet 3 mg/l and agreed to language that would allow Maryland to specify alternative, higher, requirements on a case-by-case basis.

In terms of affordability, the Petition does not provide any information about the affordability of a 3 mg/l requirement other than to cite to a draft EPA document that, according to the Petition, merely asserts that installation of unspecified nutrient control technologies "are affordable for POTWs in many communities in the Bay watershed…." (emphasis added). CBF fails to provide EPA with any information about whether technologies to achieve the 3 mg/l level of control are affordable. The information available from the petition either does not answer these questions or strongly suggests that more study is necessary.[6]

There are several other reasons why CBF's call to amend the definition of secondary treatment to impose a 3 mg/l total nitrogen annual average requirement on POTWs is not warranted. First, such an approach would disrupt the states' tributary strategies, which set other levels of control for POTWs generally taking into account water quality benefits, technical feasibility, the need for these facilities to serve future growth, cost, cost-effectiveness, affordability, and many other factors. Second, such an approach is unnecessary and inefficient given the water quality-based permitting programs. At one time, secondary treatment played a role -- a congressionally funded role. Today, imposing broad technology mandates is inefficient and unnecessary because advanced water quality programs such as wasteload allocations and TMDLs are in place

[6] It bears noting that the estimate to achieve approximately 3 mg/l at just the largest 66 POTWs in Maryland is in excess of $1 billion – a figure which CBF has never disputed.

that fine tune the need for additional treatment instead of inefficiently mandating a one-size-fits-all approach. Finally, the secondary treatment regulation was developed and implemented with federal grant funding. The facilities necessary to meet the definition of secondary treatment have already been built. It is inappropriate to change the technology mandate at this time when the water quality-based programs are a more appropriate and efficient way for addressing these issues.

### 3. EPA is not Required to Issue a Rule to Force Watershed States to Include Effluent Limitations for Total Nitrogen and Total Phosphorous in Existing NPDES Permits

CBF argues that EPA must initiate rulemaking procedures to adopt a rule to force states to put limits in NPDES permits for discharges of nitrogen and phosphorous from point sources into the Bay. CBF Pet. at 13. In support of this argument, CBF advances an overly simplistic reading of the Clean Water Act that has been rejected by the courts. CBF argues that because nitrogen and phosphorous are pollutants that are discharged from point sources into navigable waters, EPA has no discretion and must require that enforceable effluent limits must be placed in all permits. CBF Pet. at 13-14, citing CWA section 301(a). This argument, seeking in effect a categorical ban on states from issuing permits without nutrient limits, misconstrues the Clean Water Act and nothing in the Act can be read to create such a ban. See Arkansas v. Oklahoma, 503 U.S. 91, 108 (1992).

EPA and the States have broad authority to develop long-range, area-wide programs to alleviate pollution and are doing so with regard to nutrients. See, e.g, 33 U.S.C. §1288(b)(2). Permit limits have been included where there have been near field nutrient issues that were addressed by TMDLs. Permit limits have not been included for the broader Chesapeake Bay issues because these far field concerns have been adequately addressed by the States through a variety of other approaches and controls such as the Virginia Water Quality Improvement Act, the Maryland Water Quality Improvement Act, the Maryland Flush Fee legislation, and the addition of Attachment A language in Maryland Discharge permits. This comprehensive approach to point sources has achieved unprecedented nutrient reductions and will ensure significant further progress.

### 4. EPA is not Required to Halt all Permits for New or Expanded Facilities

In its petition, CBF argues that EPA must require that no NPDES permits be issued in Bay watershed states for new or expanded facilities.[7] The petition would stop any and all new public wastewater treatment plants as well as any plant expansions. This request is unwarranted from a public health and environmental protection perspective. Precluding new or expanded public wastewater plants will force all development onto on-site systems. On-site systems present grave problems for the Bay. They are generally

[7] CBF states that permits could be issued with appropriate limits but then sets those limits at zero, thus, in reality, CBF is arguing that no new or expanded permits may be issued.

unregulated with respect to their impacts on the Bay, are not monitored, and are enormously expensive to address once installed. Moreover, according to CBF, septic systems discharge greater loadings to the Bay than equivalent sanitary flows treated by nutrient removing POTWs. Finally, studies have documented that septic systems raise other public health issues relating to bacteria at the sites as well as in nearby receiving waters. Prohibiting the development of new or expanded POTWs will force development onto on-site systems. This will be counterproductive to public health and the reduction of nutrients entering the Chesapeake Bay.