

**Submitted via Regulations.gov**

Alec Mullee  
Water Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
May 19, 2023

**RE: Proposed Settlement Agreement: Clean Water Act and Administrative Procedure Act Claims  
Docket ID No. No. EPA–HQ–OGC–2023–0243**

Dear Mr. Mullee:

The Chesapeake Legal Alliance (CLA) writes to urge the U.S. Environmental Protection Agency (EPA) to commit to the fullest and most vigorous implementation of the proposed Settlement Agreement. While CLA is disappointed that EPA did not agree to a more robust set of measures consistent with its obligations under Section 117 of the Clean Water Act, the 2014 Chesapeake Bay Watershed Agreement, E.O. 13508, and the broader accountability framework established by the Chesapeake Bay Total Maximum Daily Load, there are some *potentially* valuable features of this Agreement that could meaningfully improve water quality, public health, and climate resilience if EPA fully commits to their implementation.

Though CLA believes EPA should have committed to a broader suite of measures, the Settlement Agreement does contain some potentially useful actions in Section III. For example, Paragraph III.4.a commits EPA to identify animal feeding operations that may meet the regulatory criteria for designation as a CAFO, using existing federal regulatory authority. Such an action could constitute an important backstop action of the sort that EPA should have employed many years ago, per the pledged consequences EPA had established contemporaneously with the TMDL for state sectors that fell behind progress milestones. Similarly, the commitment in Paragraph III.4.d to evaluate whether certain point sources of stormwater pollution contribute to water quality standard violations constitutes a valuable exercise of the rarely used “residual designation authority” under the Clean Water Act that EPA should most certainly be exercising going forward, particularly in light of EPA’s separate commitment last year to utilizing legal tools, including this particular authority, to advance environmental justice.

Moreover, in the context of basic permitting and enforcement measures, the Settlement Agreement requires EPA to take certain basic steps that could have beneficial short term impacts. Paragraph III.2.a will likely require Pennsylvania to accelerate the renewal of a significant number of Clean Water Act permits that are presently expired or administratively continued and should have been reissued long ago with improved and modernized pollution controls. And under Paragraph III.3, EPA commits to at the very least maintaining, if not increasing, its enforcement and compliance assurance activities and to more effectively target them in the counties that contribute the most to nutrient and sediment loading to the Bay. These too are examples of activities that EPA should have been undertaking all along pursuant to the accountability framework of the Bay TMDL. Nevertheless, they could begin to yield results.

It is important to emphasize, however, the conditionality of this Agreement’s *potential* benefits. Perhaps the greatest disappointment of this Agreement is not the lack of creativity or ambition in its terms, but in the

substantial degree of discretion reserved by EPA. It is simultaneously possible that this Settlement Agreement could lead to a significant acceleration of pollution load reductions, or to no reductions at all. Not a single action in Section III of the Agreement can be said to deliver pollution reductions with certainty.

By consistently and repeatedly emphasizing that EPA *may, in its discretion*, take an action *if it determines* that some action is warranted, the public cannot have any confidence that the Settlement will certainly result in any meaningful change to the status quo. In other words, by reserving discretion to undertake further action, EPA is leaving the success or failure of this Agreement up to advocates and the public once again. It remains incumbent on the public to continue to push EPA to abide by its commitments to the Chesapeake Bay.

EPA has repeatedly emphasized that states have a “heightened obligation” under their delegated authority because of the Bay TMDL, but EPA does not appear to view its own obligation as heightened in this way. We had hoped that the resolution of this Agreement would provide an important reaffirmation from EPA of its special and particular responsibilities and reveal a path forward to accelerating progress toward the Chesapeake Bay TMDL pollution reduction goals. Nevertheless, like dozens of other partnering organizations and hundreds of thousands of public supporters, CLA will continue to do our part to advocate before EPA and state agencies to vigorously apply your authority and dutifully execute your statutory charge to bring about a restoration of water quality for communities across the watershed.

Thank you for the opportunity to provide this comment,

David L. Reed  
Executive Director  
Chesapeake Legal Alliance