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Glyphosate and Dicamba: *The Registration Drama*

2023 Pennsylvania Farm Show | Agricultural Law Symposium

Presented by Chloe Marie, Research Specialist

January 12, 2023, at 2:15pm (EST)





Dicamba – *a little background*

- December 20, 2016 – EPA granted two years conditional registrations for new uses of three dicamba products: *XtendiMax*, *Engenia*, and *FeXapan* on dicamba-tolerant (DT) soybean and cotton.
- October 31, 2018 – EPA extended for two additional years the conditional registration of dicamba products *XtendiMax*, *Engenia*, and *FeXapan* along with new labeling requirements and application restrictions.
- January 11, 2019 – National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and Pesticide Action Network North America petitioned the Ninth Circuit Court of Appeals for review of the 2018 registration decision. *Nat'l Family Farm Coalition, et al v. U.S. EPA*, No. 19-70115
 - June 3, 2020 – the Ninth Circuit Court overruled EPA's registrations of *XtendiMax*, *Engenia*, and *FeXapan* after concluding that EPA “substantially understated risks that it acknowledged;” EPA “failed entirely to acknowledge other risks.”



5-year EPA Registration for Dicamba

- Bayer and BASF filed in July 2020 applications for new registrations of *XtendiMax* and *Engenia* for use on DT cotton and DT soybeans; Syngenta filed an application to extend the registration of *Tavium*, which was scheduled to run out on December 20, 2020.
- October 27, 2020 – EPA [approve](#) five-year unconditional registrations of *XtendiMax*, *Engenia*, and *Tavium* with the following restrictions:
 - Are for new uses on DT soybeans and DT cotton only
 - Prohibit soybean application after June 30 annually and cotton application after July 30 annually
 - Require the dicamba products to be tank-mixed with a pH-buffering agent prior to application
 - Requires farmers to maintain a 240-foot “downwind buffer” and a 310-foot buffer in listed species locations
 - Prohibit applications during temperature inversions and at any time other than between one hour after sunrise and two hours before sunset
 - States’ authority to impose further regulations on pesticide use is limited.



EPA's Incident Report on the Use of OTT Dicamba

[Status of Over-the-Top Dicamba: Summary of 2021 Usage, Incidents and Consequences of Off-Target Movement, and Impacts of Stakeholder-Suggested Mitigation](#) (EPA-HQ-OPP-2020-0492-0021; issued on December 21, 2021)

- *“Dicamba incidents continue at high numbers relative to recent past. They occur over a large geographic range and damage occurs on a wide range of plant species. There is no change from previous years in the number, severity, or geographic extent of incidents. In 2020, EPA estimated that dicamba incidents were underreported by a factor of 25; no evidence suggest that underreporting has changed.”*
- *“Incidents affected more than 1 million acres of non-DT soybean and at least 160,000-acre of vegetation in a wildlife refuge in 2021.”*
- *“Incidents were reported in 29 of the 34 states where use of dicamba on DT crops is authorized.”*



EPA's Registration Amendments

- March 15, 2022 – EPA announced in a press release it approved label amendments to the October 2020 registration to further restrict the use of over-the-top (OTT) dicamba in the states of Minnesota and Iowa.
 - Prohibits OTT dicamba application on DT-crops after June 20 in Iowa
 - Prohibits OTT dicamba application on DT-Crops south of I-94 after June 12 in Minnesota – for land situated north of I-94, the cut-off date remains June 30
 - Prohibits OTT dicamba application when the air temperature is over 85 degrees at the time of application in both Minnesota and Iowa
 - Prohibits OTT dicamba application in Minnesota if the forecasted high temperature of the nearest available location exceeds 85 degrees.
- *“These restrictions are intended to reduce the likelihood of volatility and offsite movement of over-the-top dicamba ...”*

[EPA Approves Label Amendments that Further Restrict the Use of Over-the-Top Dicamba in Minnesota and Iowa](#) (Released on March 15, 2022)



Dicamba Registration Related-Litigation

Nat'l Family Farm Coalition, et al. v. U.S. EPA, Ninth Circuit, No. 17-70196

- January 20, 2017 – Petitioners challenged EPA's final order entered on December 20, 2016, granting a conditional registration for the news use of dicamba on DT-soybean and DT-cotton.
- January 10, 2019 – The Ninth Circuit Court filed an order dismissing the petition as moot, following the expiration of the 2016 conditional registration on November 9, 2018.

Nat'l Family Farm Coalition, et al v. U.S. EPA, Ninth Circuit, No. 19-70115

- January 11, 2019 – Same petitioners [sought review](#) of EPA's approval decision to extend for an additional two years the conditional registration of dicamba for new uses on DT-cotton and DT-soybean.
- June 3, 2020 – The Ninth Circuit [vacated](#) EPA's approval of conditional two-year registration of dicamba; thus, prohibiting the herbicide from being used and sold in the United States.



Nat'l Farm Coalition et al. v. U.S. EPA , et al. **Ninth Circuit, No. 20-73750**

- December 21, 2020 – The group of petitioners again [sought review](#) of EPA's 2020 5-year registration approvals of dicamba products for:
 - "failing to support its unconditional registration conclusion of no unreasonable adverse effects on the environment with substantial evidence ..."
 - "refusing to hold notice and comment on the decision embedded in the Registration Decision to eliminate state pesticide restriction authority under section 24 of FIFRA."
 - "failing to consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service to insure that the Registration Actions will not jeopardize any listed species or destroy or adversely modify any of their critical habitats."
- The case was transferred to the U.S. Court of Appeals for the District of Columbia, No. 21-01043, and consolidated with *American Soybean Association v. Regan*, No. 20-01441.
- August 6, 2021 – Petitioners filed a motion to voluntarily dismiss the Ninth Circuit Court's case proceedings; later granted by the court with prejudice.



Center for Biological Diversity et al. v. U.S. EPA , et al. **USDC Arizona, No. 4:20-cv-555**

- December 23, 2020 – The same group of petitioners [filed](#) a parallel lawsuit mirroring similar claims as the ones argued before the Ninth Circuit Court.
 - “... the Registration Actions again either underestimate or ignore risks and costs to farmers and the environment from its decision.”
 - “... the decision also found separate ways to violate FIFRA beyond the substantive errors in the registrations ... EPA admitted it lacked all the necessary studies in order to register the products ‘unconditionally.’”
 - “... EPA also violated FIFRA and the APA by failing to provide a formal notice and comment period despite approval of a new use of these products ... because there was no prior *lawful* new use, this attempt is still EPA’s first attempt at a lawful new use, which under FIFRA should require notice and comment”
 - “... EPA’s failure to hold notice and comment prior to its removal of state’s authority under FIFRA section 24(c) violated the APA.”



Center for Biological Diversity et al. v. U.S. EPA , et al. **USDC Arizona, No. 4:20-cv-555**

- November 15, 2021 – The Arizona Federal District Court ordered a stay of the case proceedings pending resolution of the jurisdictional issue before the D.C. Circuit Court (*since dismissed with prejudice in September 2021*)
- January 6, 2022 – Plaintiffs filed a motion to lift the current stay following the release in December 2021 of EPA’s Incident Report on the Use of OTT Dicamba.
 - “EPA’s recent admissions mark a drastic change in circumstances warranting a lift of this Court’s stay. When this Court granted its initial stay, EPA stood firmly behind the adequacy of its assessments and label restrictions to prevent unreasonable adverse environmental effects and behind its no effect determinations for endangered species, and the extent of dicamba drift damage caused by the 2020 Registration was yet unknown. That is no longer the case.”
- June 7, 2022 – Plaintiffs filed a motion to amend their first amended complaint to include additional claims against EPA’s March 2022 Registration Amendments.
- October 14, 2022 – The court lifted the stay and granted Plaintiffs’ motion to amend their first amended complaint.



American Soybean Association et al. v. U.S. EPA , et al. **USDC D.C., No. 1:20-cv-3190**

- November 4, 2020 – American Soybean Associations (ASA) and Plains Cotton Growers, Inc. [sued](#) EPA seeking a declaratory and injunctive relief against the application restrictions imposed in EPA’s 2020 Registration of dicamba products.
 - “... several registration conditions impose growing restrictions and disrupt growing seasons which will diminish crop yields, cut productivity, and drive up operational costs. Some of these conditions are significantly more stringent than those found in past dicamba registrations.”
 - “... this case seeks remand of EPA’s temporal dicamba application restrictions and spatial application buffers.”
 - “This action also seeks to confirm that the remainder of EPA’s registration decision satisfies FIFRA, the ESA, and the Administrative Procedures Act.”
- September 3, 2021 – The district court stayed the case proceedings pending resolution of separate lawsuit *American Soybean Association v. Regan*, No. 20-1441.
- May 9, 2022 – Plaintiffs filed a motion to temporarily lift the stay “for the limited purpose of supplementing their pleadings to include” additional claims related to EPA’s March 2022 Registration Amendments; the motion was granted a few days later.



Glyphosate – *a little background*

- Glyphosate is the active ingredient in Roundup products as well as one of the most used herbicides in the United States.
- Section 3(g) of FIFRA requires EPA to conduct a periodic registration review of pesticides every 15 years.
 - “... the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risks to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.”
- EPA [initiated](#) a registration review process for glyphosate on July 22, 2009
 - (Docket EPA-HQ-OPP-2009-0361)
 - [Registration Review – Preliminary Ecological Risk Assessment for Glyphosate and its Salts](#) (issued in September 2015; available for public comment in February 2018)
 - [Glyphosate Draft Human Health Risk Assessment for Registration Review](#) (issued in December 2017; available for public comment in February 2018)



Glyphosate Interim Registration Review Decision

- February 3, 2020 – EPA published its [Glyphosate Interim Registration Review Decision](#).
 - “The EPA concludes that the benefits outweigh the potential ecological risks when glyphosate is used according to label directions.”
 - “The agency is requiring label changes to reduce off-target spray drift and establish a baseline level of protection against spray drift that is consistent across all glyphosate products. Reducing spray drift will reduce the extent of environmental exposure and risk to non-target plants and animals.”
 - “A final decision on the glyphosate registration review case will occur after: (1) an EDSP FFDCA §408(p) determination, (2) an endangered species determination under the ESA and any needed §7 consultation with the Services, and (3) a resolution of the EWG et al. petition.”



Natural Resources Defense Council et al. v. U.S. EPA , et al., Ninth Circuit, No. 20-70787

- March 20, 2020 – Natural Resources Defense Council and Pesticide Action Network North America [sought review](#) of EPA’s glyphosate interim registration review decision.
 - The case was later consolidated with *Rural Coalition, et al. v. U.S. EPA*, No. 20-70801.
- June 17, 2022 – The Ninth Circuit Court issued an [opinion](#) vacating the human health portion of the interim decision and remanded for further analysis. In addition, the court remanded the ecological portion of the interim decision without vacatur and required EPA to issue a new ecological risk assessment by October 1, 2022.



Withdrawal of EPA's Interim Decision for Glyphosate

- September 23, 2022 – EPA published an [agency memorandum](#) fully withdrawing its glyphosate interim registration review decision.
 - “EPA explained that, while the court did not define what it meant by ‘issue a new ecological portion,’ the Agency would not be able to finalize a new ecological portion in a registration review decision for glyphosate by the October 1, 2022, deadline because of the time needed to address the issues for which EPA sought remand and to complete consultation under the ESA.”
 - “Although the glyphosate ID is now vacated in part and the remainder withdraw, that does not automatically mean that EPA’s underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely carcinogenic to humans, are either incorrect or cannot be used as support for a future decision following reconsideration in accordance with the court’s decision.”
 - “EPA anticipates issuing a final registration review decision for glyphosate in 2026.”



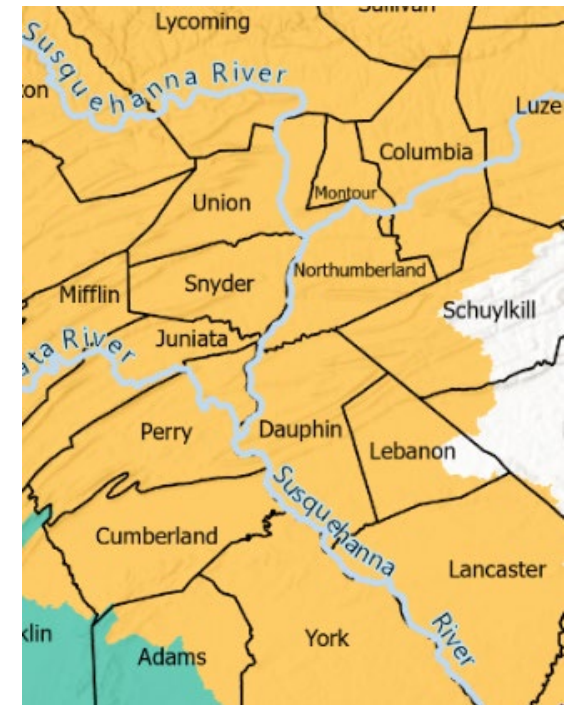
Agriculture & the Environment: **2022 in the Chesapeake Bay**

**3rd Annual Pennsylvania Farm Show
Agricultural Law Symposium**

**January 12,
2023**



**Clean water:
Great for PA
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Pennsylvania Announces Amended Watershed Implementation Plan to Meet 2025 Chesapeake Bay Pollution Reduction Goals

- On January 5, 2022, the Pennsylvania DEP [announced](#) that with the amendments to its [Phase 3 Watershed Implementation Plan](#) (WIP) **submitted to the EPA on December 31, 2021**, and provided adequate program funding is maintained for its WIP, Pennsylvania will be able to meet its 2025 nutrient and sediment pollution reduction goals.
- The goals require the state to reduce nitrogen by 32.5 million pounds and phosphorus by 0.85 million pounds.
- As of 2020, Pennsylvania has reduced nitrogen by 6.77 million pounds and phosphorus by 0.3 million pounds.
- According to DEP, the WIP as amended will: (a) reduce nitrogen by 7.8 million pounds through multi-year and structural best management practices (BMPs) between 10-15 years of age which continue to function despite EPA modeling not attributing credit for their continuing reductions due to age; and (b) achieve a reduction of 16.8 million pounds of nitrogen through the coming implementation of a full complement of 34 [Countywide Action Plans](#) (CAP) across the watershed.
- Additionally, Pennsylvania will reduce nitrogen by 6.1 million pounds through forestry practices, wastewater treatment, stormwater management, and agricultural nutrient management.
- \$324.2 million annually remains the funding need.



Chesapeake Bay Principals' Staff Committee and Pennsylvania DEP Respond to EPA's 'No Confidence' Evaluation of Funding for Conowingo Watershed Implementation Plan

- On March 21, 2022, six representatives of the Principals' Staff Committee (PSC) Members of the Chesapeake Bay Program (CBP) issued a [letter](#) to Adam Ortiz, the new U.S. Environmental Protection Agency (EPA) Region III Administrator, in response to EPA's [January 2022 evaluation](#) of the [final Conowingo Watershed Implementation Plan](#) (CWIP). In that evaluation, EPA stated that it had "no confidence" that the proposed nitrogen and phosphorus load reductions would be accomplished "[w]ithout dedicated funding in place." EPA PSC Members 60 days to address the lack of dedicated funds before the agency acted to redistribute the six million pounds of nitrogen and 0.26 million pounds of phosphorus "among the partnership jurisdictions as appropriate."
- On March 25, 2022, Pennsylvania Department of Environmental Protection (DEP) also sent a [letter](#) to EPA Administrator Ortiz in response to EPA's evaluation outlining several sources of potential and established CWIP funding.
- Both letters from the PSC and DEP request federal funding from EPA to secure the CWIP, and DEP's letter specifically calls for funding from the federal Infrastructure Investments and Jobs Act (enacted 11/15/21) to implement both the CWIP and state-specific watershed implementation plans.



EPA and USDA Detail 2022 Chesapeake Bay Restoration Funding and USDA Task Force on Crediting Bay Investments

On May 2, 2022, the U.S. Environmental Protection Agency (EPA) [announced](#) nearly \$48 million for 2022 Chesapeake Bay restoration from the Infrastructure Investment and Jobs Act ([H.R.3684](#)), a.k.a. the Bipartisan Infrastructure Law, which appropriated \$238 million for Chesapeake Bay restoration through 2026. In addition, on May 6, 2022, the U.S. Department of Agriculture (USDA), National Resource Conservation Service (NRCS) [announced](#) \$22.5 million for 2022 release through the Chesapeake Bay States' Partnership Initiative. Lastly, on May 6, USDA [announced](#) the establishment, without further immediate detail, of a new *Task Force on Crediting Chesapeake Bay Conservation Investments* intended to identify and more fully credit farmers' existing conservation efforts.





Water Quality: High-Resolution Imagery of Land Use Change in Chesapeake Bay Watershed Released

On May 17, 2022, the Chesapeake Bay Program, the U.S. Geological Survey, the Chesapeake Conservancy and the University of Vermont [announced the release](#) of the free, publicly-accessible and interactive “[Very High- Resolution Land Use/Land Cover and Change Data](#),” which reflects land cover and land use change 30 times higher than satellite imagery previously used, across 99,000 square miles and 206 counties of the Chesapeake Bay watershed between the years 2013-14 and 2017-18. The on-line data set and imagery is contained at “[CBP Land Use/Land Cover Data Project](#)” website and includes a 61-page [overview of the project](#) and a [recorded webinar](#). Four of the seven largest increases in impervious surface were the Pennsylvania counties of Lancaster (#2; 2,424 acres), Chester (#4; 2,002 acres), York (#5; 1,770 acres), and Cumberland (#6; 1,763 acres).



Enacted Pennsylvania 2022-23 Budget \$220 Million in New Clean Streams Fund

On **July 8, 2022**, Pennsylvania Governor Tom Wolf signed into law [Act No. 1A of 2022](#), titled the “General Appropriation Act of 2022” and [Act No. 54 of 2022](#), commonly referred to as the “2022-2023 Fiscal Code Bill,” both of which together provide the primary state fiscal year 2022-23 budget for the Commonwealth of Pennsylvania government.

- The budget created the Clean Streams Fund, which will receive \$220 million of Pennsylvania’s federal American Rescue Plan funding appropriation, and which is made non-lapsing (can be used fiscal year-after-fiscal year until 100% expended).
- Among other authorized uses of those funds in the statute, 70% is to be distributed to the State Conservation Commission (SCC) to implement a newly created statutory program called the Agriculture Conservation Assistance Program (ACAP). Those funds shall be used for the purpose of “preventing nutrient and sediment pollution” generally and are to be distributed via grants according to criteria in the statute to address impaired waters throughout the state, including those within the Chesapeake Bay Watershed which will help meet Pennsylvania’s 2025 reduction mandates for nitrogen, phosphorus and sediment contributions to the Bay.





Pennsylvania Enacts Turf Fertilizer Law

- On July 11, 2022, Pennsylvania Governor Tom Wolf signed into law [Act No. 83 of 2022](#), amending the Agriculture Title of Pennsylvania Consolidated Statutes (Title 3) to add new Chapter 68, Sections 6801 – 6832 titled “Fertilizer.”
- It adds for the first time to Pennsylvania law, after over a decade of unsuccessful attempts, a comprehensive regulatory scheme applicable to the use of fertilizer not in connection with the production of crops, livestock or poultry, e.g. fertilizer labeled for turf uses.
- The enactment of this legislation is one of Pennsylvania’s state programmatic priority initiatives to achieve nutrient reductions contained in the [Pennsylvania Phase 3 Chesapeake Bay Watershed Implementation Plan, Final August 2019, AMENDED July 2022](#) and is described therein as follows: “This bill . . . would limit nitrogen and phosphorus in consumer-level fertilizer as well as nitrogen and phosphorus applications by professional lawn companies, unless they prepare a site-specific nutrient management plan.”





Pennsylvania Submits Final Phase 3 Watershed Implementation Plan

On July 19, 2022, the Pennsylvania Department of Environmental Protection (DEP) [submitted](#) to the U.S. Environmental Protection Agency (EPA) an amended [Pennsylvania Phase 3 Chesapeake Bay Watershed Implementation Plan, Final August 2019, AMENDED July 2022](#) reflecting, among other things, the new programs and funding contained in the Pennsylvania FY 2022-23 Budget bills, most notably the creation of the Clean Streams Fund providing funding of approximately \$154 million to the State Conservation Commission (SCC) to implement new Agriculture Conservation Assistance Program (ACAP) grants for the purpose of “preventing nutrient and sediment pollution” in impaired waters, including those including within the Chesapeake Bay Watershed.





Water Quality: Bell & Evans Subsidiary Settles Suit Over Six Years of Unpermitted Nitrogen Discharges into Chesapeake Tributaries

- On July 21, 2022, the Lower Susquehanna Riverkeeper Association [announced](#) a settlement by [Consent Decree](#) of its 2019 federal lawsuit against Keystone Protein as a result of six years of Clean Water Act and NPDES Permit violations from unpermitted nitrogen discharges between 2014 – 2020 into Chesapeake Bay tributaries from its Fredericksburg, Lebanon County, Pennsylvania rendering operation. *Susquehanna Riverkeeper et al v. Keystone Protein Company*, [No. 1:19-cv-01307](#).
- The plant is wholly owned and operated by the national organic poultry industry leader Sechler Family Foods, Inc. and the Bell & Evans poultry brand.
- The violation and liability had not been in doubts since the federal court had granted summary judgment against Keystone Protein in February 2021. The lawsuit remained pending to address damages only. For details on the lawsuit, see [Agricultural Law Weekly Review—Week Ending February 26, 2021](#), “Federal Judge Grants Summary Judgment Against Keystone Protein for Years of Violating Nitrogen Discharge Permit Levels.”
- Terms of the settlement are outlined in the Consent Decree and include funding of multiple water quality restoration and remediation efforts and projects totaling \$1 million and attorneys’ fees.



Conservation Programs: Pennsylvania Receives \$17.8 Million in Competitive Grants from USDA Regional Conservation Partnership Program

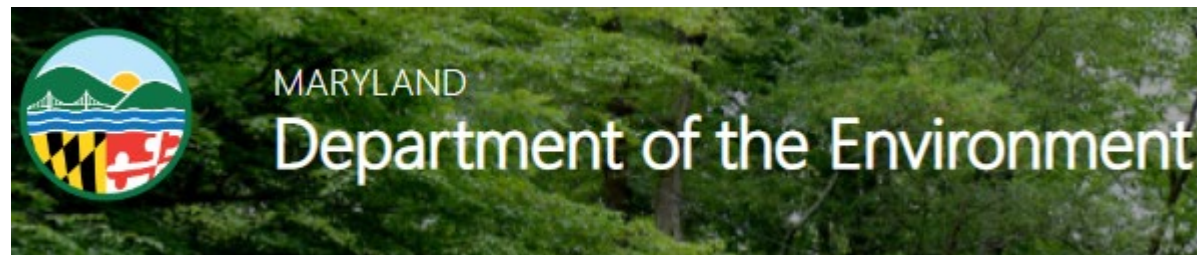
On August 19, 2022, the Pennsylvania Department of Agriculture (PDA) [announced](#) that the agency's [Farmland Preservation Program](#) received [\\$7.85 million](#) from the U.S. Department of Agriculture's (USDA) [Regional Conservation Partnership Program](#) (RCP) to support climate-smart conservation on Pennsylvania farms. Additionally, the Chesapeake Conservancy [announced](#) that it received [\\$9.99 million](#) from the RCP to improve agriculturally impaired streams in central Pennsylvania. Both grants are part of a [\\$197 million](#) block of funds recently awarded by USDA to 41 conservation projects nationwide.





Water Quality: Valley Protein Enters into Consent Decree for NPDES Violations

- On September 12, 2022, the Maryland Attorney General and Maryland Department of the Environment (MDE) [announced](#) a [consent decree](#) executed with poultry renderer Valley Protein after the company's numerous violations of its National Pollutant Discharge Elimination System (NPDES) permit. See [Valley Protein Halts Operations After NPDES Permit Violations](#), ALWR—Dec. 24 & 31, 2021.
- On several occasions, MDE had cited Valley Protein for discharging pollutants into the Transquaking River, a Chesapeake Bay tributary. According to the consent decree, Valley Proteins must pay a \$540,000 civil penalty, take corrective actions, indemnify the State of Maryland and various intervening water quality advocacy groups, and pay \$135,000 into the Transquaking River Watershed Fund. As a result of the enforceable consent order, MDE will now “determine[e] the appropriate, complementary conditions to be included in [Valley Protein’s] final renewal discharge permit” which it intends to issue within 60 days.



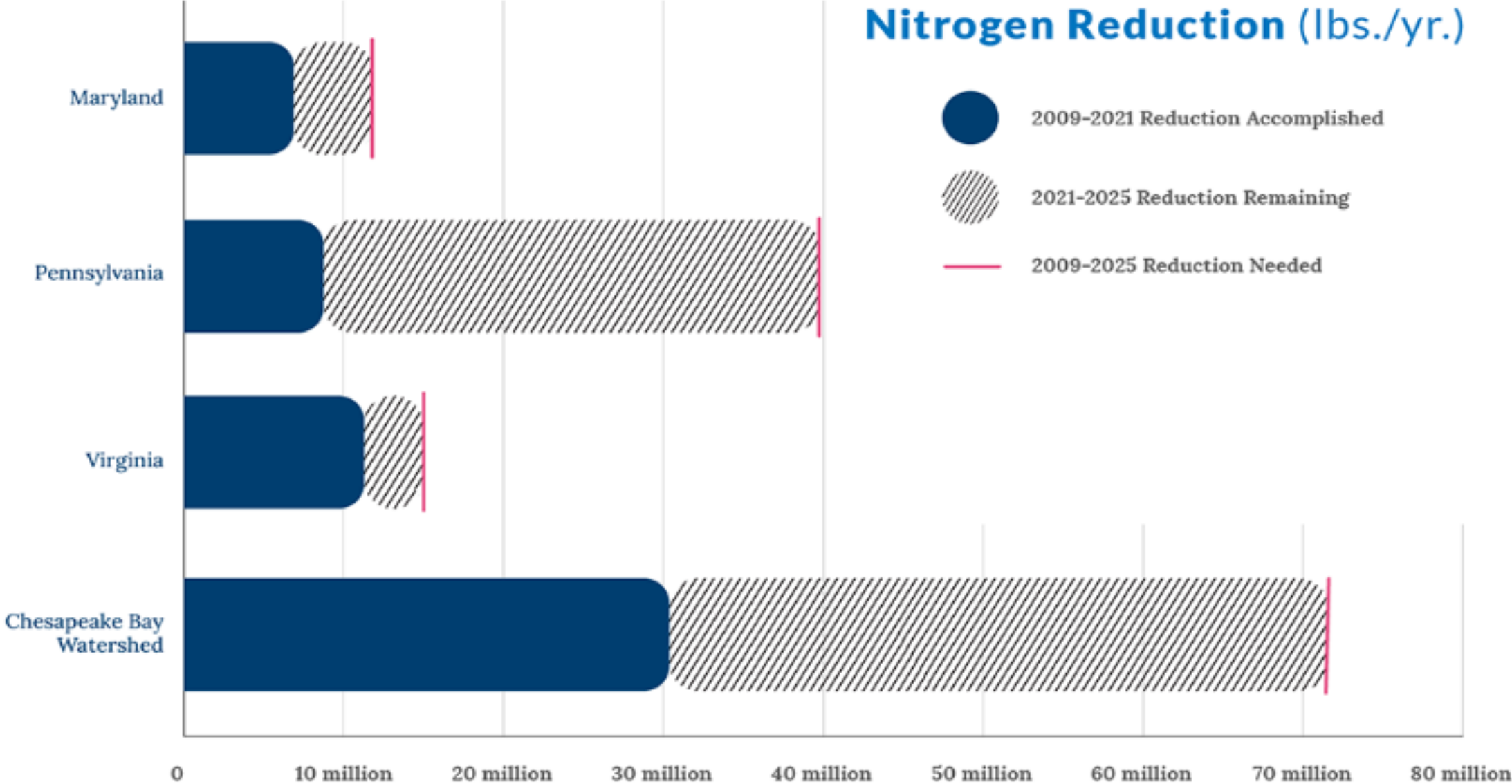


Water Quality: Chesapeake Bay Foundation Releases 2022 State of the Blueprint Report

- On October 5, 2022, the Chesapeake Bay Foundation (CBF) [announced](#) its [2022 State of the Blueprint](#) report, which evaluates progress toward the 2025 Bay restoration targets in [Virginia](#), [Maryland](#), and [Pennsylvania](#).
- While all three states are on track to meet point source phosphorus and nitrogen reductions, agriculture stormwater runoff reductions remain “significantly behind.”
- In Pennsylvania, agricultural pollutant reductions account for more than 90% of the state’s remaining nitrogen reductions.
- According to CBF’s announcement, “Pennsylvania is not on track to meet its 2025 pollution-reduction commitments including the creation of an adequate plan that achieves those commitments.”
- However, the report optimistically notes Pennsylvania’s new \$220 million [Clean Streams Fund](#), which allocates \$154 million for the [Agricultural Conservation Assistance Program](#), as providing great potential for the state’s pollution reduction efforts.



Nitrogen Reduction (lbs./yr.)



The above chart shows the nitrogen-pollution reductions needed under the Chesapeake Clean Water Blueprint; the reductions achieved between 2009 and 2021; and the reductions that remain to be completed in Maryland, Pennsylvania, Virginia, and the Chesapeake Bay Watershed as a whole.



Chesapeake Executive Council to Take One Year to Develop ‘Path Forward’ Plan in Light of Missed 2025 Goals

- On October 11, 2022, the [Chesapeake Executive Council](#) met for its [annual meeting](#) at the U.S. Environmental Protection Agency (EPA) headquarters in Washington, D.C. The Council “establishes the policy direction for the restoration and protection of the Bay.”
- The council is composed of the six Bay State governors (Del., Md., Va., W. Va., Pa., and N.Y.), D.C. Mayor, Chesapeake Bay Commission Chair, and the EPA Administrator. (Michael Regan)
- Prior to the meeting, on October 4, 2022, EPA [released formal evaluations](#) of each individual state’s progress in 2020–21 and established 2022–23 [Chesapeake Bay milestones](#) towards meeting the Bay’s total maximum daily load (TMDL) and the states’ obligations under the Chesapeake Bay Watershed Agreement.
 - [EPA EVALUATION OF PENNSYLVANIA’S 2020-2021 and 2022-2023 MILESTONES](#)
- At the meeting, EPA’s Chesapeake Bay Program Office released the “[2021-2022 Bay Barometer: An Annual Report on the State of the Program and the Health of the Chesapeake Bay.](#)”
- According to a post-meeting [press release](#), “[T]he Council agreed to set a path forward **over the next year** to outline the necessary steps, and prioritize the actions needed, to meet the targets of the Watershed Agreement outcomes. This charge will consider recommendations on how to best address and integrate new science and restoration strategies, as well as emerging issues and changing conditions in the watershed (e.g., climate change). This critical plan is expected to be put into place in time for the 40th anniversary of the Chesapeake Bay Program in 2023. . . .”



The Chesapeake Executive Council signs a document for the partnership at its January, 2018 meeting.

The Chesapeake Executive Council—consisting of the governors of the six watershed states, the mayor of the District of Columbia, the chair of the Chesapeake Bay Commission and the administrator of the U.S. Environmental Protection Agency—establishes the policy direction for the restoration and protection of the Chesapeake Bay.



EPA Issues Evaluation of Pennsylvania's Final Amended Phase III Watershed Implementation Plan (WIP) November 15, 2022

[History:]

“Pennsylvania’s 2019 Phase III WIP fell 9.8 million pounds short of achieving its nitrogen target. In 2020, Pennsylvania committed to amending its Phase III WIP by the end of calendar year 2021 to address its nitrogen gap. Pennsylvania submitted its draft amended Phase III WIP to EPA on December 30, 2021, which superseded Pennsylvania’s 2019 Phase III WIP. EPA published its evaluation of Pennsylvania’s draft amended Phase III WIP on April 18, 2022 and gave Pennsylvania 90 days to submit a final amended Phase III WIP. Pennsylvania submitted its final amended Phase III WIP on July 18, 2022. . . .”

[Current WIP:]

“ . . . Although Pennsylvania did provide additional details about new funding sources in the 2022-2023 commonwealth budget, plans for federal infrastructure funding, additional existing state programs that could result in reductions, and ongoing efforts to innovate BMP verification, tracking, and reporting between the draft and final amended Phase III WIPs, those changes did not result in any significant increase in proposed implementation. Pennsylvania has not provided a final plan that demonstrates a sufficient acceleration of implementation to meet its 2025 target; **Pennsylvania still has a 9.3 million pound nitrogen gap**. Using current CBP partnership approved practices and decisions, simulations using the CBP partnership’s Chesapeake Assessment Scenario Tool 2019 (CAST-19) indicate that **full implementation of Pennsylvania’s final amended Phase III WIP would achieve 72% of the statewide Phase III WIP planning target for nitrogen, 99% of the phosphorus target, and 93% of the sediment target.**”



EPA's November 15, 2022 Cover Letter with Evaluation – “No Confidence Letter”

The final amended Phase III WIP does not provide EPA with confidence that Pennsylvania will have all practices and controls in place by 2025 to achieve the CBP partnership's nitrogen and sediment targets. Pennsylvania still has a 9.3-million-pound nitrogen gap and has not provided a final plan that demonstrates a sufficient acceleration of implementation to close that gap.

* * * *

EPA expected Pennsylvania's final amended Phase III WIP to fully address the nitrogen shortfall and provide confidence through enhancements to programs and increased funding that it could meet its nutrient and sediment reduction targets. Given the lack of programmatic changes to accelerate BMP implementation, EPA will continue to take action to ensure adequate progress toward meeting the CBP partnership's 2025 targets. We will continue our increased compliance assistance in the agriculture and stormwater sectors, increased permitting oversight and, as appropriate, grant-related actions including the establishment of additional federal award conditions and/or redirection of certain federal funding to agencies and programs that can spend it more efficiently in Pennsylvania.



D.C. Circuit Court Vacates and Remands Conowingo Dam License

- On December 20, 2022, the U.S. Court of Appeals for the District of Columbia Circuit issued an [opinion](#) vacating and remanding the license for Constellation Energy Generation, LLC’s Conowingo Dam. *Waterkeepers Chesapeake v. FERC*, No. [21-1139](#).
- The court concluded that the Federal Energy Regulatory Commission (FERC) exceeded its statutory authority under section 401(a)(1) of the [Clean Water Act \(CWA\)](#) ([33 U.S.C. § 1341\(a\)\(1\)](#)) by granting the March 2021 license under a circumstance not enumerated in the CWA. The court stated the CWA only allows FERC “to issue a license [in] two circumstances: (1) where a state has granted a [water quality] certification; or (2) where the state has waived its authority to certify . . . by failing or refusing to act.” Neither situation applied here.
- The state of Maryland issued a 2018 CWA water quality certification with conditions but, during Constellation’s subsequent legal challenge to those conditions, Maryland settled with Constellation and waived its CWA certification rights.
- The court found that the CWA “leaves no room for FERC’s third alternative, in which it issued a license based on a private settlement arrangement entered into by Maryland after the state had issued a certification with conditions but then changed its mind.”
- *For background, see [ALWR—March 19, 2021](#), “Exelon’s Conowingo Dam Relicensed as Per Settlement with Maryland”); [ALWR—June 18, 2021](#), “Conowingo Dam Relicensing Appealed to D.C. Circuit Court of Appeals.”*



RECAP FROM 2021: Exelon's Conowingo Dam Relicensed As Per Settlement with Maryland

On March 18, 2021, the Federal Energy Regulatory Commission (FERC) [issued](#) a new 50-year [license](#) to Exelon Generation Company, LLC's Conowingo Hydroelectric Project, the nearly century-old dam located on the Susquehanna River in Maryland approximately ten miles north of its entry to the Chesapeake Bay. *Exelon Generation Company, LLC, Project Nos. 405-106 and 405-121*, 174 FERC ¶ 61,217.

In recent years it was discovered that previous modeling of phosphorous, nitrogen and sediment trapped behind the dam were flawed and pollutants previously assumed to be trapped behind the dam for decades routinely wash over the dam in current heavy rain events. **A focus of the relicensing was Exelon's financial responsibility to address water quality issues of the Chesapeake Bay. The relicensing culminated years of administrative and judicial litigation that produced a settlement agreement between the State of Maryland and Exelon which formed the basis of the FERC relicensing approval. As a condition of the relicensing, Exelon must pay approximately \$200 million to Maryland's Clean Water Fund, some of which is earmarked for particular measures to improve water quality and habitats below the dam.** The Chesapeake Bay Foundation, one of more than twenty intervenors in the proceeding, has continuously and publicly [announced](#) its strong opposition to the terms of the settlement which are now terms of the license, including that Maryland waived its rights to issue a Water Quality Certification for the dam as well as to require pollution discharge permitting.



THANK YOU!





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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation’s leading source of agricultural and food law research and information.

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