

## SETTLEMENT AGREEMENT

WHEREAS, on January 5, 2009, plaintiffs C. Bernard Fowler, *et al.* (collectively "Plaintiffs") filed suit against defendant United States Environmental Protection Agency ("EPA") alleging that EPA failed to comply with the Clean Water Act ("CWA" or "Act"), Case No. 1:09-CV-00005-CKK, the Administrative Procedure Act, and the Chesapeake Bay Agreements with respect to restoring and preserving Chesapeake Bay ("Bay" or "the Bay") water quality and living resources;

WHEREAS, Count I of Plaintiffs' complaint alleges that EPA has nondiscretionary duties under Section 117(g) of the Act, 33 U.S.C. § 1267(g), to achieve and maintain the goals of the Chesapeake Bay Agreement, which duties are enforceable via the citizen suit provisions of the Act, 33 U.S.C. § 1365;

WHEREAS, on May 12, 2009, President Barack Obama issued Executive Order 13508 (74 Fed. Reg. 23,099) ("Executive Order"), whose Section 201 established a Federal Leadership Committee ("Committee") to "manage the development of strategies and program plans for the watershed and ecosystem of the Chesapeake Bay and oversee their implementation." The Administrator of the Environmental Protection Agency, or the Administrator's designee, shall Chair the Committee;

WHEREAS, in accordance with Section 202 of the Executive Order, on September 9, 2009, EPA submitted a draft report to the Committee;

WHEREAS, on November 24, 2009, EPA submitted a revised draft Report ("Report") to the Committee;

WHEREAS, the revised draft Report recommends various actions to protect and restore

the Bay;

WHEREAS, Section 203 of the Executive Order provides that the “Committee shall prepare and publish a strategy for coordinated implementation of existing programs and projects to guide efforts to protect and restore the Chesapeake Bay;”

WHEREAS, in accordance with Section 203 of the Executive Order, on November 9, 2009, the Committee published a Draft Strategy for Protecting and Restoring the Chesapeake Bay (“Draft Strategy”) for public review and comment;

WHEREAS, the public comment period on the Draft Strategy ended on January 8, 2010;

WHEREAS, the Committee will publish a final Strategy for protecting and restoring the Chesapeake Bay by May 12, 2010;

WHEREAS, Section 203 of the Executive Order provides, among other things, that “[t]o the extent practicable and authorized under their existing authorities, agencies may begin implementing core elements of restoration and protection programs and strategies, in consultation with the Committee, as soon as possible and prior to release of a final strategy;”

WHEREAS, EPA is in the process of developing a federal Total Maximum Daily Load for nutrients and sediment for the Chesapeake Bay and its tidal tributaries (the “Bay TMDL”) because, among other things, the water quality goals set forth in the Chesapeake 2000 Agreement will not be met by 2010;

WHEREAS, by letter dated September 11, 2008 EPA provided the Chair of the Chesapeake Bay Program’s Principals’ Staff Committee (PSC) with information about the Bay TMDL, including information about how EPA intends for the Bay TMDL to allocate nutrient and sediment loads and provide accountability for the basin-wide reductions necessary to achieve

water quality standards and stating that EPA's "expectations for the Bay TMDL are not applicable to the TMDL program in general." (Hereinafter the "September 11, 2008 letter");

WHEREAS "Enclosure A" to EPA's September 11, 2008 letter to the PSC said that "EPA expects each of the TMDL states and the District to work with Region III to develop the following information as part of its reasonable assurance and implementation framework" for the Bay TMDL:

- "1. Identify the controls needed to achieve the allocations identified in the proposed TMDL through revised state tributary strategies.
2. Identify the current state and local capacity to achieve the needed controls (*i.e.* an assessment of current point source permitting/treatment upgrade funding programs and nonpoint source control funding, programmatic capacity, regulations, legislative authorities, *etc.*).
3. Identify the gaps in current programs to achieve the needed controls (additional incentives, state or local regulatory programs, market-based tools, technical or financial assistance, new legislative authorities, *etc.*).
4. A commitment from each state and the District to work to systematically fill the identified gaps to build the program capacity needed to achieve the needed controls. As part of this commitment, the states and the District would agree to meet specific, iterative, and short-term (1-2 year) milestones demonstrating increased levels of implementation and/or nutrient and sediment load reductions.
5. A commitment to continue efforts underway to expand monitoring, tracking, and reporting directed towards assessing the effectiveness of implementation actions and use these data to drive adaptive decision-making and redirect management actions.

6. Agree that if jurisdictions do not meet these commitments, additional measures will be necessary;”

WHEREAS, by letter dated November 3, 2009, EPA provided the PSC with “the preliminary basinwide target loads for nitrogen and phosphorus and the working target loads for nitrogen and phosphorus for the basin-jurisdictions to meet the states’ Bay dissolved oxygen water quality standards in the Chesapeake Bay and its tidal tributaries” and milestones for completion of the Bay TMDL (Hereinafter the “November 3, 2009 letter”);

WHEREAS, by letter dated November 4, 2009, EPA provided the PSC with “the U.S. Environmental Protection Agency’s expectations for the Watershed Implementation Plans, which the six watershed States and the District of Columbia will submit in support of the development of the draft and final” Bay TMDL and identified a variety of actions EPA may take if the jurisdictions do not submit Watershed Implementation Plans or the plans do not meet EPA’s expectations. (Hereinafter the “November 4, 2009 letter”);

WHEREAS, the actions identified by EPA in its November 4, 2009 letter to the PSC included, but were not limited to, the following:

1. Revising the Bay TMDL wasteload allocations to assign more stringent pollutant reduction responsibilities to point sources of nutrient and sediment pollution.
2. Objecting to State-issued CWA NPDES permits.
3. Acting to limit or prohibit new or expanded discharges of nutrients and sediments, and/or
4. Withholding, conditioning, or reallocating federal grant funds;

WHEREAS, in its Report, EPA identified two additional actions EPA may take if the jurisdictions do not submit Watershed Implementation Plans or the plans do not meet EPA's expectations:

1. EPA review of facilities covered under a general permit for possible coverage under an individual permit;
2. EPA review of permits to determine if the requirement in 40 C.F.R. 131.12(a)(2) (as reflected in state anti-degradation regulations) is met;

WHEREAS, by letter dated December 29, 2009, EPA provided the PSC with a description of EPA's "Chesapeake Bay Accountability Framework." In the letter EPA said that "[f]ailure to fully meet the expectations identified [in the November 4, 2009 letter] would subject a State and/or the District to potential EPA actions." (Hereinafter the "December 29, 2009 letter");

WHEREAS, "Enclosure B" to the December 29, 2009 letter identified the following potential actions currently available to EPA:

1. Expand National Pollutant Discharge Elimination System (NPDES) permit coverage to currently unregulated sources;
2. Object to NPDES permits and increase program oversight;
3. Require net improvement offsets;
4. Establish finer scale wasteload and load allocations in the Bay TMDL;
5. Require additional reductions of loadings from point sources;
6. Increase and target federal enforcement and compliance assurance in

the watershed;

7. Condition or redirect EPA grants; and
8. Federal promulgation of local nutrient water quality standards;

WHEREAS, EPA is developing three Clean Air Act (“CAA”) rules that could affect ambient air levels of NOx and therefore the deposition of nitrogen to the Bay and the Bay Watershed, i.e., a rule to replace the court-remanded Clean Air Interstate Rule (CAIR); reconsideration of the national ambient air quality standards for ozone that were promulgated in 2008; and review of the secondary national ambient air quality standards for oxides of nitrogen and sulfur;

WHEREAS, EPA is implementing new source performance standards for stationary spark-ignition engines and finalizing the proposed amendments to the national emission standards for stationary reciprocating internal combustion engines (RICE) (75 Fed. Reg. 9648);

WHEREAS, EPA is in the process of implementing the following mobile source rules and programs: the Light Duty Tier 2 Rule (65 Fed. Reg. 6698); the Clean Heavy Duty Truck and Bus Rule (66 Fed. Reg. 5502); the Clean Air Non-road Diesel-Tier 4 Rule (69 Fed. Reg. 38957); four Marine-related NOx reduction programs (64 Fed. Reg. 73300, 67 Fed. Reg. 68242, 68 Fed. Reg. 9746, 73 Fed. Reg. 59034); the Locomotive and Marine Diesel Rule (73 Fed. Reg. 25098); the Non-road Large and Small Spark-Ignition Engines Programs (73 Fed. Reg. 59034); the Coordinated Strategy for Control of Emissions from Ocean-Going Vessels; and the Voluntary Clean Diesel Programs;

WHEREAS, EPA is developing or revising multiple rules under sections 112 and 129 of the Clean Air Act that are expected to affect ambient levels of mercury and therefore the

deposition of mercury to the Bay and the Bay watershed, *e.g.*, standards for electric utilities, commercial and industrial waste incinerators, industrial boilers, municipal waste combustors, Portland cement manufacturing, and the iron and steel industry;

WHEREAS, based on present modeling, EPA expects that existing and anticipated Clean Air Act regulations will result in nitrogen air deposition reductions delivered to the Chesapeake Bay of at least 8 million pounds per year by 2020, as compared to a 2002 modeled baseline, and those reductions will be accounted for in the Bay TMDL;

WHEREAS, on November 24, 2009, EPA published a “Draft Chesapeake Bay Compliance and Enforcement Strategy” that focuses on four “key sectors” – CAFOs, municipal and industrial wastewater facilities, stormwater NPDES point sources, and air deposition sources of nitrogen regulated under the Clean Air Act, and EPA intends to apply that Strategy consistent with the May 12, 2010 Bay Strategy;

WHEREAS, on April 2, 2010, EPA issued a “Guide for the Evaluation of Watershed Implementation Plans,” which provided minimum EPA expectations for the Bay Watershed jurisdictions’ use of offsets to ensure maintenance of the TMDL’s cap loads in the face of anticipated new or increased discharges, including the capability to ensure that trades and offsets can be verified and are consistent with meeting applicable water quality standards and Bay TMDL wasteload allocations;

WHEREAS, on April 21, 2010, EPA issued for public notice and comment a draft NPDES permit for the Municipal Separate Storm Sewer System (MS4) of the District of Columbia;

WHEREAS, Plaintiffs and EPA wish to implement this Settlement Agreement in order to

avoid further litigation.

NOW, THEREFORE, Plaintiffs and EPA agree as follows:

## **I. GENERAL PROVISIONS**

A. The parties to this Settlement Agreement (“Agreement”) are the Plaintiffs and EPA. Nothing in this Agreement shall be construed to make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

B. This Agreement applies to, is binding upon, and inures to the benefit of the Plaintiffs (and their successors, assigns, and designees) and EPA.

C. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers and agencies, or any person affiliated with it.

## **II. DEFINITIONS**

For purposes of this Settlement Agreement, terms used in the Agreement that are already defined in the Clean Water Act or EPA’s implementing regulations, e.g., “wasteload allocation” and “load allocation,” have the meaning expressed in those definitions. The following terms used in the Agreement are defined as follows:

“**Bay TMDL**” means the Total Maximum Daily Load to address the impaired segments of the Chesapeake Bay identified on the currently applicable Section 303(d) list for which the aquatic life use(s) and associated criteria (*i.e.*, dissolved oxygen, water clarity, submerged aquatic vegetation, and chlorophyll *a*) have been impaired by nitrogen, phosphorous, and/or sediment pollutants.

“**Bay Watershed Jurisdiction**” means one of the following: Virginia, Maryland,

Pennsylvania, Delaware, West Virginia, New York, and the District of Columbia.

**“Chesapeake Bay”** means the tidal waters of the Chesapeake Bay and the tidal portions of the tributaries to the Bay out until the easternmost boundary of Chesapeake Bay with the Atlantic Ocean represented by a line between Cape Charles and Cape Henry, as further described in Appendix C, page 61 (wherein there are latitude and longitude coordinates for segment CB8PH, which is the segment at the mouth of the Bay) of *Chesapeake Bay Program Analytical Segmentation Schemes: Revision, decisions and rationales, 1983-2003*. EPA 903-R-04-008. CBP/TRS 268/04. Chesapeake Bay Program Office, Annapolis, Maryland.

**“Establish the Bay TMDL”** means the date the Administrator, or her designee, signs the Bay TMDL.

**“Effective date of this Settlement Agreement”** means the date it is signed by all parties.

**“Final action”** means a final decision by the EPA Administrator, or her designee, on the proposed regulations or proposed permit referred to in paragraphs 9.d, 12 and 13.

**“Impaired segment”** means a specifically identified portion of a waterbody that does not meet all of its applicable water quality standards.

**“NPDES permits”** means a “permit” as defined in 40 C.F.R. § 122.2.

**“Nutrient”** means compounds of nitrogen and phosphorus and/or any of their forms that are essential to plant and animal life but in excess quantity in waterbodies, including the Chesapeake Bay, can cause impairment of aquatic life use(s).

**“Phase 1 Watershed Implementation Plans”** means those WIPs that EPA expects States to deliver in 2010 to provide information for EPA to consider when it establishes the Bay TMDL, as described in the EPA letter signed by Acting Regional Administrator William C.

Early, dated November 4, 2009, and as may be further described in other communications from the Regional Administrator to the Principals' Staff Committee of the Chesapeake Bay Program.

**"Phase 2 Watershed Implementation Plans"** means those WIPs that EPA expects States to deliver in 2011, as described in the EPA letter signed by Acting Regional Administrator William C. Early, dated November 4, 2009, and as may be further described in other communications from the Regional Administrator to the Principals' Staff Committee of the Chesapeake Bay Program.

**"Plaintiffs"** means C. Bernard Fowler, Harry R. Hughes, W. Tayloe Murphy, Jr., Anthony A. Williams, the Chesapeake Bay Foundation, Inc., the Maryland Saltwater Sportfisherman's Association, Inc., the Maryland Watermen's Association, Inc., and the Virginia State Waterman's Association, Inc.

**"Section 303(d) list"** means the list of impaired waters submitted to, and approved by, EPA pursuant to 40 C.F.R. § 130.7(d) or established by EPA pursuant to 40 C.F.R. § 130.7(d).

**"Sediment"** means finely divided solid materials including, but not limited to, loose particles of clay, sand or silt that are suspended in water and/or such material that may be deposited onto the surface beneath this water, and that in excess quantities in water, including the Chesapeake Bay, can cause impairment of aquatic life use(s).

**"Significant point source discharge of nitrogen, phosphorus and sediment"** means an NPDES point source wastewater treatment facility discharging to the Chesapeake Bay watershed that each Bay jurisdiction defines as follows (subject to revision as indicated):

*West Virginia, Delaware and New York:* facility treating domestic wastewater and the design flow greater than or equal to 0.4 million gallons a day (mgd);

*Pennsylvania*: facility treating domestic wastewater and discharging greater than or equal to 0.4 mgd;

*Maryland*: facility treating domestic wastewater and the design flow is greater than or equal to 0.5 mgd;

*Virginia*: facility treating domestic wastewater and the design flow is greater than or equal to 0.5 mgd west of the fall line, or greater than or equal to 0.1 mgd east of the fall line, as well as all new facilities greater than 40,000 gallons per day (gpd) or facilities expanding to greater than 40,000 (gpd);

*Across all seven jurisdiction* - industrial facilities with a nutrient load equivalent to 3,800 pounds per year total phosphorus or 27,000 pounds per year total nitrogen;

*Any other facility identified as such by a Bay jurisdiction Tributary Strategy, Watershed Implementation Plan, Bay Watershed jurisdiction, or EPA.*

**“Tidal tributaries”** means those tributaries to the Chesapeake Bay that are tidally influenced.

**“Tributary strategy cap loads”** means the cap load allocations for nitrogen, phosphorus, and sediment assigned to the Bay Jurisdictions as set forth in the Memorandum of the Principals’ Staff Committee, signed April 25, 2003, by W. Tayloe Murphy, Jr., titled “Summary of Decisions Regarding Nutrient and Sediment Load Allocations and New Submerged Aquatic Vegetation (SAV) Restoration Goals.”

**“Two-year milestones”** means the milestones identified by a Bay Jurisdiction and/or EPA that describe specific actions and controls to be implemented to reach the Chesapeake Executive Council’s goal that all practices necessary for restored Bay water quality be in place as

soon as possible, but no later than 2025, as further described in the EPA letter signed by Acting Regional Administrator William C. Early, dated November 4, 2009, and as may be further described in other communications from the Regional Administrator to the Principals Staff Committee of the Chesapeake Bay Program.

**“Watershed Implementation Plans”** means plans the Bay Jurisdictions develop to achieve and maintain the Bay TMDL’s nitrogen, phosphorus and sediment allocations, as described in the EPA letter signed by Acting Regional Administrator William C. Early, dated November 4, 2009, and as may be further described in other communications from the Regional Administrator to the Principals’ Staff Committee of the Chesapeake Bay Program.

### **III. EPA ACTIONS**

#### **A. Chesapeake Bay TMDL Establishment**

1. By December 31, 2010, pursuant to 33 U.S.C. §§ 1313(d) and 1267, EPA will establish the Bay TMDL.

2. The Bay TMDL will, among other things:

(a) account for nutrient and sediment loadings to the Bay and its tidal tributaries from within the Bay Watershed and be established at levels necessary to implement water quality standards for dissolved oxygen, water clarity, submerged aquatic vegetation, and chlorophyll *a*, as applicable and in place when EPA establishes the Bay TMDL, to each impaired segment of the Chesapeake Bay and its tidal tributaries on the currently applicable Section 303(d) lists;

(b) be developed using information provided by the Bay Watershed Jurisdictions in response to EPA’s November 3, November 4, and December 29, 2009 letters;

(c) contain wasteload allocations (WLAs) for point sources and load allocations

(LAs) for nonpoint sources for each impaired segment of the Bay and its tidal tributaries on the currently applicable Section 303(d) lists, consistent with EPA's September 11, 2008 and November 4, 2009 letters to the PSC;

(d) be supported by information, including but not limited to, documentation of the kind identified on pages 2 and 3 of Enclosure A to EPA's September 11, 2008 letter describing the Bay TMDL's "reasonable assurance and implementation framework" that demonstrates nonpoint source loading reductions will be achieved as a condition for reflecting such reductions in the wasteload allocations in the Bay TMDL;

(e) reflect EPA's decisions regarding the sufficiency of the demonstration of reasonable assurance and other commitments in the seven Bay Watershed Jurisdictions' Watershed Implementation Plans and two-year milestones provided by the jurisdictions;

(f) include an allocation for new or increased permitted discharges of nutrients and sediment or a provision that such new or increased permitted discharges will be offset by quantifiable and accountable reductions necessary to implement applicable water quality standards in the Bay and its tidal tributaries. Any such offsets would in all cases account for the entire delivered nutrient and sediment load after accounting for location of the sources, delivery factors affecting pollutant fate and transport, equivalency of pollutants, and the certainty of any such reductions and would not cause an exceedence of local water quality standards or local TMDLs.

3. EPA will account for air deposition of nitrogen to the Bay and its tidal tributaries within the load allocation portion of the Bay TMDL. EPA will take into account air deposition reductions, resulting from regulations already in place or planned, in developing the load

allocations for the Bay TMDL. With the establishment and adoption of each new set of federal two-year milestones (see Paragraph 8), EPA will reevaluate ongoing and planned CAA regulations and actions for reducing nitrogen emissions and deposition and consider whether additional actions, consistent with EPA statutory authorities, are warranted. As part of its federal two-year milestone process, EPA will communicate to the Bay Watershed Jurisdictions the results of its actions under this Paragraph.

4. Prior to December 31, 2010, EPA will publish notice of a proposed Bay TMDL for public review and comment. EPA will include in this publication the Bay TMDL's proposed wasteload and load allocations and its supporting technical and policy assumptions. EPA will also make available for public review the Bay Jurisdictions' Watershed Implementation Plans and two-year milestones, to the extent they are available to EPA. EPA will also identify potential actions, including but not limited to those identified in EPA's December 29, 2009 letter to the PSC, EPA may take in the event that the Bay Watershed Jurisdictions do not submit adequate Watershed Implementation Plans or fail to meet their established two-year milestones.

**B. Chesapeake Bay TMDL Implementation**

5. Consistent with its November 4, 2009 letter, EPA expects the Bay Watershed Jurisdictions to submit final Phase I Watershed Implementation Plans as expeditiously as possible, and no later than November 29, 2010, and final Phase II Watershed Implementation Plans as expeditiously as possible, and no later than November 1, 2011.

6. Every two years, consistent with the two-year milestone process, EPA will review the progress made by the seven Bay Watershed Jurisdictions with regard to (1) their Watershed Implementation Plan commitments to address program gaps and make reasonable progress

towards achieving the pollutant loading reductions identified in the Bay TMDL and (2) their two-year milestone commitments. This biennial review will begin in 2011. On a continuous basis, EPA will also review the timeliness and content of certain draft NPDES permits in the Bay Watershed as described in Section C. of this Agreement.

7. Consistent with its December 29, 2009 letter, EPA will, as it deems necessary, take appropriate action to ensure that the Bay Jurisdictions (1) develop and implement adequate Watershed Implementation Plans and two-year milestones related to nutrients and sediment, (2) demonstrate satisfactory progress toward achieving nutrient and sediment allocations established in the Bay TMDL in a manner consistent with the expectations expressed in EPA's November 4, 2009 letter, (3) achieve their two-year milestones, and (4) issue NPDES permits consistent with the Bay TMDL's wasteload allocations.

8. By May 1, 2011, and every two years after that, EPA will announce two-year milestones for federal actions designed to reduce nutrient and sediment pollutant loadings to the Bay. EPA will invite other federal agencies to participate in a process, and EPA will coordinate the process among any agencies that choose to participate, with the goal of creating a series of two-year milestones, to commence in May 2011, designed to reduce nutrient and sediment pollutant loadings to the Bay. Consistent with the Executive Order Sections 202 and 203 and the Draft E.O. Strategy, EPA will strengthen stormwater practices on federal facilities and on federal lands.

#### **C. NPDES Permit Oversight**

9. a. Between the effective date of this Settlement Agreement and December 31, 2017, EPA will conduct a review pursuant to 33 U.S.C. § 402(d) of all proposed new or reissued

NPDES permits for significant point source discharges of nitrogen, phosphorous, and sediment in the Chesapeake Bay Watershed to determine whether the proposed permits include effluent limitations consistent with (as applicable) the respective water quality standards for the Chesapeake Bay and its tidal tributaries of the District of Columbia, Delaware, Maryland and Virginia for dissolved oxygen, water clarity, submerged aquatic vegetation, and chlorophyll *a*, in place at the time of review and (when issued) the Bay TMDL WLAs and relevant jurisdiction Watershed Implementation Plans. EPA will supplement its review of significant permits under this Paragraph with the implementation of the Tracking and Accounting System described in Paragraph 11 with the goal of ensuring that, individually or in the aggregate, they do not cause or contribute to the exceedence of the Bay TMDL's wasteload allocations or applicable water quality standards.

b. As part of the review described in Paragraph 9.a., EPA will review all proposed construction general permits drafted by Bay Watershed Jurisdictions. In conducting this review, EPA will evaluate whether such proposed permits ensure compliance with applicable water quality standards and are consistent with all applicable federal and state requirements, including federal effluent limitations guidelines, new source performance standards, existing local TMDLs, and any requirements developed in the rulemaking described in Paragraph 12.

c. By July 31, 2010, EPA will issue an "MS4 Storm Water Permitting Approach for the Chesapeake Bay Watershed" that will identify the key regulatory and water quality performance expectations EPA will consider when reviewing new or reissued draft state MS4 permits.

d. EPA will take final action on a final NPDES permit for the Blue Plains WWTP by June 1, 2010, provided that EPA concludes that issuance by that date would be appropriate after considering the Agency's responsibilities under section 7 of the Endangered Species Act. If, after considering the Agency's responsibilities under section 7 of the Endangered Species Act, EPA concludes that issuance at a date later than June 1, 2010 would be appropriate, EPA will issue the final permit expeditiously following its conclusion that issuance would be consistent with the Endangered Species Act, and taking into account any steps that EPA determines appropriate in light of the results of consultation with NMFS.

e. Notwithstanding any provisions of Paragraph 9.d., if the results of consultation with NMFS reveal that NMFS believes issuing the NPDES permit for the Blue Plains WWTP would likely jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species designated as critical by NMFS, EPA does not commit to issue a final NPDES permit for this facility by any date.

f. EPA will monitor implementation of compliance schedules in any NPDES permits or enforcement orders for significant municipal and industrial wastewater dischargers that require installation of advanced nutrient removal technology in order to meet Bay TMDL wasteload allocations or local water quality-based effluent limits for nutrients and/or sediment. EPA will, as it deems appropriate and consistent with the CWA and EPA's implementing regulations, exercise its discretionary authority to take action to ensure timely installation of such advanced nutrient removal technology and report on its actions to Plaintiffs as provided in Paragraph 10.

10. EPA will provide Plaintiffs the opportunity to meet with EPA no less than once every calendar year to discuss the status of EPA actions under this agreement.

11. Within thirty days of the establishment of the Bay TMDL, EPA will begin to implement a Tracking and Accounting System to provide EPA, the Bay Watershed Jurisdictions, and the public with information about load and wasteload allocations and how the Bay TMDL is being implemented. The system will track progress toward attaining the wasteload and load allocations established in the Bay TMDL and the maintenance of the load caps. The system will track the incorporation of the assigned wasteload allocations into new and renewed significant NPDES permits and the achievement of the TMDL's load allocations. For wasteload allocations to non-significant point sources and load allocations to nonpoint sources, the system will account for those sources at the same scale at which the TMDL allocation was established. For example, if the TMDL allocation to such a source is established as an aggregated load, the system will track the progress of achieving that load on an aggregated basis. If a state that administers the NPDES permit program fails to achieve any wasteload allocation (including but not limited to aggregate wasteload allocations), EPA reserves its discretionary authority to revoke the waiver of review for non-major NPDES permit(s) as provided in the respective EPA-State memoranda of agreement to administer the NPDES Permit Program. The Tracking and Accounting System will be publicly accessible and provide information about the status of individual significant and general NPDES permits, as well as the progress being made to meet the Bay TMDL's aggregate wasteload and load allocations.

**D. EPA Rulemakings**

12. By September 30, 2011, EPA will propose a regulation under section 402(p) of

the Clean Water Act to expand the universe of regulated stormwater discharges and to control, at a minimum, stormwater discharges from newly developed and redeveloped sites. As part of that rulemaking, EPA will also propose revisions to its stormwater regulations under the Clean Water Act to more effectively achieve the objectives of the Chesapeake Bay TMDL. In developing the proposed rule, EPA will consider the following elements related to stormwater discharges both nationally and in the Bay watershed: (1) additional requirements to address stormwater from newly developed and redeveloped sites; (2) requiring development and implementation of retrofit plans by MS4s to reduce loads from existing stormwater discharges; and (3) expanding the definition of regulated MS4s. EPA will take final action on the regulation by November 19, 2012.

13. By June 30, 2012, EPA will propose revisions to its Concentrated Animal Feeding Operations (CAFO) regulations under the Clean Water Act to more effectively achieve the objectives of the Chesapeake Bay TMDL. EPA will propose expanding the universe of CAFOs by means which might include (but are not limited to) making it easier to designate an AFO as a CAFO or increasing the number of animal operations that would qualify as CAFOs. EPA will propose more stringent permitting requirements for land application of manure, litter and process wastewater. In developing the proposed rule, EPA will consider the following: (1) requiring permitted CAFOs to implement “next generation” nutrient management plans; and (2) requiring off-site manure transfer reporting and recordkeeping. EPA will take final action on the CAFO regulation by June 30, 2014.

#### **E. Other EPA Actions**

14. By June 30, 2013, EPA will review the management plans and management

measures developed by the District of Columbia, Maryland, Pennsylvania, and Virginia pursuant to section 319 of the Clean Water Act and section 6217 of the Coastal Zone Act Reauthorization Amendments (“CZARA”) to identify whether such plans and measures are consistent with the Bay TMDL and the respective jurisdiction’s Watershed Implementation Plans. Following each review, EPA will identify in writing to each jurisdiction, as appropriate, where its management plans and management measures are not consistent with the Bay TMDL and the jurisdiction’s Watershed Implementation Plans.

15. By December 15, 2012, EPA will review each Bay Watershed Jurisdiction’s technical standards for CAFOs and identify in writing to the respective jurisdiction, as appropriate, where its technical standards are not consistent with 40 C.F.R. § 412.4(c)(2).

16. EPA will consider using existing residual designation authority, 40 CFR § 122.26(a)(9)(i)(C) and (D), for reducing pollutants from stormwater discharges in the Bay Watershed.

17. By June 30, 2013, EPA will develop a model state program for reducing individual and estimating cumulative nitrogen loadings from onsite systems, including conventional and alternative septic systems.

18. Consistent with 33 U.S.C. § 1267(g) and the authorities of the Chair of the Committee, as identified in the Executive Order, the Administrator, or her designee, will coordinate Committee management and oversight of the development and implementation by the Departments of Commerce and Interior of any programs, plans, and activities, such as oyster restoration, that those agencies may undertake pursuant to the Executive Order to protect habitat and living resources associated with the Chesapeake Bay ecosystem.

19. EPA will continue to implement actions to address pollution of the Bay from chemical contaminants in the Bay Watershed, and maintain a particular focus on the Elizabeth River and Anacostia River watersheds, previously identified as Regions of Concern in the Bay. By November 2012, EPA, carefully considering any information it may receive from other federal agencies and other scientific and state partners, will examine existing monitoring information from regional and national programs and compare existing toxicity benchmarks to the monitoring results. In November 2012, after coordinating with the Chesapeake Executive Council, EPA will issue a report summarizing this information. The report will also include an assessment of the progress of management actions taken to date pursuant to the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy. This information will be used to inform chemical contaminant outcomes to be developed in calendar year 2013 as strategic goals for the Chesapeake Bay Program and its partners to address. By 2015, EPA, after carefully considering any input it may receive from the Department of Interior, states and stakeholders, will complete and begin implementing an updated toxics management strategy for the Bay Watershed to further implement the goal of reducing or eliminating the effluent discharge of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health.

20. By July 1, 2010, EPA will invite and encourage the U.S. Department of Agriculture (USDA) to cooperatively develop and implement a plan, the goal of which would be to: (a) expand the use of conservation practices in the high priority watersheds in the Bay; (b) collaborate in development of next generation conservation planning tools with other federal state, agricultural and research partners; and (c) align EPA programs and resources with USDA

efforts to achieve water quality improvements by developing tools and technologies to help farmers meet their conservation and farm operation objectives.

#### **IV. MODIFICATION AND TERMINATION**

- A. The parties may modify any deadline or other term of this agreement in writing.
- B. This Settlement Agreement will terminate on December 31, 2017.

#### **V. RELEASES, DISMISSAL AND REMEDIES**

A. This Settlement Agreement shall constitute a complete and final settlement of all claims which were asserted, or could have been asserted, by Plaintiffs against the United States in the complaint filed in this case.

B. Plaintiffs hereby release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they may have had, or may now or hereafter have, against the United States based upon matters which were asserted, or could have been asserted, by Plaintiffs in the complaint filed in the lawsuit styled as *Fowler v. United States of America*, Case No. 1:09-CV-00005 (CKK), provided, however, that nothing in this Paragraph V.B. shall affect Plaintiffs' remedy under Paragraph V.D., below.

C. Upon signature of this Settlement Agreement by both Parties, Plaintiffs shall file a motion for voluntary dismissal without prejudice of the lawsuit styled as *Fowler v. United States of America*, Case No. 1:09-CV-00005 (CKK), provided, however, that Plaintiffs shall be barred from reinstating that lawsuit except pursuant to the terms and on the conditions specified in Paragraph V.D., below.

D. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied Party shall provide the other party with written notice of the dispute and a request for negotiations. The Parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the Parties are unable to resolve the dispute within 60 days of such meeting, Plaintiffs' sole remedy is to reinstitute the lawsuit styled *Fowler v. United States of America*, Case No. 1:09-CV-00005 (CKK) to seek an order from the Court pursuant to the Clean Water Act, the Administrative Procedure Act, or the Chesapeake Bay Agreement to obtain the same action or actions identified in this Settlement Agreement. Except as provided in Paragraph V. F., EPA does not waive or limit any defense relating to such litigation. The Parties agree that contempt of court is not an available remedy under this Settlement Agreement.

E. The Plaintiffs' sole remedy concerning any final action taken by EPA pursuant to this Agreement is to seek judicial or administrative review of such final action. Nothing in this Settlement Agreement shall be construed to limit any defenses EPA may have to any such challenge or to confer on this Court jurisdiction to review such action where it would otherwise be lacking.

F. The parties agree that, if Plaintiffs reinstitute suit within 120 days of invoking the dispute resolution procedures of Paragraph V. D., the time between execution of this Settlement Agreement and any such reinstatement of suit (the "Tolling Period") will not be included in calculating any statute of limitations applicable to the claims as to which Plaintiffs invoked the dispute resolution procedures of Paragraph V. D. (the "Tolled Claim(s)"). The United States

agrees not to assert, plead, or raise any defense or avoidance based on the running of any statute of limitations, or any defense or avoidance based on laches or other principles concerning the timeliness of commencing a civil action, based on the failure of Plaintiffs to reinstitute suit as to any Tolled Claim(s) at any time during the Tolling Period.

## **VI. SAVINGS PROVISIONS**

A. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA by the Clean Water Act or by general principles of administrative law, nor shall it in any way be deemed to limit EPA's discretion in taking any final agency action or adopting any rule, policy, or guidance.

B. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise any regulations, guidance, policy, or interpretation EPA may issue in accordance with, or on matters related to, this Settlement Agreement from time to time or to promulgate or issue superseding regulations, guidance, policies, or interpretations, or to limit any right that Plaintiffs may have to seek judicial or administrative review in a subsequent case of any such action by EPA.

C. To the extent this Agreement provides that EPA will request, recommend, or otherwise encourage any jurisdiction or federal agency (other than EPA) to take any action, or provide any information, the parties agree that the jurisdiction's or agency's failure to comply with EPA's request, recommendation, or encouragement shall not constitute a breach of this Agreement by EPA.

D. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the

Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the Clean Water Act, or any other law or regulation, either substantive or procedural.

E. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with deadlines stated in this Settlement Agreement. Such situations include, but are not limited to, a government shut-down such as occurred in 1995 and 1996, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the deadlines set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines shall be extended one day for each day of the delay. EPA will provide the Plaintiffs with notice as soon as is reasonably possible under the circumstances in the event that EPA invokes this term of the Settlement Agreement and will provide Plaintiffs with an explanation of EPA's basis for invoking the provisions of this Paragraph.

## VII. NOTICES

A. Any notices required or provided for by this Agreement shall be in writing, and shall be deemed effective (1) upon receipt if sent by U.S. Post or (2) upon the date sent if sent by overnight delivery, facsimile, or email. In addition, to be effective, any such notice must be sent to the following:

For EPA:

Associate General Counsel  
Water Law Office (2355A)  
U.S. Environmental Protection Agency  
Ariel Rios Building - North  
1200 Pennsylvania Avenue, N.W.

Washington, D.C. 20460

For DOJ:

Chief, Environmental Defense Section  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 23986  
Washington, D.C. 20026-3986

For Plaintiffs:

Jon A. Mueller  
Vice President for Litigation  
Chesapeake Bay Foundation, Inc.  
6 Herndon Ave.  
Annapolis, MD 21403

### **VIII. MISCELLANEOUS PROVISIONS**

- A. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized by the Party to enter into and execute the terms and conditions of this Settlement Agreement and to legally bind such Party to this Settlement Agreement.
- B. This Settlement Agreement is the entire agreement between the Plaintiffs and EPA in this case. To the extent this Settlement Agreement references other documents, those documents are referenced for informational purposes only and are not thereby incorporated by reference into, and do not constitute a part of, this Settlement Agreement. All prior conversations, meetings, discussions, drafts, and writings of any kind are specifically superseded by this Settlement Agreement.

- C. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the Plaintiffs and EPA. Accordingly, the Parties hereby agree that any and all

rules of construction to the effect that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

D. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

FOR PLAINTIFFS:

  
\_\_\_\_\_  
Jon A. Mueller  
Vice President for Litigation  
Chesapeake Bay Foundation, Inc.  
6 Herndon Ave.  
Annapolis, MD 21403

Dated: 5/10/10

FOR EPA:

  
\_\_\_\_\_  
Angeline Purdy  
U.S. Department of Justice  
Environment and Natural Resources  
Division  
P.O. Box 23986  
Washington, D.C. 20026-3986

Dated: 5/10/10