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## Preserving the Chesapeake: Law, Ecology, and the Bay

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# ADDRESS

## PRESERVING THE CHESAPEAKE: LAW, ECOLOGY, AND THE BAY

*The Honorable Gerald L. Baliles \**

Today the Chesapeake Bay is at a turning point, for reasons that you will recognize throughout this conference. In spite of commendable efforts made in recent decades, time is running out for this national treasure and resource of worldwide significance called the Chesapeake Bay. This is our last best chance to save it.

Virtually all of the Chesapeake Bay and its tidal areas today are on the EPA's "dirty water" list. A 1999 consent decree executed in federal court in Virginia has led the members of the federal-state partnership called the Chesapeake Bay Program to commit to a deadline in 2010 to remove the Chesapeake Bay from the federal list of impaired waters.<sup>1</sup>

In the state and federal government landmark agreement, Chesapeake 2000, the parties agreed to a roadmap for recovery of the Bay, outlining a range of specific programs and commitments meant to cut the flow of pollutants and restore the Bay's living resources by 2010, in order to meet the 1999 federal court consent decree.<sup>2</sup>

How did we get here?

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\* Former Governor of Virginia and Director of the Miller Center for Public Affairs at the University of Virginia. These remarks were given on October 20, 2006, at the Allen Chair Symposium at the University of Richmond School of Law.

1. See generally *Am. Canoe Ass'n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999) (discussing the 2010 deadline for final action in the consent decree).

2. See CHESAPEAKE BAY PROGRAM, CHESAPEAKE 2000 (2000), available at <http://chesapeakebay.net/Agreement.htm>.

A little history is in order. This morning I will not dwell at length upon the significance of the Chesapeake Bay to our region. That is intuitively understood and will be mentioned, I'm confident, many times before the conference adjourns. I'll simply say, the Bay is fundamental—fundamental to our economy, to our culture, to the very well-being of our lives. Nor will I dwell long on the Bay's plight. That, too, will be more exhaustively described later today. It is indisputable that we have prospered greatly from the Chesapeake Bay, but in so doing we have *taken*, without care.

The pressures of our population, our industry, and even our recreation have pushed this complex ecological system to its limits. In geologic terms, the degradation of the Chesapeake Bay is a relatively recent event. Throughout its long history, more fundamental damage has been done to the Bay in the last five to ten decades, perhaps, than in the thousands of years that preceded them.

We know when it started.

The Bay's decline set in at the very moment we began clearing the forests within the Chesapeake basin. It continued with nineteenth century industrial development—and the misguided notion that we could use the bay as a convenient receptacle for our refuse and debris. And it worsened still with the remarkable rise of development since the Second World War.

This much is clear: The magnificent abundance of this estuary is very fragile. It cannot co-exist with unplanned growth. It must be protected.

The questions, then, are: What do we do about it? How do we respond?

Of course, first, we had to discern the character of the damage done. And, in the 1970s, thanks to the tenacity of one U.S. Senator, Charles Mathias of Maryland, the U.S. Environmental Protection Agency won the congressional support it needed to proceed with a historic seven-year study.<sup>3</sup> That done, the jurisdictions of the Chesapeake Bay region acted—by forming a unique pact.

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3. See EPA, CHESAPEAKE BAY PROGRAM: FINDINGS AND RECOMMENDATIONS (1983).

It has been a little more than twenty years ago now, since December 1983, when Mayor Barry, Governor Robb, Governor Hughes, Lt. Governor Scranton, EPA Administrator Bill Ruckelshaus, and Chesapeake Bay Commission Chairman Joe Gartlan, fixed their signatures to the historic Chesapeake Bay Agreement and pledged the mutual support of the jurisdictions to do what was necessary.<sup>4</sup>

Of course, there was initial skepticism.

It was said that the states and the District of Columbia would not effectively work together.

But, they have.

It was said that the states and the District of Columbia would not put their money where their mouths were.

But, they did.

It was said that the federal government would not put money on the line.

But, it has.

In fact, since 1984, the signatories of the Chesapeake Bay Agreement have spent several hundreds of millions of dollars on the restoration. By the establishment of the Chesapeake Bay Agreement in 1983, the region took the important first step. We effectively acknowledged that the decades-old decline of the Chesapeake Bay would not be turned around overnight.

Yet, we committed ourselves to the long haul, to pooling our resources, our energies, and our talents into an unrelenting effort. And, by so doing, we put in place a process—a process that would advance in stages the determined pursuit of the Bay's restoration.

In 1987, a new generation of elected leaders believed that the time was right to expand the frame of reference. They concluded that it was the time to broaden the focus beyond the general issues of environmental quality and data gathering . . .

. . . to specific goals and benchmarks of pollution reduction, species protection, habitat restoration, and fisheries management

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4. See CHESAPEAKE BAY PROGRAM, 1983 CHESAPEAKE BAY AGREEMENT (1983), available at <http://www.chesapeakebay.net/pubs/1983chesapeakeBayAgreement.pdf>.

. . . to design a monitoring system that would enable us to measure clearly and precisely our rate of success in cleaning the Bay—a system that would publicly demonstrate the progress we're making.

They also wanted to ascertain the future dangers of unchecked development and determine how we could improve the way we use the land.

They wanted to use resources, to further educate the public on what's at stake with the Chesapeake Bay, about the choices we must make in the years ahead and the investments that will be required.

So, across the Bay region, public advisory groups were formed.

Public leaders requested and received reports from the newly created Citizens Advisory Committee and the Scientific and Technical Advisory Committee on proposals for the new multi-jurisdictional agreement.

In August 1987, the elected leaders of the Chesapeake Bay region, federal and state, adopted a new agreement that lifted the multi-jurisdictional partnership to a new level of understanding and commitment.<sup>5</sup> It was an agreement that pledged to unleash a series of concrete actions to be taken through a series of specific goals, objectives and commitments.

The 1987 agreement concluded that the ultimate measure of the Chesapeake Bay's health is its living productivity. So, it stated that the region's leaders would develop and adopt specific criteria for the protection of habitat conditions. Those criteria, once assembled, would guide our actions in the future.

The 1987 agreement agreed to adopt within a year, by July 1988, a baywide assessment plan, so that we would have a firm fix on the status of the Bay's living resources. The agreement also included a pledge to adopt, by January 1989, a schedule for developing a baywide fisheries management plan for commercial and recreational species, as well as those which are ecologically valuable, and to commit the region to the protection and restoration of the Bay's tidal and non-tidal wetlands.

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5. See CHESAPEAKE BAY PROGRAM, 1987 CHESAPEAKE BAY AGREEMENT (1987), available at <http://www.chesapeakebay.net/pubs/199.pdf>.

The 1987 agreement also declared that the improvement and maintenance of water quality is the single most critical element in the overall restoration and protection of the Chesapeake Bay. Because of the Bay's nutrient overload problem, the 1987 agreement noted that if we could reduce the nutrient load by thirty to forty percent, we would achieve a highly significant improvement in the Bay's condition.

So, the leaders agreed to develop and adopt, by July 1988, a basinwide plan to reduce nutrients entering the Bay system by forty percent by the year 2000, and to develop and adopt, by December, 1988, a basinwide plan for the reduction and control of toxic materials.

The 1987 agreement also contained specific commitments regarding developing plans for the management and control of pollutants entering the Bay from point and non-point sources and bottom sediments, and for the control and reduction of point and non-point sources of nutrient, toxic and conventional pollution from all federal agencies and installations.

There were also objectives outlined for the study of population growth and public education. The framers of the 1987 agreement recognized that other commitments and agreements would follow—showing that even as new leadership enters the scene, our resolve to restore the Bay must not diminish.

Indeed without a continuing rededication of intent, they noted, progress would not be sustained. They recognized that cleaning up the Bay is a complicated battle.

There were other agreements during the 1990s—ones that recognized tributary strategies and proposed even more specific metrics, even though funding requirements later failed to match the commitment language.<sup>6</sup>

The process of developing agreements over two decades has been good, and the 2000 Chesapeake agreement is evidence that more can be accomplished.

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6. See, e.g., CHESAPEAKE BAY PROGRAM, JOINT TRIBUTARY STRATEGY STATEMENT (1993), available at <http://www.chesapeakebay.net/pubs/>; CHESAPEAKE BAY PROGRAM, CHESAPEAKE BAY AGREEMENT: 1992 AMENDMENTS (1992), available at <http://www.chesapeakebay.net/pubs/1992ChesapeakeBayAmendments.pdf>.

For more than twenty years, then, the federal-state partnership called the Chesapeake Bay Program has had in place a remarkable partnership, one that has developed a sophisticated estuarine science. The partnership effort has created cleanup strategies that have resulted in measurable gains in reducing the flow of pollutants into the Bay. Without the current restoration framework now in place, the Chesapeake Bay would assuredly be in much worse shape.

Because we live in one of America's fastest growing regions, the relative shallowness of the Bay makes it especially vulnerable to the polluted runoff that accompanies such rapid population growth in the region.

Notwithstanding all the agreements and progress made, current efforts by the state and federal governments are barely keeping the restoration effort's proverbial head above water. Today we are funding a Chesapeake Bay Program that provides essential science and coordination functions. We are not, however, investing enough in large-scale, effective on-the-ground solutions.

And time is not on our side.

The modest gains of today are certain to be swept aside in the tide of growth. Every day the watershed loses 100 acres of forest. That's the equivalent of losing every tree in the entire National Arboretum in less than a single workweek.

And the losses mount day after day, week in and week out, as the years bleed into decades.

Population in the watershed is growing by more than 150,000 people annually. We are adding more than one million residents every decade. Today more than 16.6 million people call this watershed their home.

And our development patterns are vastly outstripping our rapid population growth. The amount of impervious surface—the hardened landscape through which water cannot penetrate—is increasing five times faster than the population. In the 1990s, population in the watershed grew by eight percent, but impervious surface skyrocketed by forty-two percent. That hardened landscape takes away the watershed's natural ability to absorb rainwater and the pollutants associated with modern life.

This fact of life is often overlooked or conveniently ignored: A one-acre parking lot produces sixteen times the volume of polluted runoff that comes off a one-acre meadow. That same one-acre parking lot produces about forty times the polluted runoff volume that comes off a one-acre lot of mature trees.

This must not be forgotten: the Chesapeake Bay is not a static body of water, and the restoration effort is not trying to clean up pollution that is frozen in time. The burden grows every day, and the ability of the landscape to absorb that growing pollution burden is diminished with every acre of resource land that we lose to growth and development. We need bold action, and we need it today if we are truly serious about Bay restoration.

The current EPA Chesapeake Bay Program performs an absolutely critical function. It provides the glue that holds this celebrated national effort together. Sound science is at the heart of an effective restoration effort, and the Chesapeake Bay Program's internationally recognized scientific community provides that vital service to the region and the nation. The Program also provides an essential coordination role among six states, the District, more than a dozen Federal agencies, the non-profit sector, businesses, academic institutions and average citizens. Certainly no other collaborative effort can rival it.

Many of us are frustrated with the slow pace of the restoration. Some critics in the last two years, however, have blamed the current Chesapeake Bay Program for the fact that the Bay is not restored. Such criticisms are wildly off the mark. In fact, this modest \$20 million a year coordination effort is admirably doing what it has been charged to do. We need the Bay Program for the critical scientific, coordinating and leadership roles it plays.

But the restoration of the Chesapeake requires much more.

It demands an investment commensurate with its value.

In 2004, the federal- and multi-state-created Blue Ribbon Finance Panel found that the cost of restoring the Bay is on the order of \$25 billion dollars. The Bay Program's budget is less than one-tenth of one percent of that amount.

Put another way, it would take more than 1200 years for the Program alone to come up with the funds needed to restore the Bay, given its current funding levels.



The big challenge facing us today is how to leverage that much more substantial investment.

The Blue Ribbon Finance Panel that I chaired proposed something bold: a new Chesapeake Bay Financing Authority that is loosely modeled after the Clean Water Act State Revolving Loan Fund. Capitalized with billions of dollars from the federal government and matched 80:20 by the states, this Authority would have the resources to fund cost-effective strategies that would actually get the job done. It would serve as the financing arm that would be guided and directed by the Bay Program.

I note with pleasure the recent record bi-partisan commitments being made by state governments in the Bay watershed. Maryland's Republican Governor Bob Ehrlich and the state's Democratic legislature combined to pass the so-called "flush fee" that is being used to leverage a billion dollar investment in the restoration effort.<sup>7</sup>

In Pennsylvania, the political lineup has been different, but the results are the same. Democratic Governor Ed Rendell worked with the Republican legislature there to enact a \$650 million "Growing Greener" bond issue.<sup>8</sup>

And in Virginia, Democratic Governors Mark Warner and Tim Kaine proposed to the Republican-controlled legislature earlier this year a record investment in their biennial budget submission: \$254 million for nutrient pollution reduction initiatives for both sewage treatment plant upgrades and new conservation practices on agricultural lands.<sup>9</sup> With strong support in the legislature, the Commonwealth has joined the list of Bay states making substantial new investments in the restoration effort. Governor Kaine has also announced plans to seek an additional \$200 million appropriation in 2007, which would be in addition to the mandated ten percent of state budget surplus that goes into the Water Quality Improvement Fund.<sup>10</sup>

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7. See MD. CODE ANN., ENVIR. § 9-1605.2 (LexisNexis 2006).

8. See 27 PA. STAT. ANN. § 6116 (West Supp. 2006).

9. See Press Release, Governor of Virginia, Governor Kaine Announces \$250 Million Clean Water Bond Initiative (Dec. 13, 2006). See generally Governor Warner's Proposed 2006-2008 Biennial Budget, <http://www.dpb.state.va.us/budget/04-06/buddoc04/buddoc.cfm> (last visited Feb. 12, 2007).

10. See *id.*

The point of this historical perspective is this: The cost of restoration is large, but the price of inaction is even larger—and the work will only become more expensive and difficult with every year of delay.

We need strengthened and sustained sources of financial commitment from the federal government—as well as from the States—that are equal to the scope of the work that needs to be done and the ultimate value of the resource we all want to protect.

So, in closing, let me put on the table for discussion some questions for conference participants.

We know what's wrong with the Bay.

We know the sources of the pollution.

We know the solutions, too.

What we lack is adequate funding.

Bay restoration now rests on identifying permanent and predictable sources of funding for the array of pollution prevention and mitigation efforts needed.

Here are the questions:

What is proposed to secure the needed funds?

Reliance on general revenue from annual appropriations is destined to be the subject of regional and even national swings in the economy. Some states have begun experimenting with permanent funding sources. Is a Maryland-style “flush fee” appropriate for Virginia? Would a Pennsylvania-style “tipping fee” at landfills be an appropriate and reliable source of funding in Virginia?

Innovative funding sources will need to be identified. For example, the federal Superfund tax of several decades ago was levied on all petroleum and chemical companies to pay for orphan shares of cleanup costs because these were the ultimate sources of the pollutants. Today, chemical fertilizer accounts for one-half of the excess nitrogen and phosphorus pollution coming off agricultural lands. Should a simple fee be assessed on all chemical fertilizers sold in the Commonwealth, or the watershed, with the funds dedicated to nonpoint source pollution reduction?

Should such a fee apply across the country?

Funding is key. Let me propose three criteria to use in evaluating potential funding sources: Are they

*Adequate* to do the job,

*Appropriate* as to source and amount, and

*Permanent* so that they can be leveraged and sustained?

Next year, 2007, marks the 400th anniversary of Captain John Smith's sailing the Bay, helping to establish the first permanent English-speaking colony at Jamestown in what would become America. Today the capitals of Pennsylvania, Maryland, Virginia and America sit alongside rivers that feed the Chesapeake Bay.

It is no exaggeration to say that the Chesapeake region is the cradle of America, and today it is home to the government that is the richest and most powerful in the world. The vital commerce of the region relies on the bounty and beauty of the Chesapeake Bay. The ecological value of the Chesapeake is both unparalleled and priceless. It is truly a national treasure worthy of the highest protection.

The fundamental question for us all is this: are we willing to invest in what we value in order to save it?