

[Sent to all U.S. Senators]

Re: S. 1816, the Chesapeake Clean Water and Ecosystem Restoration Act

Dear Senator xxx:

We are writing on an issue of critical importance that may arise in the lame-duck session of Congress. It is our understanding that Sen. Cardin may attempt to attach S. 1816, *the Chesapeake Clean Water and Ecosystem Restoration Act* to a must-pass bill or some other measure. We urge you to inform Majority Leader Reid that the scope and effect of the changes in S. 1816 are unprecedented and represent some of the most fundamental amendments to the Clean Water Act since its modern inception in 1972. This is not a bill with implications just for the Chesapeake Bay watershed; its measures would have far reaching consequences for the entire U.S. and, as such, merits the full and serious consideration that the Senate would normally give to measures of such importance. We ask that you oppose any bill that comes to the Senate floor if it includes the text of S. 1816.

One possible vehicle may be an omnibus “clean water” bill combining several bills that authorize non-regulatory programs to help improve water quality in various regions of the country. These bills may include S. 3073 *the Great Lakes Ecosystem Protection Act of 2010*, S. 1311 *the Gulf of Mexico Restoration and Protection Act*, S. 3550 *the Columbia River Basin Restoration Act*, S. 3539 *(the San Francisco Bay Restoration Act*, H.R 4715 *the Clean Estuaries Act*, S. 2739 *the Puget Sound Recovery Act*, and S. 3119 *the Long Island Sound Restoration and Stewardship Act*. These are non-controversial measures that enjoy broad support.

In contrast with these measures, S. 1816 is not a regional bill with only local consequences and only benign effect for the rest of the country. That is manifestly not the case with S. 1816, and this bill does not belong in such a package. Unlike the bills listed above, S. 1816 does not authorize a program to improve water quality through collaboration, technical assistance, and/or funding. Instead, S. 1816 would set a major legislative precedent in federal environmental law, taking the authority and control granted to states and local governments under the Clean Water Act and instead vest it in the Environmental Protection Agency (EPA) – a step never before taken in the 38-year history of the law. Additionally, by subjecting a wide range of traditionally local and state activities to federal jurisdiction under the Clean Water Act, S. 1816 automatically grants citizen lawsuit privileges to environmental activists to stymie lawful economic activity and ensnare landowners and state and local governments in expensive, protracted litigation.

The backdrop for S. 1816 is the Chesapeake Bay Total Maximum Daily Load (TMDL). Under current law, TMDLs are developed by states to limit the amount of pollutants that may enter an impaired river, lake, or estuary. They do this by allocating loads among various sources, including industrial and municipal wastewater treatment plants, municipal storm sewer systems, septic systems, and runoff from urban, suburban and agricultural land. Under current law, EPA has authority to approve or disapprove a state’s TMDL. EPA also can issue its own version of a TMDL if a State does not act or if EPA disapproves the state’s TMDL.

S. 1816 would completely change the law and its application in the District of Columbia and in the six states that encompass the Chesapeake Bay watershed. In the District of Columbia, S.

1816 would give EPA authority to regulate the flow of water and the use of land, and impose extreme controls that would result in higher costs borne by the citizens of the District in order to reduce both runoff and wastewater discharges.

In the rest of the 64,000 square mile watershed, falling within six states, S. 1816 would re-write the Clean Water Act and how responsibilities are shared between the federal government and the states. For example, if a state sends an implementation plan to EPA for approval, the plan would become federalized. This means that once a state sends its plan to EPA, EPA is given authority to regulate the flow of water and land use in that state and can require the citizens of that state to fund and implement very stringent controls, without regard to cost or feasibility. But that is not the end. Once a plan is federalized, it also becomes enforceable by environmental activists through the courts. This means that a member of the federal bench can be put in charge of determining land use issues in the Chesapeake Bay watershed. Given recent history by EPA in failing to defend its own regulations and settling cases with environmental groups, it raises the very realistic prospect of federal regulatory encroachment on traditional state and local responsibilities and imposing draconian controls on economic activity and growth in the Chesapeake Bay watershed, without assuring that water quality will improve. What is even more alarming is that EPA and environmentalists are already holding up S. 1816 as a model for how they want to regulate the rest of the country.

US EPA officials have said on more than one occasion since the start of this Administration that they consider the policies being developed and implemented in the Bay region to be the model for Clean Water Act policies and approaches to be applied throughout the country. S. 1816 is a breathtaking expansion of federal regulatory control, and in the adoption of such policies the Senate would be setting a major precedent for the application of this model to the entire U.S. The end result of this would be, in effect, making EPA the pre-eminent land use authority in the nation.

Under current law, EPA does **not** have the authority to issue a TMDL without giving states the opportunity to act first. EPA does **not** have the authority to tell states how to achieve the pollutant reductions called for in a TMDL. EPA does **not** have the authority to directly regulate water flow, land use, and/or the buildings and streets of every community to implement the TMDL itself. Because EPA does not have this authority under current law, this means that current law also does not grant environmental activists the opportunity to file lawsuits to try to force EPA to regulate the use of land in both rural and urban communities without any regard to cost or feasibility. S. 1816 would overturn all this, granting EPA authority it does not currently have and resulting in all the risks and liabilities that come by making decisions made with these authorities subject to challenge in federal court.

The limits on EPA's authority in current law are grounded in sound public policy. EPA is the entity charged to develop the scientific expertise to determine what level of pollutants a water body can assimilate and still achieve water quality standards. Thus, current law gives EPA the authority to set that level. States and local governments are the entities with the authority and expertise to address water flows and land use issues, as well as to determine the designated use of a water body. Because TMDLs address both point source discharges, which are regulated

under federal law, and diffuse runoff, which is regulated by states and municipalities, implementation authority is appropriately vested with the States and their political subdivisions.

Agriculture and forestry are committed to working with Congress, the administration and other stakeholders in the Bay region in support of advancing policies that can achieve greater water quality for the Bay. We have the same commitment with respect to improving water quality across the country. But we emphatically cannot support the precedent setting, fundamental altering of the Clean Water Act policy framework that S. 1816 would carry forward, with all its attendant implications for the application of the Clean Water Act throughout the country. It simply will not work. We urge you to oppose this measure should it come up for consideration later this year.

Sincerely,

Agricultural Retailers Association  
Agrotain International, L.L.C  
American Farm Bureau Federation  
American Feed Industry Association  
American Meat Institute  
CropLife America  
Delaware Maryland Agribusiness Association  
Delmarva Poultry Industry, Inc.  
Illinois Fertilizer & Chemical Association  
Kansas Agribusiness Retailers Association  
Maryland Pork Producers Association  
Maryland & Virginia Milk Producers Cooperative Association, Inc.  
Maryland Grain Producers Association  
Michigan Agri-Business Association  
Missouri Agribusiness Association  
National Alliance of Forest Owners  
National Association of Conservation Districts  
National Association of Wheat Growers  
National Cattlemen's Beef Association  
National Chicken Council  
National Corn Growers Association  
National Council of Farmer Cooperatives  
National Milk Producers Federation  
National Pork Producers Council  
National Sorghum Producers  
National Turkey Federation  
PotashCorp  
South Dakota Agri-Business Association  
South East Dairy Farmers Association  
The Fertilizer Institute  
The National Association of State Departments of Agriculture  
United Egg Producers  
U.S. Cattlemen's Association

Virginia Agribusiness Council  
Virginia Grain Producers Association  
Virginia Poultry Federation  
Virginia State Dairymen's Association  
Wyoming Ag-Business Association  
Wyoming Crop Improvement Association  
Wyoming Wheat Growers Association