



# **TMDL NPS Implementation in Maryland**

TMDL Program in Transition  
Environmental Law Institute Workshop  
Shepherdstown, WV

May 28, 2009

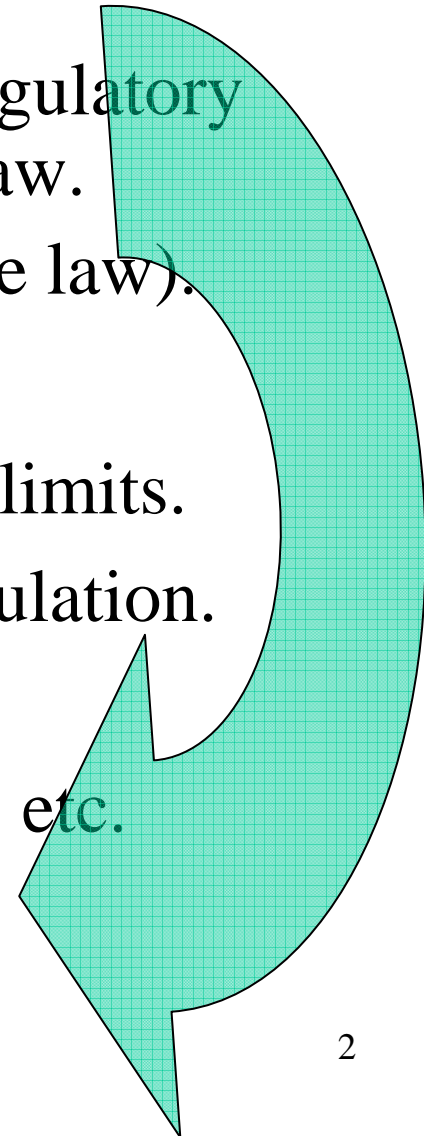
Presented by:  
Jim George, PhD  
MDE, Science Services Administration





# Laws, Regs vs Voluntary Actions

- **Laws: Federal and State**
  - Laws can convey broad powers without regulatory specifics on how to implement the given law.
  - Judicial branch interpretation (courts create law).
- **Regulations:**
  - Spell out specific implementation steps & limits.
  - More NPS activities are coming under regulation.
- **Unregulated NPS:**
  - Traditional: Education, Incentives, Grants, etc.
  - Broad Legal Powers
  - Leverage Unregulated via Regulated





# Traditional Voluntary NPS Actions

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- **Chesapeake Bay Agreement:**
  - Goal to Reduce Nutrient Load & Maintain Cap.
  - Tributary Strategies: Peer Pressure, Quantified BMPs
  - BaySTAT & 2-Year Milestones
  - Presidential Executive Order
- **State Funding Programs:**
  - Maryland Agricultural Cost Share (MACS).
  - Bay Restoration Fund “flush tax” (PS & Septic).
  - Chesapeake and Coastal Bay Trust Fund (NPS)
  - State Stormwater Fee (proposed legislation)
- **2006 TMDL Implementation Guidance for Local Governments**



# Traditional NPS Actions (Con't)

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- **Partnerships (and More):**
  - EPA Region III – Legal Partners
  - Sister Agencies
    - Dept. Natural Resources – Coastal NPS Program & Chesapeake Bay.
    - Agriculture – Implementation & Nutrient Trading
    - Planning – Water Resource Element of local land use plans
  - Local Governments – Legal Partners
  - University Cooperative Extension – Educ/Outreach
  - EPA Bay Program – Technical (Bay TMDLs)
  - EPA ORD – Implementation Targeting for Success
  - Corsica River Initiative



# Broad Legal Powers: Federal

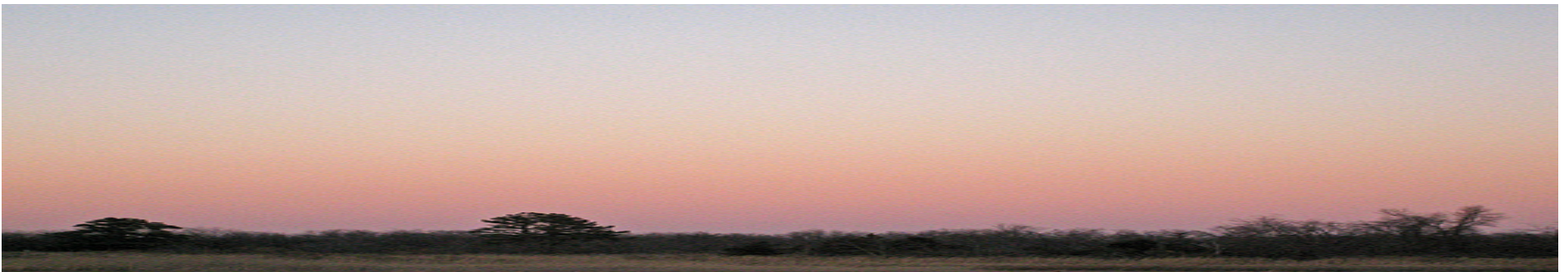
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- **Federal Power Source:**

- Congressional Intent
- Constitutional Powers: Commerce Clause, Necessary/Proper Clause.

- **Often Revealed Through Courts:**

*Wickard v Filburn*: Congress has constitutional power over a non-commercial activity, even if “**trivial by itself**” if when **combined with similar activities** has a significant impact on commerce. (Austin & Myers, ELF 2007)





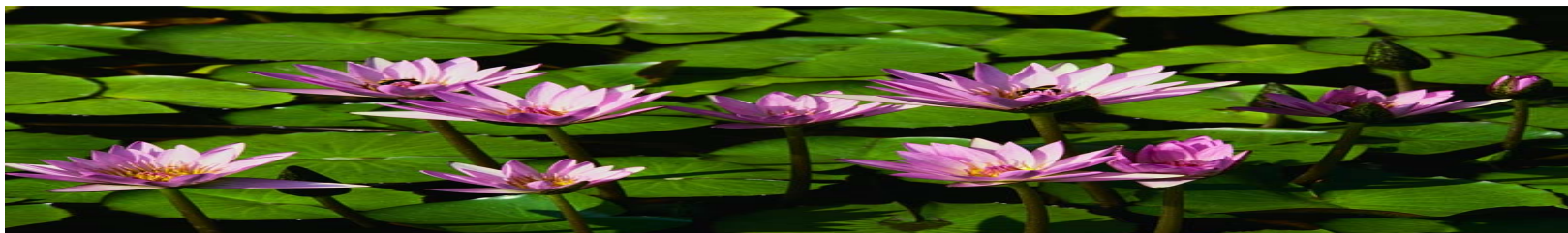
# Federal Powers (Con't)

- **40 CFR 122.4(i):**

- Prohibition on issuing NPDES permits of impairing substance to impaired water without a TMDL allocation.
- Construction General Permits.

- **Pinto Creek:**

Prohibition on issuing a permit until a control plan demonstrates all sources, including NPS, will be reduced by an amount necessary to create additional capacity for the increased load. Offsets are not sufficient.





# Broad Legal Powers: State

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## Maryland Environment Article

- **Regulations Often *Limit* State Legal Powers**
- **Nuisances - Duty to investigate. Penalties.**

The Secretary shall investigate all nuisances that affect the public health and devise means for the control of these nuisances.

- **Miscellaneous powers and duties**

To issue, modify, or revoke orders and permits that prohibit discharges of pollutants into the waters of this State or to adopt any other reasonable remedial measures to prevent, control, or abate pollution or undesirable changes in the quality of the waters of this State; **(Nexus for Co-Permitting NPS)**





# Broad Legal Powers (Con't)

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- **Sediment Control**
- **Stormwater Management**
- **Watershed Sediment and Waste Control**

If the development plan contains any septic or private sewer facility, the Department of the Environment shall approve it only if the facility will not contribute in any way to pollution of the Severn River;

The developer shall submit a certificate from a professional engineer stating that the developer's plan to control silt and erosion is adequate to contain the silt and erosion on the property covered by the plan. (Title 4, Maryland Environment Article)





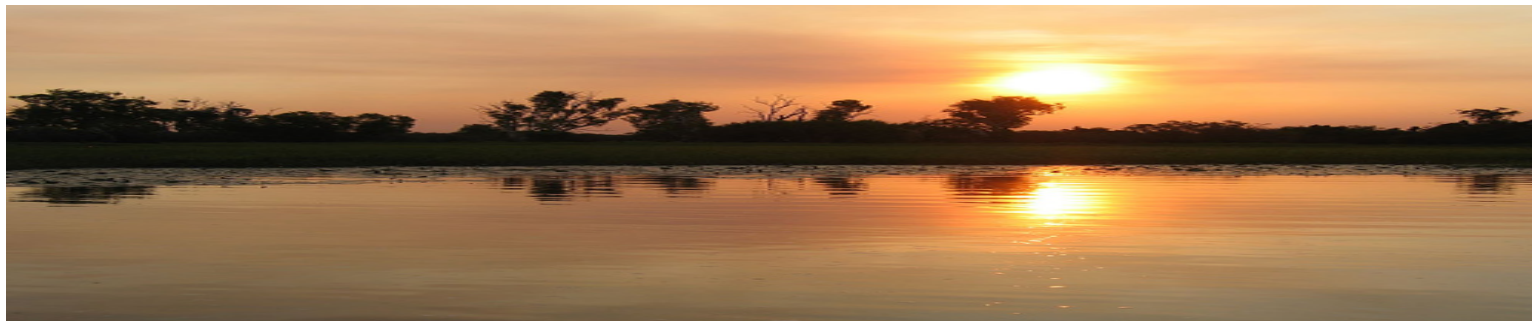
# Broad Legal Powers (Con't)



- **Abandoned Mine Drainage**

It is the intention of the General Assembly to provide for the restoration of State waters affected by pollution from any abandoned mine to the quality necessary to support fish and other aquatic life, recreation, and other beneficial purposes.

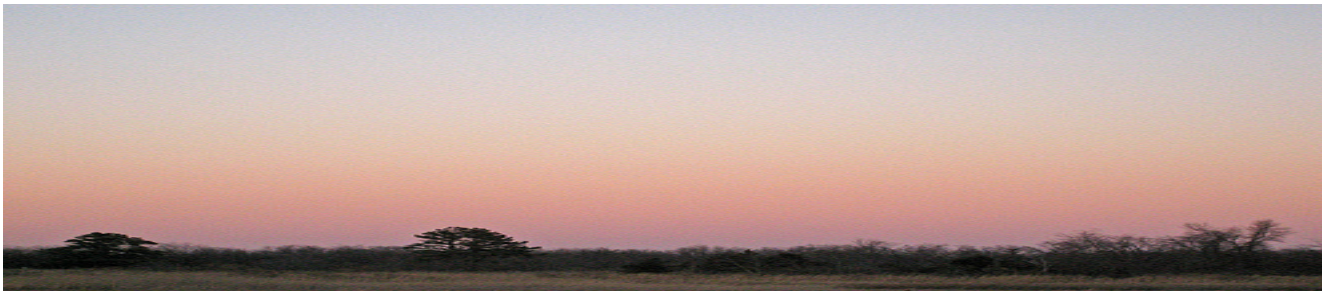
To accomplish this objective, the Secretary may acquire and rehabilitate land occupied or degraded by any abandoned deep or strip mine to prevent the land from contributing to water pollution and take whatever other measures are necessary to prevent, control, and abate water pollution from any abandoned mining area. (Title 15, Maryland Environment Article)





# Leveraging NPS Reductions

- **Broad Legal Authorities (Damocles Sward)**
- **Permits and Offsets:**
  - **WWTP Point Source to NPS Offset**
  - **NPDES Stormwater to NPS Offset**
  - **State Stormwater to NPS Offset (NPS to NPS)**
  - **Septic System Offsets (2 for 1 denitrification)**
- **Water Resources Element**
- **Friends of Pinto Creek vs EPA**





# Questions?

