

Chesapeake Bay Independent Evaluator

ISSUE: The Chesapeake Bay Accountability and Recovery Act (CBARA), signed into law in December 2014, calls for the EPA Administrator to appoint an independent evaluator for the Chesapeake Bay within 30 days of a Chesapeake Executive Council (EC) nomination. The first report of the Independent Evaluator is due to Congress 180 days later, and a new report is due every two years thereafter. The EC intends to provide a nomination at their September 27, 2016 meeting. It is likely that the EC will put forward a single nomination of the National Academy of Science (NAS) at that meeting. Funding for NAS to provide this function will be ongoing and CBP signatories would be responsible for covering the necessary cost.

BACKGROUND: The Chesapeake Executive Council has nine members, the Governors of each of the 6 states in the watershed (Maryland, Virginia, Pennsylvania, New York, Delaware, and West Virginia), the Mayor of Washington, D.C., the Chesapeake Bay Commission chair, and the Administrator of EPA on behalf of the Federal Government. The CBARA calls for the Executive Council to nominate potential independent evaluators. Once that nomination occurs the EPA Administrator has 30 days to appoint the Independent Evaluator for the Chesapeake Bay. Because of this tight timeframe, the EC members' principals (generally state secretaries and the Region 3 RA) have been exploring options for the EC's consideration. They have looked at two existing entities that could convene special panels, the EPA's Science Advisory Board (SAB), the National Academy of Science, and an option that considers initiating a new independent evaluator through a grant.

The Principals' Staff Committee (PSC) met twice to consider these three options (see appendix below), once in March 2016 and once in May 2016. The PSC largely discarded the idea of creating a new independent body, and focused on considering the EPA's SAB and the NAS. While both were similar options, the consideration of the two options came down to two criteria – the cost to the CBP partners and a concern about appearance of conflict of interest. In between the two meetings, the CBP's Scientific and Technical Advisory Committee (STAC) evaluated the options and recommended the NAS. In addition, the two sponsors of the Bill to enact CBARA (Senator Warner and Congressman Wittman) wrote a letter to the PSC also recommending NAS.

PSC Recommendation: Based on both the recommendations from the sponsors and STAC and concerns that many of the PSC members had that there was an appearance of conflict of interest with the EPA SAB, the NAS became the preferred option of the PSC. While they recognize the cost to the CBP would be ongoing and that all Partners would be contributing to that cost, they felt that it was the better choice.

Appendix: Three Options for Chesapeake Bay Program Independent Evaluator (From March 2016 PSC Meeting)

Statutory Language

SEC. 4. INDEPENDENT EVALUATOR FOR THE CHESAPEAKE BAY PROGRAM.

- (a) IN GENERAL.—There shall be an Independent Evaluator for restoration activities in the Chesapeake Bay watershed, who shall review and report on—
- (1) restoration activities; and
 - (2) any related topics that are suggested by the Chesapeake Executive Council.
- (b) APPOINTMENT.—
- (1) IN GENERAL.—Not later than 30 days after the date of submission of nominees by the Chesapeake Executive Council, the Independent Evaluator shall be appointed by the Administrator from among nominees submitted by the Chesapeake Executive Council with the consultation of the scientific community.
 - (2) NOMINATIONS.—The Chesapeake Executive Council may nominate for consideration as Independent Evaluator a science-based institution of higher education.
 - (3) REQUIREMENTS.—The Administrator shall only select as Independent Evaluator a nominee that the Administrator determines demonstrates excellence in marine science, policy evaluation, or other studies relating to complex environmental restoration activities.
- (c) REPORTS.—Not later than 180 days after the date of appointment and once every 2 years thereafter, the Independent Evaluator shall submit to Congress a report describing the findings and recommendations of reviews conducted under subsection (a).

Options for Consideration

The three options for consideration by the PSC/EC include:

1. EPA Science Advisory Board (www.epa.gov/sab)
2. Letting a grant to an entity through the EC nomination/Administrator selection
3. The National Academy of Science (<http://www.nasonline.org/>)

The first table compares the three options related to a set of criteria intended to identify key characteristics of each option. The second table identifies how each option meets the intent of the Chesapeake Bay Accountability and Recovery Act and the follow-up letter the sponsors of the Bill sent to the Executive Council.

Key Characteristics

Criteria	Option 1 SAB	Option 2 Grant	Option 3 National Academies
Format	SAB would act as convener. Using established procedures they would convene a standing committee with rotating members, set up review, and staff the process.	Undetermined. Letter to EC from sponsors of the Bill envisions that it is a single entity (institution of higher learning) who manages the process, using a combination of expertise internal to that entity, ad hoc members from other institutions, and/or a panel similar to the NAS panels.	NAS would act as convener, convening a panel of experts using established procedures. Unknown whether this would be a standing committee or if different panels would be set up every two years.
Cost to Program	No additional funding required.	Could be costly – who pays?	Fairly costly – who pays? (Current estimates from the NAS are \$250,000-\$375,000 annually).
Timeliness	Immediate start up of the committee formation process. Could ensure timeliness of process.	Difficulty in ensuring timeliness of process. Getting contracts in place, identifying potential funding sources, conducting initial review (e.g. getting grants in place requires at least 60 days and there is only 180 days between the Administrator's selection of the I.E. and the first Report to Congress.	Timeliness depends on ability to get a contract in place, reaching agreement on study questions, and adherence to contract deliverable due dates. Short start up time once funding is provided.
Sustainability	Would provide for an ongoing standing committee for continuity.	Dependent on how funded, ongoing funding source established, and willingness of nominated entity.	Has experience convening an ongoing standing committee for continuity in other programs. This would need to be negotiated. Ongoing funding source would have to be established.

Criteria	Option 1 SAB	Option 2 Grant	Option 3 National Academies
Readiness	Has procedures in place for convening panels that would provide expertise, avoid conflict of interest, and provide transparency through FACA. EPA has agreed to provide this service if nominated.	No known established procedures related to criteria of an independent evaluator, avoidance of conflict of interest, nomination process, etc.	Has procedures in place for convening panels that would provide expertise, avoid conflict of interest, provides opportunity for openness for some parts of the process
Meets intent of law	CBARA envisions the IE as an institution of higher learning, which this obviously isn't. However, the majority of the members are from academic institutions. It does not require this, using the term "may"	Process can be designed to ensure it meets the intent of the law.	CBARA envisions the IE as an institution of higher learning, which this obviously isn't. However, the majority of the members are from academic institutions. It does not require this, using the term "may".
Avoids actual or appearance of conflict of interest Independence?	The SAB is an independent body of external scientists that provides advice to the EPA Administrator. The EPA has procedures in place to ensure that the SAB's advice and recommendations are the product of the Board's independent judgment, and not inappropriately influenced by the EPA or any special interest. Procedures are in place for avoiding conflict of interest and other ethical issues when selecting candidates for membership. Long history of making objective findings and recommendations. Experts serve as Special Government Employees, subject to Executive Branch Ethics Regulations	It may be difficult to avoid the appearance of conflict of interest if the EC members nominate an institution of higher learning within the Chesapeake Bay watershed to use its own expertise for the evaluation. Most have received funding for restoration work, many have been members of STAC. Procedures would need to be developed to avoid this issue and nominations may have to come from outside the watershed.	The NAS is recognized for its independent advice nationally on scientific issues (not so much for policy) and has procedures to ensure avoidance on conflicts of individual panel experts. NAS evaluates in accordance with its Policy on Committee Composition and Balance and COI

Intent of Chesapeake Bay Accountability and Recovery Act

CBARA	Further Guidance via Letter to EC (Warner, Wittman)	Option 1 – SAB Standing Committee	Option 2 – Grantee	Option 3 – NAS Panel
Nominations submitted by the EC for independent evaluator		EC could nominate SAB to administer the independent evaluation process. Experience and procedures are already in place for this sort of work.	EC could nominate 1 or multiple entities for consideration by the Administrator. Criteria would be developed to guide the nomination process to ensure qualified candidates. Experience and procedures would have to be developed by the nominated I.E.	EC could nominate NAS Panel to administer this process. Experience and procedures are already in place for this sort of work.
Science-based institution of higher education	Envisioned as a single academic institution	It is a single science-based entity, although not an institution of higher education. However, the majority of members are from academic institutions. SAB would be able to maintain a standing committee for the long term.	Nominations can be made for a science-based institution of higher learning, although there may be concern about such an institution having, or perceiving to have, a conflict of interest related to restoration work in the Chesapeake Bay watershed.	It is a single science-based entity, although not an institution of higher- education. However, the majority of members are from academic institutions. There is precedent for maintaining standing committees for other purposes.
	Draw on expertise from other institutions/orgs (either ongoing collaborators or ad hoc review panels)	The standing committee is selected based on a FR notice for particular expertise needed for reviews. As expertise needs change, so can panel members.	This would be up to the nominated institution. May not have a history of assembling experts from outside the institution.	

CBARA	Further Guidance via Letter to EC (Warner, Wittman)	Option 1 – SAB Standing Committee	Option 2 – Grantee	Option 3 – NAS Panel
Administrator appoints IE from among nominees		<p>If EC just nominates the SAB to oversee the process, the Administrator can move forward immediately with the appointment process.</p> <p>(Process includes public nomination of experts and public comment on the list of candidates. Approximately 4 months from first FR notice to appointment of the committee)</p>	<p>This would have to be done within 30 days, and would require vetting of the nominations, in consultation with the scientific community. A funding mechanism (a grant) would have to be initiated quickly, and likely without further competition if using EPA. CBARA does not provide funding (Section 6 states that “no additional funds are authorized to be appropriated to carry out this Act”).</p>	<p>If the EC nominates NAS to oversee the process, the Administrator can quickly appoint NAS. Work would have to be done before hand to make sure there is adequate understanding and agreement to maintain a standing committee and a contract vehicle would need to be established. No funding source identified to cover this cost. (Section 6 states that “no additional funds are authorized to be appropriated to carry out this Act”).</p>
With consultation of the scientific community				
Demonstrates excellence in marine science, policy evaluation, or other studies relating to complex environmental restoration activities		<p>The SAB has experience setting up panels in all of these areas. The excellence and expertise will come from the individuals selected for the standing committee. There is a process in place for ensuring such expertise.</p>	<p>This would need to be part of the criteria developed for the nomination process and followed by the appointment process. No criteria exists right now to ensure this step.</p>	<p>The NAS has experience setting up panels in all of these areas. The excellence and expertise will come from the individuals selected for the standing committee. There is a process in place for ensuring such expertise.</p>

CBARA	Further Guidance via Letter to EC (Warner, Wittman)	Option 1 – SAB Standing Committee	Option 2 – Grantee	Option 3 – NAS Panel
Reports not later than 180 days after date of appointment and once every 2 years thereafter	Phased approach, with specific activities examined in depth, sequentially.	Because the SAB has procedures in place, the panel members can be selected and the process can be started quickly, therefore allowing adequate time for the first report to be completed in 180 days from appointment of members. For future reports, the standing committee would provide continuity while ensuring flexibility to bring on different experts depending on the focus of the evaluation.	The ability to meet the 180 day initial report deadline would depend on the history and experience of the entity selected. Continuity for ongoing evaluation would depend on ongoing funding, the ability and interest of the chosen entity to provide a permanent and ongoing program.	Because the NAS has procedures in place, the panel members can be selected and the process can be started quickly, therefore allowing adequate time for the first report to be completed in 180 days. For future reports, the standing committee would provide continuity while ensuring flexibility to bring on different experts depending on the focus of the evaluation.