

May 24, 2019

Cosmo Servidio
Regional Administrator, Region 3
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, Pennsylvania 19103
Servidio.Cosmo@epa.gov



Via electronic mail only

Dear Regional Administrator Servidio:

The undersigned members of the Choose Clean Water Coalition would first like to express our appreciation to your staff and that of your state and District of Columbia colleagues for their efforts in developing the draft Phase III Watershed Implementation Plans (WIPs). Unfortunately, after review of the draft WIPs, we have identified some deficiencies and do not believe they provide the necessary assurances and accountability to satisfy EPA's expectations. Pennsylvania's draft WIP is particularly problematic. There are also topics that are missing or insufficiently addressed in the WIPs, including environmental justice and climate change.

We urge EPA to ensure the draft WIPs adhere to its expectations¹ and demonstrate the necessary "reasonable assurance" that programs, policies, and other necessary actions will be put in place by 2025 to achieve the pollution reduction targets.² We encourage you to continue to require meaningful and transparent WIPs, as well as a transparent and open process, which is necessary to continue to engage the people living throughout the watershed.

Key States

Pennsylvania

We recognize Pennsylvania for their engagement of local governments in the WIP process. We appreciate that Pennsylvania is targeting work in the counties and watersheds that will deliver the most load reductions. However, we urge EPA to functionally reject Pennsylvania's WIP unless and until it clearly describes how they will meet their pollution reduction targets. The draft WIP is simply incomplete and unacceptable. Historically, EPA has rejected deficient WIPs, the primary example being the New York Phase I WIP, which fell short. EPA should take backstop actions to reject the state's WIP and either force them to re-calibrate it, reallocate loads and wasteload allocations, or take some other creative actions to get Pennsylvania back on track.

The Pennsylvania WIP as written is not calibrated to the 2025 target. While they state they are committed to reaching the target, the plans do not do so. We have concerns over the fact that while four pilot counties developed what seem to be good county-level WIPs, the other 39 counties are still working on theirs. This makes it hard to determine how much will get done by the counties in the current WIP.

¹ U.S. Environmental Protection Agency. 2018. U.S. Environmental Protection Agency's Expectations for the Phase III Watershed Implementation Plans. Available at: <https://www.epa.gov/sites/production/files/2018-06/documents/epa-phase-iii-wip-expectations-6-19-18.pdf>

² U.S. Environmental Protection Agency. 2018. EPA Oversight of Watershed Implementation Plans (WIPs) and Milestones in the Chesapeake Bay Watershed. Available at: <https://www.epa.gov/chesapeake-bay-tmdl/epa-oversight-watershed-implementation-plans-wips-and-milestones-chesapeake-bay>

Agriculture best management practice (BMP) implementation and verification, and stormwater pollution reduction in the 75% of the area not covered by MS4s are both big concerns. The WIP says repeatedly that they want to document BMPs already in place that haven't been "counted", and while that may be useful, it will do nothing to reduce pollution.

Further, Pennsylvania has not identified how to close the projected funding gap in order to implement their plan.

We request EPA insist that Pennsylvania demonstrate "reasonable assurance" and close the gap on pollution reductions and funding. EPA must have a strong response that prods the states, especially Pennsylvania, to clearly articulate the current level of progress; the pollution reduction gap(s); the funding needs; the plans to close the funding gaps; and the contingencies if the current plans fail.

If EPA determines that Pennsylvania state agencies are not properly and adequately spending federal dollars given to them for these purposes, we urge EPA to reprogram the money and allow other organizations to properly spend the funds in Pennsylvania to help meet the needs on the ground. But restricting or repurposing funds is only one tool in EPA's accountability framework toolkit and we expect that EPA will follow through on its commitment to ensure states are accountable to the Bay TMDL target by taking as many backstop actions as is necessary to get the Commonwealth back on track. Without a well-developed and fully implemented WIP in Pennsylvania we will never see a fully restored Chesapeake Bay.

Maryland

The Maryland WIP is strong in some areas, such as verification and engagement process of determining agricultural sector targets. However, the WIP is required to lay out specific strategies, new investments, and a clear framework for how the state will achieve water quality goals above "business as usual". We do not believe this WIP provides reasonable assurances that the state will meet its goals, because the plan:

- is vague;
- includes illogical statements and assertions;
- relies upon incorrect or inconsistent calculations;
- conflates past actions with future strategies; and
- fails to address top concerns discussed in our January 4, 2019, comment letter.

We outlined six key concerns in the comment letter provided to MDE on January 4, 2019 entitled "Re: Comments on Maryland's Phase III WIP Strategy and Development".

Unfortunately, this WIP also fails to adequately address those top six recommendations:

1. Numeric county-level planning targets, but no plans to meet them;
2. Increased technical and financial assistance, but no details;
3. Compliance and enforcement deficiencies, as well as best management practices (BMP) verification;
4. Inadequate strategy for accounting for growth;
5. Climate change is not addressed quantitatively nor specifically;
6. Permanent regenerative agricultural practices are inadequately addressed.

The WIP is Maryland's best opportunity to reaffirm and invest in a comprehensive water quality restoration approach that ensures more nonpoint BMPs are implemented and maintained. However, the Maryland WIP requires substantial revisions if its purpose is to present a realistic

path to reaching that goal. We encourage Maryland to include more concrete steps, as well as more consistent and factually accurate information in the final WIP (including, for example, a full listing of NPDES permits and the CAST input deck in appendices). Without this information, the state is missing an important opportunity to inform and engage with the public on this important planning document and set a successful course for the final phase of the Chesapeake Bay TMDL.

Virginia

Virginia's draft Phase III WIP was developed through a rigorous process that encouraged engagement and input from diverse stakeholders. Efforts to include both urban and agricultural communities and to encourage their input is commendable, and we are hopeful that this commitment to an inclusive process and output—necessary to implement the scaling up required to achieve these ambitious water quality goals—will continue. Successful implementation of the WIP will require significant coordination among stakeholders, including federal, state, and local governments, regulated and unregulated communities, non-governmental and governmental agencies and organizations, and citizens of the commonwealth. Adequate staffing and support at each respective level of government and among all agencies will be paramount.

We urge the commonwealth to add several new components to this plan as well as expanded detail on several issues.

1. Increased detail with regard to funding mechanisms that will support this plan.
2. New improved cost efficiency tracking for the Virginia Agricultural Cost Share Program to help ensure maximum pollution reductions per state investment is achieved.
3. Expanded detail related to potential future livestock stream exclusion mandates.
4. Enhanced Water Quality Monitoring in order to identify reduction opportunities.
5. More detail regarding how increased tree canopy will occur on lands that are not regulated through an existing MS4 permit.
6. Specific proposals for state agency staff funding – Enforcement, Monitoring, Technical Assistance / DEQ, DCR, DOF, VDH.
7. Recommendations to break these out into milestones within the WIP.
8. Expand funding for land conservation to provide matching funds to leverage federal programs.

Virginia's draft Phase III WIP includes a broad suite of initiatives to address these critical sectors, including exponential increases in cost-share funding, enhancements to the Chesapeake Bay Preservation Act, and reductions of agricultural, wastewater, and stormwater pollutants. All of these initiatives are necessary, and we strongly encourage support for their inclusion in the final Phase III WIP.

Stormwater

For the stormwater sector, EPA expectations for the Phase III WIPs identifies that the jurisdictions build "the financial capacity, technical assistance, regulatory oversight, and other incentives to oversee and implement the necessary MS4 [Municipal Separate Storm Sewer System] and other stormwater management and prevention programs."³ Across the watershed,

³ U.S. Environmental Protection Agency. 2018. U.S. Environmental Protection Agency's Expectations for the Phase III Watershed Implementation Plans. Available at: https://www.chesapeakebay.net/documents/EPA_Phase_III_WIP_Expectations.pdf

the review undertaken by Coalition members found most jurisdictions inadequately addressed reductions by the stormwater sector and the gaps in programmatic needs. In general, the pollutant load reductions in the Phase III WIPs predominantly rely on the agricultural and wastewater sectors, failing to put the programs and resources in place and to ask the stormwater sector to reduce its fair share. Furthermore, pollutant loads in the agriculture and wastewater sector are decreasing while there is an increase in pollutant loads from the stormwater sector, due to population growth and development pressures across the watershed.⁴

The Midpoint Assessment also recognizes that MS4 programs need adequate financial support and inspection and enforcement by the jurisdictions. While each jurisdiction has its own individual plan, our review revealed that many of the Phase III WIPs inadequately address how they will ensure that local stormwater programs are adequately funded or verify the proper function of BMPs. Additionally, most jurisdictions failed to include a viable plan to address voluntary practices for stormwater runoff on unregulated developed land. Voluntary practices play a critical role in achieving reductions by the stormwater sector because most states have more unregulated land than land covered under an MS4 permit.

The Expectations document establishes that the U.S. EPA will conduct its review of the draft Phase III WIPs to determine if the jurisdictions submitted a plan that includes all the fundamental pieces necessary to meet the 2025 goals. We ask that the U.S. EPA consider the programmatic gaps and shortcomings of the stormwater sector uncovered by Coalition members as it reviews the draft Phase III WIPs. All source sectors must be asked to do their part to reduce their contribution of the pollutants impacting the water quality and health of the Chesapeake Bay watershed.

Recognizing the uniqueness of each Phase III WIP, Coalition members included our top concerns below regarding the stormwater sector in each jurisdiction:

- Delaware- funding for the Department of Natural Resources and Environmental Control (DNREC) and the implementation and verification of BMPs.
- District of Columbia- an overreliance on forecasts of private BMP implementation (via compliance with the District's development rules) with no backup plan in case those third-party actions don't meet projections, and a lack of capacity to inspect the maintenance status of all BMPs.
- Maryland- a weakening of MS4 load reduction efforts embodied in the plans for the next round of Phase I permits and an overreliance on poorly performing BMPs.
- New York- education, funding, and capacity needs are crucial to be able to meet goals in the stormwater sector.
- Pennsylvania- funding, increased rigor in existing regulatory programs, and strategies to address currently unregulated sources of stormwater.
- West Virginia- funding for BMPs on unregulated land and BMP verification.
- Virginia- funding the needs unveiled in the forthcoming stormwater, agriculture, and wastewater assessments.

⁴ U.S. Environmental Protection Agency. 2018. Midpoint Assessment of the Chesapeake Bay Total Maximum Daily Load. Available at: <https://www.epa.gov/sites/production/files/2018-07/documents/factsheet-epa-midpoint-assessment-chesapeake-bay-tmdl.pdf>

Best Management Practice Verification

The Bay jurisdictions have committed to verify BMPs implemented and counted as part of estimating progress toward Chesapeake Bay pollution reduction efforts. The 2018 reporting year represents the first time this verification process went into effect. Verification has been an important issue for the environmental community and we appreciate the efforts of EPA and the Bay jurisdictions to undertake this initiative. It is difficult, however, for interested stakeholders to understand how well this process did, or did not function as intended.

Based on a quick look at BMPs between 2017 (pre-verification) and 2018 (post-verification) the implementation numbers don't look hugely different – suggesting Bay jurisdictions were able to verify most of the practices that had been previously counted. Unfortunately, since the process itself isn't transparent (e.g., which, if any, practices were eliminated due to lack of verification) there is no way for interested stakeholders to be sure whether states implemented adequate verification or EPA was an "easy grader".

Transparency could be increased with a report or summary of what transpired between EPA and the states regarding verification.

Climate

On their face, the draft plans begin to broadly address climate mitigation and adaptation needs. But they lack the necessary detail to substantiate processes and measurable outcomes that together ensure the planned restoration will be climate-resilient. Put differently states like Maryland, Pennsylvania, and Virginia have largely failed to explain how their climate efforts are aligned with the Chesapeake cleanup plans and their intended results.

Last year, the Bay Program partners committed to addressing climate change programmatically in their Phase III WIPs. The jurisdictions agreed to include a discussion of how climate change will impact the Bay cleanup, on the basis of preliminary modeling. They would further describe how their broader climate strategies would align with proposed restoration plans. The jurisdictions also approved five "guiding principles" for addressing climate change in the draft plans:

1. Capitalize on co-benefits;
2. Account for and integrate planning and consideration of existing stressors;
3. Align with existing climate resiliency plans and strategies where feasible;
4. Manage for risk and plan for uncertainty; and
5. Engage federal and local agencies and leaders

The Bay Program's Climate Resiliency Work Group and Water Quality Goal Implementation Team also produced a narrative template for the jurisdictions' programmatic consideration of climate change in the Phase III WIPs. The narrative template reflects the Partners' priorities to "facilitate the collection and evaluation of management practice performance data" to adapt to climate impacts; to reduce vulnerability of BMPs through "Climate-Smart" siting and design principles; and to integrate flexibility into planning for BMP implementation to account for climate-related uncertainties. In addition to addressing climate change on a programmatic basis in these Phase III WIPs, the jurisdictions also committed to returning to the question with 2021 addenda to the plans that would account for additional pollutant loads resulting from projected climate change conditions in 2025.

The common thread running throughout the Phase III WIP drafts from Virginia, Maryland, and Pennsylvania is a lack of detail on how exactly the states intend to account for climate change in their Bay restoration efforts and the intended results. They each take a stab at it, but none offers

up enough detail to assure that they will be able to follow through. In the context of Bay cleanup efforts, that's a red flag. Over the years, the states have committed themselves to a series of ambitious cleanup goals, only to fall far short of the mark when it came to doing the hard work. If the states have detailed plans, now is the time to serve them up. Otherwise, in this case, the devil is in the lack of detail.

Before states submit their draft plans to EPA for approval, they should improve them to adequately address the impacts of climate change on restoration planning and programming to:

- Provide more detail to describe how existing climate strategies will align with BMP design, implementation, and other WIP strategies and policies that will measurably increase the resilience of the restoration effort and will promote discrete resilience co-benefits;
- Provide detailed processes for adapting restoration design and other relevant regulatory standards to account for changed climate conditions and worsening climate impacts. (For example, Virginia should also consider expanding the scope of its proposed freeboard standard for sea-level rise to include not just state-owned buildings but other state-owned facilities and state-financed restoration practices.); and
- Provide more detailed discussion of how proposed WIP programs and practices have been designed to account for existing stressors related to climate change, to adapt to potential climate risks and uncertainty, and to promote resilience outcomes through structured engagement with federal and local governments, as well as private-sector partners.

Conowingo

We understand that the additional load reductions needed to restore the Bay due to the lost pollution trapping capacity at Conowingo Dam will be addressed in a separate Conowingo WIP. To date, the activities of the Conowingo WIP Steering Committee have not included notification to, or participation by, interested stakeholders. We encourage EPA and the jurisdictions to make the process more accessible and transparent. In addition, we are disappointed that the Principals' Staff Committee did not follow through on their idea to send a letter to Exelon, inviting them to participate in the process. As it stands, Exelon appears unwilling to assume any responsibility for downstream water quality impacts associated with the operation of the Conowingo Dam. Consequently, we recommend the following:

1. The development of the Conowingo WIP should include outreach to, and involvement of interested stakeholders;
2. MD should hold Exelon accountable for impacts on downstream water quality and make them take responsibility for their share of the costs/or actions required under the Conowingo WIP;
3. Exelon's responsibility should consider the long term impacts of climate change on the severity of storms, and thus the scouring of nutrients and sediments from the Conowingo reservoir WIP.

Environmental Justice

During the development of the Phase III WIPs, there was no engagement with environmental justice communities, even though environmental justice is a principle woven throughout the 2014 Chesapeake Bay Watershed Agreement. Many of the states undertook an exhaustive outreach process, particularly with respect to local governments, but also with representatives of

industry and public interest organizations. But in all of this outreach, little or no consideration was given to those who work to protect environmental justice communities.

What makes this omission in the outreach process so glaring is the fact that most states have at least one, if not multiple, environmental justice commissions, advisory boards, or other public bodies charged with ensuring that the state's environmental decision making processes are inclusive of environmental justice communities and policy considerations. The WIPs are nothing if not a massive environmental decision making process.

If the states do not weave environmental justice considerations into their planning processes, then the policies used to guide implementation of each state's Bay restoration work will likely fail to benefit vulnerable communities and may even have detrimental impacts on some. Moreover, several decisions and policies described in the states' WIPs have the potential to exacerbate pollution problems disproportionately for some communities, which is why the WIPs should be revised to include plans to mitigate the potential harms. We urge EPA to request the states to meaningfully engage environmental justice communities and directly address environmental justice concerns going forward.

Federal Facilities

Federal facilities are located throughout the Chesapeake Bay watershed. Releases of contaminated stormwater from these facilities impose significant challenges on the abilities of states to achieve the stormwater sector reduction goals in their Phase III WIPs. This is especially true for the District of Columbia, in which nearly 30% of it is occupied by federally owned facilities. DC is heavily dependent on runoff control at federal facilities but has no legal authority to require the federal agencies to carry out the necessary measures.

The five federal agencies that occupy the biggest share of DC's land were asked to submit documents describing the measures they would take to reduce their fair share of runoff and otherwise support DC's WIP (see Appendix F to the Draft DC Phase III WIP). Neither USDA nor the Smithsonian Institution submitted plans at all (we understand USDA's just came in), the National Park Service's plan was short on details and commitments, and GSA's was also short on details and commitments. The submission by DoD was comprehensive and well written, but subject to the availability of funds.

It is essential that EPA, as the lead Federal agency in the Bay Program, impress upon these and other federal agencies that they must do their fair share to achieve the goals of the Bay TMDL and the state WIPs, and that the agencies lead by setting a good example. This includes using all possible efforts to secure the necessary funds.

Sediment Caps

The Bay TMDL contains loading caps for sediment, needed to achieve legally binding water quality standards. These must be included in each state's WIP, but they have not been included in each of the drafts. The PSC's May 5, 2019, "Background Paper" – purporting to explain that achievement of the loading caps for nitrogen and phosphorus may result in achievement of the sediment loading caps as well—provides no legal or practical justification for not including them in the final WIPs. If in fact they turn out to be redundant because achievement of the nitrogen and phosphorus goals results in achievement of the sediment goals, no harm will have been done by their inclusion. However, there is no guarantee that this will be the case, nor is there any guarantee that each state will, in fact, achieve its N and P target levels. Therefore we urge EPA and the states to include sediment loading caps in their final WIPs.

The Coalition developed Phase III WIP Engagement Guides that reiterate all of the points above and outline our expectations for strong Phase III WIPs. You can find the guides [here](#). Thank you for the opportunity to comment.

Sincerely,

Alliance for the Shenandoah Valley
Anacostia Watershed Society
Annapolis Green
Arundel Rivers Federation
Audubon Naturalist Society
Baltimore Tree Trust
Center for Progressive Reform
Chesapeake Legal Alliance
Clean Fairfax
Clean Water Action
Delaware Nature Society
Environmental Integrity Project
Friends of Accotink Creek
Friends of the Rappahannock
James River Association
Lackawanna River Conservation Association
Lower Susquehanna Riverkeeper Association
Maryland League of Conservation Voters
Mattawoman Watershed Society
National Parks Conservation Association
Otsego County Conservation Association
PennEnvironment
Piedmont Environmental Council
Potomac Conservancy
Potomac Riverkeeper Network
Richmond Audubon Society
Shenandoah Riverkeeper
Sierra Club, Virginia Chapter
Southern Maryland Audubon Society
St. Mary's River Watershed Association
Virginia Conservation Network
Virginia League of Conservation Voters
Waterkeepers Chesapeake
West Virginia Rivers Coalition
Wicmico Environmental Trust
Wild Virginia