

August 05, 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:

On May 24, 2019, members of the Choose Clean Water Coalition (Coalition) sent a letter urging that the Environmental Protection Agency (EPA) address deficiencies in the six states' and the District of Columbia's draft Phase III Watershed Implementation Plans (WIPs). In that letter we asked that EPA ensure that all the jurisdictions' plans adhered to its expectations and "demonstrated the necessary 'reasonable assurance' that programs, policies, and other necessary actions will be put in place by 2025 to achieve the pollution reduction targets." We also outlined gaps in the plans that failed to address issues like environmental justice and climate change. Unfortunately, after our review of EPA's evaluations, we see that most of these comments were left unaddressed and there was no mention of potential EPA actions should these WIPs remain deficient. This was most apparent in EPA's evaluation of Pennsylvania's WIP, which lacked any discussion of potential repercussions in response to their clearly inadequate draft plan.

We have appreciated EPA's commitment to ensuring that the creation of the WIPs remains a public process. **However, we would like to meet with you at your earliest convenience** to discuss our concerns regarding the lack of transparency and commitment in the state WIPs and to seek a stronger response from EPA than what was communicated in the recently released WIP evaluations. Here, we briefly summarize a few of these concerns.

EPA Expectations

I. General Expectations

In June 2018, EPA released the much anticipated expectations for jurisdictions preparing to draft the Phase III WIPs in order to "maintain accountability" under the Bay TMDL. Many of us in the community of Chesapeake Bay advocates read the document with a sense of satisfaction that EPA would maintain its commitment to ensuring that state plans are strong enough to achieve the pollution reductions called for with the 2025 planning targets.

EPA made clear to the jurisdictions through this document, before they began writing the WIPs, that the state's "will need to address ... [s]ecuring legislative, regulatory, cost-share, incentive,

voluntary, and market-based levels of pollutant load reductions across all source sectors, which in combination, will achieve each jurisdiction's Phase III WIP planning targets." To do so, EPA said in this expectations guide that it "expects the Phase III WIPs to include ... [i]dentification of the specific ... actions needed to be taken to address recognized gaps in programmatic capacity and quantification of the practice implementation anticipated resulting from each set of actions."

II. Specific and Heightened Expectations

Beyond these general expectations regarding the level of specificity and transparency EPA wanted in the WIPs, the document also expressed specific expectations on a host of issues of particular concern, including:

1. Since states have generally ignored the expectation that jurisdictions should "offset any increases in nutrient and sediment pollutant loads", EPA specifically called upon states to commit in the WIPs to "[b]uilding and implementing the programmatic infrastructure, tracking systems, BMP verification programs, policies, legislation, and regulations necessary to fully account for growth, and offsetting all resultant new or increased pollutant loads through 2025." EPA specified that this should include taking "any steps required by the Clean Water Act and National Pollutant Discharge Elimination System regulations to offset, or adjust source sector goals for, new or increased loads at the general and/or individual permit level."
2. The WIPs should include "a full listing of all NPDES permits— for example, municipal and industrial wastewater, Phase I and II MS4s, and CAFOs..." perhaps to emphasize the critical role that WIPs are supposed to play in guiding future state permitting decisions.
3. EPA also established "heightened expectations" for "pollutant source sectors which are under enhanced levels of federal oversight." These heightened expectations were to be satisfied by each jurisdiction (or at least the four jurisdictions - Delaware, Maryland, New York, and Pennsylvania - with at least one major source sector under enhanced oversight) through more "detailed documentation" regarding how the state would enhance its programs to reduce pollution from these lagging source sectors.

As an example, EPA requested more information on how states under enhanced oversight for stormwater (Maryland and Pennsylvania) would build "the financial capacity, technical assistance, regulatory oversight, and other incentives to oversee and implement the necessary MS4 and other stormwater management and prevention programs." This specific and heightened expectation also appears to have been blatantly ignored. For example, in Maryland's WIP, the state expressed its desire to maintain the status quo for MS4 permit holders. Rather than "building the financial capacity" to address the lagging progress in its stormwater sector, Maryland's WIP analyzed past progress to determine "what pace of implementation can be reasonably expected... This

approach corresponds with the idea of local feasibility ... instead of defining a restoration pace to meet specific allocations by 2025.”

These are just a few examples where states expressed a willingness to openly defy clearly articulated and even the “heightened expectations” of EPA. In some cases, states are not only committing to do the opposite of what EPA expected, but expressing a willingness to ignore the fundamental purpose of a TMDL under the Clean Water Act, which is to ensure that permits are consistent with the assumptions of the TMDL wasteload allocation.

III. Pennsylvania Expectations

While Pennsylvania’s local outreach efforts in preparation of the Phase III WIP were laudable, the WIP itself failed the most basic and important test of all: to demonstrate reasonable assurance that the state will meet the 2025 planning target and uphold the pollution reduction commitments expressed in the 2014 Bay Agreement. The disappointment we all felt as Chesapeake Bay and clean water advocates after reading Pennsylvania’s deficient WIP was repeated after reading EPA’s evaluation of that WIP. Despite expressing some strong concerns about the Pennsylvania WIP’s clear deficiencies, the EPA evaluation lacked any discussion of the consequences and federal actions that the agency had previously pledged to take, including that it “will ... take appropriate federal actions if a jurisdiction’s Phase III WIP ... do not meet EPA expectations.”

The expectations document established a separate appendix specifically for Pennsylvania “given that three of PA’s source sectors are under enhanced or back-stopped levels of federal oversight” and because “PA is significantly off track in meeting their programmatic and numeric WIP and two-year milestone commitments, and PA is not on trajectory to meet their Phase III WIP planning targets by 2025.” In bold print, the document stated that “**EPA expects that Pennsylvania’s Phase III WIP will include the technical details (Best Management Practice (BMP) input deck) and evidence of public stakeholder engagement** necessary to show it will meet its Phase III WIP planning targets.” Instead, as you are well aware, Pennsylvania chose to submit an input deck that was not consistent with the 2025 planning target and a WIP that did not include funding, regulatory, or programmatic plans to achieve even their lesser stated goals.

The potential consequences for not meeting any of EPA’s heightened expectations for Pennsylvania were laid out in Appendix B of the June 2018 document. EPA committed to assessing “all potential and appropriate federal actions under its discretionary authority under the Clean Water Act (CWA)” including to:

1. “target federal enforcement and compliance assurance in the watershed, which could include both air and water sources”
2. “expand NPDES permit coverage through designation, as provided by the Clean Water Act and its regulations, for the following sources of pollutants not currently regulated

under any NPDES permits: animal feeding operations, [industrial and municipal] stormwater sources, and/or urbanized areas”

3. “establish finer scale wasteload and load allocations through a Pennsylvania state-specific proposed amendment to the 2010 Chesapeake Bay TMDL”
4. “require additional reductions of loadings from point sources through a Pennsylvania state-specific proposed amendment to the 2010 Chesapeake Bay TMDL”
5. “initiate a process to propose promulgating nitrogen and phosphorus numeric water quality standards for Pennsylvania.”

Measures called for under the WIP are not only necessary to restore impaired water quality in the Chesapeake Bay, but in Pennsylvania’s rivers and streams. The restoration of the Susquehanna and its tributaries as well as improvements to the landscape provides important ecological and economic benefits to the state in the form of cleaner air, improved drinking water, climate resiliency, and increased recreational opportunities. A 2014 report by the Chesapeake Bay Foundation estimated the economic value of these benefits to be \$6.2 billion per year.¹

EPA Action

Unlike in EPA’s previous evaluations of the Phase I and II WIPs, which described “EPA Actions” to be taken based on deficiencies in the WIPs in order to maintain reasonable assurance that planning targets would be achieved, the Phase III WIP evaluations were devoid of serious actions consistent with previous evaluations or last year’s expectations document. Instead of describing the potential actions EPA had said all along it would take pursuant to the accountability framework, all that the evaluations presented were “potential enhancements” and other EPA recommendations.

Conowingo

We understand that final decisions were made related to the Request for Applications for support of the creation and implementation of the Conowingo WIP. To date, the activities of the Conowingo WIP Steering Committee have not included notification to, or participation by, interested stakeholders. We ask that EPA ensure the process is more accessible and transparent moving forward and that any future work require public engagement and input, especially as it relates to the creation of the final WIP.

In summary, while we are concerned by some of the glaring weaknesses in the state’s Phase III WIPs, we are alarmed that EPA’s response to these deficient plans has been insufficient and inconsistent with prior commitments to act under the accountability framework. EPA must be willing to use its oversight authority to require that each state’s WIP incorporate concrete

¹ The Economic Benefits of Cleaning Up the Chesapeake. October 2014. Available at: <https://www.cbf.org/news-media/features-publications/reports/economic-benefits-of-cleaning-up-the-chesapeake-bay/> . Peer reviewed journal article available at: https://www.chesapeakebay.net/channel_files/23984/economic_benefits_of_cleaning_up_the_chesapeake_cbf_report.pdf

features providing reasonable assurance that all programs and actions needed to achieve the water quality goals established under the TMDL will be in place by 2025, including all necessary funding and other resources. We would appreciate a meeting with you at your earliest convenience in order to discuss these concerns in more detail and gain a better understanding of what plans for future action EPA is currently anticipating should the final Phase III WIPs continue to not meet the expectations. To schedule this meeting at a suitable time, please contact Kristin Reilly, director of the Choose Clean Water Coalition, at reillyk@nwf.org or 443-759-3409.

Sincerely,

Anacostia Riverkeeper
Anacostia Watershed Society
Arundel Rivers Federation
Audubon Naturalist Society
Baltimore Tree Trust
Beaverdam Creek Watershed Watch Group
Blue Heron Environmental Network Inc.
Blue Water Baltimore
Center for Progressive Reform
Chesapeake Bay Foundation
Chesapeake Legal Alliance
Clean Water Linganore, Inc.
Delaware Nature Society
Delaware-Otsego Audubon Society
Eastern PA Coalition for Abandoned Mine Reclamation (EPCAMR)
Environmental Integrity Project
Friends of Lower Beaverdam Creek
Friends of Quincy Run Watershed
Friends of Sligo Creek
Friends of the Bohemia
Friends of the Chemung River Watershed
Friends of the Nanticoke River
Friends of the North Fork of the Shenandoah River
Friends of the Rappahannock
Goose Creek Association
Lancaster Farmland Trust
League of Women Voters of Maryland
Lynnhaven River NOW
Maryland League of Conservation Voters
Mattawoman Watershed Society
Middle Susquehanna Riverkeeper Association, Inc.
Montgomery Countryside Alliance
National Wildlife Federation

Natural Resources Defense Council
Otsego County Conservation Association
Otsego Land Trust
PennFuture
Pennsylvania Council of Churches
Piedmont Environmental Council
Potomac Conservancy
Potomac Riverkeeper Network
Rachel Carson Council
Rappahannock League for Environmental Protection
Rock Creek Conservancy
Sleepy Creek Watershed Association
Southern Maryland Audubon Society
Surfrider Foundation, Virginia Chapter
Virginia Conservation Network
Virginia Association for Biological Farming
Warm Springs Watershed Association
Waterkeepers Chesapeake
West Virginia Rivers Coalition
Wicomico Environmental Trust

*Cc: Dana Aunkst
director, Chesapeake Bay Program*