



June 7, 2019

Via electronic mail ecomment@pa.gov

Jessica Shirley
Director, Policy Office
Department of Environmental Protection
Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063

Re: PennFuture Comments on Pennsylvania's Draft Phase 3 Chesapeake Bay
Watershed Implementation Plan.
49 Pa. Bull. 1855 (April 13, 2019)

Dear Ms. Shirley:

PennFuture submits these comments to the Pennsylvania Department of Environmental Protection (PADEP or the Department) in response the notice of availability of Pennsylvania's Draft Phase 3 Chesapeake Bay Watershed Implementation Plan published in the Pennsylvania Bulletin on April 13, 2019.¹

PennFuture is a public interest membership organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. One focus of PennFuture's work is to improve and protect water resources and water quality across Pennsylvania, including, in particular, the Susquehanna River Basin, through public outreach and education, advocacy, and litigation. In fact, PennFuture participated in defending the Environmental Protection Agency (EPA) as an intervenor in the American Farm Bureau Federation's challenge to the Chesapeake Bay Total Maximum Daily Load (TMDL).²

¹ 49 Pa. Bull. 1855 (April 13, 2019).

² *Am. Farm Bureau Fed'n v. EPA*, 984 F.Supp.2d 289 (M.D. Pa. 2013).

The objectives of the Clean Water Act include restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.³ The Clean Water Act sets water quality standards consisting of both (1) the designation of one or more uses (e.g., fishing, recreation, aquatic life) for each water body, and (2) the promulgation of the narrative or numeric water quality criteria necessary to protect these uses.⁴ Once water quality standards are in effect, states must identify the water bodies that are failing to attain such standards using traditional methods of pollution control under the Clean Water Act, i.e., impaired waters.⁵ Under Section 303(d)(1)(C) of the Clean Water Act, the states “shall establish ... the total maximum daily load” of pollutants for each impaired water, which “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety”⁶ Federal regulations define a TMDL as “the sum of the individual [Waste Load Allocations (WLAs)] for point sources and [Load Allocations (LA)] for nonpoint sources and natural background.”⁷

The Chesapeake Bay has been impaired for decades by excessive amounts of nitrogen, phosphorus, and sediment. After numerous Chesapeake Bay Agreements and various lawsuits failed to achieve appropriate improvements in water quality, EPA developed a restoration plan in the form of a TMDL.⁸ The Chesapeake Bay TMDL, which EPA issued in December 2010, “is the largest and most complex TMDL thus far.”⁹ It identifies the total amount of certain pollutants that the entire Chesapeake Bay watershed can contribute in order to restore water quality in the Bay to a level that will support protected water uses (such as fisheries and recreation). The TMDL contains waste load allocations for point sources and load allocations for non-point source sectors and allocates these loads across the affected portions of Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia.

Importantly, these WLAs and LAs are not self-executing. To ensure the described reductions are achieved, the Bay TMDL establishes deadlines for the states to develop and implement plans within the watershed to come into compliance with the determined

³ 33 U.S.C. § 1251(a).

⁴ *Id.* § 1313; 40 C.F.R. § 131.

⁵ 33 U.S.C. § 1313(d).

⁶ *Id.* § 1313(d)(1)(C).

⁷ 40 C.F.R. § 130.2(i).

⁸ EPA, Chesapeake Bay TMDL, December 29, 2010.

⁹ *Id.* See also *Am. Farm Bureau Fed’n v. EPA*, 984 F.Supp.2d 289, 303 (M.D. Pa. 2013).

loadings. And, while WLA are incorporated into National Pollutant Discharge Elimination System (NPDES) permits,¹⁰ non-point sources of pollutants are addressed through specific regulatory actions. Each State's proposal to accomplish these reductions must be articulated in their respective Watershed Implementation Plans (WIP) in order to provide "*reasonable assurance*" that the required reductions in pollution will be achieved.¹¹ EPA is responsible for evaluating whether those reasonable assurances are met.

Pennsylvania has recently completed a draft of its third WIP ("draft WIP3") and made it available for public comment. PennFuture commends the Department for its efforts in creating and crafting this plan. As discussed in more detail below, we appreciate the Department's commitment to a collaborative process in the development and implementation of Pennsylvania's WIP, but note that the plan fails to provide reasonable assurance that Pennsylvania will achieve the proscribed reductions. Perhaps most significantly, in order to provide this assurance, Pennsylvania must provide sufficient funding and implement necessary legislative tools to accomplish the goals of the plan and the mandates of the Chesapeake TMDL. Without sufficient accountability and funding, Pennsylvania will be unable to comply with the Clean Water Act and could open itself up to federal enforcement actions and litigation.

1. PennFuture Commends the Department's Collaborative Process.

PennFuture acknowledges and appreciates the effort the Department has put into engaging with numerous stakeholders and the emphasis that will be placed on this "bottom up" approach in crafting and implementing county level plans. The Department notes that nearly 100 individuals from the public and private sectors served on the Phase 3 WIP Steering Committee and workgroups. PennFuture's own President and CEO, Jacquelyn Bonomo, serves on the Forestry Workgroup. The Department's Chesapeake Bay Program also put considerable effort into ensuring that meetings and agendas were posted on the Department's webpage in advance and Steering Committee and workgroup meetings were

¹⁰ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹¹ EPA, Chesapeake TMDL, Section 7: Reasonable Assurance and Accountability Framework, December 29, 2010, available at https://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf [hereinafter TMDL Section 7]. See also EPA Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992 at 4, available at https://www.epa.gov/sites/production/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf.

open to the public.¹² The relationships built through the planning process will be critical to developing and implementing county level plans, a significant element of the proposed plan moving forward. Indeed, such a collaborative and inclusive approach will be necessary to implement a plan significantly reliant on voluntary mechanisms to reduce pollution.

2. The Draft WIP3 Fails to Provide Reasonable Assurance That Expected Load Reductions Will Be Achieved.

As articulated above, EPA must evaluate whether a TMDL provides reasonable assurance that controls will achieve expected load reductions. EPA has laid out its approach to ensuring that the reductions set forth in the Bay TMDL will be met. This includes each Bay jurisdiction's development of phased WIPs and 2-year milestones for implementing practices to achieve load reductions, and EPA's commitment to track and assess the jurisdictions' progress and take appropriate federal actions if the jurisdictions fail to develop sufficient WIPs, effectively implement their WIPs, or fulfill their 2-year milestones.¹³

In June 2018, EPA provided the Bay jurisdictions with expectations to maintain accountability.¹⁴ EPA communicated its heightened expectations for reasonable assurance and included state specific expectations for Pennsylvania "given that three of PA's source sectors are under enhanced or back-stopped levels of federal oversight, PA is significantly off track in meeting its programmatic and numeric WIP and two-year milestone commitments, and PA is not on trajectory to meet its Phase III WIP planning targets by 2025."¹⁵ It is clear that EPA expects Pennsylvania to provide a convincing, detailed, and realizable plan in its Phase 3 WIP. Although the Department's draft WIP3 seeks to address many of the expectations EPA outlines, significant gaps remain in Pennsylvania's proposed path forward. Pennsylvania must address these gaps in its final WIP3 since without these elements the WIP fails to provide reasonable assurance that expected load reductions will be achieved.

¹² Pennsylvania's Draft Phase 3 Chesapeake Bay Watershed Implementation Plan at 9 [hereinafter WIP3].

¹³ TMDL Section 7, at 7-5.

¹⁴ EPA, 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> [hereinafter EPA Expectations].

¹⁵ *Id.* at 10.

a. The Draft WIP3 Does Not Set Forth a Plan to Achieve the Required Nitrogen Reductions.

Pennsylvania’s draft WIP3 fails to actually plan for the necessary nitrogen reductions. In order to successfully meet the 2025 target reductions, Pennsylvania will need to reduce 34.13 million pounds of nitrogen and 0.756 million pounds of phosphorus annually.¹⁶ Despite the various initiatives described and the length of the Department’s proposal, the draft WIP3 only professes to address about 66% of the necessary nitrogen reduction.¹⁷ Despite the draft WIP3’s assertion that “Pennsylvania commits to have practices and controls in place by 2025 necessary to achieve the final Phase 3 WIP phosphorus and nitrogen targets,”¹⁸ a document that does not even set forth a plan to address the required reductions provides no assurance that expected load reductions will be achieved.¹⁹ Pennsylvania’s final WIP3 must address this significant shortcoming.

b. The Collaborative, “Bottom Up” Approach Unfortunately Provides Little Accountability.

The Department points to the draft WIP3’s “bottom up” approach as the mechanism through which reasonable assurance is demonstrated, but this process, without some oversight or enforcement tool, provides little accountability. The draft WIP3 focuses on a county-by-county creation of action plan approach. The Countywide Action Plans that the draft WIP3 propose to be developed were determined to be most feasible in terms of size, number, existing data levels, and ability to organize resources.²⁰ We understand that the through this collaborative process, the pilot counties have prepared County Action Plans that

¹⁶ WIP3, at 22.

¹⁷ WIP3, at 41, Table 2.2 (totaling nitrogen reduction to the Bay at 22,371,000 million pounds), *and see* 60, Table 2.4 (totaling edge of tide nitrogen reduction to 22,566,820 million pounds, approximately 66% of 34.1 million pounds).

¹⁸ WIP3, at 11, 26, 88, and 142.

¹⁹ It should be noted that the WIP3 does articulate an approach to achieve the required phosphorus reductions by 2025 and notes, without further description, that “[w]hen the phosphorus goal is exceeded, the excess phosphorus can be converted into nitrogen reductions.” WIP3, at 78. PennFuture questions the ability to convert excess phosphorus to nitrogen reductions. We assume the Department is referring to some sort of exchange of phosphorous reduction for nitrogen reduction based on the EPA’s provided conversion factors, as referred to on page 11 of the draft WIP3 and not discussed thereafter. However, this proposed exchange of through which Pennsylvania would achieve an additional 155,664 pounds reduction of nitrogen will still not reach the necessary nitrogen reductions.

²⁰ WIP3, at 75.

the Department believes are “realistic and implementable.”²¹ However, these plans fail to provide reasonable assurance in three critical ways: almost all of the counties’ planning targets for nitrogen fail to meet the necessary goal; the ability to complete thirty-nine additional plans (let alone in five years) is uncertain; and the draft WIP3 provides no accountability structure should these plans not be developed, sufficient, or properly implemented. Pennsylvania’s final WIP3 must address these significant shortcomings.

As described in the draft WIP3, none of these pilot plans reach the nitrogen reduction goal necessary for Pennsylvania to achieve the over-all reduction required.²² In fact, it appears that the draft WIP3 ascribes targets below the overall nitrogen goal to almost all of the counties.²³ Should the remaining counties’ County Action Plans only include nitrogen reduction percentages described in the draft WIP3, Pennsylvania will fail to achieve the required nitrogen reductions.

Furthermore, there is significant uncertainty about the ability of the remaining counties to successfully craft and implement such plans in a very short amount of time. Over the last year, only four pilot counties prepared plans. The remaining thirty-nine counties must prepare and implement such plans in just five years—a significant feat. The draft WIP3 does not present a strategy for scaling up the production of County Action Plans from the four pilot counties. Without more, it seems unlikely that so many plans will be successfully prepared let alone implemented.

In the event that County Action Plans are not prepared or do not sufficiently achieve reduction goals, the draft WIP3 remains silent as to an enforcement mechanism or accountability structure for the counties. Instead, it simply relies on the collaborative, bottom up approach, which, as discussed above, by itself is insufficient to provide reasonable assurance that the ultimate reductions required by the Bay TMDL will be achieved.

c. Lack of Legislative Initiative Undermines Effective Pollution Reduction Measures.

The draft WIP3 identifies a number of legislative actions that would provide authority to achieve significant reductions necessary to comply with the Chesapeake Bay TMDL. For example, the draft WIP3 notes the necessity to revise to Pennsylvania’s Clean Streams Law

²¹ *Id.* at 76.

²² *Id.*

²³ *Id.* at 60. Blair County is the only county with a nitrogen reduction goal equal to or above the target.

to allow fencing for the purpose of keeping farm livestock out of the streams.²⁴ However, without these initiatives being a priority to our state elected officials, there is little likelihood that they will be advanced, hindering Pennsylvania’s ability to comply with required TMDL reductions. Without the authority to enact the necessary pollution reducing elements, the Department fails to provide reasonable assurance that expected load reductions will be achieved.

3. Lack of a Dedicated and Targeted Funding Source Undermines Pennsylvania’s Ability to Achieve Its Goals.²⁵

Perhaps the biggest problem with the draft WIP3 is that without dedicated and stable funding sources, there is no ability for the Department’s proposed plan to be implemented. In fact, in EPA’s 2018 evaluation of Pennsylvania’s progress, EPA noted that it expected Pennsylvania “to identify a *dedicated and targeted* funding source” in its WIP3.²⁶ The Phase 3 WIP Funding Workgroup estimated that “the current public investment in waterways cleanup in the areas upstream of the Chesapeake are approximately \$229 million per year. The total investment needed to achieve the 2025 goals is estimated to be \$485 million per year — an annual gap of \$257 million.”²⁷

The draft WIP3 provides a thorough breakdown of the funding needed in order to implement the proposed practices.²⁸ It also describes various legislative actions that would provide necessary financial support to implement Chesapeake Bay initiatives,²⁹ but includes no paths towards executing this legislation or assurances that it will be done. Thus, it remains unclear how the gap in funding will be closed without leadership and action by the

²⁴ *Id.* at 52.

²⁵ The lack of demonstrated, secure funding to implement the practices required to meet the Bay TMDL goals accentuates the plan’s inability to provide reasonable assurance. However, it is such a significant shortcoming and essential element of the draft WIP3 that we place it in its own section in this comment letter.

²⁶ EPA, Evaluation of Pennsylvania’s 2016-2017 and 2018-2019 Milestones, July 27, 2018, *available at* http://files.dep.state.pa.us/Water/ChesapeakeBayOffice/TrackProgress/EPA_Final_Evaluation_of_Pennsylvania_2016-2017_and_2018-2019_Milestones.pdf (emphasis added).

²⁷ WIP3, at 4.

²⁸ *See Id.* at 97-112.

²⁹ *See Id.* at 51.

Pennsylvania legislature.³⁰ And without this funding there is no reasonable assurance that Pennsylvania will meet its goals.

In conclusion, the draft WIP3, while commendable for its reliance on a collaborative, “bottom up” input and execution strategy, has several significant flaws that, if not addressed, will prevent Pennsylvania from complying with EPA’s Chesapeake Bay TMDL. For example, this same bottom up approach fails to provide the necessary accountability and enforcement that is critical to implementation. Finally, Pennsylvania’s reliance on its legislature to pass funding and regulatory legislation is not only unrealistic but foolish. Without all of these measures, Pennsylvania will be unable to comply with the Clean Water Act. Pennsylvania’s final WIP3 must address these significant shortcomings.

Thank you for your consideration of these comments. Please feel free to contact me at 215.545.9694 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Alice R. Baker".

Alice R. Baker
Attorney

³⁰ Furthermore, as described above, the draft WIP3, as currently written, does not set forth a plan to successfully achieve required reductions.