



June 7, 2019

James Davis-Martin
Virginia Department of Environmental Quality
1111 East Main Street, Suite 1400
P.O. Box 1105
Richmond, 23218
Via e-mail to
chesbayplan@DEQ.Virginia.gov

Re: Potomac Riverkeeper Network and Shenandoah Riverkeeper comments on the Commonwealth of Virginia's Draft Chesapeake Bay TMDL Phase III Watershed Implementation Plan

Dear Mr. Davis-Martin,

Please accept the following comments on behalf of Potomac Riverkeeper Network and Shenandoah Riverkeeper (collectively "PRKN") on Virginia's Phase III Watershed Implementation Plan ("WIP")¹. PRKN appreciates this opportunity to provide our perspective on this final phase of the state's formal planning to achieve the pollutant reductions required to meet the goals of the Chesapeake Bay TMDL. We commend the Department of Environmental Quality ("DEQ") and the Department of Conservation and Recreation (DCR) for providing multiple opportunities for the public and interested stakeholders to weigh in on this historic process.

As noted in the comments PRKN joined from the Virginia Conservation Network, Choose Clean Water Coalition and Waterkeepers Chesapeake, we fully support many aspects of the WIP, including the effort to integrate the impacts of climate change and the need to improve reporting of best management practices being implemented by the agricultural community as a whole. In order for the WIP to succeed and nutrient reduction targets to be met, all affected parties will need to utilize the best available data on changes

¹ Shenandoah Riverkeeper is one of three Riverkeepers that make up the Potomac Riverkeeper Network, a member supported clean water advocacy organization whose mission is to protect the public's right to clean water in the Potomac River watershed. For more information on our mission and accomplishments, go to www.potomacriverkeepernetwork.org



to climate in the Bay Region along with the most accurate possible accounting of the agricultural sector's implementation of practices to reduce nonpoint source pollution of the Commonwealth's rivers and streams that lead to the Bay.

As Riverkeepers, our perspective on Virginia's WIP process and the goals of the regional Chesapeake Bay TMDL are naturally different than those of many advocacy organizations and coalitions directly involved in work to restore the Chesapeake Bay. Our focus is on protecting and restoring the fourteen thousand square mile Potomac River watershed, which includes many miles of the Potomac River and nearly the entirety of the Shenandoah River in Virginia, from its headwaters to the confluence at Harpers Ferry, West Virginia. While we share the goal of a healthy, clean and productive Chesapeake Bay and understand the critical importance of the Bay to our region and the Nation's economic and ecological prosperity, we want to make sure that the WIPs implemented by Virginia and the other Bay states improve water quality both in the Bay and its upstream waterways. In that light, we reviewed the WIP both for its overall feasibility to meet the state's reduction goals, but also in terms of how it would lead to improvements in local water quality in the Shenandoah and Potomac Rivers. At a minimum, the WIP should not prioritize the restoration of the Bay at the expense of the Shenandoah River or tidal Potomac. The following comments focus on two areas of concern that we urge the Commonwealth to consider carefully before finalizing the WIP.

Cattle Exclusion

In the Shenandoah Valley, Shenandoah Riverkeeper has supported and advocated for cost share funding, technical assistance and other incentives to transition farmers towards fencing their cattle out of streams and the North and South Fork and main stem of the Shenandoah River to reduce bank erosion, destruction of riparian buffers, sedimentation of streams and direct deposition of fecal matter into our waterways.² Allowing cattle to water in streams degrades water quality, contributes directly to the formation of harmful, nuisance algal blooms, and can pollute the waterway to an extent that poses a threat to public health for people recreating in the river. Shenandoah Riverkeeper also submits complaints to the Virginia Department of Agricultural and Consumer Services (VDACS) pursuant to the Agricultural Stewardship Act (ASA),

² For more detailed information on the impacts of livestock manure on water quality in the Shenandoah and policy recommendations to address them, please see *Water Pollution from Livestock in the Shenandoah Valley*, Environmental Integrity Project, April 26, 2017, attached and incorporated to these comments as Attachment A.

identifying properties where practices related to cattle or improperly stored manure are impacting water quality and violating state law.

PRKN has traditionally supported the previous WIPs' stated goal of excluding cattle from 95% of linear feet of perennial streams in the Commonwealth by 2025, and were dismayed to see that this metric has been effectively removed or abandoned in the current draft WIP. While the WIP states a goal of removing livestock from all perennial streams in the Bay watershed, it fails to describe in detail how this will be accomplished. WIP at 61. Instead, it proposes to provide additional flexibility to landowners, presumably free of the 95% exclusion metric, and sets a goal of proposing state legislation to set a statutory deadline for cattle to be fenced out of streams, but does not propose any specific dates. The WIP does not explain why the Commonwealth decided to pursue a deadline through legislation rather than regulation, but relying on future passage of legislation is rife with risk and uncertainty, and could be seen as state regulators punting to the legislature to fix a problem they have been unable to resolve. Nonetheless, PRKN recommends that Virginia pursue legislation that sets 2025 as a firm deadline for all cattle to be excluded from state waterways, including perennial streams and the Shenandoah River.

In the Potomac watershed, the WIP proposes to set targets for 46,470 acres of forest or grass buffers with exclusion fencing. WIP at 81. But the state will also have a far larger goal in this same watershed of having 76,859 acres of "off stream watering without fencing." This suggests the Commonwealth will no longer be emphasizing fencing as the key for protecting waterways. Instead, it appears Virginia will be telling farmers that simply setting up alternative watering devices, without fences, will be sufficient and counted as acreage used towards keeping cattle out of streams. While providing alternative water sources is a critical element of effective stream exclusion, this ignores the fact that on hot days cattle may seek waterways to cool themselves off, and if there is no fence there, nothing will stop them from entering the waterway.

In addition, PRKN is concerned that the switch to measuring the progress of cattle exclusion using total acreage, as opposed to linear feet of stream exclusion, will not accurately reflect the progress, or lack thereof, of excluding cattle from perennial streams and the Shenandoah River. The problem with the acre measurement tool is that a fenced portion of a pasture could have only a narrow length touching a stream, and then extend far upland, away from the streams, with all the acreage away from the stream counting

towards the stream exclusion target. A nearby property could still be allowing cattle into the stream, but not be reflected in the state's proposed new accounting.³

PRKN recommends the following actions to improve the rate of cattle exclusion in Virginia.

- Revise the WIP III to continue using linear feet of streams fenced as the metric for measuring progress, rather than total acreage.
- Commit to a 2025 deadline for excluding all cattle from waterways (perennial streams, rivers, etc.), either through legislation or regulatory action by DEQ or DCR.
- Reinstate 100% cost share funding for cattle fencing
- Revise cost share funding to allow for maintenance and replacement of fencing, and develop a funding mechanism to provide farmers with at least 50% of the funding up front, to encourage more farmers to utilize state funds.
- Increase funding of technical assistance to farmers and reassess the cost share funding process to ensure it is well-publicized, transparent and relatively simple to engage in.

Basin: Basin Exchanges

PRKN continues to be concerned that the practice of Basin to Basin Exchanges (“B2B”) will result in disproportionately lower water quality in the Potomac and other basins that are not on track to meeting their original pollution reduction targets by 2025. The Phase 3 WIP contains N2P exchanges in every basin as well as B2B exchanges from each of the Potomac, Eastern Shore, Rappahannock, and York Basins to the James Basin.⁴ The largest exchanges will be from the Potomac and Eastern Shore Basins, respectively. This presents a serious issue where the waterways that tend to need the most improvement, as identified in the TMDL and previous WIP Phases, will not attain the prescribed pollution reduction. On its face, this approach will lead to the Potomac (and Eastern Shore) Basins being de facto “sacrifice zones” where water quality may improve slightly but the failure to reach pollution reduction goals will be “offset” by additional progress made in the James Basin. As noted previously in these comments, PRKN is primarily concerned with water quality in the Potomac and Shenandoah Rivers, and common sense tells us that if water quality improves

³ For more detail on the lack of progress on livestock fencing, see *Livestock Fencing in the Shenandoah Valley*, Environmental Integrity Project, April 4, 2019, attached and incorporated hereto as Attachment B.

⁴ Virginia WIP III Draft at 122.

in these rivers, the benefits will flow downstream to the Bay. However, the state's approach seems entirely focused on averaging the overall reductions among Basins, in order to achieve the overall statewide reduction target that will meet EPA's expectations. While this may be legal and pragmatic for purposes of meeting the Bay TMDL goals, it fails to provide any assurance that water quality in the Shenandoah and Potomac Rivers will see significant improvement if the B2B exchanges occur without other actions to further improve water quality in the Potomac Basin. PRKN urges DEQ/DCR to provide additional information on any plans to measure the actual impact on water quality in the Potomac that will result from these exchanges, so that the public is fully informed as to how this plan will either benefit or degrade water quality in each of the Basins.

PRKN also notes that Maryland manages the Potomac River to the high water mark on the Virginia shore, so the Virginia and Maryland WIP III plans must be viewed jointly in terms of their impact on the Potomac River. Maryland is planning to use similar exchanges to accommodate the lack of progress in the Potomac. Like Virginia, Maryland has employed B2B exchanges to fabricate attainment for three of its river basins. Taking allocations from the Western Shore and transferring it to the Potomac, Eastern Shore, and Susquehanna River Basins, Maryland reallocated approximately 1.5 million pounds of pollution. This is particularly concerning given that the Eastern Shore and Potomac River Basins are shared with Virginia, and both states are accounting pollution away from them. Notwithstanding this accounting scheme, rivers in those basins are more polluted than is acceptable under the TMDL. Maryland did not engage in N-to-P exchanges because the state was able to meet its phosphorus goals and did not engage in P-to-N exchanges because it found that "the exchange ratio would not provide a meaningful increase in the nitrogen targets."⁵ Virginia's draft WIP does not mention any coordination with Maryland to assess the overall impact of these types of exchanges on the shared Potomac Basin, which suggests that the Commonwealth's exchange calculations were conducted in a vacuum, without consideration of how Maryland's similar actions would affect the Potomac River. PRKN requests that Virginia share any information on this issue with the public in its comment response, so that there is a public record of interstate coordination, or the lack thereof, on this issue.

⁵ Maryland WIP III Draft at F-1.

Conclusion

PRKN appreciates having this opportunity to provide feedback on the draft WIP, and greatly appreciates the work done by DEQ, DCR and countless other state staff to develop this plan. We are confident that we all share the same goal of clean, healthy and safe Potomac and Shenandoah Rivers that flow to a restored, productive and resilient Chesapeake Bay. PRKN looks forward to reviewing the final WIP, and will continue to work with our partners, elected officials and the public to make sure that this enormous planning effort leads to improved water quality, from the headwaters of the Shenandoah and the Potomac to the Bay.

Respectfully,



Phillip Musegaas
Vice President of Programs and Litigation
Potomac Riverkeeper Network



Mark Frondorf
Shenandoah Riverkeeper