



## Virginia's Draft Chesapeake Bay TMDL Phase III Watershed Implementation Plan: Endgame, or Just Another Episode in a Long Series?

06.05.2019

In early April 2019, Virginia released its draft Phase III Watershed Implementation Plan (“Draft Plan”) to achieve compliance with EPA’s 2010 Chesapeake Bay Total Maximum Daily Load Rule (“Bay TMDL”). The Bay TMDL sets allowable loadings of nutrients (nitrogen and phosphorous) and sediment into the Bay from various sources in Virginia and other Bay watershed states and compels Bay states to develop plans to achieve compliance by the 2025 deadline. Prepared after significant stakeholder consultation, the Draft Plan builds on the earlier Phase I and Phase II Watershed Implementation Plans (“WIPs”) and progress in nutrient and sediment reductions achieved to date. Based on the Draft Plan, however, the finale of the WIP series is expected to continue and even increase the challenging roles for regulated parties in the Bay cleanup saga to achieve Bay TMDL goals.

Several themes of the Draft Plan influence stakeholder roles. First, Virginia is seeking to identify and document any previously unaccounted for progress toward nutrient and sediment load reductions to help demonstrate compliance. Second, as before, the relative burden of meeting Bay TMDL objectives generally depends on the type of nutrient or sediment source sector involved. Third, the Draft Plan offers several new tools and options to meet these increased challenges. Finally, each of the major Bay watersheds – the Potomac, Rappahannock, York, and James Rivers and the Eastern Shore – has its own implementation goals tailored to that watershed’s water quality.

The Draft Plan also calls for much action by various Virginia agencies, including 50 multisector and sector-specific policy and regulatory initiatives. To the degree actually performed, they would have major impacts on different regulated parties and create new options for compliance. They include the following major proposed steps:

(a) **Multisector:** (i) enhanced reporting of best management practice (“BMP”) implementation; (ii) extension of Chesapeake Bay Preservation Act applicability to Bay watershed localities west of Interstate 95; (iii) reliance on interbasin exchanges of nutrient reductions to balance burdens and costs of nutrient load reductions among the main watersheds; (iv) finalization of carbon trading regulation and determination of method to determine related nitrogen reduction; and (v) development of a new coastal resilience master plan to assist localities in planning for flood risks.

(b) **Construction/Development and MS4 Sectors:** (i) addition of nutrient management plan (“NMP”) obligations to erosion and sediment control requirements for land disturbing activities exceeding one

acre; (ii) confirmation of contractor-applicator reporting of fertilizer application to urban lands and related increase in enforcement and reporting authority over contractor-applicators; (iii) preparation of an annual estimate of the amount of local stormwater assistance needs for MS4 and non-MS4 localities pursuant to House Bill 1822 (2019) and seek sufficient funding; and (iv) reevaluation of post-construction water quality design criteria for the VSMP program to ensure they are sufficient to meet Bay TMDL objectives.

(c) **Agriculture and Forestry Sectors:** (i) update and reinstatement of the Commonwealth's Agriculture BMP Loan Program; (ii) various changes to the Virginia Agriculture Cost Share ("VACS") program, including increasing the state's cost-share funding contribution to 70%; (iii) an increase in the tax credits offered for agricultural BMPs and equipment and greater staffing of Soil and Water Conservation Districts providing tax credit assistance; (iv) NMP implementation on 85% of all cropland areas and new legislation to increase the number of farms subject to NMP requirements to ensure this goal is reached; (v) continued efforts toward the exclusion of livestock from all perennial streams through enhanced VACS program incentives and flexibility; (vi) expansion of the Poultry Litter Transport Program area and additional program reporting and recordkeeping; (vii) increase in vegetated buffer areas through the USDA Conservation Reserve Enhancement Program by raising the state match to landowners from 25% to 35%; and (viii) economic development support to localities for private sector farming of native plant species and for oyster aquaculture; and (ix) changes to the Healthy Watersheds Initiative Project to facilitate large-scale investment in forest conservation.

(d) **Wastewater Sector:** (i) additional nutrient reductions from certain significant wastewater treatment plants ("WWTPs") that have not yet upgraded to achieve current nutrient effluent criteria; (ii) reevaluation and potential adjustment of current allocation of nutrient loads to WWTPs per statutory requirements; (iii) reporting of sewer connections by wastewater utilities; (iv) completion of the transition of oversight and enforcement from localities to Department of Health ("VDH") for obligations to inspect and periodically pump out on-site sewage treatment systems in the Northern Neck, Middle Peninsula, and Eastern Shore localities and development of related legislative recommendations for plan implementation; (v) establishment of VDH as "state-certifying authority" for community wastewater systems (serving 10 or more households) that have total nitrogen reducing treatment systems and for related sales tax exemptions for such systems financed with public funds; and (vi) setting by new regulation total nitrogen limits for large conventional on-site sewage systems.

Once reviews are in on the Draft Plan through the public comment process ending June 7, and after EPA's separate review process, Virginia's WIP trilogy should wrap with a final Phase III WIP. Before then, stakeholders still have an opportunity to influence editing of the Draft Plan before its release in final form. Whether this is the Bay TMDL endgame for Virginia is unclear: the Phase III WIP is a plan of action, and whether the action unfolds as currently scripted is unknown. Also unclear at this point is whether these actions will ultimately achieve the Bay TMDL load reductions – and do so in a cost-effective manner. Regardless, in the epic effort to clean up the Bay, regulated parties, state agencies, and other stakeholders all have important roles to play.

[\*\*Notice of Availability of Public Comment on Virginia's Draft Phase III Chesapeake Bay Watershed Implementation Plan, 35 Va. Reg. Reg. 2015 \(April 1, 2019\)\*\*](#)

## Related People

- Henry R. "Speaker" Pollard, V – 804.420.6537 – hpollard@williamsmullen.com

## **Related Services**

- Environment & Natural Resources