



UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
WASHINGTON, D.C. 20460

February 12, 2013

Re: EPA Response to New York's Final Phase II Watershed Implementation Plan

Dear Commissioner Martens:

Thank you for submitting New York's Final Phase II Watershed Implementation Plan (WIP) on January 7, 2013. The U.S. Environmental Protection Agency (EPA) is encouraged by New York's commitment to improving water quality, habitat and flood resiliency in the Chesapeake Bay watershed. The proposed efforts will protect and enhance the health of New York's waters as well as the Chesapeake Bay. EPA also appreciates New York's acknowledgement that, collectively, water quality standards must be fully achieved.

New York's Final Phase II WIP submission addresses many of the issues that EPA requested in my letter of last August. However, one critical omission is acknowledgement of the adjusted Phase II WIP targets of 8.85 and 0.64 million pounds per year for nitrogen and phosphorus, respectively, which are the result of an additional adjustment of 500,000 pounds of nitrogen provided by EPA.

New York's proposed Final Phase II WIP results are approximately five percent over the Phase II WIP nitrogen (adjusted) and phosphorus planning targets (sediment targets were achieved in the proposed final WIP). These gaps are primarily the result of increased nutrient loads from the wastewater sector compared to New York's Final Phase I WIP submitted in December 2010. To fully achieve water quality standards, additional reductions to close these gaps must be achieved between now and 2025. One option worth highlighting here is that EPA does agree with New York that, over time, additional load reductions are possible from wastewater.

EPA is prepared to remove the existing wastewater backstop based on New York's submission of a Final Phase II WIP on January 7, 2013 that addressed some of EPA's comments on prior drafts. Through future milestones and/or the Phase III WIP, EPA will work with New York to close the five percent nutrient gaps in the context of the "bubble permit" approach presented in the Phase II WIP or through reductions from other source sectors. We will further discuss this process in a more detailed evaluation of the WIP to be provided separately to your Department's staff. In addition, as is the case with all of the Chesapeake Bay jurisdictions, EPA's stated expectation is that we will continue to hold New York accountable for implementing controls and practices by 2017 that would achieve 60 percent of the necessary nutrient and sediment load reductions needed to achieve water quality standards.

EPA will maintain oversight of WIP and milestone implementation for all Bay jurisdictions and reserves its authority to use the full suite of federal actions available under the Clean Water Act

and applicable regulations, as detailed in EPA's December 29, 2009 letter, to ensure that WIPs are implemented and pollution reductions are achieved. EPA will work with the jurisdictions to avoid the need for these actions.

Thank you for your commitment to protect and restore local waters and the Chesapeake Bay watershed. If you have any questions or comments, please do not hesitate to contact me (215-667-9304, Corbin.Jeffrey@epa.gov). You may also contact Joan Leary Matthews (212-637-3724, Matthews.Joan@epa.gov) or Jeff Gratz (212-637-3873, Gratz.Jeff@epa.gov).

Sincerely,



Jeff Corbin
Senior Advisor to the Administrator for the
Chesapeake Bay and Anacostia River

cc: Judith Enck, Regional Administrator, U.S. EPA Region 2
Shawn Garvin, Regional Administrator, U.S. EPA Region 3

**EPA EVALUATION OF NEW YORK'S FINAL PHASE II WATERSHED IMPLEMENTATION PLAN
AND 2012-2013 MILESTONES**

Overview

New York State Department of Environmental Conservation (NYSDEC) submitted Draft Phase II Watershed Implementation Plans (WIPs) to the U.S. Environmental Protection Agency (EPA) on March 23, 2012 and July 6, 2012. EPA provided NYSDEC with evaluations of these drafts on April 10 and August 28. EPA requested that NYSDEC revise the Draft WIPs or provide an addendum to finalize this document. EPA received NYSDEC's Final Phase II WIP, including a final wastewater input deck and cover letter, on January 7, 2013. This WIP is very similar to the July 6 WIP with notable exceptions in the wastewater section and some changes to the trading and offsets section.

Since the March draft, New York increased implementation levels for numerous agricultural best management practices (BMPs) such that its level of effort for the agricultural sector is fully commensurate with the level of effort New York committed to in its Phase I WIP. However, the Final Phase II WIP commitments result in nitrogen and phosphorus loads of 9.28 and 0.67 mil lbs/year, respectively, which are 4.8 percent and 4.6 percent above EPA's Phase II planning targets of 8.85 million pounds per year (mil lbs/yr) nitrogen (adjusted) and 0.64 mil lbs/yr phosphorus. The adjusted nitrogen target includes a 500,000-pound advance based on anticipated, future limits on air emissions. New York's Final Phase II WIP results in sediment loads of 249 mil lbs/year, which are 18 percent under EPA's Phase II targets of 304 mil lbs/year.

These nutrient gaps are primarily the result of increased loads from the wastewater sector compared to New York's Final Phase I WIP. EPA expects New York to address these gaps and meet planning targets that achieve water quality standards. Although the current bubble permit approach does not fully meet the adjusted Phase II WIP planning targets, it provides a cost-effective mechanism to achieve additional reductions. EPA fully expects New York's Phase III WIP and/or future two-year milestones to incorporate schedules for issuing permits utilizing this bubble permit approach and/or commit to actions in other sectors that will meet the WIP planning targets by 2025.

New York's Final Phase II WIP included sixteen options for achieving additional pollution reductions necessary to close the gap between its Phase II WIP loads and WIP planning targets that are necessary to meet water quality standards in the Bay by 2025. However, these options lack sufficient detail to assess how much, and when, additional pollution reductions would occur.

As a result of New York's Final Phase II WIP submission that addresses some of EPA's comments on previous drafts, EPA is upgrading New York's wastewater sector from "backstop" to "enhanced oversight." Other source sectors remain in "ongoing oversight." EPA will evaluate whether each of the Bay jurisdictions have practices in place by 2017 that would achieve 60 percent of the necessary reductions to achieve water quality standards compared to 2009. Table 3 of the Final Phase II WIP indicates that New York is not on track to achieve this 2017 interim

target. EPA is committed to work with New York through the oversight and milestone process to further evaluate actions needed to meet this goal.

Local Engagement

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- New York has provided stand-alone local engagement sections for all sectors.

Agriculture

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- New York maximized use of agricultural and non-point source funding to achieve very aggressive levels of BMP implementation by 2025 for practices such as conservation plans, acres of prescribed grazing, and livestock mortality composting systems. New York has provided detailed information on the implementation costs of this program and projected funding levels through 2025 based on current funding.
- New York's planned agricultural implementation levels described in the Phase II WIP are consistent with Phase II WIP model input deck.
- New York reinforced its commitment to work closely with the Chesapeake Bay Program partnership to develop science-based data collection and verification protocols.
- New York is currently updating its Clean Water Act State Pollutant Discharge Elimination System (SPDES) Concentrated Animal Feeding Operation (CAFO) General Permit (GP-04-02) and expects to release a draft permit for public comment in March 2013.

Key areas to address in two-year milestones through 2017

- In 2013, EPA will work with New York through its performance partnership agreement to develop a schedule for issuance of a final 2008 Clean Water Act-compliant CAFO permit. New York's comprehensive revision of Title 6, Subpart 750 of the Codes, Rules and Regulations, which will include aligning New York's CAFO program with the 2008 Federal Rule, is scheduled to begin in State Fiscal Year 2013.
- EPA will continue to work with New York to ensure that aggressive implementation targets are met and under-reported practices are properly credited.
- Develop contingencies for obtaining additional nutrient reductions in case WIP commitments are not fully realized, given the large increases in implementation rates of numerous practices, significant technical assistance levels that will be required to develop and implement these practices, and projected assumptions for agricultural BMP crediting.

Potential EPA Actions: Maintain ongoing oversight.

Urban/Suburban Stormwater

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- New York is using its Chesapeake Bay Regulatory and Accountability Program grant to enhance compliance at construction sites.
- New York's stormwater program now includes a connection to floodplain management.

Key areas to address in two-year milestones through 2017

- Explain how New York will achieve its 2025 reduction targets of eight percent for nitrogen, twenty percent for phosphorus, and ten percent for sediment given that the WIP does not

include controls on new and redevelopment outside of MS4s or propose any retrofits. For example, explain possible contingency actions by 2017 if reductions are not on schedule to meet 2025 targets; include a schedule for proposed activities (e.g., advancing stormwater program, modifying Notice of Intent Form); and explain what is currently being challenged within the MS4 lawsuit and whether New York plans to defend relevant issues.

Potential EPA Actions: Maintain ongoing oversight.

Wastewater Treatment Plants and Onsite Systems

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- Included individual wasteload allocations (WLAs) for all significant wastewater treatment plants with interim loads to be achieved by 2017 and final loads to be achieved by 2025.
- New York no longer states that interim WLAs for phosphorus are contingent on TMDL modification.
- Provided additional information on how “bubble” or aggregate permit limits will work for nitrogen.

Key areas to address in two-year milestones through 2017

- Two-year milestone commitments through 2017 need to include issuance of wastewater permits that meet New York’s interim (2017) facility-specific nitrogen limits and the bubble permit approach described within the Final Phase II WIP.
- Because NY’s Phase II WIP reductions for nitrogen and phosphorus are about five percent higher than the Phase II planning targets, EPA expects additional reductions from wastewater or other sectors in the Phase III WIP to fully meet water quality goals. Therefore, the fact sheets for the permits issued with nitrogen and/or phosphorus limits to meet NY’s Phase II WIP need to indicate the potential for permit revision or modification in 2018 or sooner if required by the Phase III WIP and/or any modifications to the Chesapeake Bay TMDL.
- When permits for significant facilities are reissued, EPA suggests that New York focus on phosphorus reductions for local water quality benefits by issuing wastewater permits with compliance schedules that meet an average phosphorus concentration of 0.5 mg/l.
- Continue to work with EPA to finalize details on how the bubble permit(s) will be issued, implemented and enforced.
- Where lacking, implement monitoring requirements in permits for non-significant facilities to document existing loads in order to capture potential reductions in the assigned aggregate WLAs. Where monitoring data demonstrate that non-significant wastewater loads are higher than assumed, New York will need to offset or reduce these loads.
- New York’s Final Phase II WIP proposed to increase the threshold for “negligible discharges” of phosphorus from 0.02 mg/L to 0.1 mg/L. EPA does not support this proposal since it would result in a less thorough accounting of phosphorus loads from wastewater treatment plants.

Potential EPA Actions: EPA is upgrading the wastewater sector from “backstop” to “enhanced oversight” given the submission of New York’s Final Phase II WIP that addresses some of EPA’s comments. Through the issuance and reissuance of a bubble permit for significant wastewater treatment plants and supporting additional actions in other sectors, EPA will work

with New York to close any remaining nutrient gap between the WIP planning targets that achieve water quality standards and New York's WIP loads by 2025.

Offsets and Trading

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- Began to formulate trading and offset baseline determinations for wastewater, combined sewer overflows, stormwater and septic loads.
- Provided more detail on its planned process for wastewater and MS4 trading and offsets.
- Included plans to reduce loads from septic systems by extending connections to existing wastewater treatment plants.

Key areas to address in two-year milestones through 2017

- Provide additional detail on planned process for wastewater and MS4 trading and offsets.
- Commit to resolve all New York-specific Tier 1 and Tier 2 issues and all unresolved recommendations that are common to all jurisdictions, as identified in EPA's assessment of New York's trading and offset program, in 2013.
- By February 28, 2013, provide an initial sector growth management submission to EPA that contains a description of the content, scope and status of NY's offset program (formal or otherwise) as outlined in EPA's February 6, 2013 email to all the jurisdictions.

Potential EPA Actions: Conduct ongoing oversight, including NPDES permit reviews, to ensure commitments are implemented and recommendations from EPA's offsets and trading program assessment are addressed.

Federal Agencies

Key improvements since draft Phase II WIP and final 2012-2013 milestone submission

- Included a new federal facilities section that identifies 13 facilities owned/operated by federal agencies and mechanisms for coordinating with federal facilities.
- Committed to work with federal agency partners that have facilities in the Upper Susquehanna watershed to account for BMPs on federal lands.
- Committed to a federal partners coordination meeting.

Key areas to address in 2012-2013 milestone period and through 2017

- As New York meets with federal agencies to advance coordination, develop an agreement between federal agencies and New York on federal reduction targets.

Proposed EPA Actions: Maintain ongoing oversight.

General Note to All Jurisdictions:

- EPA will assess annual progress and track two-year milestone commitments. EPA may take federal actions, including but not limited to actions described in its December 29, 2009 letter, to ensure that nitrogen, phosphorus, and sediment reductions identified in the jurisdictions' individual WIPs and needed to meet Bay TMDL allocations are achieved.
- The Chesapeake Bay Program partnership is developing verification protocols in order for nutrient and sediment controls to be credited by the Chesapeake Bay Program models. These protocols will address unreported and non-cost shared practices and will include guidelines

for identifying and removing duplicate records and addressing expired, failed, or removed practices.

- EPA may conduct special studies or program assessments to ensure progress under the WIPs and milestones.