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Jessica Shirley, Director  
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Pennsylvania Department of Environmental Protection  
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P.O. Box 2063  
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June 6, 2019

**Re: Pennsylvania's Draft Phase 3 Chesapeake Bay Watershed Implementation Plan**

Dear Ms. Shirley:

I am writing on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber), the largest, broad-based business advocacy organization in the Commonwealth. Our more than 7,500 member companies are involved in all industrial categories and are of all sizes. On behalf of these businesses, we welcome the opportunity to respond to the Department's invitation for public comments concerning the development of Pennsylvania's Phase III Watershed Implementation Plan (WIP) to progress toward achievement of the nutrient and sediment reductions required under the Chesapeake Bay TMDL.

As the Department and its staff are aware, the PA Chamber has been actively and positively involved throughout the past 15 years or more in working with other stakeholders in helping to frame workable approaches to addressing the water quality challenges of the Chesapeake Bay. Representatives from the PA Chamber and individual Chamber members have served on a myriad of committees, subcommittees and stakeholder groups that have devoted hundreds of hours to seeking solutions for reducing nutrient loadings in a fair, equitable, cost-effective and implementable manner. We recognize that all sectors and stakeholders (industry, agriculture, communities, citizens and environmental groups alike) have a stake in the Bay, and, equally, all of those in the Bay watershed should have a strong interest in preserving the economic, as well as environmental, viability and well-being of this region. Likewise, all sectors who contribute to the loadings entering the Bay have a stake and a responsibility to address those contributions.

During the process of developing the Phase I WIP, the PA Chamber observed and underscored the importance of assuring that allocations of nutrient loadings be fair, reasonable and achievable. If the agencies or stakeholders lose sight of this loadstar, if efforts are made to shift burdens arbitrarily between sectors or among individual entities, the entire process is doomed to failure. Given the enormous efforts and investments that are needed to achieve nutrient and sediment reductions, public support is essential. Such public support will never be forthcoming for allocations or implementation plans that are arbitrary, outlandishly expensive and unaffordable. Conversely, the goal in developing and implementing the WIP is to provide measures that are affordable, implementable, and assure that all contributing sectors do their fair share to reduce loadings in order to achieve the TMDL allocations.

We appreciate that the Department has taken strides to develop a plan that reflects accurately the progress that the respective sectors involved have made so far – and that responsibly allocates responsibility with respect to remaining reductions by these sectors. The point source sector (including publicly owned treatment works and industrial wastewater plants) in Pennsylvania have fulfilled their commitments to achieve the reductions called for under the Chesapeake Bay TMDL, which the Draft WIP 3 notes. At

considerable cost, in terms of both capital investment and operation and maintenance expense, industries have modified production processes to reduce nutrient generation in wastewaters, and both municipalities have upgraded treatment facilities to reduce nitrogen and phosphorus in their effluent. According to the latest available assessment of loading reductions achieved, as of 2015, the point source sector had more than met its targeted 2017 milestone reductions for nitrogen and phosphorus (TN: 9.8 M lbs/year actual vs 10.2 M lbs/year 2017 target; TP: 0.76 M lbs/year actual vs. 0.966 M lbs/year 2017 target). Indeed, the point source sector in Pennsylvania has already achieved its mandated 2025 phosphorus load levels (0.897 M lbs/year) reductions and is within striking distance of meeting its 2025 nitrogen reductions (8.92 M lbs/year). That progress has been made by industries and municipalities not because it was easy, but because this sector has taken its obligations seriously and has worked assiduously to design, construct and invest in the improved processes and facilities required to meet these ambitious targets.

Unfortunately, the progress made by some other sectors toward their TMDL targets have been less encouraging. As the Department reported last year, Pennsylvania committed to reduce its urban/suburban stormwater load for Nitrogen by 41 percent and for Phosphorus by 45 percent, but as of 2016 had only reduced Nitrogen Loads from that sector by about 1 percent and Phosphorus by approximately 10 percent. With respect to the agricultural sector, the modeled loadings remain significantly above the 2017 TN and TP targets. While we understand (and support) efforts to assure that the Bay model better accounts for all best management practice that are, in fact, being implemented, it appears that both the stormwater and agricultural sectors have accrued a significant shortfall that needs to be addressed in the Phase III WIP.

With this in view, the PA Chamber reiterates its support for the following theme as part of a final Phase III WIP.

1. ***Maintain Fair Sector Allocations:*** Given the significant investments already made by the wastewater point source sector, it would be unfair and unreasonable to shift the loadings shortfalls of other sectors onto the point source sector. As the Department knows, the point source sector has already implemented TN and TP removal efficiencies of 95% and higher, and attempting to achieve reduction or the last few percentages will achieve little, but at enormous cost. “Zero discharge” is not technologically nor economically achievable, but even if one were to eliminate the entire point source category the resulting reductions in TN would represent less than 25% of the current shortfall in loading reductions required from the agricultural and stormwater sectors. Punishing one sector (industry and POTWs) to make up for the shortcomings in other sectors makes no regulatory, water quality, or economic sense.
2. ***Encourage a More Viable Nutrient Trading Program:*** The PA Chamber continues to favor utilization and encouragement of market measures to help promote more cost-effective implementation of nutrient load reductions. For a nutrient trading program to be effective, however, there are several significant prerequisites: (1) a regulatory regime must be stable and predictable, establishing criteria for determining credits that are fixed for the long-term; (2) credits once traded must be secure against subsequent “second-guessing” or regulatory change; (3) there needs to be a marketplace with both an adequate number of willing buyers and willing sellers.

After an initial promising start, it is unfortunate that Pennsylvania’s nutrient trading program was essentially side-tracked by EPA’s objections, and subsequent changes made by policy and guidance that trumped published regulations, leading to regulatory confusion and uncertainty. Such changes have led potential buyers in the marketplace to be chary of relying on credits to meet what would

otherwise be their nutrient reduction obligations, lest the value of those investments evaporate in a subsequent regulatory “adjustment.”

At the same time, the fact is that the market of willing buyers has reached a hiatus. Point sources have opted for the security of investing in their own long-term improvements to meet nutrient reduction obligations; and having done so and achieved mandated cap loads, the incentive to acquire credits has dissipated. But if the credit program is encouraged, that hiatus may be temporary. As municipal separate stormwater systems face the requirement of developing and implementing nutrient reduction plans, if the option is offered of acquiring credits as part of such plans, the credit program might assist in helping to channel funds through the market toward activities (whether it be in the agricultural or stormwater sectors) where nutrient reductions can be achieved in a more cost-effective manner.

This said, we are reluctant to endorse proposals that have come from some quarters that would set up a forced market – where the government would be statutorily obligated to purchase credits and charge “fees” or “assessments” to municipalities, stormwater authorities or perhaps others to fund the program. A true market system is one based on willing buyers and willing sellers, not forced transactions where one side is forced to participate. On the other hand, if it is determined that a public investment is needed to attract sufficient nutrient reductions (particularly from non-point sectors, such as agriculture), then we might suggest *pilot testing* a public procurement program to solicit and enter into long-term contracts for credit creation via a competitive bid/competitive proposal process – allowing the market to respond with competitive and cost-effective proposals, rather than just allocating funds to a range of “initiatives” and “measures” that we hope will generate reductions.

3. ***Establish and Encourage More Effective Stormwater Institutional Arrangements:*** The Chamber perceives that one of the impediments to effectively addressing the stormwater component of the TMDL lies in Pennsylvania’s currently balkanized institutional arrangements for stormwater. Across much of the Commonwealth, we see multiple communities in a watershed, each attempting to manage their own stormwater infrastructure and programs – often one flowing into the next. Although the Storm Water Management Act, enacted nearly 40 years ago, called for watershed planning for stormwater, implementation of stormwater management has been left to each municipality, and this municipality-by-municipality approach has been fostered by the MS4 permit program.

Tackling this challenge will require some evolution of our institutions toward a more watershed-based implementation structure. That evolution may well require some concerted educational effort and investment in fostering inter-municipal cooperation and the creation of stormwater management authorities (as now authorized under the Municipality Authorities Code). A concept to be considered would be to establish a “seed fund” program that provides foundational support for creating such authorities and their initial funding, with the provision that they must establish and maintain a long-term sustainable funding base using the tools provided in the Municipality Authorities Code (e.g., a fee system premised on contribution to the stormwater challenges). In that process, we would note that in addressing various legislative proposals on this topic, the PA Chamber has consistently taken the position that those property owners who have invested in stormwater management practices, such as infiltration basins, to address their respective contributions must be given credit for such efforts in any fee structure. It is our understanding EPA Region 3 has been dismissive of an approach that allows for municipalities to achieve compliance with MS4 requirements by supporting projects outside their borders; we believe this opposition sidelines a very important option for local governments to deploy.

- 4. *Adopt Legislation Allowing Public-Private Partnerships in Stormwater and other Water/Wastewater Projects:*** The PA Chamber has long advocated that Pennsylvania consider the adoption of legislation authorizing counties and local governments, as well as Commonwealth agencies, to enter into public-private partnership (P3) transactions for various types of infrastructure and other projects. Although the General Assembly has done so in relation to transportation projects via Act 88 of 2012, counterpart authorizing legislation for other types of projects, including water, wastewater and stormwater, has been proposed but not progressed to fruition.

The viability of this tool in the field of stormwater is underscored in the EPA report, *Community Based Public Private Partnerships and Alternative Market-Based Tools for Integrated Green Stormwater Infrastructure* (April 2015).<sup>1</sup> This approach has been utilized successfully in our neighboring state of Maryland, where the Prince Georges County Clean Water Partnership was launched in 2014 via a P3 involving the county and Corvias Solutions.<sup>2</sup> In that area, traditional project delivery methodologies and procurement could have been utilized to address the stormwater issues (including Chesapeake Bay requirements). However, as described in the project's website, "given the magnitude of the challenge of retrofitting 2,000 impervious acres with Green Infrastructure, with the flexibility to potentially grow to 15,000 acres of untreated impervious area by 2025, and an estimated cost of \$100 million, an alternative solution was sought." Under that community-based P3, solutions were sought via a competitive proposal process. The selected solution involves a private partner, Corvias, is leading a \$100 million/30-year effort involving planning, financing, design and execution of projects (including many green infrastructure projects) across the entire watershed, with the private financing to be repaid via a stream of payments from the County's stormwater fee program. Instead of a myriad of literally hundreds or thousands of procurements for individual projects conducted on a design-bid-build basis, this P3 approach brings to the table both financing and private expertise to more efficiently identify and execute cost-effective projects.

While no tool is a panacea, public-private partnerships are a tool that definitely should be added to the tool box. The Department and Administration should work with the General Assembly to move forward expeditiously with legislation that permits P3 transactions via competitive proposal procurement procedures in the water, wastewater and stormwater sectors. We must also note that P3's can be a tool used to achieve meaningful, verifiable pollutant reductions; any enabling legislation must not establish additional mandates or obligations, particularly on sectors that have already achieved the necessary reductions in nutrient loading.

- 5. *Conservation District Programs and Other Should Build Upon Promising Outreach to the Agricultural Sector:*** The agricultural sector remains the most challenging element of the TMDL picture. We are encouraged by the recent Penn State evaluation of what farmers reported were best management practices they were implementing compared to what was observed in the field – which indicated that reported voluntary measures were, in fact, being implemented and in some cases underreported.<sup>3</sup> It should not require an overly elaborate regulatory program to encourage the type of communication needed to collect data on those measures and obtain credit for such efforts in the Bay

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<sup>1</sup> Community Based Public-Private Partnerships (CBP3s) and Alternative Market-Based Tools for Integrated Green Stormwater Infrastructure. U.S. Environmental Protection Agency Region 3 Water Protection Division, April 2015. [https://www.epa.gov/sites/production/files/2015-12/documents/gi\\_cb\\_p3\\_guide\\_epa\\_r3\\_final\\_042115\\_508.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/gi_cb_p3_guide_epa_r3_final_042115_508.pdf).

<sup>2</sup> See <https://thecleanwaterpartnership.com/>.

<sup>3</sup> Survey finds Pa. farmers have done much to protect Chesapeake Bay water quality. Penn State News, Dec. 15, 2016. <http://news.psu.edu/story/442579/2016/12/15/survey-finds-pa-farmers-have-done-much-protect-chesapeake-bay-water-quality>.

model. A combination of enhanced Conservation District outreach programs, farmer self-assessments, periodic spot-checking of self-assessments of the type that Penn State demonstrated, and use of remote sensing technologies should be considered and advocated.

In this regard, we would encourage the agricultural community to modify its positions which limit effective use of satellite and other remote sensing technologies. As noted in a study prepared for EPA:

A principal reason for the often haphazard nature of BMP data collection by watershed projects is the fact that privacy laws and policies often restrict the type and amount of information available to those involved in a watershed project, most notably information about agricultural enterprises. Because specific, farm-level information about livestock, crops, farm inputs such as fertilizer and pesticides, and basic farm management is usually only available if disclosed by the individual farmer, watershed projects often have incomplete information or inconsistent levels of detail from farm to farm. Project investigators are often put into the position of having to reduce the level of detail to the least common denominator across farms or of patching together as much information as they can and then determining how to use it later. Confidentiality policies also drive government agencies that collect land use or management data to aggregate their data – even information collected on a site-specific basis – to a geographic scale (e.g., county, HUC-12) that reduces the utility of the data to a watershed project evaluating water quality influenced by specific drainage areas.<sup>4</sup>

Industries, municipalities, and others in the regulated community are universally subject to some amount of reasonable data collection by the government, including rights of inspection. The use of remote sensing to ascertain and verify use of BMPs on farms, so that they may be utilized in modeling loadings to the Bay, is by far less intrusive than the governmental oversight that other members of the regulated community face every day. We need to get past overly broad claims of “confidentiality” to tackle this shared challenge.

While some (perhaps many) farmers have taken on the challenge, adopted nutrient management plans, and undertaken various voluntary practices (such as no till and stream buffers), pursuit of best management practices is far from universal. A financial incentive approach, via the type of trading arrangement mentioned above, might help. But none of this will work unless the agricultural community fully embraces its responsibilities.

6. ***All Significant New or Expanding Nutrient Contributors Should be on Equal Footing.*** Under the current TMDL program, industrial and municipal generators of nitrogen and phosphorous loadings are subject to cap loading limits, with new or expanded loadings precluded unless offset by countervailing reductions at the same source or the acquisition of credits representing equivalent reductions elsewhere. But it is not clear that the same rules apply to all major generators. For example, agricultural operations including CAFOs, are being sited and are expanding in various parts of the Bay watershed, but we do not see evidence that those operations (all of which should be subject to NPDES permitting requirements) are being required to obtain offsetting credits for their increased loadings. If our perception is correct, then we have a serious credibility and fairness gap in our approach to Bay TMDL obligations. All of us, whether businesses involved in agriculture or

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<sup>4</sup> Land Use and BMP Tracking for NPS Watershed Projects. Meals, et al., National Nonpoint Source Monitoring Program, August 2014. Available at [https://www.epa.gov/sites/production/files/2016-05/documents/tech\\_notes\\_11\\_aug28\\_bmptrack.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/tech_notes_11_aug28_bmptrack.pdf).

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agribusiness, have a responsibility and when undertaking new enterprises or expansions, should be on equal footing in terms of requirements to plan for and mitigate the impacts associated with new or increased nutrient loadings.

We appreciate the opportunity to provide these comments, and for your attention and consideration of them. It is our sincere hope that our efforts, along with those of other stakeholders involved in the Pennsylvania WIP process, will lead to a Phase III plan that is viable, positive and effective as a path forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Gene Barr", written in a cursive style.

Gene Barr  
President and CEO  
Pennsylvania Chamber of Business and Industry