

March 13, 2014

[Via e-mail to agreement@chesapeakebay.net](mailto:Via_e-mail_to_agreement@chesapeakebay.net)

Mr. Nicholas DiPasquale  
Chair, Chesapeake Bay Program Management Board  
410 Severn Avenue, Suite 109  
Annapolis, MD 21403



Dear Mr. DiPasquale and Management Board Members:

The undersigned members of the Choose Clean Water Coalition—a coalition of organizations from Maryland, Pennsylvania, New York, Delaware, Virginia, West Virginia and the District of Columbia with the common goal of restoring the thousands of streams and rivers flowing to the Chesapeake Bay—respectfully submit the following comments on the draft Chesapeake Bay Agreement dated January 29, 2014.

The Chesapeake Bay Agreement stands as the framework around which we have built a coordinated effort to restore local waterways and Chesapeake Bay. In order to protect human health throughout the region and achieve improved water quality and habitats, clearly, it is time for a new Agreement. With the addition of Delaware, West Virginia, and New York as signatories, this new Agreement has the potential finally to lead us to the clean and healthy waters that we have all envisioned.

Unfortunately, this version of the Agreement falls short of achieving that vision. While the draft Agreement recognizes that “measurable results coupled with *firm accountability* yield the most significant results,”<sup>1</sup> this draft fails to provide the accountability mechanisms necessary for success. Also, the draft is plagued by its failure to address key issues critical to healthy waters throughout the Chesapeake, including identifying and reducing toxic contaminants.

The Choose Clean Water Coalition cannot support the draft Agreement in its current form. We have provided specific, concrete amendments that, if adopted, would address our concerns and create an Agreement we can support.

**A. The Final Agreement Should Preserve the Incorporation of Chesapeake Bay Total Maximum Daily Load Requirements into the Draft Agreement.**

While the draft Agreement has mostly been a disappointment, there are some positive aspects of the Agreement that should be preserved in the final Agreement. Specifically, continued inclusion of the existing water quality goal and outcomes is critical to securing Choose Clean Water Coalition support for the Agreement. The 2017 and 2025 Watershed Implementation Plan outcomes are properly included in the draft Agreement and should remain in the final Agreement. Furthermore, the draft Agreement properly acknowledges that the outcomes related to the Chesapeake Bay Total Maximum Daily Load are not subject to discretionary participation by the jurisdictions.<sup>2</sup> These aspects of the draft Agreement should be preserved in the final Agreement.

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<sup>1</sup> Draft Agreement at 2.

<sup>2</sup> Draft Agreement at 5.

## B. The Final Agreement Must Provide Accountability for States' Participation in Management Strategies.

The heart of the Agreement lies in the Goals and Outcomes, which the draft Agreement defines as “commitments... the signatories collectively will work on to advance restoration and protection of the Chesapeake Bay ecosystem and its watershed.”<sup>3</sup> But while the Goals and Outcomes represent the signatories’ collective commitments, each individual signatory may exercise its discretion whether to develop and implement management strategies to achieve the goals and outcomes. This “opt in, opt out” design robs the Agreement of any accountability. It turns the Agreement into an affirmation by the signatories that *someone* should address these issues, while relieving signatories of the responsibility of actually committing to do *any* of the work—let alone their fair share. Not only does this mean that a signatory could potentially opt out of all of the goals and outcomes, but this creates the potential for “orphaned” goals or outcomes—those for which no jurisdiction elects to implement the management strategy.

Adopting an updated Agreement that allows signatories to choose to implement none of the Goals and Outcomes—other than those related to the Chesapeake Bay TMDL or otherwise required by law—undermines the spirit of the Agreement and fails to comply with the Clean Water Act.

Section 117(e) of the Clean Water Act directs the Environmental Protection Agency to issue grant money to the Agreement signatories to implement programs in the Agreement, but only “if a signatory has approved and committed to implement ***all or substantially all*** aspects of the Chesapeake Bay Agreement.”<sup>4</sup> As the draft Agreement stands, upon signing the Agreement, none of the signatories would approve and commit to implement all or substantially all of the Agreement.

Fortunately, this problem is relatively simple to fix. Two options to addressing this problem include:

1. For each outcome, each signatory will indicate, prior to signing the Agreement, whether it intends to implement management strategies related to the outcome. For example, the Tree Canopy Outcome may read: “Expand urban tree canopy by 2,400 acres by 2025. (Virginia, Maryland, Pennsylvania, New York, Delaware, West Virginia, Washington, D.C.)”
2. Draft the management strategies prior to jurisdictions signing the Agreement, and then have each jurisdiction indicate during that process which management strategies it intends to implement.

Either solution requires a jurisdiction to make a commitment to one another and the public as to how it intends to contribute to the collective efforts to advance restoration and protection of the Chesapeake Bay ecosystem and its watershed. Further, by requiring each jurisdiction to indicate those outcomes it intends to work on over the coming years, the Agreement meets its principle of “operat[ing] with transparency in program decisions, policies, actions, and progress to strengthen public confidence in [these] efforts.”<sup>5</sup> Without this transparency, the public has little confidence that the Agreement does anything more than provide a meaningless photo opportunity.

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<sup>3</sup> Draft Agreement at 5.

<sup>4</sup> 33 U.S. Code § 1267(e)(1) (emphasis added).

<sup>5</sup> Draft Agreement at 4.

### C. The Final Agreement Must Incorporate Outcomes Related to Toxic Pollutants.

The Chesapeake Bay ecosystem and its watershed can never achieve the Chesapeake Bay Program partners' vision of a watershed with "clean water [and] abundant life" without addressing toxic contamination. In 2012, 74% of the Chesapeake Bay and its tidal tributaries were impaired due to toxic contaminants – up from 66% in 2006.<sup>6</sup> These waters have long lists of fish consumption advisories due to PCB and mercury contamination.<sup>7</sup> In addition, there have been widespread fish kills in freshwater areas throughout the watershed, including in the South Branch of the Potomac (West Virginia),<sup>8</sup> North and South Forks of the Shenandoah (Virginia),<sup>9</sup> and the Susquehanna (Pennsylvania) rivers.<sup>10</sup>

A September draft of the Agreement included two provisions to address these toxic issues – but they were stricken from the current draft. These outcomes should be added to the Water Quality goal.

- **Toxic Contaminants Reduction Outcome:** By 2015, identify existing practices and propose an implementation schedule for new practices, if necessary, to reduce loadings of PCBs and mercury to the Chesapeake Bay and its watershed.
- **Toxic Contaminants Research Outcome:** By 2015, assess ongoing research and develop an agenda for new research, if needed, to improve knowledge of the effects of contaminants of emerging concern on the health of fish and wildlife so future strategies can be considered.

These provisions are reasonable, narrowly tailored, and strategic. Their inclusion is necessary to meet the goal of reducing pollutants to achieve water quality necessary to protect human health, as well as to support recreation, and provide a clean and biologically healthy aquatic habitat for wildlife. Further, the Bay Program has a long history of commitment to reducing toxic contaminants, which it should continue. Since the original five-year study toxic contaminants launched in 1976, the Chesapeake Bay Program's Executive Council has committed to key

<sup>6</sup> See Maryland's 2012 Final Integrated 303(d) Report, *available at* [http://www.mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Pages/2012\\_IR.aspx](http://www.mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Pages/2012_IR.aspx); Virginia's Final 2012 305(b)/303(d) Water Quality Assessment Integrated Report, *available at* <http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityAssessments/2012305b303dIntegratedReport.aspx>; District of Columbia Water Quality Assessment 2012 Integrated Report, *available at* <http://green.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/2012%20IR%206-19-2012.2.pdf>

<sup>7</sup> See District of Columbia fish advisories, *available at* <http://ddoe.dc.gov/service/fishing-district>; Maryland Department of the Environment fish consumption advisories, *available at* <http://mde.maryland.gov/programs/marylander/citizensinfocenterhome/pages/citizensinfocenter/fishandshellfish/index.aspx>; Virginia Department of Health fish consumption advisories, *available at* <http://www.vdh.virginia.gov/Epidemiology/dee/PublicHealthToxicology/Advisories/>; Pennsylvania 2014 fish consumption advisory *available at* <http://fishandboat.com/fishpub/summary/sumconsumption.pdf>; West Virginia fish consumption advisories *available at* [http://www.wvdhhr.org/fish/Current\\_Advisories.asp](http://www.wvdhhr.org/fish/Current_Advisories.asp); Delaware fish advisories *available at* [http://www.dnrec.delaware.gov/fw/Fisheries/Documents/Delaware\\_Fish\\_Advisory\\_Chart.pdf](http://www.dnrec.delaware.gov/fw/Fisheries/Documents/Delaware_Fish_Advisory_Chart.pdf)

<sup>8</sup> See West Virginia DEP website, "Potomac Fishkills" *available at* <http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Pages/PotomacShenandoahFishKills.aspx>.

<sup>9</sup> See Virginia department of Game and Inland Fisheries website, "Shenandoah and James River Fish Disease and Mortality Investigation" *available at* <http://www.dgif.virginia.gov/fishing/fish-kill/>.

<sup>10</sup> See Pennsylvania Fish and Boat Commission press release, *available at* [http://www.fish.state.pa.us/newsreleases/2009/susqu\\_fish\\_kills.pdf](http://www.fish.state.pa.us/newsreleases/2009/susqu_fish_kills.pdf)

goals, actions, and objectives related to toxic contaminants in the tidal waters in both the 1987 Agreement and the Chesapeake 2000 Agreement, and has adopted aggressive toxic contaminants reduction strategies in 1994 and 2000. We urge you to continue this commitment to addressing this toxic contamination.

We are happy to discuss our concerns and help your partnership develop a strong and effective new Agreement in any way that we can. Please contact Jill Witkowski by phone at 443-842-7525 or by email at [witkowskij@nwf.org](mailto:witkowskij@nwf.org).

Respectfully submitted,

American Rivers  
Audubon Maryland-DC  
Audubon Naturalist Society  
Center for the Celebration of Creation  
Chesapeake Bay Foundation  
Citizens for Pennsylvania's Future  
Clean Water Action  
Conservation Pennsylvania  
Conservation Voters of Pennsylvania  
Delaware Nature Society  
Earth Forum of Howard County  
Environment America  
Environment Maryland  
Friends of Dyke Marsh  
Friends of the Rappahannock  
Friends of the Rivers of Virginia  
Interfaith Partners for the Chesapeake  
James River Association  
Maryland Conservation Council  
Maryland League of Conservation Voters  
Maryland Native Plant Society  
Maryland Pesticide Network  
National Aquarium  
National Wildlife Federation Mid-Atlantic Regional Center  
Natural Resources Defense Council  
Nature Abounds  
Neighbors of the Northwest Branch  
Pennsylvania Council of Churches  
Piedmont Environmental Council  
Port Tobacco River Conservancy  
Potomac Conservancy  
Rivanna Conservation Society  
Rock Creek Conservancy  
Savage River Watershed Association  
Severn Riverkeeper  
Shenandoah Riverkeeper  
Shenandoah Valley Network  
Sierra Club – Maryland Chapter  
Sparks-Glencoe Community Planning Council  
St. Mary's River Watershed Association

Virginia Conservation Network  
Virginia League of Conservation Voters  
West Virginia Rivers Coalition  
Wetlands Watch