

Issue: **Participatory/Discretionary Language** (pertaining to Management Strategies for Outcomes)

Updated April 10, 2014 (for PSC meeting discussion)

IRC recommendations for PSC are highlighted in yellow below.

Current Language

“Except for those outcomes required by law and related to the implementation of the Chesapeake Bay Total Maximum Daily Load (TMDL) under the water quality goal, each signatory may exercise its discretion to participate in the development and implementation of individual outcomes’ management strategies depending upon relevance, resources, priorities, or other factors. Partnerships with other agencies, organizations, and stakeholders will be identified as appropriate. Signatories may decide to adjust their level of participation in the implementation of strategies as circumstances warrant.”

Options

1. Status quo
2. **Deletes discretionary language from Goals and Outcomes section and adds that strategies will identify participating jurisdictions.** Adds new language to Affirmation and Signatures section recognizing voluntary nature of Agreement and that it is not a contract or assistance agreement. (EPA proposed language: See exact wording below under EPA comments).
3. **Include the participatory language for headwater states only.** The paragraph would read, “each signatory **headwater state** may exercise its discretion...” (WV proposed language).
4. **Delete discretionary language from Goals and Outcomes section and signatories should identify management strategies they will participate in at the time the Agreement is signed in an Addendum.** The Agreement should recognize that participation in management strategies, which will be for two-year periods, will vary. The Agreement should also require stakeholder engagement and public comment and review prior to adoption and subsequent reporting to the EC. (Maryland proposed language: See exact language below under Maryland comments).

Partner Comments

Citizen’s Advisory Committee

(12/12/13)

... concern over the ... jurisdictions’ discretion to participate in the goals and outcomes. We understand that there will be periodic progress reports issued to the public, but reporting information will only be available for the jurisdictions who decided to participate in certain outcomes. The result is that all of the citizens of the watershed will not be fully informed about their local waterways. ... We believe all the jurisdictions should commit to all of the goals and outcomes that apply to their region so every citizen knows the health of their local waterway and can benefit from as many partners as possible working toward restoration and protection.

(9/12/13)

We believe all the jurisdictions should commit to all of the goals and outcomes that apply to their region. To help balance the inherent lack of accountability in the current structure, we believe the Agreement should include: Interim Progress Reports, Independent Evaluation throughout the life of the Agreement (refer to full letter for details)

New York

“...each signatory may exercise its **voluntary** discretion to participate in the development and implementation of individual outcomes’ management strategies depending upon relevance, resources, priorities, or other factors.”

CBC

What influence will a signatory that has not initially made a commitment have in the development and implementation of that strategy? How will watershed-wide progress be tracked if only a few signatories participate?

EPA

Add to Preamble: [“The signatories to this voluntary Agreement commit to achieving the goal of restoring and protecting the Chesapeake Bay ecosystem and its living resources consistent with Section 117 of the Clean Water Act.”](#)

Add to Goals and Outcomes section: “Management strategies will identify participating jurisdictions.”

Delete from Goals and Outcomes section: “Except for those outcomes required by law and related to the implementation of the Chesapeake Bay Total Maximum Daily Load (TMDL) under the water quality goal, each signatory may exercise its discretion to participate in the development and implementation of individual outcomes’ management strategies depending upon relevance, resources, priorities, or other factors. Partnerships with other agencies, organizations, and stakeholders will be identified as appropriate. Signatories may decide to adjust their level of participation in the implementation of strategies as circumstances warrant.”

Add to Affirmation and Signatures section: [“As Chesapeake Bay Program partners, we acknowledge that this agreement is voluntary and subject to the availability of appropriated funds. This agreement is not a contract or an assistance agreement. We also understand that this agreement does not pre-empt, supersede or override any other law or regulation applicable to each signatory.”](#)

Maryland

Summary of Stakeholder Concerns: Partners (CBC, CAC), stakeholders (numerous) and citizens have expressed concern over the "discretion to participate" or opt-in/opt out language, citing lack of accountability, responsibility and transparency. One stakeholder (Upper Susquehanna Coalition) expressed concern that NY would be agreeing to potential management strategies that had not yet been developed, creating ambiguity of expectations and responsibilities. Stakeholders offered the following solutions:

1. Each signatory commits to all goals and outcomes applicable to the signatory (Alliance);
2. Each signatory indicates, prior to signing the Agreement, whether it intends to implement management strategies related to the outcome (Clean Water Coalition); and
3. Signatories should draft management strategies prior to signing the Agreement and indicate in the strategies which jurisdiction will participate in the implementation (Clean Water Coalition).
4. Agreement should include broad language to allow flexibility in the definition of implementation (CBF)

Maryland Observations: Participation in management strategies, which will be for two-year periods, should be inclusively defined and will vary. Signatories should, in an addendum to the Agreement, identify the strategies in which they will participate for the first two years. Actual management strategies will be developed in consultation with stakeholders, including local governments and nonprofit organizations. A requirement for public comment, review and reporting to the Executive Council will provide transparency sought by stakeholders and address concerns regarding premature commitment to management strategies.

Delete from Goals and Outcomes section: “Except for those outcomes required by law and related to the implementation of the Chesapeake Bay Total Maximum Daily Load (TMDL) under the water quality goal, each signatory may exercise its discretion to participate in the development and

implementation of individual outcomes' management strategies depending upon relevance, resources, priorities, or other factors. Partnerships with other agencies, organizations, and stakeholders will be identified as appropriate. Signatories may decide to adjust their level of participation in the implementation of strategies as circumstances warrant."

Add the following as the last sentence in the first paragraph of the Goals and Outcomes section:

Signatories will participate in achieving the outcomes of this Agreement in the manner described in the "management strategies development and implementation" section below.

Add the following as a new second paragraph in the Management Strategies Development and Implementation section:

Participation in management strategies or participating in the achievement of outcomes will vary by signatory, and may include sharing knowledge, data or information; educating citizens or members; working on future legislation; and developing or implementing programs or practices. Management strategies, which are aimed at implementing outcomes, will identify participating jurisdictions and other stakeholders, including local governments and nonprofit organizations, and will encompass two-year periods. Signatories have identified the management strategies and outcome implementation efforts they will participate in for the first two-years of this Agreement in Addendum A, which shall be updated every two years. Specific management strategies will be developed in consultation with stakeholders, organizations and other agencies, and will include a period for public comment and review prior to final adoption. The Principal Staff Committee will report on adoption of management strategies at the next Executive Council meeting and report on implementation of management strategies every two years.

Stakeholder Comments

CBF

Do not allow for jurisdictions to "opt in or out" of the various goals and outcomes in the new Bay Agreement. The Agreement should specify roles and responsibilities of state and federal partners.

SOLS/LSR

"Discretion to participate" is not a commitment. This lack of commitment causes a conflict with potential funding of jurisdictions. ... If a particular goal and its outcomes do not pertain to a jurisdiction, this can be stated in the specific Goal and Outcomes section. Other than providing for relief under these conditions, there should be no "discretion to participate". These "discretions to participate" should be clearly stated before the signing of the Agreement. If the current mechanism remains, this is not an agreement, and the appropriateness of any federal funding could be in question.

Potomac Conservancy

States should be held to consistent standards if they sign on to commit to management strategies on a given outcome. However, the Chesapeake Bay Commission should be able to sign on to an outcome without jargon-based obstacles due to the management strategy's jurisdictional focus. The Commission could commit to alternative means of implementation like future legislative action to promote management strategies. This flexibility, however, must be defined in a sense that it cannot scapegoat signatories out of their implementation responsibilities under management strategies.

The Nature Conservancy

The provision allowing signatories to "exercise discretion to participate in the development and implementation of individual outcomes' management strategies depending upon relevance, resources, priorities and other factors" and "adjust their level of participation in the implementation of strategies as circumstances warrant" weakens the document considerably in comparison to past Agreements. One of the key features that has made the Chesapeake Bay Program a model for the

nation is the existence of Agreements that constituted mutual commitments among the signatories. This Agreement should continue CBP's leadership for the nation's largest estuary and its watershed.

Alliance for the Chesapeake Bay

We suggest that no signatory should have the ability to completely "opt out" of participation. Rather than opting out, commitment to the outcomes should mean that the signatory will also participate in the development and implementation of all management strategies. Participation should simply be clearly defined by signatories. Participation may vary by state and by time and available resources. Essentially, each signatory should identify clearly what they will contribute and should revisit those commitments on a regular basis. We suggest that participation in strategies be defined in this way.

SWQAC

There is a general concern among our members that the statement, "Signatories may decide to adjust their level of participation in the implementation of strategies as circumstances warrant" will be perceived to weaken and undermine the Agreement. ... a joint and sustained effort by all the Agreement parties will be required to achieve the stated 2025 goals. We suggest that you revise or delete this sentence

Upper Susquehanna Coalition

Our comments are not directly related to the language of the agreement, but rather our concern about the implications of signing it. NY would be agreeing to potential management strategies that have not yet been developed and may not align with NY's needs. These management strategies would have the potential to affect our agricultural communities, municipalities and economic development ... Without the details of the management strategies, the ambiguity of this document leaves interpretation of its intent up to the reader. Local farmers and municipalities are reluctant to support a document, and the goals and outcomes within it, without a clear understanding of the expectations and responsibilities, or lack thereof that come with it.

Cecil Land Use Association

The lack of accountability of the individual signatories, each of which can exercise its discretion whether to develop and implement the management strategies required to achieve the goals and outcomes. (Page 5, para 3).

Chesapeake Conservancy

This opt in-/out strategy directly undermines the purpose of the agreement ... Participation by the states should be mandatory, as it has been in past Chesapeake Bay watershed agreements.

Conservation Pa, Choose Clean Water Coalition, Va League of Conservation Voters, Potomac Conservancy, Va Conservation Network, Potomac Riverkeeper, PennFuture, Allegheny Highlands Alliance, Rock Creek Conservancy, Md Conservation Council, James River Association, National Parks Conservation Association, Friends of the Rappahannock, NRDC, NWF, SELC, Sierra Club Pa Ch., VASWCD, 70+ Individuals:

This "opt in, opt out" design robs the Agreement of any accountability and relieves signatories of the responsibility of actually committing to do any of the work, let alone their fair share. ... This creates the potential for "orphaned" goals or outcomes—those for which no jurisdiction elects to implement the management strategy. ... As the draft Agreement stands, upon signing the Agreement, none of the signatories approve and commit to implement all or substantially all of the Agreement. ... 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. With either solution, it requires jurisdictions commit to one another and the public as to how they intend to contribute to the collective efforts to advance restoration and protection ...

Public Individuals:

- Re-word current “opt in or out” for signatories to gain accountability and clearer commitment to the goals and outcomes stated
- On page 5 Goals & Outcomes, the entire third paragraph needs to be deleted. There can be no language that allows optional participation. The cost and burden of cleaning up the Bay and then maintaining a clean Bay must be shared among all that call the watershed home. In 2004, it was estimated that the Bay provides annual economic benefits ranging from \$33 to \$60 billion. It is irresponsible to expect some states and their residents to do the work necessary to make these benefits possible, all members should fully participate. If nothing else, work to limit and control the externalities that come from the business and development in our home states.
- My greatest concern about this draft agreement is the lack of accountability through an opt-out provision. ... The Bay and its citizens need real action and accountability. This cannot be achieved by simply agreeing to broad goals or outcomes, while leaving loopholes for the real action—management strategies. These management strategies should be created in collaboration with states to minimize resistance to implementation. Management strategies must also be accessible, transparent, emphasize resilience, and consider future generations to limit inaction in the name of shortsighted cost-benefit analysis or election year politics.
- By allowing various players of the agreement to decide what they chose to opt in and opt out of is catastrophic. This creates an inconsistency of the implantation, and when assessments are conducted the results will be skewed. The revision of page 5 is needed, to establish requirements while still allowing autonomy that will work with various conditions inflicted upon states.
- One phrase in the preamble particularly resonated with me: “measurable results coupled with firm accountability yield the most significant results.” Unfortunately the Goals and Outcomes do not honor that declared fact. Page 5, para 3 enables a lack of accountability of the individual signatories, each of which can exercise its discretion whether to develop and implement the management strategies required to achieve the goals and outcomes. Please find some way to rectify this “opt out” clause.
- It is a pity that after all the efforts done through the years, this time each State has the option to decide when to participate. Frequently, environmental issues are not a priority to invest limited resources. I recommend analyzing deeply the consequences of this new sentence in the agreement.

Background

- Headwaters states of NY and WV strongly support the language in the draft Agreement regarding signatory’s sole discretion to decide whether or not to participate in a management strategy.
- Numerous partner and stakeholder comments were received calling for removal of the “opt-i/Opt-out” participatory language in the draft Agreement.
- Many stakeholder comments referred to CWA S 117 (e)(1) which requires signatories to participate in “all or substantially all aspects of the Chesapeake Bay Agreement in order to receive S 117 implementation and monitoring grant funding from EPA non-competitively.

