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Via e-mail to agreement@chesapeakebay.net

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

Re: Chesapeake Bay Watershed Agreement – Draft January 29, 2014

Dear Mr. DiPasquale and Management Board Members:

This letter sets forth my comments on the draft Chesapeake Bay Watershed Agreement dated January 29, 2014. By way of introduction, I have been practicing environmental law for nearly 40 years. For 30 of these I was a partner in a Washington, D.C., law firm, where I started that firm's environmental practice. In addition, I am a former Associate General Counsel for Water at EPA, a former officer of the Environmental Law Institute, a life member of the American Law Institute, and a Regent in the American College of Environmental Lawyers. I am currently Vice Chair of the Chesapeake Legal Alliance, Inc. However, these comments are submitted on my own behalf, and not on behalf of any of those or any other organizations.

In developing these comments I have worked closely with members of the Choose Clean Water Coalition, and understand that several organizational members of CCWC will be submitting comments similar to mine, which reflect broad agreement on the substantive recommendations.

The Chesapeake Bay Agreement stands as the framework around which the Bay states and the District of Columbia, EPA, the Chesapeake Bay Commission, local communities and the private sector, working together, have built a coordinated effort to restore the Chesapeake Bay and its watershed, including local waterways. In order to protect human health throughout the region and achieve improved water quality and habitats, and address issues which have arisen since the signing of the last Bay Agreement in 2000, 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, the January 29, 2014, draft Agreement falls short of that vision. While the draft Agreement recognizes that "measurable results coupled with ***firm accountability*** yield the most

significant results,”¹ this agreement fails to provide the accountability mechanisms necessary for success (see technical comment in footnote 1). The draft is also deficient in its failure to address key issues critical to a healthy bay, including identifying and reducing toxic contaminants, reducing runoff pollution, eliminating pollution from hydraulic fracturing, and incorporating climate change projections during infrastructure planning.

Because of these deficiencies, I cannot support the draft Agreement in its current form. The following comments are designed to address these shortcomings.

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

Despite the shortcomings in the draft Agreement identified above, there are some positive features that should be preserved in the Final Agreement. Specifically, continued inclusion of the existing water quality goal and outcomes is critical. 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.² These aspects of the draft Agreement should be preserved in the final Agreement.

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.”³ But while the Goals and Outcomes represent the signatories’ collective commitments, the draft Agreement allows each individual signatory to exercise its discretion as to whether or not 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.

We are all in this together. States should not be allowed to abandon the common efforts to achieve the Goals and Outcomes which the Agreement sets forth. Among other things, this would put an unfair burden on those who remain committed.

Adopting an Agreement that allows signatories to choose to implement only some, or 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. In particular, 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

¹ Draft Agreement at 2. In the quoted sentence, the words “measurable results” should be changed to read “measurable actions”

² Draft Agreement at 5.

³ Draft Agreement at 5.

the Agreement, but only “if a signatory has approved and committed to implement **all or substantially all** aspects of the Chesapeake Bay Agreement.”⁴ As the draft Agreement stands, upon signing the Agreement, none of the signatories would unequivocally approve and commit to implement all or substantially all elements 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. Revise the language at page 5 to provide states with flexibility, not to decline to adopt any management strategy with respect to a particular goal or outcome, but to tailor a management strategy to the particular circumstances which exist in that state.

Either solution requires a jurisdiction to make a commitment to the other jurisdictions 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.”⁵ Without this transparency, the public will have little confidence that the Agreement does anything more than provide a meaningless photo opportunity.

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 2006.⁶ These waters have long lists of fish consumption advisories due to PCB and mercury contamination.⁷ In addition, there have been widespread fish kills in freshwater areas throughout the watershed, including in the South

⁴ 33 U.S. Code § 1267(e)(1) (emphasis added).

⁵ Draft Agreement at 4.

⁶ See Maryland’s 2012 Final Integrated 303(d) Report, *available at* 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>

⁷ 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; Delaware fish advisories *available at* http://www.dnrec.delaware.gov/fw/Fisheries/Documents/Delaware_Fish_Advisory_Chart.pdf

Branch of the Potomac (West Virginia),⁸ North and South Forks of the Shenandoah (Virginia)⁹ and the Susquehanna (Pennsylvania) rivers.¹⁰

A September draft of the Agreement included two provisions to address these toxic issues and they were removed. 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 of toxic contaminants launched in 1976, the Chesapeake Bay Program's Executive Council has committed to key 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.

D. The Final Agreement Should Ensure Baseline Information is Updated and That Restoration Goals Reflect Net Increases.

The draft Agreement contains several outcomes that aim to improve from baseline conditions. While the Stream Health Outcome specifies that the baseline will be re-assessed, and the Fish Passage Outcome indicates the 2011 baseline year will be used, other goals are silent on baselines to be used to calculate success. For example, the Forest Buffer Outcome does not include a baseline riparian buffer inventory. Without an updated baseline, the outcome to achieve 70% of all riparian areas being forested is meaningless. Similarly, the Brook Trout Outcome not only fails to indicate a baseline of how much habitat is already occupied, but it fails to specify that the 8% increase must be a net increase from the total occupied habitat in the entire watershed.

For each of the outcomes listed under the "Vital Habitats" goal, the Agreement should indicate the baseline year or amount being used to calculate improvements and should specify that all improvements must be a net increase from the baseline.

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

⁹ 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/>.

¹⁰ See Pennsylvania Fish and Boat Commission press release, available at http://www.fish.state.pa.us/newsreleases/2009/susqu_fish_kills.pdf

E. The Final Agreement Should Address Polluted Runoff.

Polluted runoff is the largest source of increasing nutrient and sediment pollution, and the one that impacts the most people. It is not specifically mentioned in this draft Agreement. Many local governments have developed innovative strategies for runoff pollution, adopting stormwater utilities and other mechanisms to deal with the problem. The draft Agreement fails to mention polluted runoff, let alone set outcomes for reducing it. An outcome related to reducing polluted runoff would fit either within the “Water Quality” or “Land Conservation” goals.

F. The Final Agreement Should Address Hydraulic Fracturing.

The Chesapeake Bay watershed is home to rapid natural gas development through the use of hydraulic fracturing. While currently this gas development is only occurring in Pennsylvania and West Virginia, there is the potential for development to occur in Virginia, Maryland, and New York as well. There is widespread concern about increased erosion and stormwater runoff of nutrients and sediment from drilling operations, including pipelines, roads, and drill pads; and increased water withdrawals from local streams. Not addressing this growing source of nutrient and sediment pollution in the watershed is a glaring omission. A hydraulic fracturing outcome might read as follows:

Hydraulic Fracturing Assessment Outcome: By 2017, assess the cumulative impact of hydraulic fracturing and related activity, including pipelines, roads and drill pads related to any increase in erosion and stormwater runoff of nutrients and sediment from drilling operations. Based on the assessment, develop guidance to ensure relevant states scientifically address options to reduce loadings and comply with obligations under the Chesapeake Bay TMDL.

G. The Final Agreement Should Address Climate Change.

The draft Agreement fails to acknowledge or address climate change or its impacts. Adapting to climate change should be included throughout the Vital Habits section, where outcomes such as tidal wetlands (sea level rise) and brook trout habitat (warming waters) are threatened by the impacts of climate change. The Land Conservation section should direct land use planning to adapt to climate change impacts related to sea level rise.

In the Preamble of the agreement, fourth paragraph, instead of “anticipates changing conditions, including long-term trends in sea level rise...” it should say “both addresses on-going climate impacts and anticipates changing conditions, including long-term trends in sea level, temperature, precipitation, and other aspects of environmental variability caused by climate change.”

Further, the final Agreement should include explicit and concrete goals relating to protecting the physical and biological integrity of our water bodies in the watershed from on-going and projected changes in environmental conditions. A climate adaptation goal might read as follows:

Climate Adaptation

Goal: Expand the implementation of climate adaptation practices that center on ecological transitions to ensure that rivers and stream and the Chesapeake Bay continue to maintain biological functioning as environmental conditions change.

H. The Final Agreement Should Include the Environmental Literacy Goal and Outcomes Included in the Draft Agreement.

I applaud the Bay Program partners' inclusion of the Environmental Literacy Goal and Outcomes in the draft Agreement. The future well-being of the Chesapeake Bay watershed will indeed "soon rest in the hands of its youngest citizens."¹¹ Focusing on increasing the number of students participating in teachers-supported meaningful watershed educational experiences throughout their school years will strengthen environmental literacy and foster environmental stewardship in the next generation. This is our best hope of continuing the progress we are making to clean up the watershed.

I. The "Healthy Watersheds" Goal Should be Expanded to Address Those Not Currently in Good Health.

The "Healthy Watersheds" Goal (page 8) should be expanded to include identification and restoration of waters and watersheds which are not currently in good health. An obvious example is the Anacostia River watershed. The overall "healthy watersheds" goal cannot be achieved simply by protecting healthy watersheds. The unhealthy ones must be restored as well. There appears to be widespread local support in many communities for such restoration, so this expansion should not be burdensome.

J. The Final Agreement Should Reflect that Park Agencies Need Partners to Meet The Goal to Expand Public Access.

The draft Agreement recognizes that the importance of increasing physical access to the Chesapeake Bay and its tributaries is an important means of connecting people to our local waters, and fostering stewardship. However, expanding public access should not be limited to those efforts advanced by local, state, and federal park agencies; rather, the draft Agreement should recognize and encourage partnerships that include the private sector and other institutions, as well as other governmental agencies. For example, avenues to increase public access, such as new public boat launches, should be explored as well and explicitly mentioned in the Public Access goal.

I appreciate the opportunity to submit these comments. I hope you find them helpful, and would be glad to discuss any aspect of them with you.

Respectfully submitted,

/s/ Ridgway M. Hall, Jr.

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¹¹ Draft Agreement at 10.