March 17, 2014

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:

Citizen's for Pennsylvania's Future (PennFuture) is a statewide organization that works to create a just future where nature, communities and the economy thrive by advocating for strong environmental and public health policies. We respectfully submit the following comments on the draft Chesapeake Bay Agreement.

In order to protect human health throughout the region and improve water quality and aquatic habitats, 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 to lead us to the clean and healthy waters that we have all envisioned.

Unfortunately, the current version of the Agreement falls short of that vision by failing 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.

PennFuture cannot support the draft Agreement in its current form. We offer the following comments that, if addressed, would address our concerns and create an Agreement we can support.

A. 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 Agreement defines as "commitments… the signatories collectively will work on to advance restoration and protection of the Chesapeake Bay ecosystem and its watershed."[1] But while the Goals and Outcomes represent the signatories' collective commitments, each individual signatory may exercise its discretion whether to participate in the development and implementation of management strategies to achieve the goals and outcomes. 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. 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 recognize that the Agreement has been and always will be a voluntary agreement, but crafting an 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

[1] Draft Agreement at 5.

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."[2] 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.

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.

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 of the Chesapeake Bay ecosystem and its watershed. Further, by requiring jurisdictions to indicate those outcomes they intend 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."[3] Without this transparency, the public has little confidence that the Agreement does anything more than provide a photo opportunity for politicians.

B. 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.[4] These waters have numerous fish consumption advisories due to PCB and mercury contamination.[5] In addition, there have been widespread fish kills in freshwater areas throughout the watershed, including the South Branch of the Potomac

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[2] 33 U.S. Code § 1267(e)(1) (emphasis added).

[3] Draft Agreement at 4.

[4] *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

[5] *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

(West Virginia),[6] North and South Forks of the Shenandoah (Virginia)[7] and the Susquehanna (Pennsylvania) rivers.[8]

A September draft of the Agreement included two provisions to address these toxic issues, but 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 healthy aquatic habitat for wildlife. Further, the Bay Program has a long history of commitment to reducing toxic contaminants. 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 have adopted aggressive toxic contaminants reduction strategies in 1994 and 2000. We urge you to continue this commitment to addressing toxic contamination.

C. 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 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. Additionally, the Forest Buffer Outcome does not include a baseline riparian buffer inventory nor does it specify a minimum width for restored or conserved forest buffers. We suggest forested buffers be at least 150 feet wide. Forested buffers are cost- effective and have been shown to prevent 43% of sediments and 27% of nutrients from entering streams.[9]

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[6] *See* West Virginia DEP website, "Potomac Fishkills" *available at* http://www.dep.wv.gov/WWE/watershed/ wqmonitoring/Pages/PotomacShenandoahFishKills.aspx.

[7] *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/.

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

[9] *See* Stroud Water Research Center's website, How many trees does it take to protect a stream?, *available at* http://www.stroudcenter.org/newsletters/2014/issue1/how-many-trees.shtm

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.

D. The Final Agreement Should Address Polluted Runoff.

Polluted runoff is the largest source of increasing nutrient and sediment pollution and it is not specifically mentioned in this 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.

E. The Final Agreement Should Address Hydraulic Fracturing.

The Chesapeake Bay watershed is home to rapidly expanding natural gas development through the use of hydraulic fracturing. Currently this gas development is occurring in Pennsylvania and West Virginia, but there is the potential for development to occur in Virginia, Maryland, and New York. We are very concerned about increased erosion and stormwater runoff of nutrients and sediment from drilling operations, including the construction of 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 <u>cumulative</u> impact of hydraulic fracturing and related activities, including the construction and continued presence of 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.

F. 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, we urge that 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 streams and the Chesapeake Bay continue to maintain biological functioning as environmental conditions change.

We are happy to discuss our concerns and willing to help your partnership develop a strong and effective new Agreement in any way that we can.

Respectfully submitted,

Cindy Dunn, President and CEO
PennFuture