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March 17, 2014

Mr. Joseph Gill
Chairman, Principals' Staff Committee
Secretary, Maryland Department of Natural Resources
Sent via email to: agreement@chesapeakebay.net

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Dear Chairman Gill:

On behalf of the Chesapeake Bay Foundation (CBF), our Board of Trustees, and more than 200,000 members and supporters, we offer the following comments and observations on the January 29th, 2014 draft of the new Chesapeake Bay Agreement.

There are programmatic and legal reasons for a new Chesapeake Bay Agreement. A broad suite of restoration goals and outcomes will provide direction and focus to the many agencies and stakeholders that have felt somewhat disenfranchised in recent years due to the emphasis on the development and implementation of the Clean Water Blueprint (i.e., the Chesapeake Bay Total Maximum Daily Load and the associated Watershed Implementation Plans). Furthermore, restoration of the Chesapeake Bay ecosystem requires the achievement of a broader set of goals and outcomes, as outlined in the draft Agreement.

There is also a compelling legal argument for a new agreement. As highlighted below, funding for implementation and monitoring grants under Section 117 of the Clean Water Act (CWA) is predicated on the existence of an Agreement that is guiding restoration activities.

Section 117 of the CWA establishes the Chesapeake Bay Program and delineates how funding is to be distributed through the Program. There are numerous places that specifically reference the Chesapeake Bay Agreement and funding. In particular when referencing implementation and monitoring grants, the CWA states:

If a signatory jurisdiction *has approved and committed to implement all or substantially all aspects of the Chesapeake Bay Agreement*, on the request of the chief executive of the jurisdiction, the Administrator –

(A) Shall make a grant to the jurisdiction for the purpose of *implementing the management mechanisms established under the Chesapeake Bay Agreement*, subject to such terms and conditions as the Administrator considers appropriate; and

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(B) May make a grant to a signatory jurisdiction for the purpose of monitoring the Chesapeake Bay ecosystem.¹

The Chesapeake Bay Agreement is defined in Section 117 as “the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council.”² The use of the word agreements recognizes that there have been other Agreements and that there are likely to be new agreements beyond the date of the latest amendments to Section 117. The term “signatory jurisdiction” means a jurisdiction that has signed a Chesapeake Bay Agreement.³ Reading these definitions together with the text regarding implementation and monitoring grants, it is clear that funding for this section relies on the existence of an operational Chesapeake Bay Agreement.

The last Chesapeake Bay Agreement was signed in 2000, and the last due date referenced in that agreement has passed.⁴ Once a new Chesapeake Bay Agreement is formalized, the reference to the “Chesapeake Bay Agreement” will include this new agreement. Therefore, signatories to this Agreement will be able to receive funding for implementation and monitoring grants under Section 117. These grants, particularly the implementation grants, are critical to achieving water quality and ecosystem restoration goals.

Recommendations for Transparency and Accountability: Each signatory and federal agency should indicate, in the Agreement, the outcomes with which they will be involved. The decision to change outcomes should be endorsed by the Executive Council.

As we have said before, our first priority for a new Bay Agreement is ensuring accountability and transparency. As such, we are still troubled by the language relating to the “opt in/opt out” for the goals/outcomes and the decision to allow the Principals’ Staff Committee (PSC) to change the outcomes.

Language in the 3rd paragraph on page 5 completely undermines the spirit and commitment of the new Agreement i.e., “Except for those outcomes required by law and related to the Chesapeake Bay Total Maximum Daily Load...each signatory may exercise its discretion to participate in the development and implementation of individual outcomes’ management strategies...” Viewed skeptically, it basically says the signatories are not definitively committing to any new goals and outcomes. We suggest striking this paragraph and instead allowing each signatory and federal agency to indicate, in the Agreement, the outcomes with which they will be involved. For example, after the text for each outcome, include a list

¹ Emphasis added, 33 USC §1267(e)(1).

² Emphasis added, 33 USC §1267(a)(2).

³ 33 USC §1267(a)(6).

⁴ There is one reference to 2012 as follows: “By 2012, reduce the rate of harmful sprawl development of forest and agricultural land in the Chesapeake Bay watershed by 30 percent measured as an average over five years from the baseline of 1992-1997, with measures and progress reported regularly to the Chesapeake Executive Council.” Chesapeake 2000, p. 9.

of signatories and federal agencies that intend to work on the management strategy for that outcome. This approach will give flexibility to jurisdictions, but also provide transparency and accountability to interested stakeholders like CBF.

Commitment to an outcome will mean that the signatory will participate in the development and implementation of the relevant management strategy. We suggest, however, that the Agreement include broad language to allow flexibility in the definition of “implementation.” For example, for the Chesapeake Bay Commission it may mean educating their members on the topic or committing to work on future legislation, if appropriate. We believe this approach considers the concerns the Bay jurisdictions have about limited resources and how to obligate them, but also provides the accountability that CBF and other stakeholders desire in the new Agreement.

As stated at the recent PSC meeting, we remain concerned about the decision to allow the PSC to change the outcomes. Under the current operating structure, discussions and decisions by the PSC are not publicized and so the only way for the “interested public” to find out the status of a particular issue, is by checking the PSC web page. The problem with this approach is that beyond a select few within the environmental community, groups or individuals that might be interested in a particular outcome do not even know what the PSC is, let alone where to find information about their meetings.

The goals and outcomes of other Bay Agreements have not been subject to change by the PSC, without Executive Council endorsement, raising the question of what is “broken” that is trying to be “fixed” with this change in process. The signatories are committing to the outcomes in the new Agreement, therefore the decision to change these outcomes should be made at the same level. Lastly, while we support the concept of “adaptive management,” we note that along with the flexibility to change course, comes the responsibility to specify and clearly document the reasons for the change, so that the decision-making process is transparent and understandable.

Recommendation for Toxic Chemicals: The Agreement should include outcomes committing to reduce loads of polychlorinated biphenyls (PCBs) and to study the effects of “new and emerging” chemicals.

The Partnership has a history of working on issues related to toxic chemicals and they have been a component of every Bay Agreement since 1983. We have not solved our historic problems with fish consumption advisories or in the Regions of Concern, while at the same time scientists are discovering new issues related to fish health and “new and emerging chemicals.”

CBF supports a strong commitment to reducing PCBs, the leading cause of fish consumption advisories in the tidal portions of the watershed. Skeptics might say that there is nothing to be done, that PCBs are not controllable. But in fact, in the Delaware Estuary, scientists are reporting decreases in loadings of PCBs due to the implementation of a TMDL that includes better monitoring and the implementation of

pollutant minimization plans.⁵ We suggest that one component of a management strategy for an outcome focused on reducing PCBs be to apply some of the lessons learned from the Delaware Estuary to the Chesapeake Bay. Since Pennsylvania and Delaware are partners in both efforts, they would be well-positioned to facilitate this interaction.

There are TMDLs for PCBs already on the books in the Chesapeake Bay watershed, including for the tidal Potomac and Anacostia Rivers,⁶ Baltimore Harbor,⁷ and the Susquehanna River.⁸ In addition, the estimates of loadings for these TMDLs indicate that the Potomac River and Baltimore Harbor are exporting PCBs to the mainstem of the Chesapeake Bay. Hence, implementing these TMDLs will not only help reduce fish consumption advisories within those waterways, but the Chesapeake Bay proper.

The federal government, particularly the Department of Defense, could also contribute to a management strategy focused on reducing PCBs. For example, the Environmental Protection Agency has compiled a list of facilities that have transformers containing PCBs.⁹ Within the Chesapeake Bay watershed, many of those transformers are on federal facilities. We encourage the federal government to lead by example and commit to eliminate these transformers and other PCB sources on their properties, including hazardous waste sites.

CBF also supports a commitment to increase our understanding about the potential impacts of new and emerging chemicals and would support, at a minimum, the previously proposed language. As noted in the recent report on toxic contaminants in the Chesapeake Bay,¹⁰ for chemicals like pharmaceuticals, household and personal-care products, polybrominated diphenyl ether (PBDE) flame retardants, and some new use pesticides, available information is insufficient to determine extent and severity of contamination. However, the widespread distribution of known sources of these contaminants (e.g., wastewater effluents, agricultural runoff, etc.) and recent peer-reviewed research documenting sublethal effects for some compounds at environmentally relevant concentrations, raises concerns about the potential for adverse ecological effects in the Chesapeake Bay watershed and the need for the Partnership to include this as an outcome.

Recommendations for Climate Change: The Agreement should contain language explicitly recognizing the effects of climate change on restoration efforts. An additional wetlands outcome under the Vital Habitats goal should be focused on evaluating opportunities for tidal wetland migration in the face of sea level rise.

⁵ http://www.state.nj.us/drbc/library/documents/PMPWorkshop-Oct2012/cavallo_pres102212.pdf and <http://www.state.nj.us/drbc/programs/quality/pmp.html>

⁶ http://green.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/TidalPotomac_PCB_TMDL_Final01.pdf

⁷ http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/BaltHarbor_PCBs_tmdl_092811_Final.pdf

⁸ http://www.epa.gov/waters/tmdl/docs/29485_SusqReport.pdf

⁹ <http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/data.htm>

¹⁰ US Environmental Protection Agency, US Geological Survey, US Fish and Wildlife Service, 2012 Toxic Contaminants in the Chesapeake Bay and its Watershed: Extent and Severity of Occurrence and Potential Biological Effects, USEPA Chesapeake Bay Program Office, Annapolis, MD, December, 2012, 175 pages.

The Partnership has always relied on the best science to guide its environmental decisions, hence, the omission of climate change, the world's greatest environmental challenge, and its impact on Bay restoration efforts is puzzling. Furthermore, as we stated in our December letter to the Executive Council it is also incredibly short-sighted. We appreciate the renewed dialogue on inclusion of climate change in the Agreement and vigorously maintain our call for Bay partners to include language that specifically acknowledges this global challenge and ensures management strategies include adaptation measures, where appropriate. Specifically, we suggest that the fourth paragraph on page 2 replace "changing environmental conditions" with "global climate change." In addition, we suggest adding the following language in the first paragraph on p. 11 under management strategies: "Where appropriate, management strategies should describe... consider the effects of climate change on the achievement of the outcome and identify adaptation strategies to account for these potential impacts."

In addition, it is widely recognized that certain areas of the Chesapeake Bay watershed are among the most vulnerable in the country to sea level rise (e.g., Dorchester County, Maryland and Hampton Roads area, Virginia). We recommend that an additional wetlands outcome under the Vital Habitats goal be focused on tidal wetlands; in particular, a commitment to evaluate opportunities to allow wetland migration in the areas that are most vulnerable to coastal flooding.

Recommendation for Sustainable Fisheries: CBF supports the existing outcomes in the draft Agreement and encourages the partners to ensure these outcomes are maintained in the final Agreement.

The first blue crab outcome commits to maintaining the science-based benchmarks for managing the fishery, which were first established through bi-state collaboration in 2008 and continue to be refined as the underlying science improves. These benchmarks, or "reference points," are basic to modern, science-based fisheries management. In effect, they are guardrails for avoiding overfishing and an overfished population.

The second blue crab outcome calls for improving catch data and evaluating the use of quotas for managing the catch. Catch data is the currency of fisheries management, and its quality determines the quality of the science. Recent efforts by the states have improved commercial catch data and revealed that more work is necessary for both commercial and recreational data. Catch quotas are not a "one size fits all" management tool, but in appropriate formats, quotas can dramatically improve the quality and stability of a fishery. For blue crabs, quotas are a potentially powerful tool for moderating total crabbing effort and addressing the insidious problem of growth overfishing. For crabbers, they provide more flexibility and predictability and, potentially, more profitability.

The oyster outcome actually reduces the targeted tributaries that would be fully restored to ten from the twenty first proposed under the Executive Order Strategy. Fully restoring a tributary means re-establishing functioning, self-sustaining networks of reefs, which is a huge job and we believe represents an aggressive commitment. Achieving this standard in ten tributaries by 2025 is ambitious,. It will take a concerted effort by state and federal agencies partnering to dedicate and focus appropriate resources to continue and expand the work that has begun in several tributaries. The payoff from

restoring healthy oyster reefs in these tributaries will be the invaluable ecosystem services of water filtration, nitrogen removal and reef habitat for a range of economically valuable species. In addition, these healthy systems will increase the reproductive potential of Chesapeake oysters and help rebuild populations beyond these tributaries.

The forage fish outcome commits the signatories to assessing the forage base available for predatory species in the Bay. Declines in Atlantic menhaden, bay anchovy and Alosid species, and expanded predation demand from exotic species, have combined to create what may be a critical imbalance in the Bay's food web. Already striped bass resident in the Bay are suffering higher mortality due to disease that science has shown may be nutrition-related. While we would prefer a commitment to actually take management action to maintain minimum forage levels for Chesapeake predators, assessing the forage base is a critical first step for moving toward ecosystem-based fisheries management, which is the ultimate objective that so far has alluded managers.

Recommendation for Vital Habitats: Expand the urban tree canopy goal to at least 10,000 acres.

The proposed outcome for expanding urban tree canopy, which can be a very important and useful attenuator for stormwater problems, should be increased. Washington, D.C.'s Municipal Separate Storm Sewer System (MS4) permit, covering about 12,000 acres, commits the District to *annually* plant 4,150 trees. The average crown coverage of that number of trees would be about 755 acres. And yet, across the entire Chesapeake Bay watershed, the proposed outcome for this Agreement is to expand urban tree canopy by 2,400 acres -- over the next 11 years. At a minimum, that number should be 10,000 acres.

Recommendation for Water Quality: CBF supports the existing outcomes in the draft Agreement and encourages the partners to ensure these outcomes are maintained in the final Agreement.

CBF strongly supports the Bay partners' reaffirming their commitment to implement the Chesapeake Bay Total Maximum Daily Load and the associated watershed implementation plans by the 2017 and 2025 deadlines. The goals and outcomes in the new Agreement will complement and enhance these implementation efforts, as well as accelerate restoration of the Chesapeake Bay and its rivers and streams.

Recommendation for Healthy Watersheds: Commit to protecting streams and watersheds in good condition, not just those of exceptional or high value.

The goal of sustaining state-identified healthy waters and watersheds "recognized for their exceptional quality and/or high ecological value" may leave out healthy waters and watersheds that are of "good," but not "exceptional" quality, since the latter is usually a term of art in state regulations reserved for the best of the best (which must not be degraded under the Clean Water Act anyway). Defining healthy waters and watersheds this narrowly would be a significant missed opportunity for watershed states to protect local and tributary waters that are still of good quality from decline into "fair" or even "poor"

status, leading to similar declines downstream. Thus, while the proposed objective is acceptable, the goal should be stated in broader terms.

Recommendations for Land Conservation: Increase the goal for protected acres to 2.5 million from 2010. Commit to reducing the average farm and forestland conversion rate by 40% by 2025.

We recommend setting the goal at an additional 2.5 million acres from 2010. The 2 million acre goal was in the Executive Order Strategy and we should be able to exceed this goal with strong multi-state commitments to land conservation.

Coming up with a metric by which to measure the rate of land use conversion, by 2015, is acceptable, given the “processing” time for internal Bay Program actions. But to state that, by 2017, there will be an evaluation of “policy options and incentives, resources and tools” to assist local governments better manage, and where possible, reduce the consumption of agricultural and forest lands, is to virtually ignore some twenty years of rigorous research and reporting by the EPA, NGOs, and academics around the country on the economic and environmental advantages of smart, sustainable growth patterns, and the best ways to achieve them. It’s long past time to get on with making such change happen. We strongly recommend that there be an outcome related to reducing the average annual farm- and forestland conversion rate by 40 percent by 2025, through state and local policies, incentives, and disincentives.

Recommendations for Environmental Literacy: State and local school systems should take a systemic approach to environmental education to ensure programs and opportunities ultimately reach every student and teacher in the watershed.

CBF firmly believes in the value of the “meaningful watershed experience” in motivating students, enhancing their learning experience, and engendering them with a strong sense of environmental stewardship. CBF’s Education Program has been very active in working to not only achieve, but exceed, the existing goal and we will continue to provide support for future goals and outcomes. However, we are troubled that the proposed new outcomes are *less* measurable than those articulated in the 2000 Agreement. We applaud the inclusion of outcomes for environmental literacy, but believe they need to be specific, measurable, and bold to have true and lasting impact. Further, we believe that state and local school systems should take a systemic approach to environmental education to ensure programs and opportunities ultimately reach every student and teacher in the watershed.

We propose the following Goal and Outcomes:

Goal: All students in the region graduate with the knowledge to use scientific evidence and citizenship skills to act responsibly to protect and restore their local watershed.

Outcome: Provide all students in the region with teacher-supported meaningful watershed education experiences in elementary, middle, and high school.

Outcome: All schools in the region will maintain their buildings, grounds, and operations using best practices to support environmental and human health.

Outcome: All local education agencies will implement system wide approaches for environmental education that include meaningful watershed educational experiences by 2020.

Outcome: By 2015, develop a process for measuring and communicating progress towards the outcomes related to student participation in teacher-supported meaningful watershed educational experiences and related activities.

In closing, we acknowledge and appreciate the efforts by the Chesapeake Bay Program partnership on the draft agreement. We are optimistic that the end result will be an agreement of which we all can be proud. Thank you for your consideration of these comments.

Sincerely,



Kim. Coble
Vice President
Environmental Protection and Restoration

cc: Principals' Staff Committee Members
Will Baker, CBF
Jon Mueller, CBF
Beth McGee, CBF
Alison Prost, CBF
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