March 13, 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:

I submit these comments on the draft Chesapeake Bay Agreement on behalf of the James River Association (JRA). JRA is a 501(c)(3) non-profit corporation and has worked for almost 40 years to protect and restore the James River, its tributaries, and the lands within the James River watershed. The organization pursues its goals through its core programs; Riverkeepers, Advocacy, Watershed Restoration, Education, and Outreach.

The JRA staff uses Virginia water bodies for scientific study, educational programs, and recreational purposes that are vital to our mission. JRA also owns land and holds a lease to other property adjacent to the James River, giving it valuable economic interests in protecting water quality. JRA's members enjoy a wide range of recreational activities associated with Virginia's waterways and many of them have important economic, professional, and aesthetic interests in the health of Virginia water bodies. Thus, we have a strong interest in seeing that the goals and outcomes of the Chesapeake Bay Agreement are met.

In order to protect human health throughout the region and achieve improved water quality and wildlife habitat, clearly, it is time for a new Bay Agreement. However, as currently drafted, this agreement is a step backwards to failed practices of the past where general and unspecific goals were outlined with no accountability or actual commitments specified which are needed to make the agreement actionable and measurable. Responsibility and accountability needs to be clear for each goal and each party in order to restore the health of the Chesapeake Bay and its tributaries.

There is the opportunity in this Bay Agreement to build on the strength of Bay Program by better aligning and coordinating efforts to bring people together, restoring trust and focusing on a collaborative effort. The new Bay Agreement can foster greater effectiveness and coordination among federal agencies and the states by provided the necessary resources and tools to obtain the goals and outcomes needed. However, stronger accountability and transparency must be included as a critical element of the Agreement.

There is also an opportunity to incorporate elements of the Chesapeake Bay Total Maximum Daily Load (TMDL) that have proven effective at propelling action forward toward its goals. With this in mind, it is highly recommended that the Bay Program develop two year milestones for each of the management strategies associated with this Agreement so that progress can be tracked and reported. This practice has been proven to work with the TMDL plans and is a best

practice which can be easily implemented to ensure that the short term accountability for meeting the outcomes and goals of the Bay Agreement.

While this draft Agreement has been a significant 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 our support for the Agreement. With this in mind, the James River Association wants to reiterate and strongly support that:

The Final Agreement Should Preserve the Incorporation of Chesapeake Bay Total Maximum Daily Load Requirements into the Draft 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.[1] These aspects of the draft Agreement should be preserved in the final Agreement.

However, having said that, the James River Association cannot support the draft Agreement in its current form. We offer the following comments that, if addressed, would resolve 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 draft Agreement defines as "commitments… the signatories collectively will work on to advance restoration and protection of the Chesapeake Bay ecosystem and its watershed."[2] 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. This is a failed practice of the past and that mistake should not be made again.

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."[3] As the draft Agreement stands, upon signing the Agreement, none of the signatories approve and commit to implement all or substantially all of the

---

[1] Draft Agreement at 5.
[2] Draft Agreement at 5.
[3] 33 U.S. Code § 1267(e)(1) (emphasis added).

Agreement.

We offer three potential options to addressing this problem:

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.

3. Commit in the Agreement to have the Chesapeake Bay Executive Council affirm their commitment and responsibility for the goals and outcomes in the Agreement after the management strategies are developed.

All of the solutions require a jurisdiction to make a commitment to one another, and to 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."[4] Without this transparency, the public has little confidence that the Agreement will result in the progress and actions that are needed.

B. The Final Agreement must incorporate additions to the "Water Quality" Section including goals and outcomes related to:

(i) Addressing 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.[5] These waters have long lists of fish consumption advisories due to PCB and mercury contamination.[6] In addition, there have

---

[4] Draft Agreement at 4.

[5] *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

[6] *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

been widespread fish kills in freshwater areas including in the James River, South Branch of the Potomac River,[7] North and South Forks of the Shenandoah River[8] and the Susquehanna River.[9] Sadly, America's Founding River, the James River, is the ninth worst waterway in the nation, measured by the amount of developmental toxins discharged into it.[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. Since the original five-year study 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.

In addition, two additional provisions should be provided to address the significant and potentially devastating impacts of the accidental spilling of contaminants into our rivers and Bay. The recent chemical spill in the Elk River in West Virginia affected the drinking water supply to 300,000 citizens. The spilling of 82,000 tons of coal ash on the Dan River in North Carolina resulted in unsafe levels of arsenic in the water. The James River faces similar risks which steps should be taken to ensure that similar catastrophes do not happen on our local waters.

Even though the long-term impacts are still being assessed, we all know that the ecological effects will be significant and more costly to fix than the prevention measures which could have been put in place to eliminate the risk of contaminating our most precious resource and

---

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

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

[8] *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/.

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

[10] See 2104 report by the University of Richmond, A Strategy to Protect Virginians from Toxic Chemicals, http://law.richmond.edu/centers/environmental/PDF/toxins-report-final.pdf

immense ecological value. The following provisions are needed to protect our rivers and bays from this ever happening on the James and other tributaries:

- ***Toxic Contaminants Spill Assessment:*** By 2015, provide assessment of chemical and industrial waste ponds/reservoirs in close proximity to public waters, especially drinking water supplies (zones of critical concern). Ensure close monitoring and inspection of those facilities and related storage areas which could pose a threat to human health and the health of our rivers and Bay.

- ***Toxic Contaminants Spill Prevention Plan:*** By 2016, develop prevention plans for zones of critical concern, areas the federal government designated as high threat from being in close proximity to drinking water supplies and where hazardous or toxic chemicals and wastes are stored. Prevention Plans should include steps to remove these threats from zones of critical concern. [11]

(ii) Addressing Polluted Runoff and Local Water Quality Impairments

Polluted runoff is the largest source of increasing pollution, and the one that impacts the most people. While including provisions for continued follow-through with the Watershed Implementation Plans is critical and addresses polluted runoff related to nitrogen, phosphorus and sediment, it does not address bacterial impairments which have become a widespread and significant issue in our local rivers.

The Bay States should add strategies and goals to address local bacteria pollution as part of a local pollution runoff effort, which in many cases can help to meet other goals of reducing nitrogen and phosphorus pollution. A national report cited 93,431 river miles as impaired due to fecal coliform across the U.S., making it the leading pollutant found in assessments.[12] Another study highlights bacteria as the single greatest cause of impairment in Virginia.[13] According to a 2012 integrated water quality report issued by the Virginia Department of Environmental Quality, of the total impaired waters in the James River watershed, of the total impaired waters in the James, the leading cause is bacteria, prevalent in 74% of the total impaired waterways. [14]

Curtailing bacteria pollution and stormwater runoff at the local level would go a long way toward helping meet TMDL goals as part of the watershed implementation plans. The Bay agreement management strategies should address coordinating these efforts which will speed up restoring the health of our rivers and bay. James River Association, in conjunction with the Center for Watershed Protection (CWP) released a study in 2013 which showed that by focusing more efforts on reducing bacteria impairments, this was a significant contributor to reducing nutrients and sediment loads for meeting Bay TMDL goals.[15]

---

[11] "Zones of critical concern" are identified by Source Water Assessment Reports, per the federal Source Water Assessment and Protection Program (by DHHR).
http://wvmetronews.com/wordpress/wp-content/uploads/2014/01/Govs-storage-bill.pdf

[12] http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2002_09_10_305b_2000report_chp2.pdf

[13] http://bloximages.newyork1.vip.townnews.com/sustainablecitynetwork.com/content/tncms/assets/v3/editorial/a/44/a44f46b2-7925-11e1-9490-0019bb30f31a/4f7391709dc7a.pdf.pdf

[14] http://www.deq.state.va.us/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2012/ir12_Integrated_Report_All_Draft.pdf

[15] Linking Local TMDLs to the Chesapeake Bay TMDL in the James River Basin
http://jrava.org/what-we-do/LinkingLocalTMDLstotheBayTMDL.pdf

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 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 (please refer back to the directive No. 03-01 from the Executive Council on expanded riparian buffer goals which should be incorporated). 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.

D. Environmental Literacy

(i) The Final Agreement Should Include a More Specific Environmental Literacy Goal and Outcome for Students.

We 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."[16] However, the current draft commitment is a step backwards. In the prior Bay Agreement, the goal was to provide at least 1 MWEE to every Virginia student during their K-12 career. The revised commitment does not provide an actual goal, only to say that the number of students participating in this program will be increased, but it does not say by how much. At minimum, the prior "1 MWEE per student" goal should be reinstated. Research indicates that in order for this type of education to truly impact students, ongoing engagement in terms of multiple MWEE's per student would be optimal. A minimum goal of one MWEE per student will help toward strengthening environmental literacy and fostering environmental stewardship in the next generation. This is our best hope of continuing the progress we are making to clean up the watershed.

(ii) The Final Agreement Should Include an Environmental Literacy Goal for adults/all citizens in the form of a Heritage & Recreation program.

We must not forget about educating adults about environmental literacy. To motivate and engage entire communities to capitalize on and appreciate the benefits of local waterways, including the economic benefits of healthy waterways, an adult education focus should be developed. While the push for grade school education is important, unless it is followed-up by continued engagements for adults, the benefits may not result in meaningful long-term progress in terms of understanding the challenges facing our rivers and Bay, and developing life-long stewards of our water resources.

Our Bay and rivers have amazing heritage and recreational opportunities which citizens should be educated on and this would be a central focus of an adult environmental literacy program. By

[16] Draft Agreement, pg.10

doing so, all of our citizens would not be aware of these great benefits, and they would be encouraged to enjoy, appreciate and take action for our rivers and Bay. We propose the following as some ways this agreement can support and encourage this activity.

- Develop education programs to promote the unique heritage and numerous recreation opportunities of the Chesapeake Bay and its tributaries
- Support the development and cultivation of historic landmarks and recreational amenities along our rivers and bay and provide identifying and interpretative signage.
- Support and enhance new connections to the Captain John Smith Chesapeake National Historic Trail, Star Spangled Banner National Historic Trail, and other water trails in the Chesapeake Bay watershed.

With this in mind, we urge the Bay Agreement to include goals and outcomes to develop public environmental literacy with all citizens in the bay, highlighting our great heritage and recreational resources.

E. Public Access.

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

The draft Agreement recognizes 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, 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.

Thank you for the opportunity to provide comments on this important new Chesapeake Bay Agreement. We are happy to discuss our concerns and to assist you in developing a strong and effective new Agreement that will usher in a new chapter of success in the Chesapeake Bay cleanup effort. If you need any additional information or have any questions about our comments, please feel free to contact me at the address and telephone number provided below.

Respectfully submitted,

William H. Street
Chief Executive Officer
James River Association
bstreet@thejamesriver.org
4833 Old Main Street
Richmond, VA 23231
Phone - 804.788.8811 ext. 201