NATURAL RESOURCES DEFENSE COUNCIL

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:

The Natural Resources Defense Council (NRDC), a national non-profit environmental organization dedicated to protecting and restoring water quality throughout the United States and in the Chesapeake Bay, respectfully submits the following comments on the draft Chesapeake Bay Agreement.

In order to protect human health throughout the region and achieve improved water quality and habitats, clearly, 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, this version of the 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. The draft is also plagued by its failure to address key issues critical to a healthy bay, including identifying and reducing toxic contaminants, reducing runoff pollution, eliminating pollution from operations related to hydraulic fracturing, and incorporating climate change projections during infrastructure planning.

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

While the draft Agreement has mostly been a 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. The 2017 and 2025 Watershed Implementation Plan outcomes are properly

[1] Draft Agreement at 2.

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, 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.

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."[4] 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 Agreement at 5.
[3] Draft Agreement at 5.
[4] 33 U.S. Code § 1267(e)(1) (emphasis added).

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.

Either solution requires a jurisdiction to make a commitment to one another 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 has 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 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.

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[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

[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

- ***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 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.

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 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. We are very concerned about increased erosion and stormwater runoff of nutrients and sediment from activities pertaining to the extraction of natural gas, including construction of pipelines, roads, and drill pads; storage and transport of chemicals and toxic waste and the potential for leaks and spills; 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 Habitats 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 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.

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."[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.

I. 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 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.

J. The Final Agreement Should Include More Robust Habitat Goals.

The proposed outcome for expanding urban tree canopy, which can be a very important and useful attenuator for stormwater problems, is extraordinarily paltry. 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 750 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.

K. The Final Agreement Should Include Strengthened Land Use Goals.

Protected Lands Outcome: 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.

Land Use Change: Coming up with a metric by which to measure land use change, by 2015, is probably 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 EPA, nongovernmental organizations, and academics around the country on the economic and environmental advantages of smart, sustainable growth patterns, and the ways to achieve them. Now is the time to make 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.

L. The Healthy Watersheds Goal in the Final Agreement Should Include Waters of "Good" Quality.

[11] Draft Agreement at 10.

Sustaining state-identified healthy waters and watersheds "recognized for their exceptional quality and/or high ecological value" apparently leaves out healthy waters and watersheds that may be 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. This 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.

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

Respectfully submitted,

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