

March 17, 2014

Nicholas DiPasquale, Director  
United States Environmental Protection Agency  
Chesapeake Bay Program  
410 Severn Avenue, Suite 109  
Annapolis, MD 21403

**Re: Final Draft of Chesapeake Bay Watershed Agreement, Dated January 29, 2014**

*VIA EMAIL TRANSMISSION (agreement@chesapeakebay.net)*

Dear Mr. DiPasquale:

Pennsylvania Farm Bureau (PFB) is pleased to offer comments on the final draft of the Chesapeake Bay Watershed Agreement, dated January 29, 2014. PFB is a state general farm organization with a farm and rural membership of more than 58,300 families in the Commonwealth of Pennsylvania. PFB is the state affiliate of the American Farm Bureau – an organization with a membership of more than 6.2 million farm and rural families nationwide.

As stated in our August 15, 2013 comments on the abridged draft version of the above referenced document, agriculture plays a significant role in the economy of Pennsylvania. Pennsylvania is the largest producer of agricultural products among states in the northeastern region of the United States. Pennsylvania's farm families generate nearly \$6.8 billion in annual cash receipts from agricultural production. Much of the income generated by farmers goes back into supporting the Commonwealth's local economies. The very nature of agriculture itself demands that farmers purchase from local agribusinesses high volumes of fuel, seed, fertilizer and other supplies needed to sustain levels of productivity that will keep their farms viable.

At the same time, however, Pennsylvania's farm families face serious current and future challenges in viably managing their farms, in the wake of the continuing economic evolution of agriculture nationally and internationally. Pennsylvania's agriculture continues to be predominantly managed and operated by farm families who operate their farm businesses in sole proprietorship or in partnership with other family members. Relative to other major farm producing states, Pennsylvania's farms are significantly smaller in size and scale, with limited contiguous acreage that can feasibly be used for production of field and forage crops. Pennsylvania's growing seasons are also shorter than in many farm states, particularly those in the southern and western regions of the United States.

Furthermore, the erratic forces of nature and economics themselves threaten the viability of Pennsylvania farms. The laws of supply and demand and perishability of agricultural products largely prevent farmers from influencing the level of price they ultimately receive for their products. Unlike some industries, farmers cannot feasibly halt production of farm field crops or farm livestock and livestock products in response to national or international oversupply. Nature dictates that farm crops and livestock continue to grow and that farmers continue to daily maintain the nutritional needs of crops and livestock, regardless of the current level of commodity price. Farmers can only “control” production on their operations by eliminating a portion of products being produced and bearing the loss from out-of-pocket input costs the farmer has already incurred in the production of those products eliminated.

We strongly believe that any effort among states in the Chesapeake Bay watershed to change the current Chesapeake Bay Watershed Agreement or change the regulatory function or goals to be attained by any individual state under that document must be keenly aware of and responsive to the economic and natural uncertainties that farmers realistically face and cannot realistically control. Any such effort to do so must be tailored to both meaningfully sustain the current existence of farm families in agriculture, and allow for reasonable adaptation and growth of farming operations to the volatile forces of nature and our economy.

With these thoughts in mind, we offer the following comments:

- 1. The draft final Chesapeake Bay Watershed Agreement appears to be intended, in large part, as a vehicle to transfer additional authority over land use and other decisions to the federal government—authority that the Clean Water Act properly and pointedly reserves for state and local governments.**

This document appears to have been drafted as an attempt by the Environmental Protection Agency (EPA) to create and generate *ex post facto* legal authorization for the May 2009 Presidential Executive Order (No. 13508, “Chesapeake Bay Protection and Restoration”). The draft’s inclusion of environmental reduction goals which EPA is already attempting to mandate through its exclusively chosen timeline is in our view an exercise to give rise to legal claim through “agreement” and interpretation of the federal Clean Water Act (CWA) that EPA will now have “legal authority” to mandate and enforce the sector-load allocations and reductions under EPA’s Chesapeake Bay Total Maximum Daily Load (TMDL). In addition, the document could be used by EPA to make the case that it can therefore usurp states’ authority to determine how they will meet all of the goals in the document, including those related to land use and other critical areas that are properly state and local responsibilities.

EPA has previously argued that Section 117(g) of the CWA gives it the authority to enforce the goals in the Bay Agreement. The text of Section 117(g), however, calls only for management plans to be developed by the document signatories and for implementation to begin—not for the plans to be completed. This interpretation does not comport with the legislative intent underlying this particular provision of the CWA. Section 117(g) gives EPA no new authority; the particular context of EPA’s authority under 117(g) is exclusive to the administration of grants. Also problematic is the fact that while the Chesapeake Bay TMDL purports to bind Delaware, New York and West Virginia, none of those states are signatories to the current Bay Agreement.

The draft final document adds the stipulations that the Bay states have practices in place by 2017 that are expected to achieve 60 percent of the reductions that EPA claims are needed to achieve necessary water quality improvements in relation to 2009 levels, as well as that all practices are in place by 2025 needed to meet the Bay TMDL as pertains to dissolved oxygen, water clarity/submerged aquatic vegetation, and chlorophyll a. At the same time, EPA staff have orally indicated that these stipulations will be considered to be enforceable against the signatories under Section 117(g) of the CWA if the document is signed.

In our aforementioned comments on the abridged draft version of the document, we noted the seeming lack of demand among the Bay states for changes to the current Bay Agreement. Indeed, given the amount of resources, both public and private, that have already been expended by Pennsylvania and the other Bay states to meet EPA's increasingly fluid expectations and timelines during the development of the Bay TMDL and the attendant watershed implementation plans, as well as the fact that execution of those plans is now underway and any disruption means further expenditure of ever-scarcer time, money and man-hours in response, this lack of demand for additional revisions to the existing Bay agreement is understandable. That lack becomes increasingly understandable given that the draft document now under consideration clearly seems to be a tool to stealthily transfer leverage from the Bay states to EPA in making decisions about land use, management of nutrient and sediment pollution, and other critical public policy choices—decisions that the CWA leaves with them.

**2. While the draft document gives substantial attention to the goals of promoting maritime commerce, preserving wildlife habitats and expanding recreational opportunities in the Bay watershed, we continue to be concerned about its lack of insight into its intended future effects on agriculture.**

The final draft version of the document mentions farms in only two places—once in the preamble (in the context of addressing the loss of both farm and forest land), and again under the “Land Conservation” goal section (in the context of sustaining “working” forests, farms and maritime communities). It is therefore difficult for us to ascertain the intended effects of the document's proposed changes upon future farming operations and farming practices.

Application of the current Bay Agreement has prompted states to focus particularly on control and reduction of nitrogen, phosphorus and sediment pollution to improve water quality in the Chesapeake Bay, and Pennsylvania farmers have directed their pollution control efforts accordingly. States and stakeholders in the Chesapeake Bay watershed have committed serious financial and technical resources to implement and finance those programs and activities. Any further revision in the Agreement to abruptly change the areas of environmental focus will likely have devastating effects upon the efforts of states to feasibly achieve existing reduction goals. In that spirit, the removal of references in the abridged draft document to “toxic contaminants” is welcome, as that term was presented without any context or premise of its application to farming or to other land use activities.

**3. Any changes to the Chesapeake Bay Agreement must protect and enhance the future viability of agricultural operations in Pennsylvania, and take into consideration the significant environmental improvements that agricultural conservation practices have already provided for the Bay watershed—many of which predate the imposition of the Chesapeake Bay TMDL.**

As noted in our comments on the preceding item, farmers in Pennsylvania and the other Bay states have already made significant investments in pollution control practices, many of which have resulted in marked pollution reductions in the Bay and its tributaries. As mentioned in Pennsylvania's Phase 1 Watershed Implementation Plan, prior to 2009, Pennsylvania agriculture played a major role in reducing nutrient levels in the Chesapeake Bay watershed. During that time, implementation of conservation practices on Pennsylvania farms accounted for 41 percent of the total reduction in nitrogen attained by agriculture in the Bay watershed.

Since 2008, according to the National Agricultural Statistics Service (NASS), the percentage of reported no-till and conservation tillage acreage on Pennsylvania farms has:

- Increased to 81.7 percent on planted corn acreage (up from 69.4 percent in 2008).
- Increased to 92.8 percent on planted soybean acreage (up from 79.7 percent in 2008).
- Increased to 89.4 percent on planted barley acreage (up from 66.6 percent in 2008).
- Increased to 86.9 percent on planted wheat acreage (up from 69.2 percent in 2008).
- Increased to 59.1 percent on planted oat acreage (up from 45.1 percent in 2008).

Further confirmation of agriculture's positive environmental impact in the Bay watershed came with the December 2013 publication of a report by the U.S. Department of Agriculture (USDA) titled "Impacts of Conservation Adoption on Cultivated Acres of Cropland in the Chesapeake Bay Region, 2003-06 to 2011." The report found that conservation practices followed by farmers in Pennsylvania and other Bay states from 2003-06 to 2011 have reduced nitrogen levels by 48.5 million pounds each year and reduced phosphorus by 7.1 million pounds. As a result of those voluntary, incentives-based conservation practices, farmers reduced sediment loss by 15.1 million tons a year, or 60 percent, during the same time period.

The USDA report, which is the product of farmer surveys conducted under the Conservation Effects Assessment Project (CEAP), found that some form of erosion control has been adopted on 97 percent of cropland acres. The report also found that cover crops are utilized in 52 percent of crop acres in the watershed, an increase from 12 percent in 2006. These conservation practices were put in place ***prior to*** the imposition of the Bay TMDL, and were also implemented prior to new guidelines that targeted timely application of nutrients.

With the help and guidance of state and federal financial and technical assistance, Pennsylvania's farm families continue to make significant strides in environmental improvement of their farms ***under the current Bay Agreement***. PFB strongly recommends that any further changes to the current Bay Agreement make explicit that viability of agriculture and viable growth of farming operations in the Chesapeake Bay watershed be given the highest priority in implementation of governmental activities performed pursuant to the Agreement. In addition, any "environmental literacy" efforts undertaken as a result of changes to the current Agreement must include information and educational curricula reflecting the environmental benefits that farmers already provide for residents of the Bay watershed.

- 4. While PFB does not believe changes are necessary to the existing Bay Agreement, in the event that changes occur, a process prompted and driven by the Bay states themselves, rather than by EPA or other federal officials, should be substituted for the one utilized to craft the draft final document.**

We do not perceive that much emphasis was placed upon the views of the individual Bay states in conceiving the draft final document, nor was much consideration given to their actual level of satisfaction with the existing Bay Agreement. A process that was truly invested in seeking meaningful input from, and developing a consensus among, individual stakeholders in the Bay states would likely not resemble the one employed in this case, in which the organizational make-up of the main participants and its practical function led to undue influence by federal officials in considerations and outcome.

PFB believes that no change to the current Bay Agreement should be considered until at least 2025, when states have had full opportunity to work with and achieve the Agreement's existing goals and more comprehensive and detailed analysis of effects of environmental improvement projects will likely be completed. However, if any serious effort is made to consider any amendment to the current Bay Agreement, an alternative process should be implemented independently of the process used in development of the abridged and final draft documents, which provides individual Bay states and stakeholders of Bay states a more genuine opportunity to answer the fundamental questions whether there is any dissatisfaction with the current Bay Agreement and, if so, what are the particular areas of dissatisfaction and what provisions in the Agreement should be changed to address those areas of dissatisfaction.

## **Conclusion**

The tone and flavor of the final draft document appear to us to be a concerted effort to incorporate the Chesapeake Bay TMDL into the Bay Agreement as an enforceable goal, thus attempting to carry out EPA's theorized avenue of regulatory authority over Bay states "by agreement" under its claimed interpretation of the Clean Water Act, thus setting the stage for EPA to argue that it can appropriate to itself the authority over land use and other public policy decisions that the CWA properly reserves to state and local governments. This is an issue about which PFB and numerous stakeholders have raised serious questions of legal authority and practical wisdom, and are currently challenging in court litigation.

Pennsylvania's agricultural community remains committed to doing its part to assist in the restoration of the Chesapeake Bay, and will continue to advocate for solutions that achieve maximum environmental benefits that can be feasibly attained by public agencies and private sector stakeholders. At the same time, Pennsylvania's farm families, who themselves have had significant economic challenges in maintaining their farms over the past decade due to prolonged periods of low and unprofitable commodity prices, have become highly weary of the persistent attempts at regulatory overreaching by federal authorities without serious effort to understand or provide reasonable accommodation to the realities of agriculture and the challenges that farm families face each day.

We appreciate the opportunity to provide comments relative to the draft final document. Please feel free to contact us if you have any questions regarding any of the discussion above.

Sincerely,

Grant R. Gulibon  
Director, Regulatory Affairs