

COMMENTS ON THE DRAFT CHESAPEAKE BAY WATERSHED AGREEMENT

March 17, 2014

Dear Chesapeake Bay Program Leaders,

A group of Chesapeake Bay leaders has been carefully studying and reviewing the draft Chesapeake Bay Watershed Agreement promulgated on January 29, 2014. We have concluded that the first new Bay Agreement in 14 years is seriously flawed and herein make 28 suggestions for changes in the form of a Citizen's Bay Agreement to rectify the serious deficiencies. Please accept this document as our comments and consider the points we make for inclusion in the final Agreement. Without substantial changes we urge you to reject any new Bay Agreement until such time as when the climate is ripe for a bolder Agreement to restore the Bay

We see a new Bay Agreement with serious shortcomings, because rather than augmenting the existing regulatory framework and assuring measures to meet the TMDL and WIPs and building on the 2000 Bay Agreement, the new draft Agreement appears much weaker.

For example, the draft inexplicably leaves out all references to the Bay's largest pollution source—agriculture—while only mentioning the necessity to preserve agricultural lands. The draft omits any reference to population growth only mentioning "population changes". On land development, the draft only requires setting up metrics to measure new impervious surface and the conversion of farm and forest land by 2017 with an evaluation of options after that. Also omitted were any references to dealing with stormwater runoff, a major Bay pollution source. The old 30% reduction for impervious/developed lands has been thrown out with no new goal set.

The draft lowers the Bay grass restoration goal for an unlimited period. The draft fails to adopt any tighter specific targets for nutrient and sediment reductions or ways to reach them and does not offer an explicit set of commitments to meet or exceed the TMDL and state WIPs. We note that one of the proposed signatory states, West Virginia, has its top legal officer, their Attorney General, joining in support of the plaintiff's federal court appeal to block the Bay TMDL.

Some in the Bay Program allude to the voluntary nature of such an Agreement, but it is a formal, signed Agreement with commitments as has always been the case. A partnership as EPA likes to call it. The failure to even mention the major threats of farm pollution from more intensive agricultural operations and leaving out population growth and sprawling development sadly makes the current draft untenable. Has anyone considered what happens to more than 100 explicit commitments under the 2000 Bay Agreement should this draft Agreement be signed? The nullification of these commitments would be a real setback for Bay restoration.

How can a Bay Agreement in 2014 leave out the two widely recognized biggest threats to the Bay and still maintain some semblance of credibility? Together, agriculture and developed lands contribute 60% of the Bay's nitrogen, 75% of the phosphorus, and 82% of the sediment

The 27 committed Bay conservationist leaders who developed the attached Citizen's Bay Agreement have been joined by 19 other signatories.

Signors of our current proposal to the EPA include former U.S. Senator Joe Tydings, former Rep. Wayne Gilchrest, former VA Secretary of DNR Tayloe Murphy, current County Councilman Trumbauer, former Delegate Dick D'Amato, former Annapolis Mayor Ellen Moyer, the head of the Maryland Sierra Club and Environment Maryland, and many Riverkeepers, as well as PhD's, and other groups.

As we have digested and dissected the draft Agreement and listened to studied responses, we have come to believe that it would be better to drop this weak proposal rather than have the states commit to such a document. It appears that the politics of gaining the signatures of watershed states never before party to past Agreements (WV, DE, and NY) and the less than stellar commitment of certain Bay states has led to a very weak proposal.

Please consider these comments as coming from each of us individually as we are not a formal group or organization, just Bay citizen's who care about restoring the bay, some of us whom attended the signing of the first Agreement in 1983.

Respectfully Submitted for the 27 Bay Leaders and 19 Citizens Joining Them as Noted Below:

CHESAPEAKE BAY CITIZEN'S AGREEMENT

Preamble

We citizens of the Chesapeake Bay watershed have concluded that after 30 years of effort, the non-binding, voluntary Bay Agreements produced by our elected and appointed officials have not worked to restore the Bay. We recognize that many people, organizations, and government entities have worked diligently to restore the Bay, which would be even more degraded without their actions. But in the face of rapid population growth, expanding development, and pollution from agriculture and developed lands, voluntary efforts for Bay restoration have been insufficient and are likely to continue to fall short in the future.

A Failed Voluntary Approach

After more than thirty years of pursuing nonbinding, voluntary Bay Agreements, the Environmental Protection Agency acknowledges that the water quality in the Chesapeake Bay and almost all of its tributaries is severely degraded. Other analyses indicate that much of the Bay's waters are declining or not improving, and living resources continue to decline. History shows that no large scale ecosystem restoration effort has succeeded using the voluntary methods embodied in the Bay Agreements.

The real consequences of this failed approach are collapsed fisheries, including oysters, shad and soft clams. In 2012 alone, nearly 15,000 acres of underwater grasses disappeared from the Bay. We have so poisoned our waters that reports abound of serious infections in humans and pets that come into contact with Bay waters. Scientific studies show that oyster populations, the Bay's great filter feeders, are currently at less than one percent of their historic norms.

We believe that we must transition from the voluntary, nonbinding approach proposed in the latest Bay Agreement to a more comprehensive regulatory program that establishes mandatory, enforceable measures for meeting the nutrient, sediment, and toxic chemical requirements of the Clean Water Act. We firmly believe that in any new Bay Agreement all of the states in the Bay watershed, the District of Columbia, the EPA, and the Chesapeake Bay Commission need to collectively endorse the TMDL component of the Clean Water Act and to pursue the regulatory tools necessary to restore the Bay.

Flaws in the Draft Bay Agreement

Rather than augmenting the existing regulatory framework, we have concluded that the new Chesapeake Bay Draft Watershed Agreement, released on January 29, 2014, is fundamentally flawed in numerous ways and may undermine the existing legal framework.

FLAWS IN THE DRAFT CHESAPEAKE BAY AGREEMENT

- 1) The draft Agreement's opt out clause allows signatories to adjust or ignore their level of participation in the implementation strategies.
- 2) The draft Agreement lacks enforceable limits and substantive sanctions for noncompliance.
- 3) The draft Agreement lacks a mechanism for systematic independent evaluations of restoration progress.
- 4) The draft Agreement's Land Conservation Section lacks a no net loss forest provision and is inadequate to address the onslaught of population growth and sprawl development.

- 5) The draft Bay Agreement fails to set the limits on impervious surfaces that are required to reduce storm water runoff rates, volumes, and pollutant loads.
- 6) The draft Agreement contains no specific goals to reduce toxic contaminants.
- 7) Global climate change and its impacts on the Bay system are omitted from the draft Agreement and should be forthrightly addressed in any new Agreement.
- 8) In the draft Bay Agreement, we object to the indefinite postponement of the longstanding agreement to restore 185,000 acres of underwater grasses.
- 9) The draft Bay Agreement fails to require implementation of best available fish migration technology for the licensing and re-licensing of hydroelectric dams.
- 10) The draft Bay Agreement fails to dedicate resources to find the causes of the disease and declines in freshwater species in Chesapeake tributaries, including the recreationally valuable Smallmouth Bass.
- 11) The draft Bay Agreement fails to commit to preserve existing riparian buffers and fails to establish a needed 300 foot forested buffer for exceptional value freshwater waterways and other sensitive water quality areas. There should be a no additional loss of existing buffers policy for development or for agriculture.
- 12) The draft Bay Agreement makes no mention of the environmental threats caused by the rapid expansion of hydraulic fracturing (fracking) in many parts of the Chesapeake Bay watershed.
- 13) The draft Agreement fails to prioritize science in setting goals and making difficult decisions.

New Direction for the Chesapeake Bay Restoration

The draft Bay Agreement lacks specific, scientifically-based, implementation measures. The required measures should be incorporated into a legally binding Agreement, with no opt out provision, and plans should be adopted to fully implement and enforce these measures. We believe that the core measures listed below are critical for restoring the Chesapeake Bay and should be included in any meaningful Bay Agreement:

NECESSARY MEASURES FOR AGRICULTURAL POLLUTANTS

- 1) Discrete, performance-based nutrient and sediment reductions from agricultural sources of pollution should be required by law throughout the Chesapeake Bay watershed. Monitoring and assessments of those practices should be mandated and conducted by independent third-party entities to assure effectiveness and proper implementation.
- 2) Chesapeake Bay watershed states should require agricultural measures to reduce nutrients and sediment flows to the Bay system, including nutrient management plans and the use of Best Management Practices, throughout the watershed. States should include detailed enforcement measures and sanctions for any agricultural pollution source that exceeds specified pollution limits under the TMDL and state Watershed Implementation Plans for each of the 92 Bay segment watersheds.
- 3) Monitoring agricultural pollution reduction results is essential for achieving Bay-safe agricultural practices, therefore agricultural monitoring results should be available to the public and the implementation of Best Management Practices needs to be publicly reported at a parcel scale.

- 4) All agricultural lands receiving manures from any animal feed operation should be treated as a regulated entity. It is equally important that there be an assessment and accountability for all Concentrated Animal Feed Operation (CAFOs) and all other federal and state regulated agricultural activities should have increased assessments and accountability. Current state programs do not provide adequate assurance that CAFO permits (particularly related to land application and other state regulations of agricultural activities) are being enforced.
- 5) States in the Bay watershed should adopt agricultural regulations concerning the land disposal of animal waste/manure that mirror Maryland regulations concerning land disposal of human sludge. These requirements should include the injection or incorporation of all animal waste/manure into soils within 24 hours of application on land, soil tests to assure no animal waste is applied to phosphorus saturated land, and the prohibition of applying animal waste on steep slopes, highly erodible soils, frozen ground, and in riparian buffers of up to 200 feet.
- 6) States in the Bay watershed should assure that on any agricultural lands that receive human sludge or animal manure, there should be a requirement to plant cover crops for a minimum of one year after the application.
- 7) Greater accountability and verification of performance of agricultural Best Management Practices is essential and must be required by states in the Bay watershed.
- 8) States that drain to the Bay should mandate whole-farm water quality plans for all agricultural lands including the next generation of nutrient management, with clear targets, a reasonable implementation schedule, progress checks, and enforcement.

NECESSARY MEASURES FOR POLLUTANTS FROM DEVELOPED LAND

- 9) States in the Bay watershed should expand their regulatory jurisdiction over storm water controls, require septic system upgrades, and implement growth control measures. Bay watershed states should require completely offsetting new growth related pollution with pollution reductions elsewhere in the same watershed.
- 10) Each Bay jurisdiction should be required to adopt laws and regulations to assure that there is no net increase in stormwater discharge rate, volume, or pollutants for all new development for a 5-year storm. Current state stormwater laws clearly do not accomplish this.
- 11) Chesapeake Bay watershed states should include improved water quality retrofit requirements for their storm water permits (MS4) and for all developed lands including road construction or reconstruction. All such storm water permits should be required to meet the no net increase in rate, volume, and pollutants rule. For redevelopment, to the maximum extent practicable, no net increase in rate, volume, or pollutants should be required for a 5-year storm and offsets required where the no net increase requirement cannot be met. States should include funding mechanisms to provide reasonable assurances that such urban retrofits will be accomplished.
- 12) States that drain to the Bay should include provisions for improved water quality through systematic urban retrofits of large areas of developed lands such as shopping centers, large industrial sites, and other large impervious surfaced areas in private ownership, with mandatory measures and timelines for such retrofits.
- 13) Regulatory measures to reduce or eliminate fertilizer usage on residential lawns, golf courses, and public lands should be passed by Chesapeake Bay watershed states, including measures to prohibit phosphorus in fertilizers sold for maintenance of such properties.

- 14) All federal and state facilities and public lands in the watershed should be required to undertake storm water retrofits to meet pollution limits. Federal and state facilities and lands and buildings should follow guidance developed by EPA pursuant to Section 438 of the Energy Independence and Security Act and Section 502 of the Chesapeake Bay Executive Order (13508). All new government construction should meet a requirement for no net increase in rate, volume, or pollutants for a 5-year storm.
- 15) States in the Chesapeake Bay watershed should apply the precautionary principle when considering the implementation of hydraulic fracturing techniques and let the best available science determine what areas, if any, in the Chesapeake Bay watershed are suitable for this rapidly spreading technique.

NECESSARY MEASURES FOR FOREST LAND PROTECTIONS

- 16) Chesapeake Bay watershed states should require a no net loss of forest coverage in each of the 92 Bay segment watersheds and have detailed measures to expand forested buffer coverage to at least 85% of all the shores of the Bay and its tributaries.
- 17) Bay watershed states should target funds for the fee simple or easement purchase of sensitive lands such as forests and wetlands on private lands and farm lands, especially those bordering the Bay and its rivers. Acquisitions should take into consideration State Wildlife Action Plans and Green Infrastructure maps.

NECESSARY MEASURES FOR SEPTIC SYSTEM NUTRIENT REDUCTIONS

- 18) Chesapeake Bay watershed states should include regulations that require all new and replacement on-site waste disposal systems (septic systems) in the Chesapeake Bay

watershed to be systems that utilize the best available technology for nitrogen removal.

- 19) Chesapeake Bay watershed states should include requirements for implementation of a mandatory septic inspection program for existing systems, with a requirement for a best available technology system for nitrogen removal in failing systems and inspections of these new systems.
- 20) Chesapeake Bay watershed states should adopt requirements to evaluate existing clusters of septic systems for connection to centralized sewage treatment that uses Enhanced Nutrient Removal technology.

NECESSARY MEASURES FOR AIR EMISSIONS REDUCTIONS

- 21) Chesapeake Bay watershed states should pass provisions for stricter control of air emissions by better regulating and enforcing emission controls from all major sources.
- 22) All new stationary sources of air emissions in the region that contribute increased nitrogen to the Bay should be offset and Chesapeake Bay watershed states should enact provisions for accomplishing these offsets.

NECESSARY MEASURES FOR NUTRIENT REDUCTIONS FROM WASTEWATER TREATMENT PLANTS

- 23) All wastewater treatment plants that discharge into the Bay watershed should be required to meet nutrient discharge limits of no more than 3.0 mg/l Nitrogen and 0.3 mg/l Phosphorus.
- 24) States should allocate wastewater treatment plant pollution loads based on 2010 wastewater flows, assuming a concentration of 3.0 mg/l of nitrogen and 0.3 mg/l of

phosphorus. Any increased nitrogen or phosphorus loads with flows beyond 2010 actual flow levels must be offset with equal or greater reductions from other sources.

- 25) Chesapeake Bay watershed states must aggressively address and fund infrastructure upgrades to prevent and treat combined sanitary sewer overflows. Chesapeake Bay watershed states should adopt all necessary measures to assure that existing Clean Water Act and other water quality laws are fully enforced.

NECESSARY MEASURES FOR RESPONDING TO CLIMATE CHANGE

- 26) Chesapeake Bay watershed states should invest in ongoing scientific analysis of climate change and sea-level rise in the Chesapeake Bay watershed and make use of the best available science to adopt policies designed to reverse or alleviate the impact of climate change and sea-level rise in the Bay watershed.

NECESSARY MEASURES FOR THE ELIMINATION OF TOXIC CHEMICALS

- 27) Chesapeake Bay watershed states should continue the long-held goal of a Bay free of toxic chemicals by reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bio-accumulative impact on the living resources that inhabit the Bay or on human health.

NECESSARY MEASURES FOR ACHIEVING ENVIRONMENTAL JUSTICE

- 28) In compliance with Executive Order #12898, signed by President Clinton in 1994, the Environmental Protection Agency and its Chesapeake Bay partners should make achieving environmental justice a priority in the Chesapeake Bay restoration effort, assuring the fair treatment of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of policies related to Chesapeake Bay restoration.

By signing this Citizens Agreement, we rededicate ourselves to the restoration of the Chesapeake Bay and commit to working together to assure that our public servants fulfill their obligation to protect the environmental rights of the citizens of this region. We urge these measures be adopted in the final Chesapeake Bay Agreement.

DATED: March 13, 2014

Respectfully Submitted,

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***FOR THE SIGNATORIES MARKED WITH AN *, THE VIEWS EXPRESSED IN THIS DOCUMENT REPRESENT THEIR PERSONAL VIEWS AND NOT NECESSARILY THE VIEWS OF THEIR EMPLOYERS OR ORGANIZATIONS**

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