COMMONWEALTH of VIRGINIA

Office of the Governor

Robert F. McDonnell
Governor

June 15, 2010

The Honorable Lisa P. Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building – Mail Code: 1101 A, Room 3000
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Virginia's Concerns with the Chesapeake Bay TMDL Process

Dear Administrator Jackson:

I found the opportunity to attend my first annual meeting of the Chesapeake Bay Executive Council a valuable experience in working together with other Bay state leaders to restore and maintain the Chesapeake Bay, a true national treasure. I am sorry that other, and certainly more pressing, matters prevented your attendance. I look forward to the continued close cooperation with Council members during the coming years.

I am committed to improving Virginia's efforts to restore the Chesapeake Bay. It is one of my top environmental commitments along with the conservation of 400,000 additional acres of land much of which is in the Bay watershed. I can assure you that Virginia will work diligently to set and achieve appropriate milestones in the restoration of the Bay. We must ensure that continued progress is maintained in improving the water quality of the Bay as we develop the Total Maximum Daily Load (TMDL) for the Chesapeake Bay and its tidal rivers. A strong basis of this effort will be to establish a shared commitment with Virginia's stakeholders based on sound science and reasonable goals.

This brings me to the main purpose of this letter.

At the Executive Council meeting I spoke briefly with Deputy Administrator Bob Perciasciepe, and shared with him some concerns about the on-going TMDL development process. Of paramount importance is the perceived lack of transparency to the stakeholders as evidenced by the short time frames and opportunities for public review and comment by the very citizens and affected constituencies who will be responsible for reducing nutrient and sediment pollution to the Bay. I am also troubled by the continually changing pollution reduction goals as

Patrick Henry Building • 1111 East Broad Street • Richmond, Virginia 23219
(804) 786-2211 • TDD (804) 828-1120
www.governor.virginia.gov

modifications are made to the Bay model, and want to be sure we have sound science supporting the requirements being imposed on the states.

Outlined below are my key concerns with the TMDL development process:

- **TMDL Deadlines** – Despite significant delays in providing promised data to the states, EPA is holding firm to the December 2010 deadline for the TMDL and state Watershed Implementation Plans (WIP's). Virginia has worked diligently over the past decade with EPA to develop TMDLs in accordance with the schedule contained in the June 1999 federal court consent decree which requires EPA to have final numbers by May 2011. We remain disappointed that EPA is not utilizing the available time allowed under the consent decree to better ensure this highly complex TMDL is technically sound, and the citizens of Virginia are provided sufficient time to both understand the implications of the TMDL on their lives and offer constructive comment.

- **TMDL "Reasonable Assurance" Not Defined by EPA** – The states are being compelled by EPA to provide reasonable assurance that the nutrient loadings are achieved. However, EPA has failed in two efforts to adopt a regulation that would officially define how that standard can be met. This places the states in an untenable position of developing WIR's without knowing how this standard may be met. This is particularly troublesome given EPA's newly developed accountability system and list of consequences that can be imposed on the states if they do not meet an undefined standard. It is a mandate we are being required to enforce without adequate standards to hold regulants accountable. In essence, neither the enforcer nor regulant knows precisely what is required of them.

- **Transparency with Public** – In spite of numerous Bay Program meetings, the current process does not result in proper communication to the states, stakeholders and citizens of how key decisions are being made. Improved documentation is needed to explain the basis for decisions, and these decisions need to be peer reviewed so the public confidence is sufficient to support the decisions.

- **Public Comment Process** – EPA expects to provide, at most, 45 days for the public to provide comments on the TMDL and WIPs. Given the complexity of these materials and the magnitude of the costs involved and other potential impacts, this time period is inadequate. In addition, EPA expects to review the anticipated extensive public comment, and make appropriate adjustments in response to this comment, within 60 days. Given our experience with highly complex regulatory issues, these timeframes only communicate to the public that their input will not be considered in any reasonable way.

- **Model Elements Are Flawed** – EPA acknowledge the model version being used for the 2010 TMDL is flawed since it does not properly account for common pollution reduction

practices employed by the states and does not accurately reflect levels of impervious surface. These current shortcomings are undermining the confidence the public and stakeholders will have in the Watershed Implementation Plans developed by the states. In addition, EPA is applying the results of the water quality model in a manner that many believe overestimates the precision of the model. This approach is resulting in much lower nutrient loading caps that are not justified by the resulting high costs and disruption to society.

- **James River is Unique** – It has long been known that the James River has a relatively minimal impact on the water quality problems of the Bay. The assignment of nutrient loading caps by EPA for the James should reflect this minimal impact. However, there are nutrient related problems within the tidal James River. Therefore in 2005, Virginia, EPA and stakeholders agreed upon a solution to address those problems, resulting in adoption of unique chlorophyll standards for the James estuary. Recent EPA modeling is threatening to undermine the basis for those unique standards and the progress being achieved in cleaning the river. The agreed upon solution should remain intact under the Bay TMDLs EPA is developing. However, if EPA believes the 2005 solution needs to be revisited, then Virginia should retain its entitlement under the Clean Water Act to develop a James River TMDL for this issue under a reasonable schedule.

- **Unfairness of EPA Consequences** -- EPA threatens to impose harsh consequences on certain source sectors if other sectors are falling behind, such as removing allocation from wastewater treatment plants or making development more expensive if unregulated agricultural sources do not achieve expected reductions. This appears to violate fundamental principles of fairness. Any regulatory consequences need to be targeted to the source sector lagging behind, and not on others that are working diligently to keep in compliance with state and federal mandates.

- **Funding** – Given current economic conditions, federal funding sources will need to dramatically increase to address additional federal responsibilities required of the states. Doing this without further increasing the federal deficit could be problematic.

- **Federal Executive Order** – Some states are concerned that elements of the President's Chesapeake Bay Executive Order will mandate additional work by the states for activities that should be the responsibility of federal agencies. For instance, EPA is creating a new tracking system which will call for local governments to track voluntary practices over a 64,000 square mile area. This can represent a significant effort and is simply another reporting system layered on top of those that already exist. It may also divert federal resources from our primary water quality objectives.

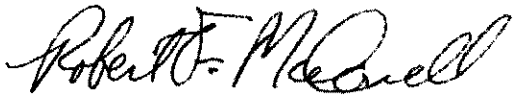
- **Use of Offsets** – Clear direction from the EPA is needed regarding the use of offsets in achieving reductions, particularly those associated with Virginia's Stormwater Construction General Permit.

- **Federal Reduction Commitments by Jurisdiction** – Federal agencies are ramping up reduction activities on federal lands and in some cases such as the Natural Resources Conservation Service (NRCS) have been receiving significantly more funding. In a four year period, NRCS will implement agricultural BMPs through the EQIP program with an additional $43 million targeted to the Chesapeake Bay watershed within Virginia. EPA needs to be coordinating federal reduction activities and commitments and then crediting that reduction against the goals set for each jurisdiction.

- **EPA Enforcement Measures in the Valley of Virginia** – On June 3, 2010, EPA issued orders for two farms in the Shenandoah Valley to cease and desist discharge and pollutants into local waterways. We understand that EPA has also taken the unprecedented step of expanding the definition of point source pollution to include common agricultural practices. Many are very concerned that this is an over reach of EPA's authority. We believe the EPA's time and energy would be better spent in Virginia educating farmers on best practices and positive actions they should be undertaking to help restore the Chesapeake Bay, rather than expanding the scope of its regulatory authority through enforcement measures. We were delighted to learn at the annual meeting that USDA will soon release a report of agricultural BMPs that are working around the country.

I hope that you will give serious consideration to these issues. It is not too late for mid-course corrections that would result in a fairer outcome for the states and a better bay clean up program.

Sincerely,



Robert F. McDonnell

RFM/dd
cc: Virginia Congressional Delegation
The Honorable Patricia Smith Ticer
The Honorable Harvey B. Morgan
The Honorable Kenneth T. Cuccinelli
The Honorable Martin L. Kent
The Honorable Douglas W. Domenech
The Honorable Todd P. Haymore