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April 2, 2020

Mr. Jeff Steers
Enforcement Manager
VA DEQ - Central Office
P.O. Box 1105
Richmond, VA 23218

Dear Mr. Steers,

On behalf of the Chesapeake Conservancy, thank you for the opportunity to respond to the Proposed Consent Decree between the Virginia Department of Environmental Quality (DEQ) and State Water Control Board (plaintiffs) and the Virginia True Corporation (defendant), case number CL18-122. Chesapeake Conservancy submitted comments on a previous proposed consent order regarding the same violations. A copy of that letter is attached. Unfortunately, the new consent decree fails to adequately address the three primary concerns that we noted in our previous comments, those being: an insufficient civil assessment, no requirement to replant trees that were uprooted and burned during the illegal clearing, and no plan to require an undisturbed forested setback to prevent future collapses of the adjacent high bluffs known as Fones Cliffs.

We will not repeat our recital of the significant cultural, historic and natural resource values of Fones Cliffs contained in our original comments. The importance of this property to the history and culture of the Rappahannock Tribe, to bald eagles and other migratory birds, and to the integrity of the Captain John Smith Chesapeake National Historic Trail is well documented. We focus these comments on our original concerns, and further request clarification of the relationship between this consent order and ongoing bankruptcy case filed by Virginia True Corporation.

We continue to believe that the proposed consent decree fails to arrive at a civil penalty commensurate with the damages that the defendants inflicted on the land and the Rappahannock River. The consent order makes clear that its penalties are dependent on approval from the Federal bankruptcy court that is hearing the Virginia True case. Accordingly, DEQ must be aware that the most recent reorganization plan filed by Virginia True on February 7, 2020 calls for construction of housing for veterans, assisted living housing, and affordable housing, with estimated construction costs of over \$32 million. Additionally, the construction costs for the first of the "four to five 10-story towers" proposed to be constructed "near the 44-acre hotel site located near the cliffs edge along the Rappahannock River at its highest point" is over \$51 million, according to Virginia True's proposed reorganization plan. While it is unlikely that such

a far-fetched plan would ever come to fruition, the proposed consent decree is dependent on it being accepted, and therefore it is reasonable to compare the proposed penalty of \$200,000 with phase one construction costs that are projected to exceed \$83 million. A penalty that represents only 0.24% of the construction costs of a project of this scale is not likely to act as a significant deterrent, but can be calculated as simply the cost of doing business. The law provides for fines for up to \$32,500 per day per violation. Friends of the Rappahannock has calculated that Virginia True was out of compliance with applicable regulations for 173 days. We are not suggesting the maximum fine be assessed, but DEQ has sufficient leverage to negotiate a settlement that would repair damage to the site, and compensate for damages to the river ecosystem.

We remain concerned that erosion and habitat loss continue on the Virginia True property. There should be no doubt that the loss of tree canopy has accelerated erosion, causing tree loss near the cliffs' edge and a complete failure of the cliff face. We have seen photographic evidence from as recently as March 14, 2020 showing trees and sediment piled at the bottom of the cliffs directly below the disturbed area. There have been no publicly-available photographs taken on the disturbed site for quite some time and it is difficult to ascertain from the consent order the current condition of the disturbed area or the engineered efforts to recontour the land. We see no requirement that trees be replanted where they once were. Without the long-term positive effects that trees provide, such as the dampening effect from leaves and absorption from root systems, the exacerbated runoff from the disturbed area will likely continue to cause the impacts we see today.

We were informed that a potential argument against requiring tree planting is that penalty funds cannot be used to improve the defendant's property. That is not a valid argument in this case because it was to "improve" the property that the area was cleared illegally in the first place. Virginia True is on record stating that they wanted to open up the view for prospective investors. In truth, allowing the disturbed area to remain in a meadow-like condition is exactly what the clearing was meant to achieve, constituting an illegal improvement of their property that the consent decree does nothing to address. Requiring Virginia True to replace the trees they illegally cleared is not an act that will improve the property in a financial sense, but would help stem the ongoing erosion and loss of mature trees along the edge of the cliffs.

Another of our concerns that remains unaddressed in the current consent decree is the need to establish a requirement that forested buffers will need to be maintained should any construction activities take place in the future. We note with some concern that a new term was introduced in the most recent consent decree that did not appear in the first consent order. A "Construction General Permit" is defined in the current consent decree as "the General VPDES Permit for Discharges of Stormwater from Construction Activities (VAR10) for the Permitted Site as of the date of this Consent Decree." It is unclear what future construction is contemplated by DEQ and the defendants that would be subject to this permit. Does it relate to continued manipulation of the land to install remedial stormwater controls, or to future construction of facilities? Regardless, DEQ should take the opportunity presented by these violations and subsequent remedial requirements to clearly send a message that a substantial, permanent forested buffer must be maintained to protect the cliffs, and thereby the Rappahannock River, from catastrophic cliff failures. In a letter to Virginia True dated January 11, 2018, the Shoreline Erosion Advisory Service, a state agency housed within the Department of Conservation and Recreation (DCR),

recommended a 280-foot setback from the cliffs' edge. The report clearly states the following: "No development or infrastructure establishment should be within this setback and the area should be maintained as an un-mowed vegetative buffer." We concur with the recommendations of DCR, and encourage DEQ to do the same and make that a part of negotiations on the consent decree.

We have reviewed the response by the Diatomite Corporation of America to the consent decree that they filed on March 10, 2020 with the bankruptcy court that is hearing the Virginia True case. They do not object to a consensual settlement of the DEQ litigation, but present compelling arguments why the consent decree is premature and not in compliance with the rules governing bankruptcies. They point out, and we concur, that the reorganization plan submitted by Virginia True is clearly not approval-ready, thereby making the payment schedule outlined in the consent order unachievable. Diatomite requests that the bankruptcy court "defer approval of the settlement motion until additional information is provided and modifications are made." While our arguments are different, we concur with the ultimate recommendation that this consent order is premature.

We respectfully ask that DEQ continue to negotiate a consent order that complies with the bankruptcy code and that holds Virginia True accountable for repair of the damage that they caused to the land and to the Rappahannock River. Thank you again for the opportunity to comment. We look forward to DEQ's response.

Sincerely,

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Joel Dunn
President and CEO
Chesapeake Conservancy