VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

THE CHESAPEAKE BAY FOUNDATION, INC., and GEORGE T. and NELL MINTON, C. PEARCE COADY,	)	
Appellants,	)	
v.	)	Chancery No. 760CHO40001390
COMMONWEALTH OF VIRGINIA, ex rel. VIRGINIA STATE WATER CONTROL BOARD, ROBERT G. BURNLEY, Director, Department of Environmental Quality, THE TOWN OF ONANCOCK, VIRGINIA,	)	
Appellees.	)	

BRIEF OF AMICI CURIAE VAMWA AND AMSA IN OPPOSITION TO CBF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DISMISSAL OF PETITION FOR APPEAL

The Virginia Association of Municipal Wastewater Authorities ("VAMWA") and the Association of Metropolitan Sewerage Agencies ("AMSA") submit this amicus brief in opposition to the Chesapeake Bay Foundation's ("CBF's") motion for summary judgment and in support of the dismissal of the petition for appeal.

INTRODUCTION

The local government members of VAMWA and AMSA are as concerned about Chesapeake Bay water quality as CBF. VAMWA and AMSA member agencies are at the forefront of the action being taken across the region and are leading the progress being made. Already, many VAMWA and AMSA members in the region have taken steps to

upgrade municipal wastewater treatment plants by installing advanced technology to remove nutrients in wastewater generated by households, businesses and institutions. Other member local governments have taken proactive steps to maximize the amount of nutrient removal possible with their existing facilities by adjusting the manner of operations. These efforts have resulted in real, measurable reductions of nutrient discharges from wastewater treatment plants. In Virginia, point source nitrogen loads are down 37 percent and point source phosphorus loads are down 56 percent, according to the Virginia Department of Environmental Quality ("DEQ").[1] Even CBF credits reductions from wastewater treatment plants as "the sole source of major, documented cleanup gains in nutrients entering the bay."[2]

Although the multi-jurisdictional Chesapeake Bay Program has found that point sources now comprise only one-fifth of the nutrient inputs to the Bay (agricultural runoff is the single largest source category), advances in municipal wastewater treatment will continue to play a key role in making further progress. As a continuation of their leading efforts, many VAMWA and AMSA members have initiated technical studies to prepare plans and engineering designs for the next round of treatment plant upgrades. In addition, the State Water Control Board ("the Board") is in the process of adopting new regulations ensuring that the positive contributions of point sources will continue in the years ahead.

More specifically, the Board's pending regulations will lead to new, more stringent effluent limitations in the Virginia Pollutant Discharge Elimination System ("VPDES")

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[1] A "point source" is defined by regulation as "any discernible, defined and discreet conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discreet fissure, container, rolling stock vessel or other floating craft, from which pollutants are discharged. This term does not include return flows from irrigated agricultural land." 9 VAC 25-720-10.

[2] T. Horton and CBF, Turning the Tide: Saving the Chesapeake Bay, at 71 (2003).

permits that govern the operation of municipal wastewater treatment plants, including the facility owned by the Town of Onancock ("the Town"). Until these regulations are duly adopted in accordance with the Virginia Administrative Process Act (Va. Code § 2.2-4200) – and they soon will be – there is no lawful, rational basis upon which to impose on the Town (or any other owner of a municipal wastewater treatment plant in Virginia) the *specific* permit limits sought by CBF in this litigation.

Applicable laws and regulations define the legal process for rationally developing appropriate permit limits based on sound science and fair policy. This process consists of (1) setting scientifically sound nutrient-related water quality standards, (2) fairly allocating cleanup responsibilities to all sources of nutrients to the Bay, and (3) adding appropriate water quality-based effluent limitations to dischargers' VPDES permits consistent with that allocation of responsibility. The Board is in the process of, and will soon conclude, the first two steps. Those actions will provide the necessary foundation for establishing permit limits in the forthcoming Chesapeake Bay Watershed General VPDES Permit recently mandated by the Virginia General Assembly.[3]

VAMWA and AMSA understand that there is much more to be done to "save the Bay." Given their excellent progress in the absence of any regulatory mandate up to this point, there is every reason to believe that VAMWA and AMSA members will continue to do their at least their fair share when the Board's final regulations take effect in the near future. In the meantime, the Court should not allow one single interest group to disrupt and

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[3] See House Bill 2862 (2005) and Senate Bill 1275 (2005). Governor Warner signed these identical bills on March 24, 2005. They are available from the Virginia Legislative Information Service's website at http://leg1.state.va.us/cgi-bin/legp504.exe?+ful+CHAP708+pdf and http://leg1.state.va.us/cgi-bin/legp504.exe?+ful+CHAP710+pdf.

preempt a comprehensive public process of such great importance for the environment, our communities across the state, and their citizens and businesses.

RESPONSE TO CBF'S STATEMENT OF UNDISPUTED FACTS

The material facts in this case are not in dispute, and the Court may enter judgment based on the administrative record. The Court should disregard CBF's Statement of Undisputed Facts for the following reasons.

First, CBF's Statement of Undisputed Facts demonstrates that CBF misapprehends the nature of this case. While on one hand CBF agrees that the administrative record provides that facts necessary for this Court's determination, on the other hand CBF argues that Appellees "have not challenged" the basic facts set out in its Petition for Appeal. CBF Br. at 2, n. 3. This claim is incorrect, because review in this case is of an administrative record. Appellees do not have to "challenge" any facts, as the facts are established in the administrative record. Moreover, given that this is the first pleading by Appellees on the merits of this case, Appellees now have their first opportunity to comment on any statements or characterizations of the facts to date.

Second, CBF's Statement of Undisputed Facts contains more argument than fact. For example, as part of its statement of undisputed facts, CBF includes two pages of argument why it believes the Commonwealth was wrong in its argument about its legal authority to include limits in permits. CBF Br. at 8-10.

Finally, VAMWA and AMSA object to many of the characterizations CBF makes in its Statement of Undisputed Facts. These characterizations, however, in large part are not material to the specific issues in this case.

LEGAL AND REGULATORY BACKGROUND

The federal Clean Water Act establishes a specific process for limiting the discharge of pollutants to levels protective of desired uses and the quality of surface waters. 33 U.S.C. § 1251 et seq. This legal process consists of three basic steps: (1) establishing a scientifically defensible water quality standard, 33 U.S.C. § 1313(a)-(c), 40 C.F.R. Part 131, (2) in the case of a water body that does not meet such a standard, determining the total amount of a pollutant that can be assimilated by the water body without exceeding the water quality standard and allocating that amount among various sources, 33 U.S.C. § 1313(d)-(e), 40 C.F.R. §§ 130.6 and 130.7, and (3) in the case of regulated "point sources," issuing permits containing water quality-based effluent limitations consistent with those allocations, 33 U.S.C. §§ 1311, 1312, 1342(a)(1); 40 C.F.R. § 122.44(d)(1). Together, the applicable laws and regulations set forth a logical "ready, aim, fire" approach through which proper standards and a fair allocation of the acceptable pollutant loading among the individual point and non-point sources provide a rational basis for establishing lawful permit limits protective of water quality.

In Virginia, the State Water Control Law, Va. Code § 62.1-44.2 et seq., authorizes the Board to adopt regulations to protect and restore the quality of state waters. Pursuant to Va. Code § 62.1-44.15(3a), the Board has adopted over 100 water quality standards for specific parameters, but it has never adopted standards for the nutrients total nitrogen or total phosphorus – the pollutants at issue in this case. See 9 VAC 25-260 (Virginia Water Quality Standards Regulation). In fact, most states have not yet adopted comprehensive nutrient standards, and Virginia is a leader in the current national effort to do so.

Although the Board's regulations provide standards for dissolved oxygen in estuarine waters[4] and, in the case of the Chesapeake, low dissolved oxygen levels in the Bay are partly due to nutrient inputs, these dissolved oxygen standards have been officially acknowledged by the Board, the other Chesapeake Bay states and the U.S. Environmental Protection Agency ("EPA") as outdated, inappropriate and unattainable.[5] Therefore, the existing dissolved oxygen standards cannot serve as a valid basis for regulating sources of nutrients. Additionally, while the Board has adopted regulations allocating the acceptable loading of various pollutants to certain point sources, the Board necessarily has not adopted regulations allocating the allowable nutrient loads, because the Board has not had available a proper water quality standard upon which to base such decisions. See 9 VAC 25-720 (Water Quality Management Planning Regulation) (no wasteload allocations assigned for total nitrogen or total phosphorus to help meet Chesapeake Bay dissolved oxygen goals).

The Board is now in the final stage of promulgating new water quality standards for the Bay and its tidal tributaries, including new standards for dissolved oxygen and other nutrient-related parameters. See Proposed Water Quality Standards Regulation, Virginia Register, Volume 21, Issue 5, p. 479 (Nov. 15, 2004), attached as Exhibit A. The Board

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[4] The Board's Water Quality Standards Regulation currently specifies 5.0 milligrams per liter ("mg/L") as a daily average concentration and 4.0 mg/L as an instantaneous minimum. 9 VAC 25-260-50.

[5] For example, the Board has stated that Virginia's current water quality standards for dissolved oxygen, adopted almost thirty years ago, are no longer "appropriate for protecting water quality in the Chesapeake Bay and its tidal tributaries" and "have been ineffective in protecting water quality in the bay." Virginia Register, Volume 21, Issue 5, p. 481 (Nov. 15, 2004). These conclusions are based on extensive scientific study described at length in two EPA publications specifically cited in the Virginia Register at Volume 21, Issue 5, p. 481. The titles of these EPA publications are "Ambient Water Quality for Dissolved Oxygen, Water Clarity and Chlorophyll *a* for the Chesapeake Bay and its Tidal Tributaries" (April, 2003) and "Technical Support Document for Identification of Chesapeake Bay Designated Uses and Attainability" (October, 2003).

approved the final regulation at its meeting on March 15, 2005 and these regulations should become effective within the next few months after the Commonwealth's process of executive review and federal EPA review are completed. In addition, on the basis of these forthcoming dissolved oxygen standards, the Board is in the midst of allocating the allowable nitrogen and phosphorus loads to individual point sources (including the Town of Onancock's treatment plant) by amending the Water Quality Management Planning Regulation, 9 VAC 25-720. See Proposed Water Quality Management Planning Regulations, Virginia Register, Volume 21, Issue 12, p. 1469 (Feb. 21, 2005),attached as Exhibit B. Together, these forthcoming regulations will provide – for the first time – a regulatory basis for developing and imposing appropriate water quality-based effluent limitations for nutrients in VPDES permits.

ARGUMENT

CBF's petition for appeal of the Town's permit should be dismissed for a number of reasons. The permit limits that CBF asks this Court to order DEQ and the Board to impose are not supported by existing laws and regulations, would be arbitrary if imposed, and would both preempt and conflict with the Board's forthcoming regulations defining new dissolved oxygen standards and allocating the allowable nutrient loading under those standards to the various sources.

A. THE BOARD'S REGULATIONS DO NOT CURRENTLY PROVIDE A VALID LEGAL BASIS FOR ESTABLISHING WATER QUALITY BASED NUTRIENT LIMITS.

As described in the legal and regulatory background section, federal and state laws and regulations establish a three-step process for properly developing water quality based effluent limitations. Currently, the Board's regulations properly address the first two steps

in this process. First, scientifically defensible water quality standards must be established. Although the Board's regulations do contain standards for dissolved oxygen in estuarine waters, those dissolved oxygen standards have been officially acknowledged by the Board, the other Chesapeake Bay states and EPA to be outdated, inappropriate and unattainable, as was pointed out above. The Court should not force the Board to apply these wrong standards just because they mistakenly have remained in the Board's regulations, especially when the Board is so near to completion of the proper administrative process for correcting them. To impose these standards now would severely compromise the credibility of the Board, its regulatory processes in general, and the Bay restoration in particular.

Second, even if proper water quality standards were in effect, they alone would not provide a reasonable basis for selecting any particular permit limits for the Town's plant. Before the limits could be set for an impaired waterbody, a determination of how to equitably allocate the environmentally acceptable amount of nitrogen and phosphorus among the various sources in the Bay watershed is necessary. This allocation decision is critically important. It drives the level of investment by each source (and, in the case of a publicly owned treatment plant, by its citizen ratepayers). It could also limit the ability of a treatment plant to serve future population growth and economic development. Like the water quality standards, these allocations have not yet been adopted but soon will be when the Board completes the pending amendments to its Water Quality Management Planning Regulations. See Proposed Water Quality Management Planning Regulations, Virginia Register, Volume 21, Issue 12, p. 1469, (Feb. 21, 2005), attached as Exhibit B. DEQ and the Board plan to complete this process in 2005. Without these allocation decisions,

however, choosing any particular nutrient limits for this one permit would be an arbitrary act at best.

The DEQ has long recognized that it cannot lawfully establish nutrient limits without completing the first two regulatory steps.[6] Throughout the process leading up to the issuance of the Town's VPDES permit, the DEQ repeatedly acknowledged this:

- *"Including effluent limits in permits while the [water quality] standards process is underway is not consistent with current law, regulations and procedures."*

  - Alan Pollock, DEQ, Manager, Office of Water Quality Programs, e-mail to Larry Lawson dated July 15, 2003. AR 104094.

- *"Sets limits without legal or technical basis"*

  - DEQ options memorandum commenting on option of issuing a permit with "CBF recommended limits." AR 000013.

- *"Until the time that these procedures are completed, there is no other action that we can take that is supported by current Federal or State regulations or DEQ procedures."*

  - DEQ options memorandum commenting on Tidewater Region Office's Recommendation for issuing permit with no limits for total nitrogen and total phosphorous." AR 000014.

- *"To include limits in a permit where there is no regulatory basis is to impose requirements not in conformance with established water pollution laws and rules."*

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[6] Despite DEQ's long-standing position that it lacked a proper legal basis to impose numeric water quality based limits until the appropriate water quality standards were adopted, DEQ reversed that position, without explanation, in an apparent response to immense pressure instigated by CBF's media campaigns and related efforts. See draft DEQ internal guidance memorandum (Nutrient Monitoring and Maximum Annual Loadings for VPDES Permitted Facilities on the DEQ Chesapeake Bay Program's List of Significant Discharges) at AR 000423. The record, though, contains numerous references to DEQ's earlier and correct position that it lacked a basis to impose such permit limits. VAMWA and AMSA suggest that DEQ did not and could not magically acquire a rational basis for imposing these requirements without completing the basic steps discussed in this brief. Accordingly, the Court should give no deference whatsoever to the agency's unexplained flip-flop on this critical legal issue. See Browning-Ferris Industries v. Residents Involved in Saving the Env't, Inc., 254 Va. 278, 492 S.E.2d 431, 434 (1997) (no deference is applied to agency decision on issue that is purely one of law).

- DEQ Fact Sheet for the Town of Onancock VPDES Discharge Permit. AR 103679.

- *"Any limit, even an annual one, subjects the permittee to possible enforcement if they violate that limit. Because of the lack of data, any limit we imposed on them would be guess work that we would be hard pressed to defend.*

  Our perspective on a limit at this time is that there is no regulatory basis for setting any limit .... In addition, I believe putting any sort of nutrient limit in the Onancock permit would require a new public notice. This time, I suspect the city and/or VAMWA would object to the permit and request another public hearing. I believe they would have a sound regulatory basis for that request."

  - E-mail from James McConathy, DEQ Tidewater Regional Office, to Richard Weeks (Re: nutrient sample data for Onancock), dated January 21, 2004. AR 000011. (emphasis added)

In summary, the law is clear and DEQ staff clearly understood and wrote that at the time the permit was issued Virginia's regulations did not provide a basis for the permit limits that CBF is asking this Court to require.

B. CBF'S CONTENTION THAT FEDERAL AND STATE LAWS REQUIRE SPECIFIC PERMIT LIMITS IN THE ABSENCE OF PROPER WATER QUALITY STANDARDS AND FAIR ALLOCATIONS IS INCORRECT.

CBF argues that federal and state law mandate the particular permit limits CBF's has chosen. CBF first argues that the Virginia Constitution serves as the basis of the authority for the Board and DEQ to impose nutrient permit limits. CBF Br. at 14. CBF constructs an argument contending that because Article XI, section 1 of the Virginia Constitution states that it is "the policy of the Commonwealth to protect its atmosphere, lands and waters from pollution, impairment, or destruction" that the Board and DEQ are required to include the particular nutrient limits at issue here. To contend that this general policy contains a specific "mandate" to an executive department on the details and timing of the permitting process simply stretches the language of the Constitution far beyond any

reasonable construction, particularly as here in the context of a constitutional provision that is not self-executing. See Newport News v. Woodward, 104 Va. 58, 61-62, 51 S.E. 193, 194 (1905) (a constitutional provision "is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.") The weakness of CBF's argument on this contention is demonstrated by the fact that it only devotes one paragraph to this argument and fails to cite any case law in support of it.

CBF's general contentions that the federal and state statutes also require DEQ and the Board to include numeric limits in the Town's permit at this time, though somewhat longer than its constitutional argument, fail for the same reason. CBF Br. at 14-17. CBF again argues from general, undisputed concepts but completely ignores and discredits the important steps critical to establishing a fair and effective watershed-wide nutrient control program – the statutory processes set forth in the legal and regulatory background section above. In essence, CBF would have the Board skip the "ready, aim" and just begin firing.

C. CBF'S PROPOSED LIMITS WOULD BE INCORRECT EVEN IF PROPER WATER STANDARDS AND FAIR ALLOCATIONS HAD BEEN AVAILABLE AT THE TIME OF PERMIT ISSUANCE.

CBF contends that Onancock's permit should contain specific *concentration* limits for nitrogen and for phosphorus. AR 103638-103646. This reflects a fundamental misunderstanding of the regulatory program in general and the Bay restoration effort in particular. The Bay system responds to the mass of nutrients that enter the system, that is, pounds of nitrogen and phosphorus. Therefore, the allocations for Bay dischargers under the Board's proposed regulations and, in the future, the water quality-based effluent limitations that will be established consistent with those allocations, are all properly

expressed in pounds allowed to be discharged over time (pounds per year), as opposed to a specific concentration limit. Thus, even if proper water quality standards were in effect and fair allocations established, the ensuing permit limits would properly be expressed as mass limits (pounds per year), not concentration limits as proposed by CBF.

D. THE COURT SHOULD DENY THE RELIEF SOUGHT BY CBF TO AVOID DISRUPTING THE BOARD'S PENDING RULEMAKINGS.

As discussed above, the Board is now in the final stage of promulgating both nutrient-related water quality standards appropriate for the Bay and its tidal tributaries and wasteload allocations for various point sources, including the Town's facility. These forthcoming regulations will provide – for the first time – a regulatory basis for developing and imposing water quality-based effluent limitations for nutrients.[7]

VAMWA and AMSA have no objection to appropriate permit limits or, more to the point, to proceeding with additional capital upgrades of Virginia's public wastewater infrastructure where such projects will yield meaningful progress toward meeting the Commonwealth's water quality goals. However, with over one billion dollars in capital costs alone anticipated at point source facilities, it is only reasonable to expect the state administrative agencies to comply with the applicable laws and regulations that provide an orderly framework for making scientifically sound and equitable decision. CBF's proposal to skip the most fundamental steps and jump straight to whatever permit limits it believes are appropriate is a sure path to disagreement and delay. The Court should decline CBF's

[7] It bears noting that Virginia and the other Bay jurisdictions are national leaders in developing nutrient-related water quality standards. EPA generally does not expect most states to accomplish for several years yet what Virginia and the Bay jurisdictions have nearly completed.

invitation to disrupt the Board's nearly-completed rulemakings, which will put the Board on course for issuing permit limits within the coming months.

CONCLUSION

The relief that CBF asks this Court to order DEQ and the Board to impose is contrary to existing laws and regulations, would be arbitrary if imposed, and would both preempt and conflict with the Board's nearly-completed regulations governing future efforts to restore the Bay. VAMWA and AMSA – whose members are leaders in reducing nutrients and whose members undoubtedly will continue to lead – respectfully urge the Court to dismiss the petition for appeal.

VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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