

In The  
**Supreme Court of Virginia**

RECORD NO. 992575



**ALLIANCE TO SAVE THE MATTAPONI,  
 Chesapeake Bay Foundation,  
 Mattaponi And Pamunkey Rivers Association, Sierra Club,  
 Paulette Berberich, and Warren Mountcastle,**

*Appellants,*

v.

**COMMONWEALTH OF VIRGINIA, ex. Rel.,  
 State Water Control Board, and City of Newport News,**

*Appellees.*

**APPENDIX**

Katherine E. Slaughter  
 Deborah M. Murray  
 SOUTHERN ENVIRONMENTAL  
 LAW CENTER  
 201 West Main Street  
 Suite 14  
 Charlottesville, VA 22902  
 (804) 977-4090 Telephone  
 (804) 977-1483 Facsimile

*Counsel for Appellants*

Deborah Love Feild  
 Assistant Attorney General  
 OFFICE OF THE  
 ATTORNEY GENERAL  
 900 East Main Street  
 Richmond, VA 23219  
 (804) 786-0098 Telephone  
 (804) 786-0034 Facsimile

*Counsel for Appellees*

James E. Ryan, Jr.  
 George A. Somerville  
 Matthew M. Farley  
 MAYS & VALENTINE, L.L.P.  
 1111 East Main Street  
 Richmond, VA 23219  
 (804) 697-1200 Telephone  
 (804) 697-1339 Facsimile

*Counsel for Appellees*

M. Scott Hart  
 Christian L. Connell  
 MAYS & VALENTINE, L.L.P.  
 4425 Corporation Lane  
 Suite 420  
 Virginia Beach, VA 23466  
 (757) 518-3200 Telephone  
 (757) 518-3210 Facsimile

*Counsel for Appellees*

Stuart E. Katz  
 Allen L. Jackson  
 CITY OF NEWPORT NEWS  
 2400 Washington Street  
 Newport News, VA 23607  
 (757) 926-8416 Telephone  
 (757) 926-8549 Facsimile

*Counsel for Appellees*



## TABLE OF CONTENTS

### Appendix Page

Petition for Appeal to The Circuit Court for the City of Newport News, with Attached Exhibit, filed February 13, 1998 .....	1
--	---

### Exhibit:

A. Affidavit of Eudora B. Campbell sworn to February 4, 1998 .....	20
--	----

Affidavit of William C. Baker sworn to February 10, 1998 .....	24
--	----

Affidavit of Margaret S. Baybak sworn to February 10, 1998 .....	27
--	----

Affidavit of William R. Perritt sworn to February 10, 1998 .....	29
--	----

Affidavit of Thomas C. Rubino sworn to February 10, 1998 .....	31
--	----

Affidavit of Charles W. Smith, with Exhibits, sworn to February 11, 1997 .....	33
---	----

Exhibit, continued:

Affidavit of Billy W. Mills, Jr. sworn to February 9, 1998 .....	43
Affidavit of MaryBeth Hawn sworn to February 9, 1998 .....	47
Affidavit of John B. Murray sworn to February 9, 1998 .....	50
Affidavit of Garrie Rouse sworn to February 10, 1998 .....	53
Affidavit of Robert Lee Stevens sworn to February 9, 1998 .....	56
Affidavit of John Henry Walker, III sworn to February 9, 1998 .....	59
Affidavit of Jay Kardan sworn to February 12, 1998 .....	62
Affidavit of Joanne Fridley sworn to February 9, 1999 .....	65
Affidavit of Tyla Matteson sworn to February 7, 1998 .....	67

Exhibit, continued:

Affidavit of Paulette P. Berberich sworn to February 9, 1998 .....	70
Affidavit of Warren Mountcastle sworn to February 9, 1998 .....	74
City of Newport News' Demurrer filed March 11, 1998 .....	77
Commonwealth of Virginia <i>ex rel.</i> State Water Control Board's Demurrer filed March 17, 1998 .....	80
Order of The Honorable Robert W. Curran Taking the Case Under Advisement entered August 7, 1998 .....	87
Final Order of The Honorable Robert W. Curran entered September 11, 1998 .....	90
Opinion of The Honorable Rosemarie Annunziata Re: Affirm the Decision of the Circuit Court filed October 5, 1999 .....	93
Assignment of Error .....	115

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD

Appellee.

Serve:

Thomas L. Hopkins, Director  
Department of Environmental Quality  
and Secretary  
State Water Control Board  
629 East Main Street  
Richmond, VA 23219

CITY OF NEWPORT NEWS, a Virginia Municipal  
Corporation

Serve:

Stuart E. Katz, City Attorney  
2400 Washington Street  
Newport News, VA 23607

Mattaponi Indian Tribe  
MATTAPONI INDIAN RESERVATION  
West Point, VA 23181

Serve:

David S. Bailey, Counsel  
16397 Triple Creek Lane  
Beaverdam, VA 23015  
804/227-3122

Chancery No.

29998 AM

## PETITION FOR APPEAL

IN RE: Approval of Virginia Water Protection Permit No.  
93-0902 for the King William Reservoir Project

### CASE DECISION APPEALED FROM

1. Pursuant to Virginia Code Ann. §§ 62.1-44.15:5, 62.1-44.15(5), 62.1-44.29 and 9-6.14:16 (Supp. 1997), Appellants Alliance to Save the Mattaponi, et al. ("Appellants") do hereby appeal the case decision made December 16, 1997 by the State Water Control Board ("SWCB") to issue on December 22, 1997, Virginia Water Protection ("VWP") Permit No. 93-0902 to the City of Newport News ("Applicant") for a proposed drinking water reservoir project ("Project").

2. Appellants believe that such decision was prematurely made and was not supported by substantial evidence in the record on the Project's effects on applicable water quality standards and the potential destruction of a fish hatchery, and harmful impacts on shad, herring, and striped bass, wetlands, and other instream beneficial uses of the Mattaponi River and Cohoke Mill Creek.

3. Pursuant to Rule 2A of the Supreme Court of Virginia Appellants filed a Notice of Appeal with the State Water Control Board, with a copy to the City of Newport News on January 15, 1998, and hereby submit this petition for consideration by the Court.

### PARTIES

4. All of the following parties have participated, in

person or by comment, in the public comment process related to the VWP Permit and allege that they meet the standard for obtaining judicial review under Va. Code Ann. § 62.1-44.29 (Supp. 1997). All parties would suffer actual or imminent injury or represent members or citizens who would suffer such injury; their injuries are traceable to the permit decision by the Board, and such injuries would be redressed by a favorable decision of this court. Id. (See Affidavits at Exhibit A Attachment.)

5. The Alliance to Save the Mattaponi ("Alliance"), a 1,100-member unincorporated organization claims that the proposed permit allowing construction of the Project will threaten irrevocable harm to the ecosystems of the Mattaponi River and Cohoke Creek region -- irreplaceable natural resources which its members use for boating, fishing, recreation and water supply.

6. The Chesapeake Bay Foundation, Inc. ("CBF"), a nonprofit corporation organized and existing under the laws of the State of Maryland, with a state office in Richmond, Virginia, is a regional conservation organization with approximately 23,000 members residing in Virginia. The Project would injure its members who regularly use and enjoy the Mattaponi River, a tributary of the Bay for swimming, boating, kayaking, canoeing, sport fishing, hunting, beach walking, snorkeling, and other educational and recreational pursuits.

7. The County of King and Queen is a Virginia governmental body and locality through whose boundaries the Mattaponi River

flows. It is adversely affected by the decision to issue VWP Permit No. 93-0902 because the Project will impact the quality of the Mattaponi River water and future water withdrawals from the River and discharges into the River by the County and its citizens with resulting impacts on King and Queen County land use policies, economic and financial status, and recreational opportunities and agricultural activities within its jurisdiction.

8. The Mattaponi and Pamunkey Rivers Association ("MPRA"), a 350-member nonprofit corporation organized under the laws of the Commonwealth of Virginia, believes that the proposed construction of the Project will cause injury to the rivers and ecosystems which it strives to enhance and protect for its members' benefit for fishing, swimming, canoeing, and other recreational uses.

9. The Sierra Club, a national nonprofit corporation organized under the laws of the State of California has over 10,000 members in its Virginia Chapter and is dedicated to protecting and restoring the quality of the natural and human environment. Its members use and enjoy the Mattaponi for fishing, swimming, canoeing, and other aesthetic and recreational purposes. The Sierra Club, along with the Alliance to Save the Mattaponi, submitted an independent analysis of the Lower Peninsula Regional Raw Water Supply Plan ("Supply Plan") to the State Water Control Board for its consideration in determining



the actual need for increased water supply.

10. Paulette P. Berberich, a landowner on Cohoke Mill Creek, would lose 15-20 acres of her property and possibly her home adjacent to the proposed reservoir. She would also be harmed by loss of wildlife habitat on her land and her enjoyment of its use.

11. Warren Mountcastle is a riparian landowner on the Mattaponi River adjacent to the location of the water intake pipe. He also uses the River for swimming, fishing, hunting, and photography. Therefore, his enjoyment of these uses would be injured by the location the pipe and the noise from the intake, and he may also suffer a potential decrease in value of his property.

#### **BACKGROUND AND REASONS WHY CASE DECISION UNLAWFUL**

12. The Project would include a water intake and pumping station on the Mattaponi River at Scotland Landing in or near King William County that would withdraw up to 75 million gallons per day from the Mattaponi River. The Project would also involve a reservoir impoundment on Cohoke Mill Creek resulting in the inundation of 437 acres of wetlands, 21 miles of perennial and intermittent streams, and 875 acres of upland wildlife habitat, and additional alteration of 105 acres of downstream wetlands -- all of which would be harmful to fish and wildlife in the York River watershed. The Project also would include construction of two pipelines -- one to convey water from the Mattaponi River to

the Reservoir and a second from the Reservoir to the western boundary of Newport News' existing water supply system.

13. The Clean Water Act ("CWA") requires that any project that will destroy or fill wetlands must apply for and receive a permit from the U.S. Army Corps of Engineers ("Corps"), 33 U.S.C. § 1344 ("§ 404 permit"), and certification by the state that it complies with the Clean Water Act and applicable state water law. 33 U.S.C. § 1341(a)(2) ("§ 401 permit").

14. Under the CWA, the Corps may not issue a § 404 permit if there is a practicable alternative which would have less adverse impacts than the proposed project. 33 C.F.R. § 230.10(a).

15. In addition and prior to a decision on § 404 permit issuance under the CWA, the Corps must complete an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") to identify and compare the environmental effects of the proposed project with those of any alternatives. 42 U.S.C. § 4332.

16. Newport News initiated studies in 1987 to obtain a permit for a new reservoir in King William County and to meet requirements of the Clean Water Act and state law. The application for the Virginia Water Protection ("VWP") permit was submitted July 1, 1993, to the Virginia Department of Environmental Quality ("DEQ").

17. The Corps published a Draft Environmental Impact

Statement ("DEIS") February 4, 1994 on the proposed Project; a Supplement to the DEIS, January 26, 1996; and the Final Environmental Impact Statement ("FEIS") January 24, 1997. The public comment period on the FEIS ended July 25, 1997. To date, the Corps has not issued a record of decision on the FEIS but instead has required further study of a number of issues, and has initiated review of Lower Virginia Peninsula Regional Raw Water Supply Plan and analyses of that plan by Dr. Michael Siegel and Thomas Muller ("Siegel & Muller Report") and by Dr. Don Phillips ("Phillips Report"); both analyses were submitted to the Corps and to the State Water Control Board.

18. In its July 25, 1997 comments on the FEIS, the Environmental Protection Agency ("EPA") stated that mitigation of wetlands loss and results of habitat evaluation procedure, as well as salinity impacts on fish and wildlife, including shad, should be addressed in a Supplement to the FEIS. Under the CWA, the EPA Administrator can veto any Corps permit determined to have unacceptable adverse impacts. Thus, EPA's recommendation for a FEIS Supplement and NEPA documentation prior to a permit decision signals its judgment that any Corps' decision on the § 404 permit would be premature. See 33 U.S.C. § 1344(c). Likewise, mitigation of wetlands and habitat losses and salinity impacts remain unresolved issues in the state VWP Permit process.

19. Virginia's obligations under § 401 are fulfilled by the Virginia Water Protection ("VWP") statute. Va. Code § 62.1-

44.15:5; see also 62.1-44.15(5). The VWP Permit public participation process began with a public notice of a draft VWP Permit published March 1, 1997, for public comment. A public hearing was held March 31, 1997, and the comment period closed July 25, 1997. An additional public hearing was held December 16, 1997, but was open only to those who previously participated in the comment process. At the conclusion of that hearing, the Board voted to issue the VWP Permit, subject to special conditions.

20. The VWP statute requires protection of instream beneficial uses, including "the protection of fish and wildlife resources and habitat, recreation, cultural and aesthetic values ..." Va. Code Ann. § 62.1-44.15:5(B) (Supp. 1997) (emphasis added).

21. The DEQ staff received numerous comments during the public comment period relating to impacts on existing beneficial uses of the Mattaponi River, including impacts on cultural uses posed by the project. The Phase I Cultural Resources Survey, submitted to the DEQ in the course of its evaluation, states that 118 Native American archeological sites, with spiritual as well as historic value, will be inundated by the proposed reservoir, pump station, or pipeline. In addition, other comments addressed the injury caused by water withdrawal to the fishery resource for all its users and, in particular, the Mattaponi Tribe's licensed fish hatchery on the Mattaponi River, which is a primary source

of the Tribe's livelihood. Finally, the culture of the entire region will be harmed by the impacts to the Mattaponi River and its popular use for boating, swimming, canoeing, and recreational and aesthetic enjoyment.

22. In issuing permits, such as the VWP, the SWCB is also obligated to consider limitations "as may reasonably be required for the beneficial uses . . . such right shall not extend to the waste or unreasonable use or unreasonable method of use of such water." Va. Code Ann. § 62.1-11(E). VWP Permits also may contain conditions, "including but not limited to the volume of water which may be withdrawn as a part of the permitted activity." Va. Code Ann. § 62.1-44.15:5(B) (Supp. 1997); see also Va. Reg. 9 VAC 25-210-110.1 (1996).

23. During the public comment period, the DEQ staff also received three studies analyzing the supply/demand needs projected by the City of Newport News in its Supply Plan: the Siegel & Muller Report; the Phillips Report; and Rocky Mountain Institute Report. The studies demonstrate flaws, errors, and inaccuracies in the City's needs projection and question the need for the reservoir. In addition, the Phillips Report and Rocky Mountain Institute Report criticize the City's failure to adequately address water conservation practices in its efforts to meet demand.

24. State Water Control Board regulations also provide that the State Water Control Board will, in authorizing any specific



water resource project, consider the extent to which inequities and hardship placed on a community or area without just compensation may be present and the steps necessary to alleviate both short and long range consequences of such inequities. Va. Reg. 9 VAC 25-390-30 (1996).

25. At the public hearing held by the SWCB on March 31, 1997, King and Queen County asserted that the SWCB did not have before it a reasonably sufficient factual basis to analyze the potential for significant changes in natural salinity intrusion into the Mattaponi River resulting from the withdrawal of water from the Mattaponi River under the requested permit. In support of this assertion King and Queen County submitted to the SWCB the written reports of Linda Huzzey, Ph.D., and Wu-Seng Lung, Ph.D., experts in the field of water quality modeling. King and Queen County reiterated and expanded on these assertions in written comments submitted to the SWCB on or about April 14, 1997 and July 18, 1997. King and Queen County asserted that one of the primary deficiencies of the study submitted by Newport News predicting the potential for salinity intrusion into the Mattaponi River (the "Hershner Study") was that the computer modeling technology utilized was deficient, and specifically that the Hershner Study utilized one-dimensional modeling rather than multi-dimensional salinity modeling.

26. Multi-dimensional modeling is designed to simulate salinity changes across the breadth and depth of the river

whereas one-dimensional modeling simulates salinity changes at only a single point. King and Queen County asserted that the one-dimensional salinity modeling utilized by Newport News was not sufficient as a predictive tool and that the Hershner Study was otherwise inadequate for the purposes intended. Newport News responded to the assertions of King and Queen County by placing statements in the record that the one-dimensional salinity modeling utilized and that the Hershner Study in general are sufficient. At no time has the SWCB considered multi-dimensional salinity modeling as applied to the potential for significant changes in natural salinity intrusion into the Mattaponi River -- changes that would result from the permitted withdrawal of water from the Mattaponi River.

27. However, the final VWP Permit included Special Condition D.4., under which the Applicant is required to utilize multi-dimensional salinity modeling (not one-dimensional salinity modeling) to develop a salinity monitoring plan for the Mattaponi River. Special condition D.4. states in part that "the permittee's salinity monitoring plan will be required to make up any shortcomings of existing salinity monitoring programs." The salinity monitoring plan is designed to monitor changes in Mattaponi River water salinity which actually occur as a result of the Permit. The conditions set forth in Special Condition D.4. reflect a finding of the SWCB that multi-dimensional salinity modeling is necessary to accurately analyze the impact

of the reservoir withdrawals under the Permit on instream beneficial uses and applicable water quality standards.

28. The final VWP Permit also include Special Conditions B.4, requiring reservoir releases to assure a minimum flow below the dam to equal that above the Dam, and B.5, imposing minimum flow conditions, below which water cannot be withdrawn from the Mattaponi River.

29. Newport News filed its first notice of appeal on December 17, 1997. VWP Permit No. 93-0902 was issued by DEQ December 22, 1997. Newport News followed with a second notice of appeal on January 13, 1998 designating the Circuit Court of Newport News to consider the appeal. Appellant Mattaponi Tribe and Appellants Alliance to Save the Mattaponi, et al. filed notices of appeal to the VWP Permit on January 15, 1998.

#### **ERRORS ASSIGNED**

30. Appellants assert that the Board refused to consider substantial evidence in the record relating to cultural and aesthetic instream beneficial uses; the reasonableness of the amounts of water withdrawal; and the impact of the water withdrawal, especially in relation to salinity intrusions and wetlands losses on water quality and instream beneficial uses. Thus, the Board erred as a matter of law in failing to follow the requirements of the Clean Water Act, the State Water Control Law, and the regulations promulgated under these statutes.

31. Error 1: The SWCB failed to make a finding that the permit is consistent with the Clean Water Act. A determination of consistency with the CWA is an express requirement under state law. VA Code Ann. § 62.1-44.15:5(B). However, because of a lack of a record of decision on the FEIS by the Corps and the EPA's assessment that a Supplement to address wetlands and habitat mitigation and salinity impacts is needed to complete the NEPA process prior to a permit decision under the CWA, any decision on consistency determination would be premature.

32. Error 2: The SWCB failed to act within the statutory requirements to consider all existing beneficial uses. Although the record contained substantial evidence about the harm to instream beneficial uses, such as impacts on wetlands, flora and fauna, the Mattaponi Tribe's fish hatchery, aesthetic and recreational uses of the river, the SWCB did not consider this information. Va. Code Ann. § 62.1-44:15:5(B) and Va. Reg. 9 VAC 25-210-80 (1996).

33. Error 3: The SWCB has failed to consider the impacts to instream beneficial uses, including cultural uses. Under Virginia law and regulation, impacts to instream beneficial uses must be considered. Va. Code Ann. § 62.1-44:15:5(B); Va. Reg. 9 VAC 25-220-10 (1996). The proposed reservoir at Cohoke Mill Creek will inundate 118 Native American archeological sites, many

of which date back to 7,540 and 6,200 B.C. See Phase I Cultural Resources Survey by Maar Associates, Inc. and submitted to DEQ. In addition, the reservoir will injure the state licensed fish hatchery owned by the Mattaponi Tribe and the use of the river for fishing, swimming, boating, canoeing and aesthetic enjoyment.

34. Error 4: The SWCB unlawfully issued the VWP Permit in violation of Surface Water Quality Standards and its antidegradation policy. Water quality standards require protection of all beneficial uses, including propagation and growth of all aquatic life, including game, fish, recreational uses, such as swimming and boating, and production of marketable natural resources, such as fish and shellfish. Va. Reg. 9 VAC 25-260-20 (1996). In addition to the general water quality standard, the antidegradation policy requires that existing water quality not be degraded. Without three-dimensional salinity modeling, the SWCB has no substantial evidence that it is complying with the antidegradation policy, which states "Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Va. Reg. VAC 25-260-30(A) (1996).

35. Error 5: The SWCB did not consider substantial evidence in the record relating to the need for the water supply. Va. Code Ann. § 62.1-11(E) (1992) declares the use of state



waters, as a public resource of the Commonwealth, "shall be limited to such water as may reasonably be required for the beneficial use of the public to be served; such right shall not extend to the waste or unreasonable use or unreasonable method of use of such water." Furthermore, under Va. Reg. 9 VAC 25-210-80 (A) (3) (d) (1996), requirements for a complete permit application include "information on how the demand for surface water was determined." Although the City of Newport News submitted information upon which its need was based, the DEQ staff also received public comment in regard to the stated need. In particular, the Board refused to consider independent studies (Mueller and Siegel Report, Phillips report) that questioned Newport News' stated need for the quantity of surface water withdrawal. The Board also refused to consider that such withdrawal could have extremely deleterious impacts on existing beneficial uses, including wetlands, fish and wildlife habitat, recreation, cultural and aesthetic values. Thus, under an inappropriately narrow construction of its authority under Va. Code Ann. § 62.1-44.15 and ignoring the requirements of Va. Code § 62.1-11(E) (F), the SWCB did not thoroughly consider the need.

36. Error 6: The SWCB failed to require multi-dimensional salinity modeling as a predictive tool to accurately analyze the potential impacts. Because the SWCB did not apply a multi-dimensional model of salinity intrusion, it could not accurately

analyze the impacts on instream beneficial uses and applicable water quality standards. The SWCB also failed to require Newport News to correct other deficiencies of the Hershner Study. The SWCB therefore did not have a reasonable assurance that the activity authorized by the VWP Permit will protect existing instream beneficial uses and will not violate applicable water quality standards. The decision of the SWCB to issue the VWP Permit therefore was arbitrary and capricious and an abuse of discretion.

37. Error 7: The SWCB erred in authorizing the specific reservoir project without considering the hardship on other communities. Issuance of the VWP Permit will impose a hardship on King and Queen County without just compensation. The SWCB has not considered the steps necessary to alleviate such inequity, as required by Va. Reg. 9 VAC 25-390-30(7) (1996).

38. Error 8: The SWCB erred in approving the VWP Permit with a conceptual rather than a final wetlands mitigation plan. Under Va. Reg. 9 VAC § 25-210-80(A)(2)(1996), requirements for a complete permit application include a plan for mitigation of unavoidable impacts. Yet the VWP Permit fails to provide for a contingency in the event irreparable damage will result from the project. Adequate assurance that mitigation can, in fact, be accomplished has not been provided because a final mitigation

plan has not been developed.

#### **STATEMENT OF RELIEF**

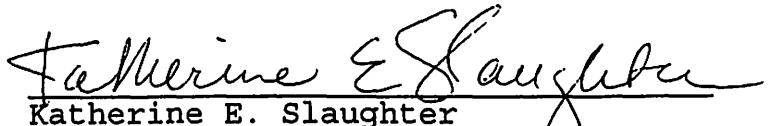
39. Appellants respectfully request that the matter be remanded to the State Water Control Board to reconsider its decision and to include in its reconsideration review of the cultural and aesthetic instream beneficial uses; assessment of the need for the quantity of water and practicable alternatives to obtain such water; and to require the use of multi-dimensional salinity modeling to analyze the potential impact of the Project on the instream beneficial uses of the Mattaponi River. They request that the SWCB make its decision regarding the permit based on substantial evidence that existing instream beneficial uses will be protected and applicable water quality standards will not be violated by such permit.

40. Alternatively, if the court should find no error in the SWCB's initial consideration of these matters, we ask the court to uphold the Board's special conditions under the authority granted by the VWP statute Va Code Ann. § 62.1-44.15:5(B), and Clean Water Act at 33 U.S.C. § 1341(a)(2).


41. Appellants also request award of reasonable costs, including attorneys' fees expended for this matter in accordance with Va. Code § 9-6.14.21 and any other applicable state provision.

42. Appellants also seek any other such relief as the court may find appropriate.

Respectfully submitted,

  
Katherine E. Slaughter

Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, Virginia 22902  
804/977-4090  
Attorney for Appellants

  
Paul C. Jacobson  
L. Lee Byrd

Sands, Anderson, Marks & Miller  
The Ross Building  
801 East Main St., Suite 1400  
Post Office Box 1998  
Richmond, VA 23218-1998  
804/683-7210  
Counsel for King and Queen County

# **EXHIBIT A**

## **Affidavits**

### **ALLIANCE TO SAVE THE MATTAPONI**

Eudora B. Chappell

### **CHESAPEAKE BAY FOUNDATION, INC.**

William C. Baker, President

Margaret S. Babyak

William R. Peritt

Thomas C. Rubino

### **THE COUNTY OF KING AND QUEEN**

Charles W. Smith, County Administrator (w/attachments)

### **MATTAPONI AND PAMUNKEY RIVERS ASSOCIATION**

Billy Mills, Jr., Executive Director

MaryBeth Hawn

John B. Murray

Garrie Rouse

Robert Lee Stephens

John Henry Walker, III

### **SIERRA CLUB**

Jay Kardan, Conservation Chair

Joanne Fridley

Tyla Matteson

### **PAULETTE P. BERBERICH**

### **WARREN MOUNTCASTLE**



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

CITY OF King William, to wit:

County

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, DORI CHAPPELL, who,  
being first duly sworn, stated that: EUDORA B.

1. I am a resident of King William County. My address is  
Route 1, Box 533. I am a member of the Steering Committee, as well  
as a founding member, of the Alliance to Save the Mattaponi.

2. The Alliance to Save the Mattaponi (Alliance) is an  
unincorporated coalition organized in response to the King William  
Reservoir proposal. The Alliance is opposed to the project because

it will irrevocably harm the ecosystems of the Mattaponi River and the Cohoke Creek watershed.

3. The Alliance currently has over 1100 supporters nationwide. The local members are a diverse group of farmers, landowners, retirees, and Native Americans from King and Queen, King William, and New Kent, York, and Essex Counties. Members include property owners on the Mattaponi River and in the Cohoke Creek region.

4. The Alliance and its members engage in activities to promote public awareness of the proposed King William Reservoir and participation in the government decision making process.

5. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential environmental impacts threatened by the proposal. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. Water withdrawal--up to 75 million gallons per day--from the Mattaponi River threatens the natural river water quality by salinity intrusion. As spokesperson for the Alliance, I participated in two public hearings for the Virginia Water Protection Permit held March 31, 1997, and December 16, 1997. In addition, I submitted written comments to the Department of

Environmental Quality, along with many other Alliance members, during the public comment period.

6. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. The project will harm the quality of life for many Alliance members. The projected increase in salinity in the Mattaponi River will harm this fresh water fishery resource. The destruction of 437 acres of wetlands will permanently harm rich and diverse ecosystems in the Cohoke Creek watershed.

7. As Steering Committee member, and spokesperson, for the Alliance I have personal knowledge that:

a. many Alliance members live in the watershed that will be affected by the construction of the King William Reservoir;

b. there are Alliance members who own property adjacent to and near the Mattaponi and Pamunkey Rivers and Cohoke Creek;

c. there are Alliance members who withdraw water for agricultural purposes from the Mattaponi Rivers;

d. many Alliance members obtain their water supply from the groundwater resources in the watershed;

e. many Alliance members frequently fish, swim, and boat in the Mattaponi and Pamunkey Rivers and hike and observe wildlife in the rivers' watersheds.

f. some Alliance members' livelihoods are derived from the recreational opportunities, aesthetic values, and cultural assets that characterize the two-rivers region.

8. Therefore, I believe that members of the Alliance will be injured by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

Eudora B. Chappell

Dori Chappell

Eudora B.

Subscribed and sworn to before me this 4<sup>th</sup> day of February, 1998.

Mary H. Hall

Notary Public

My Commission Expires:

October 31, 2000

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,	)	
CHESAPEAKE BAY FOUNDATION, INC.,	)	
THE COUNTY OF KING AND QUEEN,	)	
MATTAPONI AND PAMUNKEY RIVERS	)	
ASSOCIATION, SIERRA CLUB, PAULETTE	)	
BERBERICH, and	)	
WARREN MOUNTCASTLE,	)	CHANCERY NO.
	)	
Appellants	)	
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA, <u>ex rel.</u>	)	
STATE WATER CONTROL BOARD,	)	
	)	
Respondents	)	

STATE OF MARYLAND  
CITY OF ANNAPOLIS, to wit:

This day personally appeared before me, a Notary Public in and for the State of Maryland, William C. Baker, President of the Chesapeake Bay Foundation, Inc., who being first duly sworn, stated that:

1. I am the President of the Chesapeake Bay Foundation, Inc. (CBF). I am over the age of twenty-one (21) years and competent to testify. I am authorized to testify on behalf of CBF in my capacity as President. My office is located at 162 Prince George Street, Annapolis, Maryland 21401.

2. CBF is a 501(c)(3) corporation, licensed to do business in Virginia, and founded in 1966 under the laws of Maryland with its mission being to restore and sustain the Chesapeake Bay and its rivers by substantially improving the water quality and productivity of the watershed with respect to water clarity, resilience of the system, and diversity and abundance of living resources, and to maintain a high quality of life for the people of the Chesapeake Bay region.



CBF operates offices in Maryland, Pennsylvania and Virginia, including offices in Richmond and Norfolk. Its programs include educational activities with students (secondary and high school) and adults, on-the-ground restoration projects, conservation easement and wildlife refuge endeavors, legislative initiatives and other efforts across the Chesapeake Bay watershed.

3. CBF has approximately 66,000 members, approximately 23,000 of whom reside in Virginia. CBF members use the Mattaponi River for canoeing, swimming, fishing, as well as participation in the aforementioned CBF programs and activities.

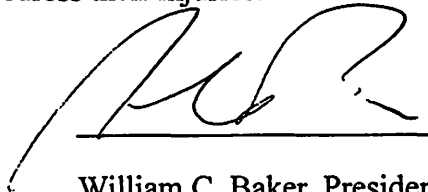
4. CBF maintains an Environmental Education Program (EEP) and each year takes over 24,000 people out on the waters of the Chesapeake Bay and its tributaries in Virginia, Maryland, and Pennsylvania in canoes and workboats that serve as floating classrooms. Annually, CBF conducts three to four educational activities on the Mattaponi and Pamunkey Rivers. CBF has a significant financial interest invested in its EEP including but not limited to investments in vehicles, canoes, workboats, water quality testing equipment, books, and other educational materials. Students and adults pay CBF a fee for participating in its EEP and CBF relies on receipt of those payments as part of its economic viability.

5. The issuance of Virginia Water Protection Permit No. 93-0902 (the permit) and the proposed reservoir project would impact CBF's ability to conduct its educational programs on the Mattaponi River. The construction of the proposed intake structure on the Mattaponi River would have short and long term noise impacts affecting CBF's educational programs on the river. The proposed project allowed by the permit would also impact CBF's missional objectives in the areas of water quality protection and resilience of the Chesapeake Bay ecosystem as it will result in the destruction of 437 acres of wetlands. A favorable decision by the court will redress CBF's injuries.

6. CBF has actively participated in the public comment process related to the final decision by the Virginia State Water Control Board in its issuance of the permit; CBF presented

written and verbal testimony during the public comment process.

7. CBF's interests in the above captioned case extend beyond the financial and missional impacts to it as an organization to its representational capacity for its members. CBF members live in the watersheds affected by the proposed reservoir which is the subject of the permit; there are CBF members who are waterfront landowners along the Mattaponi within these watersheds. CBF members use the natural resources in these watersheds for a variety of activities such as canoeing, swimming, boating, and birdwatching; these members will be injured by the ecological consequences of the permit's issuance and the proposed reservoir project. These members have participated in the public comment process related to the final decision by the Virginia State Water Control Board in its issuance of the permit by presenting written and/or verbal testimony. A favorable decision by the court will redress their injuries.

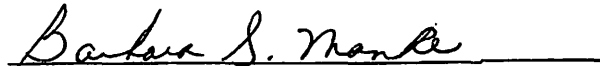


William C. Baker, President

Chesapeake Bay Foundation, Inc.

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 1998.

STATE OF MARYLAND;  
County of Anne Arundel



Notary Public

My commission expires: 10/1/01

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,	)	
CHESAPEAKE BAY FOUNDATION, INC.,	)	
THE COUNTY OF KING AND QUEEN,	)	
MATTAPONI AND PAMUNKEY RIVERS	)	
ASSOCIATION, SIERRA CLUB, PAULETTE	)	
BERBERICH, and	)	
WARREN MOUNTCASTLE,	)	CHANCERY NO.
	)	
Appellants	)	
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA, <u>ex rel.</u>	)	
STATE WATER CONTROL BOARD,	)	
	)	
Respondents	)	

COMMONWEALTH OF VIRGINIA  
COUNTY/CITY OF King + Queen Cty. to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, Margaret S. Babyak, who being first duly sworn, stated that:

1. I am over the age of twenty-one (21) years and competent to testify.
2. I am a resident of King and Queen County and currently reside in Walkerton, Virginia (Rural Route 1, Box 7 23177).
3. I am an owner of approximately one-hundred and ninety (190) acres of real property (the property) in Walkerton; this property is located on the Mattaponi River.
4. Since 1933, my family has operated a camp on the property. Up until approximately 1992, the camp was a residential facility for boys; since 1992, it has served as a weekend campsite for organizations like the Tuckahoe (Richmond, Virginia) YMCA. The campsite portion of the property is improved with a mess hall, recreation hall, ten (10) cabins, and toilet facilities. Currently, all improvements but the cabins are used for weekend camping during the spring,

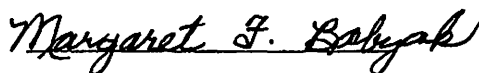
summer and fall.

5. My family and I, as well as those using the property for camping purposes, use the Mattaponi River for fishing, swimming, boating and other recreational and environmental educational purposes. The issuance of Virginia Water Protection Permit No. 93-0902 (the permit) by the Virginia State Water Control Board and the proposed reservoir project will cause ecological damage which will injure use of the river by my family, those using the campsite, and me.

6. I am a member of the Chesapeake Bay Foundation, Inc. (CBF).

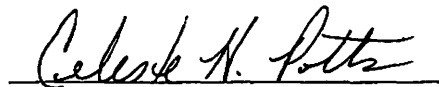
7. I participated in the public comment process related to the final decision by the Virginia State Water Control Board to issue the permit by submitting written comments and attending the public hearing.

8. The objections, concerns and interests raised by CBF in written and verbal testimony in the aforementioned public comment process, as well as in the notice and petition filed in this court proceeding, are representative of my objections, concerns and interests.



Margaret ~~F~~. Babyak  
(MFB)

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 1998.



Notary Public

My commission expires: November 30, 2001

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.,  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB, PAULETTE  
BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO.

COMMONWEALTH OF VIRGINIA  
COUNTY/CITY OF King William Cty., to wit:

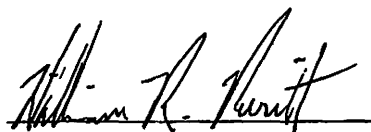
This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, William R. Perritt, who being first duly sworn, stated that:

1. I am over the age of twenty-one (21) years and competent to testify.
2. I am a resident of King William County and currently reside in Aylett, Virginia (171 Harris Road 23009).
3. I am an owner of approximately three (3) acres of real property (the property) in Aylett; this property is located on the Mattaponi River.
4. I regularly use the Mattaponi River for fishing, swimming, boating and other recreational purposes. I also occasionally serve as a river guide on parts of the Mattaponi. The issuance of Virginia Water Protection Permit No. 93-0902 (the permit) by the Virginia State Water Control Board and the proposed reservoir project will cause ecological damage which will injure my use of the river.

6. I am a member of the Chesapeake Bay Foundation, Inc. (CBF).

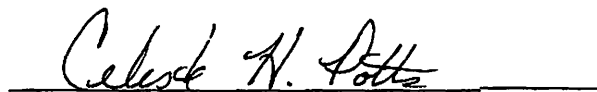
7. I participated in the public comment process related to the final decision by the Virginia State Water Control Board to issue the permit by submitting written comments and testifying at the public hearing.

8. The objections, concerns and interests raised by CBF in written and verbal testimony in the aforementioned public comment process, as well as in the notice and petition filed in this court proceeding, are representative of my objections, concerns and interests.



William R. Perritt

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 1998.



Notary Public

My commission expires: November 30, 2001

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,	)	
CHESAPEAKE BAY FOUNDATION, INC.,	)	
THE COUNTY OF KING AND QUEEN,	)	
MATTAPONI AND PAMUNKEY RIVERS	)	
ASSOCIATION, SIERRA CLUB, PAULETTE	)	
BERBERICH, and	)	
WARREN MOUNTCASTLE,	)	CHANCERY NO.
	)	
Appellants	)	
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA, <u>ex rel.</u>	)	
STATE WATER CONTROL BOARD,	)	
	)	
Respondents	)	

COMMONWEALTH OF VIRGINIA  
COUNTY/CITY OF King + Queen County to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, Thomas C. Rubino, who being first duly sworn, stated that:

1. I am over the age of twenty-one (21) years and competent to testify.
2. I am a resident of King and Queen County and currently reside in King and Queen Courthouse, Virginia (HCR 2, Box 25-D).
3. I am an owner of approximately fifteen (15) acres of real property (the property) in King and Queen Courthouse; this property is located approximately four (4) miles from the Mattaponi River.
4. I regularly use the Mattaponi River for fishing, swimming, boating and other recreational as well as scientific research. The issuance of Virginia Water Protection Permit No. 93-0902 (the permit) by the Virginia State Water Control Board and the proposed reservoir project will cause ecological damage which will injure use of the river by me.

5. I am a member of the Chesapeake Bay Foundation, Inc. (CBF).
6. I participated in the public comment process related to the final decision by the Virginia State Water Control Board to issue the permit by submitting written comments and testifying at the public hearing.
7. The objections, concerns and interests raised by CBF in written and verbal testimony in the aforementioned public comment process, as well as in the notice and petition filed in this court proceeding, are representative of my objections, concerns and interests.

Thomas C. Rubino

Thomas C. Rubino

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 1998.

Celeste H. Patta

Notary Public

My commission expires: November 30, 2001



## **AFFIDAVIT**

Charles W. Smith, being first duly sworn upon his oath, deposes and says:

1. I am the County Administrator of King and Queen County, Virginia and have held this position for over twenty years.
2. The Mattaponi River flows within the jurisdictional boundaries of King and Queen County, Virginia for a distance of over 50 miles.
3. Attached hereto as Exhibit A is a copy of a letter dated August 1, 1994 from Colonel Perkins of the U.S. Army Corps of Engineers (the "Corps") to the Director of Newport News Waterworks which is included in the Corps' record relating to the King William Reservoir Project (the "Project"). On information and belief, Exhibit A will be included in the record of the State Water Control Board relating to Virginia Water Protection Permit No. 93-0902 (the "Permit") when such record is certified. Exhibit A included as an attachment a list of information which the Corps determined should be included in a Supplement to the Draft Environmental Impact Statement, which attachment included as item 29 on page 5 (also attached hereto as part of Exhibit A) the following statement:

29) The supplement should address comments from King and Queen County concerning their consideration as an interested party and as a host jurisdiction since withdrawal of water from the Mattaponi River would affect their future uses and withdrawals.

4. Attached hereto as Exhibit B is a copy of a memorandum directed to me and others dated February 28, 1996 from the Virginia Department of Environmental Quality. Exhibit B states that the Virginia Water Protection Permit for the Project

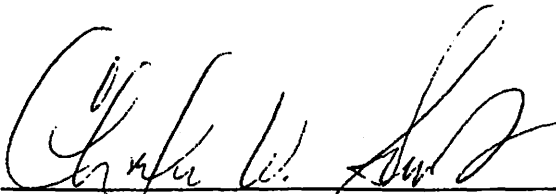
"could have an impact on future water withdrawals in the Mattaponi River Basin," recognizing that such future water withdrawals may be made by King and Queen County, Virginia and that issuance of the Permit could affect the ability to make such withdrawals. On information and belief this memorandum was sent to me pursuant to Va. Code Section 62.1-44.15:01 and was intended to provide notice to King and Queen County, pursuant to this statute, of the estimated local impact of the Permit on King and Queen County as a locality which the State Water Control Board believed would be "particularly affected by" the Permit within the meaning of this statute. On information and belief, Exhibit B will be included in the record of the State Water Control Board relating to Virginia Water Protection Permit No. 93-0902 when such record is certified.

5. Attached hereto as Exhibit C is a true and correct copy of a Resolution adopted by the Board of Supervisors of King and Queen County, Virginia on or about September 29, 1996. Exhibit C states the position of the Board of Supervisors of King and Queen County that the Project may "change water salinity, impair wildlife habitat, change the future of irrigation rights, limit recreational use and otherwise affect the Mattaponi River and have social, economic, environmental and other impacts in King and Queen County" and result in irreversible harm to the environment. Such results would cause the loss of recreational and aesthetic opportunities to citizens of King and Queen County, disrupt agricultural activity in King and Queen County, impose limitations to industrial, commercial, residential, recreational and agricultural development in King and Queen County, reduce real property values in King and Queen County, and reduce tax revenue to King and Queen County with resultant limitations on

the ability of King and Queen County to carry out various governmental activities sanctioned by state law.

6. Attached hereto as Exhibit D is a letter dated January 24, 1997 from the Mayor of Newport News to the Chairman of the Board of Supervisors of King and Queen County, Virginia in which the Mayor recognizes that the Supervisors and staff of King and Queen County were continuing to "assess the potential impact of our proposed King William Reservoir project on the Mattaponi River and your community."


7. Numerous citizens of King and Queen County utilize the Mattaponi River for a variety of recreational uses, including boating, canoeing, fishing and picnicking. A significant portion of the local economy in King and Queen County is based on agricultural activity, and Mattaponi River water is utilized in King and Queen County for irrigation in support of such agricultural activity. King and Queen County farmers also utilize water drawn from underground aquifers in their agricultural activity, which groundwater aquifers are nourished in part by water from the Mattaponi River. King and Queen County has an interest in providing unchanged recreational opportunities for its citizens and a continued source of high-quality irrigation water for its farmers. Limitations on withdrawals from and discharges to the portion of the Mattaponi River running through King and Queen County which may result from the granting of the Permit will result in limitations on industrial, commercial, residential, recreational and agricultural development in King and Queen County.

  
Charles W. Smith

STATE OF VIRGINIA

COUNTY OF KING AND QUEEN, to wit:

Subscribed and sworn to before me, the undersigned Notary Public, this 11<sup>th</sup> day of February, 1997, by Charles W. Smith, County Administrator of King and Queen County, Virginia.

  
Notary Public

My commission expires: August 31, 1998



DEPARTMENT OF THE ARMY  
NORFOLK DISTRICT, CORPS OF ENGINEERS  
FORT NORFOLK, 803 FRONT STREET  
NORFOLK, VIRGINIA 23510-1396

REPLY TO  
ATTENTION OF

August 1, 1994

Southern Virginia Regulatory Section  
93-0902-12 (Cohoke Mill Creek)

Mr. Brian L. Ramaley, P. E.  
Director, Newport News Waterworks  
Chairman, Regional Raw Water Study Group  
2600 Washington Avenue  
Newport News, Virginia 23607

Dear Mr. Ramaley:

My Regulatory Branch staff have reviewed all comments received in response to the Regional Raw Water Study Group's (RRWSG) Draft Environmental Impact Statement (DEIS) and Public Hearing and have conducted an interagency meeting to discuss the concerns of the State and Federal agencies. Based on these comments and my staff's review of the DEIS, I have determined that the preparation of a Supplement to the DEIS is warranted.

It is my intention in preparing this document to remedy the inadequacies of the DEIS, address concerns raised during the public review and publish the results of additional field studies. Attached is a list of the information which I have determined should be included in the Supplement. Also, I have enclosed a summary of specific comments on the DEIS contained in letters from the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) and in a memorandum from the Environmental Protection Agency (EPA) along with the Corps responses.

I understand that the additional field work required for this document will be finished this summer and the completed report will be submitted to the Norfolk District by October. If this is the case, I anticipate that the Supplement to the DEIS will be published before the end of the year. Should you have any questions or wish to discuss the content of this letter, you may call Pamela Painter of my Regulatory Branch staff at (804) 441-7654.

Sincerely,

*Andrew M. Perkins, Jr.*  
F. Andrew M. Perkins, Jr.  
Colonel, Corps of Engineers  
District Engineer

26) Sections 5.6, 5.7 and 5.8 are not very informative in their current format. These sections should be re-written in a narrative form rather than a bulletized form. Each impact should be discussed separately, not each alternative separately. This would clearly show that some impacts would be the same, regardless of which reservoir alternative is involved.

27) All comments and recommendations relative to projected demands, safe yields and mean annual flows contained in the 19 April 1994 letter from the Virginia Department of Environmental Quality-Water Division should be fully addressed in the Supplement.

28) Wildlife species typical of each upland and wetland community type should be included in the Affected Environment Section of the Supplement.

29) The Supplement should address comments from King and Queen County concerning their consideration as an interested party and as a host jurisdiction since withdrawal of water from the Mattaponi River would affect their future uses and withdrawals.

30) Evidence to support the conclusion that water quality at Cohoke Mill Creek is substantially higher than at Black Creek should be provided.

#### FORMAT OF SUPPLEMENT

31) The Supplement should follow the numbering system of the DEIS and should indicate where sections are added, modified or re-written. Sections that do not require changes need not be included. The Supplement should include a preface that explains the purpose of the document, how it is to be used, what is changed from the DEIS, and what additional information is still under preparation and will appear in the FEIS.

32) It is recommended that all major changes to the document be reviewed by the Corps and the Federal advisory agencies prior to submission of the full report to ensure that the work is satisfactory and to expedite review of the Supplement.

33) The reader should not be required to refer to an appendix document for important information. Pertinent information from the appendices should be summarized in the main document, so that the reader refers to the appendix only for detailed information.

34) An Index, which was prepared, but inadvertently omitted from the DEIS, should be included in the Supplement.

## MEMORANDUM

OFFICE OF WATER PERMIT SUPPORT  
DEPARTMENT OF ENVIRONMENTAL QUALITY

P. O. BOX 10009

629 E. MAIN ST.

RICHMOND, VIRGINIA 23240

RECEIVED  
MAR 5 1997  
R.P.D.C.

SUBJECT: Announcement of a Public Hearing and the Availability of a draft Virginia Water Protection Permit for the King William Reservoir Project

TO: Distribution

FROM: Joseph P. Hassell, Environmental Program Manager

DATE: February 26, 1996

COPIES: File

Attached please find a copy of a public notice announcing the availability of a draft Virginia Water Protection permit and a copy of the proposed special conditions for the proposed King William Reservoir project with a pumpover from the Mattaponi River. The draft permit establishes minimum instream flow limits and water withdrawal limits for King William Reservoir and the pump station on the Mattaponi River and could have an impact on future water withdrawals in the Mattaponi River Basin.

## Distribution:

County Administrators and Chairpersons of the Boards of Supervisors of:

King William County  
King and Queen County  
New Kent County  
Caroline County  
Spotsylvania County

Directors of the following Planning District Commissions

Richmond Regional Planning District Commission  
RADCO  
Middle Peninsula Planning District Commission

**RESOLUTION**

WHEREAS, the Mattaponi River runs through King and Queen County, Virginia and is one of the most pristine rivers on the east coast, and;

WHEREAS, the Mattaponi River is an integral part of the social fabric, economy and cultural heritage of King and Queen County, and;

WHEREAS, the proposed Cohoke Reservoir in King William County will have a capacity to pump up to 75,000,000 gallons of water a day from this resource for ultimate use outside of the Mattaponi River watershed, and the outtake facility will withdraw such water from a portion of the Mattaponi River running through King and Queen County and;

WHEREAS, this proposed reservoir may change water salinity, impair wildlife habitat, change the future of irrigation rights, limit recreational use and otherwise affect the Mattaponi River and have social, economic, environmental and other impacts in King and Queen County, and;

WHEREAS, according to the Army Corp of Engineers, Newport News Water Works should more fully implement conservation measures and more fully demonstrate future water needs for the Newport News Water Works service area, and;

WHEREAS, it appears that Newport News Water Works will profit by the sale of Mattaponi River water to other localities, and;

WHEREAS, if a permit to take water is granted irreversible harm to the environment may occur; and

WHEREAS, the Board of Supervisors of King and Queen County has previously stated a number of objections to the Cohoke Reservoir in King William County as presently proposed and has objected to the exclusion of the Board of Supervisors from meaningful participation in decisions relating to the proposed Cohoke Reservoir; and

WHEREAS, Newport News Waterworks and others appear to have requested the assistance of members of Congress in communicating with the Environmental Protection Agency without fully informing those members of all facts and circumstances surrounding the proposed Cohoke Reservoir.

THEREFORE, be it resolved, that the Board of Supervisors of the County of King and Queen reaffirms its objections to the proposed Cohoke Reservoir and its Mattaponi River outtake and to the failure to include the Board in meaningful decisions relating to the proposed Cohoke Reservoir, and;

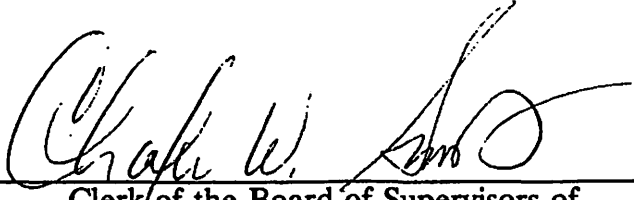


EXHIBIT C

BE IT FURTHER RESOLVED, that King and Queen County considers the Mattaponi River a joint resource to be shared by localities adjacent thereto.

A copy of this resolution shall be sent to the elected officials of the localities comprising the Regional Raw Water Study Group, King William County Board of Supervisors, the Army Corp of Engineers and the Environmental Protection Agency.

Adopted: September 9, 1996

A handwritten signature in cursive script, appearing to read "Cheryl W. Smith", is written over a horizontal line.

Clerk of the Board of Supervisors of  
King and Queen County

EXHIBIT D

## CITY OF NEWPORT NEWS

JOE S. FRANK  
MAYOR

January 24, 1997

The Honorable H. Lee Busick, Chairman  
King and Queen County Board of Supervisors  
King and Queen County Courthouse  
Virginia 23085

Dear Mr. Busick:

I am pleased to furnish you and your Board information in response to the 18 questions which were forwarded to me by Mr. Paul Jacobson, the County's attorney. I trust that this information will be of assistance to the Board of Supervisors and County staff as you continue to assess the potential impact of our proposed King William Reservoir project on the Mattaponi River and your community. If you should desire, we can also make our staff and technical consultants available to meet with County representatives to elaborate on these or other matters related to the project.

When we met on December 4, 1996, I encouraged you and Mr. Davis to consider ways that our City could work with King and Queen County to allow this project to also benefit your jurisdiction. Now that we have responded to your questions, my hope is that we are in a position to pursue mutual discussions on how the County's objections to the project can be addressed. I will look forward to hearing from you in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe S. Frank", with a long, sweeping horizontal line extending to the right.

Joe S. Frank  
Mayor

JSF:kds/a:kqchair3

Enclosure

cc: Mr. Ed Maroney, City Manager

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

*County King & Queen*  
City of , to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, BILLY W. MILLS, JR., who, being first duly sworn, stated that:

1. I am the Executive Director and founding member of The Mattaponi and Pamunkey Rivers Association (MPRA). I have been the Executive Director of the MPRA since 1995.

2. The MPRA was organized in 1991 and incorporated in 1992 as a nonprofit organization to promote stewardship and protection for the Mattaponi and Pamunkey Rivers in Virginia. The Mattaponi and Pamunkey River watersheds are rich and diverse ecosystems of mature

forests, plentiful wetlands, spectacular wildlife, and hundreds of creeks and streams. The MPRA is dedicated to the history, ecology, scenic landscape, recreation, and economy of the Mattaponi and Pamunkey Rivers.

3. The MPRA currently has 350 individual, family, and business associate members. The membership is a diverse group of citizens from throughout the two-rivers region.

4. The MPRA and its members engage in activities to: stimulate citizen interest and involvement in natural resource management issues; educate citizens on local and regional conservation issues; protect the ecology of the rivers, natural areas, agricultural and forest land, and other area resources; preserve the historic and scenic qualities of the rivers and surrounding landscapes; promote responsible recreational use of the rivers; encourage development compatible with traditional land use patterns and a high quality of life; and promote constructive dialogue between governmental bodies, industry, and citizens.

5. The activities of the MPRA and its members include: river water-quality and wildlife monitoring; annual river clean-up days; river hikes, canoe trips, field trips, and float trips; river festivals; expert speaker presentations; and promoting public participation in government decisions affecting the rivers.

6. I am aware of the proposal to construct the King William Reservoir and I am familiar with the potential environmental impacts threatened by the proposal. The proposed dam on Cohoke Creek will permanently alter the Cohoke Creek watershed with the destruction of 437 acres of wetlands. Water withdrawal from the Mattaponi River threatens the hydrologic characteristics of the two-rivers region by salinity intrusion. I participated in the public hearing for the Virginia Water Protection Permit held March 31, 1997. I submitted comments on the proposed project on behalf of MPRA members to the Virginia Department of Environmental Quality in the spring and summer of 1997.

7. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. The project will harm the quality of life for many MPRA members. The projected increase in salinity in the Mattaponi River will harm this freshwater fishery resource. The destruction of 437 acres of wetlands will needlessly harm rich and diverse ecosystems in the Pamunkey River and Cohoke Creek watersheds.

8. As Executive Director and spokesman for the MPRA I have personal knowledge that:

a. many MPRA members live in the watersheds affected by the construction of the King William Reservoir;

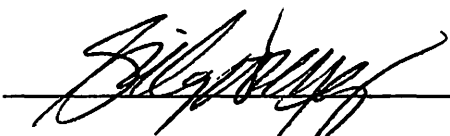
b. there are MPRA members who own property adjacent to and near the Mattaponi and Pamunkey Rivers and Cohoke Creek;

c. there are MPRA members who withdraw water for agricultural purposes from the Mattaponi and Pamunkey Rivers;

d. many MPRA members obtain their water supply from the groundwater resources in the watershed;

e. many MPRA members frequently fish, swim, and boat in the Mattaponi and Pamunkey Rivers and hike and observe wildlife in the rivers' watersheds.

9. Therefore, I believe that MPRA members will be injured by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

  
Billy W. Mills, Jr.

Subscribed and sworn to before me this 9TH day of February, 1998.

  
Notary Public

My Commission Expires:

May 31 2000

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

\_\_\_\_\_  
)  
)  
ALLIANCE TO SAVE THE MATTAPONI, )  
CHESAPEAKE BAY FOUNDATION, INC. )  
THE COUNTY OF KING AND QUEEN, )  
METOPION AND PAMUNKEY RIVERS )  
ASSOCIATION, SIERRA CLUB, )  
PAULETTE P. BERBERICH, and )  
WARREN MOUNTCASTLE, )

CHANCERY NO. \_\_\_\_\_

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents  
\_\_\_\_\_

STATE OF VIRGINIA

CITY OF Richmond, to wit:

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, MaryBeth Hawn,  
who, being first duly sworn, stated that:

1. I am a member of the Mattaponi Pamunkey Rivers Association  
(MPRA) and I have lived at 2298 Mitchell's Mill Road, Aylett, Virginia  
\_\_\_\_\_ since 1979.

2. I regularly enjoy fishing, swimming and boating in the  
Mattaponi River and I enjoy the river's aesthetic values.

3. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Metopion River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a member of the MPRA, I have participated the in Department of Environmental Quality public comment process for the project.

4. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to the water quality of the Mattaponi River posed by the project. My enjoyment of the river for fishing, boating, and swimming, and for its aesthetic qualities will be adversely affected.

5. Therefore, I will suffer injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

MaryBeth Hauer

Subscribed and sworn to before me this 9<sup>th</sup> day of February, 1998.



Alliance To Save the Mattaponi, Et al.

Joanne I. Senegast

Notary Public

My Commission Expires:

January 31, 1999

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
METOPION AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

~~CITY~~ <sup>County</sup> OF KING WILLIAM, to wit:

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, John B. Murree,  
who, being first duly sworn, stated that:

1. I am a member of the Mattaponi Pamunkey Rivers Association  
(MPRA) and I have lived in King William County  
since 1992.

2. I regularly enjoy fishing, swimming and boating in the  
Mattaponi River and I enjoy the river's aesthetic values.

3. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Mattaponi River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a member of the MPRA, I have participated in the Department of Environmental Quality public comment process for the project.

4. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to the water quality of the Mattaponi River posed by the project. My enjoyment of the river for fishing, boating, and swimming, and for its aesthetic qualities will be adversely affected.

5. Therefore, I will suffer injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

A handwritten signature in black ink, appearing to read "John B. Smith", written over a horizontal line.

Subscribed and sworn to before me this 9TH day of February, 1998.

Earl S. Chappell

Notary Public

My Commission Expires:

May 31 2000

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
~~MATTAPONI~~ ~~MATTAPONI~~ AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

COUNTY OF KING WILLIAM  
CITY OF, to wit:

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, CARRIE ROUSE,  
who, being first duly sworn, stated that:

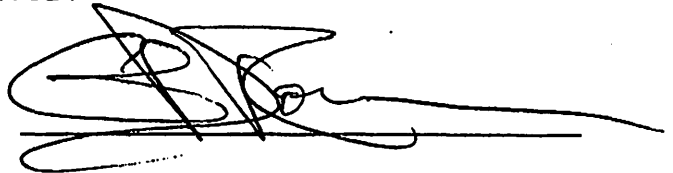
1. I am a member of the Mattaponi Pamunkey Rivers Association  
(MPRA) and I have lived AT 11002 W. RIVER RD.,  
AYLETT, VA 23009 since 1993.

2. I regularly enjoy fishing, swimming and boating in the  
Mattaponi River and I enjoy the river's aesthetic values.

3. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the ~~Mattaponi~~ <sup>MATTAPONI</sup> River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a member of the MPRA, I have participated the in Department of Environmental Quality public comment process for the project.

4. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to the water quality of the Mattaponi River posed by the project. My enjoyment of the river for fishing, boating, and swimming, and for its aesthetic qualities will be adversely affected.

5. Therefore, I will suffer injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

A handwritten signature in black ink, appearing to be "R. B. Co.", written over a horizontal line.

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 1998.

Earl H. Chapell

Notary Public

My Commission Expires:

May 31 2000

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC. <sup>Att</sup>  
THE COUNTY OF KING AND QUEEN, ~~MATTAPONI~~  
~~MATTAPONI~~ AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

~~CITY~~ <sup>COUNTY</sup> OF KING WILLIAM, to wit:

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, ROBERT LEE STEPHENS,  
who, being first duly sworn, stated that:

1. I am a member of the Mattaponi Pamunkey Rivers Association  
(MPRA) and I have lived IN KING WILLIAM COUNTY, VIRGINIA  
NEAR OR ADJACENT MATTAPONI RIVER since MAY 2, 1948.


2. I regularly enjoy fishing, swimming and boating in the  
Mattaponi River and I enjoy the river's aesthetic values.



3. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the ~~Mattaponi River~~ <sup>Mattaponi</sup> River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a member of the MPRA, I have participated the in Department of Environmental Quality public comment process for the project.

4. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to the water quality of the Mattaponi River posed by the project. My enjoyment of the river for fishing, boating, and swimming, and for its aesthetic qualities will be adversely affected.

5. Therefore, I will suffer injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

  
ROBERT LEE STEPHENS

Subscribed and sworn to before me this 9th day of February, 1998.

Joseph R. Dineen  
Notary Public

My Commission Expires:

10-31-99

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
METOPION AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

County of King & Queen, to wit:

This day personally appeared before me, a Notary Public in and  
for the Commonwealth of Virginia at large, John Henry WALKER III  
who, being first duly sworn, stated that:

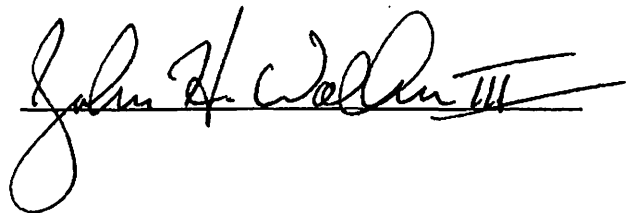
1. I am a member of the Mattaponi Pamunkey Rivers Association  
(MPRA) and I have lived AT LOCUST GROVE FARM  
WALLINGTON, VA since 1952.

2. I regularly enjoy fishing, swimming and boating in the  
Mattaponi River and I enjoy the river's aesthetic values.

3. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Metopion River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a member of the MPRA, I have participated the in Department of Environmental Quality public comment process for the project.

4. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to the water quality of the Mattaponi River posed by the project. My enjoyment of the river for fishing, boating, and swimming, and for its aesthetic qualities will be adversely affected.

5. Therefore, I will suffer injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

A handwritten signature in black ink, reading "John H. Walden III". The signature is written in a cursive style with a large, looping initial "J" and a horizontal line at the end.

Subscribed and sworn to before me this 9th day of February, 1998.

Pamela Elaine Dixon

Notary Public

My Commission Expires:

December 31, 1999

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

Respondents

CHANCERY NO. \_\_\_\_\_

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, JAY KARDAN, who, being first duly sworn, stated that:

1. My name is Jay Kardan and I am the Conservation Chair of the Sierra Club, Virginia Chapter. I have served in that position for more than one year, and before that served as a member of the Conservation Committee. In my capacity as Chair, I manage the committee which reviews conservation issues in which the Chapter will get involved.

2. The Sierra Club is a national nonprofit organization of over 525,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and

promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Over 10,000 Sierra Club members reside in Virginia. The Sierra Club frequently files citizen suits to stop activities that violate local, state or federal environmental laws and cause harm to the natural environment.

3. The Virginia Chapter of the Sierra Club has been actively engaged in opposing the King William Reservoir as an element of our National Challenge to Sprawl Campaign. Sierra Club volunteer members and staff have organized and participated in public hearings, meetings and rallies relating to the King William Reservoir. Sierra Club is also a member of the Alliance to Save the Mattaponi. In addition, the Sierra Club hired consultants, Michael Siegel and Dr. Thomas Muller, whose independent analysis of the Newport News Waterworks' Regional Raw Water Supply Plan is a part of the Sierra Club's official comments submitted to the State Water Control Board.

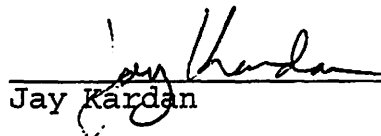
4. As the Conservation Chair and a member of the Executive Committee of the Sierra Club, Virginia Chapter, I have personal knowledge that:

a. Many Sierra Club members live in the area that would be impacted by the reservoir;

b. Many of our members enjoy the recreational benefits of the river including swimming, canoeing, boating and fishing, and the Sierra Club sponsored a recreational outing on the river in 1997; and

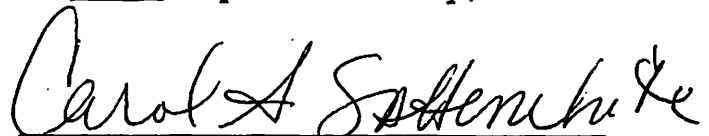
c. There are Sierra Club members who own property on the river.

5. Therefore, I believe that Sierra Club and its members will be directly and adversely injured by issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

  
Jay Kardan

Subscribed and sworn to before me this 12<sup>th</sup> day of February, 1998.

My commission expires  
October 31, 1999

  
Notary Public



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

_____	)	
	)	
ALLIANCE TO SAVE THE MATTAPONI,	)	
CHESAPEAKE BAY FOUNDATION, INC.	)	
THE COUNTY OF KING AND QUEEN,	)	
MATTAPONI AND PAMUNKEY RIVERS	)	
ASSOCIATION, SIERRA CLUB,	)	
PAULETTE P. BERBERICH, and	)	
WARREN MOUNTCASTLE,	)	CHANCERY NO. _____
	)	
Appellants,	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA, <u>ex rel.</u>	)	
STATE WATER CONTROL BOARD,	)	
	)	
Respondents	)	
_____	)	

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, JOANNE FRIDLEY, who, being first duly sworn, stated that:

1. My name is Joanne Fridley. I am a member of Sierra Club and Chesapeake Bay Foundation, Inc., and I have lived in King and Queen County on the Mattaponi River off Rt. 634 since 1979. My mailing address is P.O. Box 27, Walkerton, Virginia 23177.

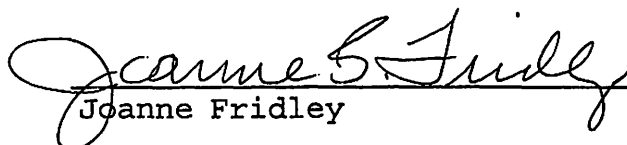
2. I own approximately 20 acres of the Mattaponi River jointly with my two sisters. The property is within one mile of the proposed intake pipe for the King William Reservoir.

3. With my family, I regularly enjoy the river for swimming, fishing, canoeing, and its aesthetic values.

4. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Mattaponi River threatens the natural river quality by additional saltwater being drawn upstream. I participated in the public hearing for the Virginia Water Protection Permit held March 31, 1997. In addition, I attended many other information meetings about the project.

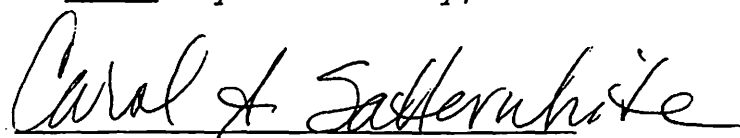
5. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the proposed water withdrawal of 75 million gallons per day from the Mattaponi River. I anticipate that the noise from the pumps which will divert as much as 75 million gallons of water per day will disturb the natural quiet on my family home as well as harm the water quality of the river. This noise as well as the potential harm to water quality will limit my enjoyment of my property and likely reduce my property values.

6. Therefore, I will be injured by the issuance of the VWP permit authorizing water withdrawal from the Mattaponi River.

  
Joanne Fridley

Subscribed and sworn to before me this 9<sup>th</sup> day of February, 1998.

My commission expires:  
October 31, 1999

  
Notary Public

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS  
ASSOCIATION, SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE,

CHANCERY NO. \_\_\_\_\_

Appellants,

V.

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD,

## Respondents

STATE OF VIRGINIA

CITY OF Hampston, to wit:

This day personally appeared before me, a Notary Public in and for the Commonwealth of Virginia at large, TYLA MATTESON, who, being first duly sworn, stated that:

1. I am a member of Sierra Club and I have lived in Hampton, Virginia at 3803 Roadsvie Avenue in a home which I have owned since 1979.

2. As a resident of Hampton, Virginia, I am a customer of the Newport News Waterworks which is the exclusive provider of domestic water to the City. If the King William Reservoir is

constructed, it is projected that water bills for customers such as myself could increase by as much as 59% over the next 9 years.

3. I am the Water Resources Chair of the Virginia Chapter of Sierra Club.

4. Over the past three years, I have visited the Mattaponi River more than 30 times to photograph the river, to enjoy the aesthetic values it offers, to canoe and boat on the river, and to attend Walkerton Days festivals.

5. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Mattaponi River threatens the natural river quality by additional salt water being drawn upstream. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed by the destruction of 437 acres of wetlands. As a citizen, as a customer of the Newport News Waterworks, and as a member of the Sierra Club, I have attended and offered testimony at DEQ public hearings and meetings.

6. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the adverse impacts to

the water quality of the Mattaponi River posed by the project. My enjoyment of the river and its aesthetic qualities will be adversely affected.

7. Therefore, I will suffer direct economic and environmental injury by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

Tyla Matteson

Tyla Matteson

Subscribed and sworn to before me this 14<sup>th</sup> day of February, 1998.

Margaret M. Stone

Notary Public

My Commission Expires:

November 30, 2000

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

CHANCERY NO. \_\_\_\_\_

v.

## Respondents

CITY OF Richmond, to wit:

1. I am a resident of King William County. I live at 4031 Powhatan Trail. I have lived at this address since 1994. My home is on 42 acres of land through which flows a tributary to Cohoke Creek. My land is comprised of agricultural fields, woodland, and wetlands.

: 70

3. Also, I am member of the Alliance to Save the Mattaponi. I have been a member of the Alliance to Save the Mattaponi since 1996.

4. The diverse ecosystem on my land is home to abundant wildlife. My family enjoys hunting on my land. I frequently observe wild flowers and wildlife on my land which will become part of the reservoir. I have observed bald eagles on my land. The groundwater supplies my drinking water. I fish in the Pamunkey River into which Cohoke Creek flows.

5. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. The proposed dam on Cohoke Creek will irrevocably alter the Cohoke Creek watershed with the destruction of 437 acres of wetlands, some of which I are on my land. Approximately 100 acres of the entire family homestead will be flooded by the construction of the reservoir. Water withdrawal from the Mattaponi River for reservoir supply threatens the natural river quality by additional salt water being drawn upstream. I participated in the public hearing for the Virginia Water Protection Permit held March 31, 1997. In addition, I attended three earlier public information meetings about the project.

6. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the proposed destruction of the Cohoke Creek watershed. Fifteen to twenty acres of my land--including agricultural fields, woodland, and wetlands--will be flooded by the proposed King William reservoir. The destruction of my land will eliminate the wildlife habitat that now is part of my home. I will not be able to enjoy the wild flowers and wildlife because the habitat for these species will be destroyed. My family will lose land for hunting. The project will harm my personal use and enjoyment of Cohoke Creek and the wetlands in its watershed.

7. It is possible that I will lose my home. The plans predict the reservoir will come within 50 feet of my home. This would inundate my sanitary drain field and make it difficult to relocate without also impacting my drinking water well.

8. Therefore, I will be injured by the issuance of the VWP permit authorizing extensive wetlands destruction and water withdrawal from the Mattaponi River.

Paulette P. Berberich

Paulette P. Berberich

Subscribed and sworn to before me this 9<sup>th</sup> day of February, 1998.



Gerda B. Caliman

Notary Public

My Commission Expires:

My Commission Expires July 31, 2002

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

CHANCERY NO. \_\_\_\_\_

V.

## Respondents

COUNTY  
~~CITY OF~~ New Kent, to wit:

1. I am a resident of King William County. I live on State Route 637 also called White Oak Lane. I have owned my residence since 1979. My home is on 15 acres adjacent to the Mattaponi River with 700 feet of waterfront.

2. Also, I am member of the Alliance to Save the Mattaponi. I have been a member of the Alliance to Save the Mattaponi since 1996.

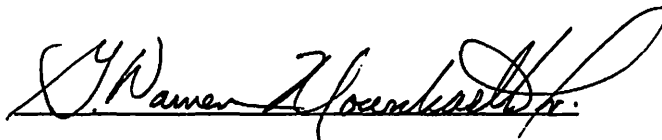
3. I regularly swim distances of one to two miles in the Mattaponi River. My swimming route passes by the location of the proposed water withdrawal intake. I frequently fish in the river. I enjoy duck hunting on the river and taking photographs on and around the river.

4. I am aware of the proposal to construct the King William Reservoir. I am familiar with the potential impacts to the environment threatened by the proposal. Water withdrawal from the Mattaponi River threatens the natural river quality by additional salt water being drawn upstream. The proposed intake for the withdrawal is within site of my home and is located at a prime shad spawning site. I participated in the public hearing for the Virginia Water Protection Permit held March 31, 1997. In addition, I attended many other information meetings about the project.

5. I am aware that the State Water Control Board has issued a Virginia Water Protection Permit to the City of Newport News for the project. I personally will be harmed by the proposed water withdrawal of 75 million gallons per day from the Mattaponi River. The intake pumps are proposed to be located within 400 yards of my home. The noise from the intake pumps will be extremely unpleasant and potentially harmful. I will not be able to enjoy swimming in the river because of the location of the water intake. The water withdrawal will affect my ability to fish in the river near my

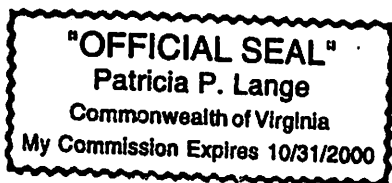
home. The project will harm my personal use and enjoyment of my home and of the Mattaponi River. Furthermore, I am concerned about a potential decrease in the value of my property because of the noise from the pumps.

6. Therefore, I will be injured by the issuance of the VWP permit authorizing water withdrawal from the Mattaponi River.



Warren Mountcastle

Subscribed and sworn to before me this 9th day of February, 1998.



Notary Public

My Commission Expires:

10-31-00

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI, et al.,

Appellants,

v.

Chancery

No. 29998-RW

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD, et al.,

Appellees.

**DEMURRER OF APPELLEE CITY OF NEWPORT NEWS**

The City of Newport News, Virginia (the "City"), by counsel, demurs to the petition for appeal on the grounds that appellants lack standing to maintain this suit for the following reasons:

(a) they were not parties to the case decision which is the subject of this appeal, and therefore they do not have standing under Virginia Code §9-6.14:16;

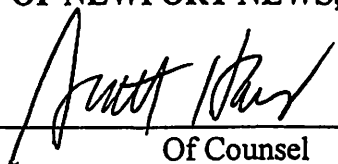
(b) they are not aggrieved persons, and they have not suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized, because the Alliance, the Chesapeake Bay Foundation, the County, the Mattaponi and Pamunkey Rivers Association and the Sierra Club do not have any such interests that will be affected by the project and because none of the appellants have suffered any alleged actual or imminent injury because the City may not proceed with its project unless and until it receives a permit from the Corps of Engineers, and therefore appellants do not have standing under Virginia Code §62.1-44.29; and

(c) any alleged injury, if it did exist, would not be fairly traceable to the decision of the Board because the City may not proceed with its project unless the Corps of Engineers

issues a permit for the project, and therefore they do not have standing under Virginia Code §62.1-44.29.

WHEREFORE, appellee City of Newport News, Virginia, requests that its demurrer be sustained, that the petition for appeal be dismissed and that it be awarded its costs and attorneys fees expended herein.

CITY OF NEWPORT NEWS, VIRGINIA

By: \_\_\_\_\_  
Of Counsel


James E. Ryan, Jr. (VSB #12215)  
George A. Somerville (VSB #22419)  
Mays & Valentine, L.L.P.  
1111 East Main Street  
P.O. Box 1122  
Richmond, Virginia 23218-1122  
(804) 697-1200

M. Scott Hart (VSB #15891)  
Mays & Valentine, L.L.P.  
4425 Corporation Lane, Suite 420  
Post Office Box 61185  
Virginia Beach, Virginia 23466-1185  
(757) 518-3200

Stuart E. Katz, City Attorney (VSB # 12994)  
City of Newport News  
2400 Washington Street  
Newport News, Virginia 23607  
(757) 926-8416

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 1998, a true copy of the foregoing Demurrer of Appellee City of Newport News was mailed to Deborah Love Feild, Assistant Attorney General, 900 E. Main Street, Richmond, Virginia 23219, counsel for Defendant State Water Control Board, Katherine E. Slaughter, Counsel for Appellants, Southern Environmental Law Center, 201 West Main Street, Suite 14, Charlottesville, Virginia 22902 and Paul C. Jacobson, Counsel for King and Queen County, Sands, Anderson, Marks & Miller, The Ross Building, 801 East Main Street, Suite 1400, P.O. Box 1998, Richmond, Virginia 23218-1998.

  
\_\_\_\_\_

#13355

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS**

**ALLIANCE TO SAVE THE MATTAPONI,  
CHESAPEAKE BAY FOUNDATION, INC.,  
THE COUNTY OF KING AND QUEEN,  
MATTAPONI AND PAMUNKEY RIVERS ASSOCIATION,  
SIERRA CLUB,  
PAULETTE P. BERBERICH, and  
WARREN MOUNTCASTLE**

**Appellants**

**v.**

**Chancery No. 29990W-01**

**COMMONWEALTH OF VIRGINIA, *ex rel.*  
STATE WATER CONTROL BOARD,**

**Appellee.**

**DEMURRER OF THE COMMONWEALTH OF VIRGINIA,  
*ex rel.* STATE WATER CONTROL BOARD**

Now comes the Commonwealth of Virginia, *ex rel.* State Water Control Board ("Commonwealth") and, pursuant to § 8.01-273 of the Code, demurs to the Petition for Appeal filed in this matter:

1. The present action is a judicial appeal to the action of the State Water Control Board ("Board") in issuing a Virginia Water Protection ("VWP") permit to the City of Newport News ("City").



**No Waiver of Sovereign Immunity Exists for  
Virginia Water Protection Permits**

2. Appellants Alliance to Save the Mattaponi *et al.* (hereafter, “Alliance, *et al.*”) cite four bases for this appeal. None of these authorizes the present action, and so this appeal is barred by the doctrine of sovereign immunity:

3. Code § 62.1-44.15:5 is the statute authorizing the State Water Control Board (“Board”) to issue Virginia Water Protection Permits such as that issued to the City of Newport News and the object of this challenge. Nothing in that statute provides a waiver of sovereign immunity or authorizes judicial review.

4. The Alliance, *et al.*, cite Code § 62.1-44.15(5) as a basis for the present action. That statute authorizes the Board to “issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to or the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions and to revoke or amend such certificates.” The Board’s action under challenge here was taken pursuant to § 62.1-44.15:5, which is the specific grant of authority for the specific permit at issue. Code § 62.1-44.15(5) authorizes other types of permits, but does not apply to the present action. In addition, Code § 62.1-44.15(5) does not waive the Commonwealth’s sovereign immunity nor does it provide for judicial review of actions taken under the statute.

5. Code § 62.1-44.29 waives the Commonwealth's sovereign immunity for certain actions taken by the Board. The authority for the Board's action under challenge in this proceeding is found in § 62.1-44.15:5; that statute is not among those for which judicial review is available.

6. Code § 9-6.14:16 is a portion of the Virginia Administrative Process Act, §§ 9-6.14:1 *et seq.* ("APA"). This section does not provide a general waiver of the Commonwealth's sovereign immunity; this is especially obvious where, as here, the General Assembly has spoken otherwise.

7. Accordingly, this action is barred under the doctrine of sovereign immunity.

**The Alliance, *et al.*, Were Not "Parties" to the Board's Decision**

8. Even if Code § 9-6.14:16 provided an independent basis for judicial review, such review would not be available to the Alliance, *et al.* That statute provides in relevant part: "[A]ny party aggrieved by and claiming the unlawfulness of a case decision, as the same are defined in § 9-6.14:4 of this chapter...shall have a right to the direct review thereof...."

9. Code § 9-6.14:4 provides:

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) is compliance with any

existing requirement or obtaining or retaining a license or other right or benefit.

10. The issuance of the VWP permit to the City is a “case decision” within the meaning of the APA.

11. The Alliance, *et al.*, were not parties to the case decision, and so cannot appeal pursuant to Code § 9-6.14:16. Therefore, this action should be dismissed.

**The Alliance, *et al.*, Failed to Make the City a Party**

12. The Alliance, *et al.*, failed to name the City as a party to this action. Accordingly, they have failed to include a necessary party, and this action must be dismissed.

**No Party May Appear in a Representational Capacity**

13. The Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club each appears in this matter representing the interests of its members. Virginia law does not recognize representational standing, except when expressly authorized by statute. No statute authorizes the appearance of these organizations in a representational capacity on behalf of their members. Accordingly, the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club must be dismissed as parties to this action.

14. Even if Code § 62.1-44.29 authorized this action, the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club do not meet the standing requirements of that section.

15. In particular, Code § 62.1-44.29 requires that a person have “suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized....” The only injuries alleged in the Petition for Appeal are the injuries to the members of the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club; the organizations have not themselves alleged any injury to the organizations. Therefore, the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club are not persons who may appeal pursuant to Code § 62.1-44.29.

**Any Alleged Injury Does Not Arise From the Board’s Decision**

16. In addition, Code § 62.1-44.29 requires that a person bringing a judicial challenge under that statute have an “injury that is fairly traceable to a decision of the Board and not the result of the independent action of some third party not before the court....” The VWP permit issued by the Board does not, of itself authorize the reservoir project that the Alliance, *et al.*, claim will cause

injury. As the appellants alleged in their Petition, the permitting authority for the project belongs to the United States Army Corps of Engineers. Any injury, then, resulting from the project is as a result of the City's action following a decision made by the Corps. Accordingly, the Alliance, *et al.*, do not meet the standing requirement of Code § 62.1-44.29.

17. The Board's action does not - and cannot - authorize any interference with private rights. To the extent that the present action is based upon an alleged impediment to private property rights, it must be dismissed.

For each of these reasons, the Board asks that this appeal be dismissed.

Respectfully submitted,

**COMMONWEALTH OF VIRGINIA *ex rel.***  
**STATE WATER CONTROL BOARD**

By Deborah Love Feild

Counsel

Mark L. Earley  
Attorney General of Virginia

Roger L. Chaffe  
Senior Assistant Attorney General

Deborah Love Feild  
Assistant Attorney General  
State Bar No. 25322  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-0098

CERTIFICATE

I certify that on this 16<sup>th</sup> day of March, 1998, a copy of the foregoing pleading was sent by first class mail to:

Katherine E. Slaughter  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, Virginia 22902  
Counsel for Appellant Alliance to Save the Mattaponi, *et al.*

Deborah Anne Fuld

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**CASE UNDER ADVISEMENT**

**Case: The City of Newport News v State Water Control Board C29920-RC  
Alliance To Save The Mattaponi et al v State Water Control Board et al C29998-RC  
The Mattaponi Indian Tribe v State Water Control Board et al C30001-RC**

**Oral Argument: June 30, 1998 and July 1, 1998**

**Written Briefs: Filed prior to argument**

**Upon consideration whereof:**

- 1. The Court *Overrules* the STATE WATER CONTROL BOARD demurrer to the Petition for Appeal filed by THE CITY OF NEWPORT NEWS.**
- 2. The Court *Sustains* the demurrer filed by the STATE WATER CONTROL BOARD TO the Petition for Appeal filed by ALLIANCE TO SAVE THE MATTAPONI, CHESAPEAKE BAY FOUNDATION, INC, THE COUNTY OF KING AND QUEEN, MATTAPONI AND PAMUNKEY RIVERS ASSOCIATION, SIERRA CLUB, PAULETTE P. BARBARIC, AND WARREN MOUNTCASTLE.**
- 3. The Court *Sustains* the demurrer filed by the STATE WATER CONTROL BOARD to the Petition for Appeal filed by THE MATTAPONI INDIAN TRIBE, CARL T. LONE EAGLE CUSTALOW, ASSISTANT CHIEF.**
- 4. The Court *Sustains* the demurrer filed by THE CITY OF NEWPORT NEWS to the Petition for Appeal filed by ALLIANCE TO SAVE THE MATTAPONI, CHESAPEAKE BAY FOUNDATION, INC, THE COUNTY OF KING AND QUEEN, MATTAPONI AND PAMUNKEY RIVERS ASSOCIATION, SIERRA CLUB, PAULETTE P. BERBERICH, AND WARREN MOUNTCASTLE.**
- 5. The Court *Sustains* the demurrer filed by THE CITY OF NEWPORT NEWS to the Petition for Appeal filed by THE MATTAPONI INDIAN TRIBE, CARL T. LONE**

**EAGLE CUSTALOW, ASSISTANT CHIEF.**

- I. The Court finds that the Petitions for appeal are not barred by the doctrine of sovereign immunity.**
- II. The Court finds that ALLIANCE TO SAVE THE MATTAPONI, CHESAPEAKE BAY FOUNDATION, INC, THE COUNTY OF KING AND QUEEN, MATTAPONI AND PAMUNKEY RIVERS ASSOCIATION, SIERRA CLUB, PAULETTE P. BERBERICH, AND WARREN MOUNTCASTLE lack standing to maintain this suit.**
- III. The Court finds that THE MATTAPONI INDIAN TRIBE, CARL T. LONE EAGLE CUSTALOW, ASSISTANT CHIEF lacks standing to maintain this suit.**
- IV. The Court finds that the action brought by THE MATTAPONI INDIAN TRIBE, CARL T. LONE EAGLE CUSTALOW, ASSISTANT CHIEF claiming that STATE WATER CONTROL BOARD action violates *the 1677 Treaty* fails to state a claim upon which relief can be granted, is multifarious and is improperly pled in an appeal pursuant to the Administrative Process Act.**
- V. The Court finds that the action brought by THE MATTAPONI INDIAN TRIBE, CARL T. LONE EAGLE CUSTALOW, ASSISTANT CHIEF claiming that STATE WATER CONTROL BOARD action violates *Indian Non-Intercourse Act* fails to state a claim upon which relief can be granted, is multifarious and is improperly pled in an appeal pursuant to the Administrative Process Act.**
- VI. The Court finds that the action brought by THE MATTAPONI INDIAN TRIBE, CARL T. LONE EAGLE CUSTALOW, ASSISTANT CHIEF claiming that STATE WATER CONTROL BOARD action violates *Title VI of the Civil Rights Act of 1964 and regulations promulgated thereunder* fails to state a claim upon which relief can be granted, is multifarious and is improperly pled in an appeal pursuant to the Administrative Process Act.**



**Counsel for STATE WATER CONTROL BOARD and THE CITY OF NEWPORT NEWS shall submit appropriate Orders reflecting these decisions.**



**Robert W. Curran  
Judge**

**August 7, 1998**

**cc:David Bailey, Esquire  
Hope Babcock, Esquire  
Kara Schmidt, Esquire  
✓ Kay Slaughter, Esquire  
Paul Jacobson, Esquire  
Scott Hart, Esquire  
Allen Jackson, Esquire  
George Sommerville, Esquire  
Deborah Love Field, Esquire**

VIRGINIA:        IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ALLIANCE TO SAVE THE MATTAPONI, et al., petitioners, )

v. )

) Chancery

) No. 29998-RW/RC

COMMONWEALTH OF VIRGINIA, ex rel. )

STATE WATER CONTROL BOARD, et al., appellees, )

FINAL ORDER

On June 30, 1998, the parties appeared, by counsel, on the demurrers of the Commonwealth of Virginia, *ex rel.* State Water Control Board ("State Water Control Board") and the City of Newport News to the Petition for Appeal filed in this matter by the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, Inc., the County of King and Queen, the Mattaponi and Pamunkey Rivers Association, the Sierra Club, Paulette B. Berberich and Warren Mountcastle. Upon consideration of the demurrers and the pleadings, briefs and arguments of counsel, the Court finds as follows:

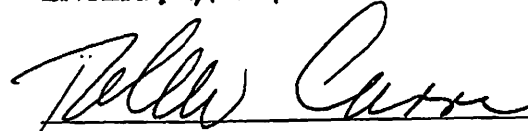
A.        The appellants' Petition for Appeal is not barred by the doctrine of sovereign immunity; and

B.        The appellants, Alliance to Save the Mattaponi, Chesapeake Bay Foundation, Inc., County of King and Queen, Mattaponi and Pamunkey Rivers Association, Sierra Club, Paulette B. Berberich and Warren Mountcastle, and each of them, lack standing to maintain this appeal.

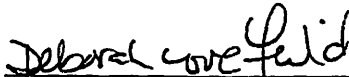
Accordingly, the Court ORDERS that the demurrers of the State Water Control Board and the City of Newport News to the Petition for Appeal filed in this matter are SUSTAINED,

and that the Appeal is DISMISSED.

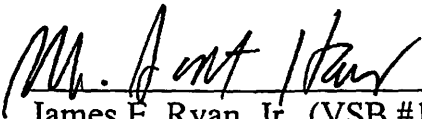
ENTER: 9/11/98

  
Judge

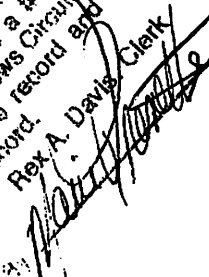
WE ASK FOR THIS:



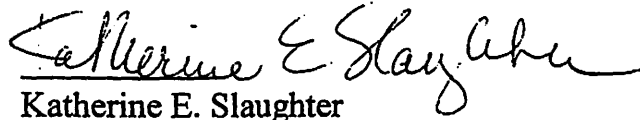
Deborah Love Feild  
Assistant Attorney General  
900 E. Main Street  
Richmond, Virginia 23219  
(804) 786-0098  
Counsel for the State Water Control Board



James E. Ryan, Jr. (VSB #12215)  
George A. Somerville (VSB #22419)  
Mays & Valentine, L.L.P.  
P. O. Box 1122  
Richmond, Virginia 23218-1122  
(804) 697-1200  
M. Scott Hart, Esquire (VSB #15891)  
Mays & Valentine, L.L.P.  
Post Office Box 61185  
Virginia Beach, Virginia 23466-1185  
(757) 518-3200  
Stuart E. Katz, City Attorney (VSB # 12994)  
Allen E. Jackson, Deputy City Attorney (VSB # 17122)  
City of Newport News  
2400 Washington Street  
Newport News, Virginia 23607  
(757) 926-8416  
Counsel for the City of Newport News

I certify that the document to which this  
authentication is affixed is a true copy of a  
record in the Newport News Circuit Court, that  
I have custody of the record and I am the  
custodian of that record.  
Rex A. Davis, Clerk  
  
D.C.

SEEN AND OBJECTED TO:



Katherine E. Slaughter  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, Virginia 22902  
Counsel for the Alliance to Save the  
Mattaponi, Chesapeake Bay Foundation,  
Inc.; Mattaponi and Pamunkey Rivers  
Association, Sierra Club, Paulette B.  
Berberich, and Warren Mountcastle

Paul C. Jacobson  
L. Lee Byrd  
Sands, Anderson, Marks & Miller  
Post Office Box 1998  
Richmond, Virginia 23218-1998  
(804)683-7210  
Counsel for King and Queen County

COURT OF APPEALS OF VIRGINIA

Present: Judges Willis, Bray and Annunziata  
Argued at Norfolk, Virginia

ALLIANCE TO SAVE THE MATTAPONI, CHESAPEAKE  
BAY FOUNDATION, INC., MATTAPONI AND  
PAMUNKEY RIVERS ASSOCIATION, SIERRA CLUB,  
PAULETTE BERBERICH AND WARREN MOUNTCASTLE

v. Record No. 2310-98-1

OPINION BY  
JUDGE ROSEMARIE ANNUNZIATA  
OCTOBER 5, 1999

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE WATER CONTROL BOARD  
AND CITY OF NEWPORT NEWS

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS  
Robert W. Curran, Judge

Katherine E. Slaughter (Southern  
Environmental Law Center, on briefs), for  
appellant.

Deborah L. Feild, Assistant Attorney General  
(Mark L. Earley, Attorney General; Roger L.  
Chaffe, Senior Assistant Attorney General,  
on brief), for appellee Commonwealth of  
Virginia, ex rel. State Water Control Board.

M. Scott Hart (James E. Ryan, Jr.; George A.  
Somerville; Matthew M. Farley; Stuart E.  
Katz, City Attorney; Allen L. Jackson,  
Deputy City Attorney; Mays & Valentine, on  
brief), for appellee City of Newport News.

Four organizations and two individuals ("appellants") appeal the circuit court's ruling that they lacked standing to challenge the decision of the State Water Control Board ("Board") to grant a Virginia Water Protection Permit ("VWPP") to the City of Newport News ("the City"). Appellants contend they have standing under

PUBLISHED

either Code § 62.1-44.29 of the State Water Control Law ("SWCL") or Code § 9-6.14:16 of the Virginia Administrative Process Act ("VAPA"). The Board and the City respond on multiple grounds, collectively arguing that: (1) neither the SWCL nor the VAPA establishes a waiver of sovereign immunity enjoyed by the Board's decision to grant a VWPP; (2) appellants lack standing under the SWCL because they have not suffered "actual or imminent injury" and any such injury is not traceable to the Board's decision; (3) the organizational appellants representing the interests of their members do not have standing under the SWCL because representational standing has not been specifically authorized by statute; and (4) appellants lack standing under the VAPA because they are not "parties aggrieved" by the Board's decision to issue the VWPP.

We hold that the SWCL waives the Board's sovereign immunity from suit but that appellants lack standing to challenge the Board's action in granting the City a VWPP. Accordingly, we affirm the decision of the circuit court.

#### I.

#### FACTUAL BACKGROUND

In July 1993, the City applied to the Board for a VWPP for its proposed King William Reservoir water supply project. The King William Reservoir project is a regional undertaking sponsored by a coalition of local governments, including Newport News, Williamsburg and York County, for the purpose of identifying and

developing a regional water supply to meet projected needs through the year 2040. Once completed, the reservoir will comprise a 1,526 acre impoundment created by a new dam across Cohoke Creek, a small tributary of the Pamunkey River located between the Pamunkey and Mattaponi Rivers in King William County. The project will also entail the construction of a water intake and pumping station to withdraw water from the nearby Mattaponi River and convey it to the reservoir.

Because the dam will be constructed by "the discharge of dredged or fill material" into Cohoke Creek, § 404 of the federal Clean Water Act ("CWA") requires the City, as the lead agency of the coalition governments, to obtain a construction permit from the United States Army Corps of Engineers ("Corps"). See 33 U.S.C. § 1344(a), (d). Under § 401(a) of the CWA, the Corps may not issue a permit for an activity resulting in a discharge into wetlands unless the state where the discharge takes place certifies that the discharge will comply with "applicable provisions" of the CWA or until the state waives such certification.<sup>1</sup> See 33 U.S.C. § 1341(a)(1).

The Corps may not issue a permit "if certification has been denied by the [s]tate . . . ." Id. Furthermore, under § 401(d) of the CWA, "any effluent limitations and other limitations, and

---

<sup>1</sup> The state certification requirements of § 401 "shall be waived" if the state "fails or refuses to act on [the Corps'] request for certification" within a year of receipt of such request. See 33 U.S.C. § 1341(a)(1).

monitoring requirements" that are included in the state's certification "shall become a condition on any Federal license or permit . . . ." 33 U.S.C. § 1341(d).

Code § 62.1-44.15(5) of the SWCL authorizes the Board to issue certificates for the alteration of the physical, chemical or biological properties of state waters. The SWCL further designates the VWPP as "the certification required under Section 401" of the CWA. Code § 62.1-44.15:5(A). "The Board shall issue a [VWPP] for an activity requiring § 401 certification if it has determined that the proposed activity is consistent with the provisions of the [CWA] and will protect instream beneficial uses." Code § 62.1-44.15:5(B). "Conditions contained in a [VWPP] may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity." Id.

On December 16, 1997, the Board issued a VWPP to the City. The VWPP contained a number of "Special Conditions" establishing various limitations and monitoring requirements for the project. For example, the VWPP requires the City to develop a monitoring plan designed to analyze the impact of the project on the Mattaponi River's salinity. The permit also sets forth conditions requiring the reservoir to release a minimum amount of water below the dam on Cohoke Creek and authorizing the withdrawal of up to seventy-five million gallons of water per day from the Mattaponi River.



Subsequently, the City, the Mattaponi Tribe and appellants, a group of petitioners consisting of the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, the Sierra Club, Paulette Berberich and Warren Mountcastle, appealed the Board's decision. Both the Board and the City demurred to appellants' petition for appeal on grounds substantially similar to those raised before this Court.<sup>2</sup> At the parties' request, the circuit court heard oral argument on both demurrers at the same time, sustaining the demurrers on August 7, 1998 in a document entitled "Case Under Advisement." Without elaborating upon the grounds for its decision, the court wrote that appellants "lack standing to maintain [their] suit." The court disagreed, however, with the Board's position that appellants' suit was barred by the doctrine of sovereign immunity. The court entered a final order dismissing appellants' appeal on September 11, 1998. This appeal followed.

---

<sup>2</sup> Collectively, the parties alleged on demurrer: (1) appellants lacked standing under the VAPA because they were not parties to the Board's decision; (2) appellants lacked standing under Code § 62.1-44.29 of the SWCL because they have not suffered actual or imminent injury since the City cannot proceed with the project unless and until it receives a permit from the Corps; (3) appellants lacked standing under Code § 62.1-44.29 because their injuries, if any existed, would not be traceable to the Board's decision because the project may not proceed unless the Corps issues a permit; and (4) the organizational parties to appellants' appeal lacked standing because they alleged no injury of their own and cannot rely on their members' injuries to sue in a "representational capacity" in Virginia. The Board also argued that appellants' appeal was barred by the doctrine of sovereign immunity.

## II.

### SOVEREIGN IMMUNITY

The Board contends that the doctrine of sovereign immunity bars appellants' appeal to the circuit court because neither the SWCL nor the VAPA explicitly waives such immunity. We disagree, finding an express waiver of immunity in the provisions of the SWCL.

Code § 62.1-44.15:5 establishes that a VWPP "shall constitute the certification required under § 401 of the [CWA]." Although Code § 62.1-44.15:5 makes no mention of judicial review, Code § 62.1-44.29 expressly waives the sovereign immunity enjoyed by the Board's grant or denial of a VWPP on the ground that a VWPP is a permit for the alteration of state waters within the scope of that statute's waiver.

Code § 62.1-44.15(5) gives the Board authority:

[t]o issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to or the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions and to revoke or amend such certificates.

Code § 62.1-44.15(5) (emphasis added).

We hold that the VWPP for the King William Reservoir project is a certificate for the alteration of state waters constituting Cohoke Creek and the Mattaponi River. See Code § 62.1-44.15(5). The VWPP certifies that the discharge of fill material into Cohoke Creek complies with the CWA. The VWPP also contains a number of

conditions relating to the operation of the proposed reservoir that will directly affect the water levels of Cohoke Creek and the Mattaponi River and which, under federal law, must be incorporated into any permit subsequently issued by the Corps under § 404 of the CWA. See 33 U.S.C. § 1341(d). Furthermore, the Board's regulations confirm that a VWPP is a permit for the alteration of state waters. See 9 VAC § 25-210-50(A) (stating that "[n]o person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, except as authorized pursuant to a [VWPP] . . ." (emphasis added)). Because the VWPP for the King William Reservoir is a permit for the alteration of state waters, we hold that Code § 62.1-44.29, by reference to the Board's authority under Code § 62.1-44.15(5), expressly waives the Board's sovereign immunity as to the grant of that permit.

Code § 62.1-44.29 authorizes judicial review of "final decision[s]" made by the Board under Code § 62.1-44.15(5).<sup>3</sup> We

---

<sup>3</sup> Code § 62.1-44.29 states in pertinent part:

Any owner aggrieved by, or any person who has participated . . . in the public comment process related to, a final decision of the Board under §§ 62.1-44.15(5), 62.1-44.15(8a), (8b), and (8c), 62.1-44.16, 62.1-44.17, 62.1-44.19 or § 62.1-44.25, whether such decision is affirmative or negative, is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act . . . .

Code § 62.1-44.29 (emphasis added).

find the language of Code § 62.1-44.29 to be clear and the scope of judicial review established therein to be unambiguously defined. Broadly inclusive language in a statute is not ambiguous if the legislature's objective requires such language. See Diggs v. Commonwealth, 6 Va. App. 300, 302, 369 S.E.2d 199, 200 (1988). As such, judicial construction is not required, and we will not resort to legislative history or extrinsic facts to endow the statute with its meaning. See id. Instead, we take the statute's words as they are written and give them their plain meaning. See id.

The Board contends that Code § 62.1-44.29 should not be construed to allow judicial review of VWPP decisions because it fails to separately and explicitly identify the precise type of permit at issue in this case. In support of this argument the Board notes that, while Code § 62.1-44.29 states that judicial review is available for final decisions made pursuant to the general authorization in Code § 62.1-44.15(5), the statute then identifies specific types of permitting decisions under other code sections which are to be afforded such review. See Code § 62.1-44.29 (authorizing judicial review of final decisions under Code §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19). The Board reasons that, because the code section providing for the issuance of a VWPP, Code § 62.1-44.15:5, is not specifically mentioned, judicial review is limited to decisions made pursuant to the specific permitting actions cited in Code § 62.1-44.29. We disagree.

First, we find no authority in support of the principle advanced by the Board that Code § 62.1-44.29 must separately and explicitly identify the precise type of permit at issue in order for its legislative waiver of sovereign immunity to be effective as to that permitting action, particularly where the statutory language providing for judicial review is otherwise clear. Indeed, we declined to require such specificity in Virginia Bd. of Medicine v. VPTA, 13 Va. App. 458, 413 S.E.2d 59 (1991), where we found an "explicit and limited waiver of sovereign immunity" in general statutory language providing that "'[a]ny person affected by . . . any [regulation]'" or any "'party aggrieved by . . . a case decision'" has the right to judicial review against the agency promulgating the regulation or case decision at issue. Id. at 465-66, 413 S.E.2d at 64 (quoting Code § 9-6.14:16(A)). Furthermore, the Board's construction effectively negates the express language of Code § 62.1-44.29 providing for judicial review of final decisions made under Code § 62.1-44.15(5). See Commonwealth v. Hawkins, 10 Va. App. 41, 44, 390 S.E.2d 3, 5 (1990) (stating that statutes "must be read so as to give effect to the plain meaning of all of [their] terms").

Second, the premise underlying the Board's position does not withstand scrutiny. The Board argues that if the legislature had intended to establish judicial review for final decisions encompassed within the "general" language of Code § 62.1-44.15(5), there would be no need to include the specific and redundant

references to Code §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19. They contend that by giving the general language of Code § 62.1-44.15(5) effect, the legislature's inclusion of the specific references is made "an unnecessary and duplicative act."

However, a close examination of Code § 62.1-44.29 makes manifest that the specific references address final decisions by the Board that are separate and distinct from those made under Code § 62.1-44.15(5). Code § 62.1-44.15(5) authorizes the Board to issue certificates for the discharge of industrial wastes, other wastes and sewage or for the alteration of state waters by other means. Code § 62.1-44.17 authorizes the Board: (1) to require the installation of facilities or the adoption of appropriate measures necessary to prevent the discharge of "other wastes" into state waters and (2) to issue certificates for the "handling, storing, distribution or production" of other wastes.<sup>4</sup>

---

<sup>4</sup> Code § 62.1-44.17(1) states in pertinent part:

Any owner who handles, stores, distributes, or produces other wastes as defined in § 62.1-44.3, any owner who causes or permits same to be handled, stored, distributed or produced or any owner upon or in whose establishment other wastes are handled, stored, distributed or produced shall upon request of the Board install facilities approved by the Board or adopt such measures approved by the Board as are necessary to prevent the escape, flow or discharge into any state waters when the escape, flow or discharge of such other wastes into any state

Although Code §§ 62.1-44.16 and 62.1-44.19 authorize the Board to issue certificates for the discharge of wastes into state waters, they also authorize the Board to make decisions that do not involve the issuance of certificates for the discharge of wastes or for the alteration of state waters. Specifically, Code § 62.1-44.16 gives the Board the authority, inter alia, to approve facilities for the treatment as well as the control of industrial wastes and other wastes.<sup>5</sup> Code § 62.1-44.19 authorizes the Board, inter alia, to certify the construction, expansion or operation of a sewerage system or sewage treatment works and to determine

---

waters would cause pollution of such state waters.

Code § 62.1-44.17(1).

<sup>5</sup> Code § 62.1-44.16(1) states in pertinent part:

Any owner who erects, constructs, opens, reopens, expands or employs new processes in or operates any establishment from which there is a potential or actual discharge of industrial wastes or other wastes to state waters shall first provide facilities approved by the Board for the treatment or control of such industrial wastes or other wastes.

Application for such discharge shall be made to the Board[, which, upon approval of the application,] shall grant a certificate for the discharge of the industrial wastes or other wastes into state waters or for the other alteration of the physical, chemical or biological properties of state waters

. . . . .

Code § 62.1-44.16(1).

minimum treatment requirements.<sup>6</sup> See 9 VAC 25-32-10; 9 VAC 25-32-30(C); 9 VAC 25-32-60(A) (2) (authorizing the Board, pursuant to the statutory authority of Code §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19, to issue Virginia Pollution Abatement permits for "pollutant management activities," which include the operation of systems for the prevention, reduction, storage, treatment, separation, disposal, recycling or reclamation of wastes).

Indeed, as their captions suggest, the waste statutes generally include provisions for the treatment of wastes and for the regulation of the facilities where wastes are stored or produced. See Code §§ 62.1-44.16, 62.1-44.17 (entitled "Regulation of Industrial Establishments"); Code § 62.1-44.19 (entitled "Regulation of Sewage Discharges"). See also Hawkins v. Commonwealth, 255 Va. 261, 269, 497 S.E.2d 839, 842 (1998)

---

<sup>6</sup> Code § 62.1-44.19 states in pertinent part:

A. Before any owner may erect, construct, open, expand or operate a sewerage system or sewage treatment works which will have a potential discharge or actual discharge to state waters, such owner shall file with the Board an application for a certificate in scope and detail satisfactory to the Board.

B. If the application involves a system or works from which there is or is to be a discharge to state waters, . . . [t]he Board shall approve such application if it determines that minimum treatment requirements will be met and that the discharge will not result in violations of water quality standards.

Code § 62.1-44.19 (emphasis added).



(stating that a title "may be read in an attempt to ascertain an act's purpose").

Thus, the legislature's authorization of judicial review for decisions made under Code §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19, in addition to the class of decisions encompassed within 62.1-44.15(5), is not redundant. See Code § 62.1-44.29. Rather, the language is necessary to address comprehensively the different decision-making authority granted to the Board under the SWCL.

In summary, we hold that Code § 62.1-44.29 explicitly provides for judicial review of the Board's decision to issue a permit for the alteration of state waters. Because the VWPP for the King William Reservoir project is such a permit, the doctrine of sovereign immunity does not bar appellants' suit.<sup>7</sup>

---

<sup>7</sup> The Board also contends our recent decision in May Dep't Stores v. Commonwealth, Dep't of Environmental Quality is relevant to our disposition of this case. 29 Va. App. 589, 513 S.E.2d 880 (1999). However, we find our decision in May to be inapposite. In May, we held that "where an agency's basic law provides expressly for VAPA coverage of certain proceedings under specified conditions and makes no provision for judicial review of other proceedings, the unmentioned proceedings are subject to the VAPA unless otherwise expressly excluded." Id. at 594, 513 S.E.2d at 882. Unlike May, in this case the basic law provides expressly for judicial review of the agency action at issue. As such, we need not look to the provisions of the VAPA for a waiver of sovereign immunity. Nor do we rely on the provisions of the VAPA to analyze whether appellants have standing. See Code § 9-6.14:3 (stating that the VAPA "does not supersede or repeal additional procedural requirements in" an agency's basic law).

### III.

#### STANDING

Having established that the SWCL provides for a waiver of the Board's sovereign immunity from judicial review of its decision to grant or deny a VWPP, we must now determine whether appellants have standing to challenge the decision at issue.

The SWCL provides that any person who has participated, either in person or by the submission of written comments, in the public comment process related to a final decision of the Board under Code § 62.1-44.15(5) is entitled to judicial review of that decision "if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution." Code § 62.1-44.29.

A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.

#### Id.

Appellants contend they have standing to challenge the Board's grant of a VWPP to the City because they meet the three-part test for Article III standing enunciated in Code

§ 62.1-44.29.<sup>8</sup> We find that, under the statutes and regulations applicable to the proposed reservoir project, the Army Corps of Engineers must grant a § 404 permit for the discharge of fill material into Cohoke Creek before construction of the King William Reservoir project may proceed. Accordingly, we hold that appellants do not have standing under Code § 62.1-44.29 to challenge the Board's issuance of a VWPP because the injuries alleged in their petition for appeal will result from the independent action of the Corps, a third party not before the circuit court. In light of this holding, the remaining arguments of the Board and the City are rendered moot, and we will not address them.

The CWA establishes a comprehensive program to restore and maintain the chemical, physical and biological integrity of the waters of the United States. See 33 U.S.C. § 1251(a); Route 26 Land Development Assoc. v. United States Government, 753 F. Supp.

---

<sup>8</sup> Appellants filed affidavits with their petition for appeal in which each appellant represented that the King William Reservoir project will inflict injury upon it or its individual members. Members of the Alliance to Save the Mattaponi, the Chesapeake Bay Foundation ("CBF"), the Mattaponi and Pamunkey Rivers Association, and the Sierra Club contend the construction of the reservoir and subsequent withdrawal of water from the Mattaponi River will harm them by damaging the ecosystems and the aesthetic qualities of the Mattaponi River and Cohoke Creek, which they use for boating, fishing, swimming, water supply, and educational purposes. Paulette Berberich alleges the reservoir will flood fifteen to twenty acres of land that she owns, resulting in her loss of use and enjoyment of that land. Warren Mountcastle, a landowner on the Mattaponi River, alleges the project will harm his use, enjoyment, and economic value of his real property due to the placement of an intake pipe nearby.

532, 536 (D. Del. 1990), aff'd, 961 F.2d 1568 (1992). Pursuant to §§ 401 and 404 of the CWA, the Corps is authorized to issue permits for the discharge of dredged or fill material into the waters of the United States after obtaining a certification from the state where the discharge originates that any such discharge will comply with the CWA. See 33 U.S.C. §§ 1341(a)(1), 1344(a). Although the certifying state may prevent the Corps from issuing a § 404 permit by denying the certification required by the CWA or may issue a certification with limitations that become conditions on any § 404 permit issued by the Corps, only the Corps, by issuance of a § 404 permit, has the power to authorize an actual discharge into the waters of the United States. See 33 U.S.C. §§ 1341(a)(1), 1341(d). Indeed, in the absence of a state's timely action "on a request for certification," the Corps is authorized to proceed with a permitting action without the state's certification. See 33 U.S.C. § 1341(a)(1).

Rules regarding the Corps' authority to issue § 404 permits are codified at 33 C.F.R. Parts 230, 320 and 323. Part 230 establishes guidelines to implement the policies of the CWA "through the control of discharges of dredged or fill material." 33 C.F.R. § 230.1(a), (b). The guidelines are "applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States," 33 C.F.R. § 230.2(a), and establish "conditions which must be satisfied in order to make a finding that a proposed discharge of dredged or fill material

complies with" the CWA. 33 C.F.R. § 230.4. Part 320 contains the Corps' general policies for evaluating all applications for permits. See 33 C.F.R. § 320.4. See also Route 26 Land Development, 753 F. Supp. at 536. Part 323 contains additional policies, practices and procedures specifically applicable to the Corps' "review of applications for . . . permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the [CWA]." 33 C.F.R. § 323.1.

According to these rules and policies, the Corps "is neither a proponent nor opponent of any permit proposal" and bases its permitting decisions on a "public interest review." 33 C.F.R. § 320.1(a)(1), (4). The Corps may issue or deny a permit based on its assessment of whether "the proposed activity and its intended use" is in the public interest. See 33 C.F.R. § 320.4(a)(1).

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur are therefore determined by the outcome of this general balancing process.

33 C.F.R. § 320.4(a)(1) (emphasis added). As to § 404 permits for the discharge of dredged or fill material, Part 323 specifically

provides that the Corps will review such applications and, if it "determines that the proposed discharge would comply with the [Guidelines], . . . grant the permit unless issuance would be contrary to the public interest." 33 C.F.R. § 323.6(a). Factors that the Corps must balance in making its public interest determination include, inter alia, "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, . . . recreation, water supply and conservation, water quality, . . . considerations of property ownership, and, in general, the needs and welfare of people." 33 C.F.R. § 320.4(a)(1).

As the foregoing regulations make clear, the Corps ultimately authorizes the discharge of fill material into Cohoke Creek after consideration of numerous factors, including some which are co-incident with those considered by the Board in issuing a VWPP. Compare Code § 62.1-44.15:5 (stating that the Board "shall issue" a VWPP "if it has determined that the proposed activity is consistent with the provisions of the [CWA] and will protect instream beneficial uses," which include navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural and aesthetic values), with 33 C.F.R. § 323.6(a) (stating that the Corps shall issue a § 404 permit if it determines that the proposed discharge

complies with the Guidelines and comports with the public interest).

Moreover, we cannot say that the Board's issuance of a VWPP has a "determinative or coercive effect" on the Corps' ultimate decision to issue a § 404 permit for the King William Reservoir project. See Bennett v. Spear, 520 U.S. 154, 169 (1997). In Spear, the United States Supreme Court found that an injury was fairly traceable to a biological opinion of the Fish and Wildlife Service, notwithstanding the fact that the Service's opinion was not "the very last step in the chain of causation," based on the opinion's coercive effect on the ultimate decision-making agency.<sup>9</sup> See id. The Court based its decision, however, on several factors not present here. In Spear, the statutory scheme: (1) placed a heavy burden on an agency that disagreed with the Service's

---

<sup>9</sup> In Spear, the Bureau of Reclamation notified the Service that an irrigation project it administered might affect two endangered species of fish. See id. at 158-59. In accordance with the Endangered Species Act, the Service issued a biological opinion, concluding that the operation of the project was likely to jeopardize the species and identifying an alternative method of operation. See id. at 159. Several petitioners challenged the opinion, contending that the Bureau would abide by the restrictions imposed therein and that these restrictions would substantially reduce the quantity of available irrigation water. See id. at 167. The Government responded that petitioners failed to meet the requirements of Article III standing, particularly the requirement that their injuries be "fairly traceable" to the Service's opinion. See id. at 168. The Government contended that petitioners' injuries were traceable to the Bureau's ultimate implementation of the opinion, not to the opinion itself. See id. The Court disagreed, holding that petitioners' injuries were fairly traceable to the opinion based on its "powerful coercive effect on the [Bureau] . . . ." Id. at 169.

opinion to articulate its reasons, (2) raised wildlife issues for review that were beyond the Bureau's sphere of expertise and which were peculiarly within the Service's expertise and (3) imposed the risk of civil and criminal penalties upon agencies and their employees who chose to disregard an opinion's terms.

In this case, although 33 C.F.R. § 320.4 states that the Corps "will generally . . . issue[]" a permit upon receipt of "a favorable state determination," the remaining regulatory provisions make clear that the Corps independently reviews whether a § 404 permit would comport with the public interest and that numerous factors must be considered by the Corps before a permit can issue. Furthermore, we note the absence of any provisions imposing penalties on the Corps should it elect to deny a § 404 permit after receiving the required state certification and the relative expertise enjoyed by the Corps in reviewing the relevant issues to be addressed before a permit may be issued. See 33 U.S.C. § 1344(a), (d) (authorizing the Secretary of the Army, "acting through the Chief of Engineers," to issue permits for the discharge of dredged or fill material); 33 C.F.R. § 323.1 (establishing "policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of . . . permits [for] the discharge of dredged or fill material into waters of the United States . . ."). Further, as expressly established in 33 C.F.R. § 320.4, the general statement that the Corps will issue a permit upon receipt of a favorable state



determination applies only "in the absence of overriding national factors of the public interest that [are] revealed during the evaluation of the permit application" and only if the "concerns, policies, goals, and requirements as expressed in 33 C.F.R. Parts 320-24, and the applicable statutes have been considered and followed." These factors underscore the independent nature of the Corps' review of permit applications and the absence of a coercive or determinative effect of a state certification upon the process.

In summary, the construction and operation of the King William Reservoir project is contingent upon the Corps' issuance of a § 404 permit for the discharge of fill material into Cohoke Creek. Under the applicable statutory scheme, the Corps has exclusive authority to issue such a permit upon finding that the project and its intended use comply with the guidelines implementing the policies of the CWA and comport with the public interest. The Board's issuance of a VWPP does not compel the Corps to issue a § 404 permit. Thus, we hold that appellants' alleged injuries are the result of the independent action of the Corps upon its authorization of the discharge of fill material into Cohoke Creek pursuant to § 404 of the CWA. As such, appellants have failed to satisfy the second prong of the test for standing established in Code § 62.1-44.29.

For the foregoing reasons, we affirm the decision  
of the circuit court.

Affirmed.

APPELLANTS' ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED WHEN IT HELD THAT APPELLANTS' INJURIES WOULD RESULT ONLY FROM THE PERMIT ISSUED BY THE U.S. ARMY CORPS OF ENGINEERS AND NOT FROM THE VIRGINIA WATER PROTECTION PERMIT.