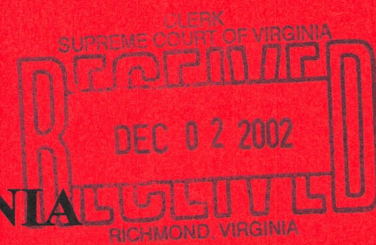


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IN THE  
**SUPREME COURT OF VIRGINIA**

**RECORD NO. 021507**

**STATE WATER CONTROL BOARD,  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
AND COUNTY OF HANOVER, VIRGINIA,**

*Appellants,*

**v.**

**FRANCES BROADDUS CRUTCHFIELD  
AND HENRY RUFFIN BROADDUS,**

*Appellees.*

**JOINT APPENDIX  
VOLUME I of III**

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## **ASSIGNMENTS OF ERROR**

1. The Court of Appeals erred by applying the liberal amendment standards of Rule 1:8, rather than those of Rule 2A:4 which apply to APA appeals, to find that the Circuit Court abused its discretion in overruling the Broadduses' motion to amend their standing allegations.
2. The Court of Appeals erred by ruling that the Broadduses could amend their Petition to add a necessary party after expiration of the jurisdictional appeal period and by finding that Hanover waived objection to this nonwaivable jurisdictional defect.
3. The Court of Appeals erred by finding that the Broadduses alleged and/or proved injury to their recreational use and aesthetic enjoyment of the Property.
4. The Court of Appeals erred by failing to give deference to the Circuit Court's factual findings and by ruling that the Circuit Court clearly erred in finding the Broadduses' evidence insufficient to prove a concrete and particularized injury.

**VA0089915 Totopotomoy  
Public Hearing – January 19, 2000**

**Tom Van Auken:**

Good evening, my name is Tom Van Auken. I'm a member of the State Water Control Board and I'm the hearing officer for this evening's hearing. You've been talking to some of the staff here but let me introduce them anyway. This is Gerry Seeley. He is the Piedmont Regional Office Director for the Department of Environmental Quality. J.R. Bell is the Piedmont Water Permits Manager for the Department of Environmental Quality ... and Allan Brockenbrough is the Piedmont Regional Office Permit Engineer, also for the Department of Environmental Quality.

Now, in this hearing, we'll be taping the testimony, for public record. And, in addition to your comments tonight, if you want to enter written comments, the deadline for written comments has been extended to 4 p.m. on Thursday February the 4<sup>th</sup>, 1999. So, you're not restricted to what you might want to say tonight ... you can also give written comments to the Department of Environmental Quality. The State Water Control Board is holding this hearing to receive comments on the proposed issuance of a Virginia Pollution Discharge Elimination System Permit No. VA0089915 to the county of Hanover under the operation of the proposed Totopotomoy Wastewater Treatment Plant. This hearing is authorized by the Regional Director of the Piedmont Regional Office of the Department of Environmental Quality. The Department of Environmental Quality did notice for this hearing was published in the *Herald Progress*, *The Mechanicsville Local*, and *The Tidewater Review*. This fact finding proceeding is being held pursuant to section 9.6-1411 of the Code of Virginia and 3.7 of Virginia Regulations 6801401 and the Board's procedural rule number one. Tonight's hearing will lead to no decision; this is just a fact-finding hearing. The State Water Control Board ultimately decides whether to issue the permit that the County is asking for and that decision will be made at the Board's meeting on March the 11<sup>th</sup>, 1999. Tonight, we'll listen to whatever you've got to hear that's relevant to this permit. What we really want to do is get your input. Okay, the general procedure tonight will be ... first, the staff will make a presentation and Allan Brockenbrough will make that presentation for the staff. Then the applicant, that's the county, will make their presentation. Then, we'll hear from everybody who has signed up on a card. After everyone who has a card is signed up, has spoken, then we'll hear from anyone else who wants to speak.

Now there are a fair enough number of people here tonight, so when you come up to speak, I'd appreciate it if you'll hold your remarks to about three to five minutes ... please, so everybody can get his say in and we're not leaving here at two o'clock in the morning. If you're part of a group here, just have one spokesman or two spokesmen speak for you and ask the people in your group to stand up. All right, now, in the interest of saving time, and if there are no

**001651**



objections, I will enter the exhibits we have here. This information DEQ has already received to date at the end of the record by incorporating the exhibit list as exhibit number one. If there are no objections to that, okay, the hearing here are entered. This list is available for your inspection and, again, the public record will close on Thursday, February the 4<sup>th</sup> at four p.m. Allan-your game.

**Allan Brockenbrough:**

Good evening ladies and gentlemen. My name is Allan Brockenbrough and I am the permit writer for the proposed Totopotomoy Wastewater Treatment Plant in DEQ's Piedmont Regional Office. Tonight's hearing is being held to solicit comments from the public on the proposed issuance or denial of VPDES permit no. VA0089915 to the County of Hanover for discharge from a municipal wastewater treatment plant, to the Pamunkey River...and the affect of the treated wastewater discharge on water quality for beneficial uses in state waters. On April 11, 1997, Hanover County submitted a VPDES permit application for the proposed Totopotomoy Wastewater Treatment Plant. The County requested effluent limits for a wastewater treatment plant design flows for five and ten million gallons per day. Numerous supplements and amendments to the application were submitted over the next year and a half with a final submittal being received and the application being considered complete on October 13<sup>th</sup>, 1998.

The Pamunkey River is classified as a Tier 2 water, which means that the water quality exceeds the minimum standards adopted by the state. The anti-degradation provisions in the Clean Water Act and the State Water Control Board's VPDES regulation requires that any permits contain provisions which protect the existing life quality of water in the river. The proposed VPDES permit contains numerous provisions to ensure that existing water quality in the Pamunkey River is maintained. The proposed VPDES permit includes monthly average effluent limitations of ten milligrams per liter for a five day carbonaceous biochemical oxygen demand, fifteen milligrams per liter, total suspended solids, and three milligrams per liter for total - nitrogen. These limitations are established at a level that the DEQ staff believes will have a negligible impact on dissolved oxygen levels in the Pamunkey River. Although this particular section of the Pamunkey River is not considered to be nutrient-enriched, the total phosphorous limitation of two milligrams per liter has also been included in the permit. The permit also includes additional limitations for fecal coliform, pH, and dissolved oxygen. Additional major provisions of the permit include: 1) metals limitations and numerous management requirements, for the bio-solids it will produce, should the County choose to dispose of the material by land application through agricultural sites. 2) The requirement that an industrial pre-treatment program be developed. A treatment program ensures that any industrial waste receives adequate pre-treatment by the generator, such that waste will not adversely affect the biological treatment process at the wastewater treatment plant, the quality of any bio-solids which may be land-applied, or pass wastes through the

wastewater treatment plant and adversely affect the receiving waters. 3) Monitoring for numerous toxic parameters for which the State Water Control Board has adopted water quality standards. And finally, 4) a Toxics Management Program which includes whole effluent toxicity testing. This consists of looking at individual toxic parameters, or species of aquatic life (that is two vertebrates and two invertebrates) which are subjected to the wastewater's determine whether there are any cumulative toxic impacts. If the testing shows acute toxicity, in one hundred percent effluent, or any chronic impacts on survival, growth, and reproduction, concentrations below those in the receiving stream toxicity reduction evaluation will be required. In summary, the staff believes that the permit will adequately maintain existing high quality of water in the Pamunkey River. This concludes my comments. Following this public hearing, the Board's staff will consider all the comments received, specifically including the comments received to date, the comments made tonight, and any additional written comments which we receive by four p.m. on Thursday February 4<sup>th</sup>, 1999. The staff will then develop recommendations and then present them to the State Water Control Board, comprised by seven citizens appointed by the Governor, for their decision at the March 11, 1999 meeting.

**John Hodges- Hanover County.**

Mr. Van Auken, members of the DEQ staff, members of the public...years ago, Hanover recognized that in order to continue to successfully implement its land use plan additional wastewater treatment capacity would be required by 2003. Many options to provide this capacity were explored including regional alternatives. And after considerable effort, Hanover determined that the construction of a new wastewater treatment plant with a discharge to the Pamunkey River is its best option. The discharge permit we have applied for is critical if the County is to maintain the integrity of its land use plan, and to meet the wastewater treatment needs of its citizens and customers. Hanover County is unique in that its comprehensive land use plan limits the areas to which water and sewer service may be provided, which in turn helps control the suburbanization of the rural areas of the County. This discharge permit and the additional wastewater treatment capacity it makes available are consistent with the County's comprehensive land use plan. This consideration has been refined through a series of studies over the years, and a preliminary study was completed by *Black and Veatch* in 1989. The Pamunkey River was identified as the most viable alternative for a discharge in the event a new wastewater treatment facility was needed. In 1993, in the finalization of their 1989 study, *Black and Veatch* again identified the Pamunkey River as the most viable alternative for a new discharge. In 1995, *Hazen and Sawyer*, a new County consultant was retained to review the previous study and make specific recommendations regarding implementation. This independent review also identified the Pamunkey River as best alternative and further identified the portion of the Pamunkey River located downstream at



the route 360 bridge as the best location for the discharge. In April 1997, following a review of alternatives, the County applied for a VPDES discharge permit at the location being considered tonight. The County also began the process of obtaining local approval of the proposed wastewater treatment plant and its associated discharge. In August 1997, after the County-held public information meetings and hearings, the Hanover County Board of Supervisors approved the conditional use permit required to construct a new wastewater treatment plant at a site located off of Tate Lane, and a discharge for the new plant at a location identified in the County's VPDES permit application. After application for the discharge permit was submitted, and on the basis of conversations with one of the owners of the property, the County considered and at one point revised the location of the proposed discharge to a point approximately four thousand feet downstream. This was also a good location from a water quality perspective but it would have had a greater impact on nearby downstream property owners. It would have been more expensive to construct and did not have local land use approval. When the owners of the property subsequently ended their consideration of any location on the property, the County revised its application to the site originally approved in the County's public hearing. Hanover County has kept open the lines of communication and has recently, this last week, met with the property owners' lawyers to seek ways to reach agreement on this matter. There are many good reasons this location was selected and I would like to briefly go over these reasons. Minimizing the impacts to the Pamunkey River, as I stated earlier, the primary importance to the County was a location that would minimize the impact of the discharge on the Pamunkey River. The segment of the river where the discharge is being proposed is subject to strong tidal influence, which promote rapid mixing of the treated effluent throughout the stream cross section, which is protective of water quality and minimizes impacts on residences. To build the outfall anywhere downstream of the location proposed for the discharge would require much longer force main and would disrupt several residential areas. The property on which the discharge is proposed to be located is currently utilized for farming and the discharge point is approximately four thousand feet to the nearest adjoining property line and improved residential properties and minimizes the impact on historic resources. Hanover County is very sensitive to the many historic resources found within its boundaries. The County protects its historic resources whenever possible and in fact minimizing impacts on historic resources is a self-imposed condition of approval for the County's entire wastewater treatment plant project. The County is aware of the fact that the Town of New Castle archaeological site is located on the property on which the discharge is proposed. The actual site of the discharge and its associated force main have been located along the outer limits of the identified New Castle historic area and is separated by an abandoned twentieth century rail line. Because most of the New Castle historic area is farmed and has been disturbed there are no surface indications of New Castle. Further, the County is performing ongoing archaeological investigations across the ongoing force main and at the discharge site to ensure compliance with all

Federal, state and local requirements. Finally, we have avoided the burial site identified by the property owners. Environmental impacts: Minimizing impact on wetlands and endangered species was important when siting the discharge in our analysis as follows... wetland impacts: impacts on wetlands were considered in locating the discharge in the area. In the area of the discharge, the Pamunkey River has high banks with limited or no contiguous wetlands. The reiteration structure is identified here, associated with the discharge will be constructed in an upland area and is not subject to flooding. Upstream from the proposed discharge the riverbank is much lower in their significant wetland areas contiguous to the river... endangered species: Record research identified that there was a potential for endangered mussels to be located in this segment of the river. Although not required at this time, the County had a field survey of the Pamunkey River conducted in the vicinity of the proposed discharge. It was completed to determine if endangered mussels were located in this section of the river. No endangered mussels were identified by this survey. In summary, the proposed location for the discharge has strong tidal influence promoting better mixing for water quality, minimizes the impacts on residents in the vicinity, has local land use approval, and will have little or no impact on identified historic resources and minimizes impacts on wetlands and endangered species. We believe that the limits and conditions set forth in the draft permit developed by the Department of Environmental Quality and approved by EPA are appropriate and are protective of water quality. The County is committed to constructing and operating a state-of-the-art facility that will meet the conditions of the proposed permit, which is critical to the future vitality of Hanover County. We hope that the State Water Control Board agrees that the draft permit is environmentally sound and that the County's project has been well conceived. We respectfully request that a VPDES permit, based on the draft permit, being considered tonight be issued to Hanover County by the State Water Control Board. The County's staff and representatives, our engineers, and *Hazen and Sawyer* are here to answer any questions that may arise during the remainder of the public hearing that the state representatives deem this appropriate. Thank you.

**Henry Broaddus:**

Thank You. Initially, I must take issue with Mr. Hodges portrayal of me and my family as having, I believe the quote was, "ended their consideration of any location on the property." When in the fact the record shows, is very clearly, we never considered any location. We did allow the County to conduct some studies in the hope that they would create more hard data than the hypothetical models, which are all that you have right now. In fact, after we suspended their permission to enter the property they continued to do so anyway and still I think their research is sorely lacking. Adaline Stevenson, after yet another failed presidential candidate did introduce his remarks to a crowd with the following statement: "My job is to speak to you. Your job is to listen to me and if experience is any guide, your



job will be over long before mine is." And I introduce my remarks the same way tonight. Not to prepare you for a lengthy diatribe but to express the frustration that I feel at the fact that the proposal before you has made it even this far in the spite of the cacophony of voices, mine included, raised in opposition. What's so important to me is the preservation of that opposition and of the land itself that I have flown down here today from Dartmouth College in New Hampshire to restate it. And I offer you the following succinct statement with sincerest hope that you will not look past it as lip service but think about it as most heartfelt concern. I am the landowner on whose property this sewage discharge would fall. You're gonna be hearing, and in fact, in the question and answer session you've already heard, about some of the potential adverse affects this projects has on the Pamunkey River and you will continue to hear about the egregious lack of resources that has been done in any effort to minimize those effects. What I want to offer you now is a sense of context without which I do not believe that the Department of Environmental Quality can be well prepared to make its decision. When we speak of pristine land of a preserved natural environment it becomes necessary to explain that this condition is not accidental, rather is the consequence of concerted efforts on the part of those individuals to whom its care was entrusted. I call myself a landowner only in the loosest sense of the term. My role could be more properly be called that of a steward in that not only do I not wish to develop New Castle or to use it for any purposes other than agricultural ones. I actively dissuade those potentialities and this is consistent of those whose efforts came before me. My sixth great grandfather, Edwin Ruffin, one of the greatest agricultural scientists in American history had the revolutionary idea of using marl in the Pamunkey River bed to replenish the nutrients and soil there. And my own father, Woodford Meade Broaddus, also a farmer refused to put any chemicals that he suspected would have adverse affects on marine biology of the Pamunkey river onto that same soil. His integrity is one of the few things I know about my father who died when I was five months old. His land is one of the few tangible monuments I have of him and you can bet that I have applied his same standards of integrity to its use thus far. What is disheartening to me now, even more so than the fact that I may not be listened to and the record shows that I have not been is that fact that I no longer have the ability to force those same standards of integrity, the one such as my father who made his living from this land not only upheld but lived as a credo. In violation of those standards, such as placing a sewage outfall on this property without having directly explored its impact on rare fresh water mussels, aquatic life and water quality, is not only an affront to my father's legacy...it's an affront to any reasonable individual's sense of the consideration the government owes any project before imposing it on its citizens. We don't know the extent of the environmental damage this outfall may cause and yet now, despite these pleadings of one who is part of a long-standing tradition of those who have resisted any such development, on the grounds of their fear of the extent of what might be damaged, this discharge is on the fast track to being built on the

grounds of an ignorance of the extent to which this river will be damaged. I don't have the power to stop it. I don't even have the power to impose the need for more extensive research...you do. And as one steward of the land, to a body of individuals whose responsibility is similar...please don't be anything less than thorough before you permit this travesty. Please do not grant your endorsement of this project now, at a time where the only data before you is based on hypothetical models and a desire to expediency. Please ensure that we are not careless and our responsibility to protect this pristine land, this preserved natural environment, for our County, our state, our ecology. Thank you.

**Charles D. McGhee:**

I come here tonight to express my concern over the placement of the discharge pipe at New Castle Farm. I'm not only a concerned citizen of Hanover County but I am responsible for the day to day agricultural operations at New Castle Farm. As good stewards of the land that is entrusted to me, I operate under the guidelines of the federal government's best management practices. A Chesapeake Bay plan is under construction at this moment, to ensure any water than runs off of that farm into the Pamunkey River is of the best quality. We are also enacting a state nutrient management plan to work in conjunction with the Chesapeake Bay plan. If the current route of this pipe is followed, you will be running it through Mr. Broadus' farm. It will also be going through a resource protection area as denoted by the Chesapeake Bay plan. Now, I realize that the Pamunkey and its tributaries have other wastewater treatment plants along its banks; however, these are very far upstream, and I hopefully feel that any effluent has had time to assimilate into the water and to be diluted by the time it reaches this point in the river. We operate two similar irrigation systems that draw water out of the Pamunkey at a point less than a quarter of a mile from where you are planning to issue the permit for this discharge. I have concerns for my health and my safety that some of this effluent will not have time to be diluted and to assimilate into the water in such a fashion that it would not be detrimental to my health. I also feel that construction of this pipeline will be disruptive and detrimental to the agricultural operations at any given time. While I am sure the County is looking out for my well being, and is trying to protect me from any hardship, delays and mishaps will occur. I am concerned that possible construction of this pipe will cause me undue hardship. There has been a study and it has been already brought up in conversations tonight in Great Britain, and Cornell University, that is concerned with wastewater treatment effluent discharged into rivers. In North Carolina, there are two rivers that constantly come under attack for their animal units of concentration...the Neuse River and the Cape Fear River. The Neuse River can be described as probably the dirtiest river in North Carolina. The Cape Fear, however, is relatively clean. But there are two distinct differences between these rivers. You see, the Cape Fear River has only eleven discharge permits along its banks. The Neuse River has four hundred

and twenty-four discharge permits. So, you see, it seems to me that its not a matter of animal discharge to the water that is messing this river up but rather municipal discharge. Now, I am not sure that I have the authority to speak on such matters as to whether or not the County has exercised patience with Mr. Broaddus or whether they have exercised good will, but it seems to me that they have gone about this rather fast and rather expedient. Have they looked at other matters adjacent land and property to put this discharge pipe? We have not heard. Now, this route 605 on this map, there's another piece of land that has the same topographical features of the bank of the river at New Castle. Was this studied? The public does not know. However, one thing I do know is that the people that own that portion of land have no emotional attachments to this land as does Mr. Broaddus. Could it be that they are looking at an easy way out? Could it be that they are looking at Mr. Broaddus as an absentee landowner and trying to pull the wool over his eyes? This remains to be seen. Now, I have very grave concerns over the fact that this lake may have personal consequences to my health as I do come in contact with the water practically every day. And I think less than a quarter of a mile is not enough to dilute any effluent that comes in the water. Even though the Pamunkey has strong tidal flows as stated before, there are times when the river runs very slow and practically stops. There are times when the river actually runs backwards when the tide is coming in. So where is this three million gallons per day going to go? Have there been any studies done to the fact as to how fast the effluent moves down the river? In a tidal area such as this, I wouldn't think it would move very fast at all. All one has to do is place a Veatch ball in the river and see that through the course of the day it will not move very far. I urge you to consider this matter very carefully. Mr. Broaddus wants to take care of his farm and as a steward of his farm, I want to take care of it. He has often times told the previous renters, and myself, to never apply solid waste sludge. I can't help but think that I would break that promise by allowing this effluent to be pumped through the irrigation systems and applied in such a manner. Thank you.

**Meade Anderson:**

Good evening. My name is Meade Anderson. I am a nearby property owner and a user of this river. The issue today seems to be, and Hanover has even mentioned it, minimizing the effect on the Pamunkey River and minimizing the effect of this effluent on the water quality. Well, if Hanover was really concerned about water quality it would have joined in with Henrico when the opportunity presented itself or with Richmond into a cooperative joint venture for a discharge on the James River. Henrico invited Hanover to do it and they passed the time up. I've swam in this river and fished in it for over thirty-five years right where the County now proposes to locate this discharge of wastewater from the sewage treatment. I actually swim there several times a week nearly six months out of the year and often take my daughter swimming with me. My mother swam here.

My grandfather swam and fished as did his father, and his father, and his father. The scientists and engineers said that their computer modeling data indicates that the ever-increasing discharge, which starts at five million gallons per day, will not hurt this river. Well, I think computers are a very valuable tool but I also believe in using a little bit of common sense occasionally too. Does anybody know what five million gallons actually is? Well I ran the numbers on it just on a calculator and Hanover's got four hundred and seventy one square miles. In one day alone, five million gallons per day would cover Hanover to the depth of three-quarters of an inch and in one year to 22.6 feet deep. Now, you know, everybody can run numbers, once you increase that to thirty five million gallons per day...that's a hundred and fifty eight feet deep of effluent. Just to give people a perspective of what five million gallons per day is. Well, so all the engineers and people who do all this modeling say it's perfectly fine to dump this discharge into the river, I'll leave everyone with one question. Would you swim in five million gallons a day of effluent and would you take your children swimming in it? I think I know the answer to that question. Thank you very much.

**Georgie Myers:**

——DEQ does not have a very good reputation and the state is not doing that grand and since you all let people like Smithfield and Warner, the EPA has to come in do their job to get ya'll to do yours. How do we know that you're even gonna do half of the monitoring that should be done? And how will we know if you do or not?

**Magi Shapiro:**

I've got more questions than I've got comments and, if possible, I would appreciate a written response to my questions. My address is 16411 Gun Barrel Rd. Montpelier VA 23192. I would appreciate a description of the project. As I stand here, right now, I really don't know what the details of this project are and I think it would have been more appropriate for this entire evening to be proceeded with a description of the project. What kinds of waste will be treated there...immediately and long term? So far, I haven't heard any response to those sorts of issues. What about the impact to the dwarf wedge mussel? Could we see a copy of the report? Apparently, an investigation was carried out; I would like to read it. What impacts beyond the dwarf wedge mussel...this is a tidal area...things come and go on tides, they don't just sit around. Tidal volume and reach varies considerably with the amount of rainfall and the amount of winter precipitation. There are all kinds of things that can affect the range of tidal movement. With effluent going into it at this critical point because this is almost the upper limit to tidal reach. I am concerned about what effects this effluent will have at this point, even if it has been processed through the tertiary impact stage. What are the baseline data? What's there now? What do we really know



about what's in that river...what's living in it...what kind of bottom does it have...what are in the sediments of that river? How are we gonna know there are any affects if we don't know what's there in the first place? What have we got to measure against? I haven't seen anyone speak to those kinds of data. I would also appreciate, this is gonna be a little disjunct because I've just taken notes throughout the evening. I would also appreciate having the telephone number of the contact person of DEQ on this so I can talk to him or her personally. I'm also concerned about exactly how fast DEQ will react to a potential problem. Will the County be out there everyday doing monitoring, I mean everyday? How long will it take the County to find out if there's a problem, and during that time frame, what will happen? Will it be irreversible? Will it be reversible? Will it be benign? Will it be detrimental? We don't know the answers to any of that. Typically, DEQ does not respond very fast and if Hanover County doesn't happen to be out there on the very day of an adverse impact, how long is it gonna take before DEQ knows about it and then turns that report around to action so that whatever it is, is stopped? In other words, can they shut that plant down within thirty minutes of detection of the toxic effluent? I don't know. Maybe they can, but it's a good question. And this is kind of by means of just comment...*Black and Beech* identified the Pamunkey River as a high candidate for this kind of project because it's so clean. They could have gone anywhere to a dirty river, but when you're talking about a dilution fraction...when you're putting a pollutant, whether it's a benign pollutant or an adverse pollutant, when you put a pollutant in a river, there's a mixing zone. And if the river, if the receiving water, is very very clean as in this case, the Pamunkey River, then it gives you a little more leeway to put pollutants in there because they will be more diluted once they get there. So, I think the Pamunkey, and I'm just guessing here, but I think the Pamunkey was chosen because it is so clean, which gives the County a lot more leeway to introduce pollutants. I'm also concerned about this magic four thousand linear feet. What is going on in that four thousand linear feet that makes it safe? I'm not sure that it's meaningful to me. That's all I have right now. Thank you.

**Anne Melton:**

Hi, I'm Anne Melton. I was just kind of clueless when I got here but listening to all this I had a few little questions and, first of all, this gentleman said (I think) that the lawyers had to work with the County over this. You apparently had hired lawyers...Mr. Broadus or...and did you have you pay for that lawyer or is the County gonna pay for that lawyer? I mean, this seems a little unfair to me. But anyway, I was wondering who the mussel survey is conducted by. Is that some department, I mean somebody that you all choose or the County chooses, or I just kind of wonder about that good stuff. And, also the historical values, somebody was talking about the historical value of the County, I think, Mr. Hodges, to protect historical things and I know this is not totally in Hanover

County but this gentleman here from the Pamunkey Indian reservation...I mean, what larger historical, you know, value should be placed on that? And these, like, you know, he said these people depend on that for their livelihood and I can't imagine, you know, that you would even consider something like this that would adversely affect them so much. That's all.

**BJ Ostergren:**

Good evening, my name is BJ Ostergren. I live in the Ashland district and I was the first one that stood at this podium, in this room, on May 22 1996, and advised the citizens of this County when no one else did, that there would be a wastewater treatment plant right beside our new multimillion dollar park and nobody in this County, administration and John Hodges can attest to this fact, told the citizens of this County that we were going to have a sewage plant over there. Now, I learned how to swim in the Mattaponi River...I still fish there and let me tell you how clean it is...it is absolutely the most pristine river on the east coast that you all are aware. They have many mussels; I'd like to tell you. So, I don't know how long the Pamunkey will last but I do canoe and have canoed on the Pamunkey. I have put in at route 738, which is up near Bear Island, and I put in on the South Anna right out a half a mile before the confluence with of the Pamunkey. And it was a hot August day...the river was very low. There were many logs to get over and I almost gagged until I got to the confluent. The stench was unbelievable. So, my question I guess is where were you all when I was trying to breathe that gross smell? I have never been back there. That makes me bring up the other point. There are now two treatment plants on the South Anna; one is a small one that treats Country Club Hills, and another one is over there and I have looked at that map that Mr. Hodges pointed out. One is at Ashland, now we're up to three. One is at Doswell. We have a dumping place right up here at Hanover. We have one at the Boy's School. We have a major landfill down here that is the biggest polluter of all, whose leakage has something going into a pond, which then goes into the river. And then, of course, we have King William County which wants to put basically, I will call it number nine on the river. Henrico County has, someone here mentioned before, asked Hanover and wrote a letter to Jack Berry and if anybody denies this in this County, I've heard somebody deny it before, I will call them a liar to their face. Henrico County asked Hanover in three different letters and we ignored them all...how much capacity do you need? How much capacity do you need? Third time...Hanover, we've written to you, we need to know how much capacity do you need because we are doing our plant and we want to know so you can join in with us. Well, the third time Mr. Berry, former County administrator, wrote a letter back and said "well, we're gonna build our own plant." Now, Louisville landfill, Kentucky's sewage plant had a major accident and had all sorts of stuff from their sewage plant dumping into the river. Jacksonville, from fifty years of major problems, was just written up in a recent story in the *Richmond Times-Dispatch* from

dumping down into their river down in Jacksonville; they are having major problems and trying to come up with solutions to cure it. As we all know, there's a movie out today and it's called "A Civil Action," now that's not quite this because that involved TC being dumped on lands by two major companies. But now, because nobody from their State Water Control Board checked their wells or anything, many, many, many children died from leukemia. Now they're involved in like a seventy-two million-dollar cleanup. I would advise you to read the book rather than seeing the movie because there are many, many, many facts in that book and lots of technical stuff. My next point that I would like to address is, I just find it reprehensible that this County is going over these people's land which they have been good stewards for...they have no right of way and this County has applied for permit on somebody else's land without working it out or even asking anyone else in the area if they'd like to have a sewage dumping line on their property. In some places in this river when I've gone fishing down and I've put in down here at 301 and I've canoed down, there are many, many, many places where I've actually had to get out of the canoe and, you know, just let it float on by because with the weight in it, and it's not that I'm not so overweight, it's just that the water is only like this tall and of course the draft on the canoe is deeper than that. So, the water on the Pamunkey River, is so low during the summer time that I'm just questioning, with all of the plants up river dumping into this Pamunkey, how are we gonna have another one down here and I love the man's point about the Veatch ball because I put in one day at Mattiponi and I rode the current out and I got to a certain point and I was watching one piece of wood and it was sort of like going long with me as I was fishing and doggoned if that piece of wood didn't come back and ride back up in the tide. So, if we dump into this river, won't we be having effluent go down a certain place and then, when the tide comes back, I know it's mixing, however I don't think it's mixing to that point, then it'll come back and of course we're gonna dump more into there. Also, we're talking about testing daily. King George County, right now, Senator Bill Bolling of Hanover County has requested that King George landfill, which has been violating their dumping regulations and no one has been watching them...he wants an investigation into that and I think that that probably falls under the bailiwick of DEQ. So, if we can't watch how many dump truck loads and truckloads of trash are coming into King George landfill, and I don't know all the facts about that...I'll admit that. I only know what I've read in the paper today and read on the news. Then, if somebody isn't watching them then how do we know some accident can't occur over here? Also, I mentioned about how this Pamunkey River's affected by our own dump. Hanover County has had violations on this. Dr. Carter, who owns a pond adjoining the dump, has said his pond has been ruined. A spring at Portland Farm has been totally ruined, and of course we know that leakage has been running all over the place up here at any different time. And as far as I am concerned...don't swim in any open waters. Well I can tell you if you add another, and another, and another, and another effluent dumping ground on the Pamunkey River...we won't be able to do anything, because the smell will

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be just as bad as it was up there on the South Anna River. And what I'd like to do right now is I'd like to have everybody in this audience who is against this and having this point come out right there, please stand and let's just show these people...and I think that's pretty interesting. *(let the record show that most of the people in the room stood at that point)*

**Dale Taylor:**

My name is Dale Taylor and I live in the Beaver Dam district. I will be short because I've already questioned and addressed most of my thoughts, but I do applaud what Mr. Broadus said, because I've stood at this podium before and literally begged this County to be thorough and accurate and go slow and make sure that you have the best information that you can get before you put something like this in the works. And I think the philosophy in this County is "if we can get it on the agenda quick enough and if we can ram it in, and do an end run around people, nobody will have the time to react." And I think that's exactly what happened to your family and it's happening all over this County but this is egregious situation. And I also want to follow up on what Ms. Shapiro said about just how long will DEQ take to react once there's a problem and you have you do an evaluation. How long is this gonna take? How many plants have you shut down or said no go until you get this straight? It's been my experience that government and DEQ, and certainly the County, is not going to do anything to hurt its own self. So, I think all of these things that you've heard today are very important and I don't live in site of this but I do know where this County's heading and it's in a bad direction.

**J.J. Markow:**

Mr. Van Auken and members of DEQ, ladies and gentlemen, I appreciate Mr. Van Auken you putting the Russian connotation on my name. It's not Markoff, it's MAR-KOE. I guess I'm basically here to sort of underscore some comments that have already been made. Those, I guess, start with Mr. Hodges, with all due respect to Mr. Hodges. His job is to be the point man for the County and more or less like when you have a presidential debate and after the debate you get those spin doctors out there in front of the press and "well, you know it went this way and this guy really looked good this way and we did all the right things," and I've had the benefit to sit on this side of this dais as far as on the other side and it is not true that the County has not had any other alternatives. When I was on the Board, there were requests from Henrico County for us to go in with them again like Ms. Ostergren reiterated with Mr. Berry. How much do you need? How much capacity? They already were serving us through their plan and then to Richmond through their pipelines. We always talk about reasonable cooperation in the paper...staff comments, the Board of Supervisors comment about regional cooperation. But the only cooperation is when we have to spend

taxpayer dollars for economic development. This is the type of thing where we ought to have reasonable cooperation, these huge capital infrastructures. Also, I believe that the DEQ should look upon Hanover County as, because they are the regulating agency just the same as a parent looks over a child when the child behaved and wants something, they're rewarded; when they're not behaving, they don't get the reward. And what I'm speaking of, is I think you folks should look at the track record of this horrible, horrible manner of handling the landfill. Now it's been there, ever since it's been permitted in 1979, there have been state and federal violations virtually every year. Mr. Seeley, I wanna point out that earlier in the comments before the program started you made a comment that "well, they'll test everyday," well, I'll assure you that *that* won't be the case. If history serves us correctly, "history is our teacher," is what Patrick Henry had to say. And, I can tell you this...that you can look at the records of the landfill and you can see there have been years where monitoring of the wells has gone absent and has not been reported. DEQ did nothing about it. The County did nothing about it. They violated state, federal, and local laws. I've found local violations of trash, of pilfering, of sediment, of erosion...it just goes on and on and to say because of that track record you should allow them to reward them by allowing some more discharges into the river. It's beyond me that there are alternatives...Richmond, since Henrico has its own, I'm sure Richmond has some capacity. Again, regional cooperation...and I know these are tough decisions for you folks because this is primarily a political decision. As political Republican parties head up the state agencies, head up the state government, you folks work for the Republican governor, the Republican majority, the Republican co-chair in this County; but I hope that won't be the case. I hope that you'll be able to take your courage and do what is really right. Thank you.

**Erika Shriner.**

Hi, my name is Erika Shriner. Governor Gilmore has said that water quality is the number one environmental priority. He proposes spending 48.3 million of our tax dollars, cleaning up our rivers. Given the importance of clean water, and in light of the problems of water pollution in our state, we hope that you'll look very critically at this project. Incomplete studies, hypothetical models, and estimates are exactly what got us into the problems we face today with our rivers. Very sadly, Hanover County has not proven itself to be environmentally responsible. As Chip mentioned, the County currently operates a landfill, which is not in compliance and poses a serious problem to the health of both people and wildlife. The problems of the landfill have been allowed to continue, even though our County officials brag each year about a budget surplus. Earlier, one of you gentlemen said that we would have no problems if operated in accordance with this permit. Well, currently we're not operating in accordance with permit at our landfill and many of us residents feel very nervous about this being our only safeguard. In a completely rational world, this request would be turned down. We would not



allow, as rational men and women, this County to undertake a very environmentally sensitive project until they had shown both the willingness and an ability to operate existing projects within compliance of the law. I, as just one citizen of Hanover County, would like to apologize to the Broaddus family. I am ashamed of what we are doing to this family. I'm ashamed of what we're doing to the environment. People who are trying their hardest to keep land open, to keep it well operated, to keep it environmentally respected are being harassed by this County... and that's sad and I do apologize, and I think the vast majority of the other members of this community would do the same given the opportunity. Thank you.

**William B. Ellis:**

Thank you Mr. Van Auken. My name is Bill Ellis. I'm an attorney from Richmond and I'm here tonight speaking on behalf of Francis Crutchfield, one of the owners of New Castle Farm. I guess, by now, you all know that New Castle Farm is on the banks of the Pamunkey River, near the US route 360 bridge. It's the site of the proposed discharge. I intend to file some written comments and so I will not, I hope, go over your time limit tonight. But I do wish to emphasize three points and I certainly appreciate the opportunity to do so. The first point that I wanna make is that the County has not really provided the kind of sufficient information that I think you and the other Board members will want before making a decision on this matter. There are several examples of this, I think, but tonight I'm just gonna focus on one. The Natural Heritage Division of the Virginia Department of Conservation and Recreation has said that there is a high probability that three rare mussel species inhabit the stretch of the Pamunkey River where this discharge will be going. In addition, a 1993 Master's thesis by a fellow named David Michaelson from Virginia Tech indicates that the federally endangered dwarf wedge mussel historically has occupied this portion of the Pamunkey River. Now these things aren't really surprising. When you step back for a moment, you realize that the Pamunkey River is of course one of the cleanest streams left in Virginia...and, in fact, probably on the east coast. Mussels certainly need very clean water to survive and thrive. And what we have found is that as streams like the Pamunkey become polluted, even within existing water quality water standards, that mussels are becoming increasingly rare. And I think what that says is that water quality standards have not been set sufficiently to protect organisms like mussels that are and have been out there in the water body using it and yet, of course, we know that they should be. Now despite the probability that rare mussels are out in this stretch of the river, it is my understanding although I heard something different tonight...that Hanover County has not performed any fieldwork that had a credible chance of discovering those mussels. I've arrived at that conclusion after talking to Professor Neves, at Virginia Tech, also with representatives at the Natural Heritage Division. And after sending two Freedom of Information Act requests to

Hanover County, and the other to the Department of Environmental Quality. Although, any reports on mussels would have been within the scope of what we requested, no reports on mussels were furnished to us. And I conclude that either it hasn't been done or it hasn't been done in such a way and in such a time that it could produce meaningful results. According to Dr. Neves, a noted mussel expert, mussels burrow into the bottom sediments of rivers during the winter months, and if you go out there and look for them during the winter you're not likely to find them. To be credible, a mussel survey must be done in other times of the year and I ask that DEQ postpone action on this application certainly until it can perform an adequate study to determine whether or not mussels are in fact there...whether the existing water quality standards are really sufficient to protect them, which I think is a doubtful proposition. And, of course, if existing water quality standards aren't adequate, if I understand right, for the basis of the permit as it has been projected thus far...it's been assumed that achieving water quality standards would achieve a suitable level of water quality in the river...that may well not be the case. The second point I want to make tonight is that Hanover County has not yet applied for, much less obtained, a permit that it will require from the United States Army Corps of Engineers for the reiteration structure and outfall associated with this project. Now, I'm aware that ordinarily that's not a great problem. The Corps has nationwide permits and usually they can be applied in situations like this. However, that's just not the case here. The reason, I think, one of the reasons is because of the unique historical significance of New Castle Farm. And also, a federal law known as the National Historic Federation Act. As you may know, the Corps of Engineers is required by that act to take into account the impacts of federally licensed projects on historic resources. And because of the unique historic resources in this case, it's simply not going to be available to Hanover County to rely on a nationwide permit. They will have to pursue the individual permit process and go through the section 106 Historic Resource Review with particular reference to the unique resources that are on this property. That can be a very long process; I've been through it several times and I can speak from experience. Now, I said this property was historically unique. What's so unique about it? Well, a portion of the property is not merely eligible for listing on the national register; it's actually on the national register. The Town of New Castle that we've heard about is a listed Virginia Historic landmark. There may be other resources. Tonight, I'll spare you the history of New Castle town. Suffice it to say, I think that it has played a unique and pivotal role in Virginia history and at one point came within two votes of being the capitol of the Virginia colony. It's where Patrick Henry, in 1775, rallied volunteers to go march on Williamsburg and protest Governor Dunbar's seizure of the colonists' gunpowder. And now, this is the spot where Hanover County has proposed to discharge its treated sewage. This heritage may be an expendable resource to Hanover County. The Corps of Engineers doesn't have that luxury and I think that this site is probably for that reason, not permissible through the Corps of Engineers. What Hanover County is asking you to do is to

go forward with the evaluation of a discharge location that they haven't obtained a permit for from the Corps, and more importantly that they probably can't obtain a permit for from the Corps. Now, on the third point I want to make...is that the County has manipulated the proposed discharge location in a way that I think you should be aware that I hope DEQ will not wish to participate in. Originally, as Mr. Hodges indicated, the County had proposed to locate this discharge across the middle of New Castle Farm. That was absolutely the worst location as the County itself determined that it could have been put on the farm. And the County performed a study. They visited the farm. They ranked potential discharge locations according to a number of factors...the most important, of which, were water quality, historic resources, and damage to New Castle Farm itself. According to the County, they also considered matters of safety, access, cost, and wetland impacts. And, after considering all those factors, they came to the conclusion that a discharge location some four thousand feet downstream at site called "Downstream 2" was a demonstrably better solution. And, they said, superior in terms of water quality. Now, I'm not saying that that downstream site is without problems; it does have problems and they are not acceptable to the owners of New Castle Farm. But what happened, is that when the owners of New Castle said so publicly, the County officials responsible for this application did an abrupt about-face and they've now asked you to return to the original discharge site in spite of the fact that they've acknowledged that it's an inferior location. Now why do you think they've done that? Well, after examining the evidence, I've arrived at my conclusions and I want to announce that today I've filed a legal action in Federal District Court against the irresponsible officials of Hanover County who have engaged in this behavior. The suit alleges that the abrupt return to the original discharge location was an intentional effort to punish and intimidate the owners of New Castle Farm for exercising their constitutional rights to oppose the County's plans for their property. I intend to prove those allegations and I intend to collect both compensatory and punitive damages against those responsible. Now, to summarize this point, the County officials are attempting to abuse your board. They are asking you to participate in using these proceedings as a vehicle for punishing dissent and intimidating landowners in the County. And my sincere hope is that you won't allow that. On behalf of Mrs. Francis Crutchfield, I ask that you either deny this application outright or postpone consideration of it until the County has performed a complete assessment of the necessary information that you require and its obtained federal permits that it will need. Thank you very much, I appreciate it.

**Darrell Hicks:**

—People say I do not know much about the environment—cherry trees I had are called "the early Richmond," they're at Sunrise House. People try to pull them up early but they seem to come back each year. And in Tennessee, they had a — — which it stood its own ground for many, many years. —in the

Philippine Islands and then in Vietnam. We were— on medicine—dioxin— people think that the Agent Orange was the dioxin—but—was the environment. It affected human eyesight. —question may ways my eyes are 28 over 100. The only knowledge I had of that— 1226, let's see —we sat and held a man's head, he's going to heaven—been shot in the head—Ten minutes later, he held another man's head. You can only —to the people that were called a suicide— this guy flew a Navy plane Marine Chopper's friend to keep on—dioxide. So, at Sunrise House, they have—got my name written on the stall. I do ask to be exempt from the legal procedure — and I get social security, you know, the kindness of the country. The papers I have with me—Bill Bolling, in Richmond they call him Senator — In Washington, they call him "miracle worker," because the money comes from international monetary sorts that they try to give to Korea —North Korea—they tried to give the money to Brazil—they take a wheelbarrow of money—American dollar—Honorable—came to Sunrise House on Labor Day of 1995 and —saw him yesterday. I voted in that district in 1994, unfamiliar with honorable people and I just—Honorable Bill Bolling— Thank you—Honorable—Honorable Bill Bolling—did not receive a response—Thank you very much. God Bless you each and everyone.

G. Warren Cook:

(Written statement. Did not testify)

Orville L. Cole:

My name's Orville Cole. I live on the Pamunkey River and we've owned this place since about 1951. A thing you might wanna put down in your books, which doesn't come up in a lot of your studies, that this water in the summer time when you get the least amount of rainfall like we did this year. This water gets up to about eighty-seven degrees and with the bacteria that's in the water and what your opposing dumping in the water is gonna have a big effect, not because of the amount you're gonna be putting into it, it's because of how fast it will grow. Now, I know by most answers if you take your swimming pool outside and I tried to do it one time....I pumped the river water into it and you get algae real quick, so I know how fast things will grow in it. This is one thing I was real puzzled...if you dump five million gallons in, it reaches two thousand, one hundred meters downstream before it gets fully mixed. That's on the outgoing tide and then on the tide coming back is gonna bring that same mixture back to a point where it's going to be half mixed on the incoming tide because it moves half the speed than it does going out. And in between the two tides, you get a still tide...which it doesn't move at all for about ten minutes. So, during this time, you've got a turmoil of water. So, like I say, I live in this area and about two hundred yards from where you're dumping it at, on the incoming tide, you can stand in the middle of the river on low tide and your chest is not going to get wet. And on the

downstream side of it, is where all the water sand sediments set at. Well, the sand is a nice deterrent, you know, for little shell life and everything else but that's where the rock fish like to lay their beds and —out their eggs and everything and they look for that sand bed. Like I said before, you know you can go down there while they're ponding and that river will be full of rock fish and I'd hate to see that change. And, if you put a ten millionth gallon down there, it's gonna reach my house before it ever mixes. That's all I've got to say. (How far is your house?——)

**Bob Branner:**

Good evening. I'm Bob Branner and I'm a resident of the Henry District in Hanover County and I serve as President of the Patrick Henry Concerned Citizens Association. We concur with the views expressed by others here tonight that the solution to this problem is to put no pollution in the Pamunkey River. By Hanover solving its sewage treatment problem requirements on a reasonable basis with neighboring jurisdictions. This was the original recommendation of a Citizen's Commission appointed to look into this matter some years ago. We never heard, I never saw a report from that Commission. We heard little or nothing of this Commission's report. We heard only of a very illogical sequence of negotiations with Henrico, by a Hanover County administration that did not indicate a valid bona fide attempt to successfully arrive at a mutually beneficial arrangement for the metropolitan area sewage requirements. Citizens' groups substantially confirmed this by presentations at a public meeting, at Lee Davis, on this project. Not only as to the real need for a plant in Hanover, but also as to the end bottom line cost. Patrick Henry Association suggests again a joint citizen, County, administrative task force be established to realistically study sewage treatment on an effective, reasonable basis and that the construction of the Hanover Treatment Plant be held in advance by holding up a permit... relieving the Pamunkey of this potential pollution and all the interests of an associated negative impact. And I thank Mr. Hodges as my good friend, now director of community relations, I think this would be a good job for him to undertake. Thank you.

**Kevin Damian:**

I agree with a lot of the higher speakers. One thing I do have to say is my father-in-law, of course, is a retired oceanographer, and he was employed for most of his career at the Virginia Institute for Marine Science. One thing I do know is that shellfish, of course, are filtering animals and they can tell us all kinds of things and it's not hypothetical. Shellfish, as I say, they bury in the sediment and they would be the best determining factor on long term and even short term effects of situations where what we're looking at tonight. I agree with Ms. Shapiro, that we need to have some kind of baseline. I believe it when the study that was done by



—By Dr. Albert —was not done, it was just done like hypothetical with figures from other areas. I really think that if you're going to discharge effluent all year long, that you should do an all year study to get a baseline idea of what affect you will have on this river. That way, there, you take into account low water, high water, slow water, cold water, warm water, and you can actually judge, of course, by these shellfish their reactions to what happens. My concern also is what will happen downstream to the saltwater shellfish when the salinity level decreases...that, along with parasites, which is a more or less an indirect result of lack of salinity is the reason that the oyster population in Virginia is about devastated...I mean, there's so few grounds that are productive and that they're even allowed to be fished. I would also like to know what kind of documents were used to determine the criteria on the effects on the environment. I read in the paper only yesterday that Goochland is seriously considering building its own wastewater treatment plant for use for West Creek and if that does in fact occur, it would allow us even more consideration for regional cooperation. I would just hope that the DEQ would delay the issuance of this permit to allow further baseline studies so that we can honestly know what effect we will have on this river, because there's no turning back. The other, and the final thing I'm concerned about is the use...the medical waste and also the heavy metal that's usually associated with industrial waste. I understand and I'm not an engineer but I understand that there's a special whole other process in a separate system, if you will, that actually deals with the industrial waste. Heavy metals, naturally, will settle once...I assume that we use an extraordinary amount of water in this process and naturally, the metals are suspended. However, once they get into the river, to slow water and whatever effects the environment will have, they will eventually settle. What happens then, once they're in the sediment, they don't go anywhere unless they're dredged up. Thank you very much and I hope you'll consider delaying this permit issuance.

Jane Osby.

I know very little about this but I talked with a friend today who has done quite a bit of study on the wastewater treatment plant and she came out of the hospital today and couldn't be here tonight...but one thing she made me aware of is plant failure and I never even stopped to think about plant failure before...didn't even realize that these plants failed but what I was told was when mechanically the plant can not handle treatment and it has to be shut down, that raw sewage is dumped into the river. I just can't believe that *that* would be done, but then I know she knows what she's talking about and so these water quality standards that we say are sufficient...surely they're not sufficient for these type of incidences, I wouldn't think. And, if they...what I'm thinking is these finicky mussels that we've been hearing about all night tonight, somebody said that they're already endangered...how long are they gonna be in our clean Pamunkey if this is the way plant failure is handled and are there any choices? Thank you.

**Ms. Lowery:**

I wanted to thank Mr. Makow. I have one general statement to make (now I'm yelling). This Hanover County had a Natural Resources and Environmental Committee, which operated, thanks to Mr. Markow and others on the —Board. The committee served ten....twelve years giving, I think, very studied responses to problems. It became evident, perhaps under my supervision, it became evident that we were not going to become rubber stamp committee any longer. Guess what? They demolished the committee. So, therefore, unfortunately, we have had no comments to make in this particular environmental problem. But I can tell you we would have and I'm not gonna bore you with the long list of things that we did work on, but we did work on them. Georgie, how many were turned down by the Board? Everything? Maybe not everything. But, again, we were not a rubber stamp committee and it was much easier to get rid of us. I think that's a general comment. Any questions? I guess not.

**Kathy Cabe:**

My name is Kathy Cabe, I live in Beaver Dam, Virginia which is a long way from where they're planning on putting this in and I would just like to address you gentlemen since you are not knee deep in the intricacies, hopefully, of Hanover County politics. And just say that it breaks my heart that this family has to hope for a rare mussel somewhere in that river, to save them from the bulldozers. There is something wrong with this. There is something wrong. This family has been harassed that they had to hire attorneys; they had to hire them before when the County wanted to put an off water storage basin. Now, if they couldn't get the water off river water storage basin, well we'll just run sewage through there. There's something wrong with this picture and I hope that the DEQ, since quality is in your name, that you will take quality of life for this County family who have been wonderful stewards of this land, into consideration when you are making your decision. The citizens of Hanover County stand up with this family and say, "we don't want this."

**Tom Van Auken:**

Thank you. This hearing is closed.

Frances Broaddus-Crutchfield  
1196 Huguenot Trail  
Midlothian, Virginia 23113-9114  
4 February, 1999

Members of the Board  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, Virginia 23060

Dear Board members:

The soil of Newcastle Farm is as rich in historic memories, archaeological relics and wildlife species as it is in its ability to grow crops. This land transcends the six-generation struggle of the family that has safeguarded it as open space. It is one of few remaining good examples of human treatment of this planet, and it should be here for our descendants long after we have been relegated to our parts in its memory.

Thus far we have been responsible stewards. We have followed what one Secretary of the Interior called a necessary "live and help live" policy. Now we are forced to seek your aid to continue, or to submit to the powers that would stop us.

Let there be some earth not pierced with our pipes and some water not polluted with our waste. Please, help us save this land.

000880

Sincerely,  
Frances Broaddus-Crutchfield  
-22-



**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF ENVIRONMENTAL QUALITY**

James S. Gilmore, III  
Governor

John Paul Woodley, Jr.  
Secretary of Natural Resources

**PIEDMONT REGIONAL OFFICE**

4949-A Cox Road  
Glen Allen, Virginia 23060  
(804) 527-5020  
Fax (804) 527-5106  
<http://www.deq.state.va.us>

Dennis H. Treacy  
Director

Gerard Seeley, Jr.  
Piedmont Regional Director

March 3, 1999

**MEMORANDUM**

**TO:** Members of the State Water Control Board

**FROM:** Gerry Seeley - Piedmont Regional Office Director *GS*

**SUBJECT:** Totopotomy Sewage Treatment Plant - VPDES Permit

**COPIES:** Cindy Berndt

Attached is a compilation of public comments and a summary of issues regarding the proposed issuance of a VPDES permit for the Totopotomy Sewage Treatment Plant in Hanover County. Also included are letters that some of the commentators asked us to mail to you directly.

There are some complex issues involved, so we wanted to give you an opportunity to review the materials before the Board Meeting. At the meeting our staff will be presenting a brief summary of these issues and our responses. We can answer any questions you have at that time.

Based upon our evaluation of the input received, we are considering some possible changes to the permit. These are described in the attached summary of issues. We have been discussing these possible changes with the County and hope to gain their acceptance before the meeting. We will make you aware of the County's position on these changes before we recommend them to you.

Please feel free to call me at 804-527-5053 if you have any questions.

001344

**Summary of Hearing Comments  
Totopotomoy WWTP - January 19, 1999**

The following is a summary of comments received during the January 19, 1999 public hearing at Hanover Courthouse on the proposed issuance of VPDES Permit No. VAO089915 to the County of Hanover for the Totopotomoy WWTP. Opening remarks by the hearing officer, Thomas Van Auken, and the staff presentation by Allan Brockenbrough are included in the hearing record. The comments from the public were as follows:

**John Hodges, Deputy County Administrator, Hanover County**

Mr. Hodges explained that Hanover County needs additional sewerage capacity by 2003 to accommodate growth included in their land use plan. The County evaluated many options over the years and concluded that construction of the Totopotomoy WWTP was the best alternative. The Pamunkey River was identified as the best receiving stream in many studies over the years. A Conditional Use Permit for the WWTP and outfall was approved in August '97. The County looked at an alternative discharge location approximately 4000 ft. downstream at the request of one family member. Although the downstream alternative was a good location from a water quality perspective, it impacted additional property owners, cost more and didn't have land use approval. The County went back to the original discharge location after the landowner chose not to sell an easement at the downstream location. The County believes that the discharge location minimizes impacts on the river due to strong tidal mixing, provides for less of an impact on neighboring properties, is protective of historic resources (the outfall is separated from the New Castle archeological site by an abandoned rail line), minimizes wetlands impacts and does not impact any endangered species (survey performed). Mr. Hodges indicated that the DEQ permit limits were appropriate and requested that the permit be issued.

**Henry Broaddus, owner of Newcastle Farm**

Mr. Broaddus stated that the record shows the owners have never considered any outfall location on the Newcastle Farm. The County continued to go on the property after permission was revoked. He is frustrated by the progress of the proposal despite heavy opposition. He stated that Newcastle and the Pamunkey River are in pristine condition due to the diligent stewardship by he and his forbearers from his 6th great-grandfather the great agricultural scientist Edmund Ruffin, up to his father Woodford Meade Broaddus who refused to use any harmful chemicals on the land. With the WWTP discharge, Mr. Broaddus is unable to enforce his father's standards on the property. Impacts of rare mussels, aquatic life and water quality have not been adequately studied. He is powerless to do so but DEQ can require further study and a thorough evaluation. We should not rely on the hypothetical models which are before us.

**001345**

**Charles D. McGhee**

Mr. McGhee farms the New Castle Farm property. He uses best management practices and has developed a Chesapeake Bay Plan and a nutrient management plan to minimize agricultural impacts. The outfall will run through a resource protection area. Irrigation water is pumped from the river 1/4 mile from the proposed outfall and



he is concerned about health impacts. Construction will be disruptive to the farm. Mentioned study on impact of discharges on rivers done in Great Britain and compared pollution on the Cape Fear and Neuse Rivers in North Carolina. Cape Fear River has 11 dischargers, the Neuse River has 424. Has County looked at other properties for suitability? Have studies been done on how the effluent will move with the tide? Mr. Broaddus doesn't allow the use of sludge on the farm and irrigation with effluent tainted river water will be the equivalent.

Meade Anderson

Mr. Anderson is a nearby property owner and regular user of the river at the discharge point. If Hanover was really concerned about water quality they would have pursued additional treatment capacity with Henrico or Richmond when they had the opportunity. Mr. Anderson regularly swims in the river near the outfall location as he has done so for the past 35 years. His daughter and mother swim there as have numerous ancestors. We have computer modeling but do we really know the impact of that much discharge? He characterized the amount of discharge in terms of how deep it would cover Hanover County. Would you swim in 5 MGD of discharge?

Georgie Myers

Ms. Myers stated that DEQ does not have a good reputation. EPA had to step in to get DEQ to do their job with Smithfield and Roanoke. How do we know that the required monitoring will be done?

Magi Shapiro

Ms. Shapiro had more questions than comments and she requested a written response. She listed numerous questions dealing with kinds of wastes, endangered mussels, tidal affects, baseline water quality data, DEQ response time, environmental impact, of the proposal, etc. Ms. Shapiro agreed to summarize them in written form at the request of the hearing officer (see Exhibit No. of the hearing record).

Anne Melton

Ms. Melton asked who was paying for Mr. Broaddus' attorney and who did the mussel survey. She recognized that there was a representative of the Pamunkey Indians present and that there was no greater historical resource and that DEQ should not consider a proposal which would adversely impact the tribe.

B. J. Ostergren

Ms. Ostergren indicated that she told the citizens of the WWTP location in May of 1996, long before any county officials would. She learned to swim on the Mattaponi which still is pristine and has many mussels. She canoes on the Pamunkey and related a story of odors on the South Anna River, 1/2 mile above the confluence with the North Anna, near Bear Island Paper Co. She listed the dischargers in the Pamunkey watershed and mentioned pollution being caused by the Hanover County Landfill. Henrico County offered additional capacity on 3 occasions. She mentioned wastewater problems in Louisville, KY and Jacksonville, NC and urged audience to read A Civil Action. She mentioned tidal mixing and asked who was watching when the King William landfill exceeded their daily dumping limit. She asked the opponents of the proposal to stand and most of the room did so.

Dale Taylor

Ms. Taylor stated that she has begged the County to be thorough and move slowly on such issues but they seem to push things through on a fast track. Wanted to know how long it will take DEQ to react and how many WWTP's DEQ has shut down. The government, DEQ and Hanover County will not hurt their own interests. The County is heading in a bad direction.

J. J. Markow

Mr. Markow stated that Mr. Hodges job is to be a spin doctor. He has been on the Hanover County Board of Supervisors and knows that Henrico approached Hanover about providing additional capacity. Localities should cooperate on large infrastructure projects such as this. DEQ should not reward Hanover with a permit due to the County's mishandling of the landfill. Groundwater testing was not done and DEQ did not enforce the permit conditions. Capacity is available at Richmond WWTP. He stated that Hanover County and the state are governed by Republicans but hoped that the DEQ staff would do the right thing and not decide the issued based on politics.

Erika Shriner

Ms. Shriner indicated that water quality was Governor Gilmore's #1 priority and that DEQ should look critically at the proposal. Hanover has a history of problems and the landfill and has not been operated in accordance with their permit. Ms. Shriner apologized to the Broaddus family on behalf of the citizens for the way that they have been treated by the County.

William Ellis, McSweeney, Burtch & Crump

Mr. Ellis is an attorney representing Frances Crutchfield, part owner of Newcastle Farm. He will file written comments (see Exhibit No. to the hearing record). Mr. Ellis made 3 major points: 1.) The County hasn't provided sufficient information to make a decision on the permit. Specifically, there is a probability of rare or endangered mussels in the Pamunkey River and adequate work hasn't been done to determine whether they are present or whether the water quality standards are protective of mussels which need very clean water, 2.) the County hasn't applied for a USCOE permit for the outfall structure and the site may not be permitted by USCOE due to the historic significance of Newcastle Farm which is registered as a national and state historical property, and 3.) the County has been manipulative in relocating the proposed outfall to the location which has the most impact on Newcastle Farm. Even though the County studied and agreed that a downstream location was superior, they relocated the outfall after the owners indicated that no location was acceptable. Mr. Ellis stated that he had filed suit against responsible County officials that day in Federal court and hoped that the SWCB would not allow themselves to be used in an effort to intimidate and punish the owners of Newcastle Farm.

001346

Darrell Hicks

Mr. Hicks stated that he is a resident of Sunshine House in Ashland and be related his experiences with being exposed to Dioxin and Kepone in Agent Orange as a soldier in Vietnam. Mr. Hicks thanked Supervisor Tim Ernst and Senator Bill Bolling for their help over the years.

Orville Cole

Mr. Cole lives on the Pamunkey River downstream of the discharge on property owned since 1951. Mr. Cole spoke of the high water temperatures in the summertime and the high bacterial growth rates which result. He also discussed several observations on tidal mixing action and pointed out the importance of the sand beds below the discharge and their use by rockfish to spawn.

Bob Branner - President, Patrick Henry Concerned Citizens Assoc.

Mr. Branner stated that the solution to Hanover's needs is use of a regional treatment system and not a discharge to the Pamunkey River. The regional approach was the conclusion of an earlier citizen's commission but the County made no valid attempt to follow up on it. The association he represents suggests a joint citizen/county official task force to evaluate alternatives.

Kevin Damian

Mr. Damian stated that shellfish are filtering organisms and good indicators of water quality. He stated that a baseline must be established of existing water quality and that a year round study is necessary to characterize impacts in all seasons. If Goochland builds their own WWTP then there is more of an opportunity for regional cooperation. Asked DEQ to delay action until a better baseline is established because there is no turning back. Also concerned about heavy metals possibly accumulating in river sediments.

Jane Osby

Ms. Osby mentioned the possibility of plant failures and raw sewage overflows. She indicated that the water quality standards do not account for failures and that finicky mussels may not survive such an event. She also asked if there were any other choices.

Sally Lowry

Ms. Lowry pointed out that there was a citizen's Natural Resources and Environmental Committee which advised the Board of Supervisors for a period of 10 to 12 years but it was discontinued when it became evident that they would not simply rubber stamp County proposals. This committee would have been very interested in this proposal.

Cathy Cabe

Ms. Cabe stated that it was heartbreaking that the Broadus family had to hope for a rare mussel to save their land. They have been harassed and had to hire attorney's on this an another occasion to protect their farm from County proposals after being such good stewards. She hoped that DEQ would consider this family's quality of life and indicated that the citizens support the family and don't want the WWTP.

## **Summary of Issues and Staff Response**

### **1. Impact on Dissolved Oxygen Levels in the Pamunkey River**

#### **Discussion:**

In 1995, DEQ personnel performed a special study on the Pamunkey River to document the extent of low dissolved oxygen levels which were known to occur on some frequency. Concurrently, Hanover County personnel also performed low and high water slack tide DO surveys from the Rt. 360 bridge in Hanover County downstream for 23 miles to the Whitehouse railroad bridge.

The Pamunkey river in this region is a deep channeled estuary with strong tidal action. The river is bordered by thousands of acres of tidal marsh. The results of these two studies showed that there were persistent summertime low dissolved oxygen occurrences in the river which seemed to most commonly occur below two large swampy tributaries. The upper sag occurs just below where Moncuin Creek enters the river after traveling through an approximately 700 acre wetland area known as The Island. This sag is approximately 6 miles downstream of the proposed discharge point. The second DO sag appears approximately 20 miles below the discharge point below where Black Creek enters the river and adjacent to several thousand acres of swamp/marsh land.

There have been a couple of possible explanations for the low DO levels in the Pamunkey estuary. The first is that upstream nonpoint source BOD loads settle out in the slower moving estuarine portion of the river and are exerted as sediment oxygen demand. The second and more likely explanation is that the swampy tributaries and thousands of acres of tidal marsh continually deliver a naturally occurring dissolved oxygen demand on the river with every tidal cycle. This second explanation is supported by the location of the two seemingly persistent DO sags in the vicinity of the two largest swamp-like tributaries and tidal marshes. This same phenomenon occurs on almost any coastal stream dominated by a large system of tidal marshes. DEQ staff believe that the extensive marshes are the cause of the low DO conditions in the river and have included the tidal Pamunkey River on Part V of the 303(d) List which includes waters which violate standards due to naturally occurring conditions.

Since 1987, the SWCB (now DEQ) staff have used effluent limitations of 10 mg/l CBOD<sub>5</sub>, 10 mg/l TSS, and 3 mg/l TKN for discharges that do not meet water quality standards due to swamp and marsh-like conditions. These so-called "10-10-3" limitations establish a level of treatment which in the best professional judgement of the Board's staff will not further contribute to lower dissolved oxygen levels in the receiving stream, regardless of the size of the discharge. This same standard was used to establish effluent limitations for 3 other discharges to this section of the Pamunkey River over the past years (King William STP on Monquin Creek, and Cumberland WWTP and Parham Landing WWTP on the Pamunkey River).

During the course of the permitting process, one effluent limitation was relaxed. The Total Suspended Solids (TSS) limitation was originally set at a monthly average of 10 mg/l as previously discussed. The limitation was later relaxed to a monthly average of 15 mg/l at the applicant's request. Because there is no direct correlation between dissolved oxygen demand and TSS, the staff has some leeway in setting TSS limitations. Although typically set equal to the CBOD limitations, they can be set at any level up to the 30 mg/l definition of secondary treatment in the CWA.

The Pamunkey River in the vicinity of river mile 48.80 is considered to be impaired for dissolved oxygen due to naturally occurring conditions. As a naturally occurring condition, development of a Total Maximum Daily Loads (TMDL) is not required.

#### **Recommendations under Consideration:**

Following the January 19, 1999 public hearing, the staff has taken a further look at conditions in the Pamunkey River and chosen to recommend the following modifications to the draft permit in response to dissolved oxygen concerns:

- **Change the TSS limitation back to the original monthly average limitation of 10 mg/l.** This change is not so much out of concern for TSS levels in the river but rather as a way of ensuring additional reliability and reduction of oxygen demanding materials. At a TSS limitation of 10 mg/l, the Virginia Department of Health generally requires that tertiary treatment facilities (usually effluent filters) be included in the WWTP design. The result is not only better reliability and lower TSS levels, but reduced CBOD<sub>5</sub> as well. Larger facilities designed to meet "10-10-3" limitations under peak loading conditions typically produce CBOD<sub>5</sub> and TSS values in the low single digits which is very close to the background levels in the Pamunkey River. The "10-10-3" limitations will also ensure that Hanover County's discharge to the Pamunkey River will be provided the same high level of treatment provided by Richmond, Henrico and Chesterfield for their discharges to the James River.

**Raise the minimum dissolved oxygen limitation from 5.0 mg/l to 6.5 mg/l.** This level of dissolved oxygen is easily achieved with conventional post aeration treatment facilities and further offsets the affects of any oxygen demanding material discharged to the Pamunkey River. Under warm weather conditions, the limit of 6.5 mg/l ensures that the dissolved oxygen in the discharge is at or above the background level in the river.



## 2. Toxicity Impacts

### Discussion:

There has been much discussion on the impact of the discharge on anadromous fish as well as various species of mussels in the river. The Water Quality Standards adopted by the Board are established at levels which are expected to protect all species, including anadromous fish fry and mussels. The Standards require that the staff use mixing zone concepts in establishing effluent limitations. In this case, the use of a multi-port diffuser ensures rapid mixing of the effluent and a relatively small mixing zone. The tidal action in the area also provides additional mixing which has conservatively been ignored in establishing instream waste concentrations for the effluent.

Unfortunately, it is impossible to accurately characterize the level of any toxic parameters in the discharge until after it is constructed and sampling can be performed. However, advanced wastewater treatment facilities meeting the "10-10-3" limitations outlined above do not typically show any toxic impact at the instream waste concentrations initially expected for this facility. One alternative for addressing toxicity concerns up front is to include a Whole Effluent Toxicity (WET) limit in the permit. WET limits are not typically included in VPDES permits until after the discharger has shown a reasonable potential to cause toxicity in the stream. In this case, we do not believe that the potential exists in the initial years of this project. Whole Effluent Toxicity monitoring is required in the permit. As a potential alternative, the applicant has proposed an instream benthic macroinvertebrate study to assess the impact of the discharge. The staff concurs with the applicant's proposal and recommends inclusion of the condition in the permit.

### Recommendations under Consideration:

- Include the following condition in the VPDES permit:

An annual qualitative benthic macroinvertebrate study shall be performed on the Pamunkey River to assess impacts of the Totopotomoy WWTP discharge. The study shall be conducted between August 15th and October 15th beginning in 2002. Study design shall be approved by DEQ Water Division staff prior to initiation of testing.

001348

## 3. Endangered mussels

Several commenters have raised the issue of whether there are rare or endangered mussels located in the Pamunkey River in the vicinity of the proposed discharge at river mile 54.89. In 1972 and 1973, a VCU graduate student surveyed the Pamunkey River for the presence of mussels. At the 360 bridge (river mile 56.87), four species of mussels were found including the rare eastern lampmussel *Lampsilis radiata* and the rare green floater *Lasmigona subviridis* as

well as the eastern elliptio *Elliptio complanata* and *Ligumia nasuta*. The rare yellow lampmussel *Lampsilis cariosa* was also found at a sampling station believed to be approximately 9 miles upstream of the proposed discharge and another station approximately 27 miles upstream (Rt. 614). At a station approximately 52 miles upriver (S. Anna River at Rt. 54), the federally endangered dwarf wedge mussel *Alasmodonta heterodon* was found.

Of the mussel species listed above, only one, the dwarf wedge mussel, is presently listed on the U. S. Fish and Wildlife Service list of threatened and/or endangered species. This species was found approximately 52 miles upriver of the proposed discharge point. DEQ has always maintained that the water quality standards adopted by the Board are protective of endangered species. The only provision contained in the State Water Control Board's Water Quality Standards dealing with endangered species is a halogen ban which prevents the use of chlorine as a wastewater disinfectant. Hanover County has always proposed the use of UV disinfection and the use of chlorine is not permitted by the proposed VPDES permit. The possibility of rare, threatened or endangered species has no impact on the effluent limitations included in the permit.

In applying for a permit from the U. S. Army Corps of Engineers for construction of the outfall structure, the County is required to establish whether there are any threatened or endangered species present which be impacted by the construction activities. The County has paid a consultant to perform a river survey which was performed in November 1998. The survey confirmed the presence of two common species of mussels, the eastern floater and the eastern elliptio. No federal or state-listed rare, threatened or endangered species were located. The validity of the survey results have been called into question due to the time of year it was performed and the amount of time spent searching in the river. However, since the presence or absence of rare or endangered species does not impact the effluent limitations for the VPDES permit, the validity of the report will be left up to the U. S. Army Corps of Engineers to evaluate in permitting construction of the outfall structure.

Questions have been raised as to whether the Board's Water Quality Standards are protective of mussels which are disappearing at an alarming rate. The staff believes that the Water Quality Standards adopted by the Board are protective of mussels. A comparison of the Commonwealth's water quality standards to a published listing of contaminant concentrations which are toxic to mussels shows that the Commonwealth's standards are far more stringent and based upon the protection of even more sensitive species. Indeed, it is generally accepted that the single most important threat to mussel populations is the destruction of habitat due to sedimentation or eroded soils. Additional threats include predation and the spread of non-native species.

Recommendations under Consideration:

None

#### **4. Discharge Location**

##### **Discussion:**

The location of the discharge has been the subject of a great many of the comments. The staff is generally not responsible for establishing appropriate discharge locations. Selection of the discharge site is considered to be a local decision and the staff establishes permit conditions accordingly. However discharge locations have occasionally been moved in response to public comments.

The original discharge location for the project was the center of Newcastle Farm, adjacent to an existing boat ramp and irrigation water intake. At the request of the landowner, the County evaluated one upstream alternative at the Rt. 360 bridge and two downstream alternatives. The original and all three alternative locations were also located on Newcastle Farm. The County then selected the site dubbed "Downstream II" to be the best alternative and modified the application accordingly. After determining that the landowner was unwilling to sell, regardless of the location, the County moved the discharge location back to the original site. The County also determined that the downstream site, although on the same farm, was not located on the same tax parcel and had not been included in the local Conditional Use Permit (CUP). Use of the "Downstream II" location would require that the County go back through the local CUP approval process. The landowner's attorney has filed suit against County officials contending that relocating the outfall to the center of the property was a retaliatory attempt to intimidate the landowner.

Either discharge point is acceptable from a water quality standpoint. The upstream location is located approximately 50 yards above an existing boatramp in an area routinely used for swimming. The downstream site is located approximately 100 yards above a neighboring property owner's boat dock. Although effluent limitations are set to establish a level of disinfection which would meet regulatory definition of "swimmable" waters, the presence of the discharge will realistically eliminate swimming in the river in the vicinity of the outfall as people make a reasonable choice to minimize risks to their health.

In order to determine if there was a significant difference in mixing at the two locations, the staff performed a tidal survey at the two locations discussed above. The survey indicated that on an outgoing tide, the Downstream II location provided more tidal flow than did the upstream location. The difference in flow at the two stations is currently under study by the County's consultant and hopefully that information will be available to present to you at the Board meeting.

##### **Recommendations under Consideration:**

**None**

001349

## **5. Wetlands Impacts**

### **Discussion:**

One commenter raised the issue of wetlands and the impact of construction and operation of the wastewater treatment plant and conveyance system in wetlands habitats. The scope of the VPDES permit has been limited to the impact of the discharge on the Pamunkey River. Potential impacts of the construction and operation of any facilities located in a wetland area will be subject to the terms and conditions of a permit issued by the U. S. Army Corps of Engineers under Section 404 of the Clean Water Act. The project may qualify for a Corps Nationwide 7 permit for the construction of outfall structures and a Nationwide 12 permit for the construction of utility lines. DEQ has chosen to waive permitting action on Nationwide permits for outfall structures and utility lines. If the Corps determines that a individual permit is required, then DEQ will undertake an individual review to determine whether a Virginia Water Protection permit is necessary to protect water quality.

### **Recommendations under Consideration:**

**None**

## **6. Nutrient Impacts**

### **Discussion:**

The addition of flows from the Totopotomoy WWTP will certainly contribute additional nutrients to the York River basin and make the 40% reduction goal that much more difficult to achieve. Nutrient loadings to the basin are currently dominated by non-point source run-off. At this time, the only regulatory requirement for point source discharges of nutrients is a Total Phosphorus limitation of 2 mg/l for discharges to waters determined to be nutrient enriched. This segment of the river is not considered to be nutrient enriched due to the low levels of chlorophyll-a, the indicator used to determine enrichment. However, the raft permit does include a Total Phosphorus limitation of 2 mg/l as if the segment was considered nutrient enriched. The applicant has also committed to including biological nutrient removal in the WWTP design.

### **Recommendations under Consideration:**

**None**

## **7. Water Supply Issues**

### **Discussion:**

DEQ knows of no current plans for any municipal water withdrawals on the Pamunkey River and no jurisdiction has approached the agency in an effort to designate the river as a public water supply in the Board's Water Quality Standards. If and when the river is designated as a public water supply, then the appropriate water quality standards will be applied to the discharge. In most cases, the protection of aquatic life results in more stringent standards than the protection of human health in a public water supply.

### **Recommendations under Consideration:**

**None**

## **8. Temperature Impacts**

### **Discussion:**

With regard to temperature impacts, typical municipal effluent does not vary significantly in temperature and the impacts of temperature on the receiving stream are negligible. Unless there is a very large source of industrial cooling water, temperature is not typically addressed in VPDES permits. Should the County attract an industry providing significant amounts of cooling water, the industrial pretreatment program would limit the amount of heat in the wastestream.

### **Recommendations under Consideration:**

**None**

## **9. Other Miscellaneous Comments**

### **Discussion:**

There were many other issues raised during the hearing process which are not related to water quality and the VPDES permit. The staff does not believe that any action can be taken on the following issues:

**001350**

- Impacts on historic resources
- Whether regional treatment options were sufficiently pursued with neighboring jurisdictions
- Hanover County's record in operating the county landfill which has

been recently been cited by DEQ for illegal leachate discharges

- Broader water quality impacts due to urban sprawl

**Recommendations under Consideration:**

**None**

1196 Huguenot Trail  
Midlothian, Virginia 23113  
January 19, 1999

Members of the Board  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, Virginia 23060

Dear Board Members:

This packet of letters is submitted with the hope that you will refuse to grant a permit for sewage outfall on our property, Newcastle Farm, because of the possibility of harming rare, threatened or endangered species susceptible to changes in water quality.

It is hard to believe that, here, with help from my adult son, husband and lawyer, I may be less able to save our land than I was as a young widow, holding my then infant son, as we stood alone in the fields of Newcastle. Would that I could cry enough tears to improve the quality of water in the Pamunkey River.

It is even harder to believe that, in a democracy, a family who has struggled for six generations to save a valuable, historic, 900-acre farm, can so quickly be threatened by government condemnation for outfall from a sewage plant deemed unnecessary by many citizens. More irresponsible than any government, however, is the family that facilitates the tragedy of harming a threatened or endangered creature by surrendering land too easily.

We are custodians, indeed, stewards of this land, which was here before us, and will be here long after we have returned to dust in its soil. We want to care for the property responsibly rather than to wring from it avariciously all possible profit.

Information in the attached letters indicates that rare, threatened or endangered aquatic species may exist in the Pamunkey River at Newcastle, and that no biological testing has been conducted to date. If present, such species can be harmed by changes in water quality from effluent discharged into the river. We ask your help in preventing an irreversible tragedy. Please allow time for thorough, actual testing to be performed before granting any permit for sewage outfall.

Thank you for your consideration.

Sincerely,

Frances Broadbuss-Crutchfield

Frances Broadbuss-Crutchfield

001351



January 8, 1999

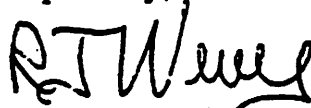
Mrs. Frances Crutchfield  
1196 Huguenot Trail  
Midlothian, VA 23113-9114

Dear Mrs. Crutchfield:

Upon reviewing the information you sent and our telephone conversation on the possibility of rare mussels in the Pamunkey River, I can tell you that a mussel survey at the site would be effective only in late spring or early summer. Because of typically high water levels and cool water temperatures in winter and spring, and because some mussel species burrow down under these conditions, a mussel survey should be undertaken when the animals are most readily visible. Your reach of the river has not received much survey effort, to my knowledge; thus, the occurrence of a rare aquatic species is possible.

If there has been no biological assessment conducted at the site, then I assume that the responsible agency will proceed with the collection of such information to confirm the absence of rare aquatic species at and immediately downstream of the discharge point. Without a prescribed survey for rare mussels, conclusions on environmental impacts would be speculative and not definitive.

Respectfully,



Dr. Richard Neves  
Professor

RN/cwl

James S. Gilmore, III  
Governor

John Paul Woodley, Jr.  
Secretary of Natural  
Resources



David G. Brickley  
Director

**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF CONSERVATION AND RECREATION**

217 Governor Street, 3rd Floor

TDD (804) 786-2121

Richmond, Virginia 23219 (804) 786-7951

FAX (804) 371-2674

<http://www.state.va.us/~dcr/vaher.html>

January 8, 1999


Ms. Francis Broaddus-Crutchfield  
1196 Huguenot Trail  
Midlothian, VA 23314-914

Dear Ms. Broaddus-Crutchfield:

This letter is sent at your request to reaffirm the possibility of rare mussel species in the Pamunkey River adjacent to Newcastle Farm. Three rare species, the green floater (*Lasmigona subviridis*), yellow lampmussel (*Lampsilis cariosa*), and eastern lampmussel (*Lampsilis radiata*), have been documented a short distance upstream of Newcastle Farm and there is a high probability that one or more occurs at or near the discharge sites. The Federally-listed dwarf wedge mussel (*Alasmidonta heterodon*) has been recorded in the watershed and is also possible at the site.

Due to the possibility of rare mussel species, we strongly recommend a survey to determine which species may occur in the vicinity of the discharge sites. Our records do not indicate that a survey has ever been conducted at this site. If you have any questions, please call me at 804-371-6206.

Sincerely,

  
J. Christopher Ludwig,  
Chief Biologist,  
Division of Natural Heritage

001352



James S. Gilmore, III  
Governor

John Paul Woodley, Jr.  
Secretary of Natural Resources

# COMMONWEALTH of VIRGINIA

Department of Game and Inland Fisheries

William L. Woodfin, Jr.  
Director

December 1, 1998

Frances Broaddus-Crutchfield  
1196 Huguenot Trail  
Midlothian, VA 23113

Dear Ms. Broaddus-Crutchfield:

This letter is in response to your request for information on the presence of threatened or endangered species in the area of the Totopotomoy Wastewater Treatment Plant, Hanover County, Virginia.

There are no currently documented threatened or endangered species in the project area. Anadromous fish species have been documented as far upstream on the Pamunkey as the Hanover/New Kent County line. In addition, there are several sensitive colonial bird nesting colonies at the US 360 bridge and approximately 2-3 miles downstream from the bridge.

Information about fish and wildlife was generated from our agency's computerized Fish and Wildlife Information System, which describes animals that are known or may occur in a particular geographic area. Field surveys may be necessary to determine the presence or absence of some of these species on or near the proposed area. Also, additional sensitive animal species may be present, but their presence has not been documented in our information system.

Endangered plants and insects are under the jurisdiction of the Virginia Department of Agriculture and Consumer Services, Bureau of Plant Protection. Questions concerning sensitive plant and insect species which may be found at the project site should be directed to John Tate at (804) 786-3515.

This letter summarizes the likelihood of the occurrence of endangered or threatened animal species at the project site. If you have additional questions in this regard, please contact me at (804) 367-1185. Please note that this response does not address any other environmental concerns. These issues are analyzed by our Environmental Services Section, in conjunction with interagency review of applications for state and federal permits. If you have questions in this regard, please contact Ray Fernald or Tom Wilcox at (804) 367-8999.

Sincerely,

Gregory B. Trolinger  
FWIS Research Specialist Sr.

cc: Ray Fernald

James S. Gilmore, III  
Governor

John Paul Woodley, Jr.  
Secretary of Natural  
Resources



David G. Brickley  
Director

**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF CONSERVATION AND RECREATION**

217 Governor Street, 3rd Floor  
TDD (804) 786-2121 Richmond, Virginia 23219 (804) 786-7951 FAX (804) 371-2674  
<http://www.state.va.us/~dcr/vaher.html>

November 20, 1998

Francis Crutchfield  
1196 Huguenot Trail  
Midlothian, VA 23113

RE: Totopotomoy Wastewater Treatment Plant  
Freshwater mussel information

Dear Ms. Crutchfield:

Enclosed please find copies of Virginia Department of Conservation and Recreation - Division of Natural Heritage correspondence regarding the above referenced project and general aquatic information:

April 29, 1997 letter to Hazen & Sawyer  
April 22, 1997 letter to Henry Broadus  
Rivers of Life, Critical Watersheds for Protecting Freshwater Biodiversity  
Effects of Contaminants on Naiad Mollusks (A review)

According to the information currently in our files, the green floater (*Lasmigona subviridis*, G3/S2/SOC/SC), yellow lampmussel (*Lampsilis cariosa*, G4/S2/SOC/SC) and Eastern lampmussel (*Lampsilis radiata*, G5/S2/NF/SC) have been documented upstream from the proposed discharge site.

**0-1253**

The green floater is a freshwater mussel species which ranges from New York to North Carolina in the Atlantic Slope drainages, as well as the New and Kanawha river systems in Virginia and West Virginia. This species is currently classified as a species of concern by the United States Fish and Wildlife Service (USFWS) and is believed to be declining throughout its range to the point that it may warrant Federal listing as Threatened or Endangered. This species inhabits riverine habitats ranging from small streams to medium or large rivers, and apparently has declined throughout much of its range; this species may even be extirpated from some drainage systems. Based on DCR staff knowledge recent efforts to reverify known populations throughout Virginia have been largely unsuccessful; no new occurrences were found during a 1997 status survey in the James River, New River, Nottoway River, Potomac River, Rappahannock River, Roanoke River and York River drainages (Chazal & Hobson, 1998).

Yellow lampmussels typically occur in larger streams and rivers and is typically found in sand and gravel where good current exists. The information currently in our files, indicates that the Eastern lampmussel occurs in rivers or blackwater creeks in a substrate of soft sediments, silt, and sand which may contain a large amount of organic material or detritus.

Mussels and other benthic organisms have suffered irreparable declines in populations due to anthropogenic activities and pollutants in the waterways (Neves, 1991). Because mussels are sedentary, they are unable to move from habitats that are being degraded or are no longer suitable. Freshwater mussel are susceptible to such activities as degradation of riverine habitat and declining water quality. Impoundment, dredging, channelization or other activities that alter water flow may all adversely affect populations of mussels and possibly the fish which serve as hosts for mussel glochidia. Pollution and increased siltation and erosion into streams from adjacent lands can impair feeding, reproduction and respiration of mussels. In addition to direct impacts to the mussels, the local fish fauna may change, eliminating needed hosts (Neves, 1991).

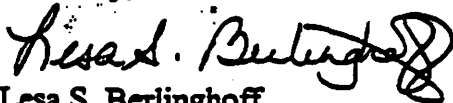
I have attached several other letters that may be interesting or useful to you. The first is DCR's response to the DEQ Water Quality Standards which includes some concerns about wastewater discharge and mussels. The second is a letter in response to a water withdrawal and wastewater treatment plant in Nelson County.

You may also want to consider contacting the Virginia Department of Game and Inland Fisheries and the United States Fish and Wildlife Service to see if they can provide further information that may be useful to you.

Any absence of data may indicate that the project area has not been surveyed, rather than confirm that the area lacks additional natural heritage resources. New and updated information is continually added to BCD. Please contact DCR for an update on this natural heritage information if a significant amount of time passes before it is utilized.

Should you have any questions or concerns, feel free to contact me at 804-371-2708. Thank you for the opportunity to offer this information.

Sincerely,

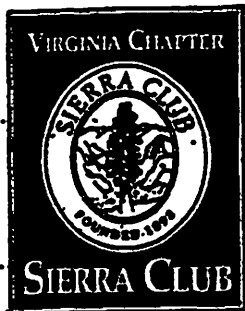


Lesla S. Berlinghoff  
Project Review Coordinator

### Literature Cited

- Chazal, A.C. and C.S. Hobson. 1998. 1997 Conservation status assessment for the green floater (*Lasmigona subviridis*) in Virginia. Natural Heritage Technical Report 98-5. Virginia Department of Conservation and Recreation, Division of Natural Heritage, Richmond. Unpublished report submitted to the U.S. Geological Survey.
- Neves, R.J. 1991. Mollusks in Virginia's Endangered Species: Proceedings of a Symposium. K. Terwilliger ed. The McDonald and Woodward Publishing Company, Blacksburg, Virginia.
- Williams, J.C. 1969. Mussel fishery investigations Tennessee, Ohio and Green rivers. Unpublished report.

001354



"When we try to pick out anything by itself,  
we find it hitched to everything else in the universe."

*John Muir*

January 13, 1999

Mr. Mark Alling  
Water Monitoring Supervisor  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, VA 23060

SUBJ: Proposed Hanover County Sewage Treatment Plant, Pamunkey River

Dear Mr. Alling:

The Virginia Chapter of the Sierra Club adamantly opposes the proposal to build a sewage treatment on the Pamunkey River in Hanover County. Both the sewage effluent and the new sprawl development that will follow the increased sewage capacity will threaten the water quality in the Pamunkey River.

As you may know, the Pamunkey River has been suggested as a potable water source for the region. The "Richmond Metropolitan Area Potable Water Supply and Demand Review", July 1993, recommends reserving the Pamunkey River as a third water source after the James and Appomattox Rivers.

The study recommends a reservoir. However, since plans for a facility there have not been permitted, it certainly seems inappropriate and ill-advised to be siting a sewage treatment plant on the river at this time.

If we are going to consider the Pamunkey as a drinking water source, we should certainly address that issue thoroughly before we start using the river for sewage. Simply put, the sewage treatment plant is putting the cart before the horse.

Again, the Virginia Chapter of the Sierra Club opposes the sewage treatment plant in Hanover County on the Pamunkey River. If I can provide any additional information, please feel free to call me at 804/353-5822.

Sincerely,

*Randy Slovic*

Randy Slovic  
Chair, Water Quality Issues  
Sierra Club, Virginia Chapter  
4604 Coventry Road  
Richmond, VA 23221



Delivery By Hand  
February 3, 1999

E. Clark Henley  
3620 Spring Run Road  
Mechanicsville, Virginia 23116  
Phone (804) 273-6223



Members of the Board  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, Virginia 23060

Re: Permit No. VA0089915  
Totopotomoy Wastewater Treatment Plant  
Proposed Municipal Discharge into Pamunkey River

Dear Board Members:

This is to express my concerns regarding the above referenced proposed discharge permit requested by the County of Hanover (the "County"). I am strongly opposed to the issuance of the permit at this time. Listed below are some items for your consideration.

- The permit is inconsistent with the Clean Water Act because it will effectively prevent established recreational use. I have frequently used the site for swimming, fishing, and boating on a regular basis in the past. The site chosen by the County encompasses the "landing" or river access for both Newcastle Farm on the Hanover side of the river, and Mr. Woods' farm on the King William side of the river. The landings of course are the natural access points for using the river, chosen because of the ease of access provided by the topography. These points on the river have been in use for well in excess of two hundred years. Clearly, the discharge of five to ten million gallons of effluent a day at this location will prevent the past recreational use from occurring in the future.
- There has been insufficient study of the existence of rare or endangered aquatic species which may be damaged by the discharge.
- The models and evaluations do not adequately consider the effect of the tides, various obstructions, and small size of the river. The river is extremely narrow at the discharge point. Fallen trees and other obstructions combined with the tidal effects will hinder mixing of the effluent and most probably cause pooling of effluent.
- The issuance of the permit is premature. In addition to the unanswered questions regarding the effects of the effluent, there is substantial disagreement between the

001355

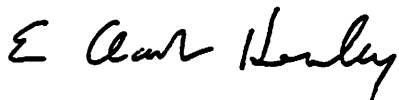
County and the landowner. This has included a lawsuit filed by the landowner alleging misconduct by the County. The permit should be postponed until the facts of the case are established to insure the Board is not tainted by any misconduct.

- No Corps of Engineers permit has been applied for by the County. Once again showing that the issuance of the permit by the Board would be premature.
- The site has great historical value and importance which has not been adequately addressed.
- There is a no degradation policy for the Pamunkey River. The effluent discharged is most certainly of lower quality than the river water at the point of discharge. I cannot understand how this could not be considered degradation of the river.
- There is substantial public use of the river at the crossing on Route 360, the above mentioned landings at the discharge site, and various landings below the discharge site. This public recreational use will be impeded or eliminated. Once again this is not consistent with the Clean Water Act.

The reasons for denial or postponement of the permit are many. I implore the Board to consider the issue carefully and thoroughly. I would also recommend a visit to the river site by the Board. It does not take much imagination to see that the discharge of five to ten million gallons of effluent a day into the river, will effectively destroy any recreational use in the area.

Your consideration in this matter is appreciated.

Sincerely,



E. Clark Henley



Virginia Department of Environmental Quality  
4949A Cox Road  
Glen Allen, Virginia 23060

February 1, 1999

Dear Members of the Board:

It has come to my attention that the Virginia Department of Environmental Quality is considering granting a permit for a sewage outfall into the Pamunkey River on Newcastle Farm in Hanover County near the Route 360 bridge. In 1973 I published my Master's Degree Thesis which is entitled *Fresh Water Mussels of the Pamunkey River System, Virginia*. This study documented the presence of six (6) mussel species in the nearby area of the Pamunkey River and four (4) species at the Route 360 bridge (Page 26, Table 5). In the thesis I cited the probability that fresh water mussels could be used as a sensitive indicator of water quality and proceeded to survey the river system for the presence and distribution of mussel species. A premise of my thesis was that improved water quality, in this instance by the impoundment resulting from the Lake Anna Dam, would allow the mussel population to increase because heavy metal toxicity from acid mine drainage would be modified. There was documentation of greater mussel species diversity and populations below the confluence of the North and South Anna Rivers (*ie.* the Pamunkey River). I urge you to insist that a well documented qualified study be done in May and June 1999, so that an updated documentation can be compared to my study and so that those mussels that are in the rare and endangered category may be protected. Your office is entrusted with responsibility for helping improve and maintain the quality of our environment. As a Virginia citizen for many years and as a contributor of baseline data, I urge you to delay granting a permit until an adequate study has been done.

Sincerely,

Marceile B. Riddick, M.S.  
2701 Dix Inlet Road  
Virginia Beach, Virginia, 23452

001356

Frances Broaddus-Crutchfield  
1196 Huguenot Trail  
Midlothian, Virginia 23113-9114  
4 February, 1999

Members of the Board  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, Virginia 23060

Dear Board members:

The soil of Newcastle Farm is as rich in historic memories, archaeological relics and wildlife species as it is in its ability to grow crops. This land transcends the six-generation struggle of the family that has safeguarded it as open space. It is one of few remaining good examples of human treatment of this planet, and it should be here for our descendants long after we have been relegated to our parts in its memory.

Thus far we have been responsible stewards. We have followed what one Secretary of the Interior called a necessary "live and help live" policy. Now we are forced to seek your aid to continue, or to submit to the powers that would stop us.

Let there be some earth not pierced with our pipes and some water not polluted with our waste. Please, help us save this land.

Sincerely,

Frances Broaddus-Crutchfield

2631 McManaway Drive  
Midlothian, VA 23112  
February 2, 1999

Members of the Board  
Virginia Department of Environmental Quality  
4949-A Cox Road  
Glen Allen, Virginia 23060

Dear Board Members:

The sixth point of the Scout Law states that a Scout is kind. "Without good reason, he does not harm or kill any living thing."

Before granting a permit for sewage outfall on Newcastle Farm, please allow time for thorough biological testing. Evidence shows that rare, threatened or endangered mussels may be present at the site designated.

We Scouts and Scout Leaders hope Newcastle Farm can be saved for the camping and swimming we have long enjoyed there. We think swimming in sewage would not be good for us, and we do not want the mussels to be hurt.

Sincerely,

David Estes  
Scoutmaster, Troop 879

Leaders and Scouts of Troop 879  
Boy Scouts of America

*Handwritten signatures and names:*  
 Andrew Repandide, Joshua Werner, Ryan Jones, Zack Phlip, John Wolf, Philie Flakin, Michael Sprayberry, Ben McCarthy, Daniel Barnett, Jack Pennington, Andrew Lee, Johnathan Graham, ParaFly, Wes, Bill M. Schmidt, Bob Augustus, Matt Rogosinski, Wayne Green, Michael H. Carter, Michael H. Carter, David Estes, Scoutmaster, Troop 879, Leaders and Scouts of Troop 879, Boy Scouts of America, 001357, 48

1783 Walkerton Road  
Walkerton, VA

January 26, 1999

Members of the Virginia State Water Control Board  
Department of Environmental Quality  
4949 - A Cox Road  
Richmond, VA 23060

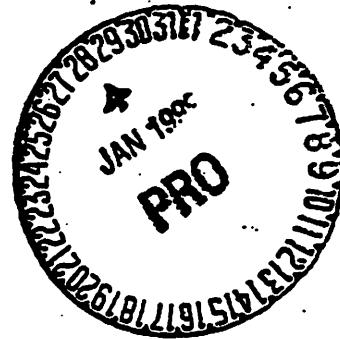
Dear Board Members:

I am writing this letter in response to the request by Hanover County asking for a permit to allow treated sewage to be discharged in the Pamunkey River at New Castle Farm.

I am opposed to this plan for two reasons.

(1) The strong possibility that this discharge could endanger several aquatic freshwater mussels currently living in this area. Please refer to the enclosed letter from the Department of Conservation and Recreation. Does this violate the provisions of the Clean Water Act? In addition, this location has been a family and friends swimming and recreation spot for over three decades. The county's plan would definitely end this.

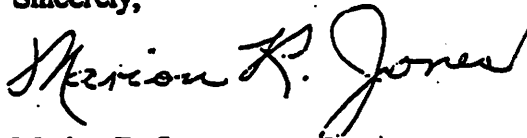
(2) There is no citizen support that I can determine. At the hearing before the State Water Control Board on January 19, 1999, there were no comments supporting this plan. My strong reaction to this is that the taxpayers of Hanover, and I am one, are not anxious to see a treatment plant built off the Pole Green Road nor have the treated waste water discharged into the Pamunkey River. Hanover County could choose to negotiate for this service with Henrico and/or the City of Richmond. This would be a prime example of *regional cooperation* that we hear much about on the local level and in the state legislature. Yet, the Hanover Board of Supervisors prefers not to explore such a plan but prefers to create a vast public utilities department and system which has to be paid for by the county tax-payers. How much better it would be if the counties that surround



large metropolitan cities did not try to compete with their services but formed a regional cooperative to handle safe drinking water and a safe method (to its citizens and to aquatic life) of disposing of waste water! This is the *best environmental* argument that there is!

Thank you for the opportunity to submit my views.

Sincerely,

A handwritten signature in cursive script that reads "Marion R. Jones". The signature is written in dark ink and is positioned above the printed name.

Marion R. Jones

001358



James S. Gilmore, III  
Governor



David G. Brickley  
Director

John Paul Woodley, Jr.  
Secretary of Natural  
Resources

**COMMONWEALTH of VIRGINIA**  
**DEPARTMENT OF CONSERVATION AND RECREATION**

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Richmond, Virginia 23219

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FAX (804) 371-2674

<http://www.state.va.us/~dcr/vaher.html>

November 20, 1998

Francis Crutchfield  
1196 Huguenot Trail  
Midlothian, VA 23113

RE: Totopotomoy Wastewater Treatment Plant  
Freshwater mussel information

Dear Ms. Crutchfield:

Enclosed please find copies of Virginia Department of Conservation and Recreation - Division of Natural Heritage correspondence regarding the above referenced project and general aquatic information:

April 29, 1997 letter to Hazen & Sawyer

April 22, 1997 letter to Henry Broadbuss

Rivers of Life, Critical Watersheds for Protecting Freshwater Biodiversity

Effects of Contaminants on Naiad Mollusks (A review)

According to the information currently in our files, the green floater (*Lasmigona subviridis*, G3/S2/SOC/SC), yellow lampmussel (*Lampsilis cariosa*, G4/S2/SOC/SC) and Eastern lampmussel (*Lampsilis radiata*, G5/S2/NF/SC) have been documented upstream from the proposed discharge site.

The green floater is a freshwater mussel species which ranges from New York to North Carolina in the Atlantic Slope drainages, as well as the New and Kanawha river systems in Virginia and West Virginia. This species is currently classified as a species of concern by the United States Fish and Wildlife Service (USFWS) and is believed to be declining throughout its range to the point that it may warrant Federal listing as Threatened or Endangered. This species inhabits riverine habitats ranging from small streams to medium or large rivers, and apparently has declined throughout much of its range; this species may even be extirpated from some drainage systems. Based on DCR staff knowledge recent efforts to reverify known populations throughout Virginia have been largely unsuccessful; no new occurrences were found during a 1997 status survey in the James River, New River, Nottoway River, Potomac River, Rappahannock River, Roanoke River and York River drainages (Chazal & Hobson, 1998).

Yellow lampmussels typically occur in larger streams and rivers and is typically found in sand and gravel where good current exists. The information currently in our files, indicates that the Eastern lampmussel occurs in rivers or blackwater creeks in a substrate of soft sediments, silt, and sand which may contain a large amount of organic material or detritus.

Mussels and other benthic organisms have suffered irreparable declines in populations due to anthropogenic activities and pollutants in the waterways (Neves, 1991). Because mussels are sedentary, they are unable to move from habitats that are being degraded or are no longer suitable. Freshwater mussel are susceptible to such activities as degradation of riverine habitat and declining water quality. Impoundment, dredging, channelization or other activities that alter water flow may all adversely affect populations of mussels and possibly the fish which serve as hosts for mussel glochidia. Pollution and increased siltation and erosion into streams from adjacent lands can impair feeding, reproduction and respiration of mussels. In addition to direct impacts to the mussels, the local fish fauna may change, eliminating needed hosts (Neves, 1991).

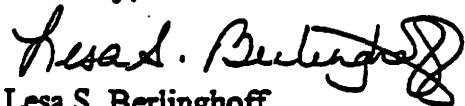
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You may also want to consider contacting the Virginia Department of Game and Inland Fisheries and the United States Fish and Wildlife Service to see if they can provide further information that may be useful to you.

Any absence of data may indicate that the project area has not been surveyed, rather than confirm that the area lacks additional natural heritage resources. New and updated information is continually added to BCD. Please contact DCR for an update on this natural heritage information if a significant amount of time passes before it is utilized.

Should you have any questions or concerns, feel free to contact me at 804-371-2708. Thank you for the opportunity to offer this information.

Sincerely,



Les S. Berlinghoff  
Project Review Coordinator

001259

**STATE WATER CONTROL BOARD**  
**BOARD MEETING – MARCH 11, 1999**  
Discussion – Totopotomoy WWTP, Hanover County

**Gerard Seeley:**

The next issue concerns a draft permit for the County of Hanover's Totopotomoy Sewage Treatment Plant which was the subject of a Public Hearing about three weeks ago. I want to ask the permit writer, Mr. Allan Brockenbrough to come up and do the staff presentation. Mr. Vanauken chaired the Public Hearing we had at the County Courthouse. It was quite a spirited event. Hopefully, we can narrow it down. It's a complex permit; the issues are complex and hopefully we'll be able to sort through those for you. I assume that you all got the packages we sent out last week. Hopefully, they gave you an opportunity to get an idea of what the issues are.....Mr. Brockenbrough will try to guide you through those.

**Allan Brockenbrough:**

Good Morning Mr. Chairman, members of the Board. My name is Allan Brockenbrough. I'm the permit writer for the proposed Totopotomoy Wastewater Treatment Plant in Hanover Co. You have before you a very complex, major new permit for a major wastewater treatment facility on the Pamunkey River. It entails a lot of complex permitting issues. I trust you've had an opportunity to review the detailed briefing package provided last week. I'd like to summarize those issues for you. Feel free to interrupt me at any time with any questions you may have. We're also handing out a copy of viewgraphs and a little better map to help you visualize some of the areas that are of concern through this hearing and permitting process. Hanover County has wrestled with what to do for long term sewage capacity for many years now. They currently operate three wastewater treatment plants for the community of Hanover Courthouse, the Town of Ashland, and the vicinity of Doswell. The majority of their sewage is presently sent to Henrico County for treatment at the Henrico Regional Wastewater Treatment Facility. Beginning in 2003 the county believes that they will be exceeding their allocated capacity at the Henrico facility and has a need for additional sewage capacity. In the mid-80s they decided that a wastewater treatment plant on Totopotomoy Creek with a discharge to the Pamunkey River was the way they wanted to proceed. You've got a map there in front of you; the black and white map which shows the location of the treatment plant on Totopotomoy Creek and the discharge down on the Pamunkey. You've got another color map before you that has a little better detail on the receiving stream. Question arose about copies of maps, etc., by a member(s) of the board. (Not understood) The county applied to DEQ in April of 97 for a discharge permit for flows of 5 MGD and 10 MGD. There were numerous modifications to the application over the years, over the next year and a half. The application was considered complete in October of 98. Now, knowing that there was substantial public interest in the proposal the county officials requested, up front, that we authorize a public hearing for this permit. The hearing was authorized and held in Hanover Courthouse on January 19<sup>th</sup> of this year. Mr. Van Auken served as the Hearing Officer. About 65 individuals attended the hearing. We had comments from 18 to 20 individuals. We also received 25 to 30 written comments during the notice period. The detailed summary of the oral comments and written comments, also, is included in your briefing package. We've categorized and tried to prioritize the issues in terms of their applicability under the VPDES Permit Program. I'll summarize it for you, and address each for you. The primary concern that we saw, the number one issue, was dissolved oxygen (DO) in the Pamunkey River. We're located in a very sensitive section of the river in the very top of the estuary. Route 360 or slightly above

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360, is pretty much the upper end of the tidal action in the estuary. Below 360 for about a distance of 8 miles we've got pretty good water quality. When we get down in this area known as the "island" we have existing dissolved oxygen (DO) violations in the Pamunkey River; the staff believes due to the extensive marshes in the area. This one marsh right here in the island area covers roughly a square mile that is mud flat at low tide and submerged at high tide. And the Pamunkey from there on down.....we have another regional map on the back side of this.....is very much dominated by marshes. To orient yourselves, we're talking about it...here's 360; discharge location in here; 6 miles down to this first very large marsh; from there on out the Pamunkey River is dominated very much by extensive tidal marshes. And, like a lot of the rivers we have throughout the state with a lot of tidal marsh we often have suppressed dissolved oxygen (DO) levels as a result of the organic load in those marshes that's delivered to the river with every tidal cycle. We've had a policy, the DEQ, since 1987 for waters that are impacted by swamps or marshes..and that is that we apply limits of 10 mg/l CBOD5, total suspended solids (TSS); and 3 mg/l TKN. And it is our opinion that effluent treated to that degree is not hurt or further contribute to lower DO values in the receiving stream. That's such a high level of treatment that you can put as much of it as you want out there and it's not going to further suppress DO. You're pretty much talking about being close to background conditions. Those were the limits originally put in this permit. During the permitting process we did back off of the total suspended solids (TSS) limit to 15 mg/l at the request of the applicant. That meant some cost savings in terms of whether or not they would immediately need effluent filters at the facility. There's not a real direct correlation between suspended solids and DO in the river and we accommodated that. Since that time we have reevaluated that and due to the extent of the low DO values in this area of the estuary, we experienced low DO, roughly 30% of the time we'll violate the 5 mg/l daily average standard. Due to the extent of those low DO occurrences we think that we need to go back to the 10-10-3; the original 10-10-3 that was in the permit and restore that original 10 mg/l suspended solids limit. Not so much out of concern for suspended solids, but for the additional reliability it gets you on the oxygen demanding materials and on the CBOD. In order to meet 10-10-3, the Virginia Department of Health generally requires tertiary treatment effluent filters. Facilities we have in this region with effluent filters consistently put out BODs and total suspended solids in the 1-2-3-4 range, pretty much the background level that we have in the Pamunkey River. We've also gone and reevaluated the DO limit. We had a minimum DO limit of 5 mg/l which is the standard in this permit. As a result to the public comments and taking a closer look at the DO violations in the Pamunkey we've decided to increase that to 6.5 from 5.

**Board Member (Mr. VanAuken):**

At this point could you tell us approximately what the dissolved oxygen level would be when we get down around the island, along the creek?

**Brockenbrough:**

We have DO values in that area in the summer time in between 4 and 5 on a 24-hour average. On an instantaneous it may be down around 4 or even lower on an instantaneous value, but on a 24-hour average we violate the 5 roughly 30% of the time. It's upper 4s, mid 4s.

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**Board Member (Mr. VanAuken):**

That's the natural condition though.

**Brockenbrough:**

That's right. That's right. We have 6's, 6.5's up in this area during warm weather. The second issue that was brought up was toxic impacts and impacts on mussels and anadromous fish. It's a very important segment of river for anadromous fish spawning, a lot of striped bass, shad spawning throughout this whole, whole area. A lot of fry staging here all summer long waiting to go back out to open waters. We believe that the permit is protective of these organisms. We believe that our water quality standards are protective of endangered species and all the species we have in Virginia. We don't feel there'll be further degradation of DO to impact any of these species. With regard to toxics, there are a lot of conservative assumptions that have gone into the limits in this permit. There's mixing from the water that comes down the river. There's also tidal mixing. We have not given the applicant any credit for any tidal mixing in this section of the river. We've only given them credit for the mixing they get from the freshwater flow coming down the river. A very conservative assumption. We believe the water quality standards are protective. But, in response to the concerns about the impacts on organisms, we have proposed to add a study in the permit where the permittee or their consultants will go out and deploy an artificial substrate..usually milk crates in the river above and below the discharge once a year. Leave those in the stream and retrieve and study the macroinvertebrates that have colonized on that artificial strata to further define the extent of any impact. The third issue which is closely related to the first two is endangered species. This section of river is not designated in our water quality standards as containing endangered species. That doesn't mean that they're not there. It hasn't been designated. We do believe our standards and the permit are protective of endangered species. The species of concern is a mussel. Mussels are disappearing at an alarming rate all across the country. For the most part it isn't due to pollutants in the water column though. The primary factors that are resulting in the great decline of mussel population are mostly destruction of the habitat. They don't deal with shifting sediments. And, inadequate soil and erosion control measures have resulted in a lot of siltation, a lot of sifting sediments in a lot of these rivers that the mussels aren't able to adapt to, There are a lot of other reasons, including predation, introduction of exotic species such as zebra mussels and whatnot that out-compete them also. Were it included in our standards as containing endangered species, the only effect on the permit would be a halogen ban. We would not allow the use of chlorine as a disinfectant. The county is not proposing to use chlorine disinfection. From the very beginning they've gone with ultraviolet disinfection, so, if there were any endangered species in that section there really would be no impact on the limits in the permit. The limits in the permit are protective. The county has gone out and done a survey in preparation of their application for a permit from the Corps of Engineers for construction of the outfall facility. Results of that survey are subject to a bit of debate and dispute by some of the opponents. But again, that doesn't have any impact on the limits in this permit and we'll leave those issues to the Corps and their evaluation of the 404 permit for construction of the outfall. The third, or, excuse me, the fourth major issue has been discharge

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location. I know you've received some correspondence on this. There's discussion in our summary. I'll walk you through a brief history. The discharge location is located on a very large, privately held farm known as Newcastle Farm. I believe it's roughly 900 acres. The county's original proposal was to discharge pretty much in the center of the farm. The farm, basically, runs from 360 down to this tributary, down here (pointing to map). Encompasses all of that open area. The county's original proposal was discharge here in the center of the farm. That's the location of a family-owned boat ramp and irrigation site where they withdraw water for their irrigation and use the river for fishing and swimming. Not wanting to have that at that location the family approached the county and asked them to evaluate some alternatives. The county evaluated an alternative at the top of the farm here at the 360 bridge and two alternatives; one about there (pointing to map) known as Downstream I, and one further down known as Downstream II. After evaluating those sites the county selected the Downstream II site and amended their application accordingly, and the permit was modified. The landowner made it clear that he was not interested in selling to the county under any circumstances. They were going to have to exercise their right of eminent domain. The county also determined at some point that this lower parcel, while on the same farm, was not on the same tax parcel. It was not included in their conditional use permit, local conditional use permit. Neighboring property owners had not been notified they didn't have their own zoning straight for that downstream site.

**Board Member (JoAnn Kwong):**

Could you explain that part if you will.....I didn't understand (Boardmember)

**Brockenbrough:**

They have to go through and rezone the property or issue a conditional use permit for the property to be able to construct that sewer line. And they had gone through that process before they came to us to apply for a permit. They determined that this farm was chopped up for tax purposes into several parcels and this lower parcel was not included in their permit. The end result was the county moved back to the original site.

Now, I know you've had some correspondence and whatnot and know that's been subject to a suit and a lot of discussion on intentions and what not.

**Board Member (Karl F. Wenger):**

Why do the owners of the farm object so, to this particular outfall if this was all done in advance and the conditional use permit was granted? Was it over their objections?

**Brockenbrough:**

Maybe, they can speak to that, but I would assume that it was over their objections. I believe they had pretty much indicated to the county all along they weren't interested in having an outfall on their property.

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**John Marshall:**

Allan, I can confirm that.

My name is John Marshall ...we represent the landowners and the conditional use permit was issued over their strenuous objections.

**Brockenbrough:**

The bottom line is DEQ normally does not pick discharge locations. The board, State Water Control Board has, on occasion, maybe changed a location if it was a driving water quality issue to make them make that change. That is pretty much a local land use issue. The applicant says what they want to do; they come to us with a location and we establish the standards and the permit conditions to protect water quality at that location.

**Board Member (Mr. VanAuken):**

I have a couple of questions for you here. The first thing, since you talk about the outfall locations, would you tell us, please, what is immediately below each of these two outfall locations?

**Brockenbrough:**

Approximately 50 yards below the proposed location is an irrigation pump for the farm. There's a boat ramp and an area that's been used by the family as a picnic-swimming area.

**Board Member (Mr. VanAuken):**

Used by the family, or used by the public, or only by the family (Question garbled somewhat)

**Brockenbrough:**

We've gotten some letters from Boy Scout troops and what not that use of the property as well. Down here you're getting.... you're at the property line for the most part, and you're getting into other neighboring properties. There are similar boat ramps, boat docks, hundred, hundred-fifty yards maybe below that downstream site.

**Board Member (Mr. VanAuken):**

Is there any swimming in there.....is that colony used for swimming in that area?



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**Brockenbrough:**

I don't have any firsthand knowledge of that. I'm sure there has been over the years, at some point. Whether or not there is right now, I don't know. We establish standards to protect the waters and maintain them as fishable and swimmable. Okay. We have a fecal coliform limit in that permit that should protect that use in the stream. That's not to say that you or me or any person that knew of a sewage discharge might not choose to swim there if they knew it was there. But the permit is designed to protect that use.

**Board Member (Mr. VanAuken):**

But, in reality, you could be discharging to still water and the people knew it was coming from the sewage treatment plant, they probably wouldn't swim right below it.

In doing your calculations for this, now, you're working with an area above 360 with a normal straight flow river and down below the area we're talking about we've got tidal river. In the area where we're talking about, you've got a combination. Am I correct in assuming that you have computer models that will help you with flat flow and other computer models that will help you with the tidal area but where you've got a combined effect that computer models don't work too well?

**Brockenbrough:**

It's certainly more difficult. There has been some modeling of the discharge. The outfall includes a diffuser that basically goes a third of the way across the river and has multiple ports to encourage very rapid mixing and assimilation into the stream. There has been some computer modeling of that. The modeling we've had a little bit of concern with and that's why we've have gone with the approach of just giving them credit for what's coming down the river. I suspect that were this facility to be built, permit issued, and facility built, that within a few short years we'd probably be looking at a dye-study to further pin down the degree of tidal mixing that maybe they'll get credit for in the future, as they grow.

**Board Member (Mr. VanAuken):**

The long and short of this is this is a lot more difficult than most cases to figure what's really going to happen here?

**Brockenbrough:**

Yes sir.

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**Board Member (Karl F. Wenger):**

If I recall correctly what I've read in here there are....some of the people who are objecting to this, point out that there are some alternatives that are as feasible as using a county treatment plant and so on. Is that correct?

**Brockenbrough:**

There were a lot of alternatives kicked around. One of those was whether or not Hanover County could have or should have negotiated for additional capacity with neighboring jurisdictions, City of Richmond, or County of Henrico. That's a local issue that we don't typically get involved with. The county's made the decision of how they want to proceed. It's our job to write a permit to protect the river for the project they've proposed.

**Board Member (JoAnn Kwong):**

Let me clarify something for my understanding. Personally, from what I know...I have problems with imposing costs on private landowners, for widespread public benefit, but, that's not really the issue before us.....is that correct? What you're saying is that the county, or, the city has made this decision and our sole job here, today, is to decide if we can grant that permit based on water quality.....(question completed/assisted by A. Brockenbrough as indicated below/next).

**Brockenbrough:**

Are we protecting the water quality?

**Board Member (JoAnn Kwong):**

So we....it's not really our position right now to be debating either alternatives, or alternative sites for the discharge, is that correct?

**Brockenbrough:**

It generally is not. We get a lot of issues thrown to us at Public Hearings that aren't really applicable to the VPDES Permitting process. Is the growth that the county wants, that the county's planning for good? You know. It's not a water quality issue, or a discharge permit issue, it's a local planning land use issue.

**Board Member (JoAnn Kwong):**

So, even if there are alternatives that we think would be better, we are only to address the question of whether the water quality will be impacted based on the standards that we have put. Is that the correct interpretation?

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**Brockenbrough:**

It's generally how we proceed. Maybe.....(interrupt)

**Board Member (Hunter Craig):**

Mr. Treacy, would you help us out...

**Treacy:**

That's generally the practice we've taken over the years. This is a long-standing practice. This ...as far as sighting a facility, I think Allan mentioned that in some instances where we believe that an impact to water quality is something that can't be handled without (muffled).....we have done that. And, often times, during the course of negotiating a permit we will talk about a number of alternatives with the applicant and we'll try to minimize the impact to water quality. However, once that decision is made the local governments have gotten their approvals, and the actual site is picked, then our focus becomes much more narrow, which is to examine water quality impacts in the receiving stream and to protect the uses of that stream.

**Board Member (JoAnn Kwong):**

So, given that, do you feel particularly confident that the permit we're talking about does not, or will not violate the water quality standards?

**Brockenbrough:**

No, we're applying the same standard to the receiving stream at either location. If a concentration of "x" of some pollutant is allowed in the receiving stream that same concentration will apply in the stream regardless of where they discharge. As a more practical matter the way this kind of plays out is in the long term this facility wants to grow to 30 MGD. At some point, way down the road, it is likely that additional controls will be necessary on some toxic parameter. If a level of "x" is required in the river at both locations, well that might be a level in the discharge of 10 lbs., here, it might be 10.4 lbs. here. It more affects the allocation that the permit has and the loading limits that are applied to the applicant. But we apply the same standard. The river has the same degree of protection at either location.

**Board Member (James Couch):**

The future is still not something that we have before us today (that's correct....Brockenbrough) because we don't know what the water quality standards will be 10 years from now. It may change at which time the permit is reissued and that would be most of those standards.

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**Brockenbrough:** That's correct.

**Board Member (James Couch):**

So, thinking what it may grow to is moot at this point. A question I would have is..you say this is a farm. What is the production of that farm. Is it a crop, or livestock?

**Brockenbrough:**

I believe it's mostly crop land. I don't know if a representative of.....

**Board Member (James Couch):**

Crop land with irrigation, you say, on it?

**Brockenbrough:**

Yes.

**Board Member (James Couch):**

And, there's a., is there any record of non-point pollution to this section of the stream, say, from 360 on down?

**Brockenbrough:**

We don't have a record, per se, of non-point pollution. There's a lot of, as you can see, all the white area, there's certainly a lot of agricultural use in this watershed.

**Board Member (James Couch):**

So, use for swimming and so forth, there may, also....by monitoring what is going on here may actually give people a better sense of what the quality of the water in that stream is supposed to be...(comments not audible)... would that be true?

**Brockenbrough:**

Yes, We're going to have monitoring. There's monitoring in the permit of the discharge. *(Exchange of comments.....as well as an indication of any affect).* The toxic impact will be monitored, also. *(Comment....which is not happening now.)* No, no we don't have a benthic work ongoing in this area.

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**Board Member (James Couch):**

And, that data would be available to anyone who'd want to pursue it, would it not. So, if I were inviting a family outing to swim there and some time in the future I could find out exactly what the quality of the water is....as opposed to historically, it's been fun to swim in.

**Brockenbrough:**

Yes, you're going to have effluent data and you're going to have data from their macroinvertebrate study. The permit doesn't include instream fecal monitoring.

**Board Member (James Couch):**

Right. Thank you.

**Board Member (Preston Futrell):**

What crops are grown on this farm and what tillage is used?

**Marshall:**

I can't answer that specific question. Sorry.

**Brockenbrough:**

Farms in the area, typically, are corn, soybean, wheat rotations, pretty much throughout that whole area.

**Board Member (JoAnn Kwong):**

The information we have refers several times or many times to stewardship that the landowners have taken....can you give me an idea ...are there specific practices that they can put in, placed on their land that are really great examples of private conservation?

**Brockenbrough:**

That's somewhat of a family tradition that goes back to the ownership of the farm by their ancestor, Edmund Ruffin, a very famous agriculturist in the 1800s who developed a lot of innovative practices 150 years ago and I think the owners have conveyed in their comments that they've taken that tradition of good stewardship very seriously, and good agricultural practices very seriously.

**Board Member (JoAnn Kwong):**

How do you see this playing in with their conservation tradition?

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**Brockenbrough:**

Well, they've expressed a concern of irrigating in that section of river right next to a discharge. We don't believe that that's going to be significant health threat whatsoever. The degree of treatment required in order to protect the river is much greater than that we would require to protect a crop if it wasn't being discharged. So, we don't see that as a significant threat. It's a matter of you know... I guess disrupting their use.

**Board Member (JoAnn Kwong):**

Well, I guess that's where I'm trying to get.....how will this visibly impact and change the land for the landowners in terms of either enjoyment of their property or their use.

**Brockenbrough:**

I guess after it's constructed there will be a small structure, I'm not sure how much land they're talking about taking right there at the river.....an acre?.....there will be a structure of some sort right there. There will be presumably an access road that county employees would have access through the center of a family farm to get to.

**Board Member (James Couch):**

This is going to a condemnation hearing?

**Brockenbrough:**

I don't know where that stands, but, presumably it will be.

**Board Member (James Couch):**

Actually, if it's not going to be needed or sold it would have to be condemned..... a process by which compensation would be decided ultimately by the court?

**Board Member (Mr. VanAuken:)**

I think there's a little more in this than just the use of the farm. This at one time apparently was a significant town and there's some archaeological significance in there, too. I have some other concerns....I'm concerned that the county switched their location back after deciding on the lower outfall. It is my understanding that the lower outfall will give a little better mixing, maybe not much, but a little advantage in mixing and what I like about it is getting below this site that apparently groups swim in. Our runs at the water meets swimming standards but the reality is that when you put that outfall in just above that dock, that people aren't going to swim there anymore. And, I think that's an important and beneficial use for the water.

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**Brockenbrough:**

Well, I think that would impact that use at that location. Very definitely. There are additional access points to the river all along here. The river is tidal. It does go back and forth.

**Board Member (James Couch):**

So, that's not the only swimming hole that's possible on the river.

**Brockenbrough:**

No sir.

**Board Member (Lance High):**

But at the standards that are written into the permit, in your professional judgment, they're protective of human health ....is that correct?

**Brockenbrough:**

That's correct.

**Board Member (Lance High):**

I know there protective of propagation of fish, and shellfish as well?

**Brockenbrough:**

Yes.

**Board Member (James Couch):**

Did you say things on the....I guess it's the north side the up side of the river, that is also agricultural?

**Brockenbrough:**

Pretty much all of these white areas you see in here is agricultural.

**Board Member (James Couch):**

Does Hanover County have conservation zones?

**Brockenbrough:**

I believe they do through the Chesapeake Bay Act.

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**Board Member (James Couch):**

Is this not a part of it. Landowner has not chosen to put their land into the conservation zone.?

**Brockenbrough:**

In terms of a conservation easement to preserve it as open land....I don't know, maybe the representative of the landowner could tell you.

**Board Member (James Couch):**

I mean that's the way that if somebody wants to protect their land for a long period of time.

**Brockenbrough:**

I'm not sure...they also have coursted districts out there and I'm not sure of the status of this property. Are you aware of (interruption)

**Marshall:**

There are no easements at this time....conservation easements...(comments not audible). There are no conservation easements on the property at Newcastle.

**Board Member (James Couch):**

But the option has existed in the county to put land in such a district, is that correct?

**Marshall:**

Right, that would be an option.

**Board Member:**

Has been an option?

**Marshall:**

That's correct.

**Board Member (Lance High):**

At this time are there any other proposed discharges on this river? Other applicants?

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**Brockenbrough:**

We have a much smaller discharge in King William County under construction up here right now. That is on the order of magnitude of 25 or 40 thousand gallons per day with the same limits, 10-10-3 limits that would discharge to Monquin Creek which flows down through this island area and enters the river down here. So, we do have another proposal, much smaller scale, but the same standards apply to it.

**Board Member (Mr. VanAuken):**

At this point I have a question of our council. Does this board(?) have the authority to set the outfall location if they deem it important?

**Love Field:**

No. We have to talk about what you mean by important. I think I concur with the....that your powers that describe it to you where this board finds that location of outfall (comments not audible)

**Board Member (JoAnn Kwong):**

Could you speak up please, Deborah?

**Love Field:**

That you impress matters such as the location of the outfall in terms of its impact on water quality as opposed to just some sort of generic importance.

**Board Member (Mr. VanAuken):**

Well okay.....if the outfall location affects the beneficial use of the water, when does the board have the authority to set the outfall location?

**Love Field:**

The board has the authority to protect water quality and to propose permit conditions to do that.

**Board Member (James Couch):**

What I think we need to remember is the water that the standards are geared to; not somebody's psychological perception of that water. If the water has met the quality standards maybe that because of other issues, a person chooses not to use it. I don't think we can get into that area.

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**Board Member (Lance High):**

What will be the first flow out of this pipe? What's the magnitude of it?

**Brockenbrough:**

Their plans are to initially build a 5 MGD facility. I don't know at that time whether they'll just take the flows over their allocation from Henrico or whether they'll go ahead and take all their flows they're sending to Henrico and send them to this location, or what. But, initially, they will build a 5 MGD facility. They also have a permit limits for 10 MGD. I guess the staging of that depends on their growth patterns and economic development and what not.

**Board Member (JoAnn Kwong):**

So, the smaller one that you mention the 25 to 40 thousand gallon per day....that's not sufficient measure for the area, it's just one of several things that will be done? It could not be in place of this to meet the new....

**Brockenbrough:**

That is for an area of King William County off the map out 360 here....to serve an industrial development client, I think, that's gone out in that area in a very small little village area. It's nothing on the scale of what we're talking about in Hanover.

**Board Member (Karl Wenger):**

Did you say that the treatment level would be tertiary?

**Brockenbrough:**

Generally, with 10-10-3, the....(interruption)

**Board Member (Karl Wenger):**

This is potable water, is it not, strictly speaking?

**Brockenbrough:**

I wouldn't drink it....I've had plenty people claim that you could but I haven't seen anyone do it yet. (laughter) But, yes, it's pretty close, you know... your actual... you design for 10-10-3 under peak loading worse case scenarios. Under regular conditions, especially under dry weather conditions when you have critical conditions in the river a lot of these plants typically are putting out 2, 3, 4 mg/l. Pretty close to background in the river.

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**Board Member (Karl Wenger):**

Well, that's what they use for drinking water in Europe, except that everybody drinks beer.  
(laughter)

**Board Member (Lance High):**

With respect to the dwarf wedge mussel, that's the mussel that's federally protected. ...do you have any studies that will show that this discharge will protect that particular mussel?

**Brockenbrough:**

I don't know that we have a study on that particular mussel. There are hundreds of varieties of mussels. We did review some toxicity data for mussels in reviewing these limits, and, for the most part, our water quality standards are very protective of mussels. Mussels are being impacted by other, other impacts of development .....siltation, predation, other non-native species moving into an area, zebra mussels, out competing, you know....that sort of thing.

**Board Member (Lance High):**

Do we know for a fact that the dwarf wedge mussel is in the location of the proposed outfall?

**Brockenbrough:**

No, we do not. It has been found in the past in this basin. In 73 there was a VCU Masters student that did a survey here at the bridge and I believe she found two fairly common species and two rare species. They are rare, threatened, and endangered designations. The endangered species, the dwarf wedge mussel was found on the South Anna River in the same watershed, but 50 some odd miles upriver at Route 54, west of Ashland. We've got two or three additional issues that have come up. Do you want me to proceed?

**Board Member (Hunter Craig):**

Please.

**Brockenbrough:**

Okay. The next is wetlands impacts and the impact of construction of sewer lines and the construction of the outfall in the river. That's really beyond the scope of what we've considered in this permit which has been the affect of the discharge on the receiving stream. The applicant will have to go to the Corps of Engineers (COE) for a 404 permit for construction of those pipelines and what not. And, we're leaving those impacts from construction of those pipelines up to the Corps and their review of their permit program. There've been issues dealing with nutrients, this segment of the Pamunkey River is not designated as nutrient enriched. We look at chlorophyll-A levels, the amount of algal activity in the river as well as

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nutrient levels in the river. It is not designated at this point as nutrient rich. If it were included in the nutrient rich designation in our water quality standards the affect would be to apply a 2 mg/l total phosphorus limit on the discharge. That's the only regulatory requirement in place at this time. We have included that limit in this permit just as an extra measure of protection. Additionally, the applicant has indicated that the design of the facility will include biological nutrient removal. So, we expect there to be some nutrient removal at the facility. We had the history of water supply and the impact of the discharge on potential water supplies. The county identified the Pamunkey River, at one point, as a potential source of drinking water. I don't know if they've abandoned that forever but they've since gotten a contract with the City of Richmond to buy potable water. Downstream on the Pamunkey quite a few miles the Pamunkey was identified at one point in the study of the reservoir on Cohoic Mill Pond, Cohoic Mill stream.... that the Pamunkey was identified as a secondary intake for that reservoir. Primary intake being on the Mataponi, I believe, during that process that alternative was not selected. We've had no jurisdiction come to us to ask that the Pamunkey be designated in our standards as a public water supply. If and when that were to occur we would apply our public water supply standards to the discharge. For the most part, the aquatic life standards that the limits in the permit are based upon are more protective of the stream than the public water supply designations. Humans can drink a lot of things that a fish can't live in. So that's...people find that hard to believe sometime that you can't discharge drinking water, but, if you put a goldfish in your tap water in the City of Richmond, chlorine is going to kill it. We also had comments on affect of temperature on the receiving stream. We have not found that to be a problem with the municipal wastewater discharges. It's a very moderate temperature waste stream. Probably a cooler in the river in the summer time and a little warmer in the river in the wintertime. But, overall, not really having a impact on the resource. In the event that a major industrial client would come in and provide a major source of cooling water to this wastewater plant that would cause a temperature concern, the pretreatment requirement and the local pretreatment ordinance would require that that temperature impact be addressed by the industry. And, as we've discussed there were numerous comments considered outside the purview of the VPDES permit concerning whether there were other options with neighboring jurisdictions the county could have pursued. The county's operation of their landfill and problems that we've found there recently; whether growth is good for the county; the historic resources on the property we haven't really touched on that but there's a site of a major colonial village, colonial era village that came within a vote or two of becoming the state capital. That's outside the purview of the impact of the discharge. Those issues do have to be addressed through the federal permitting process for the 404 permit. So, they will have to address those issues. That's a Virginia and a National Historic Landmark. They will have to address the impact on that property when they go to the Corps for a permit for construction of the outfall. Mr. Van Auken you served as Hearing Officer, are there any additional concerns or comments that you have to add?

**Board Member (Mr. Van Auken):**

If the Feds tell them that they can't run their discharge pipe to the outfall one, their preferred outfall, because of historic considerations or whatever, can they change the location of the outfall without coming back to this board?

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**Brockenbrough:**

No Sir.

**Mr. VanAuken:**

They cannot...

**Brockenbrough:**

No, they cannot... They'd be coming back to us for a permit modification to move the outfall.

**Mr. VanAuken:**

Thank you.

**Board Member (Hunter Craig):**

Any questions?

**Gerard Seeley:**

I might also add that the proposed recommendations we're going to have for changes to the permit have been considered by the Hanover County Board of Supervisors last night at their meeting and they support all of the changes that we're recommending to you today.

**Board Member (Hunter Craig):**

Do you have to submit all of this to the State Department of Health? If so, have they ruled on this?

**Brockenbrough:**

They review both the application and the draft permit and have concurred on both of those. Additionally, the health department has the major responsibility for the technical review of plans and specifications for the treatment facility. They do the real; nuts and bolts review of that.

**Board Member (Hunter Craig):**

And they've stated there's no concern whatsoever for health, safety?

**Brockenbrough:**

I don't think they've made a statement of that sort...they've indicated that they have no objections to the permit as drafted.

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**Board Member (Hunter Craig):**

Any questions? If not....

**Brockenbrough:**

Okay. I can proceed with the staff recommendation: that is that the board direct the staff to issue VPDES Permit No. VA0089915 with the following modifications:

- a. Decrease the total suspended solids (TSS) limitation to a monthly average of 10 mg/l, and a weekly maximum of 15 mg/l.
- b. Increase the minimum dissolved oxygen limitation from 5 mg/l to 6.5 mg/l.
- c. Include the following special condition dealing with an instream macroinvertebrate study:

The permittee shall perform an annual Quantitative Benthic Macroinvertebrate Study on Pamunkey River to assess impacts of the Totopotomoy Wastewater Treatment Plant discharge. The study shall be conducted between August 15<sup>th</sup> and October 15<sup>th</sup> beginning in the year 2002. The study design including sampling locations, survey methods, data analysis, etc., shall be submitted to and approved by DEQ Water Division staff prior to initiation of testing.

I would like to point out that we have some cards.

**Gerard Seeley:**

No one has indicated a desire to speak...only if questions arise. But, I don't know if there's other folks in the audience whom came in after the thing started.

**Board Member (Hunter Craig):**

Our policy, which is attached to the agenda for public speaking, allows for the applicant to make a 15 minute presentation if he or she so likes. Is it your desire as the applicant to make a brief?

**Frank Harsen:**

I'm Frank Harsen, Director of Public Utilities for Hanover County. I think Mr. Brockenbrough did a fine job summarizing the permit. I would mention that during the Board of Supervisors Meeting last night we did discuss with them the changes proposed by DEQ Staff. They were very supportive. In fact, they not only agreed with them, they had a formal motion, approved unanimously, to support the changes that are proposed by DEQ. I am available to answer any questions that you may have. I believe Mr. Brockenbrough did answer most of them that came up during your presentations.

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**Board Member (Hunter Craig):**

Any Questions?

**Board Member (JoAnn Kwong):**

Is there anyone here from the family?

**Board Member (Hunter Craig):**

Mr. Marshall, would you like to speak?

**Mr. Marshall:**

Yes. Thank you. My name is John Marshall, I'm with the law firm of McSweeney, Birtch and Crump here in Richmond, VA and we represent Mr. Henry Broaddus and Mrs. Frances Broaddus Crutchfield who are the owners of Newcastle Farm out in Hanover County. Focusing on I guess if I could for just a brief moment on a couple of things which were raised today about your role here today and focusing on the water quality issue there are a number of issues which have been alluded to today which we feel warrant this permit either being denied or held over. But specific to water quality issues...there are some internal DEQ memoranda and documents which were attached to our comment which clearly showed a couple of things. One, that the Pamunkey River experiences serious and persistent dissolved oxygen sags. That's well documented. I think Mr. Brockenbrough has conceded as much today, but, the some of the documentation attached to our comments makes clear that that has occurred. The DEQ, itself, has found in a memo dated June 2, 1997, that based on the DO data which we have attached to our comments that quote, "the assimilative capacity of the river with respect to DO is considered to be fully allocated." Now, in the face of that we have the new releases from the King William Reservoir on Monquin Creek which is going to then flow downstream to where the DO sag exists at mile 48.80. In addition to the permit that is being considered today which is going to be a minimum I guess of 5 MGD. Notwithstanding that, the reason that the DO issue is not a problem has been it's caused by natural conditions. Marshlands and things like that. Well, there's been no study to show that. There's no data that supports that at this time. The argument is, at least from staff at this point is well let's just go ahead anyway. We're going to do all these studies, we're going to have all this information available down the road. Well down the road if the impact has already occurred it's too late. And I would just point out.....

**Board Member (Hunter Craig):**

Excuse me, Mr. Marshall, can I interrupt you just for a second. I need a clarification from Mr. Treacy. The case decision public forum rules state that the owner applicant has 15 minutes and everybody has 2 minutes?

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**Mr. Treacy:**

That's correct.

**Board Member (Hunter Craig):**

Can you make a determination for me ....is Mr. Marshall an owner in this case?

**Mr. Treacy:**

Well, I think that the owner is actually the applicant, applicant/owner is the way's it's stated in the policy which suggests to me that he's not, that he's an opponent as opposed to an applicant/owner.

**Board Member (Hunter Craig):**

Okay, I think I failed to let you know that you have 2 minutes....could you conclude in the next minute?

**Mr. Marshall:**

Absolutely, absolutely. Furthermore the researcher who collected the data in 1995 and 1996 suspected that the DO sag was due, in part, to non-point sources of pollution. And, that suspicion is supported by levels of fecal coliform recorded in the data. Despite these findings by staff at DEQ, that the DO..... was that there was no more assimilative capacity in the Pamunkey River and the fact that they needed to study what was causing this, nothing was ever done. I would just ask you, please, to go back and look at the comments that we've filed and the supporting documentation behind that and at least defer this decision until some further analysis can be done. The evidence that was attached to our comments is compelling. Everyone is admitting there's a problem and rather than addressing it, analyzing and studying it, we're saying "well, let's go ahead and we'll just study it after the fact. That's not going to protect the water quality in the Pamunkey River. So, I would just ask, please, that you go back review those comments in detail that we filed with the supporting documentation. Thank You.

**Board Member (Hunter Craig):**

Thank you, very much. Thank you. Cindy are there any other cards for anybody that would like to speak? If not, Gerard Seeley, is it true that this VPDES permit, this comes up, this has to be renewed every 5 years?

**Gerard Seeley:**

That's correct.



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**Board Member (Hunter Craig):**

So, we do get a periodic look at this.

**Gerard Seeley:**

That's correct.

**Board Member (Hunter Craig):**

Which would provide us the analysis that Mr. Marshall ...

**Gerard Seeley:**

This plant will be constructed by 2002?

**Brockenbrough:**

Three (2003).

**Seeley:**

So, it will be up for renewal within a year to a year and a half of its starting operations.

**Board Member (VanAuken):**

What would be the negative effects if we deferred action on this until the next meeting of this board?

**Gerard Seeley:**

It would just make the decision occur later.

**Board Member (VanAuken):**

This backs up now the County of Hanover...I assume they have some kind of plans, or things have to happen, and if we don't act, then, does this then back them up three months in everything they do?

**Gerard Seeley:**

Well, that would be better answered by the County.

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**Board Member :**

Before that factor....for instance let me just ask....In three months, what are we going to know then that we don't know now?

**Board Member(Van Auken):**

We might still use materials that a Mr. Marshall just alluded to (comments not audible)....I don't think we've got all the reports ...we have some of the materials he has alluded to, not all of it...(not audible).

**Board Member (Lance High):**

Let's see, Gerard Seeley why don't we proceed, if we may.....Well, let's see if there are any other questions.

**Gerard Seeley:**

There's a question remaining about the impact of a delay.

**Frank Harsen:**

We're ready now to begin acquiring many of the easements, making some significant expenditures. To delay this for the next quarter, three months, that would put us in the position of either delaying the project which we have a pretty tight window to meet the 2003 time period, anyway, or we can begin making some fairly significant expenditures somewhat at limbo without pretty important.. we can a.... one of the reasons we did go for the request for the public hearing in order to keep the process moving forward.....garbled (inaudible).

**Board Member (Hunter Craig):**

Thank you.

**Gerard Seeley:**

I believe the staff recommendation is before you.

**Board Member (Hunter Craig):**

Any other questions? If not...move to adopt the staff's recommendation.

**Board Members(?):**

Second, second.

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**Board Member (Hunter Craig):**

Been moved and second. Any discussion

All those in favor

**Board Members:**

Aye (4 or 5?).....

Opposed.....nay (JoAnn Kwong)

**Board Member (JoAnn Kwong):**

I'm sorry. I know we're really charged with water quality standards, but I do have a problem with concentrating this on one family...and I just don't feel that I've heard that in good conscience I can do it without or have a better feeling that even though we're saying we can go ahead and reevaluate we've built this thing, it's on their land, they're stuck with it; maybe if they had a tradition of abusing the land, I would feel somewhat different, but, I'm uncomfortable with it.

**Board Member (Hunter Craig):**

I'll admit Ms. Kwong I have the exact same concerns you have about a private property owner accepting all of the burden for the public. I've spent a greater part of the presentation looking through the state code trying to figure out a way that that is part of our power. And I must say I wish it were part of our power.

**Board Member (JoAnn Kwong):**

And I understand that, and that's why I asked to clarify things. I think I probably am in a little limbo here because you know if I had to have a yes/no answer, do I think it violates anything I'd probably have to agree with you all but, in principle, I think what's going ahead here is wrong.

**Board Member (Hunter Craig):**

I would say that, in many ways and principle, I agree with you.

**Board Member (JoAnn Kwong):**

Thank you.

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**Board Member (Karl Wenger):**

Well, I have exactly the same concerns, same feeling. The part that puzzles me, again, this is not the board's concern, I know that. But, how does it happen that the outfall that is chosen here is over the objections of the family that owns the property...the alternative outfall that was considered and then abandoned, or not taken because the landowner objected...there's something there that I don't understand....why in one case it's being imposed on the landowner and the other case the landowner objected and the objection was accepted.

**Frank Harksen:**

Both locations is the same landowner. It's not that we were succumbing to one landowner to the detriment of another.

**Board Member (Karl Wenger):**

Okay.

**Mr. Treacy :**

Mr. Chairman, if I may add, I think that many of those issues that are being discussed now are in the courts and as I understand it, the landowner and the county disagree vehemently about some of the questions you're talking about, but I believe that the board has acted within its authority.

**Board Member (Hunter Craig):**

Clearly, many of the powers we're talking about have not been delegated to this board. So, I think .....the motion is passed and we appreciate the presentation and think you did a good job. We really appreciate that. Thank you very much.

**VIRGINIA:**

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

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS**

**Petitioners,**

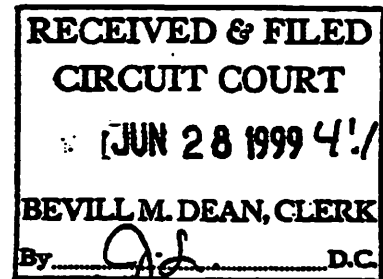
**v.**

**STATE WATER CONTROL BOARD**

**and**

**DEPARTMENT OF ENVIRONMENTAL QUALITY**

**Respondents.**



**PETITION FOR APPEAL**

1. Petitioners, Frances Broaddus Crutchfield and Henry Ruffin Broaddus, by counsel, file this petition for appeal of the issuance on April 28, 1999, by the respondents of VPDES Permit No. VA0089915 to the County of Hanover for the County's Totopotomoy Wastewater Treatment Plant. The permit allows the County to discharge up to ten million gallons a day of treated waste into the Pamunkey River.

2. Petitioners contend that, in issuing this permit, the State Water Control Board ("SWCB") failed to observe the duties imposed on it by the State Water Control Law and the SWCB's own regulations. The discharge at issue will contribute to and aggravate existing violations of water quality standards in the Pamunkey River, contrary to law. These violations of water quality standards are serious and by definition adversely affect aquatic life using the

Pamunkey River in the vicinity of the proposed discharge and downstream. Species likely to be affected — but given inadequate consideration by the SWCB — include freshwater mussels and anadromous fish such as American shad, currently the target of an intensive recovery effort to restore decimated populations in the Chesapeake Bay. The proposed discharge will also adversely affect existing recreational uses of the Pamunkey River in violation of law. In addition to violating its duty to refrain from issuing permits for discharges that will contribute to violations of water quality standards, the SWCB failed its duty to adequately address these issues and acted arbitrarily and capriciously by failing to consider the applicant's candid admission that other available discharge locations would have less adverse effects on water quality and other affected resources.

#### **Parties**

3. Frances Broaddus Crutchfield ("Crutchfield") is a citizen of the Commonwealth of Virginia and is a co-owner of property known as Newcastle Farm, the site of the proposed outfall and discharge to the Pamunkey River.

4. Henry Ruffin Broaddus ("Broaddus") is a co-owner of Newcastle Farm.

5. The SWCB is a state agency established under Va. Code § 62.1-44.7 (Repl. Vol. 1998) and has the authority, pursuant to Va. Code § 62.1-44.15(5), to issue certificates for the discharge of sewage, industrial wastes and other wastes into state waters.

6. The Department of Environmental Quality ("DEQ") is an agency of the Commonwealth of Virginia with responsibility for administering environmental regulatory matters within the jurisdiction of the SWCB.

### **Jurisdiction and Venue**

7. The SWCB issued VPDES Permit No. VA0089915 ("the permit") on April 28, 1999. The petitioners filed a timely notice of appeal on May 27, 1999. Therefore, this Court has jurisdiction over this petition under Va. Code § 62.1-44.29 (Repl. Vol. 1998), Va. Code § 9-6.14:16 (Repl. Vol. 1998) and Part Two A of the Rules of the Supreme Court of Virginia.

8. Venue is proper in this court under Va. Code § 8.01-261(1) (Cum. Supp. 1998).

### **Errors Assigned**

9. The SWCB violated the State Water Control Law, Va. Code § 62.1-44.2 *et seq.* (Repl. Vol. 1998) ("SWCL"), and the SWCB's own implementing regulations by issuing a permit for a proposed discharge that, in combination with other existing sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

10. The SWCB violated the SWCL and implementing regulations by failing to consider adequately evidence that the proposed discharge, in combination with other sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

11. The SWCB violated the SWCL and implementing regulations by issuing this permit notwithstanding that aquatic life currently using the vicinity of the proposed discharge and downstream areas, including rare, threatened and endangered freshwater mussel species and anadromous fish, will be significantly and adversely affected by the proposed discharge.

12. The SWCB violated the SWCL and implementing regulations by failing to consider adequately the aquatic life currently using the vicinity of the proposed discharge and downstream areas and the adverse effects the proposed discharge will have on the species present, including rare, threatened and endangered freshwater mussels and anadromous fish.

13. The SWCB violated the SWCL and implementing regulations by failing to consider adequately that issuance of the proposed permit will terminate significant, existing recreational uses of the Pamunkey River in the vicinity of the proposed discharge.

14. The SWCB acted arbitrarily and capriciously by issuing a permit for the proposed discharge prior to collecting sufficient information and performing sufficient analyses with respect to the foregoing matters to reach a rational conclusion that existing aquatic resources and beneficial uses of the Pamunkey River will be adequately protected.

15. The SWCB acted arbitrarily and capriciously by failing to consider the applicant's admission that other available discharge locations would have less adverse effects on aquatic resources the SWCB is charged by law to conserve and protect.

#### **The Facts**

16. Newcastle Farm, which has been owned by the Broaddus family for six generations, consists of approximately 900 acres of land located on the Pamunkey River in the County of Hanover. Newcastle Farm is the location of the historic Town of Newcastle, which is listed in the Virginia Landmarks Register.

17. In March of 1997, the County of Hanover agreed to purchase land near the Totopotomoy Creek on which the County proposed to locate a sewage treatment plant.



18. In April of 1997, the County informed Broaddus that Newcastle Farm had been identified by the County as the location for the sewage treatment plant's discharge and outfall pipe to the Pamunkey River.

19. As proposed by the County, the project would 1) include 5,000 linear feet of discharge pipe crossing Newcastle Farm, 2) require an ingress/egress easement road approximately 50 feet in width which would encompass approximately 5.8 acres of land, and 3) require up to an acre of land on Newcastle Farm in order to construct reaeration and discharge structures.

20. Hanover County applied for a VPDES permit to discharge wastewater at a discharge and outfall location on Newcastle Farm on April 4, 1997. The application reflected a discharge location that became known as the "Original Site."

21. During the next several months, the County conducted feasibility studies of other potential discharge locations that might have less adverse impacts on the Pamunkey River, Newcastle Farm, and historic resources.

22. As a result of the feasibility studies, the County decided to move the discharge and outfall pipe from the Original Site to a site downstream that became known as the Downstream II location. The County's own analysis indicated that the Downstream II site was superior based on three criteria including 1) the protection of water quality in the Pamunkey River, 2) minimizing impacts to the Town of Newcastle archaeological site and 3) minimizing impacts to Newcastle Farm.

23. The County maintained that protection of water quality was of the highest importance in selecting a location for the discharge and outfall pipe and on April 20, 1998, the

County amended its permit application to select the Downstream II location for the discharge and outfall pipe.

24. On October 8, 1998, the County again amended its permit application to return the proposed discharge to the Original Site, without any new information indicating it was superior from the perspective of water quality.

25. On January 19, 1999, the SWCB conducted a public hearing at the Hanover County Office Complex. Ms. Crutchfield, Mr. Broaddus and their counsel presented information orally at the hearing.

26. On February 4, 1999, counsel, on behalf of Crutchfield and Broaddus, submitted timely written comments to the DEQ regarding the proposed VPDES permit for the County's Wastewater Treatment Plant. *See Comments attached hereto as Exhibit A.*

27. On March 11, 1999, the SWCB approved the permit. On April 28, 1999, the permit was issued to Hanover County.

#### **Existing Water Quality Violations**

28. Like all Virginia waters, the Pamunkey River at the site of the proposed discharge is designated for uses including swimming and the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them.  
9 VAC 25-260-10.

29. In order to achieve these uses, the SWCB has determined that the daily average concentration of dissolved oxygen in the Pamunkey River cannot be permitted to fall below 5mg/l, and that dissolved oxygen concentrations can never be permitted to fall below 4mg/l.  
9 VAC 25-260-50, 25-260-530.

30. Data collected by the DEQ shows that the Pamunkey River already experiences severe and persistent violations of both of these water quality standards for dissolved oxygen at river mile 48.80. River mile 48.80 is approximately 6 miles downstream from Hanover County's proposed discharge of treated sewage at river mile 54.89.

31. In stream conditions such as those in the segment of the Pamunkey River involved here, the effect of a pollutant discharge is generally greatest at a point several miles downstream.

32. During a 5-month period of continuous monitoring in 1995, the daily mean standard for dissolved oxygen was violated 40 times. The first daily mean violation occurred on June 24<sup>th</sup>, and the last occurred on October 8<sup>th</sup>.

33. During that period of 106 days, there were 40 daily mean violations, indicating that dissolved oxygen concentrations were below the standard for 38% of the time. Furthermore, the instantaneous dissolved oxygen standard of 4 mg/l was violated 10 times for up to four hours at a time.

34. The lowest dissolved oxygen level recorded at river mile 48 was found by accident in a monthly grab sample taken on September 11, 1996, when the dissolved oxygen in the Pamunkey was a mere 2.8 mg/l.

35. The DEQ researcher who collected these data recommended further study to check whether dissolved oxygen violations occur prior to June 1 and to confirm dissolved oxygen sag areas. The DEQ elected not to better define or document this problem despite its knowledge at the time that Hanover County would be proposing a significant discharge of

treated sewage upstream. A DEQ memorandum dated June 2, 1997, noted that the assimilative capacity of the Pamunkey with respect to dissolved oxygen is considered to be fully allocated.

36. In the three years since dissolved oxygen problems in the Pamunkey River were discovered, the DEQ has not undertaken any research or analyses sufficient to document the reasons for the dissolved oxygen sag at river mile 48.80. Instead, it has continued to issue permits for substantial discharges of treated sewage — including oxygen consuming pollutants — to upstream waters.

37. Specifically, the SWCB issued a discharge permit for the King William County Sewage Treatment Plant on Moncuin Creek. When operational, this plant will discharge treated sewage to Moncuin Creek just 3.88 miles upstream from its confluence with the Pamunkey River at river mile 48.80.

38. Without performing the analyses or adhering to the procedures required in such cases, the SWCB issued a VPDES to Hanover County to discharge up to 10 mgd of effluent with a significant load of oxygen-consuming pollutants and nutrients including chemical oxygen demand, biological oxygen demand, suspended solids, phosphorus and nitrogen.

39. These pollutants would be mixed with the modest flow in the Pamunkey River and carried downstream until the river deepens and slows near river mile 48.80. There, with similar pollutants from the King William County Sewage Treatment Plant, they will settle out, consume oxygen, and promote the growth of oxygen-demanding microbes and bacteria. The result will necessarily be even lower levels of dissolved oxygen, for longer periods, over an even wider geographic area.

40. The DEQ has never conducted any field investigation or modeling of these effects.

#### **The Pamunkey River is an Impaired Water**

41. Section 303(d) of the Clean Water Act (the "CWA") requires states to identify their waters that do not meet water quality standards, even after treatment required by the CWA or when other controls are in place. The state must consider all existing and readily available water quality related data and information in preparing the list of waters identified as impaired.

42. For each of the waters on the list, the state is required to develop a Total Maximum Daily Load ("TMDL") of pollutants. A TMDL calculates how much of a pollutant can be put into the entire watershed without violating water quality standards. Permits for discharges of pollutants into the watershed may only be issued if the total amount of pollutants to be discharged by all dischargers to the watershed is below the TMDL.

43. The development and implementation of TMDLs has become the focal point for water quality protection. TMDLs are based on sound water quality standards but must be calculated and faithfully applied by the SWCB in permit decisions.

44. Notwithstanding the clear violations of water quality standards for dissolved oxygen in the Pamunkey River, the SWCB and DEQ failed and refused to identify it as an "impaired water" subject to Section 303(d). As a result, the United States Environmental Protection Agency ("EPA") was compelled to exercise its oversight authority and designate the Pamunkey River — and many other Virginia waters — as "impaired" for the SWCB and DEQ.

45. On December 16, 1998, the EPA published notice of its proposal to designate numerous Virginia waters as "impaired" owing to the failure to the SWCB and DEQ to do so.

46. On May 12, 1999, the EPA placed the tidal portion of the Pamunkey River, including the area of the proposed discharge and river mile 48.80, on the list of impaired waters. This decision was made based on existing and readily available water quality-related data in the possession of the DEQ.

47. The SWCB issued the sewage discharge permit here with full knowledge of EPA's proposal and the "impaired" nature of the receiving water body, yet failed to consider adequately evidence that the proposed discharge, in combination with other sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

#### **Rare, Threatened or Endangered Mussels**

48. There is strong evidence that rare, threatened or endangered mussel species use the vicinity of the proposed discharge and will be adversely affected by the proposed discharge. Despite this evidence, the DEQ refused to perform work adequate to detect their presence in the Pamunkey River, and issued a permit without adequate information to make a rational and informed decision.

49. A study conducted in 1972 and 1973 surveyed the Pamunkey River for the presence of mussels. At a location just upstream from the proposed discharge location, the surveyor found four species of mussels, including the rare *Lampsilis radiata* (Eastern Lampmussel) and the rare *Lasmigona subviridis* (green floater), as well as *Elliptio complanata* and *Ligumia pasuta*. At the next station upstream, the surveyor found another rare mussel, *Lampsilis cariosa* (yellow lampmussel).

50. The Virginia Department of Conservation and Recreation shares the assessment that rare, threatened or endangered mussel species are likely to be at or near the proposed discharge site. Due to this possibility, the department strongly recommended a survey to determine which species may occur in the vicinity of the discharge site.

51. The County of Hanover arranged for a field survey of mussels which took place in November of 1998. The investigation consisted of approximately one hour of search time at each of four stations, a total of 2.5 hours of stream bank searching, and 54 minutes of waterscoping. The survey was submitted to the DEQ.

52. This survey was reviewed by Dr. Richard Neves of Virginia Tech, who considered the work inadequate for several reasons. Among these, the survey was not conducted in the late spring or early summer and thus was unlikely to find all the species present. Furthermore, the amount of time spent searching for the mussels was inadequate.

53. In addition, the surveyor was under the mistaken belief that the U.S. Route 360 bridge, where the surveyor in the 1972-73 study conducted her sampling was several miles upstream from the survey area. This error cast doubt on the researcher's knowledge and understanding of the site.

54. According to Dr. Neves, only a more thorough survey would determine whether any mussel species resided within the survey reach. Until such a survey is conducted, the best available evidence indicates that rare, threatened or endangered mussels occupy the very stretch of river into which the County proposed to discharge treated sewage.

55. According to the Virginia Department of Conservation and Recreation, the *Lasmigona subdiridis* (green floater) is believed to be declining to the point that it may warrant federal listing as a threatened or endangered species.

56. The United States Fish and Wildlife Service also did not concur with the findings of the County's mussel report. In a letter to the DEQ, the Fish and Wildlife Service concurred with Dr. Neves' concerns which included the time-of-year that the survey was conducted and the level of effort spent sampling. The letter noted that the Virginia Department of Conservation and Recreation, Division of Natural Heritage had also indicated concern about this survey report.

57. The Fish and Wildlife Service recommended that another freshwater mussel survey be conducted in May or June 1999 and that the survey effort be two to three times greater than the effort put forth in the original survey.

58. Importantly, the Fish and Wildlife Service stated that until the additional survey is conducted, no state or federal permits should be issued for the proposed project to ensure compliance with the Endangered Species Act.

59. Nevertheless, the SWCB issued a permit to allow the County to discharge ten million gallons per day of treated sewage immediately upstream from this known freshwater mussel habitat that has historically included rare, threatened or endangered species. During slack tides and low flow conditions in the Pamunkey, these mussels will be exposed to large quantities of concentrated sewage effluent.

60. Despite the comments by Dr. Neves and the Fish and Wildlife Service and evidence presented by Crutchfield and Broadbuss, the SWCB issued the VPDES permit to the



County. This action violates Virginia's SWCL and implementing regulations, and was arbitrary and capricious.

#### **Anadromous Fish**

61. The SWCB also failed to consider adequately that the proposed discharge will have a significant adverse effect on anadromous fish spawning and migration.

62. The populations of anadromous fish in the York River system, including the Pamunkey, are in serious trouble. Among the reasons cited by researchers for the collapse of the shad population is pollution that blocks migratory pathways, making it impossible for adults to reach or return from spawning habitat, and impossible for juveniles to migrate successfully to bay and ocean waters. Spawning and nursery habitat is eliminated upstream from dissolved oxygen sags that anadromous fish cannot, and will not, traverse.

63. Historically, anadromous fish have used almost the entire Pamunkey River as spawning and nursery habitat. Spawning adults have been documented in the South Anna River, in the North Anna and throughout the Pamunkey. For shad, spawning occurs during the spring and extends into June, with juvenile fish migrating downstream thereafter. Other species spawn earlier as well as later in the year.

64. The existing dissolved oxygen problem in the Pamunkey at river mile 48.80 poses a significant obstacle for migratory shad and other anadromous fish because such fish cannot swim through waters with inadequate levels of dissolved oxygen to sustain their respiration.

65. The evidence before the SWCB indicated that the Pamunkey may be effectively closed to migratory fish passage at river mile 48.80 during a significant portion of the year extending from late spring through early fall.

66. The precise times the Pamunkey may be blocked to migratory fish is not known because the SWCB and DEQ failed to develop adequate data on the problem.

67. The licensed discharge will make the situation for anadromous fish worse. The DEQ could not properly issue the permit without sufficient information to assess the possible effect of the proposed discharge on passage of migratory fish.

#### **Recreational Uses**

68. At the public hearing on the proposed discharge on January 19, 1999, several speakers informed the DEQ that they have used the area at and immediately downstream from the proposed discharge for swimming for many years.

69. Several troops of Boy Scouts regularly use this area of the property for camping, picnicking, swimming and other forms of outdoor recreation and nature observation. The area is highly prized and regularly used by canoeists, fishermen and others for a variety of primary contact recreation.

70. Crutchfield and Broaddus have personally witnessed such usage over the years and confirm that the portion of the Pamunkey bordering Newcastle Farm downstream from the proposed discharge site is heavily used for all manner of primary contact water-based recreation.

71. At the public hearing, several individuals who have used this stretch of the Pamunkey for recreation uniformly said they would not continue to do so if the County is permitted to discharge treated sewage immediately upstream.

72. The Virginia Department of Health has advised numerous members of the public that primary contact recreation should be avoided downstream from discharges of treated sewage such as are at issue.

73. Water is not "swimmable" if the Health Department recommends that the public not swim there. Nor can water be considered "swimmable" if no reasonable person in fact would ever swim in it.

74. The SWCB violated the SWCL and implementing regulations by issuing this permit notwithstanding its effective termination of existing beneficial uses of the Pamunkey River for recreation.

#### **Alternative Locations for Discharge**

75. According to a letter to the DEQ from the County, the most important siting criteria applicable to this discharge of treated sewage are the protection of water quality, historic resources and property interests.

76. The site licensed by the SWCB for this discharge, the Original Site, is by the County's own admission more damaging to water quality, historic resources and property interests than other, equally available alternatives.

77. The SWCB's approval of an admittedly inferior discharge location is arbitrary and capricious.

**Relief Requested**

**WHEREFORE, Crutchfield and Broaddus, by counsel, move this Court to declare that VPDES Permit No. VA0089915, issued on April 28, 1999, by the State Water Control Board, was issued in violation of the State Water Control Law and implementing regulations and is therefore invalid, void and of no effect.**

**Crutchfield and Broaddus also move this Court to award them reasonable costs and attorneys' fees incurred in bringing this appeal as provided for under Va. Code § 9-6.14:21 (Repl. Vol. 1998).**

**Respectfully submitted,**

**FRANCES BROADDUS CRUTCHFIELD  
AND HENRY RUFFIN BROADDUS**

By: 

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BY HAND

Mr. Allan Brockenbrough  
Virginia Department of Environmental Quality  
Piedmont Regional Office  
4949-A Cox Road  
Glen Allen, Virginia 23060

Re: County of Hanover, Totopotomoy Wastewater  
Treatment Plant; Proposed Permit No. VA0089915

Dear Mr. Brockenbrough:

Thank you very much for the opportunity to comment on the proposed VPDES permit for Hanover County's planned Totopotomoy Wastewater Treatment Plant. The comments presented in this letter are made on behalf of Mrs. Frances Broaddus-Crutchfield and her son, Mr. Henry Ruffin Broaddus. Mrs. Broaddus-Crutchfield and Mr. Broaddus are among the persons who would be most affected by the proposed discharge because they own Newcastle Farm, the site of the proposed outfall to the Pamunkey River. While I know that you will attempt to evaluate all comments on this proposal conscientiously, please make a special effort to see that the concerns of these landowners are considered carefully and completely.

Newcastle Farm has been in my clients' family for six generations. It is an historic property which each generation has faithfully preserved, husbanded and conserved. The present owners repeatedly have rejected efforts to develop or otherwise disturb the integrity of this land. Now however, its rich resources are being threatened by others as never before. Its proximity to U.S. Route 360 and the Pamunkey River make it a convenient location from which to dispose of treated sewage.

However, convenient, easy and cheap solutions are not always best in the long term. Before issuing the proposed permit, there are substantial reasons to stop, gather additional information, and consider more carefully than has been possible on the basis of the existing record. Please consider the following points.

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1. There is Strong Evidence that Rare, Threatened or Endangered Mussel Species Will Be Adversely Affected by the Proposed Discharge, But No Work Adequate to Detect Their Presence Has Been Performed.

- a. The Riddick Study

In 1972 and 1973, Ms. Marceile B. Riddick surveyed the Pamunkey River for the presence of mussels. Her work, part of a master's thesis supervised by Dr. James R. Reed (then a professor at Virginia Commonwealth University) is reported in *Freshwater Mussels of the Pamunkey River System, Virginia* (1973). A copy of this thesis is enclosed as Exhibit 1.

Ms. Riddick's sampling station 48 was located at the U.S. Route 360 bridge, just upstream from the proposed sewage discharge location. At that location, Ms. Riddick found four species of mussels, including the rare *Lampsilis radiata* (Eastern lampmussel) and the rare *Lasmigona subviridis* (green floater), as well as *Elliptio complanata* and *Ligumia pasuta*. At the next station upstream (station 47, at State Route 602), Ms. Riddick found another rare mussel, *Lampsilis cariosa* (yellow lampmussel). According to a letter from the Virginia Department of Conservation and Recreation dated November 20, 1998 (Exhibit 2), *Lasmigona subviridis* (green floater) "is believed to be declining throughout its range to the point that it may warrant Federal listing as Threatened or Endangered."

While the documented occurrence of three rare mussel species in the general vicinity of the proposed discharge is significant, it is even more remarkable when one recalls the limitations of this work.

Ms. Riddick's survey of mussels in the Pamunkey covered a wide area, with sampling performed at a total of 50 stations located on the North Anna, South Anna, Little River, and Pamunkey River. As befits a general geographic survey such as this, the amount of effort at individual sampling stations was necessarily quite limited. Nor was it possible given Ms. Riddick's limited resources to conduct the sampling at each station at the time when mussels are most likely to be found.

According to a letter of January 8, 1999, from Dr. Richard Neves, a professor at Virginia Tech, "a mussel survey at the site would be effective only in late spring or early summer." Please refer to Exhibit 3. This is because mussels burrow into river substrates during winter months, and when they are otherwise not reproductively active. That means that if one genuinely wishes to know if rare, threatened or endangered species are present at a given location, one must look for them during the late spring or early summer months. However, Ms. Riddick's field work was conducted "during summer, fall, and winter of 1972 and the early spring of 1973" (at 10). She did not record when sampling was performed at each station, but clearly the odds are that the timing of this work resulted in many mussels -- and especially any rare mussels -- being missed.

Under these circumstances, the documented occurrence of three rare mussel species in the area

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is strong evidence that these -- and perhaps other rare, threatened or endangered species -- are likely to be present today at and below the proposed discharge site.

b. The Natural Heritage Division Findings and Recommendation

The Virginia Department of Conservation and Recreation, Natural Heritage Division, shares the assessment that rare, threatened or endangered mussel species are likely to be at or near the proposed discharge site. In a letter dated January 8, 1999 (Exhibit 4) it stated:

Three rare species, the green floater (*Lasmigona subviridis*), yellow lampmussel (*Lampsilis cariosa*), and eastern lampmussel (*Lampsilis radiata*), have been documented a short distance upstream of Newcastle Farm and there is a high probability that one or more occurs at or near the discharge site. The Federally-listed dwarf wedge mussel (*Alasmodonta heterodon*) has been recorded in the watershed and is also possible at the site.

Due to the possibility of rare mussel species, we strongly recommend a survey to determine which species may occur in the vicinity of the discharge sites.

On January 12, 1999, after the Natural Heritage Division wrote this letter, a consultant to Hanover County prepared a report describing its prior field search for mussels in the Pamunkey River near the proposed discharge site. Unfortunately, that effort was manifestly inadequate and likely would not have found any rare, threatened or endangered mussel species even if they are present, as expected.

c. Hanover's Survey of November 1998

In late 1998, long after it had committed to this stretch of the Pamunkey River as its discharge location, Hanover County arranged for a field survey for mussels. The survey was conducted on November 6, 7, 8, 18, and 20, 1998. The investigation consisted of approximately one hour of search time at each of four stations, a total of 2.5 hours of stream bank searching, and 54 minutes of waterscoping. A final report setting forth the results was not prepared until January 12, 1999. It says this work located two common mussel species in the vicinity of the proposed discharge, *Anodonta cataracta* (Eastern floater) and *Eliptio complanata* (Eastern elliptio). By far the greatest numbers of these mussels were found approximately 1,000 feet downstream of the proposed discharge point, at a sampling point dubbed "Tributary Station." There, notwithstanding the time of year, mussels were found at a rate of 30 per hour. The next most productive station produced 10 mussels per hour.

Hanover County's mussel survey has been reviewed by Dr. Richard Neves of Virginia Tech, who considers the work inadequate for several reasons. Among these, the survey was not conducted in



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the late spring or early summer and thus was unlikely to find all of the species present. That is especially true for rare, threatened or endangered species that are difficult to find even under ideal conditions. Furthermore, the amount of time spent searching for mussels was woefully insufficient to the task. Rare mussels are hard to find -- especially in November. The failure to search for a reasonable time made it very unlikely that any rare, threatened or endangered mussels would be found even if they are present. Please refer to the attached letter from Professor Richard Neves to Frances Broadus-Crutchfield dated February 2, 1999 (Exhibit 5).

It should also be noted that the County's investigator was under the mistaken belief that the U.S. Route 360 bridge -- where Riddick conducted her sampling at Station 48 -- was "several miles upstream from the survey area" (at 14). This error casts doubt on the researcher's knowledge and understanding of the site, as well as his evaluation of Riddick's work and conclusions based on it.

To put matters simply, Hanover County made very little effort to find mussels, and what little effort it did make came at a time when mussels were very unlikely to be found. The survey is completely inadequate and unreliable. According to Dr. Neves, "only a more thorough survey would determine whether any other mussel species reside within the surveyed reach." Exhibit 5 at 2. Until a full and complete mussel survey is performed that satisfies the recommendations of the Natural Heritage Division and Dr. Neves, the best available evidence indicates that rare, threatened or endangered mussels occupy the very stretch of river into which Hanover proposes to discharge treated sewage.

d. The Water Quality Needs of Freshwater Mussels

Freshwater mussels are notoriously sensitive to water pollution. Time and again, they have disappeared from streams in the mid-Atlantic area following pollution that was previously undetected and in compliance with all established water quality standards. In the attached article published by the American Fisheries Society (Exhibit 6), several experts including Dr. Neves report that there are 297 varieties of native freshwater mussels in the United States and Canada -- of which 213 (71.7%) "are considered endangered, threatened, or of special concern." Mussels are sensitive to water pollution as miners' canaries are sensitive to dangerous gases. Their deaths warn of water quality problems that otherwise may go undetected. This explains why many freshwater mussels are joining the ranks of rare, threatened and endangered species. See letter from Virginia Department of Conservation and Recreation dated April 22, 1997 (Exhibit 7).

Yet, Hanover County has proposed to discharge 10 million gallons per day of treated sewage immediately upstream from known freshwater mussel habitat that probably includes rare, threatened or endangered species. During slack tides and low flow conditions in the Pamunkey, these mussels will be exposed to large quantities of concentrated sewage effluent.

Given these facts, one would expect that before this permit issues the record would contain an assessment of the sensitivity of freshwater mussels to all of the expected constituents in the proposed

effluent, and a demonstration that all of the relevant species can tolerate the concentrations and durations of the predicted exposure. However, no such assessment or demonstration has been made. Issuance of a permit for this discharge should be postponed until the likely effects are thoroughly examined and understood.

2. The Proposed Discharge Would Contribute to Existing Violations of Water Quality Standards in the Pamunkey River, But No Assessment Has Been Prepared.

Like all Virginia waters, the Pamunkey River at the site of the proposed discharge is designated for uses including swimming and the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them. 9 VAC 25-260-10.

In order to achieve these uses, the Board has determined that the daily average concentration of dissolved oxygen in the Pamunkey River cannot be permitted to fall below 5 mg/l, and that dissolved oxygen concentrations can never -- not even for an instant -- be permitted to fall below 4 mg/l. 9 VAC 25-260-50, 25-260-530. According to the Environmental Protection Agency, these levels of dissolved oxygen are the threshold at which lethal effects (suffocation) begin for fish and other aquatic life.

a. The Pamunkey River Already Experiences Significant and Persistent Violations of Water Quality Standards for Dissolved Oxygen.

Data collected by the Virginia Department of Environmental Quality shows that the Pamunkey River presently experiences severe and persistent violations of the water quality standard for dissolved oxygen at river mile 48.80. River mile 48.80 is approximately 6 miles downstream from Hanover County's proposed discharge of treated sewage at river mile 54.89. During a 5-month period of continuous monitoring in 1995, the daily mean standard for dissolved oxygen was violated 40 times. The first daily mean violation occurred on June 24, and the last occurred on October 8. During that period of 106 days, there were 40 daily mean violations, indicating that dissolved oxygen concentrations were below the standard for 38% of the time. Furthermore, the *instantaneous* dissolved oxygen standard of 4 mg/l was violated 10 times for up to four hours at a time.

The lowest dissolved oxygen level recorded at river mile 48 was found by accident in a monthly grab sample taken on September 11, 1996. On that date, dissolved oxygen in the Pamunkey river was a mere 2.8 mg/l -- a level lethal to all but the hardiest of species. All of these data on dissolved oxygen levels in the Pamunkey are collected in Exhibit 8 to these comments.

The DEQ researcher who collected these data recommended deployment of a datasonde beginning May 1, 1996 "to check whether mean daily DO violations occur prior to June 1, the start

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date of this [1995] study." He also recommended continuing datasonde deployments throughout the summer "to confirm the results of the 1995 deployments" and "perform[ing] more longitudinal DO surveys to confirm DO sag areas." Exhibit 9 at 3. However, DEQ -- then under the administration of Governor George Allen -- elected not to better document or define this problem. DEQ made that decision notwithstanding its knowledge at the time that Hanover County would be proposing a significant discharge of treated sewage upstream.

A DEQ memorandum from Jon van Soestbergen to Curt Linderman dated June 2, 1997, sheds further light on this situation (Exhibit 10). Based on the dissolved oxygen data discussed above, it concludes that "*the assimilative capacity of the river with respect to DO is considered to be fully allocated*" (emphasis added).

Consultants to Hanover County were not aware of this dissolved oxygen problem in the Pamunkey River until March 1996, when Hazen & Sawyer were provided these data. Thus, the condition simply was not taken into account in any of the prior studies performed for the County. The County nevertheless continues (improperly) to cite those earlier reports for the proposition that its proposed discharge would neither cause nor contribute to violations of water quality standards.

In the three years since dissolved oxygen problems in the Pamunkey were discovered, the DEQ has not undertaken any research or analyses sufficient to document the reasons for the dissolved oxygen sag at river mile 48.80. Instead, DEQ simply has assumed that the condition is the result of "natural conditions caused by extensive marshlands that border the tidal Pamunkey River" (Exhibit 10). However, the researcher who collected the data in 1995 and 1996 suspected that it was due in part to nonpoint sources of pollution including agricultural runoff. See Exhibit 9. His suspicion is supported by the levels of fecal coliform recorded in the data. See Exhibit 8. The Pamunkey River tends to be shallow and fast-moving as one progresses downstream from the U.S. Route 360 bridge, until just above river mile 48.80. There, the river becomes deeper and slower. Water there has a greater residence time, tending to slosh back and forth on each tidal cycle with less net downstream displacement. In this environment, pollution that remained suspended in the water upstream tends to settle out, including oxygen-demanding materials and nutrients. This provides an ideal habitat for microbes to grow, reproduce and consume available dissolved oxygen -- thus accounting for the dissolved oxygen sag.

Whatever the cause, the important points are: (1) a severe and persistent dissolved oxygen sag occurs in the Pamunkey River a short distance downstream from the proposed discharge, (2) the problem has not been adequately documented, and (3) the assimilative capacity of the Pamunkey River for dissolved oxygen has already been fully allocated.

- b. The Proposed Discharge Will Contribute to these Existing Water Quality Violations.

The sewage discharge proposed by Hanover County would add a large amount of additional

oxygen demand to the river, making this existing water quality problem worse. It would permit discharge of up to 10 mgd of effluent (20% of the 7Q10 river flow) with a significant load of oxygen-consuming pollutants and nutrients including chemical oxygen demand, biological oxygen demand, suspended solids, phosphorus and nitrogen. These pollutants would be mixed with the modest flow in the Pamunkey River and carried downstream until the river deepens and slows near river mile 48.80. There, they will settle out, consume oxygen, and promote the growth of oxygen-demanding microbes and bacteria. The result necessarily must be even lower levels of dissolved oxygen, for longer periods, over an even wider geographic area.

The DEQ has not conducted any field investigation or modeling of these effects. Nor are the proposed effluent limitations as strict as prior DEQ practice would require.

Hanover County employees have attempted to characterize the effluent limitations in this proposed permit as "strenuous." At best, that description is inaccurate. Our examination of DEQ permits indicates that the proposed limitations are merely "typical" of modern treatment plants on streams that *exceed* water quality standards. They are positively "lax" when compared to the significantly more stringent limitations applied by DEQ to streams with existing downstream water quality problems, such as the Pamunkey has with dissolved oxygen.

In early 1997, you made essentially the same observation. Your memorandum to Maynard D. Phillips dated February 26, 1997 (Exhibit 11), noted dissolved oxygen problems in the Pamunkey and observed that no validated model existed to evaluate the likely effects of Hanover County's proposed sewage discharge on stream dissolved oxygen levels. The memorandum observed that it was therefore impossible to show that the effect of the proposed discharge on dissolved oxygen levels would be small, and suggested that this situation called for more stringent effluent limitations than are applied commonly to streams without water quality problems.

Several months later, the DEQ memorandum of June 2, 1997 (Exhibit 10), adopted this approach and recommended discharge limits that are significantly more stringent than those in the proposed permit:

	June 2, 1997 Recommendation Based on BPJ	Proposed Effluent Limitation
cBOD <sub>5</sub>	10 mg/l	15 mg/l
TSS	10 mg/l	22.5 mg/l
TKN	3 mg/l	4.5 mg/l

The recommended effluent limitations were based on the "Best Professional Judgment" of DEQ staff and were backed by DEQ's Water Permits Support Division.

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Almost a year later, DEQ staff was still recommending this approach. A DEQ memorandum dated April 15, 1998 (Exhibit 12 at 5), states:

The Pamunkey River at the point of discharge is not modellable by conventional means due to the tidal influence upon the river. DEQ has recommended that, in such cases, VPDES permit limits should be set at "self-sustaining" levels. "Self-sustaining" is defined by DEQ as an effluent that causes virtually no degradation to the river water quality. Traditionally, "self-sustaining" limits have been in the range of BOD<sub>5</sub> = 10 mg/l, TSS = 10 mg/l, and TKN = 3 mg/l.

The record contains no evidence or analysis sufficient to justify DEQ's last minute rejection of these recommended effluent limitations. Without explanation or supporting evidence, the proposed permit would allow a 50% increase in BOD<sub>5</sub> over staff recommendations, a 125% increase in TSS, and a 50% increase in TKN. The resources of the Pamunkey are too important to risk in this fashion.

Furthermore, DEQ cannot avoid its obligation to designate the Pamunkey River in the vicinity of river mile 48.80 as a nutrient enriched, water quality impaired stream segment merely by refusing to further document the problem. It is required to perform sufficient investigation to determine the sources of pollution contributing to the water quality standard violations, and to determine the total maximum daily load of pollutants that may be introduced into these waters consistent with meeting the water quality standard. It is required to adopt and enforce effective limitations on both point sources and nonpoint sources in order to achieve those water quality standards. If DEQ wishes to contend that the existing water quality problems at river mile 48.80 are caused *entirely* by natural phenomena and are not contributed to by point or nonpoint sources of pollution, then it must perform sufficient investigations and documentation using the processes provided for in its rules. Unless and until it does so, it is improper to issue discharge permits with obvious potential to make existing violations of water quality standards worse.

This situation is made worse by the recent issuance of a discharge permit by DEQ for the King William County Sewage Treatment Plant on Moncuin Creek. This plant, now under construction, will soon begin discharging treated sewage to Moncuin Creek just 3.88 miles upstream from its confluence with the Pamunkey River -- at river mile 48.80. There is no record that the combined, cumulative effects of the King William and Hanover County discharges on the existing dissolved oxygen sag in the Pamunkey have been properly considered.

In short, DEQ has not performed the investigations necessary to demonstrate that the permit limitations it has proposed will protect water quality standards downstream from the proposed discharge site.

3. The Proposed Discharge Will Interfere with Existing Uses of the Pamunkey River.

a. Recreation

During the public hearing on the proposed discharge on January 19, 1999, several speakers mentioned that they have used the area immediately downstream from the proposed discharge for swimming for many years. Those using this area are not limited to the property owners. Several troops of Boy Scouts regularly use the property for camping, picnicking, swimming, and other forms of outdoor recreation and nature observation. Please refer to the enclosed letter from Mr. David Estes, Scoutmaster of Troop 879, dated February 2, 1999 (Exhibit 13), and to the enclosed letter from Mr. J. Harry Davis, Scoutmaster of Troop 876, dated January 31, 1999 (Exhibit 14). Furthermore, the area is highly prized and regularly used by canoeists, fisherman and others for a variety of primary contact recreation. Mrs. Broadus-Crutchfield and Mr. Henry Ruffin Broadus have personally witnessed such usage over the years and confirm that the portion of the Pamunkey bordering Newcastle Farm downstream from the proposed discharge site is heavily used for all manner of primary contact water-based recreation.

At the public hearing, several individuals who have used this stretch of the Pamunkey River for recreation uniformly said that they would not continue to do so if the County is permitted to discharge treated sewage immediately upstream. Several reported advice they had received from the Virginia Department of Health that primary contact should be avoided downstream from treated sewage effluent. Despite claims from DEQ staff at the hearing that swimming in this effluent would not be harmful to human health and that the area would remain "swimmable," it is clear that allowing the proposed discharge would in fact terminate the existing use of a significant stretch of the Pamunkey River for primary contact recreational uses -- including swimming -- from the proposed discharge location downstream for a considerable distance.

Water is not in fact "swimmable" if the Health Department recommends against swimming there. Nor does it satisfy the purposes of DEQ's regulations or applicable law for water to be technically "swimmable" according to DEQ's criteria, if no person in fact would ever swim there given the risks cited by the Health Department.

b. Shellfish Habitat

As noted above, the Pamunkey River currently is used as shellfish habitat by several freshwater mussel species. The areas immediately upstream and downstream from the proposed discharge in particular are documented habitat for mussels, including rare, threatened or endangered species. This existing use of the Pamunkey River is to be maintained, but would likely be terminated by the proposed discharge. Until such time as it is demonstrated that all mussel species likely to be present in the discharge area will survive the proposed discharge during all stream conditions, issuance of the proposed permit is premature.

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c. Anadromous Fish Spawning and Migration

Anadromous fish are those species that migrate from saltwater to freshwater to spawn, but return to saltwater to live most of their adult lives. The reproductive strategies of these species require that spawning adults be free to swim up coastal rivers to freshwater spawning habitat during their annual spawning migrations, and free to return to bays and ocean waters once spawning is complete. Newly spawned fish larvae live and grow into juvenile fish in upstream freshwater nursery habitats, then migrate downstream to bays and ocean waters to complete their maturation into reproducing adults.

There is no doubt that populations of anadromous fish in the York River system, including the Pamunkey River, are in serious trouble. In 1994, the Virginia Marine Resources Commission ("VMRC") imposed a total ban on in-shore fishing for migratory fish "after it became obvious that shad populations in tidal rivers across the state had collapsed. . . ." Recently, the VMRC voted again to extend that ban for at least another year. *Richmond Times-Dispatch*, "Shad fishing ban is extended a year" (Dec. 22, 1998), Exhibit 15. Among the reasons cited by researchers for the collapse of the shad population is pollution that blocks migratory pathways, making it impossible for adults to reach or return from spawning habitat, and impossible for juveniles to migrate successfully to bay and ocean waters. In effect, spawning and nursery habitat is eliminated upstream from dissolved oxygen sags that anadromous fish cannot, or will not, traverse.

Historically, anadromous fish have used almost the entire Pamunkey River as spawning and nursery habitat. Spawning adults have been documented in the South Anna at the U.S. Route 1 bridge, in the North Anna, and throughout the Pamunkey. For shad, spawning occurs during the spring and extends into June, with juvenile fish migrating downstream thereafter. Other species spawn earlier as well as later in the year.

The existing dissolved oxygen problem in the Pamunkey River at river mile 48.80 may pose a significant obstacle for migrating shad or other anadromous fish. Fish cannot swim through waters with inadequate levels of dissolved oxygen. The existing evidence indicates that the Pamunkey may be effectively closed to migratory fish passage at river mile 48.80 during a significant portion of the year extending from late spring through early fall. The precise times the Pamunkey may be blocked to migratory fish is not known because DEQ failed to follow the advice of its research employees to develop additional data on the problem. However, it is clear that the proposed discharge will make this situation worse. Until a thorough study of the possible effect of the proposed discharge on passage of migratory fish is performed, issuance of the proposed permit is premature.

4. The County Requires, But Probably Cannot Obtain, A Federal Permit to Construct the Outfall at the Proposed Location.
  - a. The Proposed Outfall Location May Have Significant Adverse Effects on Federally Protected Resources, Including Endangered Species and Historic Resources.

The outfall structure proposed by the County will involve discharges of fill material in areas subject to the jurisdiction of the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Ordinarily, construction of such outfall structures can be expected to produce only "minimal" effects on protected resources and is thus eligible for use of a "Nationwide" permit. In this case however, there are substantial reasons to suspect that the effects of constructing the outfall at the proposed location will be "more than minimal." The potential effects of this discharge location on rare, threatened or endangered species protected by the federal Endangered Species Act, and on anadromous fish protected by the federal Fish and Wildlife Coordination Act, have already been discussed.

In addition, the location of the proposed outfall may have significant and adverse effects on historic resources protected by the National Historic Preservation Act ("NHPA").

Section 106 of the NHPA requires federal agencies to consider carefully the effects of undertakings they fund, perform or approve on historic resources that may be eligible for listing on the National Register of Historic Places. It also requires the Corps to provide the Advisory Council on Historic Preservation with an opportunity to comment on such undertakings. When the Advisory Council determines that an undertaking would have an adverse effect on an eligible resource, the federal agency may proceed only after an elaborate review process has been completed and it has evaluated and rejected other alternatives and mitigation.

In the present case, Newcastle Farm contains significant, documented historic resources that would indeed be adversely affected by construction of the proposed discharge pipe, reaeration structure, and outfall. These include the colonial era Town of Newcastle -- a listed Virginia Historic Landmark -- and a portion of Marlbourne, which is already listed on the National Register.

Newcastle Town was founded by William Meriwether in 1738. It became an important cross-roads, with major highways leading to Williamsburg, Hanover Courthouse, and Philadelphia. Ocean going vessels docked at its wharfs, and it was a regional center for both culture and commerce. When removal of the colonial capital from Williamsburg was contemplated by the House of Burgesses in 1751, Newcastle fell just two votes shy of being selected as the new capital of the Virginia Colony. It is where Patrick Henry rallied volunteers in 1775 to march on Williamsburg and protest Governor Dunmore's seizure of the colony's gunpowder.

Marlbourne is where Edmund Ruffin, sixth generation ancestor of Mr. Henry Ruffin Broadbush,



Mr. Allan Brockenbrough

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conducted his famous agricultural experiments concerning the effects of various fertilizers on crop production. Often called the "father of soil chemistry in America," Ruffin is credited with pioneering scientific agriculture in the New World. His farm, Marlbourne encompassed a portion of Newcastle Farm and is listed on the National Register of Historic Places. Additional information on these two sites, prepared by the Virginia Department of Historic Resources, is set forth in Exhibit 16.

Now, this historic property is where Hanover County proposes to pipe, reaerate and discharge its sewage. Clearly, doing so may have "adverse effects" on historic resources. Because of these and the other impacts cited above, the Corps will be required by its regulations to consider alternatives to the proposed discharge location in an individual permit process.

**b. The County Has Admitted that Superior Alternatives Exist.**

Despite knowledge of the historic importance of this property, Hanover County has not performed any survey for or evaluation of historic resources at its proposed discharge site. Earlier, it had Gray & Pape perform a "Phase I" evaluation of two potential downstream discharge locations, known as "Downstream I" and "Downstream II." Virginia's Department of Historic Resources responded to that study by recommending additional investigations and suggesting that alternative discharge sites should be explored. Letter from David Dutton dated July 7, 1998 (Exhibit 17). The County itself has concluded, based in part on the Gray & Pape report, that impacts to historic resources would likely be more severe at its proposed discharge location (called the "original site") than at an equally available alternative location (Downstream II).

According to a letter to DEQ by Mr. Steven P. Herzog, Utility Engineer for Hanover County's Department of Public Utilities, dated March 25, 1998 (Exhibit 18), the most important siting criteria for treated sewage discharges are protection of water quality, historic resources, and property interests. He further has stated that Hanover County's proposed discharge location would have *greater* impacts to *each* of these resources than would other, equally available alternatives. According to Mr. Herzog, the Downstream II location remained superior to the County's proposed location after considering additional factors including "safety, access from Route 360, cost and wetlands impacts."

**c. A Federal Permit Probably Cannot Be Obtained for an Admittedly Inferior Location.**

Hanover County has admitted that its proposed "original" discharge location is inferior to an equally available alternative with respect to water quality and every other relevant factor, including wetland impacts. Nevertheless, it has asked the DEQ to approve that location by means of a letter from Mr. Steven P. Herzog dated October 8, 1998. The request cited no reasons why the discharge should be located at the inferior "original" site, and offered only that it is not much worse -- from a water quality perspective only -- than the Downstream II site. The request ignores the other "primary" and secondary site evaluation criteria earlier applied by the County itself, and which will be applied by

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the U.S. Army Corps of Engineers. These criteria include impacts to historic resources, property interests, safety, access, cost, and wetlands.

The County's request that DEQ approve an admittedly inferior discharge location appears on its face to be arbitrary and irrational. To grant such a request without supporting justification would be even more so.

Whatever response the State Water Control Board may make to this request, the Corps of Engineers is required by federal law and regulations to issue a permit only for the least environmentally damaging, practicable alternative. The record demonstrates -- from the County's own statements -- that the least damaging site is not the proposed "original" site. Accordingly, no federal permit is likely to issue for it. If the applicant should obtain such a permit, it will be vulnerable to judicial challenge.

#### Conclusion

The State Water Control Board should not issue the proposed permit. Impacts to freshwater mussels have not been adequately explored or considered. The discharge would contribute to and aggravate existing water quality problems in the Pamunkey River. The DEQ should address those problems before permitting the discharge of pollutants that would make them worse. The existing violations of water quality standards in the Pamunkey are serious and are adversely affecting aquatic life, possibly including anadromous fish such as American shad. The proposed effluent limitations are not sufficient to prevent such adverse effects according to the best professional judgment of DEQ employees themselves. The proposed discharge also would adversely affect existing recreational uses of the Pamunkey, including swimming and camping. These matters need to be examined carefully, but have not been thus far.

Finally, Hanover County has not yet obtained a federal permit its proposal requires -- and there are strong reasons to believe the County will not obtain one for the proposed discharge site. That site admittedly would have more severe impacts on numerous protected resources than other practicable alternatives. It therefore is ineligible for federal permitting under Corps rules. If a federal permit should issue, it would be vulnerable to challenge in federal court.

On behalf of Mrs. Frances Broaddus-Crutchfield and Mr. Henry Ruffin Broaddus, thank you very much for the opportunity to express these views.

Sincerely,



William B. Ellis

**VIRGINIA:**

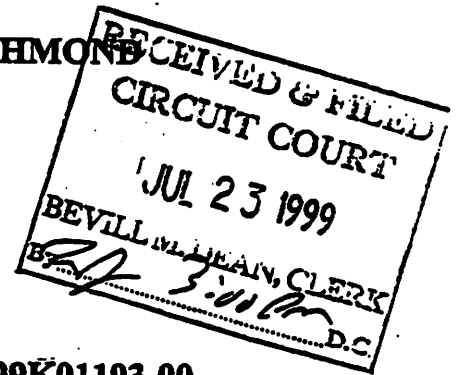
**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

**Petitioners,**

**v.**

**Chancery No. 760CH99K01193-00**



**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**Respondents.**

**DEMURRER OF THE STATE WATER CONTROL BOARD  
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY**

Now come the State Water Control Board and the Department of Environmental Quality (collectively, "Commonwealth") and demur to the Petition for Appeal filed by Francis Broaddus Crutchfield and Henry Ruffin Broaddus on the following grounds:

1. The present proceeding is an appeal of a case decision of the State Water Control Board ("Board") to issue a VDPES permit to the County of Hanover for a proposed wastewater treatment plant to be located in the County. The Board is authorized pursuant to § 62.1-44.15(5) of the Code of Virginia (1950), as amended ("Code") to issue such permits.

2. Decisions of the Board made under § 62.1-44.15(5) may be appealed, by virtue of § 62.1-44.29. That statute authorizes certain persons to seek judicial review "in accordance with the provisions of the Administrative Process Act, §§ 9-6.14:1 *et seq.* of the Code ('APA')."

3. The APA provides that such appeals are to be brought "in the manner provided by the rules of the Supreme Court of Virginia." Code § 9-6.14:16.A. APA appeals are governed by Part 2A of the Rules of the Supreme Court of Virginia.

4. Under the Rules, appeals are initiated by first filing a timely notice of appeal. See Rule 2A:2. Next, the challenger must file a petition for appeal pursuant to Rule 2A:4:

Within 30 days after filing the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed. Such filing shall include all steps provided in Rule 2:2 and 2:3 to cause a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary and every other party.

5. Hanover County is a necessary party to the present action. See *Browning-Ferris Industries v. Residents Involved in Saving the Environment*, 254 Va. 278, 492 S.E.2d 431 (1997). Crutchfield and Broaddus have failed to join a necessary party and failed to comply with the requirements of Rule 2A:4 by failing to meet the deadline of Rule 2A:4 to take the necessary steps to cause

Hanover County to be served. Accordingly, they have failed to perfect their appeal, which must be dismissed.

6. In addition, the petitioners fail to allege facts that would demonstrate that they meet the standard of § 62.1-44.29 for obtaining judicial review of the Board's decision. Accordingly, the Petition for Appeal must be dismissed.

7. Lastly, the petitioners have sued both the State Water Control Board and the Department of Environmental Quality. The General Assembly of Virginia granted to the State Water Control Board the authority to issue permits such as that issued to Hanover County, and it is the Board that made the permit decision. The Department of Environmental Quality provides staff support to the Board, but does not make the decision. Accordingly, the Board is the sole proper State respondent in this action, and this appeal should be dismissed as to the Department of Environmental Quality.

For these reasons, the Petition for Appeal is fatally defective and therefore the State Water Control Board and the Department of Environmental Quality ask that the Petition for Appeal be dismissed.

Respectfully submitted,

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY**

By Debra Love Field  
Counsel

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**CERTIFICATE**

I certify that on this 23rd day of July, 1999, a copy of the foregoing pleading was sent by first class mail to:

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Richmond, Virginia 23218-1463

Counsel for Petitioners

Deborah Love Feild

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

**Petitioners,**

**v.**

**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**Respondents.**

**MEMORANDUM IN SUPPORT OF DEMURRER  
OF THE STATE WATER CONTROL BOARD AND  
DEPARTMENT OF ENVIRONMENTAL QUALITY**

The present action is an appeal of a decision of the State Water Control Board to issue a Virginia Pollutant Discharge Elimination System Permit to Hanover County for a proposed wastewater treatment plant to be located in the County. Petitioners Frances Broaddus Crutchfield and Henry Ruffin Broaddus have challenged the agency's action by the filing of a Petition for Appeal naming the State Water Control Board ("SWCB") and the Virginia Department of Environmental Quality ("DEQ") as respondents. SWCB and DEQ have demurred to the Petition for Appeal filed in this case, and submit this Memorandum in support of the demurrer.

### Background

Until 1972, the protection of the nation's waters was largely a matter of state enforcement of federally-adopted water-quality standards. In that year, Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 33 U.S.C. § 1251 *et seq.* ("the Act"). The Act's express purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1). The Act shifted the emphasis from water-quality based requirements to "direct restrictions on discharges." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976), and made it "unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." *Id.*, at 205.

The Act prohibits the discharge of any pollutant, except in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1342. Recognizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," Congress provided for states to issue and enforce permits under the Act. *Id.* at §§ 1251(b) and 1342. A state may apply to the Administrator of the United States Environmental Protection Agency ("EPA") to take responsibility for licensing all affected discharges within its boundaries under the NPDES program. *Id.* at §§ 1342(b). If the state program meets the requirements of § 1342, the Administrator suspends his issuance of NPDES permits in that state. *See id.* and 40 C.F.R. Part 123 (1999).



Virginia first enacted its State Water Control Law in 1946. 1946 Va. Acts, Ch. 63B. That law is now codified at §§ 62.1-44.2 through 62.1-44.34:13 of the Code. In 1974, the General Assembly amended the State Water Control Law so the State Water Control Board could seek authority to issue and enforce permits under the federal Act. The Administrator of EPA approved the Virginia program in 1975. See 40 Fed. Reg. 20,129 (May 8, 1975). The Board issues its *Virginia* Pollutant Discharge Elimination System permits under the authority of Code § 62.1-44.15(5), and implements this program through its permit regulation, 9 VAC 25-31-10 *et seq.*

Hanover County applied for, and received a VPDES permit for a proposed wastewater treatment facility. That permit is the subject of this appeal.

#### Appeals of Administrative Actions

The SWCB issued its permit under the authority of § 62.1-44.15(5). The General Assembly has waived the Commonwealth's sovereign immunity in certain respects. Of relevance here is Code § 62.1-44.29, which provides in part:

Any owner aggrieved by, or any person who has participated, in person or by submittal of written comments, in the public comment process related to, a final decision<sup>1</sup> of the Board under §§ 62.1-44.15(5),

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<sup>1</sup> The APA defines a "case decision" as

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) in compliance with any existing requirement for

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 (§ 9-6.14:1 et seq.) if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution.

The Administrative Process Act, §§ 9-6.14:1 *et seq.* of the Code ("APA") provides that appeals must be brought "in the manner provided by the rules of the Supreme Court of Virginia." Code § 9-6.14:16.A. APA appeals are governed by Part 2A of the Rules of the Supreme Court of Virginia.

The present appeal fails on its face in 3 respects:

- The petitioners fail to allege facts demonstrating their standing to bring this action;
- The petitioners have failed to join a necessary party to this action; and
- There is no basis upon which to bring an action against the Department of Environmental Quality.

#### Standing to Appeal

The General Assembly has designated the 2 classes of persons who may bring appeals of VPDES permits: (1) owners aggrieved by the SWCB's decision; and (2) persons who have participated in the public comment process related to the

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obtaining or retaining a license or other right or benefit.

§ 9-6.14:4. Plainly, the issuance of a VWP permit is a "case decision" within the meaning of the APA.

decision and who meet "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.

"Owner" is defined in the State Water Control Law in relevant part as "any person or group of persons acting individually or as a group that owns, operates, charters, rents, or otherwise exercises control over or is responsible for any actual or potential discharge of sewage, industrial wastes, or other wastes to state waters, or any facility or operation that has the capability to alter the physical, chemical, or biological properties of state waters in contravention of § 62.1-44.5...." Code § 62.1-44.3. An "owner," then, is the owner of a facility that is the subject of the SWCB's action. *See EDF v. State Water Control Board*, 12 Va. App. 456, 404 S.E.2d 728 (1991). Crutchfield and Broaddus are not "owners" within the meaning of § 62.1-44.29.

The Petitioners' standing, if any, must reside in their satisfying the second test of § 62.1-44.29 – that is, that they are persons who participated in the public comment process and who satisfy the requirements for Article III standing:

- **Participation in public comment process.** Code § 62.1-44.29 specifies that judicial review may be available to "any person who has participated, in person or by submittal of written comments, in the public comment process related to, a final decision of the Board under § 62.1-44.15(5)...." Crutchfield and Broaddus allege that they submitted both oral and written comments. Petition ¶¶ 25, 26.

• **Article III standing.** A commenter must meet "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. The statute goes on to list 3 conditions that must be met for a person to be deemed to satisfy Article III standing:

(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.

Petitioners do not allege any injury connected to themselves, let alone an injury can be evaluated against the criteria listed above. The most direct connections between the petitioners and the permitted discharge are: (1) the location of the property on the Pamunkey River (*Petition* ¶ 16); and (2) their having witnessed others using the river (*Petition* ¶ 70). In neither instance do Petitioners allege any injury at all, much less one that is actual or imminent, invading a legally-protected interest, concrete, particularized, traceable to a decision of the SWCB, and capable of redress by this court.

Accordingly, the Petition for Appeal fails on its face and the demurrer should be sustained and this action dismissed.

### Failure to Join a Necessary Party

Crutchfield and Broaddus bring this action against the SWCB and DEQ. They have not named as a respondent in this action the permit holder, Hanover County.

The holder of a permit is a necessary party to an appeal of that permit. *Browning-Ferris Indus. v. Residents Involved in Saving the Env't*, 254 Va. 278, 492 S.E.2d 431 (1997). In the absence of a necessary party, a court is without jurisdiction to proceed, and so the action must be dismissed. *Asch v. Friends of Community of Mt. Vernon Yacht Club*, 251 Va. 89, 465 S.E.2d 817 (1996). Any decision of the court made without a necessary party is void and of no effect, even as to those parties that were before the court. *Atkisson v. Wexford Associates*, 254 Va. 449, 456, 493 S.E.2d 524, 528 (1997).

This doctrine makes sense in the present case, where Petitioners seek to have a permit declared "void and of no effect." *Petition* page 16. Such a declaration is manifestly prejudicial to the holder of the permit. The present case is unlike that in *Browning-Ferris*, where the permit holder intervened, and the court deemed moot the failure to name BFI a party. The Petitioners' failure to make Hanover County a party to this action means that they have failed to perfect their appeal. Such failure is fatal where, as here, the permit holder has not intervened, and the court is without authority to extend the deadline for perfecting the appeal. *Mayo v. Department of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987).

Accordingly, this action must be dismissed for failure to perfect an appeal within the mandatory and jurisdictional deadline of Rule 2A:4 of the Rules of the Supreme Court of Virginia.

**The Department of Environmental Quality  
Should Be Dismissed From this Action**

Petitioners have named as respondents in this action both the State Water Control Board and the Department of Environmental Quality. Of these, only the State Water Control Board is a proper party. The Board, not the Department, issued the permit under challenge. The waiver of sovereign immunity in Code § 62.1-44.29 authorizes appeals of decisions made by the *Board*, not the Department. Although the Board has authority to delegate certain responsibilities to the Director of the Department, *see* Code § 62.1-44.14, in this case it was the Board that issued the permit. Furthermore, there is no relief pleaded or available under the APA that supports maintaining this action against the Department.

Accordingly, this action should be dismissed as against the Department of Environmental Quality.

**Conclusion**

For all these reasons, the Petition for Appeal is defective on its face, and the Demurrer of the State Water Control Board and Department of Environmental Quality should be sustained and this action dismissed.

Respectfully submitted,

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY**

By Deborah Love Feild  
Counsel

Mark L. Earley  
Attorney General of Virginia

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Assistant Attorney General  
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**CERTIFICATE**

I certify that on this 28th day of January, 2000, a copy of the foregoing pleading was sent by first class mail to:

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Counsel for Petitioners

Deborah W. Crump



**VIRGINIA:**

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

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS**

**Petitioners,**

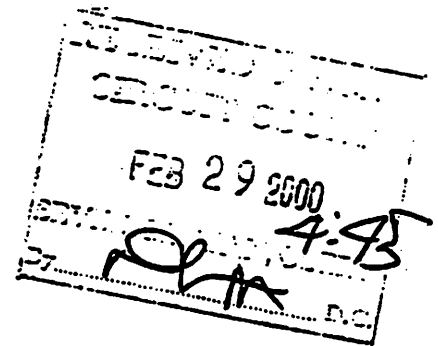
**v.**

**STATE WATER CONTROL BOARD**

**and**

**DEPARTMENT OF ENVIRONMENTAL QUALITY**

**Respondents.**



**Petitioners' Opposition to Demurrer of the State Water  
Control Board and Department of Environmental Quality**

Petitioners, Frances Broaddus Crutchfield ("Crutchfield") and Henry Ruffin Broaddus ("Broaddus"), by counsel, submit this memorandum in opposition to the demurrer filed by the Respondents, the State Water Control Board ("SWCB") and the Department of Environmental Quality ("DEQ").

**Background**

On April 28, 1999, the SWCB issued VPDES Permit No. VA0089915 to the County of Hanover for discharges of treated sewage from the County's proposed Totopotomoy Wastewater Treatment Plant. The permit would allow the County to discharge up to ten million gallons a day of sewage into the Pamunkey River from a discharge structure located in the middle of property owned by Crutchfield and Broaddus.

The complaint alleges, and for purposes of ruling on this demurrer the Court must assume it to be true, that the SWCB failed to observe the duties imposed on it by the State Water Control Law and the SWCB's own regulations in issuing this permit. The discharge at issue is alleged to contribute to and exacerbate existing, well-documented violations of water quality standards in the Pamunkey River, contrary to law. These violations of water quality standards are serious and by definition adversely affect aquatic life using the Pamunkey River in the vicinity of the proposed discharge, including the Crutchfield and Broaddus property. Species likely to be affected are alleged to include freshwater mussels and anadromous fish such as American shad, currently the target of an intensive recovery effort to restore decimated populations in the Chesapeake Bay. The proposed discharge is also alleged to adversely affect existing recreational uses of the Pamunkey River and Crutchfield and Broaddus property, all in violation of law. In addition to violating its duty to refrain from issuing permits for discharges that will contribute to violations of water quality standards, the SWCB is alleged to have failed its duty to adequately address these issues and to have acted arbitrarily and capriciously by failing to consider the applicant's candid admission that other available discharge locations would have less adverse effects on water quality and other affected resources. Again, all of these allegations must be regarded as true for purposes of ruling on this demurrer.

**I. Crutchfield and Broaddus Have Standing to Appeal**

Crutchfield and Broaddus have standing to appeal the decision by the SWCB to issue this permit because they satisfy the requirements necessary to obtain judicial review. See Va. Code § 62.1-44.29. First, Crutchfield and Broaddus participated in the public comment process in person at a public hearing and by submitting written comments to the DEQ regarding the

proposed VPDES permit. Petition, ¶¶ 25 and 26. The SWCB concedes that Crutchfield and Broaddus satisfy this requirement. See SWCB Memo. at 5. Second, Crutchfield and Broaddus meet the standard for obtaining judicial review pursuant to Article III of the United States Constitution.<sup>1</sup> Contrary to the claim made by the SWCB, Crutchfield and Broaddus, as riparian owners of the property where the sewage discharge will occur, have suffered concrete and particularized injuries as a result of the issuance of this permit.

In ruling on the SWCB's demurrer, this Court must "consider as true all material facts alleged in the [petition], all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts." *Krantz v. Air Line Pilots Assoc.*, 245 Va. 202, 204, 427 S.E. 2d 326, 327 (1993). Federal courts, in considering a motion to dismiss for lack of standing, must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing. *Glavin v. Clinton*, 19 F.Supp. 2d 543, 548 (E.D. Va. 1998), *aff'd*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). Federal courts also must "presume that general allegations embrace those specific facts that are necessary to support each claim." *Glavin*, 19 F.Supp. 2d at 548 (citations omitted); see also *Bennett v. Spear*, 137 L.Ed. 2d 281 (1997) (holding general allegations of injury satisfy requirements of Article III, and a plaintiff need not allege each specific subsidiary fact that supports its general claim of injury). The requirements of Article III are satisfied where a litigant has a personal stake in the outcome of the controversy. *Glavin*, 19 F.Supp. 2d at 548 (citation omitted).

The Petition contains detailed allegations about the injuries to property owned by

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<sup>1</sup> The federal requirements to establish standing, which are incorporated in Va. Code § 62.1-44.29, are less stringent than those previously required under Virginia law. While Crutchfield and Broaddus have standing under either standard, application of the federal standard

Crutchfield and Broaddus that will result from the issuance of this permit. These allegations, as well as all facts impliedly alleged and the reasonable inferences that can be drawn from those facts, must be considered by the Court. Moreover, the injuries to Crutchfield and Broaddus and their property result from the issuance of the challenged permit because without a permit there would be no sewage discharge. For the same reason, these injuries can be redressed by a decision of this Court invalidating the permit. Applying the legal standards discussed above, it is clear that Crutchfield and Broaddus have pled facts sufficient to withstand a demurrer.

Crutchfield and Broaddus have alleged they are the owners of Newcastle Farm, the site of the proposed outfall and sewage discharge to the Pamunkey River. Petition, ¶¶ 3-4; See Exhibit A attached to Petition for Appeal at 1.<sup>2</sup> Six generations of the Broaddus family have faithfully “preserved, husbanded and conserved” Newcastle Farm. See Exhibit A at 1. As riparian owners of the property where the sewage discharge will occur, Crutchfield and Broaddus have alleged their property will be damaged in concrete and particularized ways. Beginning in the second paragraph of the Petition, Crutchfield and Broaddus allege several injuries including 1) that the permitted discharge will contribute to and aggravate existing violations of water quality standards in the Pamunkey River adjacent to their property; 2) that these violations of water quality standards adversely affect fish, mussels and wildlife using the Pamunkey adjacent to their property and downstream from the proposed discharge; 3) that the permitted discharge will adversely affect existing recreational uses of the Pamunkey River and their adjacent property;

---

leaves no doubt on this issue.

2 On demurrer, a court may examine not only the substantive allegations of the pleading attacked, but also any exhibits filed with the pleadings or mentioned in them. See Rule 1:4 (i) of the Rules of the Supreme Court of Virginia; *W.M. Schlosser Co., Inc. v. Fairfax County*, 245 Va. 451, 452, 428 S.E. 2d 919, 920 (1993); *Flippo v. F & L Land Co.*, 241 Va. 15, 17, 400 S.E. 2d

and 4) that the discharge location licensed by the SWCB will damage water quality and historic resources on their property, and other property interests to an extent greater than other, equally available alternatives. Petition, ¶¶ 2, 68-77; *see also* Exhibit A at 2-13. These allegations plainly satisfy the requirement that plaintiffs must allege injury to themselves. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (allegations of damage to aesthetic and environmental well-being sufficient injury to confer standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (*same*); *Parents, Alumni, and Friends of Taylor School v. City of Norfolk*, 37 F.Supp. 2d 435, 440 (E.D. Va. 1999) (non-economic interests can establish standing for purposes of Article III standing under the United States Constitution).

But the Petition also contains details describing how these injuries to Crutchfield and Broaddus will result from the issuance of this permit. Newcastle Farm is the location of the Historic Town of Newcastle, which is listed in the Virginia Landmarks Register. *Id.* at ¶ 16; Exhibit A at 11-12. Despite the fact that Hanover County had previously identified other discharge locations that would have less adverse impacts on water quality, Newcastle Farm and the Town of Newcastle, (*Id.* at ¶¶ 20-24), the SWCB permitted the discharge at a location with greater adverse impacts. *Id.* The resulting damage is concrete and particularized to Crutchfield and Broaddus, the owners of Newcastle Farm.

The Pamunkey River at the site of the proposed discharge is designated for uses including swimming and the propagation and growth of a balanced, indigenous population of aquatic life. *Id.* at ¶ 28. The permitted discharge injures Crutchfield and Broaddus because it will contribute to and exacerbate water pollution, including violations of applicable water quality standards for

dissolved oxygen, and will effectively end water-contact recreation on the Crutchfield and Broaddus property downstream from the proposed discharge. The violations of dissolved oxygen standards threaten rare or endangered mussels, other freshwater mussels and anadromous fish spawning and migration at the point of discharge on Newcastle Farm as well as upstream and downstream. *Id.* at ¶¶ 28-67; Exhibit A at 2-11. Other less damaging alternatives in terms of protecting water quality were before the SWCB, but ignored. *See* Petition, ¶¶ 20-24, Exhibit A at 12-13. Such allegations, which must be taken as true, are plainly injuries to Crutchfield and Broaddus and to their property.

Crutchfield and Broaddus are also injured by the issuance of this permit because the area at and immediately downstream from the proposed discharge has been used for swimming, camping and other forms of outdoor recreation and nature observation by Crutchfield, Broaddus and others, including the Boy Scouts, for many years. Petition, ¶ 70; Exhibit A at 9. Such activity will cease if the permitted discharges occur. *Id.* at ¶¶ 71-74; Exhibit A at 9. In fact, the Virginia Department of Health has advised the public that primary contact recreation should be avoided downstream from discharges of treated sewage such as are at issue in this case. *Id.* at ¶ 72; Exhibit A at 9. The effective termination of existing recreational uses of the Pamunkey River and Newcastle Farm for recreation by Crutchfield and Broaddus is an injury sufficient to confer standing on Crutchfield and Broaddus to appeal.

If the allegations made by Crutchfield and Broaddus, as riparian owners of the property where the permitted discharge will occur, are not sufficient to confer standing, then one must question whether any individual citizen who spoke at a public hearing or submitted written comments would ever have standing to challenge *any* permit. While this may be the result

desired by the SWCB, Virginia law dictates otherwise.

This Court should overrule the SWCB's demurrer because Crutchfield and Broaddus have standing to maintain this action.

## **II. Crutchfield and Broaddus Have Perfected an Appeal of the VPDES Permit**

Appeals pursuant to the Virginia Administrative Process Act, Va. Code §§ 9-6.14:1 to 9-6.14:25, are governed by Part 2A of the Rules of the Supreme Court of Virginia. Crutchfield and Broaddus perfected their appeal by timely filing a Notice of Appeal and a Petition for Appeal with the clerk of this Court and then causing a copy of the Petition to be served on the SWCB and DEQ, the parties to this litigation.

Rule 2A:1 of the Rules of the Supreme Court of Virginia defines a "party" as "any person affected by and claiming the unlawfulness of a regulation or a party aggrieved who asserts a case decision is unlawful and any other affected person or aggrieved person who appeared in person or by counsel at a hearing, as defined in § 9-6.14:4E, with respect to the regulation or case decision as well as the agency itself." The parties in this action, as defined by Rule 2A:1, are Crutchfield, Broaddus, the SWCB and the DEQ.

The SWCB argues that the Petition must be dismissed because Crutchfield and Broaddus have failed to name a necessary party, Hanover County. They argue that failure to join a necessary party means the appeal has not been perfected. See SWCB's Memo. at 7-8. The SWCB's argument must fail. Whether or not Hanover County is a necessary party, naming Hanover County a party and serving them with the Petition plainly is not required in order to perfect an appeal pursuant to Part 2A of the Rules.<sup>3</sup>

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<sup>3</sup> This case does not involve a challenge to a regulation or involve an appearance by Hanover

Assuming arguendo that Hanover County may be a necessary party, the failure to serve Hanover County is not a fatal defect that deprives this Court of jurisdiction to hear this appeal. In *Browning-Ferris Indus. v. Residents Involved in Saving the Env't*, 254 Va. 278, 492 S.E.2d 431 (1997), the Supreme Court stated that the permit holder, BFI, was a necessary party to an appeal from the DEQ's ruling because the ruling conferred specific rights on BFI which could be defeated or diminished by the appeal. In so stating, the Court took no action on the merits of the circuit court's denial of the motion to dismiss (based on a failure to name BFI as a party) and vacated the part of the Court of Appeal's decision finding that BFI was not a necessary party pursuant to Rule 2A:1 because BFI's intervention in the appeal rendered the issue moot. The failure to join BFI was not fatal to the appeal. Were it fatal, the Supreme Court would have dismissed the entire appeal based on a lack of jurisdiction because BFI was not named as a party and served with the Petition within 30 days of the Notice of Appeal as required by Part 2A of the Rules. The fact that the Court proceeded to rule on the merits of the appeal makes clear that the failure to name BFI as a party was not a defect that deprived the court of jurisdiction.

Should this Court find that Hanover County is a necessary party, Crutchfield and Broaddus request leave to amend their Petition to name Hanover County a party and then serve the County with the Amended Petition.<sup>4</sup> In the alternative, the Court can grant Hanover County leave to intervene. The Court will then have all necessary parties before it and can proceed to rule of the merits of the Petition.

Neither the SWCB nor Hanover County will suffer any prejudice from such a ruling

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County at a hearing as defined in Rule 2A:1. Therefore, Hanover County is not a party under these circumstances either.

<sup>4</sup> Leave to amend shall be liberally granted in furtherance of the ends of justice. Rule 1:8



because each party will have ample time to respond to the Petition and to present a defense of the permit. Hanover County was aware of the filing of the Notice of Appeal and this Petition and could have moved to intervene at any time. In fact, in response to a request from the assistant County Attorney, Crutchfield and Broaddus forwarded a copy of the Petition to the County immediately after it was filed. Apparently, either Hanover County did not think it necessary to intervene to protect its interests or it intentionally refrained from doing so in hopes of supporting the SWCB's present attempt to evade judicial review.

Crutchfield and Broaddus have perfected their appeal of the permit. Accordingly, this Court should overrule the SWCB's demurrer.

#### **Conclusion**

Crutchfield and Broaddus have standing to bring this appeal and have perfected that appeal pursuant to Part 2A of the Rules of the Supreme Court of Virginia. Accordingly, Crutchfield and Broaddus respectfully request that this Court overrule the demurrer filed by the SWCB.

Respectfully submitted,

FRANCES BROADDUS CRUTCHFIELD  
AND HENRY RUFFIN BROADDUS

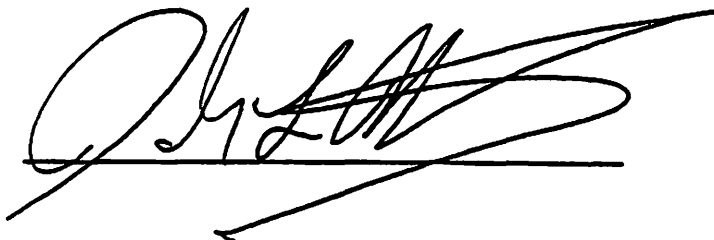
By: 

William B. Ellis (VSB No. 19753)  
John L. Marshall, Jr. (VSB No. 38474)  
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Post Office Box 1463  
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Richmond, Virginia 23218-1463  
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Telefax: (804) 782-2130

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing "Petitioners' Opposition to Demurrer of the State Water Control Board and Department of Environmental Quality" was mailed this 27<sup>th</sup> day of February, 2000, by first-class mail, postage prepaid, to:

Mark Earley, Attorney General  
Deborah Love Feild, Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

A handwritten signature in black ink, appearing to read "D. Love Feild", is written over a horizontal line.

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

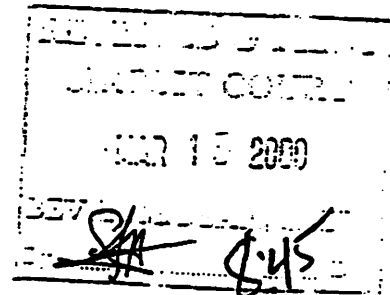
**Petitioners,**

**v.**

**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**Respondents.**



**REPLY MEMORANDUM IN SUPPORT OF DEMURRER  
OF THE STATE WATER CONTROL BOARD AND  
DEPARTMENT OF ENVIRONMENTAL QUALITY**

The State Water Control Board and Department of Environmental Quality (collectively, "Commonwealth") reply to the "Petitioners' Opposition to Demurrer of the State Water Control Board and Department of Environmental Quality."

Francis Broaddus Crutchfield and Henry Ruffin Broaddus have attempted in their "Petitioners' Opposition" to provide what their Petition for Appeal did not: allegations sufficient for the court to conclude that they meet the requirements for standing under § 62.1-44.29 of the Code of Virginia (1950), as amended ("Code"). At issue in this case is whether the allegations of the Petition are sufficient for this court to find that Crutchfield and Broaddus meet the requirements for Article III

standing. Section 62.1-44.29 spells out the specific requirements a person must satisfy in order to have such standing:

(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.

These criteria for Article III standing originate in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Crutchfield and Broaddus fail to satisfy the first of these. There are only 2 allegations that purport to demonstrate any connection between them and the permit issued by the State Water Control Board: (1) ownership of Newcastle Farm, on the Pamunkey River at the location of the discharge point (Petition ¶¶ 3-4); and (2) their observations of others enjoying recreational usage of the river (Petition ¶ 70). Every other allegation of error by the State Water Control Board is general – in no way “concrete and particularized.” The *Lujan* Court explained: “By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” *Id.* at n.1. Nothing in the Petition for Appeal alleges any connection between those provisions of the permit that Crutchfield and Broaddus challenge and any injury to themselves.

"The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, \_\_\_ U.S. \_\_\_, 120 S.Ct. 693, 704 (2000). In asserting only harm to the environment generally and not to themselves particularly, the petitioners have failed to allege a sufficient case.

Furthermore, counsel is unaware of any case where an allegation of mere ownership of property was sufficient to confer Article III standing. Counsel for Petitioners forwarded *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, \_\_\_ F.3d \_\_\_, 2000 WL 204559 (4<sup>th</sup> Cir. 2000), to this court. Each plaintiff in that case alleged a direct and personal harm from the operation of the facility at issue. Although one of the plaintiffs was an owner of property, the allegations that supported his standing to pursue the action included adverse effects upon his use and enjoyment of the water in question. *Id.* at 3, 7-8.

No similar allegations exist in the present Petition for Appeal. The "closest" connection between the petitioners and an injury are: (1) the allegations of paragraph 70, which states that Crutchfield and Broaddus have "personally witnessed" use of the river for recreation; and (2) allegations that "several individuals" have used the river recreationally and would not continue to do so. There is no allegation that the persons who said they would lessen their recreational usage of the river are the same persons Crutchfield and Broaddus have observed. More to the point: Crutchfield and Broaddus are claiming an adverse impact, not on their own use of the water, but on someone else's. Manifestly, this

derivative interest is exactly the sort of attenuated connection that the "concrete and particularized" injury-in-fact criterion rules out of bounds.

"Petitioners' Opposition" strives to make the connection and the allegations that the Petition for Appeal lacks. The effort via the "Petitioners' Opposition" to shore up the Petition for Appeal is too little, and too late.

The present issue before the court is whether the Petition for Appeal fails on its face to state a cause of action. The Petition makes no meaningful effort to allege a connection between the action of the State Water Control Board and injury to Crutchfield and Broadus. From the face of the Petition, one cannot conclude that the Petitioners have standing to bring this action, and it must fail. Under *Mayo v. Department of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987), jurisdictional defects cannot be cured. To the extent that the "Petitioners' Opposition" adds allegations of injury in fact to Crutchfield and Broadus, it is out of order.

For these reasons, the Commonwealth asks the court to sustain its Demurrer and dismiss the appeal.

Respectfully submitted,

STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

By Deborah Love-Fried  
Counsel

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CERTIFICATE

I certify that on this 14th day of March, 2000, a copy of the foregoing pleading was sent by first class mail to:

John L. Marshall, Jr.  
McSweeney, Burtch & Crump, P.C.  
Post Office Box 1463  
11 South Twelfth Street  
Richmond, Virginia 23218-1463

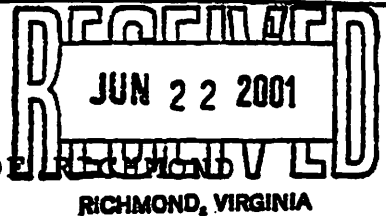
Counsel for Petitioners

Deborah Love Feild



1095-01-2

CLERK  
COURT OF APPEALS OF VIRGINIA



1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND  
3 JOHN MARSHALL COURTS BUILDING

4  
5 FRANCES BROADDUS CRUTCHFIELD  
6 and HENRY RUFFIN BROADDUS

7 vs.

8 STATE WATER CONTROL BOARD and  
9 DEPARTMENT OF ENVIRONMENTAL  
10 QUALITY

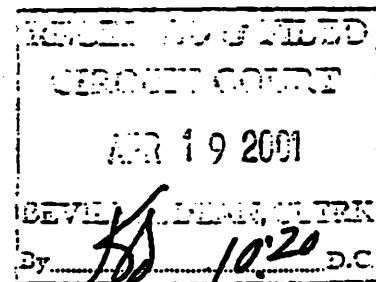
Chancery No.:  
760CH99K01193-00

11 April 26, 2000

12 ORIGINAL

13 Richmond, Virginia

14 Complete transcript of the hearing, when heard  
15 before the Honorable Melvin R. Hughes, Jr., Judge.



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## 1 APPEARANCES:

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11 Counsel for the Defendants  
12  
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25

1 (Beginning at 2:05 p.m.)

2  
3 THE COURT: This is the matter  
4 involving the State Water Control Board?

5 MS. FEILD: Yes, it is, Your Honor.

6 THE COURT: I thought I had the file  
7 here. Yes, Crutchfield.

8 Are you ready to proceed?

9 MS. FEILD: Yes, I am Your Honor. Good  
10 afternoon, Your Honor. I'm Deborah Love  
11 Feild. I represent the Water Control Board.

12 Your Honor, we're here today in a case  
13 that is an appeal pursuant to the  
14 Administrative Process Act, an appeal of a  
15 Virginia pollute and discharge elimination  
16 that's a permit issue by the State Water  
17 Control Board to Hanover County. The  
18 project in which this permit is an issue is  
19 dated by a proposed waste water treatment  
20 plant to be located there.

21 The permit was issue by the State Water  
22 Control Board pursuant to authority it had  
23 in the State Water Control Office pursuant  
24 to Section 62.1-44.15.5, which authorized  
25 the board use certificate for the discharge

1 of pollutants and alteration of state  
2 waters.

3 Now, issuance of these permits is  
4 subject to review under another section of  
5 the State Water Control Office; 62.1-44.29.  
6 That statute authorizes judicial review of  
7 certain actions taken by the board under  
8 listed statutes. And the one under which  
9 the board issued this permit is one of those  
10 for which the General Assembly has waived  
11 sovereign immunity.

12 As Your Honor knows, these cases are --  
13 appeals are brought first by filing a notice  
14 of appeal within 30 days of the action  
15 complained of and then by filing with the  
16 court a petition for appeal. And that's  
17 where we are in this case, Your Honor. And  
18 it's the position of the State Water Control  
19 Board that the petition for appeal is  
20 defective on its face and fails to state a  
21 cause of action. And, therefore, we're  
22 asking that this case be dismissed.

23 We've actually identified three issues  
24 in our demurrer. First of those, and the  
25 easiest -- because it's not going to decide

1 the case one way or the other. It's just a  
2 matter of clean pleading. This suit has  
3 been brought against the State Water Control  
4 Board and against the Department of  
5 Environmental Quality. It's our duty, Your  
6 Honor, that the State Water Control Board  
7 that issued this permit, it's their action  
8 that under review -- certainly the staff of  
9 the department is staffed to provide  
10 assistance to the board, but it's our view  
11 that the department is not properly a  
12 respondent in this action. We would ask  
13 that they be dismissed. That, of course, is  
14 not dispositive of the case, Your Honor.

15 The more fundamental flaws in the  
16 petition, Your Honor are two. One is that  
17 the petitioners in the case, Frances  
18 Broaddus Crutchfield and Henry Ruffin  
19 Broaddus, have failed to include a necessary  
20 party. That is, they brought this case  
21 against the State Water Control Board, a  
22 state defendant, but they did not name  
23 Hanover County as a defendant in this  
24 action.

25 And Your Honor will remember back to

1       our Brownie Fairs Industry days, we had a  
2       similar issue. Well, Your Honor, the  
3       present case is procedurally in --

4               THE COURT: Would you characterize  
5       Hanover as an indispensable party?

6               MS. FEILD: Absolutely, Your Honor.  
7       And I think that's what the Supreme Court  
8       does. They describe it as a necessary  
9       party. When the case was previously before  
10      Your Honor, the BFI case, it went up to the  
11      Supreme Court. The conclusion of that court  
12      was that plainly the permittee is a  
13      necessary party. What the Supreme Court had  
14      found, though, because as Your Honor will  
15      remember, BFI petitioned to intervene in  
16      that case. And the timing of that motion to  
17      intervene -- first of all, they intervened.

18              THE COURT: I was going to say I  
19      thought they did intervene.

20              MS. FEILD: Right, BFI in that other  
21      case, they intervened, and Your Honor  
22      allowed them in. And they moved for leave  
23      to intervene in as timely a fashion as if  
24      they had been sued simultaneously with the  
25      Commonwealth. So there's no delay, there's

1 no stretching, if you will, Your Honor, of  
2 the deadlines the rules of court provide  
3 for.

4 This case, we're in a different place.  
5 Hanover County has not petitioned to  
6 intervene in this case. We're well past the  
7 time that this case has been filed. So to  
8 the extent that there's some -- well, what  
9 the Supreme Court found in the BFI case is  
10 that the company's actions had mooted the  
11 objections.

12 We had asked that the Supreme Court  
13 find that the case should be dismissed on  
14 the grounds that a necessary party was not  
15 included in the time limits required by the  
16 rule, and, therefore, a mandatory and  
17 jurisdictional requirement had not been met  
18 and the case ought to be dismissed.

19 The Supreme Court found in that case  
20 that BFI's action in intervening had  
21 effectively mooted that issue out. But they  
22 did hold that BFI was, in fact, a necessary  
23 party. But they were before the Court and  
24 there was no -- well, the Court really  
25 didn't say much else. Since they were

1 before the Court, there was no need to look  
2 at that further.

3 In this case, we don't have Hanover  
4 County before the Court. They have not  
5 asked to be a party to this case. It would  
6 be argued, Your Honor, that this case sits  
7 on some different facts than did the BFI  
8 case because of that, because they haven't  
9 asked to intervene and because we're well  
10 past the deadline for filing responsive  
11 pleadings for that sort of thing.

12 It's also our view, Your Honor, to the  
13 extent that this court is interested in  
14 entertaining the motion of the plaintiffs  
15 that they be allowed to amend up to include  
16 Hanover as a party and add them in, we would  
17 object to the that, as well, Your Honor. We  
18 believe that the Mayo case stands for the  
19 proposition that plainly says that the trial  
20 courts -- the circuit courts, which really  
21 are sitting appellate courts. The circuit  
22 courts are without ability, without  
23 authority to extend the mandatory  
24 jurisdictional deadlines provided in the  
25 rules. Those deadlines in this case, Your



1 Honor, are you file a notice of appeal  
2 within 30 days and you file a petition for  
3 appeal within 30 days.

4 An amended petition at this point, Your  
5 Honor, is well past the deadline. And we  
6 maintain that the Court is without authority  
7 to extend that deadline in Rule 254 of the  
8 rules.

9 Your Honor, our other fundamental  
10 objection here is that you've got to look at  
11 the petition for appeal. And you don't find  
12 sufficient facts where the Court could  
13 conclude that these folks have standing to  
14 bring this case. Now, we've got to go back  
15 and we've got to look at the particular  
16 statute that authorizes judicial review of  
17 these kinds of decisions. That's at 44.29  
18 of Title 62.1. The statute says that any  
19 owner who's grieved by the board action can  
20 appeal.

21 Well, plainly, these people are not  
22 owners. We have case law that says that to  
23 be an owner, you've got to be owner of a  
24 facility. And I don't think that's in  
25 dispute here today.

1           The question is whether or not they  
2           satisfied the second prong of the test. The  
3           statute says that persons who may appeal  
4           include any person who has participated in  
5           person or by submittal of written comments  
6           in the public comment process, is entitled  
7           to judicial review if the person meets  
8           Article III standing.

9           Now, the plaintiffs have alleged that  
10          they've made comments, and, Your Honor,  
11          we're not -- since we're here dealing with  
12          the plaintiff's pleadings on their face, I'm  
13          not in a position to dispute that. But  
14          that's only part of the test. They have to  
15          have made comments, but they also have to  
16          satisfy Article III standing.

17          And the statute goes on to specify what  
18          criteria must be present in order for a  
19          plaintiff to be found to have Article III  
20          standing. There's three criteria. One is  
21          the person has suffered an actual or eminent  
22          injury which is an invasion of a legally  
23          protected interest and which is concrete and  
24          particularized. They have to suffer an  
25          actual injury that is personal. Secondly,

1 the injury -- and all three of these must be  
2 true, Your Honor. The injury has to be  
3 traceable to a decision of the board and not  
4 the decision of some other party that's not  
5 before the Court. And, thirdly, the injury  
6 has to be one that is likely to be redressed  
7 by a decision of the Court.

8 Well, here, Your Honor, I suggest you  
9 look at the petition for appeal. And you  
10 can't find an injury that these people have  
11 alleged that is personal to them. There are  
12 two paragraphs in the petition for appeal,  
13 Your Honor. One says the plaintiffs here  
14 owned property on the Pamunkey River near  
15 the point of the proposed discharge. That  
16 they owned property. Secondly -- and that's  
17 paragraph 16 of their petition for appeal.

18 Paragraph 70 of the petition for appeal  
19 says they've seen other people enjoying the  
20 river. And that's it, your Honor. That is  
21 all.

22 Now, there are a number of allegations  
23 in the petition for appeal having to do with  
24 what they think is wrong with the permit.  
25 They think it may pose a threat to certain

1 species. Well, Your Honor, that's not a  
2 particular harm to them. That is a general  
3 allegation of harm. But it is not one that  
4 is concrete, that is actual or eminent, that  
5 is an invasion of their legally protected  
6 interest and which is concrete and  
7 particularized.

8 Now, their memorandum of law -- we  
9 filed memorandum on this demurrer, Your  
10 Honor. I filed a memorandum, a reply, and  
11 the plaintiffs filed their own. They  
12 suggest that what the Court needs to do here  
13 is look with a liberal eye at the petition  
14 and look at those general allegations of  
15 harm and conclude that because they are  
16 riparian owners, these must hurt them in a  
17 particular way.

18 Well, Your Honor, I'm not sure that's a  
19 fair reading of the petition in the first  
20 place. And, plainly, a memorandum of law  
21 doesn't stand in place of a petition and  
22 can't augment and cannot allege those things  
23 that perhaps they wish they had alleged  
24 originally in the petition for appeal.

25 And let me give you one example of

1 this, Your Honor. This is on Page 6 of --

2 THE COURT: That's the very page I  
3 turned to. Go ahead.

4 MS. FEILD: It's Page 6 of their  
5 opposition to demurrer.

6 THE COURT: Oh, I'm sorry. I've turned  
7 to your Page 6 where you've set out -- You  
8 want me to turn now to Page 6 of their  
9 memorandum?

10 MS. FEILD: Right. You see where it  
11 says Crutchfield Broadbus, where it starts  
12 down there?

13 THE COURT: Right.

14 MS. FEILD: All right. I'll just quote  
15 from it. It says: Are also injured by  
16 issuance of this permit because the area at  
17 and immediately down stream from the  
18 proposed discharged has been used for  
19 swimming, camping and other forms of outdoor  
20 recreation and nature observation by  
21 Crutchfield, Broadbus and others, including  
22 the Boy Scouts for many years.

23 And they cite back to their petition,  
24 paragraph 70.

25 Now, Your Honor, when you turn to

1 paragraph 70, you have to put in context the  
2 allegations that immediately precede that.  
3 This is on Page 14 of the petition for  
4 appeal, paragraph 68.

5 It says: At the public hearing on the  
6 proposed discharge on January 19th, 1999,  
7 several speakers informed the DEQ that they  
8 have used the area at and immediately  
9 downstream from the proposed discharge for  
10 swimming for many years.

11 All right. That's speakers. Not the  
12 plaintiffs, but that speakers who have said  
13 that they have used the area for swimming.

14 Secondly, there in paragraph 69:  
15 Several troops of Boy Scouts regularly have  
16 used this area of the property for camping,  
17 picnicking, swimming and other forms of  
18 outdoor recreation and nature observation.  
19 The area is highly prized and regularly used  
20 by canoeists, fishermen and others for a  
21 variety of primary contact recreation.

22 Again, impact or intersection, if you  
23 will, between others and the river, but not  
24 between the plaintiffs.

25 Paragraph 70, the one that they cited

1 to: Crutchfield and Broaddus have  
2 personally witnessed such usage over the  
3 years and confirm that the portion of  
4 Pamunkey bordering Newcastle Farm downstream  
5 from the proposed discharge site is heavily  
6 used for all manner of primary contact  
7 water-based recreation.

8 Well Your Honor, you know, it's one  
9 thing to say I'm someone who enjoys watching  
10 birds. It's another thing to say I'm  
11 someone who enjoys watching other people  
12 watch birds. You know, there's a step back,  
13 Your Honor, from -- there is an insufficient  
14 connection, Your Honor, between the  
15 plaintiffs in this case and the harm or the  
16 impact that they allege.

17 When Your Honor reviews the petition  
18 carefully, you'll find that there is no  
19 direct personal connection. There's no  
20 actual or eminent injury that invades their  
21 legally protected interest and that is  
22 concrete and particularized.

23 Now, they claim that as riparian  
24 owners, if they don't have standing, nobody  
25 has standing. Well, Your Honor, when we

1 look at these cases, we look -- you know,  
2 it's not a secret to anybody that the  
3 language of the statute, the time standing  
4 to Article III standing is connected to what  
5 happened in the Federal appeal. And there's  
6 a significant amount of case law having to  
7 do with standing. And there's a long  
8 standing in the history of appeals of EPA  
9 action, for example. And there's a  
10 significant body of case law there.

11 Your Honor, I have yet to find a single  
12 Federal case that says it's enough to own  
13 property on the river. That is an  
14 insufficient allegation. Now, if you own  
15 property on the river and something else  
16 that is personal, that is actual or eminent,  
17 that is invades your legally protected  
18 interest, that is concrete and  
19 particularized, that's a different matter.  
20 But it's not enough to own property on the  
21 river and simply say that and to say that  
22 other people enjoy the river or that there's  
23 some general sense of environmental harm as  
24 a result of this.

25 One of the Federal cases I cited, Your



1 Honor in my reply memorandum is Friends of  
2 the Earth, Inc. vs. Laidlaw Environmental  
3 Services. And this is on Page 3 of my reply  
4 memorandum. And the quotation there I think  
5 is highly instructive.

6 It says: The relative showing for  
7 purposes of Article III standing, --however,  
8 is not injury to the environment, but injury  
9 to the plaintiff.

10 We're here on demurrer, Your Honor.  
11 We're taking the petition for appeal on its  
12 face. And despite what the plaintiffs might  
13 wish they had alleged or what they might now  
14 attempt to allege, you look at this pleading  
15 on its face, and it is insufficient on its  
16 face.

17 Your Honor, we take the view on behalf  
18 of the State Water Control Board that there  
19 is no second bite of this apple.

20 THE COURT: I was going to ask you  
21 that.

22 MS. FEILD: I think the Mayo case is  
23 very clear about that. If all you have to  
24 do is file a notice of appeal and some sort  
25 of petition for appeal, and if it doesn't

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1 include all the parties who need to be  
2 before the Court and if it doesn't include  
3 all the allegations that need to be there in  
4 order to show that you have a cause of  
5 action, Your Honor, then you've got to  
6 wonder where we're left.

7 The Mayo case stands for nothing,  
8 apparently, if it does not stand for the  
9 proposition that when you're dealing with a  
10 waiver of sovereign immunity, as we are in  
11 here -- and the rules of instruction having  
12 to do with that are strictly construed. The  
13 waivers of sovereign immunity are construed  
14 narrowly. What we have here is in effect  
15 something less than notice pleading. Just  
16 get a pleading in, and the trial court will  
17 take care of it when the Commonwealth points  
18 out what it thinks the defects in the  
19 pleading are.

20 Your Honor, we believe the Court --

21 THE COURT: So there's no room for  
22 amendments here?

23 MS. FEILD: Your Honor, I believe not.  
24 I think that runs counter to the holding of  
25 Mayo, and I think it runs counter to public

1 policy. As I said, we're here dealing with  
2 a waiver of sovereign immunity, and it's  
3 construed narrowly.

4 When you bring your case against the  
5 Commonwealth, yeah, there are some strict  
6 deadlines. And there are good reasons for  
7 that in which the General Assembly and the  
8 Supreme Court has decided that. For some  
9 sort of pleading to be filed and then  
10 amended up as seems to be needful later on,  
11 I think is contrary. We're here on appeal,  
12 Your Honor, this is not quite the same as a  
13 chancery matter.

14 Now, Rule 2A:5 of the rules of the  
15 court talks about further proceedings being  
16 held as though in a court of equity. But  
17 what Mayo says very clearly is you don't get  
18 to that further proceeding until you have  
19 perfected your appeal. I submit, Your  
20 Honor, that in order to perfect your appeal  
21 in this case, you have to bring in all the  
22 parties and you have to make all your  
23 allegations. So we ask that this action be  
24 dismissed. Thank you.

25 THE COURT: Thank you.

1 MR. MARSHALL: Good afternoon, Your  
2 Honor.

3 THE COURT: Good afternoon.

4 MR. MARSHALL: My name is John  
5 Marshall. I'm with the law firm of  
6 McSweeney, Burth & Crump here in Richmond.  
7 I'm here on behalf of the petitioners,  
8 Frances Broaddus Crutchfield and Henry  
9 Ruffin Broaddus. With me at counsel table  
10 is Mrs. Frances Crutchfield, one of the  
11 petitioners in this matter.

12 As the Commonwealth correctly pointed  
13 out, we're here on the appeal of an issuance  
14 of a VPDES permit to Hanover County allowing  
15 the discharge of 10 million gallons a day of  
16 treated sewage into the Pamunkey River from  
17 a place, a location on my client's property  
18 and into the river at that spot. I think  
19 that --

20 THE COURT: Now, you say on your  
21 client's property?

22 MR. MARSHALL: Yes, sir. Yes, sir.  
23 And, in fact, as part of this project, if it  
24 is allowed to proceed, part of their  
25 property will be condemned for this very

1           purpose.

2           THE COURT: Well, Ms. Love Feild just  
3           said that the plaintiffs are not owners.

4           MR. MARSHALL: And that's incorrect if  
5           she said that. Both Mrs. Crutchfield and  
6           Mr. Broaddus are owners of the property.

7           THE COURT: Didn't you say that,  
8           Ms. Love Feild?

9           MS. FEILD: Your Honor, I'm not  
10          disputing that they don't own the property  
11          that's in issue here.

12          THE COURT: Okay.

13          MS. FEILD: I said that they are not  
14          owners within the meaning of the statute  
15          waiving sovereign immunity. There are two  
16          classes of persons who can appeal. One are  
17          owners. And that case law says that you've  
18          got to be the owner of a facility. You've  
19          got to be an owner of grief in order to  
20          appeal, and you have to be an owner of a  
21          discharging facility. In fact, you have to  
22          be a permittee.

23          THE COURT: So you have to be the  
24          permittee, the owner of a facility in this  
25          case?

1 MS. FEILD: The other class of persons  
2 who can appeal are persons who participated  
3 and then who meet the Article III standing.

4 THE COURT: Do you agree with that,  
5 Mr. Marshall?

6 MR. MARSHALL: Oh, yes. And between us  
7 there is no dispute that Mrs. Crutchfield  
8 and Mr. Broaddus appeared in person and  
9 spoke at the meeting and filed written  
10 comments. So as to that prong of the  
11 requirements, there's no dispute about  
12 whether that's been met or not.

13 THE COURT: You mean the Article III  
14 question?

15 MR. MARSHALL: Well, no, the Article  
16 III question is in dispute. But the fact  
17 that they did appear and make comments is  
18 not --

19 THE COURT: Oh, that part of that  
20 prong, okay.

21 MR. MARSHALL: Correct.

22 THE COURT: All right.

23 MR. MARSHALL: I think it's important  
24 first just to alert the Court that what the  
25 State Water Control Board is attempting to

1 do here is dress up issues as  
2 jurisdictional, painting them as fatal to  
3 this appeal when they're as far from fatal  
4 to this appeal as possible.

5 I will address the issues as they were  
6 raised by the State Water Control Board,  
7 beginning with the necessary party article  
8 and the claim that because Hanover County  
9 was not added as a party to this lawsuit  
10 within the 30-day period in part 2A of the  
11 rules, that somehow this appeal must be  
12 dismissed and that such failure was fatal.  
13 That's absolutely incorrect.

14 And I think that the BFI case as  
15 decided by the Supreme Court -- you,  
16 obviously, are very familiar with the  
17 history of that case. It started here and  
18 went to the Virginia Court of Appeals and  
19 then up to the Supreme Court. In that case  
20 you ruled that BFI was not a necessary party  
21 and they did not need to be named as a party  
22 and served pursuant to the language of part  
23 2A of the rules of the Supreme Court of  
24 Virginia. And that ruling was affirmed by  
25 the Court of Appeals.

1 THE COURT: But I thought BFI was a  
2 party in that case.

3 MR. MARSHALL: They intervened and  
4 became one. But it was something that was  
5 done out of time.

6 THE COURT: I see.

7 MR. MARSHALL: And you ruled that that  
8 was not fatal to the appeal. You refused to  
9 dismiss the appeal. The Court of Appeals  
10 affirmed you on that, correctly reading Rule  
11 2A, that defines a party. It's absolutely  
12 clear pursuant to the language that the only  
13 party here pursuant to the language of part  
14 2A of the rules is the State Water Control  
15 Board.

16 When the case went to the Supreme  
17 Court, at that point, BFI had intervened.  
18 You had allowed them to intervene. The  
19 Supreme Court cited language that said they  
20 are a necessary party and then mooted or  
21 basically said because they intervened, the  
22 matter was moot, and they were not going to  
23 pass judgment. They vacated the Court of  
24 Appeals ruling on whether or not failure to  
25 include BFI was fatal to the appeal.



1           It's an opinion that, Your Honor, to be  
2           frank, doesn't expound on how they arrived  
3           at that conclusion. It's literally two  
4           sentences after a headnote.

5           But what is absolutely clear is that it  
6           is not a jurisdictional issue. Had it been  
7           a jurisdictional issue, the fact that BFI  
8           became a part of that suit and was added as  
9           a party after the 30-day period, the Supreme  
10          Court could not have then proceeded to rule  
11          on the merits of the case, which it did.  
12          It's fundamental. Had it been a  
13          jurisdictional defect, the Supreme Court  
14          would not have had jurisdiction to rule on  
15          the merits of that appeal. They did so.  
16          And inherent in that decision is that it is  
17          not a jurisdictional defect and it is not  
18          fatal to the appeal.

19          I would point out to the Court that we  
20          hear about the importance of the rights that  
21          are involved in this case as to Hanover  
22          County. Hanover County was given a copy of  
23          this petition days after it was filed. They  
24          have chosen not to intervene. They have a  
25          large contingent of folks here today --

1 THE COURT: I was going to ask you --  
2 but there's no prospect in this case of  
3 Hanover ever becoming a party to this  
4 proceeding, is there?

5 MR. MARSHALL: Oh, I think so, Your  
6 Honor. I think that they could move to  
7 intervene, and we would not object to that,  
8 or we could move to amend and add them. And  
9 the reason that that's not a problem is that  
10 pursuant to the rules, the only  
11 jurisdictional requirements that we have to  
12 meet are filing the notice of appeal and the  
13 petition for appeal naming and serving the  
14 party or parties as defined by part 2A of  
15 the Rules of the Supreme Court.

16 Those definitions make clear that the  
17 only party is the State Water Control Board.  
18 Hanover County does not fall under that  
19 definition. And the BFI case as ruled by  
20 the Supreme Court confirms that. If such an  
21 omission was fatal, the Supreme Court could  
22 not have gone to the merits of that case,  
23 because they would not have had jurisdiction  
24 and they would have so said. They did not  
25 do so. And the fact that they went to the

1 merits of the case with all of the parties  
2 involved means that there was no  
3 jurisdictional defect that divested the  
4 Court of jurisdiction to hear it.

5 And in that case, BFI did not become a  
6 part of that lawsuit until well after the  
7 30-day period to file a petition for appeal  
8 and that time had run. So I don't think  
9 that a fair representation of BFI is that  
10 because we have failed to name Hanover  
11 County as a party, that it divests this  
12 Court of jurisdiction and dismissal is  
13 appropriate. It absolutely is not. And if  
14 you go back and read the BFI case --

15 THE COURT: So can this case proceed  
16 now without the permittee, Hanover, ever  
17 being a party?

18 MR. MARSHALL: I think that it can,  
19 Your Honor. If they want to intervene, we  
20 have no objection to that. And if you so  
21 rule, we'll amend and add them. But having  
22 Hanover County as a party is not a  
23 jurisdictional prerequisite. It is not  
24 something required to vest this court with  
25 jurisdiction to hear this matter. Were it,

1 BFI would have said exactly that and turned  
2 out completely differently. Because the  
3 Supreme Court would have said BFI was not  
4 added as a party within a 30-day period,  
5 therefore, no court has jurisdiction, we  
6 have to dismiss it, we're vacating  
7 everything, reversing, it's done. --

8 But they didn't say that at all. They  
9 went ahead and said we're going to rule on  
10 the merits of the case. And so in this  
11 case -- well, one of three things can  
12 happen. Hanover cannot participate at all,  
13 they can move to intervene, or we could  
14 amend to add them as a party without in any  
15 way violating the limits on the waiver of  
16 sovereign immunity that are contained in the  
17 statute and in part 2A of the Rules of the  
18 Supreme Court of Virginia. We have adhered  
19 to those to the letter. And there's no  
20 question about that.

21 And Mayo, Mayo, Mayo we hear about. We  
22 kind of got pounded in the head with Mayo.  
23 Mayo does stand for the fact that this court  
24 does not have the power to extend a  
25 jurisdictional deadline. If we had not

1        named the State Water Control Board within  
2        30 days, filed a petition naming them as a  
3        party, we'd be out of luck and you could  
4        send us home. But because Hanover County is  
5        not a party necessary for this court --  
6        doesn't need to be named for this court to  
7        have jurisdiction, Mayo then also says --  
8        and Ms. Feild mentioned public policy.

9                Mayo points out that the purpose of the  
10       specific time limit is not to penalize the  
11       appellant, but to protect the appellee, to  
12       allow the appellee to assume that the  
13       litigation has ended if nothing has been  
14       filed in a timely manner.

15               This was filed, and they do not dispute  
16       this, in a timely manner as to the State  
17       Water Control Board. They were clearly on  
18       notice that this was going to be challenged.  
19       And for that matter, Hanover County knew, as  
20       well. They chose not to intervene for  
21       whatever reason. Perhaps to just evade  
22       judicial review. Obviously, if their  
23       interests were threatened in a way that they  
24       were concerned about, they would have moved  
25       to intervene.

1 But the point being, Mayo stands for  
2 more than just the proposition that after 30  
3 days, the Court cannot extend the time  
4 limit. It points out the reason for that.  
5 And all of the reasons that they talk  
6 about -- and the public policy behind that  
7 has been met. There's no question. The  
8 State Water Control Board, we filed a  
9 petition in a timely manner, and they were  
10 on notice that we were challenging this.  
11 There's no question about that at all.

12 As to the standing argument, Your  
13 Honor, I will point out or just remind the  
14 Court of what I'm sure you're aware of. And  
15 that's the standard of review on a demurrer.  
16 And what we're looking at looking at is a  
17 demurrer. So you've got to look at both the  
18 pleadings and the exhibits that we attach to  
19 our petition for review. Look at the facts,  
20 the facts that can be reasonably inferred  
21 from those facts to determine if in fact  
22 standing has been pled.

23 But, again -- and let me point out  
24 before I kind of walk the Court through  
25 where we have in fact pled that injury.

1 Again, this is not a jurisdictional matter,  
2 that if for some reason you were to look at  
3 the petition and go, well, I don't see it up  
4 here and I don't concede that, I'm going to  
5 show the Court how it's there. But that's  
6 not a jurisdictional defect that warrants  
7 dismissal of this appeal.

8 If you go back to the requirements of  
9 part 2A of the rules, we have met that. We  
10 have touched all of the bases the  
11 Commonwealth established in order for us to  
12 get here to you to appeal their permit. The  
13 rest of this is just smoke in mirrors in an  
14 attempt to evade judicial review. This is  
15 not a jurisdictional question.

16 I think you'll see that we have pled  
17 enough facts to establish standing. If not,  
18 again, what you can do is order us to amend,  
19 and we will do that. But I don't think  
20 you'll find it necessary after you'll see  
21 what we have in fact pled.

22 Ms. Feild correctly pointed out that  
23 62.1-44.29 lists three requirements to  
24 establish Article III standing. Elements  
25 two and three are not in dispute. And

1       they're basically yielding in their reply  
2       brief at Page 2 that the injury being fairly  
3       traceable to the board and the possibility  
4       of favorable relief in this court has been  
5       met.

6               There's no dispute that the damage  
7       being done to my client is as a result of  
8       the issuance of the permit. And were the  
9       Court to void the permit, we would get the  
10      relief that we're seeking.

11              So elements two and three aren't in  
12      dispute. What we are here to argue about  
13      today, I think, is element number one. And  
14      the State Water Control Board maintains that  
15      we have not pled an actual or eminent  
16      injury, something that impacts our legal  
17      rights.

18              THE COURT: Now, what injury do you say  
19      is traceable to the board's decision?

20              MR. MARSHALL: Well, I'll walk you  
21      through that. Well, one, Your Honor, first,  
22      I disagree with what I think was the  
23      belittling of the fact that our folks own  
24      the piece of property where the outfall is  
25      going to take place and their riparian



1 rights that run with that, you know, was  
2 just kind of brushed aside as not being a  
3 big deal.

4 If the owner of the land where the  
5 discharge is going to take place doesn't  
6 have standing to appeal a permit, who in the  
7 Commonwealth of Virginia would when it's  
8 going to be on your property being  
9 discharged in the river in front of that  
10 property.

11 And as you are probably aware, Your  
12 Honor, riparian rights convey certain  
13 things. That's the right to wharf out, the  
14 right to use the water for recreational  
15 purposes, for fishing, for drinking, for  
16 irrigation, for any number of things. All  
17 those are bundled up in what the riparian  
18 rights are.

19 So to say that a discharge of up to 10  
20 million gallons a day of treated sewage into  
21 that riparian area is not an injury that's  
22 unique and particularized to the owner of  
23 the piece of property where that's taking  
24 place, it defies logic to me. It just  
25 doesn't make sense or even pass my giggle

1 test, Your Honor.

2 But beyond that common sense approach  
3 and all of the rights that are vested in  
4 your riparian rights as an adjoining  
5 landowner, I would like to walk the Court  
6 through where we have pled specific injury.  
7 And then I want to finish by pointing to  
8 Federal case law that provide, I guess, the  
9 meat on the bones of what's in this  
10 particular statute. And I don't think that  
11 the State Water Control Board would disagree  
12 that that's where we're going to look for  
13 guidance on an Article III constitutional  
14 standing issue, particularly in light of  
15 very little, if any, Virginia case law.  
16 Because this statute took effect only  
17 recently.

18 And I point out it's a statute that  
19 lightened the standing requirement.  
20 Previously, you had to meet the elements of  
21 Virginia's standing, which are quite  
22 onerous. The Commonwealth fought very hard  
23 not to have Article III standing  
24 incorporated into this statute because they  
25 didn't want people coming to court to review

1 the decisions of administrative agencies,  
2 and in this case, the State Water Control  
3 Board. So the standard is much lower to  
4 achieve standing under Article III and the  
5 Federal interpretation than it was under the  
6 prior applicable Virginia interpretation.

7 But, first, Your Honor, and I'm going  
8 to walk you through several things. And I'd  
9 appreciate it, if you want to walk through  
10 with it, that you can.

11 THE COURT: Yes, I will. .

12 MR. MARSHALL: I point out again, Your  
13 Honor, we filed a petition. Attached to  
14 that petition we also filed a twelve-page  
15 letter. Those were the written comments  
16 that we submitted to the State Water Control  
17 Board as they were deliberating whether or  
18 not to issue this permit. That letter can  
19 be reviewed by the Court. And we've cited  
20 the cases in the footnote in our opening  
21 brief that makes clear the Court may look at  
22 not only the pleadings, but any exhibits  
23 attached to that pleading are referred to in  
24 that pleading. And we have attached that.  
25 So I'm going to go back and forth between

1 the two documents.

2 Under the petition for appeal, Your  
3 Honor, first we have alleged that we're  
4 owners of this property at Newcastle Farm,  
5 the site of the proposed outfall and  
6 discharge to the Pamunkey River. And that  
7 incorporates all of the riparian issues that  
8 I've talked about earlier.

9 If you go to paragraph 2 prior to that,  
10 Your Honor, we walk through in some detail  
11 exactly what damage is going to occur as a  
12 result of the issuance of this permit.  
13 Among those are the aggravation of existing  
14 violations of water quality standards in the  
15 river adjacent to their property.

16 And, Your Honor, again, for purposes of  
17 this demurrer, everything that we have pled  
18 has to be assumed as true. And so it's not  
19 a question of is there or is there not  
20 damage or what's the extent of that damage.  
21 There's damage. And that's how we've got to  
22 read this.

23 Second, we talked about adverse  
24 effects -- and this is in the fish, mussels  
25 and wildlife, in the face of alternatives

1 that would have been less injurious to fish,  
2 mussels and other wildlife on the Pamunkey  
3 River.

4 Third, we talk about the adverse effect  
5 on recreational uses at the Pamunkey River.  
6 And I take some issue with the parsing of  
7 our petition by the Commonwealth and how  
8 they chose to characterize what we've pled.  
9 You have to look at the pleading as a whole.  
10 You can't just take one sentence and go,  
11 well, that didn't have the magic words, I,  
12 Frances Crutchfield, have been directly  
13 injured and say that's not sufficient.

14 Beginning in paragraph 70 -- or 68,  
15 actually, Your Honor, which is on Page 14 of  
16 our petition for appeal, we outline the fact  
17 that speakers, including Mr. Broaddus and  
18 Mrs. Crutchfield, informed the DEQ of the  
19 uses of that area at and immediately  
20 downstream of the discharge. Remember our  
21 folks were at this public hearing. They  
22 spoke and made all of these points.

23 In addition to the use of this area by  
24 Broaddus and Crutchfield, there was also  
25 testimony and we've also referenced the

1 facts that Boy Scouts used this area for  
2 fishing, for camping and for other things.  
3 Now, yes, that's somebody else. That's not  
4 Crutchfield and that's not Broaddus. But  
5 those Boy Scouts used that property because  
6 Crutchfield and Broaddus allowed them to do  
7 so. They can no longer do that in good  
8 faith with sewage shooting out of that  
9 discharge pipe while they're there canoeing  
10 and fishing and swimming in the river.

11 So it's not just, well, it's somebody  
12 else. The owners of this property are  
13 involved in that activity indirectly. But,  
14 again, directly we have pled that we won't  
15 use the river for swimming or recreational  
16 purposes. We've witnessed it and we've done  
17 it.

18 I'd like to take the Court to the  
19 comments that were attached to the petition,  
20 if you wouldn't mind, at Page 9 of those  
21 comments, Your Honor.

22 THE COURT: At Page 9 of what?

23 MR. MARSHALL: Page 9 of Exhibit A,  
24 which were the comments that were submitted  
25 to the Department of Environmental Quality.

1 THE COURT: Okay.

2 MR. MARSHALL: If you'll note 3(a),  
3 recreation -- and I'll just read to you the  
4 first sentence there: During the public  
5 hearing on the proposed discharge on January  
6 19th, '99, several speakers mentioned that  
7 they have used the area immediately  
8 downstream from the proposed discharge for  
9 swimming for many years. Those using this  
10 area are not limited to the property owners.

11 Not limited to Crutchfield and  
12 Broaddus. That brings back in the Boy  
13 Scouts and the other folks that have used  
14 that property, but clearly includes use by  
15 Crutchfield and Broaddus. It's their  
16 property. It has been in their family for  
17 generations. They have farmed this property  
18 and used the water from the river for  
19 irrigation. They have swam in the water.  
20 They've enjoyed watching the wildlife, fish  
21 and --

22 THE COURT: Have you said those things,  
23 that they farm in it, that they swim in it?

24 MR. MARSHALL: We mentioned, again, in  
25 the letter, Your Honor, that was attached,

1 if you would look at Page 1 -- let's see.  
2 Yes, the second paragraph, Your Honor. It  
3 says: Newcastle Farm has been in my  
4 client's family for six generations. It is  
5 historic property which each generation has  
6 faithfully preserved, husbanded and  
7 conserved.

8 "Husbanded" is there. The definition  
9 of "husbanded" is to farm. We didn't say  
10 "farm." We said "husbanded." I guess we're  
11 lawyers, and that's what we do.

12 But, yes, all of those things have been  
13 alleged. And we have specifically alleged,  
14 if you read paragraphs 68 through 74 of our  
15 petition in context, Your Honor -- and let  
16 me just walk you through some of the  
17 language. We talk about the fact that the  
18 river has been used for all types of primary  
19 contact water-based recreation. We allege  
20 that the Virginia Department of Health  
21 advised members of the public you don't want  
22 to swim down the stream of these discharges.

23 We then allege water is not swimmable  
24 if the health department recommends that the  
25 public not swim there, nor can water be



1 considered swimmable if no reasonable person  
2 in fact would ever swim in it.

3 And then we allege that the State Water  
4 Control Board violated its own implementing  
5 regulations by issuing the permit  
6 notwithstanding its effective termination of  
7 the existing beneficial uses of the Pamunkey  
8 River for recreation. That includes  
9 Crutchfield and Broaddus, the riparian  
10 owners of this property.

11 We have alleged that directly, I think,  
12 on the petition's face in these paragraphs.  
13 And if there was any doubt, certainly in the  
14 exhibit, which is properly before this court  
15 for consideration, in paragraph 3(a) where  
16 we say it's basically the owners plus at  
17 Page 9, which I pointed the Court to  
18 earlier.

19 That in and of itself, Your Honor, when  
20 I get to the Federal case law that discusses  
21 what's necessary to establish standing, that  
22 in and of itself is enough to establish  
23 standing. You wouldn't have to plead  
24 anything else. Nothing else. But we have  
25 pled much else, including, as I had pointed

1 out, the aggravation of existing violations  
2 of water quality standards adjacent to our  
3 property. That's standing alone, no pun  
4 intended, is enough to establish standing.

5 We've also pled the adverse effects  
6 from the fish, mussels and wildlife. That  
7 alone is enough to establish standing.

8 We've pled basically a cessation of  
9 recreational use by Crutchfield and  
10 Broadbus. That alone is enough.

11 In addition to that, Your Honor, we  
12 discuss the adverse affects of water quality  
13 and the historic resources at the property  
14 as a result of the issuance of this permit.  
15 The Town of Newcastle, part of which is  
16 contained within Newcastle Farm, my client's  
17 property, is listed on the Virginia Historic  
18 Landmark and is eligible for listing on the  
19 National Register of Historic Places. And  
20 the Town of Marlbourne, a portion of which  
21 is on Newcastle Farm, already listed on the  
22 National Register. Now, that damage has to  
23 be unique to Crutchfield and Broadbus  
24 because it's on their property. It can't be  
25 anything else. It has to be unique to them.

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1           The damage as I've just described, Your  
2           Honor, are all unique to Crutchfield and  
3           Broaddus, and it's been pled as so. Do we  
4           say in one very simple sentence we've been  
5           damaged pursuant to Article III standing  
6           requirements? No. But if you look at our  
7           pleading and you take it as a whole,  
8           particularly given the legal standard by  
9           which this demurrer is reviewed, looking at  
10          all the facts and all the reasonable  
11          inferences, and when you look at Federal  
12          law -- and we've cited it in our memorandum,  
13          Your Honor. The standard -- the demurrer,  
14          every possible doubt, every way you look at  
15          this has to be in the favor of the  
16          petitioner here.

17                 And we're not asking you to stretch at  
18                 all. Because I believe that it's right  
19                 here. But I think that when the  
20                 Commonwealth stands up and says they're  
21                 asking you to liberally construe the  
22                 pleading, well, we are. Because that's the  
23                 legal burden on this court. That's what the  
24                 rules say. That's what you're supposed to  
25                 do.

1           And I would like to go back and just  
2 touch on a couple of the Federal cases, Your  
3 Honor, that I alluded to earlier. And one  
4 of the biggest, Your Honor, is a case that  
5 we submitted after our brief was filed. It  
6 was addressed by the Commonwealth in their  
7 reply. It was published after the briefing  
8 schedule, or our briefing period had run,  
9 Your Honor. But I think that it's hardly  
10 instructive.

11           It was decided on February 23rd of  
12 2000. It's Friends of the Earth vs. Gaston  
13 Copper Recycling Corporation. And it's  
14 found at 204 Fed. 3d 149. And we did submit  
15 that to the Court. So that should be in  
16 your file.

17           THE COURT: What's the cite on that  
18 again?

19           MR. MARSHALL: 204 Fed. 3d 149.

20           THE COURT: All right.

21           MR. MARSHALL: And we sent along the  
22 Westlaw case. At that point it had not been  
23 given a Federal Reporter cite.

24           And I want to walk you through some of  
25 the language in that case that will give, I

1 think, some context to you as you look at  
2 this Article III question. And, again, I  
3 just I don't see how it cannot be here based  
4 on the language that you're going to hear.

5 They point out that the standing  
6 inquiry in an environmental case must  
7 reflect the context in which the suit is  
8 brought. And they say: In some instances  
9 environmental injury can be demarcated as a  
10 traditional trespass on property or tortious  
11 injury to a person.

12 Well, there's a trespass here.

13 But it goes on to say: In other cases,  
14 however, the damages to an individual's  
15 aesthetic or recreational interest, that's  
16 enough to confer standing. Supreme Court  
17 has made clear that such interest may be  
18 vindicated in Federal Courts.

19 It cites the Friends of the Earth vs.  
20 Laidlaw case. It was a recent decision by  
21 the United States Supreme Court, found at  
22 120 Supreme Court 2d 693, where it said:  
23 The effect on recreational, aesthetic and  
24 economic interest is injury for purposes of  
25 standing.

1           They cite the Lujan vs. The Defenders  
2 of Wildlife case, which is at 504 U.S. --  
3 the jump cite here is 562 and 63.

4           Purely aesthetic interest is cognizable  
5 for purposes of standing.

6           They cite the Sierra Club v. Morton  
7 case.

8           And all of these were the cases that we  
9 had previously noted in our opposition memo  
10 before this case was handed down.

11           In the Morton case: Aesthetic and  
12 environmental well-being, like economical  
13 well-being, are important ingredients of the  
14 quality of life in our society deserving of  
15 legal protection through the judicial  
16 process.

17           And then they cite another Supreme  
18 Court case. Association of Data Processing  
19 Servicing Organization vs. Camp. At 397  
20 U.S. 150.

21           Where interest supporting standing may  
22 reflect aesthetic, conservational and  
23 recreational as well as economic values.

24           Now, someone in California can't raise  
25 those issues for Crutchfield and Broadus.

1 I'm not arguing that. Standing has to mean  
2 something. There has to be some impact on  
3 the person coming before the Court. But  
4 clearly we have that here, where you have  
5 the riparian owners of the property where  
6 this is going to take place. And I describe  
7 to you how they're going to be impacted.

8 Some other language in that case is, I  
9 think, even more instructive, Your Honor.  
10 That case involved a permit under the Clean  
11 Water Act in a citizen suit challenging some  
12 discharges from this company that was  
13 upstream. What the court pointed out that  
14 Congress proclaimed as part of the goals for  
15 the Clean Water Act was to provide for the  
16 protection and propagation of fish,  
17 shellfish and wildlife and to provide for  
18 recreation in and on the water.

19 Now, they point out it is well  
20 established that the injury required by  
21 Article III may exist solely by virtue of  
22 statutes creating legal rights, the invasion  
23 of which creates standing.

24 If there's something that says this is  
25 what the EPA or the Commonwealth is supposed

1 to be doing and they don't, if there's a  
2 violation of that that's pled, that's enough  
3 to confer standing.

4 Now, if you go back to our petition  
5 again, Your Honor, at paragraph 28, under  
6 when we're discussing existing water quality  
7 violations, we point out that like all  
8 Virginia waters, the Pamunkey River at the  
9 site of the proposed discharge is designated  
10 for uses including swimming and the  
11 propagation and growth of a balanced and  
12 indigenous population of aquatic life which  
13 might reasonably be expected to inhabit  
14 them.

15 The analogy could not be more clear.  
16 Here we have a legal obligation via the  
17 State Water Control Board and what they are  
18 charged with doing. And I think if you look  
19 in that section of the statute, 62.1, and it  
20 begins -- I'll find the exact cite. I think  
21 it's dash 44.1. It lists the things the  
22 State Water Control Board is charged with  
23 doing, protecting the water, doing these  
24 things. And then the regulations they  
25 implement specifically provide for this.



1 Now, we have alleged that they're violating  
2 that with the issuance of this permit for  
3 all of the reasons that I have previously  
4 discussed. So for that reason, again,  
5 alone, we have established standing.

6 The bar has been raised by the  
7 Commonwealth to a level that is not  
8 recognized in court, I don't think, Your  
9 Honor, in the case law. Any of the issues  
10 that I have pointed to, in and of themselves  
11 alone are enough to establish standing.  
12 When you look at all of them together, there  
13 cannot be any doubt that the riparian owners  
14 of the piece of property where the discharge  
15 is going to take place have standing here.

16 And, again, Your Honor, if you look at  
17 that and for some reason decide, no, I don't  
18 think it's pled, it's not a jurisdictional  
19 issue. It is not part of part 2A of the  
20 rules. We have met the letter of the law  
21 pursuant to part 2A. We got our notice of  
22 appeal filed, the petition for appeal, and  
23 we named the proper party.

24 This is not a jurisdictional question.  
25 And the Commonwealth pointed out that Rule

1       2A:5 provides basically that when it's not  
2       in conflict with the other rules of the APA  
3       or part 2A, the typical rules of equity  
4       apply, meaning that allowing leave to amend,  
5       if that's what you decide is required --  
6       and, again, I don't think that it's  
7       necessary -- is totally within your  
8       prerogative and your discretion to do.

9               And in this case when what the defenses  
10       are is an attempt to evade judicial review,  
11       Your Honor, I think that the equity demands  
12       that if you decide that it hasn't been pled  
13       that we be allowed to amend.

14              But I just don't think that we even  
15       need to get that far. Because I think if  
16       you look at the pleading as a whole and the  
17       attachments, that we have clearly pled facts  
18       sufficient to confer standing.. And you have  
19       to ask yourself the question, if not us,  
20       then who?

21              Your Honor, I would just alert the  
22       Court to a case, which is at 30 Va. App.  
23       133. And that case involved the failure of  
24       a writ tax to be paid. A petition was filed  
25       appealing an agency decision. The

1 Commonwealth tried to get the case dismissed  
2 because a writ tax wasn't paid.

3 And the court distinguished between  
4 what is required by the rules, which are the  
5 things that we have done and I have  
6 described to you, and the other things that  
7 don't make it a jurisdictional issue, like a  
8 failure to pay a writ tax. They said that's  
9 different, and we're going to invoke the  
10 power that we have as an equitable tribunal  
11 to allow them to pay the writ tax.

12 And that's an analogy that I think is  
13 helpful here to the extent that you feel  
14 that you need to take any action to have us  
15 re-plead.

16 And I will just close with I just want  
17 to touch again, Your Honor, on the necessary  
18 party point. I don't want the BFI case, the  
19 ruling by the Supreme Court to be overlooked  
20 or abused. It's not a jurisdictional  
21 question. Were it, the Supreme Court would  
22 not have ruled on the merits. As you know,  
23 if you don't have jurisdiction, you're not  
24 going to issue a ruling on the merits in any  
25 case. If you proceed to rule on the merits,

1 inherent in that decision is an  
2 acknowledgement that you do have  
3 jurisdiction.

4 BFI joined that case outside of that  
5 statutory period or the period provided in  
6 the rules. And so there can be no argument  
7 that it's a fatal jurisdictional defect not  
8 to have Hanover County added. And if they'd  
9 like to intervene, I will yield the floor to  
10 them and they can stand up and ask you to do  
11 so, and we'll get an amended pleading to  
12 them today if that's what they want to do.  
13 But it is not jurisdictional, Your Honor.

14 And if you don't have any questions,  
15 that will conclude my presentation.

16 THE COURT: Thank you, sir.

17 MS. FEILD: May I briefly address the  
18 Court, Your Honor?

19 THE COURT: Yes, ma'am.

20 MS. FEILD: Your Honor, there's  
21 apparently historic structures on this  
22 property. Now, what is the connection  
23 between the permit and damage to those  
24 historic structures? Your Honor, that's  
25 exactly the kind of gap we're talking about

1 in this pleading.

2 You know, I've sat in this court and  
3 listened to the walk-through through this  
4 petition for appeal, and I'm no more  
5 enlightened now than I was this morning.  
6 There's a disconnect here that we're not  
7 leaping over.

8 The Commonwealth is not suggesting that  
9 recreational or aesthetic uses or those  
10 kinds of things are not the kind of things  
11 that can confer standing. We are not  
12 suggesting that. We have read the Federal  
13 case law as well. What we are suggesting is  
14 that you've got to meet the requirements of  
15 the statute, and you have to allege an  
16 injury that is personal.

17 As I've said before -- and, you know,  
18 we've all talked about this Friends of the  
19 Earth vs. Laidlaw case. The relevant  
20 showing is not injury to the environment,  
21 but injury to the plaintiff.

22 Your Honor, what we have here are  
23 inferences and gaps in the pleadings that  
24 the plaintiffs are asking this court to fill  
25 in. And, Your Honor, I'm not sure what the

1           problem is with a simple declarative  
2           sentence that says I am injured in this way  
3           by this thing. They have not said that.  
4           They have not alleged that. They have  
5           alleged that other people's activities may  
6           be impacted in some way. But they have not  
7           said I swim in the river and I will not now.

8           One of the things that counsel  
9           mentioned was that we were talking simply  
10          about the --

11          THE COURT: Well, they said they  
12          wouldn't use the river.

13          MS. FEILD: Where, Your Honor? Where  
14          does it say that?

15          THE COURT: Well, he said they said  
16          that.

17          MS. FEILD: Well, it doesn't say that,  
18          Your Honor. That's my point.

19          THE COURT: He said it was implicit  
20          really it the letter.

21          MS. FEILD: Well, Your Honor, the most  
22          we get out of this is that they own  
23          property, they watch other people use the  
24          river, and several speakers who are not  
25          limited to the property owners, I guess,

1 have used the area for swimming for many  
2 years. They haven't even taken the final  
3 step and said and they're got going to  
4 anymore.

5 You know, how much filling of the gap  
6 do you have to do, Your Honor? I think we  
7 need to hold plaintiffs to their pleadings  
8 and not create for them connections that  
9 they assume are obvious to everyone. But  
10 for the life of me, I have no idea how this  
11 permit issued by the State Water Control  
12 Board in any way injures any historic  
13 structures on their property. There is no  
14 way for me to do anything but guess at that,  
15 Your Honor. And that is not even noticed  
16 pleading.

17 You know, the suggestion was made that  
18 we're only talking about the first of the  
19 three elements there, those three prongs for  
20 Article III standing. And, Your Honor, I'd  
21 suggest that in the absence of any  
22 meaningful allegation of injury here, we  
23 can't even measure how the injury stacks up  
24 against the second or third elements.

25 We're at fundamentals, Your Honor. I

1 will not dispute, because they've alleged  
2 this, that they commented on this permit.  
3 But they still have to have an injury that  
4 is immediate, that is actual and eminent,  
5 that's an invasion of their legally  
6 protected interest and that's concrete and  
7 particularized. And we do not have that.

8 We have general allegations that other  
9 people's actions may be affected, other  
10 people's uses of the river may be affected,  
11 certain species may be impacted. And we're  
12 going to deny that all that is true. But  
13 not the plaintiffs. They have not made a  
14 simple, straightforward case that they have  
15 been injured.

16 THE COURT: So it's not enough that  
17 they say that they're owners of the property  
18 where this --

19 MS. FEILD: No, Your Honor. I have not  
20 found a single Federal case that would  
21 suggest that because you own property along  
22 a river where a discharge will flow, that  
23 that is sufficient to confer standing.  
24 You've got to be damaged you've got to  
25 allege some kind of an injury there.



1           There's really no difference between a  
2           landowner whose right next to the river and  
3           someone in California -- if you don't have  
4           to allege any impact of what's going on in  
5           that river to you personally, you might as  
6           well live in California. It doesn't make a  
7           bit of difference.

8           And, Your Honor, what we're suggesting  
9           here, what's plainly required here, is that  
10          plaintiffs have to allege an injury from  
11          this action of State Water Control Board to  
12          themselves, and they have not.

13          Now, the necessary party issues, Your  
14          Honor, I strongly disagree with counsel's  
15          suggestion that this case can go forward  
16          without Hanover County. It cannot. The  
17          relief that has been requested here is that  
18          the Court declare that the county's permit  
19          is invalid, void and of no effect.

20          Now, my constitution has due process in  
21          it. And Hanover County is entitled to  
22          notice and an opportunity to be heard on  
23          that. This court cannot proceed. The BFI  
24          case says that. It says that BFI -- the  
25          Supreme Court case said BFI was a necessary

1 party. And a necessary party is one without  
2 whom the Court cannot proceed and relief  
3 cannot be granted, and the relief granted by  
4 the Court is not binding on anybody who  
5 wasn't before the Court.

6 So, Your Honor, I strongly disagree  
7 that this court can go forward.

8 You know, there's some sort of a  
9 suggestion that there's some underhandedness  
10 here in Hanover County's not having thrown  
11 itself before this court. Your Honor, we  
12 can speculation on the County's motives just  
13 as long as we could speculate on the  
14 plaintiffs motives in leaving them out.  
15 It's their permit. Why shouldn't they have  
16 been brought before this court? The BFI  
17 case is very clear. They need to be before  
18 this court.

19 And as to whether or not this is  
20 jurisdictional, I've got to say that portion  
21 of part 2A of the rules, Rule 2A:5, it says  
22 that the Court, once an appeal has been  
23 perfected, and we suggest that it's not --  
24 once it's been perfected, that you go on as  
25 in equity. And, apparently, that's supposed

1 to get you to whatever you want.

2 Your Honor, that issue was not raised  
3 in the BFI case, whether or not the Court  
4 had authority to entertain this after the  
5 fact. What we said was that they were  
6 not -- when we were here arguing before Your  
7 Honor, we said that the problem was that BFI  
8 had not been made a party the first instance  
9 and that they failed to comply with the  
10 rules.

11 So the Rule 2A:5 argument was not one  
12 that was before the Supreme Court.

13 And I would suggest that while there  
14 are certainly strong similarities between  
15 this case and the BFI case, that this  
16 actually stands slightly outside of the  
17 ruling of the BFI case for that reason.  
18 There were issues there having to do with  
19 time limits and the deadlines that were not  
20 raised to the Virginia Supreme Court. And,  
21 therefore, we can only speculate what that  
22 court might say.

23 So we'd ask that this case be  
24 dismissed, Your Honor.

25 THE COURT: All right.

1 MS. FEILD: Thank you.

2 THE COURT: Thank you.

3 Counsel, I will continue to review what  
4 you've provided in light of your arguments,  
5 and I'll write you and let you know about  
6 the outcome of the demurrer.

7 I do have some concerns I'll say,  
8 though, about Hanover. I worry that if this  
9 case is to proceed and if, assuming the  
10 outcome is favorable for the plaintiffs,  
11 it's hard for me to think now how a relief  
12 can be afforded without the permittee being  
13 involved in the proceeding.

14 I say that sort of thinking out loud  
15 without deciding anything. And I understand  
16 Ms. Love Feild's comments about that too,  
17 but you say that's not jurisdictional.

18 MR. MARSHALL: Well, if that's the  
19 case, Your Honor, then, again, I said it's  
20 not a jurisdictional issue. The matter was  
21 raised before the Supreme Court. I point to  
22 you in the BFI case at Page 282 where the  
23 court points out that the department first  
24 argued that a party who challenges the  
25 issuance of a permit is required to join the

1 permit holder as a party to the appeal.  
2 Thus, the department contends that the  
3 resident's appeal to the Circuit Court  
4 should have been dismissed because they  
5 filed the name BFI as a party to the appeal.

6 It was clearly before the Supreme  
7 Court. The Supreme Court decided it's not  
8 jurisdictional, we're going to the merits.

9 THE COURT: They didn't say that, but  
10 that's --

11 MR. MARSHALL: It's implicit there. It  
12 has to be. And, secondly, Your Honor, as to  
13 Hanover County, as to that point, if they  
14 would like to intervene today, they can do  
15 so, or we will amend and add them, get the  
16 petition to them. They're fully aware of  
17 all the issues. No one is prejudiced in any  
18 way by this. And we can move ahead from  
19 there, which I think is completely  
20 appropriate.

21 But, again, it's not a jurisdictional  
22 issue. And once we get beyond that point,  
23 your power as sitting in the court of equity  
24 come into effect, and you can allow us to  
25 amend if that's what you decide we need to

1 do. And we have no objection to Hanover  
2 County becoming involved in this.

3 THE COURT: Okay. The BFI case was to  
4 me an interesting case, I should say. As I  
5 recall, the case went to first the Court of  
6 Appeals and then to the Supreme Court. And  
7 the issue that the case turned on, as I  
8 recall, was having to do with whether or not  
9 there was a specific finding made by the  
10 agency with respect to -- I forget the  
11 boilerplate of statutory language involved.

12 Didn't the court require and reverse  
13 because there was no finding by the agency  
14 of something?

15 MS. FEILD: That's correct, Your Honor.  
16 The statute required that the -- directed to  
17 make a finding that there was no substantial  
18 present or potential threat to human health  
19 and the environment.

20 THE COURT: You know what I'm alluding  
21 to, don't you?

22 MS. FEILD: Yes, I do, Your Honor.  
23 Your Honor, that issue was never before this  
24 court.

25 THE COURT: That's what I recall.

1 MS. FEILD: That was my recollection,  
2 too. And that was one of the objections  
3 that was cited on appeal, that this was a  
4 new argument. We lost on that.

5 But, Your Honor, this case differs from  
6 that in a couple of fundamental respects.  
7 And one is, in that case BFI submitted  
8 itself to the jurisdiction of the court.  
9 Hanover County has not done that.

10 And in the second case, you know, we  
11 didn't have in the BFI case an amended  
12 petition to bring them in as a party. So  
13 the issue of whether or not you can do that  
14 more than 30 days after filing your notice  
15 of appeal was not before the Virginia  
16 Supreme Court. So I suggest that there are  
17 a couple of fundamental differences here.

18 THE COURT: All right. Thank you.

19  
20 (Ending at 3:10 p.m.)  
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25

## CERTIFICATE OF COURT REPORTER

I, Shloma J. Pierce, hereby certify that I was the court reporter in the Circuit Court of the City of Richmond, Virginia, on April 26, 2000, at the time of the hearing herein; further, that the foregoing is a true and accurate record of the hearing herein, to the best of my ability.

Given under my hand this 12th day of April, 2001.

  
Shloma J. Pierce



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**Circuit Court**  
OF THE  
**City of Richmond**

MELVIN R. HUGHES, JR.  
JUDGE

May 24, 2000

JOHN MARSHALL COURTS BUILDING  
400 NORTH 9TH STREET  
RICHMOND, VIRGINIA 23219

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Deborah Love Feild, Esq.  
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Richmond, VA 23219

Re: Case No. HK-1193-1  
Frances Broaddus Crutchfield & Henry Ruffin Broaddus  
v.  
State Water Control Board & Dept. Of Environmental Quality

Dear Counsel:

In this case petitioners, in a Petition for Appeal, challenge a decision by the State Water Control Board (the Board) to issue a Virginia Pollutant Discharge Elimination System Permit to Hanover County to discharge pollutants into the Pamunkey River at a site near their property. Respondents, the Board and the Department of Environmental Quality demur to the Petition. After hearing argument from the parties, the court took the matter under advisement.

Respondents contend the petitioners (1) do not have standing and (2) have failed to perfect the appeal by joining a necessary party, the permittee, Hanover County. More specifically, they argue petitioners have not alleged an injury to themselves and thus lack standing to pursue this appeal. Respondents contend that all petitioners have alleged is injury to others or the environment. Thus, under standards applicable to standing in administrative appeals the petition is not maintainable. Secondly, respondents assert that this appeal is not perfected as Hanover County was not joined and made a party in the Petition For Appeal. Such failure cannot be cured by amendment because this would effectively extend the time for perfecting the appeal. Therefore, on this basis as well the petition must be dismissed. The court rejects respondents' position regarding Hanover County. The court will allow Hanover County to be included by amendment. The court also rejects respondents' position on standing.

William B. Ellis, Esq.  
Deborah Love Feild, Esq.  
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As noted, the Board has allowed Hanover County a permit to discharge pollutants into the Pamunkey River. Petitioners' property, called Newcastle Farm is located near the intended discharge site. As the Supreme Court of Virginia allowed the late intervention of a necessary party in *Browning-Ferris Industries of S. Atlantic, Inc. v. Residents Involved in Saving the Environment, Inc, et al.*, there is no apparent reason why joinder should not also be allowed in such an appeal. See 254 Va. 278 (1997). Petitioners' request for leave to amend their petition by joining Hanover County as a party is granted.

The next issue involves the petitioners standing. They detail in their Petition three categories of injury: injury to planet and animal life, injury to the public's recreational use of their property which borders the river, and injury to certain historic attributes of Newcastle Farm. Standing, for the purposes of this case, is described in Code § 62.1-44.29. That section states:

Judicial review. -- Any owner aggrieved by, or any person who has participated, in person or by submittal of written comments, in the public comment process related to, a final decision of the Board . . . is entitled to judicial review thereof . . . if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution.

Relevant to the instant inquiry, Code § 62.1-44.29 continues:

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.

Clearly, the injuries which petitioners allege are traceable to the Board's action granting the permit to discharge. Just as evident is that the injury is redressable by an order of the court vacating the Board's decision and enjoining the discharge. The only inquiry, therefore, is whether petitioners have "suffered an actual or imminent an injury which is an invasion of a legally protected interest and which is concrete and particularized." As the General Assembly explicitly referred to Article III of the U.S.



William B. Ellis, Esq.  
Deborah Love Feild, Esq.  
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Constitution, an inquiry into standing must include a review of federal opinions on the topic.

Notably, the United States Court of Appeals for the Fourth Circuit in *Friends of the Earth v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000) has said:

Article III of the Constitution restricts the federal courts to the adjudication of "cases" and "controversies." The threshold requirement of standing is "perhaps the most important" condition of justiciability. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate. See *id.* at 750-51. The standing requirement also "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

*Id.* at 153-54. Where injury caused by pollution is alleged, "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff." *Id.* at 160-61.

The Fourth Circuit clearly articulated the standard relevant to this court's current inquiry.

In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 705 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. [555,] 562-63 [(1992)] (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. [727,] 734 [(1972)] ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the

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Deborah Love Feild, Esq.  
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quality of life in our society . . . deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (interest supporting standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)).

*Id.* at 154. In light of the above description, the Court of Appeals added a proviso.

But because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.

*Id.* Hence, in order to allege injury sufficient for Article III purposes as identified by the Code of Virginia, petitioners must allege injury to themselves, not merely injury to others or to the environment.

In their pleading, petitioners allege serious effects to various wildlife including rare and endangered species of mussels in the Pamunkey River, which will be caused by the challenged discharge. Clearly, however, such allegations are not sufficient to confer standing upon the petitioners without some nexus between the agency's action and an injury to the petitioners. Petitioners make no allegations that they personally will find the river aesthetically less pleasing, nor do they allege that their normal recreational use of the property adjoining the river will be hampered or changed in some way. Thus, to the extent petitioners seek to vindicate the rights of other persons and the ecosystem, they have not alleged any injury which would confer upon them legal standing. Such concerns are addressed by the political branches of government and are not within the court's jurisdiction.

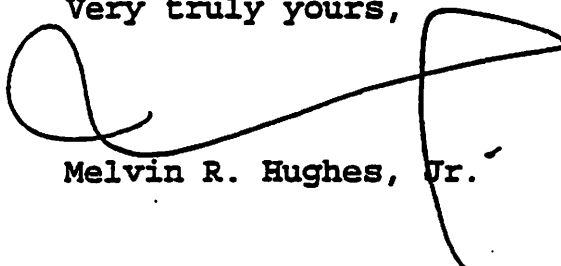
However, attached to petitioners' pleading as Exhibit A is a letter sent by counsel for the petitioners to the Department of Environmental Quality, dated February 4, 1999. As an exhibit attached to the pleading, the letter is read together with the allegations in the petition. Although the letter details petitioners' basis for challenging the wisdom of the Board's decision, allegations of injury to petitioners' aesthetic or recreational interests are absent from the text.

William B. Ellis, Esq.  
Deborah Love Feild, Esq.  
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May 24, 2000

Petitioners, however, do seem to allege an injury to historic places which are found on petitioners' property. At pages 11 and 12 of the letter, petitioners assert that the outfall location will damage historic places on their land, Newcastle Farm. Notwithstanding the lack of any mention of such injury to historic places in the petition, the court accepts the allegations in petitioner's exhibit as part of the initial pleading in this appeal. The court can consider facts amplified by a writing added to the pleading. See *Ward's Equipment, Inc. v. New Holland America*, 254 Va. 379, 380 (1997). Such allegations state a clear injury to property interests sufficient to confer standing upon petitioners under the Article III standard. Therefore, the demurrer is overruled.

Mr. Ellis is directed to provide an order implementing this ruling with exceptions noted and to submit it for entry.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a long horizontal stroke and a vertical line ending in a small hook.

Melvin R. Hughes, Jr.

jsn

ANTHONY H. MASONBERRY  
JACOB W. BURTON, JR.  
BRODERICK L. CRUMP  
WILLIAM B. ELLIS  
ROBERTO R. MONTFORT  
M. BRUCE STODOL  
DAVID S. BURY  
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DAVID S. BURY  
WILLIAM B. ELLIS, JR.

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June 12, 2000

RECEIVED 8-31-20  
CIRCUIT COURT  
JUN 12 2000

BEVILL, JR. PRESBYTERIAN CHURCH  
BY: 6/8 11.15 DC

## BY HAND DELIVERY

The Honorable Melvin R. Hughes, Jr.  
Richmond Circuit Court  
John Marshall Courts Building  
400 North Ninth Street  
Richmond, Virginia 23219

Re: *Frances Broddus Crutchfield and Henry Ruffin Broddus v.  
State Water Control Board and Department of Environment Quality*  
Caseary No.: 760CH99K01193-00

Dear Judge Hughes:

I have filed for entry the enclosed Order which implements the Court's ruling in its letter opinion dated May 24, 2000, overruling the Respondents' demurrer.

Counsel for the Respondents will not endorse this Order without additional language specifying certain objections. (The parties have agreed on all other language in the Order.) The Respondents are, of course, entitled to note properly preserved objections. However, the additional language demanded by the Respondents should not be included in the Order because the particular objections now being noted by the Respondents were not raised before the Court.

Specifically, the Respondents never objected to Attachment A to the Petition for Appeal being considered by the Court on demurrer. In their brief in opposition to the demurrer and during oral argument, the Petitioners made clear, based on case law and the Rules of Court, that this Court should examine both the substantive allegations of the pleading and the exhibit attached thereto. See, e.g., Petitioners' Opposition at 4 n.2. The Respondents did not object in either their reply memorandum or during oral argument on April 26, 2000. Therefore, such objections have been waived and cannot be revived now by including them in the Court's Order.

The Honorable Melvin R. Hughes, Jr.  
June 12, 2000  
Page 2

The Petitioners respectfully request that you enter the enclosed Order and not the alternative order submitted by the Respondents.

Sincerely,



John L. Marshall, Jr.

Enclosure

cc: Deborah Love Feild, Esquire (by hand)  
Ms. Frances B. Crutchfield  
Mr. Henry Broadbush

**VIRGINIA:**

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

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS**

**Petitioners,**

**v.**

**STATE WATER CONTROL BOARD**

**and**

**DEPARTMENT OF ENVIRONMENTAL QUALITY**

**Respondents.**

**Chancery No.:  
760CH99K01193-00**

**ORDER**

On April 26, 2000, the parties, by counsel, argued the Demurrer filed by the Respondents to the Petitioners' Petition for Appeal. Upon consideration of the briefs and oral argument of counsel and considering it just and proper to do so, it is hereby:

**ORDERED** that the Demurrer of the Respondents is overruled; and

**FURTHER ORDERED** that the Petitioners are granted leave to amend their petition and to name Hanover County as a party; and

**FURTHER ORDERED** that endorsement by counsel is waived pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

Let the Court send a copy teste to counsel of record.

Enter: 6 114100



Judge Melvin R. Hughes, Jr.

**SEEN AND AGREED**

William B. Ellis (VSB No. 19753)  
John L. Marshall, Jr. (VSB No. 38474)  
McSweeney, Burtch & Crump, P.C.  
Post Office Box 1463  
11 South Twelfth Street  
Richmond, Virginia 23218-1463  
Telephone: (804) 783-6800  
Telefax: (804) 782-2130

*Counsel for Petitioners*

The State Water Control Board objects to the ruling of the court overruling the demurrer filed in this matter on the grounds previously stated in the Demurrer and memoranda in support thereof, and stated in open court.

Mark L. Earley  
Attorney General of Virginia  
Deborah Love Feild (V.S.B. #25322)  
Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-0098

*Counsel for Respondents*

VIRGINIA:

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

FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS

Petitioners,

v.

STATE WATER CONTROL BOARD

and

DEPARTMENT OF ENVIRONMENTAL QUALITY

and

COUNTY OF HANOVER, VIRGINIA,

Serve: Sterling Rives, Esquire

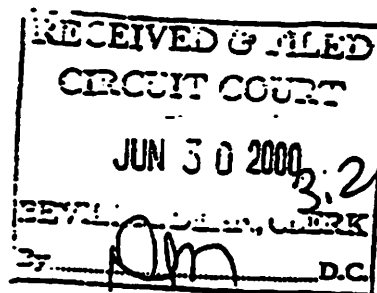
County Attorney

Hanover County

6497 County Complex Road

Hanover, Virginia 23069

Respondents.



Chancery No.:  
760CH99K01193-00

FIRST AMENDED PETITION FOR APPEAL

1. Petitioners, Frances Broaddus Crutchfield and Henry Ruffin Broaddus, by counsel, file this petition for appeal of the issuance on April 28, 1999, by the respondents of VPDES Permit No. VA0089915 to the County of Hanover for the County's Totopotomoy Wastewater Treatment Plant. The permit allows the County to discharge up to ten million gallons a day of treated waste into the Pamunkey River.



2. Petitioners contend that, in issuing this permit, the State Water Control Board ("SWCB") failed to observe the duties imposed on it by the State Water Control Law and the SWCB's own regulations. The discharge at issue will contribute to and aggravate existing violations of water quality standards in the Pamunkey River, contrary to law. These violations of water quality standards are serious and by definition adversely affect aquatic life using the Pamunkey River in the vicinity of the proposed discharge and downstream. Species likely to be affected — but given inadequate consideration by the SWCB — include freshwater mussels and anadromous fish such as American shad, currently the target of an intensive recovery effort to restore decimated populations in the Chesapeake Bay. The proposed discharge will also adversely affect existing recreational uses of the Pamunkey River in violation of law. In addition to violating its duty to refrain from issuing permits for discharges that will contribute to violations of water quality standards, the SWCB failed its duty to adequately address these issues and acted arbitrarily and capriciously by failing to consider the applicant's candid admission that other available discharge locations would have less adverse effects on water quality and other affected resources.

#### **Parties**

3. Frances Broaddus Crutchfield ("Crutchfield") is a citizen of the Commonwealth of Virginia and is a riparian co-owner of property known as Newcastle Farm, the site of the proposed outfall and discharge to the Pamunkey River.

4. Henry Ruffin Broaddus ("Broaddus") is a riparian co-owner of Newcastle Farm.

5. The SWCB is a state agency established under Va. Code § 62.1-44.7 (Repl. Vol. 1998) and has the authority, pursuant to Va. Code § 62.1-44.15(5), to issue certificates for the discharge of sewage, industrial wastes and other wastes into state waters.

6. The Department of Environmental Quality ("DEQ") is an agency of the Commonwealth of Virginia with responsibility for administering environmental regulatory matters within the jurisdiction of the SWCB.

7. The County of Hanover is a political subdivision of the Commonwealth of Virginia and is the holder of VPDES Permit No. VA0089915.

#### **Jurisdiction and Venue**

8. The SWCB issued VPDES Permit No. VA0089915 ("the permit") on April 28, 1999. The petitioners filed a timely notice of appeal on May 27, 1999. Therefore, this Court has jurisdiction over this petition under Va. Code § 62.1-44.29 (Repl. Vol. 1998), Va. Code § 9-6.14:16 (Repl. Vol. 1998) and Part Two A of the Rules of the Supreme Court of Virginia.

9. Venue is proper in this court under Va. Code § 8.01-261(1) (Cum. Supp. 1998).

#### **Errors Assigned**

10. The SWCB violated the State Water Control Law, Va. Code § 62.1-44.2 *et seq.* (Repl. Vol. 1998) ("SWCL"), and the SWCB's own implementing regulations by issuing a permit for a proposed discharge that, in combination with other existing sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

11. The SWCB violated the SWCL and implementing regulations by failing to consider adequately evidence that the proposed discharge, in combination with other sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

12. The SWCB violated the SWCL and implementing regulations by issuing this permit notwithstanding that aquatic life currently using the vicinity of the proposed discharge and downstream areas, including rare, threatened and endangered freshwater mussel species and anadromous fish, will be significantly and adversely affected by the proposed discharge.

13. The SWCB violated the SWCL and implementing regulations by failing to consider adequately the aquatic life currently using the vicinity of the proposed discharge and downstream areas and the adverse effects the proposed discharge will have on the species present, including rare, threatened and endangered freshwater mussels and anadromous fish.

14. The SWCB violated the SWCL and implementing regulations by failing to consider adequately that issuance of the proposed permit will terminate significant, existing recreational uses of the Pamunkey River in the vicinity of the proposed discharge.

15. The SWCB acted arbitrarily and capriciously by issuing a permit for the proposed discharge prior to collecting sufficient information and performing sufficient analyses with respect to the foregoing matters to reach a rational conclusion that existing aquatic resources and beneficial uses of the Pamunkey River will be adequately protected.

16. The SWCB acted arbitrarily and capriciously by failing to consider the applicant's admission that other available discharge locations would have less adverse effects on aquatic resources the SWCB is charged by law to conserve and protect.

#### **The Facts**

17. Newcastle Farm, which has been owned by the Broaddus family for six generations, consists of approximately 900 acres of land located on the Pamunkey River in the County of Hanover. Newcastle Farm is the location of the historic Town of Newcastle, which is listed in the Virginia Landmarks Register.

18. In March of 1997, the County of Hanover agreed to purchase land near the Totopotomoy Creek on which the County proposed to locate a sewage treatment plant.

19. In April of 1997, the County informed Broaddus that Newcastle Farm had been identified by the County as the location for the sewage treatment plant's discharge and outfall pipe to the Pamunkey River.

20. As proposed by the County, the project would 1) include 5,000 linear feet of discharge pipe crossing Newcastle Farm, 2) require an ingress/egress easement road approximately 50 feet in width which would encompass approximately 5.8 acres of land, and 3) require up to an acre of land on Newcastle Farm in order to construct reaeration and discharge structures.

21. Hanover County applied for a VPDES permit to discharge wastewater at a discharge and outfall location on Newcastle Farm on April 4, 1997. The application reflected a discharge location that became known as the "Original Site."

22. During the next several months, the County conducted feasibility studies of other potential discharge locations that might have less adverse impacts on the Pamunkey River, Newcastle Farm, and historic resources.

23. As a result of the feasibility studies, the County decided to move the discharge and outfall pipe from the Original Site to a site downstream that became known as the Downstream II location. The County's own analysis indicated that the Downstream II site was superior based on three criteria including 1) the protection of water quality in the Pamunkey River, 2) minimizing impacts to the Town of Newcastle archaeological site and 3) minimizing impacts to Newcastle Farm.

24. The County maintained that protection of water quality was of the highest importance in selecting a location for the discharge and outfall pipe and on April 20, 1998, the County amended its permit application to select the Downstream II location for the discharge and outfall pipe.

25. On October 8, 1998, the County again amended its permit application to return the proposed discharge to the Original Site, without any new information indicating it was superior from the perspective of water quality.

26. On January 19, 1999, the SWCB conducted a public hearing at the Hanover County Office Complex. Ms. Crutchfield, Mr. Broaddus and their counsel presented information orally at the hearing.

27. On February 4, 1999, counsel, on behalf of Crutchfield and Broaddus, submitted timely written comments to the DEQ regarding the proposed VPDES permit for the County's Wastewater Treatment Plant. See Comments attached hereto as Exhibit A.

28. On March 11, 1999, the SWCB approved the permit. On April 28, 1999, the permit was issued to Hanover County.

#### **Existing Water Quality Violations**

29. Like all Virginia waters, the Pamunkey River at the site of the proposed discharge is designated for uses including swimming and the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them.  
9 VAC 25-260-10.

30. In order to achieve these uses, the SWCB has determined that the daily average concentration of dissolved oxygen in the Pamunkey River cannot be permitted to fall below

5mg/l, and that dissolved oxygen concentrations can never be permitted to fall below 4mg/l.

9 VAC 25-260-50, 25-260-530.

31. Data collected by the DEQ shows that the Pamunkey River already experiences severe and persistent violations of both of these water quality standards for dissolved oxygen at river mile 48.80. River mile 48.80 is approximately 6 miles downstream from Hanover County's proposed discharge of treated sewage at river mile 54.89.

32. In stream conditions such as those in the segment of the Pamunkey River involved here, the effect of a pollutant discharge is generally greatest at a point several miles downstream.

33. During a 5-month period of continuous monitoring in 1995, the daily mean standard for dissolved oxygen was violated 40 times. The first daily mean violation occurred on June 24<sup>th</sup>, and the last occurred on October 8<sup>th</sup>.

34. During that period of 106 days, there were 40 daily mean violations, indicating that dissolved oxygen concentrations were below the standard for 38% of the time. Furthermore, the instantaneous dissolved oxygen standard of 4 mg/l was violated 10 times for up to four hours at a time.

35. The lowest dissolved oxygen level recorded at river mile 48 was found by accident in a monthly grab sample taken on September 11, 1996, when the dissolved oxygen in the Pamunkey was a mere 2.8 mg/l.

36. The DEQ researcher who collected these data recommended further study to check whether dissolved oxygen violations occur prior to June 1 and to confirm dissolved oxygen sag areas. The DEQ elected not to better define or document this problem despite its knowledge at the time that Hanover County would be proposing a significant discharge of treated

sewage upstream. A DEQ memorandum dated June 2, 1997, noted that the assimilative capacity of the Pamunkey with respect to dissolved oxygen is considered to be fully allocated.

37. In the three years since dissolved oxygen problems in the Pamunkey River were discovered, the DEQ has not undertaken any research or analyses sufficient to document the reasons for the dissolved oxygen sag at river mile 48.80. Instead, it has continued to issue permits for substantial discharges of treated sewage — including oxygen consuming pollutants — to upstream waters.

38. Specifically, the SWCB issued a discharge permit for the King William County Sewage Treatment Plant on Moncuin Creek. When operational, this plant will discharge treated sewage to Moncuin Creek just 3.88 miles upstream from its confluence with the Pamunkey River at river mile 48.80.

39. Without performing the analyses or adhering to the procedures required in such cases, the SWCB issued a VPDES to Hanover County to discharge up to 10 mgd of effluent with a significant load of oxygen-consuming pollutants and nutrients including chemical oxygen demand, biological oxygen demand, suspended solids, phosphorus and nitrogen.

40. These pollutants would be mixed with the modest flow in the Pamunkey River and carried downstream until the river deepens and slows near river mile 48.80. There, with similar pollutants from the King William County Sewage Treatment Plant, they will settle out, consume oxygen, and promote the growth of oxygen-demanding microbes and bacteria. The result will necessarily be even lower levels of dissolved oxygen, for longer periods, over an even wider geographic area.

41. The DEQ has never conducted any field investigation or modeling of these effects.

## **The Pamunkey River is an Impaired Water**

42. Section 303(d) of the Clean Water Act (the "CWA") requires states to identify their waters that do not meet water quality standards, even after treatment required by the CWA or when other controls are in place. The state must consider all existing and readily available water quality related data and information in preparing the list of waters identified as impaired.

43. For each of the waters on the list, the state is required to develop a Total Maximum Daily Load ("TMDL") of pollutants. A TMDL calculates how much of a pollutant can be put into the entire watershed without violating water quality standards. Permits for discharges of pollutants into the watershed may only be issued if the total amount of pollutants to be discharged by all dischargers to the watershed is below the TMDL.

44. The development and implementation of TMDLs has become the focal point for water quality protection. TMDLs are based on sound water quality standards but must be calculated and faithfully applied by the SWCB in permit decisions.

45. Notwithstanding the clear violations of water quality standards for dissolved oxygen in the Pamunkey River, the SWCB and DEQ failed and refused to identify it as an "impaired water" subject to Section 303(d). As a result, the United States Environmental Protection Agency ("EPA") was compelled to exercise its oversight authority and designate the Pamunkey River — and many other Virginia waters — as "impaired" for the SWCB and DEQ.

46. On December 16, 1998, the EPA published notice of its proposal to designate numerous Virginia waters as "impaired" owing to the failure to the SWCB and DEQ to do so.

47. On May 12, 1999, the EPA placed the tidal portion of the Pamunkey River, including the area of the proposed discharge and river mile 48.80, on the list of impaired waters.



This decision was made based on existing and readily available water quality-related data in the possession of the DEQ.

48. The SWCB issued the sewage discharge permit here with full knowledge of EPA's proposal and the "impaired" nature of the receiving water body, yet failed to consider adequately evidence that the proposed discharge, in combination with other sources of pollution, will contribute to and exacerbate significant, existing violations of Virginia's applicable water quality standards for dissolved oxygen downstream from the proposed discharge.

#### **Rare, Threatened or Endangered Mussels**

49. There is strong evidence that rare, threatened or endangered mussel species use the vicinity of the proposed discharge and will be adversely affected by the proposed discharge. Despite this evidence, the DEQ refused to perform work adequate to detect their presence in the Pamunkey River, and issued a permit without adequate information to make a rational and informed decision.

50. A study conducted in 1972 and 1973 surveyed the Pamunkey River for the presence of mussels. At a location just upstream from the proposed discharge location, the surveyor found four species of mussels, including the rare *Lampsilis radiata* (Eastern Lampmussel) and the rare *Lasmigona subviridis* (green floater), as well as *Elliptio complanata* and *Ligumia pasuta*. At the next station upstream, the surveyor found another rare mussel, *Lampsilis cariosa* (yellow lampmussel).

51. The Virginia Department of Conservation and Recreation shares the assessment that rare, threatened or endangered mussel species are likely to be at or near the proposed discharge site. Due to this possibility, the department strongly recommended a survey to determine which species may occur in the vicinity of the discharge site.

52. The County of Hanover arranged for a field survey of mussels which took place in November of 1998. The investigation consisted of approximately one hour of search time at each of four stations, a total of 2.5 hours of stream bank searching, and 54 minutes of waterscoping. The survey was submitted to the DEQ.

53. This survey was reviewed by Dr. Richard Neves of Virginia Tech. who considered the work inadequate for several reasons. Among these, the survey was not conducted in the late spring or early summer and thus was unlikely to find all the species present. Furthermore, the amount of time spent searching for the mussels was inadequate.

54. In addition, the surveyor was under the mistaken belief that the U.S. Route 360 bridge, where the surveyor in the 1972-73 study conducted her sampling was several miles upstream from the survey area. This error cast doubt on the researcher's knowledge and understanding of the site.

55. According to Dr. Neves, only a more thorough survey would determine whether any mussel species resided within the survey reach. Until such a survey is conducted, the best available evidence indicates that rare, threatened or endangered mussels occupy the very stretch of river into which the County proposed to discharge treated sewage.

56. According to the Virginia Department of Conservation and Recreation, the *Lasmigona subdiridis* (green floater) is believed to be declining to the point that it may warrant federal listing as a threatened or endangered species.

57. The United States Fish and Wildlife Service also did not concur with the findings of the County's mussel report. In a letter to the DEQ, the Fish and Wildlife Service concurred with Dr. Neves' concerns which included the time-of-year that the survey was conducted and the

level of effort spent sampling. The letter noted that the Virginia Department of Conservation and Recreation, Division of Natural Heritage had also indicated concern about this survey report.

58. The Fish and Wildlife Service recommended that another freshwater mussel survey be conducted in May or June 1999 and that the survey effort be two to three times greater than the effort put forth in the original survey.

59. Importantly, the Fish and Wildlife Service stated that until the additional survey is conducted, no state or federal permits should be issued for the proposed project to ensure compliance with the Endangered Species Act.

60. Nevertheless, the SWCB issued a permit to allow the County to discharge ten million gallons per day of treated sewage immediately upstream from this known freshwater mussel habitat that has historically included rare, threatened or endangered species. During slack tides and low flow conditions in the Pamunkey, these mussels will be exposed to large quantities of concentrated sewage effluent.

61. Despite the comments by Dr. Neves and the Fish and Wildlife Service and evidence presented by Crutchfield and Broaddus, the SWCB issued the VPDES permit to the County. This action violates Virginia's SWCL and implementing regulations, and was arbitrary and capricious.

#### **Anadromous Fish**

62. The SWCB also failed to consider adequately that the proposed discharge will have a significant adverse effect on anadromous fish spawning and migration.

63. The populations of anadromous fish in the York River system, including the Pamunkey, are in serious trouble. Among the reasons cited by researchers for the collapse of the shad population is pollution that blocks migratory pathways, making it impossible for adults to

reach or return from spawning habitat, and impossible for juveniles to migrate successfully to bay and ocean waters. Spawning and nursery habitat is eliminated upstream from dissolved oxygen sags that anadromous fish cannot, and will not, traverse.

64. Historically, anadromous fish have used almost the entire Pamunkey River as spawning and nursery habitat. Spawning adults have been documented in the South Anna River, in the North Anna and throughout the Pamunkey. For shad, spawning occurs during the spring and extends into June, with juvenile fish migrating downstream thereafter. Other species spawn earlier as well as later in the year.

65. The existing dissolved oxygen problem in the Pamunkey at river mile 48.80 poses a significant obstacle for migratory shad and other anadromous fish because such fish cannot swim through waters with inadequate levels of dissolved oxygen to sustain their respiration.

66. The evidence before the SWCB indicated that the Pamunkey may be effectively closed to migratory fish passage at river mile 48.80 during a significant portion of the year extending from late spring through early fall.

67. The precise times the Pamunkey may be blocked to migratory fish is not known because the SWCB and DEQ failed to develop adequate data on the problem.

68. The licensed discharge will make the situation for anadromous fish worse. The DEQ could not properly issue the permit without sufficient information to assess the possible effect of the proposed discharge on passage of migratory fish.

69. As a result of the issuance of the VPDES permit, the use and enjoyment of anadromous fish by Crutchfield and Broadus on their property will be diminished and impaired.

## **Recreational Uses**

70. At the public hearing on the proposed discharge on January 19, 1999, several speakers informed the DEQ that they have used the area at and immediately downstream from the proposed discharge for swimming for many years.

71. Several troops of Boy Scouts regularly use this area of the property for camping, picnicking, swimming and other forms of outdoor recreation and nature observation. The area is highly prized and regularly used by canoeists, fishermen and others for a variety of primary contact recreation.

72. Crutchfield and Broaddus have personally witnessed such usage over the years and confirm that the portion of the Pamunkey bordering Newcastle Farm downstream from the proposed discharge site is heavily used for all manner of primary contact water-based recreation.

73. At the public hearing, several individuals who have used this stretch of the Pamunkey for recreation uniformly said they would not continue to do so if the County is permitted to discharge treated sewage immediately upstream.

74. The Virginia Department of Health has advised numerous members of the public that primary contact recreation should be avoided downstream from discharges of treated sewage such as are at issue.

75. Water is not "swimmable" if the Health Department recommends that the public not swim there. Nor can water be considered "swimmable" if no reasonable person in fact would ever swim in it.

76. Crutchfield and Broaddus have used the Pamunkey River and Newcastle Farm at the proposed discharge location and upstream and downstream of the proposed discharge for recreational uses including, but not limited to, swimming, fishing, canoeing and camping.

77. As a result of the issuance of the VPDES permit, Crutchfield and Broaddus will cease using the Pamunkey River and Newcastle Farm at the proposed discharge location and upstream and downstream of the proposed discharge location for recreational uses, including, but not limited to, swimming, fishing, canoeing and camping.

78. The SWCB violated the SWCL and implementing regulations by issuing this permit notwithstanding its effective termination of existing beneficial uses of the Pamunkey River for recreation.

#### **Alternative Locations for Discharge**

79. According to a letter to the DEQ from the County, the most important siting criteria applicable to this discharge of treated sewage are the protection of water quality, historic resources and property interests.

80. The site licensed by the SWCB for this discharge, the Original Site, is by the County's own admission more damaging to water quality, historic resources and property interests than other, equally available alternatives.

81. The issuance of the VPDES permit and construction of the discharge pipe and outfall will result in damage to documented historic resources at Newcastle Farm including the colonial era Town of Newcastle – a listed Virginia Historic Landmark – and a portion of Marlbourne, which is listed on the National Register of Historic Places.

82. The issuance of the VPDES permit also damages the aesthetic and conservational interests of Crutchfield and Broaddus at Newcastle Farm because it permits the discharge of treated sewage into the Pamunkey River at Newcastle Farm and will lead to the construction of the outfall and associated structures on Newcastle Farm.

83. Newcastle Farm has been faithfully preserved, husbanded and conserved by the Broaddus family for six generations. The present owners repeatedly have rejected offers to develop or otherwise disturb the integrity of this land. This activity and these goals will be greatly diminished as a result of the issuance of the VPDES permit.

84. As a result of the issuance of this permit, the Pamunkey River and Newcastle Farm will be aesthetically less pleasing to Crutchfield and Broaddus and their enjoyment of their property will be impaired.

85. The SWCB's approval of an admittedly inferior discharge location is arbitrary and capricious.

**Relief Requested**

WHEREFORE, Crutchfield and Broaddus, by counsel, move this Court to declare that VPDES Permit No. VA0089915, issued on April 28, 1999, by the State Water Control Board, was issued in violation of the State Water Control Law and implementing regulations and is therefore invalid, void and of no effect.

Crutchfield and Broaddus also move this Court to award them reasonable costs and attorneys' fees incurred in bringing this appeal as provided for under Va. Code § 9-6.14:21 (Repl. Vol. 1998).

Respectfully submitted,

FRANCES BROADDUS CRUTCHFIELD  
AND HENRY RUFFIN BROADDUS

By: 

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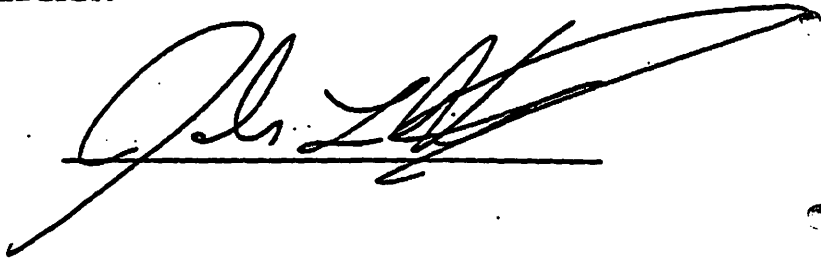


## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "First Amended Petition for Appeal"

was mailed this 30<sup>th</sup> day of June, 2000, by first-class mail, postage prepaid, to:

Deborah Love Feild, Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

A handwritten signature in dark ink, appearing to read "D. Love Feild", is written over a horizontal line.

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

**Petitioners,**

**v.**

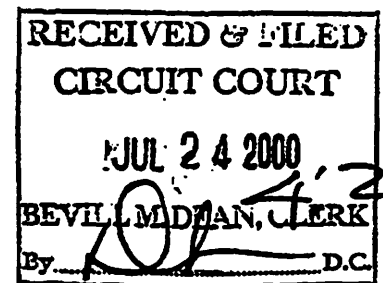
**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**And**

**COUNTY OF HANOVER, VIRGINIA,**

**Respondents.**



**ANSWER OF THE STATE WATER CONTROL BOARD AND  
DEPARTMENT OF ENVIRONMENTAL QUALITY**

Now comes the State Water Control Board and Department of Environmental Quality (collectively, "the Board") and answer to the First Amended Petition for Appeal filed in this matter.

1. *To paragraph 1 of the First Amended Petition for Appeal:* The VPDES permit that is the subject of this appeal was not issued by "the respondents," who now include the Board, the Department, and Hanover County ("the County"), as is alleged.<sup>1</sup> The remaining allegations are admitted.

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<sup>1</sup> In its Demurrer to the original Petition for Appeal in this matter, the State Water

2. *To paragraph 2:* The Board denies the allegations.
3. *To paragraph 3:* The Board is without information to either admit or deny the allegations, and so denies the same. In addition, the Board objects to the addition of "riparian" to the wording of the paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion.
4. *To paragraph 4:* The Board is without information to either admit or deny the allegations, and so denies the same. In addition, the Board objects to the addition of "riparian" to the wording of the paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion.
5. *To paragraph 5:* The Board admits the allegations.
6. *To paragraph 6:* The Board admits the allegations.
7. *To paragraph 7:* The Board admits the allegations.
8. *To paragraph 8:* The Board admits the allegations of the first two sentences. The third sentence is a legal conclusion, and therefore no admission or denial is required.

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Control Board and Department of Environmental Quality noted that the agency action complained of was a decision of the Board and not the Department. Accordingly, the state respondents asked that this action be dismissed as to the Department. To date, the Court has not expressly ruled on the matter.

9. *To paragraph 9:* The paragraph is a legal conclusion, and therefore no admission or denial is required. The Board has waived any objection it has to venue.

10. *To paragraph 10:* The Board denies the allegations.

11. *To paragraph 11:* The Board denies the allegations.

12. *To paragraph 12:* The Board denies the allegations.

13. *To paragraph 13:* The Board denies the allegations.

14. *To paragraph 14:* The Board denies the allegations.

15. *To paragraph 15:* The Board denies the allegations.

16. *To paragraph 16:* The Board denies the allegations.

17. *To paragraph 17:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

18. *To paragraph 18:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

19. *To paragraph 19:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

20. *To paragraph 20:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

21. *To paragraph 21:* The Board admits the allegations, except that the Department received the application on April 11, 1997.

22. *To paragraph 22:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

23. *To paragraph 23:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same.

24. *To paragraph 24:* The Board is without information to either admit or deny the allegations of the paragraph, and so denies the same. The Board admits that on April 20, 1998, it received a request from the County for the amendment of its permit application.

25. *To paragraph 25:* The Board admits the allegations, except to note that the County's request included a consultant's report that speaks for itself.

26. *To paragraph 26:* The Board admits the allegations, except that Ms. Crutchfield did not speak at the public meeting. In addition, many others spoke.

27. *To paragraph 27:* The Board admits the allegations.

28. *To paragraph 28:* The Board admits the allegations, and adds that the permit as approved by the Board contained changes from the version that was the subject of the public comment period; the changes were in response to public comment.

29. *To paragraph 29:* The Board admits the allegations and notes that the cited regulation (which is quoted in part in the paragraph) speaks for itself.

30. *To paragraph 30:* The Board states that the water quality standard for dissolved oxygen is in excess of what is necessary to achieve fishable and swimmable waters; the applicable standard does not take into account those waters where levels of dissolved oxygen lower than the water quality standard occur naturally.

31. *To paragraph 31:* The Board admits there have been exceedences of the water quality standard for dissolved oxygen at river mile 48.80; the Board denies the characterization of those violations.

32. *To paragraph 32:* The allegations are vague and subjective and are therefore denied.

33. *To paragraph 33:* The allegations relate to a study, which speaks for itself.

34. *To paragraph 34:* The allegations relate to a study, which speaks for itself.

35. *To paragraph 35:* The Board admits that a single sample taken over years of monitoring indicates dissolved oxygen at the level stated.

36. *To paragraph 36:* The first sentence relates to a study, which speaks for itself. The Board denies the allegations of the second sentence, and states that it has continued to collect data, and has awarded at least one grant for study of the Pamunkey River. The memorandum mentioned in the third sentence speaks for itself.

37. *To paragraph 37:* The Board states that the Department maintains a number of monitoring stations along the Pamunkey River; these include 5 stations in a 3-mile stretch that includes river mile 48.80. The Department has collected data along the Pamunkey River for years, and will continue to do so. In addition, the Department has awarded at least one grant for a study of the Pamunkey River.

38. *To paragraph 38:* The Board admits that it has issued a permit for a small (25,000 gal./day) sewage treatment plant with a discharge to an unnamed tributary to Moncuin Creek.

39. *To paragraph 39:* The Board denies the allegations.

40. *To paragraph 40:* The Board denies the allegations.

41. *To paragraph 41:* The Department states that it has a considerable monitoring program in place for many years, and that it has and will continue to collect data. In addition, the Department has performed at least one study and awarded at least one grant for study of the Pamunkey River.

42. *To paragraph 42:* The Board states that § 303(d) of the Clean Water Act speaks for itself.

43. *To paragraph 43:* The Board states that TMDLs determine the level of pollutants that may be placed in a segment of state water (not "watershed" as alleged).

44. *To paragraph 44:* The statements are highly subjective in nature, and are therefore denied.

45. *To paragraph 45:* The Board states that EPA's action speaks for itself. The Board states that its consideration of the relevant portion of the Pamunkey River in the TMDL-process was based on 5 years' worth of data, which showed too few exceedences of the water quality standards for dissolved oxygen for the segment to be considered "impaired."

46. *To paragraph 46:* The EPA notice speaks for itself.

47. *To paragraph 47:* The EPA decision speaks for itself.

48. *To paragraph 48:* The Board denies the allegations.

49. *To paragraph 49:* The Board admits there is some evidence – from 25 years ago - of rare (not “threatened” or “endangered”) mussels located miles upriver. The Board denies the remaining allegations.

50. *To paragraph 50:* The Board states that the study speaks for itself. The study did not identify any threatened or endangered mussels. The location “just upstream” mentioned in the second sentence is 2 miles upriver from the proposed discharge. The “next station upstream” mentioned in the third sentence is 9 miles from the proposed discharge point.

51. *To paragraph 51:* The letter from the Department of Conservation and Recreation speaks for itself, and the Board denies any characterization of the same.

52. *To paragraph 52:* The study performed by the County speaks for itself, and the Board denies any characterization of the same.

53. *To paragraph 53:* The conclusions of Neves are contained in correspondence that speaks for itself, and the Board denies any characterization of the same.

54. *To paragraph 54:* The Board denies the characterization of the researcher.



55. *To paragraph 55:* The conclusions of Neves speak for themselves and the Board denies any characterization of the same. The Board denies the remaining allegations.

56. *To paragraph 56:* Assuming that the comments of the Department of Conservation and Recreation are written, the document speaks for itself, and the Board denies any characterization of the same.

57. *To paragraph 57:* The Department received the letter from the U.S. Fish & Wildlife Service after the Board made its decision on the permit application. The letter is, therefore, irrelevant to the Board's decision and should not be considered by this Court. In addition, the letter speaks for itself, and the Board objects to any characterization thereof.

58. *To paragraph 58:* The Department received the letter from the U.S. Fish & Wildlife Service after the Board made its decision on the permit application. The letter is, therefore, irrelevant to the Board's decision and should not be considered by this Court. In addition, the letter speaks for itself, and the Board objects to any characterization thereof. In addition, the Board states that the letter contains a recommended list of surveyors, including the surveyor who performed the work at issue.

59. *To paragraph 59:* The Department received the letter from the U.S. Fish & Wildlife Service after the Board made its decision on the permit application. The letter is, therefore, irrelevant to the Board's decision and should not be considered by this Court. In addition, the letter speaks for itself, and the

Board objects to any characterization thereof. In addition, the Board states that the suggested additional study was performed and reached the same conclusions as the original study.

60. *To paragraph 60:* The Board denies the allegations.

61. *To paragraph 61:* The Board denies the allegations.

62. *To paragraph 62:* The Board denies the allegations.

63. *To paragraph 63:* The Board is without information to admit or deny the allegations, as the characterizations are subjective, and the mention of "researchers" is a vague reference to unidentifiable persons.

64. *To paragraph 64:* The Board agrees generally with the allegations of the paragraph but objects to the whole as too vague to be admitted.

65. *To paragraph 65:* The Board states that the allegations of paragraph 65 appear to contradict those of paragraph 64. It is unclear whether petitioners maintain that anadromous fish "use almost the entire Pamunkey River" (paragraph 64) or cannot cross river mile 48.40 (paragraph 65). Accordingly, the allegations are denied.

66. *To paragraph 66:* The Board held a public comment period, including a public meeting, at which it received oral and written comments offering a variety of information on the proposed application. The Board considered all comments before making its decision; in fact, at the staff's recommendation, the Board changed the permit from that which was originally proposed in response to the public comment.

67. *To paragraph 67:* The Board denies the allegations.

68. *To paragraph 68:* The Board denies the allegations.

69. *To paragraph 69:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

70. *To paragraph 70:* The Board held a public comment period, including a public meeting, at which it received oral and written comments offering a variety of information on the proposed application. The Board considered all comments before making its decision; in fact, at the staff's recommendation, the Board changed the permit from that which was originally proposed in response to the public comment. Among the comments received were some generally along the lines described in the paragraph. The specific comments speak for themselves, however.

71. *To paragraph 71:* The Board held a public comment period, including a public meeting, at which it received oral and written comments offering a variety of information on the proposed application. The Board considered all comments before making its decision; in fact, at the staff's recommendation, the Board changed the permit from that which was originally proposed in response to the public comment. Among the comments received were some generally along the lines described in the paragraph. The specific comments speak for themselves, however.

72. *To paragraph 72:* The Board is without information to either admit or deny what Crutchfield and Broadus have "personally witnessed" and object to the characterization of the use of the river.

73. *To paragraph 73:* The Board held a public comment period, including a public meeting, at which it received oral and written comments offering a variety of information on the proposed application. The Board considered all comments before making its decision; in fact, at the staff's recommendation, the Board changed the permit from that which was originally proposed in response to the public comment. Among the comments received were some generally along the lines described in the paragraph. The specific comments speak for themselves, however.

74. *To paragraph 74:* The Board is without information to either admit or deny the vague allegations.

75. *To paragraph 75:* The Board denies the subjective conclusions of the paragraph.

76. *To paragraph 76:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

77. *To paragraph 77:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the

allegations, as it is without information to admit or deny the future actions of Crutchfield and Broadus.

78. *To paragraph 78:* The Board denies the allegations.

79. *To paragraph 79:* The County's letter speaks for itself, and the Board denies any characterization thereof.

80. *To paragraph 80:* The Board denies the allegations.

81. *To paragraph 81:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

82. *To paragraph 82:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

83. *To paragraph 83:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

84. *To paragraph 84:* The Board objects to this paragraph as outside the scope of amendments authorized to the original Petition for Appeal; the Board's objection is the subject of a separate motion. In addition, the Board denies the allegations.

85. *To paragraph 85:* The Board denies the allegations.

86. All allegations not specifically admitted are hereby denied.

Therefore, the State Water Control Board and Department of Environmental Quality ask that the Board's action in issuing VPDES Permit No. VA0089915 be upheld, and this appeal be dismissed.

Respectfully submitted,

STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

By Deborah Love Feild  
Counsel

Mark L. Earley  
Attorney General of Virginia

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 24th day of July, 2000, a copy of the foregoing pleading was sent by first class mail to:

John L. Marshall, Jr.  
McSweeney, Burtch & Crump, P.C.  
Post Office Box 1463  
11 South Twelfth Street  
Richmond, Virginia 23218-1463

**Counsel for Petitioners**

Barbara M. Rose  
Office of the Hanover County Attorney  
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Hanover, Virginia 23069-0470

**Counsel for Hanover County**

David E. Evans  
McGuireWoods  
901 Cary Street  
Richmond, Virginia 23219-4030

**Counsel for Hanover County**

Deborah Core-Led

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

**Petitioners,**

**v.**

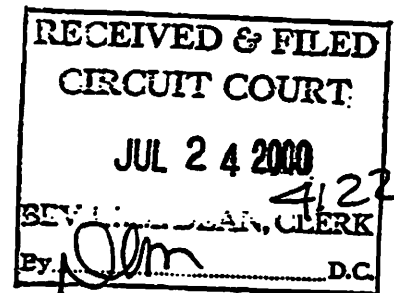
**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**And**

**COUNTY OF HANOVER, VIRGINIA,**

**Respondents.**



**MOTION TO STRIKE AMENDED PETITION FOR APPEAL**

Now comes the State Water Control Board and Department of Environmental Quality (collectively, "SWCB" or "the Board") and move that the First Amended Petition for Appeal filed in this matter be stricken. In support thereof, the Board states:

1. The Board demurred to the original Petition for Appeal filed in this matter. Among the grounds for demurrer were that the Petitioners lacked standing to bring the appeal and had failed to name Hanover County a party to the appeal.
2. In its letter opinion of May 24, 2000, the Court ruled that the Petitioners could add Hanover County as a party to this action. The Court also



held that, by considering the attachment to the Petition for Appeal, Petitioners had alleged injury sufficient to confer standing under Article III.

3. By its order entered June 14, 2000, the Court overruled the Board's demurrer and granted leave to the Petitioners to include Hanover County as a party.

4. The First Amended Petition for Appeal contains changes far beyond adding Hanover County as a party to the action. Specifically:

- a. Crutchfield and Broaddus are described as "riparian" owners of property in paragraphs 3 and 4.
- b. Petitioners add a complaint that their use and enjoyment of anadromous fish will be diminished and impaired. Paragraph 69.
- c. Petitioners add an allegation that they have used the Pamunkey River for recreational uses, and that as a result of the permit, they will cease to do so. Paragraphs 76 and 77.
- d. Petitioners allege that the permit will damage historic resources, damage aesthetic and conservational interests, interfere with their goals for the property, and render the property less pleasing aesthetically. Paragraphs 81-84.

5. These allegations far exceed the allegations as construed by the Court in its consideration of the attachment to the Petition for Appeal, and exceed the scope of the changes authorized under the Court's May 24 opinion.

Therefore, the Board asks that the First Amended Petition for Appeal be stricken, and Petitioners directed to file an amended petition for appeal in conformance with the Court's ruling.

Respectfully submitted,

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY**

By Deborah Love Feild

Counsel

Mark L. Earley  
Attorney General of Virginia

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 24th day of July, 2000, a copy of the foregoing pleading was sent by first class mail to:

John L. Marshall, Jr.  
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Post Office Box 1463  
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**Counsel for Petitioners**

Barbara M. Rose  
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Hanover, Virginia 23069-0470

**Counsel for Hanover County**

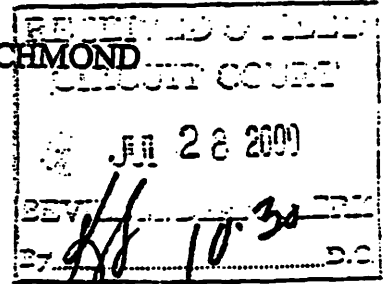
David E. Evans  
McGuireWoods  
901 Cary Street  
Richmond, Virginia 23219-4030

**Counsel for Hanover County**

Deborah Cove Feig

VIRGINIA:

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



FRANCES BROADDUS CRUTCHFIELD, et al.,

Petitioners,

v.

Chancery No. 760CH99K01193-00

STATE WATER CONTROL BOARD, et al.,

Respondents.

**RESPONDENT COUNTY OF HANOVER'S MOTION TO STRIKE  
FIRST AMENDED PETITION FOR APPEAL**

Respondent County of Hanover (the "County"), by counsel and pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, moves to strike the First Amended Petition for Appeal of Petitioners Frances Broaddus Crutchfield and Henry Ruffin Broaddus ("Petitioners"), for the reasons set forth below.

1. On May 27, 2000, Petitioners filed a Notice of Appeal of the SWCB's April 28, 1999 issuance of the Permit.
2. Petitioners filed their Petition for Appeal herein on June 28, 1999. In the Petition for Appeal Petitioners included only the SWCB and the Department of Environmental Quality ("DEQ") as respondents.
3. The SWCB and DEQ demurred to the Petition for Appeal on the grounds that: Petitioners had failed to join the County as a necessary party; Petitioners lacked standing under

Virginia Code § 62.1-44.29 to challenge the issuance of the Permit; and the DEQ is not a proper party.

4. Following the submission of briefs and a hearing on the Demurrer this Court issued a letter opinion on May 24, 2000, setting forth its ruling. The Court "allow[ed] Hanover County to be included by amendment." The Court also overruled the Demurrer as to standing because it found that Petitioners' allegation of "an injury to historic places which are found on petitioners' property," as set forth in Exhibit A to the Petition for Appeal, "state[d] a clear injury to property interests sufficient to confer standing . . . ." The Court expressly acknowledged, however, that Petitioners' allegations of "serious effects to various wildlife . . . which will be caused by the challenged discharge" were "not sufficient to confer standing upon the petitioners without some nexus between the agency's action and an injury to the petitioners." The Court also found that Petitioners had "not alleged any injury which would confer upon them legal standing [to the extent they seek to vindicate the rights of other persons and the ecosystem]." The Court's letter opinion did not grant Petitioners leave to amend the Petition for Appeal to shore up their standing allegations.

5. In its Order entered June 14, 2000, this Court overruled the Demurrer and granted Petitioners leave to amend their Petition for Appeal and name the County as a party.

6. Petitioners filed their First Amended Petition for Appeal herein on June 30, 2000. In the amended pleading Petitioners added the County as a respondent and included a paragraph describing the County (§ 7). In addition to these amendments that were authorized by the Court's Order of June 14, 2000, and letter opinion of May 24, 2000, Petitioners amended the pleading to include the following:

- a. Adding the word "riparian" to describe Petitioners' ownership in paragraphs 4 and 5;
- b. An added allegation that the issuance of the Permit will diminish and impair Petitioners' use and enjoyment of anadromous fish on their property (§ 69);
- c. Added allegations that Petitioners have used the proposed location for the Discharge Facility for recreational uses and that the issuance of the Permit will cause Petitioners to discontinue those recreational uses (§§ 76, 77);
- d. Added allegations that the issuance of the Permit and construction of the Discharge Facility will damage historic resources and the aesthetic and conservational interests of Petitioners (§§ 81, 82); and
- e. Added allegations that the issuance of the Permit will diminish Petitioners' goals of preserving their land, will make the land less aesthetically pleasing to them and will impair their use of their land (§§ 83, 84).

7. The Court's order and letter opinion authorized none of these amendments.


8. A party's ability to amend a pleading is strictly limited. "No amendments shall be made to any pleading after it is filed save by leave of court." Rule 1:8. Amendments for which no leave has been obtained have no legal efficacy. Mechtensimer v. Wilson, 246 Va. 121, 122-23, 431 S.E.2d 301, 302 (1993); see also Mallory v. Smith, 27 F.3d 991, 995 (4<sup>th</sup> Cir. 1994) (where no leave to amend has been granted, Supreme Court of Virginia lacked jurisdiction to adjudicate any new claim raised in amendment).

9. Because Petitioners failed to obtain leave to make the amendments described above, the amendments are without legal efficacy and should be stricken in their entirety.


For the foregoing reasons, the County requests that the First Amended Petition for Appeal be stricken and that Petitioners be directed to file an amended petition for appeal in conformance with the Court's Order of June 14, 2000 and letter opinion of May 24, 2000.

COUNTY OF HANOVER, VIRGINIA

By Counsel

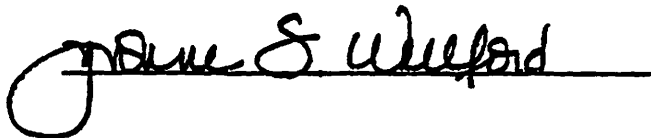
  
Sterling E. Rives III (VSB No. 23250)  
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Certificate of Service

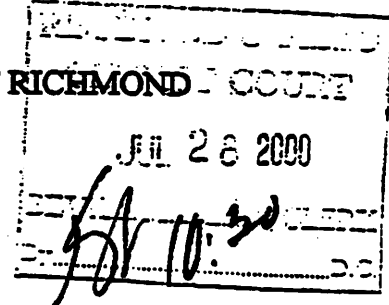
I hereby certify that a true copy of the foregoing Respondent County of Hanover's Motion to Strike First Amended Petition for Appeal was mailed, first-class postage prepaid, to: William B. Ellis and John L. Marshall, Jr., McSweeney, Burtch & Crump, P.C., Post Office Box 1463, 11 South Twelfth Street, Richmond, Virginia 23218-1463, counsel for petitioners; and Deborah Love Feild, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, counsel for respondents State Water Control Board and Department of Environmental Quality, this 28<sup>th</sup> day of July, 2000.

A handwritten signature in cursive script, reading "James S. Wilford", is written over a horizontal line.



VIRGINIA:

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



FRANCES BROADDUS CRUTCHFIELD, et al.,

Petitioners,

v.

Chancery No. 760CH99K01193-00

STATE WATER CONTROL BOARD, et al.,

Respondents.

**ANSWER OF RESPONDENT COUNTY OF HANOVER  
TO FIRST AMENDED PETITION FOR APPEAL**

Respondent County of Hanover, Virginia (the "County"), by counsel, responds to the numbered paragraphs of the First Amended Petition for Appeal of Petitioners Frances Broaddus Crutchfield ("Crutchfield") and Henry Ruffin Broaddus ("Broaddus") (collectively "Petitioners") as follows:

1. Paragraph 1 comprises argument of counsel, to which no response is required. To the extent there are any allegations of fact, the County denies the allegations. By way of further answer the County states that the VPDES permit referenced in paragraph 1 authorizes the discharge of highly treated wastewater from the County's Totopotomoy Wastewater Treatment Plant. The plant will be an advanced activated sludge wastewater treatment plant with a biologic nutrient removal process for the removal of phosphorus and nitrogen, in addition to other pollutants.

2. The allegations of paragraph 2 comprise argument of counsel to which no response is required. To the extent there are any allegations of fact, the County denies the allegations.

3. The County lacks sufficient information to admit or deny the allegations of paragraph 3, and therefore denies them. The County admits that Crutchfield is a co-owner of certain real property located in Hanover County, Virginia, identified as GPIN 8767-11-3067, on which real property the County proposes to locate the discharge facility for the Totopotomoy Wastewater Treatment Plant ("Discharge Facility").

4. The County lacks sufficient information to admit or deny the allegations of paragraph 4, and therefore denies them. The County admits that Broaddus is a co-owner of certain real property located in Hanover County, Virginia, identified as GPIN 8767-11-3067, on which real property the County proposes to locate the Discharge Facility.

5. The allegations of paragraph 5 set forth legal conclusions, to which no response is required. The County affirmatively states that the authority of the State Water Control Board ("SWCB") in issuing Virginia Pollutant Discharge Elimination System (VPDES) permits is limited to considering water quality impact, rather than land use issues, with respect to the permits it issues.

6. The County admits the allegations of paragraph 6. The County further states that the Department of Environmental Quality is not a proper party to this litigation for the reasons set forth in the Demurrer of the State Water Control Board and the Department of Environmental Quality and supporting Memorandum previously filed herein.

7. The County admits the allegations of paragraph 7.

8. In response to the allegations of paragraph 8, the County admits that the SWCB issued VPDES Permit No.VA0089915 to the County on April 28, 1999. The County denies the remaining allegations of paragraph 8.

9. Paragraph 9 sets forth conclusions of law to which no response is required.

10. The County denies the allegations of paragraph 10.

11. The County denies the allegations of paragraph 11.

12. The County denies the allegations of paragraph 12.

13. The County denies the allegations of paragraph 13.

14. The County denies the allegations of paragraph 14.

15. The County denies the allegations of paragraph 15.

16. The County denies the allegations of paragraph 16.

17. The County lacks sufficient information to admit or deny the allegations of paragraph 17 and therefore denies them.

18. The County admits the allegations of paragraph 18.

19. In response to the allegations of paragraph 19, the County admits that it communicated with Broadbus by letter in April, 1997, and states that those letters speak for themselves. To the extent that the allegations of paragraph 19 are inconsistent with the letters, the County denies the allegations. The County denies the remaining allegations of paragraph 19.

20. In response to the allegations of paragraph 20, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer the County states that it has proposed the construction of the Discharge Facility, the scope of which is set forth in certain County documents that previously have been

provided or made available to Petitioners. To the extent that the allegations of paragraph 20 are inconsistent with such documents, the County denies the allegations.

21. In response to the allegations of paragraph 21, the County admits that it applied for a VPDES permit for the discharge of highly treated wastewater from the "Discharge Facility" on real property identified as GPIN 8767-11-3067. The County states that it applied for the permit on April 11, 1997. The County denies the remaining allegations of paragraph 21.

22. The County denies the allegations of paragraph 22. By way of further answer, the County states (i) that at the request of Broaddus and his agent, the County examined potential discharge sites other than the site referenced in its April 11, 1997 application for a VPDES permit, (ii) that the sites examined had been identified by Broaddus' agent and (iii) that the County's examination of these sites was in an effort to accommodate Broaddus' request and to negotiate a site acceptable to Petitioners.

23. The County denies the allegations of paragraph 23.

24. In response to the allegations of paragraph 24, the County admits that it amended its permit application on April 20, 1998 to designate a different location for the Discharge Facility. The County denies the remaining allegations of paragraph 24.

25. In response to the allegations of paragraph 25, the County admits that it amended its permit application on October 8, 1998 to return to the site designated in its original application. The County asserts that its principal reasons for the amendment were land use considerations and Petitioners' statements that no site on their property would be an acceptable location for the Discharge Facility. The County denies the remaining allegations of paragraph 25.

26. In response to the allegations of paragraph 26, the County admits that the SWCB conducted a public hearing on January 19, 1999 at the Hanover County Office Complex. The County states, on information and belief, that Crutchfield did not present information orally at the hearing. The County admits that Broadus and his legal counsel participated in the hearing.

27. On information and belief, the County admits the allegations of paragraph 27. By way of further answer, the County denies any conclusions contained in Exhibit A to the First Amended Petition for Appeal and states that it lacks sufficient information to admit or deny any factual allegations contained therein and, therefore, denies them.

28. The County admits the allegations of paragraph 28.

29. Paragraph 29 comprises legal conclusions or attempts by counsel to paraphrase regulatory provisions, to which no response is required.

30. Paragraph 30 comprises legal conclusions or attempts by counsel to paraphrase regulatory provisions, to which no response is required. The County further states that the Commonwealth's regulations expressly recognize that water quality can vary due to naturally occurring conditions.

31. The County lacks sufficient information to admit or deny the allegations of paragraph 31 and therefore denies them. By way of further answer the County states that to the extent that dissolved oxygen standards are violated in the Pamunkey River, they are the result of naturally occurring conditions.

32. The County denies the allegations of paragraph 32.

33. The County lacks sufficient knowledge to admit or deny the allegations of paragraph 33 and therefore denies them. To the extent that dissolved oxygen standards are

violated in the Pamunkey River, the County states that they are the result of naturally occurring conditions.

34. The County lacks sufficient knowledge to admit or deny the allegations of paragraph 34 and therefore denies them. To the extent that dissolved oxygen standards are violated in the Pamunkey River, the County states that they are the result of naturally occurring conditions.

35. The County lacks sufficient knowledge to admit or deny the allegations of paragraph 35 and therefore denies them. To the extent that dissolved oxygen standards are violated in the Pamunkey River, the County states that they are the result of naturally occurring conditions.

36. The County lacks sufficient knowledge to admit or deny the allegations of paragraph 36 and therefore denies them. To the extent that dissolved oxygen standards are violated in the Pamunkey River, the County states that they are the result of naturally occurring conditions.

37. The County denies the allegations of paragraph 37. To the extent that dissolved oxygen standards are violated in the Pamunkey River, the County states that they are the result of naturally occurring conditions.

38. The County lacks sufficient knowledge to admit or deny the allegations of paragraph 38 and therefore denies them.

39. The County denies the allegations of paragraph 39.

40. The County denies the allegations of paragraph 40.

41. The County denies the allegations of paragraph 41.

42. Paragraph 42 sets forth legal conclusions to which no response is required.

43. Paragraph 43 sets forth legal conclusions to which no response is required. To the extent these allegations purport to allege that permits may not be issued for discharges to impaired waters without TMDLs or that water quality is not protected when permits are issued for discharges to impaired waters without TMDLs, they are denied.

44. In response to the allegations of paragraph 44, the County admits that TMDLs are an element of water quality protection, but denies that they are necessary to protect water quality as suggested in the first sentence of paragraph 44. The County admits that TMDLs are based on water quality standards and that once established they must be applied to permitting decisions. The County denies all other allegations of paragraph 44 as well as inferences or conclusions to be drawn from those allegations.

45. In response to the allegations of paragraph 45, the County admits that the available data indicate violations of the dissolved oxygen standards in certain segments of the Pamunkey River, as alleged in the first sentence of paragraph 45, but states that the available information indicates that these violations are caused by natural, rather than manmade conditions. The County denies that the SWCB and DEQ failed and refused to identify the Pamunkey River as an "impaired water" as alleged in the first sentence of paragraph 45. The County states that the DEQ listed the Pamunkey River as impaired, but did not list it for TMDL development because the impairment is caused by natural conditions. To the extent the last sentence in paragraph 45 purports to characterize the actions of the EPA, the County states that the EPA's actions speak for themselves and require no response. To the extent a response is required, however, the County is without sufficient information to admit or deny such allegations and therefore denies them.

46. To the extent the allegations of paragraph 46 purport to characterize the EPA's actions, the County states that these actions speak for themselves and require no response. To the extent a response is required, however, the County is without sufficient information to admit or deny such allegations and therefore denies them.

47. To the extent allegations of paragraph 47 purport to characterize the EPA's actions, the County states that these actions speak for themselves and require no response. To the extent a response is required, however, the County is without sufficient information to admit or deny such allegations and therefore denies them.

48. The County denies the allegations of paragraph 48. By way of further answer, the County states that to the extent that dissolved oxygen standards are violated in the Pamunkey River, they are the result of naturally occurring conditions.

49. In response to the allegations of paragraph 49, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County denies the allegations of paragraph 49.

50. In response to the allegations of paragraph 50, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County lacks sufficient information to admit or deny the allegations of paragraph 50 and therefore denies them. The County further states that the study referenced in paragraph 50 speaks for itself.

51. In response to the allegations of paragraph 51, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are



inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County lacks sufficient information to admit or deny the allegations of paragraph 51 and therefore denies them. Further, the County states that the Department of Conservation and Recreation set forth its assessment and recommendation in a letter, which speaks for itself.

52. In response to the allegations of paragraph 52, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that the written report of Philip H. Stevenson of Creek Laboratory, LLC, which performed the field survey referenced in paragraph 52, sets forth the scope and nature of the work performed. To the extent that the allegations of paragraph 52 are inconsistent with such report, the County denies the allegations.

53. In response to the allegations of paragraph 53, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient knowledge to admit or deny the allegations of paragraph 53 and therefore denies them. Further, to the extent the allegations refer to a letter by Dr. Neves, the letter speaks for itself.

54. In response to the allegations of paragraph 54, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County denies the allegations of paragraph 54.

55. In response to the allegations of paragraph 55, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient knowledge to admit or deny the allegations of the first sentence of paragraph 55 and therefore denies them. Further, to the extent the allegations refer to a letter by Dr. Neves, the letter speaks for itself. The County further denies the allegations of the second sentence of paragraph 55. By way of further answer, the County states that no specimens of federally or state listed endangered or threatened species occupy the stretch of the river into which the County proposes to discharge highly treated wastewater.

56. In response to the allegations of paragraph 56, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 56 and therefore denies them.

57. In response to the allegations of paragraph 57, the County admits that the SWCB received a letter from the U.S. Fish and Wildlife Service dated March 11, 2000, after the SWCB had approved the issuance of VPDES Permit No. VA0089915 to the County. Accordingly, the allegations of paragraph 57 are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. The County denies all other allegations of paragraph 57. By way of further answer, the County states that the letter from the U.S. Fish and Wildlife Service, referenced in paragraph 57, speaks for itself.

58. In response to the allegations of paragraph 58, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 58. To the extent they refer to the letter from the U.S. Fish and Wildlife Service referenced in paragraph 57, the County states that the letter speaks for itself.

59. In response to the allegations of paragraph 59, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 59. To the extent they refer to the letter from the U.S. Fish and Wildlife Service referenced in paragraph 57, the County states that the letter speaks for itself.

60. In response to the allegations of paragraph 60, the County admits that the SWCB issued VPDES Permit No. VA0089915 to the County. The County denies the remaining allegations of paragraph 60.

61. The County denies the allegations of paragraph 61.

62. The County denies the allegations of paragraph 62.

63. The County lacks sufficient information to admit or deny the allegations of paragraph 63 and therefore denies them.

64. In response to the allegations of paragraph 64, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia.

By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 64 and therefore denies them.

65. In response to the allegations of paragraph 65, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 65 and therefore denies them.

66. In response to the allegations of paragraph 66, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 66 and therefore denies them.

67. In response to the allegations of paragraph 67, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County states that it lacks sufficient information to admit or deny the allegations of paragraph 67 and therefore denies them.

68. The County denies the allegations of paragraph 68.

69. The County denies the allegations of paragraph 69.

70. In response to the allegations of paragraph 70, the County states that there exists a transcript of the public hearing referenced in paragraph 70 and that the transcript speaks for itself. To the extent that the allegations of paragraph 70 are inconsistent with the transcript, the County denies the allegations.

71. The County lacks sufficient information to admit or deny the allegations of paragraph 71 and therefore denies them.

72. The County lacks sufficient information to admit or deny the allegations of paragraph 72 and therefore denies them.

73. In response to the allegations of paragraph 73, the County states that there exists a transcript of the public hearing referenced in paragraph 73 and that the transcript speaks for itself. To the extent that the allegations of paragraph 73 are inconsistent with the transcript, the County denies the allegations.

74. The County lacks sufficient information to admit or deny the allegations of paragraph 74 and therefore denies them.

75. The County denies the allegations of paragraph 75.

76. The County lacks sufficient information to admit or deny the allegations of paragraph 76 and therefore denies them.

77. The County lacks sufficient information to admit or deny the allegations of paragraph 77 and therefore denies them.

78. The County denies the allegations of paragraph 78.

79. In response to the allegations of paragraph 79, the County states that to the extent that the letter referenced in paragraph 79 exists, the letter speaks for itself. To the extent that the allegations of paragraph 79 are inconsistent with the letter, the County denies the allegations.

80. The County denies the allegations of paragraph 80.

81. In response to the allegations of paragraph 81, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are

inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia.

By way of further answer, the County denies the allegations of paragraph 81.

82. In response to the allegations of paragraph 82, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County denies the allegations of paragraph 82.

83. In response to the allegations of paragraph 83, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County lacks sufficient information to admit or deny the allegations of paragraph 83 and therefore denies them.

84. In response to the allegations of paragraph 84, the County states that the allegations are not relevant to any matters at issue in this litigation and, therefore, are inconsistent with the requirements of Rule 2A:4 of the Rules of the Supreme Court of Virginia. By way of further answer, the County denies the allegations of paragraph 84.

85. The County denies the allegations of paragraph 85.

The County denies that Petitioners are entitled to the relief requested or to any relief whatsoever, it denies any allegations not specifically admitted above and requests that this Court dismiss this action with prejudice and award its costs incurred and other appropriate relief.

COUNTY OF HANOVER, VIRGINIA

By Counsel

James S. Wellford  
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Barbara M. Rose (VSB No. 21140)  
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Certificate of Service

I hereby certify that a true copy of the foregoing Answer of Respondent County of Hanover to First Amended Petition for Appeal was mailed, first-class postage prepaid, to: William B. Ellis and John L. Marshall, Jr., McSweeney, Burtch & Crump, P.C., Post Office Box 1463, 11 South Twelfth Street, Richmond, Virginia 23218-1463, counsel for petitioners; and Deborah Love Feild, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, counsel for respondents State Water Control Board and Department of Environmental Quality, this 28<sup>th</sup> day of July, 2000.

James S. Wellford

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

**FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS,**

**Petitioners,**

**v.**

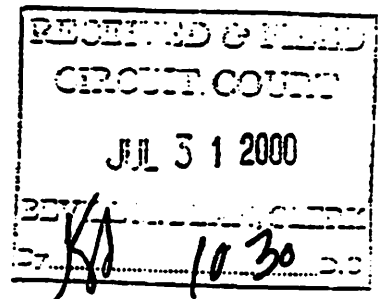
**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL QUALITY,**

**And**

**COUNTY OF HANOVER, VIRGINIA,**

**Respondents.**



**MOTION FOR LEAVE TO TAKE DEPOSITIONS**

Now come the State Water Control Board and the Department of Environmental Quality (collectively, "the Board") and ask this Court for leave to conduct discovery. In support thereof, the Board states:

1. The present action is an appeal of a case decision of the State Water Control Board, authorized pursuant to § 62.1-44.29 of the Code of Virginia (1950), as amended ("the Code"). The statute directs that such appeals be in accordance with the provisions of the Administrative Process Act ("APA"), § 9-6.14:1 *et seq.* of the Code.



2. The petitioner in an appeal brought in accordance with the APA has the burden to designate and demonstrate an error of law. Code § 9-6.14:17 lists 4 issues of law:

- (i) accordance with constitutional right, power, privilege, or immunity;
- (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions,
- (iii) observance of required procedure where any failure therein is not mere harmless error, and
- (iv) *the substantiality of the evidential support for findings of fact.*

(Emphasis added).

3. In case decisions made without a formal proceeding, such as the decision at issue, the APA provides that

any necessary facts in controversy shall be determined by the court on the basis of the agency file, minutes, and records of its proceedings under § 9-6.14:7.1 [rulemaking] of § 9-6.14:11 [informational proceedings] as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

Code § 9-6.14:17.

4. Section 62.1-44.29 authorizes judicial review of final decisions of the Board to be brought by certain persons. Specifically, the actions may be brought by persons who have participated (in person or by written comments) in a public comment process. *Id.* In addition, any such person must meet the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution:

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.*

5. The Petitioners in this matter have alleged injury to themselves or their property as a result of the permit at issue. The Board has denied that the discharge authorized by the permit has or will injure the Petitioners. Accordingly, Petitioners' standing to bring this action is in issue.

6. It is for this Court to determine the standing of parties wishing to litigate before it when such standing is placed at issue, as here.

7. The Board received and considered the public comments on the proposed permit. The Board, therefore, concedes that the Petitioners satisfy the first requirement for third party standing to appeal the decision: the Petitioners participated in the public comment process.

8. The Board did not adjudicate the Article III standing of the Petitioners to appeal the action because the Board did not have the authority to do so. Accordingly, the agency file, minutes and records of its proceedings contain only the unsupported allegations of Petitioners with regard to standing. Petitioners cannot hope to demonstrate their Article III standing with the agency file, minutes, and record undeveloped on the subject.

9. Part 2A of the Rules of the Supreme Court of Virginia governs APA appeals. Rule 2A:5 provides that, once perfected, appeals are conducted as in suits in equity, except that "[t]he provisions of Part Four shall not apply and, unless ordered by the court, depositions shall not be taken."

10. Without discovery, the Board is without a means of understanding the basis of Petitioners' claim to Article III standing, and cannot have a proper basis for responding to it.

THEREFORE, the Board asks leave to take the depositions of the Petitioners for the purpose of addressing only the issue of Petitioners' standing to bring the present action.

Respectfully submitted,

STATE WATER CONTROL BOARD and  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

By Deborah Love Felt

Counsel

Mark L. Earley  
Attorney General of Virginia

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 28th day of July, 2000, a copy of the foregoing pleading was sent by first class mail to:

John L. Marshall, Jr.  
McSweeney, Burtch & Crump, P.C.  
Post Office Box 1463  
11 South Twelfth Street  
Richmond, Virginia 23218-1463

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Hanover, Virginia 23069-0470

Counsel for Hanover County

David E. Evans  
McGuire Woods  
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Richmond, Virginia 23219-4030

Counsel for Hanover County

Deborah Love Feild

VIRGINIA:

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

FRANCES BROADDUS CRUTCHFIELD and  
HENRY RUFFIN BROADDUS

Petitioners,

v.

STATE WATER CONTROL BOARD

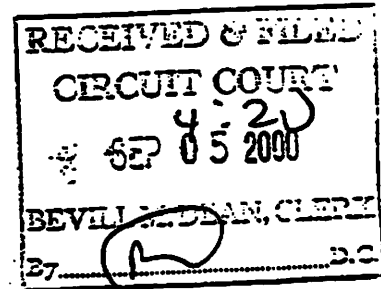
and

DEPARTMENT OF ENVIRONMENTAL QUALITY

and

COUNTY OF HANOVER, VIRGINIA,

Respondents.



Chancery No.:  
760CH99K01193-00

**PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION  
TO STRIKE FIRST AMENDED PETITION**

Petitioners, Frances Broaddus Crutchfield ("Crutchfield") and Henry Ruffin Broaddus ("Broaddus"), by counsel, submit this opposition to the Respondents' Motion to Strike the First Amended Petition for Appeal. The reasons for this opposition are set forth below.

1. On June 14, 2000, this Court entered an Order overruling the Demurrer filed by the State Water Control Board ("SWCB") and the Department of Environmental Quality ("DEQ").

2. That Order also granted leave to Crutchfield and Broaddus "to amend their petition and to name Hanover County as a party."

3. On June 30, 2000, Crutchfield and Broaddus filed a First Amended Petition for Appeal. This Amended Petition was authorized by the Court's Order dated June 14, 2000.

4. Accordingly, the Respondents' Motion to Strike should be denied.

5. Should this Court rule otherwise, Crutchfield and Broaddus move this Court to grant them leave to amend and accept the First Amended Petition for Appeal as filed.

6. Rule 1:8 of the Rules of the Supreme Court of Virginia provides that leave to amend shall be liberally granted in furtherance of the ends of justice.

7. No prejudice would result to the Respondents by granting this motion. In fact, all three have already filed Answers to the First Amended Petition for Appeal.

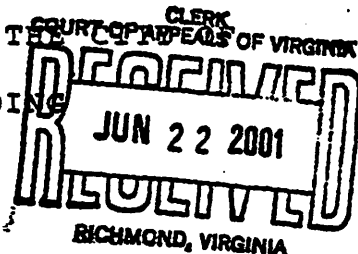
8. Moreover, granting the motion will not delay these proceedings.

9. Granting Crutchfield and Broaddus leave to amend, if necessary, will further the ends of justice.

WHEREFORE, Crutchfield and Broaddus move this Court to deny the Respondents' Motion to Strike, or in the alternative, grant Crutchfield and Broaddus leave to amend and accept the First Amended Petition for Appeal as filed.

1095:01:2

VIRGINIA: IN THE CIRCUIT COURT OF THE  
RICHMOND  
JOHN MARSHALL COURTS BUILDING



FRANCES CRUTCHFIELD, et al.,

Petitioners,

v.

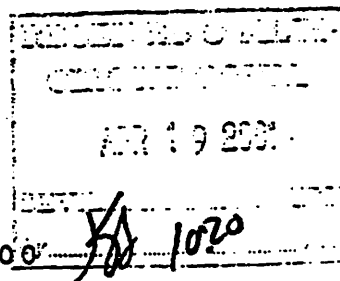
Case No.  
HK-1193

STATE WATER CONTROL BOARD,  
et al.,

Respondents.

Before: THE HONORABLE MELVIN R. HUGHES, JR., JUDGE

HEARING



September 13, 2000

Richmond, Virginia

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1     **Appearances:**

2                     **MCSWEENEY, BURTCH & CRUMP**  
3                     By: JOHN L. MARSHALL, JR., ESQ.  
4                     attorney, of counsel for Plaintiffs

5                     **OFFICE OF THE ATTORNEY GENERAL**  
6                     By: JOHN R. BUTCHER, ESQ.  
7                     attorney, of counsel for Defendant  
8                     State Water Control Board

9                     **COUNTY OF HANOVER**  
10                    By: YVONNE WELLFORD, ESQ. and  
11                    BARBARA M. ROSE, ESQ.  
12                    attorneys, of counsel for Defendant  
13                    County of Hanover

14                             o o o



1 (The hearing in this matter began at  
2 3:15 p.m.)  
3

4 THE COURT: Good afternoon.

5 MR. MARSHALL: Good afternoon.

6 MS. WELLFORD: Good afternoon.

7 THE COURT: All right. What's on your  
8 minds?

9 MR. BUTCHER: Your Honor, I think I have  
10 the first one. John Butcher representing the State  
11 Water Control Board.

12 THE COURT: Uh-huh.

13 MR. BUTCHER: Your Honor has already seen  
14 this case in a motion to strike -- or excuse me, on a  
15 demurrer handled by my colleague, Deborah Feild.  
16 Your Honor overruled the demurrer in May and allowed  
17 Hanover County to be included in the petition for  
18 appeal by amendment.

19 THE COURT: Uh-huh.

20 MR. BUTCHER: There's an order of June  
21 the 14th, and it says, and I quote, Petitioners are  
22 granted leave to amend their petition to name Hanover  
23 County as a party.

24 And that -- as far as I can tell from the  
25 pleadings; I wasn't here -- was the only mention of

1 amendment of pleadings. It was the Court's decision  
2 to allow them, and our objection was that they should  
3 have been dismissed because the County wasn't named.

4 THE COURT: Uh-huh.

5 MR. BUTCHER: The petitioners amended  
6 their petition on June the 30th, and they made  
7 another -- they added the County as a party as the  
8 order allowed, and they made a number of other  
9 additions.

10 In paragraphs 3 and 4, they added the  
11 word riparian and alleged that Ms. Crutchfield and  
12 Mr. Broaddus are riparianors. That's a new term to  
13 this petition for appeal.

14 Paragraph 69 now speaks of the anadromous  
15 fish.

16 THE COURT: Of the what?

17 MR. BUTCHER: Anadromous. Those are the  
18 ones that come out of salt water -- I mean fresh  
19 water to spawn.

20 THE COURT: What's that again?

21 MR. BUTCHER: Anadromous.

22 THE COURT: Anadromous?

23 MR. BUTCHER: Yeah. A-N-A-D-R-O-M-O-U-S  
24 if I spelled it right in my notes here.

25 THE COURT: Uh-huh.

1 MR. BUTCHER: Paragraphs 76 and 77 talk  
2 about the plaintiffs' use of the Pamunkey for  
3 reservation -- for recreation.

4 And paragraphs 81 through 84 allege harm  
5 to the historic resources, aesthetic and conservation  
6 interests and for their goals for the use of their  
7 property. All of these I think could fairly be  
8 characterized as standing allegations that were  
9 absent in the original petition.

10 Now, of course, Rule 1:8 provides that no  
11 amendment shall be made to any pleading except by  
12 leave of court. And these plaintiffs didn't have  
13 leave. They came along and amended this change and  
14 slammed it in without leave of court.

15 Accordingly, we move here, Your Honor, to  
16 strike the word riparian from paragraphs 3 and 4 and  
17 to strike paragraphs 69, 76, 77 and 81 through 84 of  
18 the amended petition for appeal.

19 THE COURT: All right.

20 MS. WELLFORD: Your Honor, Yvonne  
21 Wellford for the County of Hanover. I will be very  
22 brief as we join the motion of the agency's with  
23 respect to this issue.

24 I would like to add simply that to the  
25 extent that there is any ambiguity to the order

1     itself, I think reference to the letter opinion that  
2     accompanied that order that was issued by the Court  
3     on May 24 of this year is instructive, and, in fact,  
4     Virginia case law supports the notion that to the  
5     extent that there is ambiguity, we can refer to the  
6     Court's opinion for any guidance.

7             And in that opinion, there is only one  
8     amendment that is mentioned, and that is the  
9     amendment to allow the County of Hanover to join.

10            And equally important is the fact that  
11     the letter opinion specifically states that there is  
12     enough alleged in the initial pleading that was filed  
13     by the petitioners to confer standing to them.

14            So there simply is no reason for them to  
15     amend to include standing types of allegations. And  
16     for that reason, the amendment certainly is  
17     unwarranted, and we would ask that the motion to  
18     strike be granted on those grounds. Thank you.

19            THE COURT: All right.

20            MR. MARSHALL: Good afternoon, Your  
21     Honor. My name is John Marshall. I'm here on behalf  
22     of the petitioners, Frances Crutchfield and Henry  
23     Broadus.

24            I don't know if the Court recalls or not.  
25     There was a battle of orders of sorts, I guess,

1 between my office and Deb Feild at the attorney  
2 general's office. And there were a number of changes  
3 to the languages -- or the language within each  
4 order.

5 The order that you entered granted us  
6 leave to amend our petition and to name Hanover  
7 County as a party. That was different than what the  
8 attorney's general office submitted to you in  
9 language in its orders. We took that, in good faith,  
10 to mean that we could add Hanover County as a party  
11 and to further amend allegations in our pleading.

12 As both counsel have noted, you've  
13 overruled the demurrer. To the extent, Your Honor,  
14 that there is any confusion about what your order  
15 means, we have filed papers noting that we think it  
16 allows us to amend the petition in the way that we  
17 did, but also asking for leave to amend pursuant to  
18 Rule 1:8. No prejudice is being given to either  
19 party. They have both filed answers to the first  
20 amended petition.

21 So I think as an initial matter, Your  
22 Honor, that your order very simply allows for this.  
23 And I'm not going to beat that into the ground. I  
24 just think the language of the order says that we can  
25 do it. And if it doesn't --

1           THE COURT: I thought the language in the  
2 order -- you just read it. It says you could amend  
3 to include Hanover County.

4           MR. MARSHALL: It says, Granted leave to  
5 amend their petition and to name Hanover County as a  
6 party. We named Hanover County as a party, and there  
7 were additional allegations that were made. They go  
8 to standing. There is no new count. There is no new  
9 claim.

10           And, again, Your Honor, there is no  
11 prejudice to any party here. They filed their  
12 amended answers. This isn't going to delay this  
13 proceeding or in any way prejudice anyone.

14           So I guess we're asking for two forms of  
15 relief. One is that you deny the motion to strike  
16 the amended petition for the reasons that I've stated  
17 regarding language in the order. And secondly, if  
18 you do feel there is confusion and for the sake of  
19 formality, or to clear the decks if you will, that  
20 you grant us leave to amend and accept as filed the  
21 amended petition, which, again, Your Honor, has been  
22 answered. So all parties are ready to go.

23           THE COURT: All right. Well, I think --  
24 frankly, I don't recall allowing the amendment other  
25 than to amend Hanover County. I think that was the

1 subject of the discussion at the last hearing, as I  
2 recall.

3 Let me say as an aside, I've been called  
4 upon a lot recently to remember what I did four,  
5 five, six months ago, and this is another example of  
6 this.

7 So I think, though, based on your  
8 comments and the order, that I only permitted an  
9 amendment to be made -- I'm sorry if it's confusing.  
10 Perhaps that was a battle. I don't remember the  
11 battle.

12 But whatever order I entered indicated  
13 that I did enter, I only meant to allow the amendment  
14 for the inclusion of the County as a party in the  
15 case. The case -- the other case that comes to mind  
16 with -- that the petitioners relied on was the  
17 landfill case of King George County?

18 MR. MARSHALL: BFI case.

19 THE COURT: BFI case, yeah.

20 So the motion will be granted.

21 MS. WELLFORD: Your Honor, we have an  
22 order ready to go. And I think that this will sort  
23 of short circuit some of the problems that I'm  
24 anticipating Mr. Marshall is going to raise with the  
25 next motion.

1                   What this is designed to do is just to go  
2 ahead and, through the order, strike the offensive  
3 provisions of the pleading, and that will circumvent  
4 his need to file anything supplemental.

5                   MR. MARSHALL: Your Honor, if I could.  
6 What about our motion for late filed papers in the  
7 alternative?

8                   THE COURT: What about your motion to  
9 amend now, the motion to amend under Rule 1:8?

10                  MR. BUTCHER: Judge, I would remind you  
11 that this is an appeal. This is not an ordinary  
12 chancery action where you get down to mud wrestling  
13 and then come back up for air and try again. They  
14 were obliged to raise everything they had in that  
15 pleading.

16                  Now what they have done is they have  
17 basically ignored your order and filled it up with a  
18 whole bunch of things that they thought they should  
19 have put in the first time. I'd suggest that this is  
20 litigation. This is not a game of mother, may I.  
21 And I think you ought to hold them to it and require  
22 them to stick with their original pleading in this  
23 respect.

24                  THE COURT: Why do you need to bring in  
25 issues about the fish and the recreation? I think



1 all of that was discussed -- not the fish, but  
2 certainly recreation. While not maybe mentioned in  
3 the original petition, but I think imported on that  
4 was this --

5 MR. MARSHALL: It was, Your Honor. We  
6 just wanted to make it very clear. And I apologize  
7 for any confusion on the order. I don't appreciate  
8 the implication that somehow we just ignored you and  
9 are trying to mock the Court in any way.

10 THE COURT: Well, I can see where you  
11 had --

12 MR. MARSHALL: And I would --

13 THE COURT: -- based on the language --

14 MR. MARSHALL: I do apologize for that,  
15 Your Honor, again. And you'll see with the motions  
16 yet to come, this is an appeal that involves some  
17 interesting issues, standing being one, that the  
18 attorney general's office has moved to take  
19 depositions on. So it's not this little tight  
20 administrative box that it's been portrayed as.

21 And number two, Your Honor, the record is  
22 the record. These allegations are in no way  
23 jurisdictional in terms of having to lay them all out  
24 and petition for appeal. There is absolutely no  
25 reason that leave to amend cannot be granted. No one

1 has shown any reason why they would be prejudiced to  
2 either party.

3 Again, their answers to the amended  
4 petition for appeal have been filed with this court  
5 for the last -- I don't know, whenever they were due.  
6 I think at the end of July or something-like that.  
7 So there's no prejudice to any party.

8 It's not a matter of you opening up some  
9 jurisdictional box that's going to in any way expose  
10 this Court to reversal or -- you know, there's no  
11 basis for such a claim.

12 So it's a simple request to amend  
13 pursuant to Rule 1:8, which, as you know, Your  
14 Honor --

15 THE COURT: So the amendment is allowable  
16 in this context as you would for -- in a civil case?

17 MR. MARSHALL: Absolutely, Your Honor. I  
18 think that the only -- the real catch -- and this was  
19 the focus of the hearing on the demurrer as well.

20 The real catch is that 30-day time limit  
21 in naming the party that must be named and in filing  
22 that notice of appeal and the petition. And that's  
23 what the demurrer was about.

24 And we dealt with that and have overcome  
25 that hurdle in the same way that you could allow

1 Hanover County to be added as a party after the fact,  
2 pursuant to the BFI case.

3 This is -- this is an amendment of --  
4 well, what I would call even less important to some  
5 extent, Your Honor, because it's just several  
6 allegations that go to standing that have nothing to  
7 do with the jurisdictional issue or a 30-day time  
8 limit or something like that.

9 THE COURT: What does the fish have to do  
10 with the case?

11 MR. MARSHALL: Your Honor, under the  
12 federal law -- and we'll hear more about this today  
13 on this deposition point. And we argued this, I  
14 believe. I don't know if you will recall, but it's a  
15 Fourth Circuit case called Friends of the Earth, a  
16 United States Supreme Court case which preceded  
17 Friends of the Earth, Your Honor, that was Friends of  
18 the Earth v. Laidlaw that also dealt with the Fourth  
19 Circuit case.

20 And those two cases stand very clearly  
21 for the proposition that any allegation of harm to an  
22 individual's recreational aesthetic, economic  
23 interests are sufficient to confer standing.

24 Now, they distinguish between -- in this  
25 case, this property is located in Hanover County. As

1 you know, these are the landowners where this  
2 discharge outfall for the waste water treatment plant  
3 is proposed to be located.

4 The courts did distinguish between  
5 someone who lives in Arizona raising an allegation  
6 that, well, the aesthetic interests that I enjoy in  
7 that property are gone. That person is too far  
8 removed. These are the property owners.

9 THE COURT: Uh-huh.

10 MR. MARSHALL: So the reason we've added  
11 those allegations goes specifically to, again, the  
12 standing issue and go directly to what the courts  
13 have said establish standing without a doubt.

14 So that's why -- in answer why the  
15 anadromous fish were added and those kinds of things.  
16 Those are the types of injuries that clearly  
17 establish standing pursuant to Supreme Court and  
18 Fourth Circuit precedent.

19 And as you may recall, the statute that  
20 deals with APA review has incorporated the federal  
21 standing requirements, the three-prong test that  
22 Article 3 requires and that federal courts have  
23 applied for years.

24 So, again, we're merely asking for leave  
25 to amend pursuant --

1 THE COURT: Well, having found that the  
2 petition was sufficient on its face and, according to  
3 them, having overruled the demurrer, why do you need  
4 these additional allegations --

5 MR. MARSHALL: Your Honor, I think --

6 THE COURT: -- if the ruling was there  
7 was enough already alleged, stated, that gave you  
8 standing?

9 MR. MARSHALL: I understand that, Your  
10 Honor. I think when -- you know, again, as we  
11 interpreted the order and naming Hanover County as a  
12 party, bringing a new party into the litigation, we  
13 wanted to just eliminate any issue as to standing to  
14 deal with it. And because of subsequent motions that  
15 have been filed, we may still have to work through  
16 some of that.

17 But that was the reason we did it. We  
18 just thought it was a way to make sure that no  
19 questions would be asked, it would be done, and we  
20 would move forward. So that's why we've done it.

21 But, again, Your Honor, it's not  
22 something that is being used to give this Court  
23 jurisdiction when it doesn't have it, asking you to  
24 extend a filing deadline or anything like that. It's  
25 merely a motion to amend the pleading. And no one

1 has been prejudiced. Again, the answers have been  
2 filed.

3 THE COURT: All right.

4 MS. WELLFORD: I would like to respond on  
5 the issue of prejudice. And I think that the most  
6 obvious prejudice that results from an amendment  
7 being allowed at this point in time is that by virtue  
8 of these previously unauthorized amendments, the  
9 order allowing the amendments would now remove from  
10 the respondents the ability to raise those arguments  
11 on appeal if this were to go up on appeal.

12 The same standing issues that they argued  
13 initially at the demurrers are suddenly removed, or  
14 at least significantly altered, by the addition of  
15 these other allegations. And clearly that is a  
16 prejudice to the respondents in this action. And for  
17 that reason, we certainly disagree with  
18 Mr. Marshall's assessment that there is no harm or  
19 foul in granting the amendments that he's requesting  
20 at this point.

21 THE COURT: You say you argue -- you  
22 question that there's no harm or foul?

23 MS. WELLFORD: Yes. Mr. Marshall is  
24 suggesting that there's no harm or foul by allowing  
25 the amendments at this point because the parties have

1 already answered the petition as it has been amended.

2 But it is our position that if the Court  
3 were to go ahead and strike those offensive  
4 inclusions that the -- the amendments that were not  
5 authorized, it would put the respondents back in the  
6 same position that they were for purposes of, you  
7 know, subsequent appeals in terms of being able to  
8 raise those issues later on.

9 THE COURT: I see. Mr. Butcher, do you  
10 have anything?

11 MR. BUTCHER: That covers it for me,  
12 Judge.

13 THE COURT: All right. Let me hold that  
14 in advance. There's some other topics we need to  
15 discuss.

16 MR. BUTCHER: Yes, sir. I think I have  
17 that one as well.

18 Judge, as the petition now stands, the  
19 petitioners have alleged standing with respect to two  
20 historic resources that are on the property here.  
21 The issue as to standing arises under Section 29 of  
22 the water control law, which creates the right of  
23 appeal here and which provides the standards for  
24 standing.

25 Basically, what has to be an owner

1     agreed -- and I think that there's no dispute that  
2     these folks don't meet that. Owner agreed is  
3     generally the person who got denied the permit who  
4     owns the sewage treatment plant.

5             Where I understand these folks to be  
6     coming from is the second tract standing in this  
7     statute. And basically, that provides that somebody  
8     who participates in the public proceedings, that is,  
9     comes in and comments on the -- as these folks did;  
10    there's no dispute about that -- and has Article 3  
11    standing under the federal constitution, then has  
12    standing. And Your Honor dealt with some of that  
13    issue in the letter opinion earlier in this case.

14            The statute even lays out the  
15    requirements for that. You have to be a person who  
16    has suffered an actual or imminent injury which is an  
17    invasion of a legally protected interest and which is  
18    comparably particularized. That injury has to be  
19    fairly traceable to the board's decision, and the  
20    injury has to be one that's likely to be regressed by  
21    a favorable decision in the appeal.

22            The petitioners, as I said, allege harm  
23    in the amended petition in two respects; first, the  
24    historic site at New Castle Town and second, the  
25    historic site at Melbourne, which I believe is an old



1 homestead or an old mansion on the property.

2 The Water Control Board didn't decide  
3 those issues because those issues weren't before  
4 them. The Water Control Board will take from anybody  
5 who comes in and wants to talk about the permit  
6 that's at issue.

7 And so the agency file that we'll be  
8 providing to the Court won't really have anything in  
9 it beyond the petitioners bald allegation that this  
10 is going to harm them. There won't be any evidence  
11 on the subject, and there certainly won't be any  
12 decision by the Water Control Board for this Court to  
13 review. So we think that the petitioners are going  
14 to be obliged to prove their standing when we get to  
15 try this case.

16 We're interested to notice that they  
17 didn't think enough of standing to mention it in  
18 their original petition for appeal except in a letter  
19 from their lawyer. It didn't become an issue until  
20 it became a legal issue. But now that it is a legal  
21 issue, I think we're going to have to decide it.

22 My problem is that I don't want to come  
23 in here in November, or whenever we do this, to try  
24 this case -- to try this appeal really on the merits  
25 and face a bunch of evidence that I haven't seen

1 before.

2 But as I told you, this is an appeal. As  
3 a matter of fact, Rule 28:5 tells us that we're in  
4 equity, that part four doesn't apply. So all of the  
5 discovery rules that we're all accustomed to don't  
6 apply.

7 And then it says that there are not to be  
8 any depositions except by order of the Court. And I  
9 think that the rule recognizes that on some  
10 occasions, there's going to be a need to do some kind  
11 of discovery.

12 And I think that this case provides the  
13 example. Here we have an issue that is not going to  
14 be set out by the agency decision. It won't be  
15 possible to decide it based on the agency file.

16 It's going to take real evidence. And  
17 that means that these folks are going to have to  
18 bring on testimony or paper or something to prove  
19 their allegations of standing.

20 And we're going to want to be able to  
21 test that evidence. And we just don't want to get  
22 into the position of coming to the hearing and  
23 finding out what the evidence is. That's trial by  
24 surprise, and we got rid of that a long time ago.

25 So what I'm asking for is simply leave to

1 spend a half a day deposing these petitioners about  
2 their standing allegations and finding out the facts  
3 on which they rely in order to allege standing.

4 So my motion is simply for leave to  
5 conduct depositions of the petitioners on the  
6 standing issues.

7 THE COURT: All right.

8 MR. MARSHALL: Your Honor, I think the  
9 motion to deposition speaks to why it would be more  
10 than appropriate to allow the amended complaint. The  
11 statute that Mr. Butcher referenced does lay out the  
12 three elements that must be met to establish Article  
13 3 standing.

14 They don't say -- the statutory section  
15 says nothing about having to plead that. It's  
16 something that has to exist, as I read it, I think,  
17 from beginning to end of trial just as it would at  
18 any time. If someone loses standing to maintain a  
19 lawsuit, then the Court is without jurisdiction to  
20 adjudicate that.

21 And for my clients, the allegations that  
22 are contained in the amended complaint all go to  
23 their standing. That includes damage to historic  
24 resources. That includes the negative impact to  
25 their recreational and aesthetic interest, the fact

1 that they used to swim in the river and no longer  
2 will. All of those go to standing and exist. And my  
3 clients will get on the witness stand, if need be,  
4 and testify to that.

5 And under the law, the Supreme Court of  
6 the United States and the Fourth Circuit Court of  
7 Appeals applying this Article 3 federal standing  
8 standard indicate without a doubt that that's enough.

9 Now, if the attorney general's office, if  
10 the State Water Control Board wants to challenge  
11 that, I think the more efficient way to do it, rather  
12 than having a day of depositions, is to take  
13 testimony when we have a hearing on the merits. We  
14 make that the first order of business.

15 I can tell you what my clients will  
16 testify to. It is what is in the amended petition;  
17 that they used to swim in the river and use the  
18 river, that they no longer will; that they used to  
19 use and enjoy the fish in the river, they no longer  
20 will; that their historic and archeological resources  
21 will be damaged by this. All -- and there are others  
22 that are contained in that petition. And they all go  
23 to standing.

24 And if the Court is going to consider any  
25 of it, it's got to consider all of it to make the

1 correct conclusion as to whether or not my clients  
2 have standing, which, again, under the case law, they  
3 clearly do.

4 So we're opposed to depositions just  
5 because I think, to be honest, Your Honor, it's a  
6 waste of judicial resources, ours, and I think the  
7 State's as well. They would disagree with that, but  
8 I know it is for us because we're going to have to  
9 spend half a day with a court reporter.

10 But if standing is, in fact, an issue  
11 that's going to be raised, you're going to have to  
12 deal with it in some way. So let's take the evidence  
13 at a hearing. You can hear the testimony. We can  
14 direct, they can cross, and we can go from there if  
15 that is an issue that the State Water Control Board  
16 is interested in pursuing.

17 But, again, it's not something that is  
18 limited solely to what was alleged. If my clients  
19 have standing, they have standing. And the Court, if  
20 the can of worms is going to be opened, needs to hear  
21 all of the reasons my clients have standing.

22 But as to the particular motion before  
23 you now, we are opposed to the motion to take  
24 depositions. We think the same end can be achieved  
25 much more efficiently by doing that on the day of the

1 hearing on the merits.

2 THE COURT: Thank you.

3 MR. BUTCHER: Your Honor, I'm always a  
4 little bit worried when I have to litigate against a  
5 man named John Marshall in this building. It's even  
6 more troublesome when I find myself agreeing with  
7 him. And he's exactly right; if these folks don't  
8 have standing, then Your Honor doesn't have  
9 jurisdiction and there's no case.

10 At that point, however, I think we cut  
11 paths. What the petitioners are really suggesting --  
12 well, first off, the complaint here doesn't really  
13 allege the facts for establishing standing. It  
14 alleges conclusions. They use it. They don't tell  
15 us how often they use it. They don't tell us how  
16 many people use it. We don't see the pictures. We  
17 don't see the family records that talk about the use.  
18 All we have is a bald statement we use it. None of  
19 the facts that we need to get into to understand this  
20 situation.

21 What they are suggesting is that we ought  
22 to come in here and suffer a trial by surprise on  
23 that issue. And even more remarkably, what the  
24 petitioners are suggesting, Your Honor, is that we  
25 ought to use you instead of a court reporter to work

1 out these facts.

2 I'd suggest that they've got it exactly  
3 backwards; that there's a well-established process  
4 for doing this kind of thing, and that is to let  
5 Mr. Marshall and his clients and me and the County  
6 sit down in a comfortable room someplace and spend a  
7 couple of hours talking to a court reporter and  
8 thrash out these issues so that when we come see you,  
9 we'll have a focused case, we'll know whether we need  
10 to raise these issues at all. And if we do need  
11 them, we'll know where to go with them, rather than  
12 coming in here and thrashing out and wasting your  
13 time and ours.

14 On that basis, Your Honor, we'll ask you  
15 for leave to conduct those depositions.

16 THE COURT: I think the depositions could  
17 be useful in the case, the case as a whole. The  
18 motion to allow them is granted.

19 Is that all?

20 MS. WELLFORD: Mr. Marshall has some.

21 MR. MARSHALL: Are we still -- I guess  
22 obviously the initial motion is still pending.

23 THE COURT: Yeah, but do you have any  
24 other motions?

25 MR. MARSHALL: Yes, Your Honor.

1 THE COURT: What are they?

2 MR. MARSHALL: Our motion is very simple.  
3 It's very forward. It's a motion to strike the  
4 hearing date that was noticed by Hanover County for  
5 November the 9th for a hearing on the merits.

6 The State Water Control Board did not  
7 join in that motion. And I checked -- the last time  
8 I checked was several days ago. Correct me if  
9 something has changed, but the record indicates it  
10 has not yet been filed. I don't know if it arrived  
11 yesterday.

12 THE COURT: Is that your objection to it,  
13 because the record isn't here or --

14 MR. MARSHALL: Your Honor, we've had  
15 no -- yes, Your Honor.

16 THE COURT: Okay.

17 MR. MARSHALL: Obviously, this is a  
18 matter that is going to be briefed. We discussed the  
19 possibility of a hearing on the merits on November  
20 the 9th. And as we thought about it, realizing we  
21 had a motion to take depositions, a motion to strike  
22 our amended petition pending and the fact that the  
23 record wasn't filed, we said they will be very much  
24 prejudiced if all of this unfolds in the next several  
25 weeks and we have a hearing on the merits scheduled



1 for November the 9th.

2 I know we will want to brief it because  
3 it is a record-review case, and that's going to be  
4 something that I think Your Honor can decide on the  
5 papers. The other side will want to do that.

6 As to the record not being here, I have  
7 not had a chance to see what's in it, to see if it's  
8 complete, to see if we need to move to supplement, to  
9 see if we need to move to strike, let alone to  
10 prepare our brief. And so I think it's unreasonable  
11 that that hearing be noticed prior to that happening  
12 because that has to be here as a matter of law.

13 In addition, we had the two motions  
14 pending today. And I raised those with the County in  
15 two letters which are attached to the motion that we  
16 filed in the Court. They chose to notice it anyway,  
17 but that's why we moved to strike. We haven't had a  
18 chance to review the record and do all the things  
19 that we need to do to prepare.

20 Once that is here, then it is appropriate  
21 to talk about a hearing on the merits. Because  
22 the -- if you will, the field is set, and we can go  
23 from there. But, again, we now have depositions.  
24 That's -- we've been ordered to participate in  
25 depositions as well. That's going to take some time.

1 And, you know, I know we all have busy schedules, and  
2 that's part of what plays into this as well.

3 MS. WELLFORD: Thank you, Your Honor. It  
4 is the County's position that the November 9 date  
5 that has been scheduled at this point for the hearing  
6 on the merits is certainly appropriate timing wise in  
7 terms of the way this case has developed.

8 This case was filed in June of 1999. So  
9 it's well over a year old. The nature of this case  
10 is a simple review of the agency's actions. So we're  
11 not talking about a situation that's going to involve  
12 a whole lot of preparation to get ready for trial.

13 As Mr. Butcher has already suggested,  
14 what he is anticipating in terms of deposition time  
15 is a half day of depositions. That can hardly be  
16 said to impact the overall preparation time that  
17 petitioner and their counsel need in this case.

18 Mr. Marshall has argued that the fact  
19 that there is no record filed with the Court at this  
20 point is somehow justification for delaying the  
21 hearing in this case. And quite frankly,  
22 Mr. Marshall's argument is really a red herring.

23 Number one, there is no requirement that  
24 a record even be filed in this case. The rules of  
25 the Supreme Court, Rule 2(a):3 requires that the

1 filing of a record by the agency only occur when  
2 there has been a formal hearing in the agency itself.  
3 No such hearing ever occurred. There was nothing  
4 litigated in the agency. The agency simply issued  
5 the permit.

6 Equally applicable is the Administrative  
7 Process Act at Virginia Code Section 9-6.14:17, a lot  
8 of numbers. There is a requirement that the Court  
9 review the agency's action on the whole evidential  
10 record only when the issue was actually litigated in  
11 the agency below. And as I've said, there was no  
12 such litigation in the agency on this permit.

13 Equally important I think is the fact  
14 that, in fact, these petitioners have had extensive  
15 access to the record in this case. They have filed  
16 no less than four different FOIA requests to this  
17 agency and have been the beneficiaries of just reams  
18 of documents out of this agency.

19 THE COURT: Does it make any deference,  
20 though, as to whether or not this particular judge  
21 will be available on the 9th? I don't think I will  
22 be.

23 MS. WELLFORD: Well, according to your  
24 scheduling clerk, you are.

25 THE COURT: Okay. All right.

1 MS. WELLFORD: Yeah, this was done in  
2 conference with your office.

3 THE COURT: They know more about me than  
4 I do. I thought, though, that this --

5 MS. WELLFORD: Certainly if you're going  
6 to be here, Your Honor --

7 THE COURT: Well, I will be here, but I  
8 thought that the time frame coincided with some  
9 time -- go ask Stephanie -- coincided with a time I  
10 would be hearing motions in the month of November.

11 MS. WELLFORD: Right. And when we were  
12 told -- when we spoke -- when I spoke with the  
13 clerk's office, they said that because of the nature  
14 of this hearing, that it was an administrative  
15 review, that they wanted it scheduled during motions  
16 week.

17 THE COURT: Oh. So it would be  
18 scheduled.

19 MS. WELLFORD: So that's how we got --

20 THE COURT: I see. Okay. So how long  
21 will this take that day?

22 MS. WELLFORD: We have it scheduled for a  
23 half day, 2 o'clock.

24 THE COURT: Oh, I see. Well, that's  
25 likely, then. All right.

1 MS. WELLFORD: Yeah. And quite frankly,  
2 Your Honor, in conferring with both Mr. Butcher and  
3 Mr. Marshall, I don't think any of us disagree that  
4 this should take maybe three hours at best.

5 THE COURT: I see. Okay.

6 MS. WELLFORD: Going back to the point  
7 about the --

8 THE COURT: Well, I'm right in that way,  
9 but apparently they scheduled it during the motions  
10 week.

11 MS. WELLFORD: Yes. Going back to the  
12 point about the FOIA request. The petitioners have  
13 already had access and have the documents that they  
14 need to put together whatever briefs that they are  
15 going to be submitting. There are no surprises here.

16 And for this reason, I think, you know,  
17 it's clear that -- the mere fact that there's no  
18 record here today is of no consequence.

19 By the way, I believe Mr. Butcher -- and  
20 you can confirm that Mr. Butcher has information from  
21 the agency that it should be filed by Friday of this  
22 week. So it will be here.

23 Also, with regard to the outstanding  
24 motions, that was the other argument that  
25 Mr. Marshall offered up to the Court as justification

1 for changing the hearing date. I think that, you  
2 know, if we look at the motions to strike that the  
3 respondents argued first this afternoon, if they are  
4 granted, they can be addressed by the order that I  
5 proposed, which basically does not require  
6 Mr. Marshall to do anything further. He doesn't have  
7 to file any additional pleadings. And the agency's  
8 motion for leave to take depositions, we're talking a  
9 half day. That's not going to impact on the  
10 schedule.

11 So I think the bottom line is that the  
12 motions that have been argued today really are not --  
13 however they are sorted out, are not going to impact  
14 on the schedule. And for that reason, the County  
15 respectfully requests that the Court keep the  
16 scheduled hearing at November 9. Thank you.

17 MR. BUTCHER: If I could speak to this  
18 briefly, Your Honor. Ms. Wellford pointed to the  
19 rule, which is, I believe, 2(a):3. There's another  
20 prerequisite in the rule for filing a record, and  
21 that is for the plaintiffs -- the plaintiffs to file  
22 a transcript. There's no such transcript in the  
23 file.

24 If there were a requirement for us to  
25 file a record, it still would not have kicked in.

1 There is none. As a matter of fact, Section 17 of  
2 the APA specifically deals with the situation where  
3 the agency decided the case without a formal hearing.

4 It provides that the Court is to decide  
5 this on the agency file, minutes and records of this  
6 proceeding, and there's no requirement for a formal  
7 filing.

8 Now, we have had our folks busy, and they  
9 now have a foot of paper for you, Judge. It's all  
10 stamped and indexed and Bates stamped, and it's off  
11 to the copier now. And they tell me they're going to  
12 have it back Thursday. And so we're going to send it  
13 down and make your clerk mad at me.

14 THE COURT: A foot of paper, where is it  
15 from?

16 MR. BUTCHER: A foot of paper. It's the  
17 agency file in this case.

18 THE COURT: Oh. Even though they wanted  
19 a hearing or --

20 MR. BUTCHER: No. Just so you'll have it  
21 here. But the fact is that there was -- the fact is  
22 that these folks have had access to it all along.

23 THE COURT: Uh-huh.

24 MR. BUTCHER: What's really astonishing  
25 about this case, Judge, is that I'm the defendant.

1 I'm the person who is supposed to be kicking and  
2 screaming and dragging my heels trying to put this  
3 thing off. I'll note to you that the plaintiffs  
4 filed this thing a year ago, and now they are trying  
5 to avoid trying their case. I suggest to you, Judge,  
6 that we go ahead and try this thing in November and  
7 get a decision one way or the other.

8 MR. MARSHALL: Your Honor, I'll be brief,  
9 but, again, the prejudice to my clients, the record  
10 hasn't been filed. In any administrative appeal in  
11 which I've been involved -- and I've litigated  
12 several in this building -- there has always been a  
13 record filed.

14 My conversations with Mr. Butcher's  
15 predecessor in this case, Deborah Feild, were to the  
16 effect that a record was being prepared and that it  
17 was going to take some time to get it there.

18 The County went off and noticed its  
19 hearing on its own, despite the fact that the record  
20 isn't here. You've just heard it's huge.

21 Now, Ms. Wellford says, well, they have  
22 sent FOIAs. Well, if I can bring in all this outside  
23 information, if that's the deal, we'll litigate it  
24 that way. But we can't do that because it's a  
25 record-review case. It's an administrative appeal



1 based on what was before the State Water Control  
2 Board when it issued this permit. So that argument  
3 is fatuous.

4 THE COURT: Well, this record, which has  
5 been referred to as being a foot deep, it's not a  
6 terribly complex question or -- question -- or  
7 materials that lead to complex issues, is it?

8 MR. MARSHALL: Well, I think there is. I  
9 mean, it's going to have to be reviewed to determine  
10 if the decision that the State Water Control Board  
11 made --

12 THE COURT: These are mostly agency  
13 documents that refer to the processing?

14 MR. MARSHALL: It's going to be agency  
15 documents. It's going to be public comment. It's  
16 going to be evidence that was submitted I know by my  
17 clients and other clients on the issues that the  
18 State Water Control Board was addressing as it went  
19 through the process of determining whether or not to  
20 issue this permit.

21 Our argument is the action that they took  
22 in issuing the permit was arbitrary and capricious  
23 and contrary to law. That's based on the record,  
24 which isn't even in this court yet.

25 And, you know, we have to have the right,

1 Your Honor, to review that to see what's in it, to  
2 make sure the things that we submitted are a part of  
3 it, to strike things that may not be a part of it if  
4 those are included and --

5 THE COURT: Mr. Butcher, when might this  
6 record be made available again?

7 MR. BUTCHER: Judge, I have -- Friday is  
8 the short answer.

9 THE COURT: Friday?

10 MR. BUTCHER: But I have to take issue  
11 with Mr. Marshall's continuing use of the word  
12 record. The word record refers to Rule 2(a):3 and  
13 the four corners record of an administrative  
14 proceeding, whether there was a litigated proceeding.  
15 There has been no litigated proceeding here, and  
16 there is no record. What the Water Board will be  
17 sending you is a copy of excerpts from its file,  
18 minutes and the records of its proceedings.

19 MR. MARSHALL: I won't spend any more  
20 time arguing semantics with the Court. They are  
21 sending what they used to make its decision. That's  
22 a record.

23 And I believe, Your Honor, that once  
24 that's filed, then we can discuss a trial date on the  
25 hearings of the merits.

1           And I do take some offense, Your Honor,  
2   that yes, these depositions may take half a day. But  
3   I have a very business schedule. My clients are  
4   busy. We have to calendar this in. And I don't want  
5   to make a mountain out of a molehill, but I do kind  
6   of resent the notion that everything else can stop  
7   for the County of Hanover.

8           We're litigating this case in due course.  
9   We've been litigating it, as they noted, since last  
10   year, but there are many people involved and many  
11   schedules. And, you know, we will get to it when  
12   that record is filed. We will arrange for a hearing  
13   date on the merits, Your Honor.

14           THE COURT: Counsel, with regard to the  
15   request to amend under Rule 1:8, that motion for that  
16   is denied. And I think we'll keep the trial date as  
17   it is and do the best we can.

18           Thank you.

19           MR. MARSHALL: Thank you, Your Honor.

20           THE COURT: And you can have Mr. Marshall  
21   sign that order and give it to the bailiff.

22           MS. WELLFORD: We have a couple of other  
23   orders that will achieve what you've determined, Your  
24   Honor.

25           THE COURT: All right. I'll send him in.

1 You can give them to him.

2

3 (The hearing in this matter concluded at  
4 3:55 p.m.)

5

6 REPORTER'S CERTIFICATE -

7 I do hereby certify that the foregoing is a  
8 true and accurate transcription of my stenographic  
9 notes taken in this matter to the best of my ability.

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Tracy Stroh - Shorthand Reporter

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**VIRGINIA:**

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

**FRANCES BROADDUS CRUTCHFIELD, et al.,**

**Petitioners,**

**v.**

**Chancery No. 760CH99K01193-00**

**STATE WATER CONTROL BOARD, et al.,**

**Respondents.**

**ORDER**

**This matter is before the Court on the motions of Respondents State Water Control Board and County of Hanover, Virginia, to strike the First Amended Petition for Appeal, which motions were briefed and argued by counsel for the parties. Upon consideration whereof, the Court finding good cause therefor, it is hereby ORDERED**

**That the following provisions of the First Amended Petition for Appeal shall be and are hereby stricken from the pleading:**

- 1. Paragraphs 3 and 4: the word "riparian";**
- 2. Paragraph 69: the entire paragraph;**
- 3. Paragraph 76: the entire paragraph;**
- 4. Paragraph 77: the entire paragraph;**
- 5. Paragraph 81: the entire paragraph;**
- 6. Paragraph 82: the entire paragraph;**
- 7. Paragraph 83: the entire paragraph; and**
- 8. Paragraph 84: the entire paragraph.**


Seen and objected to: for the reasons stated in open court and in the  
Memoranda filed by counsel.



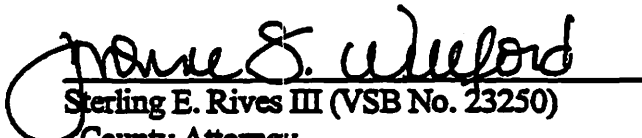
William B. Ellis (VSB No. 19753)  
John L. Marshall, Jr. (VSB No. 38474)  
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Post Office Box 1463  
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The Court shall send a copy teste to all counsel of record.

ENTER: 9/13/00

  
\_\_\_\_\_  
M. R. Hughes, Jr., Judge

We ask for this:

  
\_\_\_\_\_  
Sterling E. Rives III (VSB No. 23250)  
County Attorney

Barbara M. Rose (VSB No. 21140)

Deputy County Attorney

Yvonne S. Wellford (VSB No. 26074)

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\_\_\_\_\_  
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Senior Assistant Attorney General

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900 East Main Street

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**VIRGINIA:**

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

**CRUTCHFIELD**

**v.**

**Chancery No. 760CH99K01193-00**

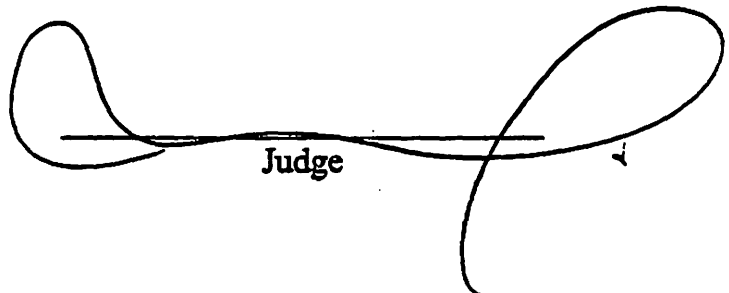
**STATE WATER CONTROL BOARD**

**ORDER**

On September 13, 2000, the parties came to be heard on the motion of the State Water Control Board for leave to conduct depositions of the petitioners.


Upon consideration of the pleadings and the arguments of counsel, the Court ORDERS that the State Water Control Board is granted leave to conduct depositions of the Petitioners for the purpose of addressing only the issue of Petitioners' standing to bring the present action.

ENTER this 13<sup>th</sup> day of September, 2000

  
Judge



**WE ASK FOR THIS:**

  
Mark L. Earley  
Attorney General

John R Butcher  
Virginia Bar No. 18761  
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and Department of Environmental Quality

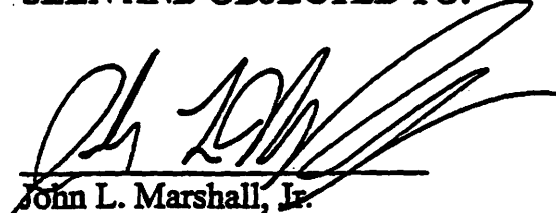
**SEEN:**

  
Sterling E. Rives, III  
County Attorney

Barbara M. Rose  
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Yvonne S. Wellford  
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Counsel for the County of Hanover

**SEEN AND OBJECTED TO:**



**John L. Marshall, Jr.  
McSweeney, Burtch & Crump, P.C.  
Post Office Box 1463  
11 South Twelfth Street  
Richmond, Virginia 23218-1463  
Counsel for Frances Broadbuss Crutchfield and  
Henry Ruffin Broadbuss**

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Printed September 12, 2000 at 10:18 AM**

**VIRGINIA:**

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

**CRUTCHFIELD**

**v.**

**Chancery No. 760CH99K01193-00**

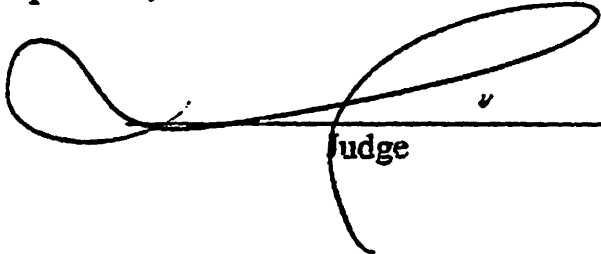
**STATE WATER CONTROL BOARD**

**ORDER**


On September 13, 2000, the parties came to be heard on the motion of the Petitioners for leave to amend their Petition for Appeal to include the averments that the Court has stricken upon respondents motion.

Upon consideration of the pleadings and the arguments of counsel, the Court concludes that the motion should be, and it hereby is, DENIED.

ENTER this 24 day of September, 2000

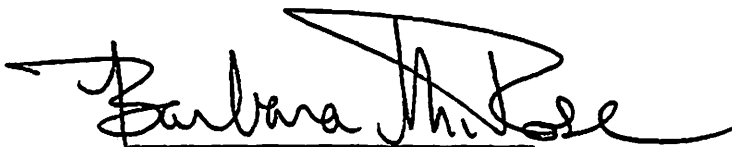
  
Judge

**WE ASK FOR THIS:**

  
Mark L. Earley  
Attorney General

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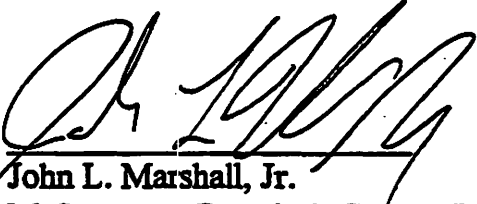
**WE ASK FOR THIS:**

  
Sterling E. Rives, III  
Virginia Bar No. 23250  
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Barbara M. Rose  
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Deputy County Attorney

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Counsel for the County of Hanover

**SEEN AND OBJECTED TO for the reasons stated in the Petitioners'  
Pleadings and in open court:**



**John L. Marshall, Jr.  
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Post Office Box 1463  
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Richmond, Virginia 23218-1463  
Counsel for Frances Broaddus Crutchfield and  
Henry Ruffin Broaddus**

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