

VIRGINIA:

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

THE CHESAPEAKE BAY FOUNDATION, INC., )  
)  
GEORGE T. and NELL MINTON, and )  
)  
C. PEARCE COADY, )  
)  
Appellants, )  
)  
v. )  
)  
COMMONWEALTH OF VIRGINIA, ex rel. )  
VIRGINIA STATE WATER CONTROL BOARD, )  
)  
ROBERT G. BURNLEY )  
Director, Department of Environmental Quality, and )  
)  
TOWN OF ONANCOCK, VIRGINIA, )  
)  
Appellees. )

Case No. 760CH04001390-00

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**MOTION FOR LEAVE TO INTERVENE BY THE  
VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES  
AND ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES**

The Virginia Association of Municipal Wastewater Agencies, Inc. (“VAMWA”) and the Association of Metropolitan Sewerage Agencies (“AMSA”) respectfully move this Court pursuant to Rule 2:15 of the Rules of the Supreme Court of Virginia for leave to intervene in this action. Intervention is appropriate because VAMWA and AMSA have significant interests in the issues the appellants seek to bring before this Court and, as set forth in Rule 2:15, have defenses that are “germane to the subject matter of the proceeding.”

## THE INTERVENORS

VAMWA is a nonprofit association incorporated in 1991 under the laws of the Commonwealth of Virginia. VAMWA's mission is to facilitate the efforts of its members to protect public health and the environment in an efficient and cost-effective manner. VAMWA's membership includes 49 local governments, water authorities and sanitation districts that own and operate municipal wastewater treatment plants (*i.e.*, "publicly owned treatment works" or "POTWs") throughout Virginia. Collectively, VAMWA members serve over 90 percent of Virginia's sewered population, plus businesses, industries and institutions. The Town of Onancock is a member of VAMWA.

AMSA has represented the interests of the nation's POTWs since 1970. AMSA is comprised of nearly 300 POTW members who serve the majority of the United States' sewered population and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA's members operate POTWs under federal and state laws and regulations in cities and towns across the United States. AMSA's membership includes 15 member agencies in the Commonwealth of Virginia, including many POTWs in the Bay watershed. As an organization, AMSA strives to maintain a leadership role in the development and implementation of a scientifically based, technically sound, and cost-effective environmental and clean water programs to protect public and ecosystem health.

## ARGUMENT

Appellant Chesapeake Bay Foundation ("CBF") acknowledges in its recently revised book, Turning the Tide: Saving the Chesapeake Bay that a reduction in POTW contributions is "the sole source of major, documented cleanup gains in nutrients entering the Bay." POTWs will continue to take a leadership role in the Bay cleanup under the approach that the Governor

of Virginia and other Bay state leaders established in the multi-jurisdictional Chesapeake 2000 Agreement. That agreement sets forth a demanding approach to a difficult problem, and VAMWA and AMSA members have embraced its elements. Nevertheless, CBF – armed with a new \$1.25 million litigation grant from a Pennsylvania private foundation<sup>1</sup> – is taking a small Virginia town to court as part of a broader effort to preempt pending state regulations governing further nutrient reductions. Rather than being about real environmental concerns, this case has been brought against Onancock to make a political statement. As reported in The Virginian-Pilot on August 17, 2004, “They were the first to pop up on the radar screen,” conceded a CBF spokesman. “We’re not picking on Onancock,” he added. “We understand their financial difficulties. We just want the state to be more aggressive with a problem that has existed for years without much being done about it.”<sup>2</sup>

The outcome of this litigation is of great importance to POTWs statewide because it will likely establish a significant legal precedent governing POTW operations under laws, regulations and permits administered or issued by the Virginia State Water Control Board (“Board”) and the Virginia Department of Environmental Quality (“DEQ”).

**A. VAMWA AND AMSA WOULD RAISE GERMANE DEFENSES**

Rule 2:15 allows intervention for the purpose of asserting “any claim or defense germane to the subject matter of the proceeding.” VAMWA and AMSA should be permitted to intervene in this action because they have interests and defenses germane to the subject matter of this litigation.

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<sup>1</sup> See CBF Press Release dated July 7, 2004 (attached as Exhibit A).

<sup>2</sup> See “Town sucked into center of Bay pollution debate,” S. Harper, The Virginian-Pilot (Aug. 17, 2004) (attached as Exhibit B).

CBF's central contention in its twenty-nine page petition is that the Board erred by reissuing a permit to Onancock without specific numeric permit limits for two nutrients, nitrogen and phosphorous. If permitted to intervene in this case, VAMWA and AMSA would defend, in part, on the grounds that the Board correctly declined to impose numeric limits, though not for the reason the Board cited in declining to impose the limits.<sup>3</sup>

At the heart of this case is one of the most significant Clean Water Act regulatory issues nationally. Consistent with the Clean Water Act (and in Virginia, the State Water Control Law), the regulated community desires a logical "ready, aim, fire" approach to water quality investments including (1) setting scientifically sound water quality standards for surface waters, (2) fairly allocating cleanup responsibility to all sources of the pollutant of concern, and (3) issuing and complying with individual permit limits consistent with the standards and allocations. To its significant credit, the multi-state Chesapeake Bay Program, which includes Virginia, is generally taking this approach. In contrast, CBF demands that regulators guess at proper facility-specific permit limits *before* proper water quality standards are adopted and a fair allocation of reduction responsibility is made among the various sources of the pollutant. CBF's "ready, *fire*, aim" approach to Virginia's new \$3 billion Chesapeake Bay water quality initiative is completely unwarranted and legal untenable.

More specifically, one of the main defenses VAMWA and AMSA would raise is that scientifically defensible water quality standards are an essential prerequisite for issuing the permit limits in question. Such standards do not yet exist in Virginia because the Board and DEQ are in the process of adopting them. In their absence, the Board has not issued the particular type of permit limits sought by CBF in the 29-year history of its Virginia Pollutant

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<sup>3</sup> The Board declined to impose numeric limits because it did not believe it had sufficient effluent monitoring data at this time to calculate reasonable limits.

Discharge Elimination System Permit Program, 9 VAC 25-31, with the one exception (to intervenors' knowledge) of the Phillip Morris facility's permit noted below. Instead, the Board and DEQ have sought and achieved significant nutrient reductions through means such as the Board's Nutrient Enriched Water Policy and DEQ's Water Quality Improvement Act grants program.

VAMWA and AMSA would also defend on the grounds that, even if proper water quality standards were in effect, they alone would not provide a reasonable basis for establishing any particular limit. Instead, this requires a determination of how to equitably allocate the environmentally acceptable amount of nitrogen and phosphorus among the various sources in the Bay watershed. This allocation decision is critically important. It drives the level of investment by each source (and, in the case of a POTW, by its ratepayers). It could also limit the ability of a POTW to serve future population growth and economic development. Significantly, like the water quality standards, these allocations have not yet been adopted, but the Board is in the process of doing so by amending its Water Quality Management Planning Regulations. DEQ plans for this process to be completed in 2005. Without the allocation decision, however, setting a limit in this one permit would be an arbitrary act at best.

This Court has allowed parties to intervene as appellees in other environmental litigation. See, e.g., James River Association v. Commonwealth of Virginia Ex. Rel. Waste Management Board, 63 Va. Cir. 602 (Cir. Ct. Richmond, 2004) (county and waste management company allowed to intervene as appellees in support of decision by the Virginia Waste Management Board).

VAMWA and AMSA should be permitted to intervene to present germane defenses including those outlined above.

**B. EQUITABLE FACTORS FURTHER SUPPORT INTERVENTION  
BY VAMWA AND AMSA**

Although “germaneness” is the only applicable standard that VAMWA and AMSA must meet, equitable factors further support their intervention.

**1. The Board Is Highly Unlikely to Raise the Foregoing Defenses**

With just the stroke of a pen only months before the Board plans to adopt the necessary water quality standard regulations and allocation regulations, DEQ reversed its approach of the past 29-years by issuing a guidance document purporting to authorize permit limits based on an arbitrary mathematical formula in permits (unlike Onancock’s) where certain effluent data is available.<sup>4</sup> On DEQ’s recommendation, the Board applied this “rule” – which was adopted without observing the basic requirements of the Administrative Process Act – to impose nutrient limits in a permit issued to another facility (Phillip Morris, the subject of similar litigation by CBF pending in the Circuit Court for Chesterfield County) on the same day the Board issued the Onancock permit. Apparently DEQ and the Board now believe they may legally issue permit limits without proper water quality standards and allocations, which is contrary to the primary defenses that VAMWA and AMSA wish to present.

**2. Appellants Are Seeking a Broad Legal Precedent Related to  
\$1.2 Billion Dollars of Point Source Nutrient Reduction Projects**

CBF’s litigation goal is basically to establish new permit obligations for VAMWA and AMSA member POTWs and other regulated facilities. According to the Secretary of Natural Resources’ April 2004 draft Tributary Strategies, the estimated cost for additional nutrient controls at point source facilities (mainly POTWs) is \$1.2 billion in Virginia. CBF’s litigation

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<sup>4</sup> DEQ Guidance Memo No. 04-2017 (“Nutrient Monitoring and Maximum Annual Loads for VPDES Permitted Facilities on the DEQ Chesapeake Bay Program’s List of Significant Discharges”) from Jon van Soestbergen, P.E., Director, Office of Water Permit Programs, to Regional Directors (July 15, 2004).

approach threatens the interests of VAMWA and AMSA in a fair and orderly public process for establishing advanced wastewater treatment requirements and for allocating to individual sources the valuable right to discharge nitrogen and phosphorus in amounts that the Bay can withstand without environmental degradation. These are far-reaching, major regulatory decisions that are more appropriately addressed via rulemaking rather than a case decision. See generally Va. Code § 2.2-4001 (Administrative Process Act's definition of "rule" or "regulation"). If these issues are to be addressed in this forum, at a minimum the regulated community should be allowed the opportunity to participate.

**3. The Town of Onancock Lacks the Resources to Defend this Action and the Statewide POTW Interests At Stake**

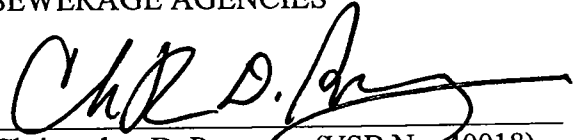
In stark contrast to CBF with its \$1.25 million Chesapeake Bay Watershed Litigation Project fund, the true party in interest here is a small town of 1,525 people. The Town's annual legal budget is only \$6,000, which pales in comparison to CBF's litigation fund and by any measure is inadequate to defend a complex regulatory case involving the interplay of the federal and state statutes, regulations, guidance and parallel non-regulatory nutrient reduction initiatives. Intervention by VAMWA and AMSA would not only promote judicial economy by resolving common issues, but also, we respectfully submit, is essential if the regulated community is to have any voice in this proceeding.

**CONCLUSION**

VAMWA and AMSA have interests and defenses germane to the subject matter of this proceeding. Accordingly, pursuant to Rule 2:15 of the Rules of the Supreme Court of Virginia and in consideration the equities, this Court should grant their motion to intervene.

VIRGINIA ASSOCIATION OF MUNICIPAL  
WASTEWATER AGENCIES

ASSOCIATION OF METROPOLITAN  
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**CERTIFICATE OF SERVICE**

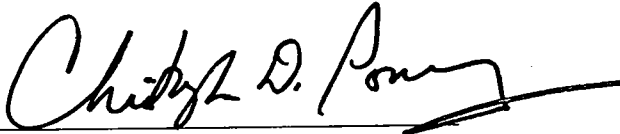
I hereby certify that on this 2nd day of September, 2004, a true copy of the foregoing Motion for Leave to Intervene by the Virginia Association of Municipal Wastewater Agencies and the Association of Metropolitan Sewerage Agencies was mailed first-class, postage pre-paid, to:

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\_\_\_\_\_  
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## CBF Launches Chesapeake Bay Watershed Litigation Project

Wednesday July 7, 2004

By: Chuck Epes

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### Legal Action Seen as Key to Reducing Bay Pollution

For Immediate Release

Contact: Chuck Epes, 804.780.1392

(ANNAPOLIS, MD) – To compel the states and federal government to enforce existing laws and deliver concrete, measurable progress in reducing pollution to the Chesapeake Bay and its watershed, the Chesapeake Bay Foundation (CBF) is launching a new Chesapeake Bay Watershed Litigation Project.

"Pollution is killing our streams, rivers and the Chesapeake Bay," said CBF President William C. Baker. "While years of sound science have provided a roadmap to restoring the Bay, the politics of postponement have produced few significant improvements in water quality or actions by state and federal governments to enforce existing laws to reduce pollution. We will continue efforts to educate and build broad public support for legislative and regulatory change. But in the final analysis, when government is unwilling or unable to enforce the law, the only recourse remaining is legal action."

The Chesapeake Watershed Bay Litigation Project will employ attorneys, as well as work with pro bono counsel, law school clinics and public interest law firms on legal actions that may range from highly focused cases to stop pollution to broad, policy-oriented lawsuits. Criteria for instituting legal action will include whether all attempts to have voluntary compliance with the law have failed, whether the outcome will further the goal of protecting and restoring the Chesapeake Bay and its tributaries, whether the case will result in a substantial reduction of pollution, and the availability of other options to accomplish change and achieve progress in a reasonable time.

"CBF has already begun a legal challenge to the EPA's administration of the Clean Water Act by petitioning it to require the Bay states to place adequate, enforceable limits on nitrogen pollution in permits," Baker said. "Should EPA fail to take this action and reduce pollution, litigation may well be the only tool left to us."

The Chesapeake Watershed Bay Litigation Project is made possible by a \$1.25 million grant from the Philadelphia-based Lenfest Foundation. H. F. (Gerry) Lenfest, Lenfest Foundation President and CBF trustee, said, "CBF has been the Chesapeake Bay's strongest and most effective advocate since 1967. The Bay is in trouble, and time is running out. I am pleased to be able to help CBF initiate this important initiative."

###

*The Chesapeake Bay Foundation is the foremost conservation organization dedicated solely to saving the Chesapeake Bay. Its motto, Save the Bay, defines the organization's mission and commitment. With headquarters in Annapolis, Md.,*

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[CBF Backs VA Bill to Require Nutrient Pollution Cuts](#)

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**EXHIBIT A**

*state offices in Maryland, Virginia and Pennsylvania, and a varied group of educational centers and programs, CBF works throughout the Chesapeake's 64,000-square-mile watershed. Founded in 1967, CBF is a 501(c)(3) not-for-profit organization. CBF is supported by more than 116,000 active members and has a staff of 150 full-time employees.*



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## Town sucked into center of Bay pollution debate

By SCOTT HARPER, The Virginian-Pilot

© August 17, 2004

Last updated: 12:34 PM



George Phillips, a resident of Onancock, often fishes behind Tuna Hunting Sportfishing, where several creeks meet before emptying into Onancock Creek. The town's wastewater flows through these creeks. Mort Fryman / The Virginian-Pilot

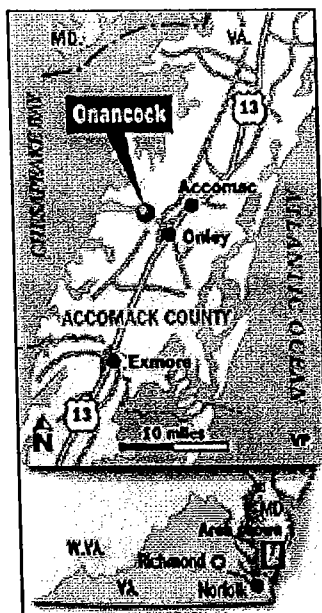
NANCOCK — Town manager Susan Scott bites her tongue when asked her opinion of the Chesapeake Bay Foundation.

The self-described Navy brat and "spicy Italian" shifts uneasily in her chair, grasping for the right words to explain how one of the largest environmental groups in the mid-Atlantic has put this quaint Eastern Shore hamlet under a hot, unwanted spotlight for the past year.

"We've been portrayed as this huge town that's polluting the Bay," Scott finally said. "But look around. Are we the bad guys here? Are we doing anything wrong? I mean, what do they expect us to do?"

Specifically, the foundation wants this historic town with a population of 1,525, a third of whom are retired, to upgrade its 1950s-era sewage treatment plant so that it releases fewer nutrients into the Bay. The price tag for the project, about \$3.5 million, would be roughly three times Onancock's annual budget for police, roads, trash collection and all other municipal services.

*EXHIBIT*



"As much as we'd like to do our part, we just don't have the money," said Bruce S. Paone, Onancock's mayor, who also runs a barber shop on the edge of town.

Speaking at his small shop called Snips, where an elderly customer waited in the chair, Paone said he has long admired the foundation's work, "but they've taken a different tack here, and not too many people around here appreciate it."

The 116,000-member foundation has brought its war on nutrients to Onancock not because the town was breaking laws or behaving badly. It's just that when the group decided last summer to challenge Virginia's policy on nutrient reduction, Onancock's sewage permit happened to be up for renewal.

In this sense, Onancock illustrates how circumstance and timing can be just as important as science and applied strategy when it comes to environmental initiatives.

"They were the first to pop up on the radar screen," conceded Chuck Epes, a foundation spokesman in Richmond.

"We're not picking on Onancock," he added. "We understand their financial difficulties. We just want the state to be more aggressive with a problem that has existed for years without much being done about it."

Nutrients such as nitrogen, phosphorus and ammonia are collectively the No. 1 pollutant confounding a 20-year-old program to clean up the Bay. In excessive amounts, nutrients cause green blankets of algae to blossom, which cloud over and steal oxygen from the water, making it difficult for fish, crabs and aquatic plants to survive.

Virginia and five other states, along with the District of Columbia, agreed last year to cut annual nitrogen loadings to the Bay by 110 million pounds by 2010, or roughly in half, and phosphorus by 6.3 million pounds, or about a third.

To do that, the foundation argues, every nutrient source – large and small, industrial and municipal – needs to sacrifice and ante up for improvements fast. It is this encompassing aspect of the cleanup, group leaders say, that Onancock represents.

"All significant plants – and Onancock is recognized as a significant source – has to step up to the plate," said Roy A. Hoagland, the foundation's executive director in Virginia. "There are various ways to pay for these upgrades, and they have to be done." Hoagland is expected to travel to Onancock this week to discuss financing

options. One alternative, he said, is to pass a "flush tax" during next year's state legislature in Richmond. The money, to be paid by homeowners across the state, would help fund sewage plant improvements without bankrupting small communities like Onancock that lack resources.

But don't expect Hoagland to be greeted warmly. The foundation filed a lawsuit in Richmond Circuit Court on Friday that seeks to overturn a permit issued to the town earlier this summer by the State Water Control Board that lacked any limits on nutrients. Another state permit, for wastewater from a processing plant owned by tobacco giant Philip Morris USA, also is being challenged in court.

The state water board required nutrient monitoring for the first time in the Onancock permit and instructed the town to prepare plans for modernizing its plant in the near future. In response, Onancock has had to hire a lawyer and is shopping for a consulting engineer, expenses that town officials are not sure how to pay for.

The U.S. Environmental Protection Agency considers the Onancock treatment plant one of 117 "significant dischargers" in Virginia, not because of its volume – only about 175,000 gallons a day – but because wastewater is released almost directly into the Bay.

After going through a series of screens, holding tanks and disinfection, the effluent is piped to a small branch of Onancock Creek, a scenic waterway that defines the town and its history as a port and fishing center. The outfall pipe is about 4½ miles from the Bay.

Onancock Creek also is classified by the state as an "impaired waterway," meaning that it flunks at least one pollution test. In this case, it's for unhealthy levels of fecal bacteria.

State officials said they recorded extremely low oxygen counts in the creek this summer, with readings near zero in one section away from the sewage plant. Low oxygen is a telltale sign of excessive nutrients.

But Scott says the readings are misleading and should not be blamed on the treatment plant. The creek is lined with farms, new homes and incoming development, all of which contribute nutrients, and it receives thousands of gallons of dirty stormwater from the neighboring town of Onley.

Standing on the docks of the Onancock harbor last week, George Phillips, who has lived in town for 60 years, said he has noticed more runoff flowing into the creek of late but that fishing remains good.

Lee Toth, owner of Tuna Hunter Sportfishing, a charter boat outfit that runs out of the harbor, agreed.

"There's not one answer to any of these environmental problems," Toth said. "You'd have to stop fishing, stop farming, stop building homes. I mean, there has to be a balance." Balance is what Scott, as town manager, wants, too.

Onancock is in the midst of improving its drinking-water service, a project expected to cost more than \$3 million. Water rates were increased 50 percent this year to pay for the work.

Similarly, sewer bills climbed 30 percent this year and 25 percent last year to finance sewer-line improvements mandated by the state. The lines were leaking raw sewage during storms because of small cracks from years of wear and tear.

The sewage plant itself is a series of concrete buildings and tanks, set in a fenced field just outside of town.

It does not stink, even close up.

Bryan Horton manages the plant. He took over about three years ago, hired away from the Hampton Roads Sanitation District. Horton used to work at a plant in Norfolk.

The Chesapeake Bay Foundation, Horton said, "has the right idea but is going about it the wrong way."



"It's frustrating," he said, "because people assume we're doing something wrong and ask us why we're polluting the Bay."

Horton and his colleague, Dean Savannah, agree with the course Gov. Mark R. Warner has chosen to combat nutrient enrichment: study each watershed, set limits for each based on their impact to the Bay, then impose limits on the sources of nitrogen and phosphorus – a process expected to take at least two to five years to complete.

"We'd love to upgrade the plant tomorrow, believe me," Horton said, as he walked down to the reed-lined banks of Onancock Creek to view the plant's outfall pipe. "But we have no financing in place, and no idea what limits we're supposed to live by. Does that sound fair to you?"

*Reach Scott Harper at 446-2340 or at [scott.harper@pilotonline.com](mailto:scott.harper@pilotonline.com).*

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