VIRGINIA:

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

THE CHESAPEAKE BAY FOUNDATION, INC., a Maryland corporation, and

GEORGE T. and NELL MINTON, and

C. PEARCE COADY,

Appellants,

v.

Chancery No. _____

COMMONWEALTH OF VIRGINIA, ex rel. VIRGINIA STATE WATER CONTROL BOARD
Serve: Robert G. Burnley
Executive Secretary
State Water Control Board
629 E. Main Street
Richmond, VA 23219

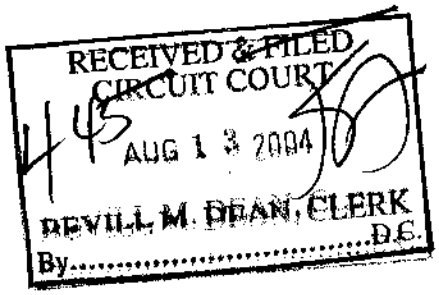
and

ROBERT G. BURNLEY
Director, Department of Environmental Quality,
Serve: 629 E. Main Street
Richmond, VA 23219

and

TOWN OF ONANCOCK, VIRGINIA
Serve: Susan D. Scott, Town Manager
15 North Main Street
Onancock, Virginia 23417,

Appellees.



PETITION FOR APPEAL

IN RE: Virginia Pollutant Discharge Elimination System Permit No. VA0021253

Town of Onancock, Virginia Waste Water Treatment Plant

CASE DECISION APPEALED

1. Pursuant to Virginia Code § 62.1-44.29 of the State Water Control Law, § 2.2-4026 of the Virginia Administrative Procedure Act, and Rule 2A:4 of the Rules of the Supreme Court of Virginia, Appellants THE CHESAPEAKE BAY FOUNDATION, INC. ("CBF"), GEORGE T. and NELL MINTON, and C. PEARCE COADY hereby appeal the case decision of the Virginia State Water Control Board ("the Board") on June 17, 2004 to reissue Virginia Pollutant Discharge Elimination System ("VPDES") Permit No. VA0021253 ("Permit VA0021253") to the Town of Onancock, Virginia Waste Water Treatment Plant ("Onancock WWTP").

2. The Virginia Department of Environmental Quality, acting on behalf of the Board, voted to reissue Permit VA0021253 to Onancock WWTP on June 17, 2004. A copy of this permit as issued is attached hereto as Exhibit A.

3. VPDES Permit No. VA0021253 allows Onancock WWTP to discharge treated waste water containing unlimited amounts of nitrogen and phosphorous directly into the North Branch of Onancock Creek, despite the fact the Board has already listed the Creek as impaired waters, and the Creek consistently violates the Board's water quality standards ("WQS").

4. Pursuant to Rules 2A:3 and 2A:4 of the Rules of the Supreme Court of Virginia, CBF, the Mintons, and Coady timely filed and served their Notice of Appeal on July 16, 2004, a copy of which is attached as Exhibit B.

5. CBF, the Mintons, and Coady appeal the Board's issuance of Permit VA0021253 because it violates the federal Clean Water Act, 33 U.S.C. § 1300 *et seq.*, its implementing regulations, Virginia's State Water Control Law ("SWCL"), Virginia Code § 62.1-44.2 *et seq.*, its implementing regulations, the Board's Antidegradation Policy, 9 VAC 25-260-30(A), and the Nutrient Enriched Waters Policy, 9 VAC 25-40-10 *et seq.*.

6. The Board's decision to reissue Permit VA0021253 was not supported by substantial evidence that the Permit will not cause or contribute to violations of water quality standards, particularly the promulgated water quality standard for dissolved oxygen.

7. The Board's reissuance of this Permit was also arbitrary and capricious in that the Board failed to require limits on nutrient pollution, despite the clear law requiring it, and the fact that the Board and DEQ acknowledged they have the authority, the data to support a limit, and included limits in other permits.

8. CBF, the Mintons, and Coady lay out the numerous violations of law in the reissuance of this Permit below.

9. CBF, the Mintons, and Coady all meet the standing requirements for judicial review under Virginia Code § 62.1-44.29.

Parties

The State Water Control Board

10. Virginia's State Water Control Law, Virginia Code § 62.1-44.1, *et seq.*, makes it unlawful to discharge waste into state waters, except in compliance with a permit issued by the Board. *See* Va. Cod Ann. § 62.1-44.5(A)(1).

11. The SWCL's defined purposes are to "safeguard the clean waters of the Commonwealth from pollution," "prevent any increase in pollution," and to "reduce existing pollution." Va. Code Ann. § 62.1-44.2.

12. The Board is charged with receiving, reviewing and issuing, reissuing, or denying applications for permits under the SWCL and with administering Virginia's state program under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program. *See* Va. Code Ann. § 62.1-44.15.

13. Among the Board's duties are "to take all appropriate steps to prevent [water] quality alteration contrary to the public interest or to the standards or policies established . . . ." Va. Code Ann. § 62.1-44.15(3a).

Robert G. Burnley

14. Robert G. Burnley is the Executive Director of the Virginia Department of Environmental Quality ("DEQ") and the Executive Secretary of the Board.

15. DEQ is charged with serving as staff and advisor for the Board, and recommended the reissuance of Permit No. VA0021253.

16. Mr. Burnley's joinder is for the purpose of ensuring any relief awarded by the Court with respect to this appeal.

17. His powers are conferred upon him by the General Assembly pursuant to Virginia Code § 10.1-1185.

The Chesapeake Bay Foundation, Inc.

18. CBF is a non-profit organization founded in 1966 under the laws of Maryland to restore and sustain the Chesapeake Bay ecosystem by substantially improving the water quality and productivity of the watershed with respect to water clarity, resilience of the system, and diversity and abundance of living resources, and to maintain a high quality of life for the people of the Chesapeake Bay region. CBF operates offices in Maryland, Pennsylvania and Virginia. The Virginia offices are located in Richmond and Norfolk. Aff. of Roy A. Hoagland, attached as Exhibit C.

19. CBF frequently uses Onancock Creek and the waters of the Onancock region for educational purposes. *Id.*

20. In the last 7 years alone CBF's educational programs have relied upon the waters of the Onancock area for conducting 46 on-the-water educational trips encompassing more than 1150 students, teachers and other participants. *Id.*

21. In the fall of 2004, CBF in conjunction with the Eastern Shore Chamber of Commerce will be participating in a birding excursion to CBF's Port Isobel education center which originates in Onancock Creek. *Id.*

22. Over the years, with the continued pollution of Onancock Creek, including pollution from the Onancock WWTP, CBF has noticed a decline in the water quality of the creek. *Id.*

23. Degraded water quality directly impacts CBF's ability to conduct educational activities on Virginia's waters and conduct successful restoration projects. *Id.*

24. CBF has approximately 40,000 members in Virginia, many of whom reside in the Eastern Shore and the Town of Onancock environs, where the Onancock WWTP is located. Many of those same members regularly use Onancock Creek and its surrounding natural resources for recreational and commercial uses. Onancock WWTP discharges directly into the North Branch of Onancock Creek. *Id.*

25. CBF actively participated in the public comment process for this permit by presenting written comments and oral testimony to DEQ and the Board. *Id.*

26. CBF has suffered and will continue to suffer an actual and imminent injury traceable to the Board's reissuance of Permit VA0021253 to Onancock WWTP. *Id.*

27. CBF's members also are affected individually by the issuance of this permit, and CBF's interests in this case extend beyond financial impacts to it as an organization to impacts on CBF in its representational capacity of its members, including recreational and aesthetic interests. *Id.*

28. These injuries are due solely to and are directly traceable to the decision by the Board to reissue this Permit and not the independent action of any third party. A favorable decision by the Court will redress CBF's injuries. *Id.*

George and Nell Minton

29. The Mintons have lived in Accomack County since 1992. They previously lived at 17861 Leatherbury Drive on the banks of Leatherbury Creek, a tributary of Onancock Creek. Aff. of George T. and Nell Minton, attached as Exhibit D.

30. While living on Leatherbury Creek, they regularly used Onancock Creek for recreational purposes such as boating, pleasure, fishing, crabbing, bird watching, and aesthetic enjoyment. *Id.*

31. They are currently building a house on Hermitage Road, fronting on Onancock Creek, within one mile downstream of Onancock WWTP. Their current address is P.O. Box 497, Onancock 23417. *Id.*

32. They are both members of the Chesapeake Bay Foundation and have been for roughly ten years. They joined CBF because they have been and are still very concerned with the health of the Bay and its tributaries, including Onancock Creek, and the Eastern Shore. Virginia's efforts to clean the Bay have been largely unsuccessful, and they have joined in this suit in the hopes that the court will require Virginia to do more and to bring awareness to these issues. *Id.*

33. The continued pollution of Onancock Creek and degradation of the health of the Creek will significantly affect the property values along the Creek, including the value for their under-construction house. *Id.*

34. They still regularly try to use Onancock Creek for boating, pleasure, fishing, crabbing, bird watching, and aesthetic enjoyment. *Id.*

35. However, with continued pollution of the Onancock Creek, including pollution from Onancock WWTP, they have noticed harm to the Creek and their ability to enjoy its resources. For instance, last summer, they noticed a significant decline in their fishing catches in the Creek. Over the years, the commercial crabbing on Leatherbury Creek has all but stopped. The Mintons have given up trying to catch crabs on the Creek as well. This decline in the health of the Creek is due in large part to pollution from Onancock WWTP. *Id.*

36. This Permit will directly harm their ability to make use of the Creek and the Bay for boating, pleasure, fishing, crabbing, bird watching, and aesthetic enjoyment. *Id.*

37. With the Onancock WWTP Permit and the continued discharge of pollutants from it, the quality of life in Onancock Creek and in the Eastern Shore area will significantly decline, as will property values. *Id.*

38. The Mintons have suffered and will suffer an actual and imminent injury traceable to the Board's reissuance of Permit VA0021253 to Onancock WWTP. *Id.*

39. The Mintons assert this Permit threatens and harms the quality of Onancock Creek and the Bay and all of the birds, fish, crabs and other animals and marine life who inhabit these waters, either temporarily or permanently. *Id.*

40. This Permit also threatens and harms Onancock Creek's uses as a natural resource, as well as their ability to enjoy those uses of the Creek and its natural resources. *Id.*

41. This Permit and its continued pollution also threaten the property values of Onancock, Accomack County, and Eastern Shore residents, including the Mintons' property. People are not going to pay more to live on the banks of a polluted and dead creek with no fish, crabs, or other wildlife. *Id.*

42. Their injuries are due solely to and are directly traceable to the decision by the Board to issue this permit and not the independent action of any third party. A favorable decision by the Court will redress their injuries. *Id.*

43. The Mintons participated in the public comment process with written comments. *Id.*

C. Pearce Coady

44. C. Pearce Coady resides on Onancock Creek on Virginia's Eastern Shore. Aff. of C. Pearce Coady, attached as Exhibit E.

45. He enjoys fishing, boating and crabbing on Onancock Creek. He also enjoys the aesthetic quality of the Creek. *Id.*

46. However, with continued pollution of Onancock Creek, including pollution from the Onancock WWTP, he has noticed that the water quality has declined significantly. *Id.*

47. The declining quality of the Creek has affected his ability to enjoy and use the Creek because it has harmed all the species that inhabit the Creek and the Bay, either temporarily or permanently. *Id.*

48. In fact, he has retrieved dead crabs from his crab pots that suffocated from the low oxygen level in the Creek. *Id.*

49. In addition, the condition of Onancock Creek significantly affects property values. *Id.*

50. Coady worries that if the Town of Onancock is allowed to continue to discharge treated waste water directly into Onancock Creek without any restrictions on the amount of nutrient pollution, the Creek will be forever altered. *Id.*

51. Coady has suffered and will suffer an actual and imminent injury traceable to the Board's reissuance of Permit VA0021253 to Onancock WWTP. *Id.*

52. His injuries are due solely to the decision by the State Water Control Board to issue this permit and not the independent action of any third party. A favorable decision by the Court will redress those injuries. *Id.*

53. Coady participated in the public comment process with written comments.

The Town of Onancock

54. The Town of Onancock owns and operates the Onancock WWTP and is the permittee of Permit VA0021253.

55. Onancock WWTP discharges its waste water and pollutants directly into the North Branch of Onancock Creek, a tidal tributary of the Bay in the Eastern Shore Basin.

Background and Reasons Why This Case Decision Is Unlawful

Nutrient Pollution and the Low Dissolved Oxygen Crisis

56. For years, the Bay has been suffering more and more from the effects of nutrient pollution – excessive amounts of nitrogen and phosphorous in the Bay and its tributaries. In tidal waters, nitrogen plays the larger role in nutrient pollution.

57. These nutrients provide food for algae, which leads to massive algal blooms that block the sun from reaching vital, oxygen-producing underwater grasses and other sub-aquatic vegetation ("SAV").

58. As the lack of sunlight kills off the SAV, the Bay and its tributaries lose the dissolved oxygen the SAV produce.

59. In addition, as the algae die off, they consume even more oxygen during the decomposition process.

60. Nearly all living things in the Bay and its tributaries require plentiful amounts of oxygen to survive. Scientists agree that at least 5 milligrams per liter ("mg/l") of dissolved oxygen is necessary to protect most aquatic species.

61. When dissolved oxygen levels drop to between 2.0 and 5.0 mg/l, the waters are said to be "hypoxic." "Severe hypoxia" occurs at levels below 2.0 mg/l. The water is "anoxic" at levels of 0.2 mg/l and below.

62. Without adequate dissolved oxygen, fish, crabs, oysters, and other aquatic life simply cannot survive.

63. For more than 20 years, the Bay has suffered from low levels of dissolved oxygen in its waters and tributaries.

64. The insufficient amount of oxygen has led to an enormous "dead zone," an area in which little or no aquatic life can survive because there is little to no oxygen.

65. Last summer, the dead zone encompassed roughly 40% of the Bay's mainstem, as was widely reported in every major newspaper in the Bay region, as well as elsewhere.

66. The summer of 2004 is again on pace for a devastating dead zone throughout the Bay and its tributaries.

67. The effects of the nutrient pollution and the dead zone are shocking. Fish kills and crabs jumping from the waters and scrambling onto shore in desperate attempts to breathe, which observers refer to as "crab jubilees."

68. The effects do not stop there. Commercial fishermen feel the impacts in their empty nets and pots. When their pots do have crabs in them, often the crabs have suffocated from lack of oxygen.

69. The Town of Colonial Beach, Virginia was forced to close its beach on the Fourth of July weekend this year because of widespread algal blooms caused by nutrient pollution. Contact with the algal blooms causes skin rashes.

70. Numerous entities have acknowledged the dissolved oxygen crisis and the dire problems of nutrient pollution, including the Chesapeake Bay Program, which is a partnership between Virginia, Maryland, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission, and the Environmental Protection Agency ("EPA").

71. The United States Fish and Wildlife Service has also commented on the crisis, calling nutrient pollution "the largest problem affecting the Chesapeake."

72. DEQ and the Board are very familiar with the dead zone crisis.

73. DEQ and the Board also know and have known for years that nutrient pollution from nitrogen and phosphorous in waste water treatment plant discharges is one of the leading causes of the low dissolved oxygen problem plaguing the Bay.

74. DEQ has at least paid lip service to this crisis, acknowledging publicly "the harmful effects of nutrient enrichment," causing DEQ Executive Director Robert Burnley to claim with regard to the James River, "We want to prevent nitrogen from going into that river to the greatest extent possible." Rex Springsteen, *State caps waste limit from Philip Morris*, Richmond Times-Dispatch, July 18, 2004.

75. Nonetheless, despite the nutrient pollution crisis, DEQ and the Board have refused to include any specific numeric limits on nutrient pollutants in this and numerous other VPDES permits.

The Clean Water Act

76. "The main purpose of the CWA is to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' by reducing, and eventually eliminating, the discharge of pollutants into these waters." *Natural Resources Defense Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (citing 33 U.S.C. § 1251(a)).

77. "As a primary means of achieving its ultimate goals, the CWA prohibits the discharge from any point source into protected national waters of any pollutant unless that discharge complies with specific requirements of the CWA." *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384 (4th Cir. 1990) (citing 33 U.S.C. § 1311(a)).

78. The CWA allows states to operate their own programs under the National Pollutant Discharge Elimination System ("NPDES"), provided the states adhere to standards at least as stringent as the federal requirements. *See* 33 U.S.C. § 1342(b) & (c)(1); 40 C.F.R. § 122.1(a)(2); *see also State Water Control Board v. Smithfield*, 261 Va. 209 (2001).

79. "Permits must incorporate technology-based controls, i.e., limitations based on the degree of effluent control which can be achieved by point sources using various levels of pollution control technology." *Westvaco*, 899 F.2d at 1384 (citing 33 U.S.C. § 1311, 1314); *see also NRDC*, 16 F.3d at 1399. "In addition to technology-based controls, permits must contain any more stringent limitations that are necessary to meet water quality standards developed by the states pursuant to § 303." *Id.* (citing 33 U.S.C. 1313).

80. DEQ and the Board's decision to reissue this Permit without any numeric limits for nutrient pollutants was contrary to the established case law interpreting states' obligations under the NPDES.

81. For instance, the Fourth Circuit has stated that "once water quality standards have been set, NPDES permit limitations must be established to ensure compliance, regardless of the availability or effectiveness of treatment technologies." *Id.*, 899 F.2d at 1384.

82. Indeed, "once a water quality standard has been promulgated, section 301 of the CWA *requires all NPDES* permits for point sources to incorporate discharge limitations necessary to satisfy that standard." *Am. Paper Ins.t v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (emphasis added).

83. The Onancock WWTP permit contains no limitations on nutrient pollutants to ensure compliance with the WQS for dissolved oxygen in Onancock Creek and the Bay.

84. The United States Environmental Protection Agency confirmed this requirement for nutrient pollutant limits in a letter from G. Tracy Mehan, III, Assistant Administrator for the Office of Water of the United States Environmental Protection Agency, responding to a letter from Albert C. Pollard, Jr. of the Virginia House of Delegates concerning the need to limit nitrogen in the Bay. Letter from Mehan to Pollard of 9/30/03, at 3-4, attached as Exhibit F.

85. That letter advised that under the CWA, whenever there is the reasonable potential for a discharge to cause or contribute to an exceedance of numeric or narrative water quality standard criteria, Virginia must include effluent limitations at least as stringent as necessary to meet both water quality standards. *Id.* at 3.

86. CBF forwarded this letter from EPA to DEQ on October 1, 2003 for inclusion in the record as public comment. Letter from Hoagland to Burnley of 10/1/03, Ex. F, at 1-2.

87. Despite EPA's clear exposition and the clear federal mandate, DEQ and the Board refused to include any numeric limits for nutrient pollutants in this Permit at all.

Virginia's State Water Control Law:

88. Virginia enacted the SWCL to "safeguard the clean waters of the Commonwealth from pollution," to "prevent any increase in pollution," and to "reduce existing pollution." Va. Code Ann. § 62.1-44.2.

89. Virginia enacted the SWCL long before Congress enacted the CWA. *Id.* The SWCL should provide additional protections for Virginia's waters, above and beyond what is required by the CWA. *See Treacy v. Newdunn Assocs., LLP*, 2003 WL 22093616 (4th Cir.

2003) (stating that Virginia's regulation of its waters, beyond the federal mandate and under the SWCL, is purely a question of state law).

90. The SWCL defines pollution as "such alteration of the physical, chemical or biological properties of any state waters as is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish, or aquatic life . . . ." Va. Code Ann. § 62.1-44.3.

91. The law further defines that any substance "contributing to the contravention of standards of water quality duly established by the Board, [is] 'pollution' for the terms and purposes of this chapter." *Id.*

92. Nitrogen and phosphorous are clearly "pollutants," as they directly cause and contribute to violations of the WQS for dissolved oxygen, a fact that DEQ and the Board cannot dispute.

93. The SWCL also recognizes there is no right for anyone, even a long-standing permittee, to continue to degrade Virginia's water quality. *See* Va. Code Ann. § 62.1-44.4 ("No right to continue existing quality degradation in any state water shall exist . . . .").

94. The SWCL also compels DEQ and the Board to prevent such degradation and to restore state waters "to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them." Va. Code Ann. § 62.1-44.4(1).

95. The SWCL also requires the Board to "take all appropriate steps to prevent quality alteration contrary to the public interest . . . ." Va. Code Ann. § 62.1-44.15(3a).

96. Moreover, Virginia has made itself and all its political subdivisions subject to court control in battling water pollution. *See Wilson v. United States*, 425 F. Supp. 143 (E.D.Va. 1977).

The VPDES Program Requirements

97. The Board is charged with administering the VPDES program pursuant to statutory mandate under the SWCL, Va. Code Ann. § 62.1-44.15, and in accordance with its own regulations, 9 VAC 25-31-10 *et seq.*

98. Those VPDES regulations require that "each VPDES permit shall include . . . [a]ny requirements *in addition to or more stringent than* promulgated effluent limitations guidelines or standards under §§ 301, 304, 306, 307, 318, and 405 of the CWA necessary to . . . [a]chieve water quality standards established under the law and § 303 of the CWA, *including state narrative water criteria for water quality.*" 9 VAC 25-31-220(D) (emphases added).

99. The regulations also require that permit "[l]imitations must control all pollutants . . . which the board determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above *any Virginia water quality standard, including Virginia narrative criteria for water quality.*" *Id.* This provision requires a specific factual determination by the Board prior to issuing or reissuing a permit.

100. The regulations also prohibit the issuance or reissuance of a permit "[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA or the law, or regulations promulgated under the CWA or the law." 9 VAC 25-31-50(C)(1).

101. DEQ and the Board were well aware of the impaired status of Onancock Creek for low dissolved oxygen and WQS violations for dissolved oxygen throughout the processing of the reissuance application for this Permit.

102. They were also well aware of the direct causal relationship between nutrient pollution and dissolved oxygen depletion.

103. The VPDES regulations required DEQ to recommend and the Board to include numeric limits in this Permit for nutrient pollutants. Nonetheless, they failed to include any.

Virginia Water Quality Standards

104. Pursuant to the mandate of Virginia Code § 62.1-44.15(3a), the Board has established water quality standards for the waters of Virginia.

105. "Water quality standards are a critical component of the CWA regulatory scheme because such standards serve as a guideline for setting applicable limitations in individual discharge permits." *NRDC*, 16 F.3d at 1399.

106. The Board's regulations have defined WQS as "provisions of state or federal law which consist of a designated use or uses for the waters of the Commonwealth and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the State Water Control Law (§ 62.1-44.2 *et seq.* of the Code of Virginia) and the federal Clean Water Act (33 USC §1251 *et seq.*)." 9 VAC 25-260-5.

107. The Board further defined "criteria" to include "elements of the board's water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." *Id.*; *see also Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384 (4th Cir. 1990) ("The state 'water quality criteria' may be expressed as numerical concentration limits or in narrative form.") (citing 40 C.F.R. § 131.3(b)).

108. The Board has promulgated a numeric concentration WQS for dissolved oxygen, which requires that concentrations of dissolved oxygen in Virginia's tidal waters, including Onancock Creek and the Bay, maintain a daily average of 5.0 mg/l of dissolved oxygen and not go below 4.0 mg/l at any time. *See* 9 VAC 25-260-50. This is known as a numeric criteria. *Id.*

109. The WQS regulations also require that "State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere

directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life." 9 VAC 25-260-20(A). Moreover, the WQS regulations specifically require that "[s]pecific substances to be controlled include, but are not limited to: . . . *substances which nourish undesirable or nuisance aquatic plant life.*" 9 VAC 25-260-20(A) (emphasis added). The Board has further designated that the uses for "[a]ll state waters," including Onancock Creek, include "recreational uses, e.g., swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life, including game fish, which might reasonably be expected to inhabit them; and the production of edible and marketable natural resources, e.g., fish and shellfish." 9 VAC 25-260-10(A). These criteria are also known as narrative criteria.

110. The SWCL and its regulations require the Board to ensure full attainment of both numeric and narrative criteria. *See* 9 VAC 25-31-220(D). The Clean Water Act also requires this. *See supra* ¶¶ 76-85.

111. Clearly, a Permit that allows the discharge of nutrient pollutants that cause and contribute to a violation of the WQS for dissolved oxygen violates the law.

112. Moreover, rampant algae that chokes off beneficial underwater grasses, causes a massive dead zone killing fish, crabs, and other aquatic life, and forces beaches to close and swimmers out of the water for fear of skin rashes is clearly "undesirable or nuisance aquatic plant life."

113. Thus, just as clearly, a permit that fails to limit at all those substances which are known to nourish that algae and are harmful to human, aquatic and plant life, specifically nutrient pollutants, also violates Virginia's WQS.

The Board's Antidegradation Policy

114. The Board has also promulgated its Antidegradation Policy, which provides, "All surface waters of the Commonwealth shall be provided with one of the following three levels, or tiers, of antidegradation protection. This antidegradation policy shall be applied whenever any

board-regulated activity is proposed that has *the potential to affect existing water quality*." 9 VAC 25-260-30(A) (emphasis added).

115. According to the Permit fact sheet, Onancock Creek is a Tier II surface water. This designation required the Board to maintain and protect the water quality of Onancock Creek.

116. This Permit, without any limitations for reducing or restricting nutrient pollution into waters already impaired for low dissolved oxygen not only does not maintain and protect the quality of Onancock Creek, it allows further degradation.

117. In fact, before this Permit was issued, samplings from the Onancock Creek showed nitrogen pollution levels several orders of magnitude higher downstream of Onancock WWTP's discharge point.

118. This Permit clearly violates the Board's Antidegradation Policy.

The Nutrient-Enriched Waters Policy

119. The Board has also designated Onancock Creek as a nutrient enriched water. *See* 9 VAC 25-260-350(A)(20).

120. Therefore, it falls under the Nutrient Enriched Waters ("NEW") Policy regulations. *See* 9 VAC 25-40-10, *et seq.*

121. In promulgating the NEW Policy, the Board stated:

> The Board recognizes that nutrients are contributing to undesirable growths of aquatic plant life in surface waters of the Commonwealth. This standard establishes a designation of "nutrient enriched waters." Designations of surface waters of the Commonwealth as "nutrient enriched waters" are determined by the Board based upon an evaluation of the historical quality data for one or more of the following indicators of nutrient enrichment: . . . dissolved oxygen fluctuations, and concentrations of total phosphorous.

9 VAC 25-260-330.

122. The NEW Policy specifically acknowledges the fact that "further limitations on discharges of phosphorous or of other nutrients may be necessary to control undesirable growths of aquatic plants." 9 VAC 25-40-50.

123. Despite this recognition and the clear necessity for controlling algae in Onancock Creek and the Bay, DEQ and the Board nonetheless refused to include any limitations on nutrient pollutants in this Permit at all.

Permit VA0021253 and Onancock Creek

124. Permit VA0021253 allows Onancock WWTP to discharge up to 0.25 million gallons per day ("mgd") of treated waste water directly into Onancock Creek.

125. Onancock Creek falls within the Eastern Shore Basins, and is a tidal tributary to the Chesapeake Bay.

126. As such, Onancock WWTP is classified as a "significant discharger" and a "significant source of nutrients" in the Secretary of Natural Resources' Annual Report.

127. Onancock WWTP's discharge contains large concentrations and amounts of nitrogen and phosphorous nutrient pollution. In fact, DEQ's Point Source Data Sheet for Onancock WWTP also showed that facility had a 60% increase in the total nitrogen load discharged into Onancock Creek from 6,300 pounds of nitrogen in 1985 to 10,100 pounds in 2002.

128. The Board and EPA have listed the North Branch of Onancock Creek as an impaired water under § 303(d) of the Clean Water Act for low dissolved oxygen, due to its violations of that WQS.[1] *See* 33 U.S.C. § 1313(d); *see also* 2002 Part 1A Impaired Waters Fact Sheet ("Sufficient violations of Virginia's water quality standards for Dissolved Oxygen and Fecal Coliform Bacteria were recorded at DEQ's ambient water quality monitoring station on North Branch Onancock Cr. . . . .")

[1] Despite Onancock Creek's status as an impaired water and its WQS violations for low dissolved oxygen, DEQ failed to list it as impaired water for low dissolved oxygen under § 303(d) in the initial permit fact sheet that it submitted to the Board at the time of the public hearing in October 2003. Nowhere in that fact sheet did it disclose that Onancock Creek was impaired for low dissolved oxygen. DEQ only disclosed that Onancock Creek was "listed on the § 303(d) list for protection of shellfish." Only in the most recent version of the Permit did DEQ disclose that Onancock Creek was and is impaired for low dissolved oxygen.

129. In October 2003, the Virginia Institute of Marine Sciences submitted a report to DEQ outlining that "[t]he DO [dissolved oxygen] observations conducted from 1995 to 2002 show that low DO (*less than 4 mg/l*) has often been observed." VIMS, "Development of DO and Fecal Coliform TMDLs for Onancock Creek," at 2 (Oct. 24, 2003) (emphasis added).

130. That report added, "[t]he monthly monitoring data shows that *high concentrations of nitrogen* have been discharged into the creek. It appears that *both point source and nonpoint sources probably cause the impairment.*" *Id.* (emphasis added).

131. Thus, DEQ's own commissioned research showed that Onancock WWTP caused and contributed to the dissolved oxygen impairment and the WQS violations.

132. Onancock Creek is in violation of both the numeric WQS for dissolved oxygen and the narrative WQS for failing to support its designated uses.

133. Despite Onancock WWTP's status as a significant discharger into impaired waters, the reissued Permit contains absolutely no restrictions on the amount of nitrogen nutrient pollution Onancock WWTP is allowed to discharge into Onancock Creek, either in terms of a total loading or a concentration of pollutants.

134. The reissuance of this Permit, despite the evidence that its discharge would cause and contribute to further WQS violations, clearly violated the law.

Permit No. VA0021253 - The Reissuance Application Process

135. The reissuance process on Permit VA0021253 began with Onancock WWTP's submission of an application for reissuance of its permit.

136. DEQ then issued a draft VPDES permit and advertised it for public comment on May 21, 2003.

137. A public hearing pursuant to 9 VAC 25-230-10 *et seq.*, was held on September 8, 2003. Approximately 50 people attended the hearing, with 24 people speaking on behalf of themselves and various organizations.

138. CBF, the Mintons, and Coady participated in the public hearing and comment process with written comments. CBF also submitted oral testimony.

139. Numerous other interested parties submitted comments as well, including the environmental organizations the Sierra Club and the Isaak Walton League, who raised serious concerns regarding the Permit.

140. At the public hearing, CBF and others demonstrated that the draft Permit violated state and federal law and regulations by not containing numeric limits on nutrient pollution discharges and not containing any requirement for monitoring discharges of these pollutants.

141. CBF also demonstrated that there was actual monitoring data for the Onancock WWTP facility that could be used to derive numeric limits.

142. DEQ squarely opposed this position before the Board, arguing it did not have the authority to put numeric limits for nutrient pollutants in this or any other VPDES permit, despite the volumes of materials CBF and others cited not only authorizing but mandating permit limits.

143. DEQ specifically stated in its presentation materials that, if it had the authority, it could include numeric limits for nutrients in this and other permits, as it could use the default values for discharges from like facilities to derive numeric limits for nutrients in the Onancock WWTP Permit.

144. CBF also demonstrated that the Permit must contain monitoring requirements for nutrient pollution.

145. DEQ opposed this position as well, despite internal DEQ memoranda and personnel recommending monitoring limits in this Permit and others.

146. The Permit should have come before the Board at its meeting in December, 2003, but DEQ did not present it for consideration at that time.

147. The next Board meeting was held in March 2004. DEQ originally planned to present the Permit for consideration at that meeting. Again, however, DEQ did not present this Permit for consideration then.

148. Finally, in June 2004, DEQ presented this Permit for consideration by the Board.

149. However, between October 2003, when the public comment period closed, and June 2004, when the Board finally heard DEQ's presentation on the Permit, the Permit changed significantly.

150. For instance, in October, CBF and others protested the lack of any monitoring requirement in the draft Permit. DEQ even opposed CBF's request for the Permit to require monitoring.

151. In the version DEQ presented to the Board in June 2004, the Permit contained a monitoring requirement, but not the one CBF or others urged.

152. In addition, in early 2004, and well after the September 2003 public hearing on the Onancock WWTP permit, DEQ drafted new internal guidance on VPDES permitting, entitled "Draft Guidance Memorandum Related to Nutrient Discharges to the Chesapeake Bay and its Tributaries" ("Guidance").

153. DEQ specifically relied on this new Guidance in redrafting the Onancock WWTP permit after the public comment period. In fact, DEQ gave a presentation to the Board on June 17, 2004 on this new Guidance, and specifically admitted the new Guidance framed the drafting of the version of the Onancock WWTP permit that it presented to the Board.

154. DEQ and the Board specifically relied on this Guidance to recommend and approve reissuance of this Permit on June 17, 2004, despite the fact that the Guidance was not even finalized until July 15, 2004.

155. In its new Guidance, DEQ professed to acknowledge the need to reduce nutrient pollution and to include numeric limits in permits. It also claimed the purpose of the

Guidance was to "hold the line" on nutrient pollution. *See* e-mail from Gerard Seeley to Richard Weeks and Robert Burnley (June 3, 2004 at 9:07 a.m. EST).

156. DEQ also acknowledged that it did, in fact, have the authority to include numeric limits on nutrient pollution on point source dischargers, such as Onancock WWTP, as CBF demonstrated to DEQ and the Board back in September 2003. This was a complete turnaround from the position DEQ took before the Board and the public at the September 2003 hearing.[2]

157. DEQ Director Robert Burnley expressed consternation of over DEQ's flip-flopping positions with its new Guidance, writing:

> What needs to be made obvious to everyone is the limits need to achieve something. They should generally reflect a reduction over at least the highest year for which there are data *or we look goofy. I thought CBF had a couple of good points for which I/we had no good answer.*
> 1. According to CBF, during the trib[-utary] strategy meetings we said it was not necessary to collect data from POTWs because the default numbers were as good as anything else for determining loading. In our guidance we use the opposite approach saying we need 3 years of data to set limits. CBF's question is – *which way is it*?

E-mail from Robert Burnley to Gerard Seeley *et al.* (June 3, 2004, 11:08 a.m.) (emphases added).

158. DEQ and the Board expressly relied on the new Guidance, instead of the requirements under the CWA, SWCL, and the federal and state regulations, to reissue this Permit with no limits on nutrient pollutants.

159. Following DEQ's recommendation, and over CBF's objection, the Board voted on June 17, 2004 to reissue Permit VA0021253.

160. Neither DEQ nor the Board ever submitted or noticed the revised draft Permit with the monitoring provision and other changes for public comment.

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[2] So, whereas DEQ claimed in September 2003 it had the data to include numeric limits on nutrient pollutants in this Permit, but not the authority, it completely changed its story in June 2004, claiming it had the authority, but not the data.

DEQ and the Board Had No Justification for Not Including Numeric Limits for Nutrient Pollution in This Permit.

161. Contrary to the position it took in September 2003, DEQ claimed at the June 2004 Board meeting that, while it did have the authority to include a numeric limit in this Permit, it lacked data for this facility necessary to establish scientifically defensible figures for numeric limits in this Permit.

162. DEQ's presentation materials and internal memoranda squarely refute its claim that it lacked sufficient basis to include numeric limits for nutrient pollution in this Permit.

163. For instance, at the October 2003 public hearing, DEQ's presentation materials stated:

> During the application process for permit reissuance, Onancock conducted effluent sampling for, among other things total nitrogen and total phosphorous expressed as maximum and monthly average. The monthly average results of the sampling were 2.29 mg/l total phosphorous and 14.76 mg/l total nitrogen. These results do, in fact, exceed the 2mg/l total phosphorous and 10 mg/l total nitrogen parameters noted on the previous screen [which discussed the limits of the NEW Policy at which monitoring is required].

DEQ Public Hearing Presentation, Town of Onancock Permit Reissuance, 9/8/03 (citing 9 VAC 25-40-40).[3]

164. Despite the acknowledgement that this Permit triggered the NEW Policy monitoring requirements, DEQ at that time proposed reissuing it without any monitoring, against the protests of CBF and others *and* the recommendation of DEQ staff.

165. This presentation also clearly demonstrated DEQ had monitoring data on Onancock WWTP.

[3] DEQ later stated, "Samples results showed a maximum concentration of 17.4 mg/l for total nitrogen and 2.48 mg/l for total phosphorous. Average values were 15.6 mg/l for total nitrogen and 2.29 mg/l for total phosphorous." E-mail from Frank Daniel to James McConathy (Jan. 15, 2004, 10:43 a.m. EST). This electronic mail and other DEQ correspondence and documents concerning this Permit cited herein should be part of the administrative record which the Board is charged with presenting to the court, pursuant to Rule 2A:3(b).

166. Later in the same presentation, DEQ discussed the default values from its "Point Source Data Sheet – Eastern Shore Basins."

167. DEQ noted that "the default value of Total Nitrogen concentration in the effluent of a treatment plant such as Onancock's is 18.7 mg/l, and the default value of Total Phosphorous in the effluent is 2.5 mg/l." *Id.*

168. DEQ concluded from this that "the default concentration values and actual effluent flow data could be used for calculations" of "loading values." *Id.*

169. DEQ also concluded that, if limits were required, which they were, "Onancock will certainly be included, regardless of monitoring results during this permit cycle." *Id.*

170. Thus, according to DEQ, if the law required numeric limits for nutrient pollutants in this Permit, DEQ would not have to include those limits in this Permit, no matter what the monitoring data were to show.

171. DEQ had also relied on default values for calculating nutrient loading in the development of the tributary strategies.

172. Moreover, on the very same day DEQ recommended and the Board reissued the Onancock WWTP permit, the Board issued a permit to Crooked Run Sewage Treatment Plant in Frederick County.

173. The Board issued the Crooked Run permit with a limit of 5 mg/l for total nitrogen, even though neither it nor DEQ had any monitoring data at all for this facility, since it has not yet been built. The inclusion of a nitrogen limit in the Crooked Run permit and the exclusion of any limits in this Permit is particularly amazing, considering the Crooked Run facility discharges directly into waters that are not listed as impaired for dissolved oxygen, while the waters Onancock WWTP discharges into are listed.

174. Thus, based on the inclusion of a numeric limit for nitrogen in the Crooked Run STP permit, DEQ's September 2003 refusal to recommend inclusion of numeric limits for

nutrient pollutants in this Permit based on its claim that it lacked "regulatory authority to require nutrient limits in this permit" was plainly wrong.

175. In January 2004, DEQ stated:

> We also have a series of stream samples in Onancock Creek at the Onancock wastewater treatment pant outfall. Although these are stream samples we believe they are basically effluent. 12 samples were collected between 02/00 and 02/02. We are no longer sampling Onancock Creek, although additionai sample [sic] will be collected as a part of the TMDL. Results of these samples show a maximum concentration of 20.5 mg/l for total nitrogen and 2.6 mg/l for total phosphorous. Average values were 8.28 mg/l for total nitrogen and 1.47 for total phosphorous.

E-mail from James McConathy to Frank Daniel (Jan. 15, 2004, 9:46 a.m. EST).

176. Thus, DEQ clearly had monitoring data for Onancock WWTP since 2002.

177. Also, after DEQ changed its position following the public hearing and realized it did have the authority to include numeric limits in this and other VPDES permits, it mulled over the options for this Permit.

178. Among the options DEQ considered were (1) "monitoring with no limits for total nitrogen and total phosphorous," (2) "let the Permit sit as being administratively continued," and (3) "reissue the permit with limits based on the DEQ CBF [Chesapeake Bay Program] Point Source Nitrogen and Phosphorous Effluent Concentrations from Tributary Strategy discussions: 8.0 mg/l nitrogen[4] and 0.5 mg/l phosphorous." DEQ, "Options for Reissuance of Onancock VPDES Permit," at 1.

179. Under Option 3, reissuing the permit with numeric limits for nitrogen and phosphorous, DEQ listed the following as the "Advantages:"

- Protective of water quality;
- Sound regulatory basis that is defensible from a technical and regulatory stand point;
- In accord with DEQ strategy for nutrients;

Id. at 1.

[4] This 8 mg/l limit figure was consistent with DEQ's own sampling data for Onancock Creek from 2000 to 2002. Thus, contrary to its claims, DEQ did have data to support numeric limits.

180. Despite DEQ's open recognition that the suggested limits were "protective of water quality," provided a "sound regulatory basis," and were in accord with DEQ nutrient strategy, DEQ rejected this option and instead opted for Option 1 – monitoring with no nutrient pollution limits at all.

181. Nowhere in the claimed "Advantages" section for Option 1 that DEQ recommended and the Board chose did DEQ claim that this course of action was "protective of water quality," provided a sound and defensible technical and regulatory basis, or was in accord with DEQ nutrient strategy. Obviously, it is not.

182. Instead, DEQ's recommendation was reflective of its long-standing "habit and mindset of thinking/saying/worrying about what the applicant will accept in terms of permit limits." *See* E-mail from Robert Burnley to Gerard Seeley (June 3, 2004, 11:08 a.m. EST). Director Burnley recommended to his staff, "I know Philip Morris and every other VPDES permit holder out there has a comfort zone as far as limits go. Pushing them to the very edge or beyond that zone is fine if it's necessary for water quality." *Id.*

183. Those admonitions fell on deaf ears, as DEQ staff recommended to the Board this Permit with absolutely no limits on nutrient pollutants whatsoever.

184. The record clearly demonstrates that DEQ and the Board had more than enough data and basis to include numeric limits for nutrient pollutants in this Permit, and that this claimed excuse for not including limits in this Permit is not only legally indefensible, it was factually wrong as well.

ERRORS ASSIGNED

185. CBF, the Mintons, and Coady reassert the averments contained in paragraphs 1-184.

186. DEQ's recommendation and the Board's reissuance of Permit VA0021253 without any numeric limits for the discharge of nutrient pollutants into already impaired waters with consistent water quality violations for low dissolved oxygen violated the Clean Water Act and its regulations, Virginia's State Water Control Law, and the Board's regulations as outlined above.

187. DEQ and the Board failed to follow statutory and regulatory mandates and procedures to ensure that this Permit would not cause or contribute to violation of water quality standards and further impairment of Virginia's waters.

188. DEQ's recommendation and the Board's reissuance of this Permit with no numeric limits at all for nutrients was wholly unsupported by any analysis or consideration of the fact that it would clearly cause and contribute to violations of Virginia's established WQS for dissolved oxygen, in violation of federal and state statutes and regulations.

189. DEQ's recommendation and the Board's reissuance of this Permit violated statutory and regulatory mandates to reduce nutrient pollution in Virginia's waters. This Permit not only does nothing to reduce nutrient pollution in Onancock Creek, waters listed as impaired and nutrient enriched, it actually allows for increased pollution.

190. DEQ's recommendation and the Board's reissuance of this Permit was clear error and not supported by any substantial evidence or proper findings of fact.

191. DEQ's recommendation and the Board's reissuance of this Permit was arbitrary and capricious in ignoring the clear mandates of federal and state law and regulations and instead relying on "Guidance" and other improper considerations, including but not limited to cost of compliance and what the permittee would accept.

192. DEQ's recommendation and the Board's reissuance of this Permit violated CBF, the Mintons, and Coady's equal protection rights by treating the reissuance of this Permit differently than other permits, including the Crooked Run STP permit, with no reasonable justification or legal or factual support. The Board's decision to reissue this permit without any permit limits was also arbitrary and capricious considering that, the very same day it issued this Permit, it issued the Crooked Run permit with a numeric concentration limit for nitrogen of 5.0 mg/l, despite no monitoring data at all and those discharge waters not being impaired for dissolved oxygen.

193. The errors assigned above are not harmless errors.

Statement of Relief Requested

194. CBF, the Mintons, and Coady respectfully request that this Court enter a final decree finding that the challenged agency action was not in accordance with the law and, pursuant to Virginia Code § 2.2-4029, grant the following relief:

a. Suspend and set aside VPDES Permit VA0021253;

b. Remand VPDES Permit VA0021253 to DEQ and the Board for further proceedings with instructions (1) to reissue the Permit with numeric limits for total nitrogen and total phosphorous effluent concentration limits and maximum annual loadings which will ensure that water quality standards are met and which are protective of water quality, (2) to make the requisite findings of fact confirming that the Permit limits and loadings are protective of water quality and will not cause or contribute to a violation of water quality standards; and (3) to comply fully with the mandates of the Clean Water Act, the State Water Control Law, and all applicable regulations.

195. CBF, the Mintons, and Coady also request an award of reasonable costs, including attorney's fees, expended in this matter in accordance with Virginia Code § 2.2-4030(A).

196. CBF, the Mintons, and Coady also request any other relief the Court may find appropriate, including an award of intermediate relief pursuant to Virginia Code § 2.2-4018.

THE CHESAPEAKE BAY FOUNDATION, INC.,
GEORGE T. AND NELL MINTON, and
C. PEARCE COADY

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal was served by first-class mail, postage prepaid, to the State Water Control Board and the Department of Environmental Quality, c/o Robert G. Burnley, Executive Secretary, Virginia State Water Control Board and Director, Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219, and sent via first class mail, postage prepaid to Jerry Kilgore, Attorney General for the Commonwealth of Virginia, 900 E. Main St., Richmond, Virginia 23219, and Susan D. Scott, Town Manager, 15 North Main Street, Onancock, Virginia 23417, on this 15th day of August, 2004.