

No. 129 Original

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IN THE  
**Supreme Court of the United States**

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COMMONWEALTH OF VIRGINIA,

*Plaintiff,*

v.

STATE OF MARYLAND,

*Defendant.*

---

**APPENDIX TO THE  
EXCEPTIONS OF THE STATE OF MARYLAND  
TO THE REPORT OF THE SPECIAL MASTER**

---

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MD App. 1

THE PAPERS OF

# Thomas Jefferson

Volume 1 - 1760-1776

JULIAN P. BOYD, EDITOR

LYMAN H. BUTTERFIELD AND MINA R. BRYAN,

ASSOCIATE EDITORS



PRINCETON, NEW JERSEY  
PRINCETON UNIVERSITY PRESS  
1950

## VII. The Constitution as Adopted by the Convention

[29 June 1776]

In a General Convention.

Begun and holden at the Capitol, in the City of Williamsburg, on Monday the sixth day of May, one thousand seven hundred and seventy six, and continued, by adjournments to the 29th day of June following:

### A CONSTITUTION, OR FORM OF GOVERNMENT,

agreed to and resolved upon by the Delegates and a representatives of the several Counties and Corporations of Virginia.

Whereas George, the Third, King of Great Britain and Ireland, and Elector of Hanover, heretofore intrusted with the exercise of the Kingly Office in this Government, hath endeavoured to pervert the same into a detestable and insupportable Tyranny; by putting his negative on laws the most wholesome and necessary for the publick good;

by denying his Governours permission to pass Laws of immediate and pressing importance , unless suspended in their operation for his assent, and, when so suspended, neglecting to attend to them for many Years;

by refusing to pass certain other laws, unless the persons to be benefited by them would relinquish the inestimable right of representation in the legislature;

by dissolving legislative assemblies repeatedly and continually, for opposing with manly firmness his invasions of the rights of the people;

when dissolved, by refusing to call others for a long space of time, thereby leaving the political system without any legislative head;

by endeavouring to prevent the population of our Country, and, for that purpose, obstructing the laws for the naturalization of foreigners;

\* \* \* \*

The territories contained within the Charters erecting the Colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the People of those Colonies respectively, with all the rights of property, jurisdiction, and Government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free Navigation and use of the Rivers Potomack and Pohomoke, with the property of the Virginia Shores or strands bordering on either of the said Rivers, and all improvements which have been or shall be made thereon. The western and northern extent of Virginia shall in all other respects stand as fixed by the Charter of King James the first, in the Year one thousand six hundred and nine, and by the publick Treaty of Peace between the Courts of Great Britain and France in the year one thousand seven hundred and sixty three; Unless by act of this legislature, one or more Territories shall hereafter be laid off, and Governments established Westward of the *Allegheny* Mountains. And no purchases of Land shall be made of the *Indian* Natives but on behalf of the Publick, by authority of the General Assembly.

\* \* \* \*



MD App. 4

# PROCEEDINGS

OF

## THE CONVENTIONS

OF THE

PROVINCE OF MARYLAND,

HELD AT

THE CITY OF ANNAPOLIS,

IN

1774, 1775, & 1776.

---

BALTIMORE  
JAMES LUCAS & E. K. DEEVER.  
ANNAPOLIS--JONAS GREEN.

.....  
1836.

TUESDAY: October 29, 1776.

Convention met. All members present as on yesterday, except Mr. Lowes. The proceedings of yesterday were read. Mr. Ridgely and Mr. Fischer appeared in the house.

On motion of Mr. Johnson, *Resolved*, That the council of safety be empowered to issue warrants to recruiting sergeants, for the enlistment of non-commissioned officers and privates in the continental service, as a part of the eight battalions for this state, agreeable to the resolutions of this convention, and that any freeman enrolled for the flying camp service be permitted to enlist.

On motion, *Resolved*, That a delegate be elected for Kent county in the room of Mr. Thomas Ringgold, deceased; that the election be held on the 14th day of November next, at Chester town in said county, by John Page, William Rogers, and William Bordly, Esqrs. or any two or one of them, and that the said election be held and made agreeable to the directions and resolves of the last convention.

Agreeable to the order of the day, the convention resolved itself into a committee of the whole, to consider further of the declaration of rights, and form of government for this state; Mr. T. Wright in the chair. After some time spent therein Mr. President resumed the chair, and Mr. Wright reported, that the committee had, according to order, taken into their consideration the declaration of rights, and form of government for this state, and had come to several resolutions thereon, but not having had time to come to a conclusion; had directed him to move for leave to sit again.

*Resolved*, That this convention will on to-morrow resolve itself into a committee of the whole, to consider further of the same.

Mr. Bowie and Alr. Hooe have leave of absence for a few days, on account of particular private business.

This convention being informed, that in the constitution or form of government agreed to by the delegates of Virginia, a claim is made by them injurious to

the inhabitants of this state, *Ordered*, That the same be read, and the same was read as follows, to wit:

"The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might at any time hereafter have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pocomoke, with the property of the Virginia shores or strands, bordering on either of the said rivers, and all improvements which have been or shall be made thereon. The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of king James the first, in the year one thousand six hundred and nine, and by the public treaty of peace between the courts of Great Britain and France in the year one thousand seven hundred and sixty-three; unless, by an act of legislature, one or more territories shall hereafter be laid off, and governments established westward of the Alleghany mountains. And no purchase of lands shall be made of the Indian natives, but on behalf of the public, by authority of the general assembly."

*Resolved*, That this convention will on tomorrow resolve itself into a committee of the whole; to take the same into consideration.

Convention adjourns till tomorrow morning, 9 o'clock.

WEDNESDAY, October 30, 1776.

Convention met. All members present as on yesterday, except Mr. Bowie and Mr. Hooe. The proceedings of yesterday were read. Mr. J. Smith and Mr. Marbury appeared in the house.

The council of safety having laid before the convention a letter from John Rogers, Esqr., inclosing a resignation of his commission as judge of the court of admiralty, the

convention proceeded to appoint another in his stead, and Benjamin Nicholson, Esqr. was appointed.

On motion of Mr. J. Hall, *Resolved*, That the council of safety be empowered to write to their agents in the foreign West Indies, for such warlike stores or other necessaries as have been heretofore ordered by this convention; to the amount of twenty-five thousand pounds currency, to be paid for in paper money by draughts on the treasury here, instead of exporting country produce to that value, any former order to the contrary notwithstanding; and that the said sum of money be deemed and taken as part of the sixty-five thousand pounds heretofore appropriated for the purchase of military stores and other articles necessary for the defence and protection of this state.

Adourned till 3 o'clock.

#### POST MERIDIEM.

Convention met. Mr. Carroll, Mr. Kent, Mr. Bishop, and Mr. Schriver, appeared in the house.

The convention according to the order of the day, resolved itself into a committee of the whole, on that part of the constitution of Virginia which was referred to their consideration; Mr. T. Wright in the chair. After some time spent therein, Mr. President resumed the chair, and Mr. Wright reported, that the committee had, according to order, taken the same into consideration, and had come to several resolutions thereon, which he read in his place and afterwards delivered in at the table, where the same were again twice read, amended, and agreed to as follow:

*Resolved unanimously*, That it is the opinion of this convention, that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore.

*Resolved unanimously*, That it is the opinion of this convention, That the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter, belongs to this state; and that the river

Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this state; and that the river Potowmack and that part of Chesapeake bay which lies between the capes and the south boundary of this state, and so much thereof as is necessary to the navigation of the rivers Potowmack and Pocomoke, ought to be considered as a common high-way, free for the people of both states, without being subject to any duty, burthens or charge, as hath been heretofore accustomed.

*Resolved unanimously*, That it is the opinion of this convention, that the very extensive claim of the state of Virginia to the back lands hath no foundation in justice, and that if the same or any like claim is admitted, the freedom of the smaller states and the liberties of America may be thereby greatly endangered; this convention being firmly persuaded, that if the dominion over those lands should be established by the blood and treasure of the United States, such lands ought to be considered as a common stock, to be parcelled out at proper times into convenient, free and independent governments.

Agreeable to the order of the day, the convention resolved itself into a committee of the whole, to consider further of the declaration of rights, and form of government for this state; Mr. T. Wright in the chair. After some time spent therein Mr. President resumed the chair, and Mr. Wright reported, that the committee had, according to order, taken the same into consideration, and had come to several resolutions thereon, which they directed him to report, as the declaration of rights, but not having had time to go through the form of government, had directed him to move for leave to sit again.

*Resolved*, That this convention will on to-morrow resolve itself into a committee of the whole, to consider further of the form of government of this state.

COMMONWEALTH OF VIRGINIA

COMMISSION OF FISHERIES

P. O Box 756

Newport News, Virginia 23607

April 20, 1967

Mrs. E. C. Rector  
1111 Rector Lane  
McLean, Virginia 22101

Re: Proposed Pier on Potomac River at  
Colonial Beach

Dear Mrs. Rector:

In reply to a letter of April 13 from Mr. Martyn N. Beck, this is to advise that since this pier will be built in part of Charles County Maryland, no license or permit is necessary from this agency. I suggest you contact U. S. Army Engineers in Baltimore and the Maryland Department of Chesapeake Bay Affairs in Annapolis Maryland.

Sincerely yours,

/s/

George H. Badger, Jr.  
Engineer

VEJ/jda

cc: U. S. Army Engineer District, Baltimore  
Corps of Engineers  
P. O. Box 1715  
Baltimore, Maryland 21203

Martyn N. Beck  
Colonial Beach, Virginia



COMMONWEALTH OF VIRGINIA  
STATE WATER CONTROL BOARD  
2111 Hamilton Street

August 5, 1977

Mr. Herbert M. Sachs, Director  
Water Resources Administration  
Tawes State Office Building  
Annapolis, MD 21401

Dear Herb:

On several occasions you have pointed out that Virginia does not have a permit program for the Potomac, that the Potomac needs a permit system because of the large demand for its water, and therefore that Maryland has operated its permit system for users on both sides of the River.

As we discussed, the State Water Control Board, on behalf of the Commonwealth, is agreeable to your continued operation of the permit system in the interest of the riparian owners on both sides of the River. However, as you may know, our General Assembly has appointed a Water Study Commission to review with the State Water Control Board the problems of water supply in Northern and Southeastern Virginia. It is possible that an outcome of the study would be a recommendation to the General Assembly that Virginia adopt its own permit system.

In the event that the General Assembly should authorize a permit system, we would expect to issue permits to all political sub-divisions in the Commonwealth and coordinate all of these permits between Virginia and Maryland, as you and I have previously discussed during our deliberations on the Potomac Low Flow Agreement.

Thank you for your cooperation.

Very truly yours,

/s/

J. Leo Bourassa  
Vice Chairman,  
State Water Control Board

JLB:ay

cc: James Coulter, Board Members



STATE OF MARYLAND  
DEPARTMENT OF NATURAL RESOURCES  
WATER RESOURCES ADMINISTRATION  
TAWES STATE OFFICE BUILDING  
ANNAPOLIS, MARYLAND 21401

August 23, 1977

Colonel J. Leo Bourassa, Vice Chairman  
State Water Control Board  
Commonwealth of Virginia  
2111 Hamilton Street  
P.O. Box 11143  
Richmond, Virginia 23230

Dear Colonel Bourassa:

I am in receipt of your letter dated August 5 concerning a proposed water appropriation permit system in Virginia. While I would concur in the need for the Commonwealth to exercise a more active role in questions of allocation, I question (perhaps don't understand) the third paragraph in your letter. If you are indicating that Maryland would not be issuing permits to Virginia users of the mainstem Potomac, I think we have a legal issue at hand. I am under the impression that regardless of whether the Commonwealth issues or does not issue permits to Virginia users of the mainstem Potomac, Maryland's appropriation law would still be applicable.

I would appreciate your further clarification of the statement in your August 5 letter.

Sincerely yours,

/s/  
Herbert M. Sachs  
Director

HMS:kh

cc: Secretary James B. Coulter  
Mr. Robert V. Davis  
Warren K. Rich, Esquire

KING GEORGE COUNTY, VIRGINIA  
DEPARTMENT OF PLANNING AND CODE  
COMPLIANCE

P. O. Box 246  
King George, VA 22485  
Telephone: (703) 775-7111  
FAX: (703) 775-5248

Raymond P. Ocel, Jr., Director  
Planning and Code Compliance

September 28, 1992

Captain Don MacGlashan  
710 W. Elkcam Circle  
Apartment P.H. 3  
Marco Island, FL 33937

RE: VMRC Permit # 92-1323

Dear Mr. Tolson:

You have inquired regarding a permit to construct a 48-foot long low profile timber groin and a 48-foot long open-pile private pier over the groin adjacent to property situated along the Potomac River near Mathias Point within the King George on the Potomac Subdivision in King George County.

No permit is required for this project because the area below the mean low water line along this portion of the Potomac River is under the jurisdiction of the Maryland Department of Natural Resources. However, the land between mean low water and high water is under the jurisdiction of the King George County Wetlands Board. If any material is placed between mean low and mean water a permit is required from the Wetlands Board.

If you have any questions or concerns, please contact this office or Mr. Jay Woodward of VMRC.

Sincerely

/s/

Jack Green

Land Use Administrator

cc: VMRC File # 92-1323

Chron File

K.K. Weakley



COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
P. O Box 756  
2600 Washington Avenue  
Newport News, Virginia 23607-0756

September 17, 1992

Captain Don MacGlashan  
c/o Kent Weakley  
P.O. Box 25  
Dogue, VA 22451

Re: VMRC #92-1323

Dear Captain MacGlashan:

You have inquired regarding a permit to construct a 48-foot long low-profile timber groin and a 48-foot long open-pile private pier over the groin adjacent to property situated along the Potomac River near Mathias Point within the King George on the Potomac subdivision in King George County.

No authorization is required from this office because the area below the mean low water line along this portion of the Potomac River is under the jurisdiction of the Maryland Department of Natural Resources and the area between low water and high water is under the jurisdiction of the Westmoreland County Wetlands Board. Your application has been forwarded to these agencies, as well

as the U.S. Army Corps of Engineers, Norfolk District, for their review and action, as appropriate.

If we may be of further assistance, please do not hesitate to call on us.

Sincerely,

/s/

Jay M. Woodward  
Environmental Engineer

JMW/kmh

HM

cc: U.S. Army Corps of Engineers, Norfolk District  
King George County Wetlands Board  
Maryland DNR  
Applicant



COMMONWEALTH OF VIRGINIA

Department of Health  
Office Water Programs

SUBJECT: Fairfax County  
Water-FCWA-Corbalis

Kathryn D. Smelley, P. E.  
Fairfax County Water Authority  
8560 Arlington Blvd., P. O. Box 1500  
Merrifield, VA 22116-0815

January 24, 1994

Dear Ms. Smelley:

We have received your letter and sketches on the proposed mid-river intake and have no objections to this proposal. While no further formal permitting requirements are necessary for this type of project since the modifications or new construction will be located in Maryland, we request the opportunity to see the final plans and design information prior to the start of any construction.

If you have any questions, please feel free to call.

Sincerely,

/s/

Hugh J. Eggborn, P. E.  
Engineering Field Director

MD App. 19

JLC/plw

cc: Fairfax County Health Department  
OWP - Central

A:15win





COMMONWEALTH OF VIRGINIA

Marine Resources Commission  
P. O Box 756  
2600 Washington Avenue  
Newport News, Virginia 23607-0756

January 31, 1996

Fairfax County Water Authority  
c/o Mr. Martin B. Sultan, Director  
Engineering and Construction Division  
8560 Arlington Boulevard  
Post Office Box 1500  
Merrifield, Virginia 22116-0815

Re: VMRC #96-0017

Dear Mr. Sultan:

You have inquired regarding a permit to construct a 120,000 square foot concrete intake structure to withdraw raw water from a nontidal portion of the Potomac River upstream of Seneca Dam in Loudoun County, Virginia, and Montgomery County, Maryland.

Please be advised that your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.

Your project will, however, encroach on subaqueous bottom under the jurisdiction of the State of Maryland. They have been forwarded a copy of your application and the archeological investigations report and will contact you if further authorization is required.

Please do not hesitate to call on us if we can be of further assistance.

Sincerely,

/s/

Jeffrey P. Madden  
Environmental Engineer

JPM/NCP

HM

Enclosures

cc: U. S. Army Corps of Engineers  
Maryland Department of Natural Resources  
(with enclosures)

MD App. 22

TOWN OF COLONIAL BEACH  
18 N. Irving Avenue  
Colonial Beach, Virginia 22443  
(804)224-7181 FAX(804)224-7185

October 15, 1998

VIA FIRST CLASS MAIL

Mr. Matthew A. Mathes  
4314 Robertson Boulevard  
Alexandria, Virginia 22309

RE: PROPOSED PIER AT 51 IRVING AVENUE

Dear Mr. Mathes;

I have enclosed a copy of the Pier Permit Agreement for your records. In accordance with the Ordinance and Agreement the following items remain to be submitted.

1. Plans for the piers drawn or approved by a registered engineer.
2. The one hundred dollar yearly permit fee.
3. Proof of insurance on the pier. Initially this should cover the pier's construction.

Once we have these items we can finish processing your building permit. Additionally, because this pier will extend into the jurisdictional waters of Maryland some review by their regulatory agencies may be required. If you have not done so already you are urged to contact Mr. Phil Mohler of the Maryland Department of Environment at (410) 414-3400.

If you have any questions or need any additional information or assistance, please let me know.

Best regards:

Sincerely,

/s/

John E. Tyler, Jr.  
Town Attorney

Enclosures

cc: George W. Bone, Jr., Mayor  
Arthur T. Buswell, Town Manager  
Barbara A. Goff, Town Clerk  
Sarah Kern, Zoning Administrator  
Paul Brunkow, Building Official

[1906 Va. Op. Atty Gen. 87]

July 2, 1906

Captain Henry C. Davis, U.S.A.  
*Fort Hunt, Virginia*

My Dear Sir:

Your letter of June 25th, addressed to the Attorney-General has been received and noted.

In reply thereto, I beg leave to say that the boundary line between the State of Virginia and the State of Maryland is the low water mark on the south bank of the Potomac river, as the river meanders from the West Virginia line to Smith's Point.

As I understand your letter, the boat on which you suspect liquor is sold is habitually anchored below the low water mark on the south or Virginia side of the Potomac river, probably opposite the City of Alexandria or Alexandria county.

I am, therefore, of opinion that the Potomac river beyond low water mark is not Virginia territory, hence this State has no legal right to impose a license for the conduct of any business carried on outside of her territory. From this it necessarily follows that this State can neither require a license to sell, or prohibit the sale of, liquor on a vessel of any kind habitually anchored below low water mark.

Under the Virginia tax law, "no person can sell wine, ardent spirits, or malt liquors, or any mixture thereof, by retail upon any steamboat canal boat, ship, barge, or other vessel at any wharf or landing or upon any river, creek, sound or any of the other waters of the Commonwealth without a license therefor," and the boat to which you refer does not seem to come under this provision.

There are agreements by compact and concurrent legislation between the States of Virginia and Maryland, as to fish and oysters, and the prosecution of certain

offenses committed on the Potomac, but there is no provision as to the sale of liquor.

I conclude, therefore, that the State of Maryland has jurisdiction of this case, and the liquor laws of that State must control.

Very truly yours,

Robert Catlett

*Assistant to the Attorney General*

[1935 Va. Op. Atty Gen. 147]

TAXATION – No tax imposed on oysters taken from  
Potomac River.

COMMONWEALTH OF VIRGINIA

Office of the Attorney General,

Richmond, VA, June 21, 1935

Hon. George L. Doughty,  
*c/o Commissioner of Fisheries,*  
*Newport News, Virginia*

Dear Mr. Doughty:

This is in reply to your letter of May 13, in which you request the opinion of this office upon the question whether or not the 1½ cents tax upon oysters provided for by chapter 411 of the Acts of 1934 may be imposed upon oysters taken from the Potomac river.

After reading the various statutes applicable, I am of the opinion that this tax is confined to oysters taken from the public rocks, bends and shoals of the Commonwealth of Virginia and from oyster grounds leased by the Commonwealth. Since the bed of the Potomac is not owned by the State of Virginia and is not leased by the Commonwealth, I concur in the view you expressed in your letter that the Commission does not possess the authority to levy the tax in question upon oysters taken from the said river.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

[1944 Va. Op. Atty Gen. 91]

JURISDICTION – Crimes Committed on Potomac River.

September 1, 1944

Honorable Colgate W. Darden, Jr.  
Governor of Virginia,  
Richmond, Virginia.

My dear Governor Darden:

This is in reply to your request for my opinion on the following question:

“Does the jurisdiction of the State of Virginia to enforce its criminal laws respecting slot machines extend to offenses alleged to have occurred on the Potomac River?”

In my opinion, the state of Virginia has no such jurisdiction.

By the compact of 1785 between Virginia and Maryland, the territorial bounds of Virginia extend only to the low water mark of the Potomac River on its southern or Virginia shore. The consequent result is that the Potomac River lies wholly in the State of Maryland, and in the absence of any further legislative compact between the two States, the State of Virginia would have no criminal jurisdiction over the waters of the Potomac.

The Compact between the two States (section 14 of the Code of Virginia) does indeed make provision for concurrent jurisdiction of the two States over certain crimes under certain conditions, to-wit:

“All piracies, crimes, or offenses committed \* \* \* by any persons, not citizens of Maryland, against citizen of Virginia, shall be tried in the court of the Commonwealth of Virginia, which hath legal cognizance of such offense \* \* \*”



This article, however, has reference only to offenses committed against the person. See *Hendricks v. Commonwealth*, 75 Va. 934, where it is said:

“This article has reference only to offenses against the citizen or individual. When the offense is against the State, and not against an individual or citizen, there is no declaration as to the court of which State shall take cognizance of it. The jurisdiction in such case is left to be regulated by the public law, \* \* \* (75 Va. 934, 941).

This holding was approved in *Wharton v. Wise*, 153 U.S. 155, 38 L.Ed. 669, 14 S. Ct. 783.

Both of the aforesaid cases involved Virginia statutes punishing unlawful fishing, which statutes expressly covered offenses in the Potomac River and Chesapeake Bay, and which were enacted with the consent and approval of the State of Maryland, and on this ground convictions were sustained.

Operation of a slot machine is not an offense against a citizen of Virginia, but an offense purely against the State; therefore, it is not within the provisions of the Compact.

The slot machine statute does not purport to cover the waters of the Potomac, and I have been unable to find any general criminal statute which purports to give Virginia general criminal jurisdiction over those waters. It is my opinion, therefore, that the State of Virginia has no jurisdiction to enforce the slot machine statutes on the waters of the Potomac River.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General*

[1948 Va. Op. Atty Gen. 118]

JURISDICTION OF STATE – Extends to the Low-Water Mark in the Potomac River. - F-79

July 13, 1948

Honorable Horace T. Morrison,  
Attorney for the Commonwealth,  
King George, Virginia.

My dear Mr. Morrison.

This is to acknowledge receipt of your letter of July 8, from which I quote as follows:

“A question of jurisdiction has arisen here upon which I would like to have your counsel.

“As you know, Maryland has jurisdiction over the Potomac River to the Virginia low water mark. If a person builds a pier out from the Virginia shore which is clearly fastened to the Virginia shore, is that pier in Maryland or Virginia? What must be done to disconnect the pier from Virginia so as to put it in Maryland?

“The question arises from the fact that a man here is selling beer on Sundays out on a pier which has no break in it. He has a Maryland license. An ordinance in this county forbids the sale of beer on Sunday --- but in Maryland it is legal. If he should make a break in the board walk, does that change the situation?”

The pertinent part of § 14 of the Code which fixes the boundary between Maryland and Virginia provides:

“Third, The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule; that is to say, *from low water mark at one headland to low-water at another*, without

following indentations, bays creeks, inlets or affluent rivers; \* \* \*” (*Italics supplied*)

While the above section also provides that the citizens of Virginia shall have full property in the southern shores of the Potomac river and the privilege of building piers so long as navigation is not obstructed, it can be seen that the territorial jurisdiction of the Commonwealth ends at the low-water mark.

Therefore, it is my opinion that that portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth.

Very truly yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General*

[1952 Va. Op. Atty Gen. 116]

GAME AND INLAND FISHERIES – Virginia has no authority to issue licenses for blinds beyond boundary in Potomac River. F-233 (33)

July 30, 1952.

Honorable L. B. Mason, Clerk  
King George County Circuit Court.

This is in reply to your letter of July 16, 1952, requesting my advice “if the States of Maryland and Virginia have a compact permitting people in Virginia to erect blinds beyond the low watermark in the Potomac River, and if [you] have the right to issue a Virginia waterfowl blind license [for blinds] to be erected in the Potomac River beyond the boundary line (low watermark).”

Kindly be advised that I know of no interstate compact providing for the erection of waterfowl blinds in the Potomac River beyond the low watermark on the Virginia side.

Moreover, as the original Maryland-Virginia Compact, as contained in §7-6 Code of Virginia, establishes the boundary line between the two States at the low watermark, and along the line as provided therein, on the Virginia Side; it is my opinion that the Commonwealth of Virginia possesses no authority to regulate or license waterfowl blinds beyond the boundary and inside of the State of Maryland. Accordingly, it does not appear that you, as Clerk, have authority to issue Virginia licenses for waterfowl blinds outside of the Virginia boundary line in the Potomac River.

[1956 Md. Op. Atty. Gen. 335]

Taxation – Property Tax-Power of Maryland County To  
Tax Improvements In Potomac River To Virginia Shore.

February 3, 1956.

Mr. Albert W. Ward, Secretary,  
State Tax Commission.

You have asked the opinion of this office on the question of the power of Montgomery County to levy real property taxes against a proposed electric power project, including a dam across the Potomac River connecting Montgomery County with Virginia. You have advised that the Potomac River is navigable and therefore, of course, permission for the erection of the dam would have to be obtained from the United States Army Engineers.

The waters of Montgomery County extend to the low watermark on the Virginia side of the Potomac River. This boundary of the State was originally determined by the grant from the King of England to Lord Baltimore and has since been formalized in the Compact of 1785 with Virginia and by subsequent arbitration fixing the line more definitely. See *Barnes v. State*, 186 Md. 287. Under the provisions of Article 75, Section 163 of the Annotated Code of Maryland (1951 Ed.), the jurisdiction of any County bounded by waters adjoining neighboring States shall extend to the ultimate limits of the State at the place in questions. Under these circumstances, therefore, it is quite clear that the jurisdiction of Montgomery County extends to the low watermark on the Virginia side of the Potomac River.

It is equally clear that a County has the power to tax a dam as well as the land flooded as a result of the dam, even though the project is located on navigable waters. In *Susquehanna Power Co. v. State Tax Comm.*, 159 Md. 334, the Court of Appeals held that an assessment levied by the County Commissioners of Harford County against the portion of the dam of the Susquehanna Power

Company as well as the land behind the dam that were flooded and lying within the boundaries of the County were subject to real property tax. It is to be noted that in that case, the Court permitted the assessors to affix a value to the flooded lands based upon their use as a part of the power project, although that valuation was substantially more than the value of the same lands prior to the development of the power project. It is therefore our opinion that Montgomery County would have power to tax that portion of the dam and the lands beyond it located in Montgomery County. It is our further opinion that this power to tax would extend to the low watermark on the Virginia side of the Potomac River as the line between Maryland and Virginia has been fixed by arbitration.

It is to be noted that under the Company of 1785, the citizens of the state of Virginia were given full property rights in the shores of the Potomac River adjoining their land and the privilege of erecting wharves and improvements not obstructing navigation of the River. It might be contended that this right reserved in the Compact of 1785 in some way might deprive Maryland of its power to tax improvements of land located within the waters of Maryland, when those improvements were made to shore properties on the Virginia side of the River. It is our opinion, however, that this provision does not in any way detract from Maryland's right to levy taxes against improvements located in the River beyond the low watermark. In this connection, it is important to note that Maryland has jurisdiction over crimes committed on the River at any point beyond the low watermark on the Virginia shore, and, therefore, Maryland has the obligation of policing any improvements that might extend from the Virginia shore into the River beyond low watermark. See *Barnes v. State, supra*.

C. Ferdinand Sybert, Attorney General.  
Frank T. Gray, Asst. Attorney General.

[1967 Va. Op. Atty Gen. 48]

BOUNDARY—Line—Between Virginia and Maryland—Not affected by artificial change in low-water mark by property owner.

April 25, 1967

Honorable Robert R. Gwathmey, III  
Member, House of Delegates

This is in reply to your letter of April 10, 1967, which reads as follows:

"The owners of the property known as Belevedere Beach in King George County are desirous of making certain improvements on the property. Filling in and making the pier which extends out into the Potomac more substantial are among these improvements.

"At the present time they are permitted to serve liquor by the drink by virtue of the fact that the restaurant which is on the pier is located in Charles County, Maryland. It is their understanding and mine that the low water mark is the boundary line between Maryland and Virginia. However, once the pier is substantiated by filling in and construction underneath it, the low water mark will be changed at that point.

"I would appreciate an opinion from your office as to whether or not this proposed construction would in fact change the state boundary so as to place the restaurant on the pier in Virginia. It has been my understanding that any man-made improvements such as this which only change the water line in one location do not change the boundary line, and further, that the boundary line continues to be the low water mark as it generally runs along the banks of the Potomac. In effect, the boundary line at the exact point

of the pier would be an imaginary line across the pier from the low water mark on one side to the low water mark on the other side."

As I am sure you are aware, it is indicated in § 7.1-7 of the Code of Virginia (1966 Replacement Volume) that the compact between Virginia and Maryland fixes the boundary between the States at the location you are interested in as the low-water mark of the Potomac, and that the low-water mark is measured ". . . from low-water mark at one headland to low-water mark at another, without following indentations, bays, creeks, inlets, or affluent rivers. . . ."

The rights of a riparian owner were recently noted by the Supreme Court of Appeals of Virginia in *Thurston v. Portsmouth*, 205 Va. 909, and include the ". . . right to build a pier or wharf out to navigable water, subject to any regulations of the State." (205 Va. at 912.)

In *Oklahoma v. Texas*, 265 U.S. 493 (1924), it was held that where the boundary between two states is a river bank, the boundary follows gradual changes attributable to accretion. In *Steelman v. Field*, 142 Va. 383, a case involving the accretion doctrine, it was said that the title of the Commonwealth to public waters shifts with the shifting sands. It was also indicated in *Oklahoma v. Texas*, *supra*, and specifically stated in what seems to be the leading case of *County of St. Clair v. Livingston*, 23 Wall. 46, 23 L.Ed. 59 (1874), that accretions attributable in part to artificial means accrue to the riparian owner. I believe this is the majority view though there appears to be a split of authority on the point.

Accretions, however, are imperceptible changes, though the process may be instituted or hastened by artificial structures. From the factual situation you have given, I doubt that you are concerned with the doctrine of accretion. You state that ". . . once the pier is substantiated



by filling in and construction underneath it, the low water mark will be changed *at that point.*" (Emphasis added). This is not, of course, an imperceptible change.

In *State v. Sause*, (Or.) 342 P. (2d) 803 (1959), many of the authorities were reviewed and it was specifically held that artificial changes made in his bank by a riparian owner do not change his boundary.

While I am not aware of any Virginia case specifically in point, the case of *Lambert's Point Co. v. Norfolk & W.R. Co.*, 113 Va. 270, seems to have some relevancy. There it was held that while a railroad company had a right to fill in and build a wharf out to the port warden's line, and that the improvement belonged to the railroad company, it could not thereby increase its riparian rights to the detriment of those of the adjoining owner. The issue in the case involved the apportionment of water front between adjoining riparian owners.

In my opinion, an artificial change in the low-water mark, occasioned by an owner in the lawful exercise of his right to construct a pier, would not change the boundary line between Virginia and Maryland.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

\* \* \* \* \*

**STIPULATIONS  
RELATING TO DESIGNEE DEPOSITIONS**

The Commonwealth of Virginia ("Virginia") and the State of Maryland ("Maryland"), by their undersigned counsel, stipulate to the following facts, for purposes of this proceeding, in lieu of a corporate designation deposition of Virginia:

1. Virginia has never generally issued a permit, certification, or other authorization to discharge wastewater or pollutants into the Potomac River on the Maryland side of the Maryland-Virginia line. In 1985, a VPDES permit was issued to Virginia Electric and Power Company for its power plant on the Potomac River at Possum Point. The permit included 7 discharges, one of which was directly into the Potomac River. When the permit was reissued in 1990, this discharge was removed, and it has not been included in any permits since that time. This is the only such instance of which officials in the Virginia Department of Environmental Quality are currently aware.

2. Virginia has issued permits, certifications, or other authorizations regulating discharges of wastewater or pollutants into tributaries and embayments of the Potomac River on the Virginia side of the Maryland-Virginia line.

3. Virginia has never objected to Maryland's jurisdiction to issue permits, certifications, or other authorizations governing discharge of wastewater or pollutants into the Potomac River on the Maryland side of the Maryland-Virginia line.

4. Virginia has never set or enforced water quality standards with respect to the Potomac River on the Maryland side of the Maryland-Virginia line.

5. Virginia has never objected to Maryland's jurisdiction to set or enforce water quality standards with respect to the Potomac River on the Maryland side of the Maryland-Virginia line.

6. Neither the Virginia Marine Resources Commission, nor any of its predecessor agencies has issued a permit, certification, or other authorization governing construction in the Potomac River on the Maryland side of the Maryland-Virginia line.

7. Since at least 1900, Virginia's statutory laws have not provided for general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line.

8. Since at least 1900, Virginia has not exercised general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line.

9. Virginia has not objected to Maryland's exercise of its general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line.

10. Since at least 1900, Virginia has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line.

11. Virginia has not objected to Maryland's enforcement of any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line.

12. Virginia has not objected to Maryland's jurisdiction to issue liquor licenses to structures located in the Potomac River on the Maryland side of the Maryland-Virginia line.

13. Virginia has not imposed any sales or use, litter, entertainment, personal property, or income tax on activities that take place in the Potomac River, or on structures located in the Potomac River, on the Maryland side of the Maryland-Virginia line.

14. Virginia has not objected to Maryland's jurisdiction to impose any sales or use, litter, entertainment, personal property or income taxes on activities that take place in the Potomac River, or on structures located in the Potomac River, on the Maryland side of the Maryland-Virginia line.

THE COMMONWEALTH  
OF VIRGINIA:

THE STATE OF  
MARYLAND:

By: /s/  
Frederick S. Fisher

By:                     /s/                      
Andrew H. Baida

Dated: 10/3/01

Dated: 10/1/01

In the  
Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA,  
Plaintiff,  
v.  
STATE OF MARYLAND,  
Defendant.

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Before the Special Master  
the Hon. Ralph I. Lancaster, Jr.

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RESPONSES TO MARYLAND'S  
INTERROGATORIES

---

Stuart A. Raphael  
Jill M. Dennis  
HUNTON & WILLIAMS  
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Suite 1700  
McLean, Virginia 22102  
(703) 714-7400  
  
*Special Counsel to the  
Commonwealth of Virginia*

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Randolph A. Beales  
*Attorney General*  
William H. Hurd  
*Solicitor General*  
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*Senior Assistant Attorney  
General*  
Frederick S. Fisher  
*Senior Assistant Attorney  
General\**  
Office of the Attorney  
General  
900 E. Main Street  
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(804) 786-3870

\* \* \* \*

4. Identify and describe all agencies, boards, or commissions of Virginia or its political subdivisions that regulate the withdrawal of water from, the discharge of water or pollutants into any waterway, including the Potomac River or any other river, including in your answer the name and address of each such agency and a detailed description of the agency's regulatory mission and scope.

**Response:**

Virginia objects to this Request to the extent it seeks information concerning the regulation of the *discharge* of water or pollutants requiring an NPDES permit under § 402 of the Clean Water Act, 33 U.S.C. § 1342. Virginia also objects to this Request to the extent it relates to water withdrawals from "any other river" than the Potomac. Such information has no relevance to any of the claims or defenses in this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence.

As limited by its specific and General Objections, Virginia states that no agency of the State government of Virginia currently requires a permit from any Virginia user to withdraw water from the Potomac River. Such permits could be required, however, if the surface water area from which the withdrawal is made were found by the State Water Control Board to be a surface water management area pursuant to Virginia Code Section 62.1-242 through 62.1-253. At present, no portion of the Potomac River, or any other river in Virginia, has been declared a surface water management area.

In addition, any person whose rights are adversely affected by a surface water withdrawal from the Potomac River by a Virginia entity or person could file a motion for judgment or bill of complaint against the party

withdrawing the water in the appropriate circuit court of the Commonwealth. The circuit court would have jurisdiction to resolve such a controversy, with a discretionary appeal to the Supreme Court of Virginia.

Virginia users withdrawing water from the Potomac River are required to report such withdrawals to the Department of Environmental Quality, in accordance with 9 Va. Reg. 25-200-10 through 25-200-50, and to the Department of Health, in accordance with 12 Va. Reg. 5-590530. Sample copies of these reports are found at VA-Gen-00648-710.

5. Identify and describe all licenses or permits that have been sought from, considered by, denied by, or granted by Virginia or its agencies or political subdivisions that relate to the withdrawal of water from the Potomac River or the discharge of water or pollutants into the Potomac River, including in your answer a description of each license or permit, the identity of the agency involved, and the date on which the license or permit was sought, considered, denied, or granted.

**Response:**

Virginia objects to this Interrogatory to the extent it seeks information concerning the regulation of the discharge of water or pollutants requiring an NPDES permit under § 402 of the Clean Water Act, 33 U.S.C. § 1342. Such information has no relevance to any of the claims or defenses in this proceeding, is not reasonably calculated to lead to the discovery of admissible evidence, and collecting and reporting it would impose an undue burden on Virginia.

As limited by its specific and General Objections, Virginia states that it has not issued or been requested to issue any licenses or permits for the withdrawal of water



from the Potomac River. In this regard, please see Virginia's answer to Interrogatory No. 4.

\* \* \* \* \*

7. Identify and describe all agencies, boards, or commissions of Virginia or its political subdivisions that regulate the construction, maintenance or demolition of structures on property located below the low-water mark of the Potomac River, including in your answer the name and address of each such agency and a detailed description of the agency's regulatory mission and scope.

**Response:**

Each local government along the Potomac River is required by the Uniform Statewide Building Code to regulate structures to ensure their compliance with that code. *See* Va. Code Ann. §§ 36-97 et seq, and the regulations at 13 VAC 5-61-10 et seq. Section 36-97 defines "structure" to mean an "assembly of materials forming a construction for occupancy or use including . . . piers [and] wharves . . . ." Enforcement of the provisions of the USBC is the responsibility of the local building department. Va. Code Ann. § 36-105; 13 VAC 5-61-31. The names and addresses of the local building permit offices for the localities along the Potomac River are as follows:

Loudoun County 1 Harrison Street S.E. Leesburg, Va. 20175 (703) 777-0397	Fairfax County 12055 Government Center Pkwy. 2nd Floor Fairfax, Va. 22035 (703) 222-0801	Arlington County 2100 Clarendon Blvd. Suite 804 Arlington, Va. 22201 (703) 228-3800
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City of Alexandria 301 King Street Alexandria Va. 22314 (703) 838-4360	Prince William County 1 County Complex Court Prince William, Va 22192-9201 (703) 792-6873	Stafford County 1300 Courthouse Road Stafford, VA 22555-0339 (540) 658-8650
King George County 10459 Courthouse Drive Suite 104 King George, Va. 22485 (540) 775-7111	Town of Colonial Beach 18 N. Irving Ave. Colonial Beach, Va 22443 (804) 224-7181	Westmoreland County P. O. Box 1000 Montross, Va 22520 (804) 493-0120
Northumberland County P. O. Box 129 Heathsville, Va 22473 (804) 580-7921		

The Virginia Marine Resources Commission, 2600 Washington Avenue, P.O. Box 756, Newport News, Va. 23607-0756, tel. (757) 247-2200, issues permits for all reasonable uses of state-owned bottomlands (submerged lands) not authorized by statute. Va. Code Ann. § 28.2-1204. It considers the effect of the proposed use on other reasonable and permissible uses of state waters and state-owned bottomlands, marine and fisheries resources of the Commonwealth, tidal wetlands, adjacent or nearby properties, water quality and submerged aquatic vegetation. These permits are only issued for structures in the Potomac River which are within those embayments that are within the boundaries of Virginia; they are not issued for structures below the low-water mark of the

Potomac River where that low-water mark is the boundary between Virginia and Maryland. *See* Va. Code Ann. § 28.2-1205.

Any county, city or town along the Potomac River may adopt the wetlands zoning ordinance set forth in Va. Code Ann. § 28.2-1302, appoint a local wetlands board and require a permit for any construction in any wetlands, except for certain exempt structures. The term "wetlands" means both vegetated and nonvegetated wetlands. *Id.* § 28.2-1302 (Wetlands Zoning Ordinance § 2). "Vegetated wetlands" means "lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project in the county, city, or town in question, and upon which is growing" certain defined species. *Id.* "Nonvegetated wetlands" means unvegetated lands lying contiguous to mean low water and between mean low water and mean high water." *Id.* If the locality does not adopt the wetlands ordinance, all non-exempt construction in wetlands will require a permit from the Marine Resources Commission under the same wetlands zoning ordinance. The standards in § 28.2-1308 require that ecological systems in the wetlands should not be unreasonably disturbed.

\* \* \* \* \*

9. Identify and describe all agencies, boards, or commissions of Virginia or its political subdivisions that regulate the mining, dredging, or extraction on property located below the low-water mark of the Potomac River, including in your answer the name and address of each such agency and a detailed description of the agency's regulatory mission and scope.

**Response:**

No agency of the Virginia state government currently regulates the mining, dredging, or extraction of materials on the submerged lands located below the low-water mark of the Potomac beyond the Virginia/Maryland line.

10. Identify and describe all agencies, boards, or commissions of Virginia or its political subdivisions that impose, enforce, or collect taxes or fees on property above the low water mark of the Potomac River, on any activity conducted on such property or on any structure built on such property, or on any owner, lessee, user, or patron of such property or structure, including in your answer the name and address of each such agency, a detailed description of the agency's regulatory mission and scope, and a description of each tax or fee imposed, enforced, or collected by the agency.

**Response:**

Virginia objects to this Interrogatory to the extent it is unlimited in time, and to the extent it is unrelated to the Potomac River, making it overbroad and unduly burdensome. As limited by its specific and General Objections, Virginia states that real property, improvements, and structures appurtenant to such property are subject to local taxation only. Va. Const. art. X, § 4; Va. Code Ann. § 58.1-3000. The localities along the Potomac River are authorized to impose a property tax on real property, structures and improvements that extend from the Virginia shore of the Potomac River. They are also authorized to include in the value of real property subject to local taxation the value of any structures appurtenant to such property that extend below the low-water mark across the Virginia/Maryland line.

The names and addresses of the local officials responsible for taxation and assessment of such real property are as follows:

<p>Catherine Ashby Commissioner of Revenue for Loudoun County 1 Harrison Street, S.E. Leesburg, VA 20175</p>	<p>Kevin Greenleaf Department of Tax Administration Fairfax County 12000 Government Center Parkway Suite 223 Fairfax, VA 22035</p>	<p>Geraldine Whiting Commissioner of Revenue Arlington County 2100 Clarendon Boulevard Suite 200 Arlington, VA 22201</p>
<p>Daniel A. Neckel Director, Finance Admin. City of Alexandria 301 King Street Alexandria, VA 22314</p>	<p>Christopher E. Martino Director of Finance Prince William County 1 County Complex Court, MC455 Prince William, VA 22192-9201</p>	<p>Scott A. Mayausky Commissioner of Revenue Stafford County 1300 Courthouse Road P. O. Box 98 Stafford, VA 22555-0098</p>

James A. Shaffer Treasurer, Town of Colonial Beach P. O. Box 450 Colonial Beach, VA 22443	Faye W. Lumpkin King George County 10459 Courthouse Drive, Suite 101 King George, VA 22485	Carol Gawen Commissioner of Revenue Westmoreland County P. O. Box 68 Montross, VA 22520
Todd E. Thomas Commissioner of Revenue Northumberland County P. O. Box 309 Heathsville, VA 22473		

\* \* \* \* \*

13. If you contend that any exercise of police power, law, rule, or regulation, including those related to public safety, occupational safety, health, alcohol, gambling, gaming, hunting, or fishing, has been imposed or enforced by any agency, board or commission of Virginia or its political subdivisions with respect to property located or activity occurring below the low-water mark of the Potomac River or on the owners, lessees, users, or patrons of such property, describe each instance where such law, rule, or regulation has been imposed or enforced, including in your answer the agency, board or commission responsible for imposition or enforcement, the person or persons that were affected by imposition or enforcement, the location that was affected by imposition or enforcement, and the dates and period of time in which the imposition or enforcement occurred.

**Response:**

Virginia objects to this Interrogatory to the extent it is unlimited in time. Virginia also objects because the Interrogatory seeks information that is neither relevant to any of the claims or defenses in the case, nor reasonably calculated to lead to the discovery of admissible evidence. As limited by its specific and General Objections, Virginia states that it does not presently enforce its laws relating to public safety, occupational safety, health, alcohol, gambling, gaming, hunting or fishing in that portion of the Potomac River that lies below the low-water mark of the Potomac River beyond the Virginia/Maryland line. As to taxation of structures appurtenant to the Virginia shore of the Potomac River that extend beyond the Virginia/Maryland line, see Virginia's answer to Interrogatory No. 10. Virginia also is party to certain reciprocal fishing agreements with respect to the Potomac River entered into between the Virginia Department of Game and Inland Fisheries and the Maryland Department of Natural Resources, and between the Virginia Marine Resources Commission, Maryland Department of Natural Resources, and the Potomac River Fisheries Commission, copies of which will be produced. (See, e.g., VA-Gen-00298-329).

In the

Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA,  
Plaintiff,

v.

STATE OF MARYLAND,  
Defendant.

---

Before the Special Master  
the Hon. Ralph I. Lancaster, Jr.

---

RESPONSES TO MARYLAND'S  
REQUESTS FOR ADMISSIONS

---

Stuart A. Raphael  
Jill M. Dennis  
HUNTON & WILLIAMS  
1751 Pinnacle Drive  
Suite 1700  
McLean, Virginia 22102  
(703) 714-7400  
  
*Special Counsel to the  
Commonwealth of Virginia*

Randolph A. Beales  
*Attorney General*  
William H. Hurd  
*Solicitor General*  
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*Senior Assistant Attorney  
General*  
Frederick S. Fisher  
*Senior Assistant Attorney  
General\**  
Office of the Attorney  
General  
900 E. Main Street  
Richmond, Virginia 23219  
(804) 786-3870

*\*Counsel of Record*



\* \* \* \*

29. Virginia has never issued or denied any waterway construction or water appropriation permits to Virginia citizens, residents or entities with respect to property located or activities occurring below the low-water mark of the Potomac River.

**Response:**

Virginia admits that it has not, to date, issued or denied any water appropriation permits with respect to the withdrawal of water from the Potomac River. The balance of this request is denied.

\* \* \* \* \*

162. Since at least 1888, Virginia has not regulated mining, dredging, or extraction of materials from property located below the low-water mark of the Potomac River.

**Response:**

Admitted.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff, \* Before Special Master

vs. \* Ralph I. Lancaster, Jr.

STATE OF \*  
MARYLAND, \*

Defendant.

\* \* \* \* \*

**AFFIDAVIT OF RICHARD J. AYELLA**

Being more than 18 years of age and competent to testify, Richard J. Ayella states as follows:

1. I am currently employed by the State of Maryland, Department of the Environment (MDE), as the Chief of the Tidal Wetlands Division within the Wetlands and Waterways Program, Water Management Administration. I have held this position within MDE since July 1995. Before becoming Division Chief, I served in a variety of positions within the Tidal Wetlands Division since 1980, all of which involved the review of permit applications to conduct regulated activities in state wetlands and waters.

2. Prior to July 1995, the Tidal Wetlands Division was part of the Water Resources Administration within the Maryland Department of Natural Resources (DNR). In July 1995, all of the programs within the Water Resources Administration were transferred to MDE, where it was renamed the Water Management Administration. The responsibilities of the Tidal Wetlands Division did not change upon the transfer.

3. The Maryland Board of Public Works (“Board”) administers the State’s proprietary rights in its submerged lands and is specifically charged with the responsibility of administering the 1970 Tidal Wetlands Act (1970 Md. Laws Ch. 241), which regulates certain activities in tidal waters and wetlands. The Board has delegated to MDE certain of its responsibilities under the 1970 Act, including its jurisdiction over piers, pilings, decks, and other related structures. COMAR 23.02.04.04A. All other activities involving the dredging or filling of tidal waters and wetlands remain subject to the Board’s licensing authority. COMAR 23.02.04.04B.

### **The Different Types of Maryland Tidal Wetlands Authorizations**

4. I am familiar with the different types of authorizations the Department issues for the placement of structures or the conduct of regulated activities in the tidal waters and wetlands of the State of Maryland, including projects extending out from the Virginia shoreline.

5. Maryland issues the same types of authorizations for work along the Virginia shoreline that it issues for work elsewhere in Maryland. The most significant projects, such as dredging, groin fields, and open water fill are authorized through a Tidal Wetlands License issued by the Board of Public Works. Although the Board issues the Tidal Wetlands Licenses, MDE is delegated responsibility for enforcing the Licenses and, as a result, maintains records of all such Licenses.

6. Most Tidal Wetlands Licenses are designated by a “WL” in the authorization code. There are two exceptions. First, since the late 1980s, piers that meet certain criteria, now set forth at Code of Maryland Regulations (COMAR) 26.24.02.04B, have been authorized by a license given the designation “PR” for internal tracking purposes. Second, projects meeting

certain criteria are authorized under a General Tidal Wetlands License that was promulgated in 1994 and is now set forth at Code of Maryland Regulations (COMAR) 26.24.02.04. These projects are authorized by a license with the designation "GL."

7. Projects involving work in tidal waters and wetlands but that do not require a wetlands license have traditionally been authorized under one of three authorizations: Pier Notifications, No Objection letters, and No License letters.

8. Pier notifications are issued exclusively for private non-commercial piers that meet the length, width, and impact limitations set forth at COMAR 26.24.02.04A. These authorizations are designated by the code "NF."

9. No Objection letters were used prior to the adoption of the General Tidal Wetlands License in 1994 for piers and projects that involve minor activity in state wetlands and waters but that are too minor to merit the issuance of a formal License. No Objection letters have also been issued for projects on the Virginia shoreline that do not require a formal Maryland wetlands license. These authorizations are typically designated by the code "NO," although in some instances received no number. *See*, e.g., Exhibit 33 at VA-MRC-00047 (Maryland letter indicating no objection to rip rap project provided certain conditions met), VA-MRC-00048 (Maryland letter explaining "letter of no objection or approval" for those projects on the Virginia shoreline that extend into Maryland waters but do not require a formal Maryland wetlands license).

10. No License letters have traditionally been issued in response to all other applications involving activity that does not require a license. For Virginia applicants, No License letters are issued for projects that do not require a license under the "Policy Clarifying

Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River" adopted by the Maryland Board of Public Works on August 12, 1987, and the regulations promulgated in 1994 codifying the 1987 policy (COMAR 23.02.04.21). For these authorizations, which are typically designated by the "NL" code, the Department has traditionally noted that the proposed project was subject to Maryland's regulatory jurisdiction but that a Maryland license was not required.

11. Files with the designation "PL" are kept for planning purposes only, usually when a potential applicant contacts MDE to discuss a project prior to the submission of a formal application. Once the application is submitted, the contents of the PL file are incorporated into a file with a designation corresponding to the type of authorization for which the project qualifies.

12. Beginning in 1991, Maryland began tracking its processing of permit applications for work done in tidal waters and wetlands through a database used jointly by the U.S. Army Corps of Engineers and Maryland. The database includes information relating to the applicant, his or her address, the location of the project, and a brief description of the project. Projects extending out from the Virginia shoreline are given a "VA" participant code in the database.

13. I am personally familiar with the Department's record keeping practices for files that are made and kept in the course of the Department's regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division. The documents attached hereto that are identified with the bates stamp code "MD-MDE-" are genuine and authentic copies of original records filed at the Department regarding projects extending out from the Virginia shoreline.

14. The documents attached hereto that are identified with the bates stamp code "VA-MRC-" are genuine and authentic copies of records produced by Virginia in this litigation. Included among them are copies of Maryland authorizations for which Maryland has no other record.

15. Exhibits 1 through 269 are genuine and authentic copies of documents either kept in the course of the Department's regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation that include a Maryland authorization of work proposed to be completed on the Virginia shoreline of the Potomac River. Exhibit number 34 is blank.

16. Attached hereto as Exhibit 349 is a summary of those Maryland authorizations issued for work on the Virginia shoreline of the Potomac River for which records have been located. Exhibits 1 through 269 are summarized in the corresponding entries on the chart.

17. The projects described at entries 270 through 291 on the chart attached hereto as Exhibit 349 represent Virginia shoreline projects for which we have located evidence that Maryland asserted jurisdiction (such as a letter stating that a license is required) but for which no paper record of the issuance of a Maryland authorization could be located.

18. The projects described at entries 292 through 345 on the chart attached hereto as Exhibit 349 represent Virginia shoreline projects in the Department's computer database for which we have been able to locate a letter from the VMRC referring the Virginia applicant to Maryland, but for which no paper record of the issuance of a Maryland authorization could be located.

19. The projects described at entries 350 through 366 on the chart attached hereto as Exhibit 349 represent Virginia shoreline projects in the Department's computer database for which neither a VMRC letter nor a paper record of the issuance of a Maryland authorization could be located. These projects are identified on the chart by the ten-digit tracking number entered into the database upon submission of the application.

**Processing Applications for Work on the Virginia Shoreline of the Potomac River**

20. I am familiar with the process by which the Department evaluates applications for, and the authorization of, the placement of structures or the conduct of regulated activities in the tidal waters and wetlands of the State of Maryland, including projects extending out from the Virginia shoreline.

21. Maryland receives applications for the placement of structures in the Potomac from the Virginia shoreline in two ways. First, some applicants apply directly to MDE and, before 1995, DNR. Second, and far more commonly, Virginia applications are forwarded to Maryland by the Commonwealth of Virginia, Marine Resources Commission (VMRC), the Virginia agency with jurisdiction over submerged lands. After receiving the applications from the VMRC, Maryland evaluates them for compliance with Maryland law and responds accordingly.

22. In some instances, the VMRC alerted Maryland to Virginia shoreline projects by copying the Maryland DNR on letters to Virginia applicants stating that the VMRC does not have jurisdiction over the project. Exhibits 17 and 346 at VA-MRC-F-00313 contain examples of this practice.

23. In other instances, the VMRC would inform applicants that it did not have jurisdiction but that Maryland did. For example, Exhibit 25 is a genuine and authentic copy of documents obtained from Virginia relating to Maryland's authorization of a private pier proposed by Mr. James M. Thomas along the Virginia shoreline at Westmoreland County. Included among these documents is a note by Mr. Thomas dated February 19, 1984, and stamped received by the VMRC on February 22, 1984, indicating that Mr. Thomas had requested guidance from the VMRC on how to apply for authorization for his pier. VA-MRC-F-00111. Also included is an unsigned copy of a letter dated March 27, 1984, from Madeline Grulich, VMRC, to Mr. Thomas in which the VMRC states that "your proposed project does not fall within the jurisdiction of the Marine Resources Commission" but that "[y]our proposed project will, however, encroach on subaqueous bottom which is under the jurisdiction of the State of Maryland. I recommend that you contact the Maryland Department of Natural Resources, Wetlands Permit Section, Water Resources Administration, Tawes State Office Building, Annapolis, Maryland 21401, for more information on their permitting requirements." VA-MRC-F-00092. Finally, Exhibit 25 includes a copy of the letter ultimately issued by Maryland, dated April 2, 1984, advising that a Maryland wetlands license is not required. VA-MRC-F-00108.

### **Post-1987 Virginia Shoreline Policy**

24. On August 12, 1987, the Maryland Board of Public Works adopted a "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River" ("1987 Policy"). A copy of the 1987 Policy is attached to the Affidavit of Doldon W. Moore, Jr.. The 1987 Policy sets forth criteria for which types of projects along the Virginia shoreline of the Potomac River would require a formal Maryland license and which could



be authorized more informally, such as through the issuance of a No License letter or a Letter of No Objection.

25. The Commonwealth continued to refer Virginia applicants to Maryland even after the 1987 Policy was in place, forwarding their applications to the Maryland DNR for review and authorization. Exhibits 79 and 82 contain examples of this practice.

26. In 1994, the Maryland Board of Public Works promulgated the 1987 Policy as a regulation. COMAR 23.02.04.21. The 1994 regulation continued the policy of not requiring a formal license for certain Virginia shoreline improvements.

27. Exhibits 164, 174, and 233 contain genuine and authentic copies of documents either kept in the course of the Department's regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation indicating that the Commonwealth continued to refer applicants to Maryland for review and authorization of Virginia shoreline projects even after the 1994 regulations were promulgated.

28. For example, Exhibit 233 contains a letter dated received by the VMRC on December 14, 1995, from Palmer N. Stearns, III, Commonwealth of Virginia, Department of Conservation and Recreation, to Ms. Andi Cunabaugh, MDE, in which the Commonwealth states that it is forwarding a copy of its permit application and notes that "[b]ecause the proposed pier extends into Charles County, Maryland, I want to ensure that the proposed undertaking complies with Maryland's laws and regulations as well as Virginia's." VA-MRC-02415.

29. Exhibits 250, 260, and 269 contain genuine and authentic copies of documents either kept in the

course of the Department's regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation indicating that the Commonwealth continues to refer its citizens and political subdivisions to Maryland's jurisdiction even after it filed its Motion for Leave to File Bill of Complaint in this case in February 2000.

30. For example, Exhibit 269 contains a copy of an August 1, 2001, letter from Jeffrey P. Madden, VMRC, to Mr. Richard H. Bickford indicating that "since your proposed project will extend channelward of the mean low water mark, you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland. They have been forwarded a copy of your application and will contact you if further authorization is required." VA-MRC-02640.

31. Exhibit 346 contains genuine and authentic copies of letters produced by Virginia in this litigation that are from the Commonwealth of Virginia, Marine Resources Commission to applicants referring them to Maryland for review and authorization of projects along the Virginia shoreline of the Potomac River that are in addition to such letters contained in Exhibits 1-345.

### **Clarifying Jurisdiction**

32. Exhibits 21 and 346 contain genuine and authentic copies of documents either kept in the course of the Department's regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation reflecting instances in which the Commonwealth sought to clarify the relative jurisdictions of the various agencies on the Potomac River.

33. Exhibit 21 contains a genuine and authentic copy of a November 9, 1983, letter from Norman E. Larsen, VMRC, to the King George County Wetlands Board to clarify "some misunderstanding of our relative jurisdictions" on the Potomac:

Under the revised Wetlands Law (and your new [County wetlands] ordinance) you now have jurisdiction over the inter-tidal area of your entire shoreline. Our (VMRC) jurisdiction, on the other hand, begins at mean low water and extends channelward to the limit of State ownership of the bottom (generally the 3 mile territorial sea). However, since Maryland owns the entire Potomac River from mean low water channelward we are unable to exercise jurisdiction over projects which encroach into the Potomac. We only have jurisdiction in the tributaries along the Virginia shore. . . .

For your further information Mark and I met with Maryland permitting officials several months ago to negotiate a special agreement for groin projects in the Potomac. Their Board of Public Works has yet to approve our agreement, but I believe that Maryland will ultimately waive public hearing requirements where the Virginia local board has acted.

VA-MRC-F-00186.

34. Exhibit 346 at VA-MRC-F-00354 is a genuine and authentic copy of a letter obtained from Virginia dated April 4, 1984, from Madeline Grulich, Commonwealth of Virginia, Marine Resources Commission, to Mrs. Mary E. Mozinsky, in which the Commonwealth states that it would help the applicant "in understanding the agencies with jurisdiction along the shoreline of the Potomac River at Colonial Beach" to

know that “[i]n 1785, Maryland and Virginia signed a compact in which Maryland took jurisdiction over the subaqueous lands of the Potomac River to the mean low water mark of the Virginia shore. As a consequence, projects constructed channelward of mean low water in the Potomac River fall under the jurisdiction of the Maryland Department of Natural Resources, rather than the Virginia Marine Resources Commission. The state boundary line follows the mean low water mark along the banks of the Potomac and across the mouths of creeks, rivers, bays, and inlets (as shown on the enclosed map).”

### **Referring Protests to Maryland**

35. Exhibits 346, 59, and 289 contain genuine and authentic copies of documents either kept in the course of the Department’s regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation indicating that the Commonwealth referred to Maryland Virginia citizens who raised objections to work being done on the Virginia shoreline of the Potomac River.

36. Exhibit 346 at VA-MRC-F-00274 is a genuine and authentic copy of a April 6, 1982, letter from Mark Turner, VMRC, to James C. Michie, indicating that Mr. Michie had objected to the timber groin project proposal of his neighbor, Herbert J. Mitchell, and that the VMRC informed Mr. Michie that it “has jurisdiction over all State-owned subaqueous land, channelward of the mean low water, not conveyed by special grant or compact according to law. With the exception of the tributaries and embayments mean low water, on the Potomac River, makes the State boundary between Virginia and Maryland. Therefore, at the site of Mr. Mitchell’s project this Commission would not have jurisdiction . . . . I am forwarding a copy of your letter to the U.S. Army Corps of Engineers, Baltimore Maryland District, and the

Maryland Department of Natural Resources. Both of these agencies would have jurisdiction over this project.”

37. Exhibit 59 contains a genuine and authentic copy of two letters dated April 12, 1991, from Jay M. Woodward, VMRC, to Ms. Roberta Raines and Frederick and Beverly Jackson, indicating that they had raised objections to a pier project proposed by the Colonial Beach School Board. After noting that the VMRC did not have jurisdiction over the matter, the letters state that “[t]he Maryland Department of Natural Resources has jurisdiction over waters of the Potomac River below mean low water, and as such, is the appropriate agency to address your concerns.” VA-MRC-00587, 00590. The letter indicates further that a copy their “protest letter” was forwarded to the Maryland DNR for its review. *Id.*

38. Exhibit 289 at VA-MRC-01565 is a genuine and authentic copy of a May 7, 1996, letter from Jay M. Woodward, VMRC, to Mr. Peter von Freiburg indicating that Mr. Freiburg had filed “an official complaint” about Mr. Dudley Staples’ groin and revetment project and recent erosion problems Mr. Freiburg was experiencing. With respect to Mr. Freiburg’s complaint, the VMRC stated that “the project was authorized by your local wetlands board but did not require a permit from this office as the subaqueous bottom channelward of mean low water along this portion of the Potomac River falls under the jurisdiction of the Maryland Department of Natural Resources. Accordingly, there is little that our office can do to address your concerns directly.” The letter indicates that the Commonwealth suggested that “perhaps the structures can be modified or realigned to minimize the effects you have been experiencing. I believe your local wetlands board could handle such a request for permit modification and I don’t think Maryland DNR would require a license, provided the scope of the project does not change significantly. I have copied both of these offices with your letter in the event there is anything they

may be able to do for you. You may wish to call Mr. Doldon Moore with DNR at (410) 974-3871 for further information on their permitting requirements.”

### **Finding Mean Low Water Mark**

39. Exhibits 318 and 346 contain genuine and authentic copies of documents either kept in the course of the Department’s regularly conducted business activities for compliance with State laws administered by the Tidal Wetlands Division or produced by Virginia in this litigation indicating that the Commonwealth uses the mean low water mark for purposes of determining where Virginia jurisdiction ends and Maryland’s begins.

40. Exhibit 318 contains a genuine and authentic copy of a post-it note in the VMRC’s files dated February 8, 2000, which indicates that an employee of the VMRC identified as “Ben” had to make a site visit “to verify this is Maryland waters.” VA-MRC-02521. As indicated in the March 31, 2000, letter from Ben Stagg, VMRC, to Mr. Vernon D. Gutjahir, the VMRC eventually determined that Mr. Gutjahir’s project “will indeed extend channelward of mean low water” and that his application had been forwarded to the State of Maryland. VA-MRC-02519. The letter states that “[s]ubaqueous bottoms in this location channelward of mean low water are under the jurisdiction of the State of Maryland.” *Id.*

41. Exhibit 346 contains a genuine and authentic copy of an March 6, 2000, letter from Ben Stagg, VMRC, to Mr. Linwood Douglas Howard informing him that “the mean low water and mean high water line should be depicted” on the plans for his bulkhead, “as this is needed to help determine jurisdictional areas between Virginia and Maryland.” VA-MRC-02757.

42. Exhibit 233 contains a genuine and authentic copy of a December 11, 1998, letter from the

Commonwealth of Virginia, Department of Conservation and Recreation, to Ms. Heather Wood, VMRC, noting that “[a]lthough the proposed pier originates in Prince William County, Virginia, it does extend into Charles County, Maryland. Following telephone conversations with the U.S. Army Corps of Engineers in Baltimore and the Maryland Department of the Environment, I was advised to forward a copy of the attached permit application directly to Ms. Andi Cunabaugh at the Maryland Department of the Environment for their review.” VA-MRC-02415.

43. Exhibit 38 at VA-MRC-00304 is a genuine and authentic copy of a May 6, 1988, letter from J. H. Lipscomb, Jr., VMRC, Mr. Jim Woodrow, advising him “that no permit will be required from this agency since the riprap is above mean low water nor for the three groins that will encroach on the Potomac River bottom which is regulated by the State of Maryland.”

### **Other Examples of Maryland’s Jurisdiction**

44. Exhibits 347 and 348 are documents relating to projects on the Virginia shoreline for which records exist indicating that the Maryland licensing process was initiated but was later terminated by the applicant.

45. Exhibit 347 contains genuine and authentic copies of records kept in the course of the Department’s regularly conducted business activities relating to the application submitted by the City of Alexandria, Virginia, for a license to dredge material from the Potomac River in the area of the City’s pier. Exhibit 347 contains a genuine and authentic copy of a March 4, 1975, letter from the City of Alexandria, Virginia, in which the City indicates that it was withdrawing its application because “it was determined that the project site is located in Alexandria water as established by the Black-Jenkins survey and that

the State of Maryland does not have jurisdiction.” MD-BPW-000568.

46. Exhibit 348 contains genuine and authentic copies of records kept in the course of the Department’s regularly conducted business activities relating to the application submitted by the Southern Marine & Salvage Company for dredging related to the proposed construction of the Dano Resource Recovery facility in King George County, Virginia. The Exhibit includes a January 25, 1979, letter from R.V. Davis, Executive Secretary of the Virginia State Water Control Board, to the Honorable Calvin G. Sanford, Member, Virginia House of Delegates, in which the Board commented on the proposed dredging project and indicated that “[a]ll of the seafood that may be affected by this project lies channelward of mean low water, which comes under the jurisdiction of the State of Maryland. While we are concerned about the possible impacts this project may have on the seafood industry, this concern is out of our jurisdiction.” The letter goes on to state that the Board would “inform the proper authorities in Maryland of your concerns on this project.” MD-MDE-13180-01.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
\_\_\_\_\_  
RICHARD J. AYELLA

Executed on December 5, 2001.





COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
P. O. Box 756  
2401 West Avenue  
Newport News, Virginia 23607  
Telephone: 247-2200

August 19, 1985

Mr. John A. Taylor, Manager  
Water Quality Corporate Technical Assessment  
Virginia Power  
Post Office Box 2666  
One James River Plaza  
Richmond, Virginia 23261

Re: VMRC #85-0527-3

Dear Mr. Taylor:

You have inquired regarding a permit to construct approximately 550 linear feet of riprap revetment adjacent to your riparian property situated along the Potomac River in Prince William County, Virginia.

Your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.

For your information, however, you may need a permit from your local wetlands board and/or authorization from the U. S. Army Corps of Engineers, Norfolk District, 803

Front Street, Norfolk, Virginia 23510, prior to commencing your project. Your application is currently being processed by both these agencies.

Also, if your proposed project extends channelward of mean low water you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland. I recommend that you contact the Maryland Department of Natural Resources, Wetlands Permit Section, Water Resources Administration, Tawes State Office Building, Annapolis, Maryland 21401, for more information on their permitting requirements.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

MGK/ncp  
HM

Michael G. Kelly  
Environmental Engineer

cc: U. S. Army Corps of Engineers  
Maryland Department of Natural Resources  
Prince William County Wetlands Board  
District Inspector

STATE OF MARYLAND  
DEPARTMENT OF NATURAL RESOURCES  
WATER RESOURCES ADMINISTRATION  
TAWES STATE OFFICE BUILDING  
ANNAPOLIS, MARYLAND 21401

August 22, 1985

Mr. John A. Taylor, Manager  
Water Quality Corporate Technical Assessment  
Virginia Power  
Post Office Box 266  
One James River Plaza  
Richmond, VA 21261

RE: VMRC#85-0527-3

Dear Mr. Taylor:

Notice of your permit application to construct approximately 550 linear feet of riprap revetment adjacent to your riparian property situated along the Potomac River in Prince William County, Virginia and potentially affecting Maryland waters has been forwarded to this office by the Virginia Marine Resources Commission.

The Maryland Department of Natural Resources has no objection to or license requirements affecting this work.

Very truly yours,

/s/

Harold M. Cassell, Chief  
Wetlands Division

HMC:jmb

cc: Michael Kelly, VMRC



COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
P. O. Box 756  
2600 Washington Avenue  
Newport News, Virginia 23607-0756

June 16, 1992

Curtis W. Carter, et al  
c/o Andrew D. Cockrell  
Route 3, Box 202  
Heathsville, Va. 22473

Re: VMRC #91-0735

Dear Mr. Carter:

You have inquired regarding a permit to construct three (3) low-profile timber groins 65-feet long, spaced 80-feet apart at property situated along the Potomac River in Northumberland County.

Your proposed project does not fall within the jurisdiction of the Marine Resources commission; therefore, no authorization is required from this agency. However, you are advised that the Maryland Department of Natural Resources has jurisdiction over waters of the Potomac River below mean low water and you may need a permit from them before you begin construction. They have been forwarded a copy of your application and will contact you, if this is the case.

You may also need a permit from your local wetlands board and/or authorization from the U.S. Army Corps of Engineers, Norfolk District, 803 Front Street, Norfolk, Virginia 23510, prior to commencing your project. Your application is currently being processed by those agencies.

If we may be of further assistance, please do not hesitate to call on us.

Sincerely,

/s/

Jay M. Woodward  
Environmental Engineer

JMW/kmh

HM

cc: U.S. Army Corps of Engineers, Norfolk District  
Northumberland County Wetlands Board  
Heathsville Field Office  
Maryland DNR  
Applicants

Maryland Department of Natural Resources  
Water Resources Administration  
Tawes State Office Building  
Annapolis, Maryland 21401

*"A Commitment to Excellence in Managing Maryland's  
Water Resources"*

June 24, 1992

Curtis W. Carter, et al  
4513 Wythe Avenue  
Richmond, Virginia 23221

RE: DNR 92-NL-1858  
VMRC 91-0735

Dear Mr. Carter:

This Department is in receipt of the letter from Mr. Jay Woodward, Marine Resources Commission, Commonwealth of Virginia, in reference to your proposal to construct 65 foot long twin timber groins that are within a maximum of 55 feet channelward of the mean low water line. The proposed project is located on the Potomac River in Northumberland County.

You should be aware that this proposed scope of work is under the regulatory jurisdiction of the Maryland Board of Public Works and the Maryland Department of Natural Resources pursuant to the Annotated Code of Maryland, Natural Resources Article, Title 9, Wetlands and Riparian Rights. However, as a result of the enactment of a policy by the Board of Public Works on August 12, 1987, projects that result in only minor nearshore impacts to the Virginia shoreline are not required to obtain a State of Maryland Wetlands License. However, the proposed scope of works must still be in compliance with

Departmental policies and proceeds as associated with the protection of Maryland waters and natural resources.

Please be advised that as a result of the aforementioned policy a State of Maryland Wetlands License is not required for the above referenced project. However, you must obtain a permit from the U.S. Army Corps of Engineers, Norfolk District prior to the start of construction.

If you have any questions, please feel free to call.

Sincerely yours,

/s/

Doldon W. Moore, Jr.  
Tidal Wetlands Division

cc: Jay Woodward



COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
P. O. Box 756  
2600 Washington Avenue  
Newport News, Virginia 23607

July 20, 1992

Mr. B.M. Marshall, P.E.  
Virginia Power  
5000 Dominion Boulevard  
Glen Allen, VA 23060

Re: VMRC #92-0988

Dear Mr. Marshall:

You have inquired regarding a permit to install approximately 400 linear feet of floating boom with a 9-foot skirt and concrete anchor to limit the amount of dead and free-floating hydrilla entering Possum Point Power Station adjacent to the Potomac River in Prince William County.

Your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization is required from this agency. It is understood that you have received authorization from the Maryland Department of Natural Resources, as they have jurisdiction over waters of the Potomac River below the mean low water line.



However, you may need a permit from your local wetlands board and/or authorization from the U.S. Army Corps of Engineers, Norfolk District, 803 Front Street, Norfolk, Virginia 23510, prior to commencing your project. Your application is currently being processed by those agencies.

If we may be of further assistance, please do not hesitate to call on us.

Sincerely,

/s/

Jay M. Woodward  
Environmental Engineer

JMW/kmh

HM

cc: U.S. Army Corps of Engineers, Norfolk District  
Prince William County Wetlands Board  
Heathsville Field Office  
Maryland DNR



COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
2600 Washington Avenue  
3rd Floor  
Newport News, Virginia 23607

August 1, 2001

Mr. Richard H. Bickford  
3926 Pebble Creek Road  
Midlothian, Virginia 23112

Re: VMRC #01-1305

Dear Mr. Bickford:

You have inquired regarding a permit to construct a 16-foot long by 5-foot wide "step down" platform and a lower 6-foot long by 3-foot wide swim platform at the water level onto an existing 100-foot long, T-head, private pier. The proposed project is adjacent to your property situated along the Potomac River in Northumberland County.

Please be advised that your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.

You may, however, need authorization from the U. S. Army Corps of Engineers, Norfolk District, 803 Front Street, Norfolk, Virginia 23510, prior to commencing

Mr. Richard H. Bickford

August 1, 2001

Page 2

your project. Your application was forwarded to the Corps for their review. If you wish, you may contact them directly at (757) 441-7652. Your application was also forwarded to the local wetlands board for their review.

Also, since your proposed project will extend channelward of the mean low water mark, you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland. They have been forwarded a copy of your application and will contact you if further authorization is required.

Please do not hesitate to call on us if we can be of further assistance. You can reach me at (757) 247-2276.

Sincerely,

/s/

Jeffrey P. Madden  
Environmental Engineer

JPM/ncp

HM

cc: Northumberland County Wetlands Board  
Maryland Department of the Environment  
(with enclosure)



COMMONWEALTH OF VIRGINIA  
Marine Resources Commission  
P. O Box 756  
2401 West Avenue  
Newport News, Virginia 23607  
Telephone: 247-2200

April 4, 1984

Mrs. Mary E. Mozynski  
4801 Cherry Hill Road  
College Park, Maryland 20740

Dear Mrs. Mozynski:

I have compiled some information which you may find helpful in understanding the agencies with jurisdiction along the shoreline of the Potomac River at Colonial Beach.

1. Virginia Marine Resources Commission, Environmental Division, Post Office Box 756, Newport News, Virginia 23607-0756. I have enclosed a reprint of the Code of Virginia which relates to the permitting program of this agency. I have highlighted in yellow the section which explains our general area of jurisdiction.

2. Westmoreland County Wetlands Board, c/o Howard W. Woodhead, Secretary-Coordinator, Post Office, Box 467, Montross, Virginia 22520. The jurisdiction of the local wetlands board is described in Chapter 2 of Title 62.1 of the Code of Virginia which

I have highlighted in blue. I have also enclosed a copy of the Wetlands Guidelines for your information.

3. U.S. Army Corps of Engineers, Norfolk District, 803 Front Street, Norfolk, Virginia 23510. I have enclosed basic information from a permit application packet which described, in general, the jurisdiction of the Corps of Engineers.

4. Maryland Department of Natural Resources, Wetlands Permit Section, Water Resources Administration, Tawes State Office Building, Annapolis, Maryland 21401. In 1785, Maryland and Virginia signed a compact in which Maryland took jurisdiction over the subaqueous lands of the Potomac River to the mean low water mark on the Virginia shore. As a consequence, projects constructed channelward of mean low water in the Potomac River fall under the jurisdiction of the Maryland Department of Natural resources, rather than the Virginia Marine Resources Commission. The state boundary line follows the mean low water mark along the banks of the Potomac and across the mouths of creeks, rivers, bays and intlets (as shown on the enclosed map).

I have also enclosed a Joint Permit Application which contains many definitions which you should find helpful.

I hope this information will be useful.

Sincerely,

/s/

Madeline Grulich  
Environmental Engineer

MG:mcd  
EV  
Enclosures

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\*      No. 129 Original

Plaintiff,

\*      Before Special Master

v.

\*      Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\*      \*      \*      \*      \*      \*      \*

**DECLARATION OF LISA BAILEY**

Being more than 18 years of age and competent to testify, Lisa Bailey states as follows:

1.      I am employed by the Office of the Charles County Attorney, as Clerk to the Charles County Board of License Commissioners ("the Board"). As Clerk, I am a member of the Board that is appointed by the County Commissioner. I have served as Clerk to the Board since 1997. My duties include attending all Board meetings and hearings, taking down the minutes of the proceedings and transcribing them, and sending notices to the applicants and the attorneys setting forth the date, time and place of the hearing on their application. In addition, I read the minutes of the previous meeting into the record of the following meeting for approval by the Board. I submit and read into the record any written statements and letters that are addressed to the Board regarding an application or a license. I transmit hearing notices to the local newspaper for publication in order to give notice to concerned citizens of the date, time, and place of the hearing. I am familiar with the Board's requirements for issuing and renewing liquor licenses, and I am custodian

of the records of liquor licenses issued by the Board and other related documents created, obtained, and maintained by the Board in the ordinary course of its business. These records are maintained in accordance with sections 10-633 to 10-637 of the State Government Article, Annotated Code of Maryland.

### **Minutes of the Board Of License Commissioners**

2. Over the years, the Board has issued licenses to and otherwise regulated the sale of liquor at a number of establishments located in the Potomac River, in Maryland, on piers that extend from the Virginia shoreline. The records of which I am custodian include the Board's minutes of its meetings since 1951. As shown below, these minutes reflect that liquor licenses were issued to establishments located in the Potomac River before 1951, and that, over the years, the Board has considered, approved, and rejected numerous applications for licenses or transfers of licenses for such establishments, has required such establishments to submit information and present testimony, and has imposed discipline on those establishments that have failed to comply with Maryland law. Exhibits 1 to 23 contain genuine and authentic copies of the official minutes of the Board for selected meetings from 1951 through 1999.

3. Exhibit 1 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1951. Page 10 of these minutes reflects that on October 2, 1951, the Board decided to investigate five licenses that had previously been issued for the sale of alcohol at establishments built on piers in the Potomac River off shore of Colonial Beach, Virginia, referred to as the "New Atlantic," the "Monte Carlo," the "Little Steel Pier," "Little Reno," and an unnamed establishment operated by Elizabeth P. Sowers. Page 10 reflects that the basis of this investigation was "the alleged making by the applicants

for said licenses of a material false statement in the applications." Pages 12 through 17 of these minutes reflect that a hearing was held by the Board on October 15, 1951 to address these five licenses, that the licenses for the "New Atlantic," the "Monte Carlo," the "Little Steel Pier," and Elizabeth P. Sowers were voluntarily surrendered, and that the license for "Little Reno" was revoked because "said licensee was not the sole party pecuniarily interested in said license when it was applied for."

4. The 1951 minutes also reflect the issuance of new licenses to establishments located in the Potomac River, and reflect that Virginia authorities were notified of and allowed to comment upon the issuance of such licenses. Page 18 of the 1951 minutes at Exhibit 1 reflects that, at its November 5, 1951 meeting, the Board was made aware of two new applications for a liquor license, one for "Little Reno Pier Charles County, off shore Colonial Beach, Virginia" and the other for "Monte Carlo Charles County off shore Colonial Beach Virginia." Pages 21 to 22 of these minutes reflect that, on November 15, 1951, the Board directed that the "Clerk transmit to the Mayor of Colonial Beach, Virginia, notices to be posted in such locations as would inform the residents of Colonial Beach of their opportunity to be heard" regarding the Monte Carlo's application for a liquor license, and to further request that the Mayor of Colonial Beach "take such further measures as he deemed necessary to inform the residents of Colonial Beach of their rights to be heard." Page 24 of the minutes reflects that, on November 24, 1951 the Board considered the Monte Carlo application, and received a letter "from the Town Council of Colonial Beach, Virginia." Page 27 of the minutes reflects that at least one Colonial Beach Town Councilman was present at the Board's November 15, 1951 meeting. Pages 26 to 27 indicate that the Board again considered the Monte Carlo application at its



December 3, 1951 meeting, and granted the requested license.

5. Page 26 of the 1951 minutes at Exhibit 1 reflects that the Little Reno application was considered by the Board on December 3, 1951 and that a suggested change was made to the application. Page 29 of these minutes reflects that, on December 6, 1951, the Board elected to reverse its previous revocation of the Little Reno license, to suspend the license for a period of time, and to authorize the license's transfer to Little Reno's new owners.

6. Exhibit 2 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1952. Page 38 of these minutes reflects that on April 7, 1952, the Board approved a request transfer the license that had been voluntarily surrendered for the Little Steel Pier to "[t]he Colonial Amusement Company[,] which business will be carried on in the same location as the Little Steel Pier." Page 56 of those minutes, labeled MD-CHAS-01344, reflects that, on June 2, 1952, the Board considered a different application for a license to sell liquor "at Colonial Amusement Pier, Colonial Beach, Va.," but deferred action until after a decision had been rendered in a case pending in the Charles County Circuit Court. Page 59 of those minutes reflects that the applicants presented testimony to the Board at its August 25, 1952 meeting, and page 62 of the minutes reflects that this application was rejected by the Board at its August 28, 1952 meeting as "not necessary to accommodate the public."

7. Exhibit 3 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1953. Page 136 of these minutes, labeled MD-CHAS-01356, reflects that, at the Board's April 27, 1953 meeting, the Board considered an application to transfer the licenses issued to the premises "Jack Pot Piers,

Colonial Beach, Virginia" to the premises of "Colonial Piers, Inc., Charles County, Offshore Colonial Beach, Virginia." This page reflects that the transfer was approved, subject to the condition that one of the owners, who was a "bona fide Charles County resident," continue to hold at least 50% of the new licensee's stock. Page 178 of the 1953 minutes at Exhibit 3, labeled MD-CHAS-01364, reflects that, on November 12, 1953, the Board granted an application for a liquor license to "the premises known as the Belvedere Beach Pier, offshore from Riverside."

8. Exhibit 4 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1955. Page 244 of these minutes reflects that, on March 29, 1955, the Board withheld approval of license applications for three establishments located offshore of Colonial Beach, Virginia, namely "Little Reno, Inc." "Colonial Piers, Inc.," and "Belvedere Beach Pier, Inc." Page 263 of these minutes reflects that the Board approved the license for the "Belvedere Beach Pier located in Charles County waters off shore Virginia" on April 28, 1955.

9. According to pages 251 to 253 of the minutes at Exhibit 4, on April 14, 1955, the Board heard testimony in support of an application for a liquor license for the "Fairview Beach Pier," which was described as "off shore from Goby Virginia, near Fredericksburg" located on "a pier that extends out in the Potomac in Charles County Waters." Page 267 of these minutes reflects that the Fairview Beach Pier's application was granted on May 17, 1955.

10. Exhibit 5 is a genuine and authentic copy of the official minutes of the Board for its May 7, 1957 meeting, which reflect that the Board approved the transfer of the license for "Belvedere Beach Pier, Inc., Belvedere Beach Virginia" to the late owner's wife.

11. Exhibit 6 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1959. These minutes reflect that, on June 2, 1959, the Board approved the transfer of a liquor license from an establishment located "at Colonial Beach, Virginia" to one located in Newburg, Maryland, and, on June 9, 1959, approved a liquor license for "Starlight Pavilion, Inc.," located "offshore Potomac River."

12. Exhibit 7 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1962. Page 2 of Exhibit 7 reflects that, on May 8, 1962, the Board withheld action on the renewal application for the "Colonial Beach Hotel, Inc." Exhibit 7 also reflects the Board's consideration of a dispute related to the "Little Reno" establishment. Page 5 reflects that, on June 12, 1962, the Board received a request to suspend or withhold the license for "Little Reno, Inc." until the Board could hold a hearing, and page 11 reflects that, on August 14, 1962, the Board was informed that the dispute regarding Little Reno had been resolved and approved an amendment to Little Reno's license renewal application.

13. Exhibit 8 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1965. These minutes reflect that, on January 12, 1965, the Board considered an application for a liquor license "to be used in a building to be constructed on the site of the Monte Carlo Pier, off-shore Colonial Beach, Va.," and instructed the clerk to place an advertisement regarding the application "in a Colonial Beach newspaper for two weeks." Page 52 of these minutes, labeled MD-CHAS-1404, reflects that the Board held a hearing on this application on February 9, 1965, that the application was opposed by four residents of Colonial Beach, Virginia, that the applicant was charged for the cost of advertisements that had run in the "Westmoreland News, Colonial Beach, Va.," and that the license was tentatively approved.

14. Exhibit 9 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1966. These minutes reflect that, at the Board's August 9, 1966 meeting, the Board considered reports that "Little Reno, off-shore Colonial Beach, Va., was operating without proper drinking water and sewerage facilities," and received testimony that Little Reno "had city water and sewerage from the town of Colonial Beach."

15. Exhibit 10 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1967. These minutes reflect that, on May 9, 1967, the Board approved a change in the person serving as treasurer of "Little Reno, Inc., Offshore Colonial Beach, Va.," "subject to the Health Department Permit number," and that, as of July 11, 1967, the Board had not yet received a copy of the Health Department Permit.

16. Exhibit 11 is a genuine and authentic copy of the official minutes of the Board's September 17, 1974 meeting, which reflects that the Board directed the preparation of an order to require "Little Reno, Inc., Colonial Beach, Va." to show cause why its liquor license should not be revoked.

17. Exhibit 12 is a genuine and authentic copy of the official minutes of the Board's April 13, 1982 meeting, which reflects that the license for "Little Reno Pier and Restaurant" was not renewed at that time because a report from the Charles County Sheriff indicated that the license was "not under glass" at the time of the Sheriff's inspection.

18. Exhibit 13 is a genuine and authentic copy of the official minutes of the Board's October 11, 1983 meeting, which reflects that the Board approved the transfer of the license for "Starlight Pavilion, Offshore Fairview Beach, Virginia" to a new owner.

19. Exhibit 14 is a genuine and authentic copy of the official minutes of the Board's January 8, 1985 meeting, which reflects that the Board approved the transfer of the license for "Reno of Colonial Beach, Inc., Colonial Beach, Virginia" to a new owner.

20. Exhibit 15 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1987. These minutes reflect that, on June 18, 1987, the Board received a report from the Charles County Sheriff's Office that "Reno of Colonial Beach, Colonial Beach, Virginia" had sold alcoholic beverages to a minor. Pages 162 to 163 of these minutes reflect that, on July 14, 1987, the establishment's liquor license was suspended for seven days.

21. Exhibit 16 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1989. These minutes reflect that, at the Board's March 14, 1989 meeting, it required a representative of "Reno of Colonial Beach" to appear and explain whether there had been a transfer of ownership, and that, at the July 11, 1989 meeting, the Board conditionally approved a transfer of the liquor license for the "Fairview Beach Crab House, Off-shore Fairview Beach, Virginia."

22. Exhibit 17 is a genuine and authentic copy of the official minutes of the Board's April 10, 1990 meeting, at which the Board approved the renewal of the liquor license for "Reno of Colonial Beach, Inc.," but decided not to release the approval until the establishment paid its Charles County, Maryland taxes.

23. Exhibit 18 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1991. These minutes reflect (a) that, on March 13, 1991, the Board conditionally approved the transfer of a liquor license to "Reno on the Potomac, Inc., Colonial Beach, Virginia," subject to the condition that "all

Maryland Sales and Use taxes and Maryland Withholding Taxes have been paid" prior to March 29, 1991; (b) that, on April 9, 1991, the Board approved the renewal of the liquor license for "Starlight Pavilion-Fairview Beach Crab House," but decided not to release the approval until the establishment filed certain tax returns with the Charles County Assessor's Office; and (c) that, on December 10, 1991, the Board conditionally approved the transfer of a liquor license to "Riverboat on the Potomac, Colonial Beach, Virginia," subject to the conditions that the Board be furnished with copies of various permits and verification that Maryland taxes had been paid.

24. Exhibit 19 is a genuine and authentic copy of the official minutes of the Board's April 14, 1992 meeting, at which the Board approved the renewal of the liquor license for "Fairview Beach Crab House," but decided not to release the approval until the establishment paid its Charles County, Maryland taxes and filed certain tax returns with the Charles County Assessor's Office.

25. Exhibit 20 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1993. These minutes reflect (a) that, on March 9, 1993, the Board conditionally approved the transfer of a liquor license to "The Pier at Fairview Beach, on the Potomac River, Charles County, Maryland," subject to the conditions that the Board be furnished with copies of various permits and verification that Maryland taxes had been paid; (b) that, on April 13, 1993, the Board approved the renewal of the liquor license for "Fairview Beach Crab House," but decided not to release the approval until the establishment paid its Maryland retail sales taxes and filed certain tax returns with the Charles County Assessor's Office; (c) that the Board was informed, on October 7, 1993, that the Pier at Fairview Beach was unable to receive a permit from the Health Department until it corrected certain problems; and (d) that, on November 4,

1993, the Board approved the withdrawal of the Pier at Fairview Beach's license transfer.

26. Exhibit 21 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1995. These minutes reflect that, on February 9, 1995, the Board conditionally approved the transfer of a liquor license to the "Fairview Beach Crabhouse Restaurant, Fairview Beach, Virginia" subject to conditions that the owners present a valid Use and Occupancy Permit and successfully complete an alcohol awareness program and that, on May 11, 1995, the Board rescinded this approval.

27. Exhibit 22 is a genuine and authentic copy of the official minutes of the Board for selected meetings in 1998. These minutes reflect (a) that, on May 14, 1998, the Board required the owners of the Fairview Beach Crab House to appear and explain whether the establishment's name had changed to Jamaica Joe's Crab House, informed the owners that any change to the service area would require the Board's approval, and required the submission of additional documentation relating to the establishment's name change and corporate charter; (b) that, on June 11, 1998, the Board conditionally approved the expansion of Jamaica Joe's Crab House subject to various conditions; and (c) that, on September 8, 1998, the Board conditionally approved a transfer of the license for Jamaica Joe's Crab House to new owners.

28. Exhibit 23 is a genuine and authentic copy of the official minutes of the Board's October 21, 1999 meeting, at which the Board considered a number of violations by various establishments in selling alcohol to minors, and imposed upon "Riverboat on the Potomac" a three year suspension of its license and a \$500 fine, and held two of the three days of the suspension in abeyance so long as there were no further violations for a period of three years.

### License Applications

29. To obtain a liquor license in Charles County, an applicant must complete and submit an application to the Board that demonstrates that all of the requirements have been met and to justify the issuance or transfer of a license. In addition, since 1952, each establishment that serves liquor in Charles County has been required to annually renew its liquor license with the Board by submitting an annual renewal application. I am the custodian of records for those files maintained by the Board relating to such applications and related documentation. Such applications have been repeatedly required and considered by the Board for establishments located on piers in the Potomac River that extend from the Virginia shore.

30. ***Belvedere Beach Pier.*** Exhibit 24 is a genuine and authentic copy of the renewal application filed in 1970 for the Belvedere Beach Pier, which describes the establishment as "off Belvedere Beach, Va." The second page of Exhibit 24 reflects the certification by the Charles County Supervisor of Assessments as to the assessed value of this establishment in April 1970.

31. ***Fairview Beach Crab House.*** Exhibit 25 contains a genuine and authentic copy of the 1983 application for a liquor license by "Starlight Pavilion, Inc.," that refers to the establishment as "an off-shore restaurant and bar" located at the Fairview Beach Resort in Fredericksburg, Virginia. Exhibit 26 contains a genuine and authentic copy of the renewal applications filed for "Starlight Pavilion T/A Fairview Beach Crab House" and "Starlight Pavilion Offshore Fairview Beach, VA" for the years 1984 through 1989, which identify that establishment as located "608 William Street, Fredericksburg, Va 22401." Exhibit 27 is a genuine and authentic copy of a 1983 Plat received by the Board that shows the location of the Fairview Beach Crab House.



32. Exhibit 28 contains a genuine and authentic copy of a 1991 liquor license application for "Starlight Pavilion t/a Fairview Beach Crabhouse," and identifies the same location as set forth in Exhibit 25. Exhibit 29 contains genuine and authentic copies of the annual renewal applications filed for "Fairview Beach Crab House" for the years 1994 to 1996, which also identify that establishment as located at 5435 Pavilion Drive in King George, Virginia.

33. ***Jamaica Joe's Crab House.*** Exhibit 30 contains a genuine and authentic copy of the 1998 liquor license application for "Starlight Pavilion T/A Jamaica Joes," identifying that establishment as located at 5435 Pavilion Drive in King George, Virginia. Exhibit 31 contains a genuine and authentic copy of the annual renewal applications filed for "Starlight Pavilion T/A Jamaica Joes" for the years 1999 to 2001.

34. ***Reno of Colonial Beach/ Reno on the Potomac.*** Exhibit 32 contains a genuine and authentic copy of the 1984 liquor license application for "Reno of Colonial Beach, Inc.," which identifies that establishment as "Offshore, 301 Beach Terrace, Colonial Beach Virginia, in Fifth Election District, Charles County." Exhibit 33 contains a genuine and authentic copy of the renewal applications filed for "Reno of Colonial Beach, Inc." for the years 1985 through 1990. Exhibit 34 contains a genuine and authentic copy of a 1991 permit allowing "Reno of Colonial Beach, Inc." to receive a bulk transfer of the license previously issued to "Reno on the Potomac, Inc." Exhibit 35 contains a genuine and authentic copy of the 1991 renewal application filed for "Reno on the Potomac, Inc.," identifying the establishment as located at the same address previously used for "Reno of Colonial Beach, Inc."

35. ***Riverboat on the Potomac.*** Exhibit 36 contains a genuine and authentic copy of the 1991 liquor

license application for an establishment named "Riverboat on the Potomac," which identifies the establishment as located at "Offshore, 301 Beach Terrace, Colonial Beach Virginia, in Fifth Election District, Charles County," the address previously used by Reno of Colonial Beach, Inc. Exhibit 37 contains a genuine and authentic copy of the renewal applications filed for "Riverboat on the Potomac, Inc." for the years 1992 to 2000.

### **Licensing Requirements**

36. At the time that a liquor license is first sought from the Board, the Board requires each applicant to demonstrate a number of qualifications. As one example, the Board requires that at least one of the owners of the establishment have been a resident of Charles County, Maryland for at least two years. This requirement has been imposed on those establishments located on piers in the Potomac River that extend from the Virginia Shore. The 1983 liquor license application by "Starlight Pavilion, Inc.," the 1991 application for "Starlight Pavilion t/a Fairview Beach Crabhouse," the 1998 application for "Starlight Pavilion T/A Jamaica Joes," the 1984 application for "Reno of Colonial Beach, Inc.," and the 1991 application for "Riverboat on the Potomac," at Exhibits 25, 28, 30, 32, and 36, respectively, contain certifications that this requirement is met.

37. In addition, the Board requires that each applicant for a license obtain a number of signatures from Charles County, Maryland residents who live within the same local election district as the proposed establishment and who can attest that they know the applicant, that they have reviewed the application, and that the applicant is a suitable person to hold a Charles County liquor license. The applications at Exhibits 25, 28, 30, 32, and 36 all contain such signatures and attestations.

38. The Board also investigates the background of all applicants for a liquor license, and the Board is assisted in such investigations by the Charles County Sheriff. Exhibit 38 contains a genuine and authentic copy of a September 22, 1983 request by the Board to the Sheriff of Charles County to conduct a background check on the owners of Starlight Pavilion, Inc. as part of the Board's consideration of their application for a liquor license. Exhibit 39 contains a genuine and authentic copy of a February 15, 1991 memorandum from Sergeant William Mancuso providing the results of a similar background check for the owners of Reno on the Potomac, Inc. Exhibit 40 contains a genuine and authentic copy of a November 19, 1991 memorandum from Sergeant Mancuso providing the results of his inquiry into the background of the owners of Riverboat on the Potomac.

39. The Board will not grant or renew a liquor license when the establishment where the liquor is to be served is not current both in the payment of all Maryland taxes and in Charles County assessments. For example, Exhibit 41 contains a genuine and authentic copy of a September 30, 1983 letter received by the Board from the Comptroller of the Treasury, certifying that Starlight Pavilion, Inc. had paid all taxes and there "is no need for holding up the transfer of the alcoholic beverage license." Exhibit 42 contains a genuine and authentic copy of correspondence received from the Maryland Comptroller of the Treasury, which reflects that, in January 1985, the Comptroller requested that the Board "hold up the transfer" of the liquor license from Little Reno, Inc. until Maryland sales, withholding, and admissions and amusement taxes were paid. Exhibit 43 contains a genuine and authentic copy of correspondence received from the Maryland Comptroller of the Treasury dated October 14, 1986 and October 3, 1986, informing the Board that the Comptroller had taken steps to seize the liquor license for Reno of Colonial Beach, Inc. on account of unpaid taxes, and then authorized the Sheriff to return

the license after the matter was resolved. Exhibit 44 contains a genuine and authentic copy of correspondence received from the Maryland Comptroller dated March 7, 1991, which asks that the transfer of the license held by Reno of Colonial Beach, Inc. be held up until Maryland sales and use and withholding taxes are paid.

40. The Board also requires applicants for licenses to demonstrate that they have complied with all applicable Maryland and local permits, by submitting copies of such permits to the Board. For example, Exhibit 45 contains a genuine and authentic copy of a September 7, 1983 letter from the Charles County Department of Health, informing the owner of the Starlight Pavilion that it had been issued a food and drink permit. Exhibit 46 contains a genuine and authentic copy of a permit issued by Maryland's Department of Health and Mental Hygiene to Starlight Pavilion, Inc. on August 31, 1983 allowing it to act as a food service facility. Exhibits 47, 48 and 49 contain genuine and authentic copies of similar permits issued on March 31, 1989 to the Fairview Beach Crab House, on September 30, 1991 to Reno on the Potomac, Inc. and on February 14, 1992 to Riverboat on the Potomac. Exhibit 50 is a genuine and authentic copy of a Certificate of Use and Occupancy issued by the Charles County Department of Public Works authorizing Reno on the Potomac, Inc. to occupy its establishment. Exhibit 51 is a genuine and authentic copy of a similar certificate issued by the Charles County Department of Public Works for Jamaica Joe's Crab House, which states that it is issued subject to the condition that the deck boarding around the restaurant be removed and replaced. Exhibit 52 is a genuine and authentic copy of a similar certificate issued by the Charles County Department of Public Works on February 6, 1989 for the Fairview Beach Crab House.

41. The Board examines the corporate ownership of any establishment for which a liquor license is issued, and requires licensees to submit information to

verify such ownership. For example, Exhibit 53 is a genuine and authentic copy of the 1988 articles of incorporation filed with the Board by Reno on the Potomac, Inc. in 1991 as part of its application for a liquor license. Exhibit 54 is a genuine and authentic copy of Starlight Pavilion, Inc.'s articles of incorporation. Exhibit 55 is a genuine and authentic copy of a 1998 Resolution and Corporate Bylaws for Starlight Pavilion, Inc., detailing its ownership. Exhibit 56 is a genuine and authentic copy of similar 1983 corporate records received from Starlight Pavilion, Inc.

42. Even after a license has been issued, the Board monitors the ownership of establishments holding a Charles County liquor license on an ongoing basis. For example, Exhibit 57 is a genuine and authentic copy of a 1989 letter to the owners of Reno of Colonial Beach, Inc., informing them that the Board had become aware of a change in the ownership of the corporation, but that the Board had not yet received an application for transfer of the liquor license. Exhibit 58 is a genuine and authentic copy of 1986 corporate minutes for Starlight Pavilion, Inc., which detail a change in the ownership of Starlight Pavilion, Inc.'s stock ownership, and require that the minutes be forwarded to the Board for its files.

43. The Board also reviews the property ownership and leasing arrangements for licensed establishments located in Charles County, Maryland, including those located on piers that extend into the Potomac River from the Virginia shoreline. For example, Exhibit 59 is a genuine and authentic copy of a 1991 lease between Reno of Colonial Beach, Inc. and Reno on the Potomac, Inc., submitted as part of Reno on the Potomac, Inc.'s application to transfer the liquor license. Exhibit 60 is a genuine and authentic copy of the 1991 lease between Riverboat on the Potomac, Inc. and Flanagan's of Colonial Beach, Inc. Exhibit 61 is a genuine and authentic copy of the Deed for the 1985 sale of that

property to Reno of Colonial Beach, Inc. Exhibit 62 is a genuine and authentic copy of the contract for the 1984 sale of Little Reno to Reno of Colonial Beach, which makes the sale contingent upon the maintenance and transfer of Maryland's liquor and lottery licenses.

44. With respect to liquor licenses issued to establishments located on piers that extend into the Potomac River from the Virginia shore, the Board has also solicited and considered comments from Virginia officials and residents. For example, Exhibit 63 is a genuine and authentic copy of a June 10, 1998 letter received by the Board from the Chairman of the King George County Service Authority expressing several of the concerns of King George County, Virginia, regarding the renewal of the liquor license for "Jamaica Joe's Crab Shak." Exhibit 64 is a genuine and authentic copy of a petition signed by residents of Fairview Beach, Virginia and submitted to the Board in support of a request to transfer a liquor license to Jamaica Joe's Crab House.

45. Establishments that serve liquor in Charles County may do so only in accordance with the terms of their license, and must obtain further approval from the Board before they may alter those terms. For example, Exhibit 65 is a genuine and authentic copy of a letter from the Board dated June 16, 1998 granting a request by Jamaica Joe's Crab House to serve alcoholic beverages on its outside deck under a number of limitations.

46. In addition, a licensee may request, and the Board may grant, a special exception to the terms of a license, thereby authorizing the licensee to engage in a particular activity only under limited circumstances or for a limited time. For example, Exhibit 66 is a genuine and authentic copy of a letter from the Board dated July 29, 1998 authorizing the provision of live entertainment on the outside portion of Jamaica Joe's Crab House for one day on August 2, 1998.

### **Compliance And Monitoring**

47. In addition to issuing licenses and renewal licenses, the Board monitors the operation of establishments that serve liquor on an ongoing basis in Charles County. The Charles County Sheriff's Office assists the Board in ensuring that such establishments comply with Maryland's liquor laws. For example, Exhibit 67 is a genuine and authentic copy of a report received by the Board from the Sheriff of Charles County detailing a compliance check conducted by the Sheriff at Riverboat on the Potomac.

48. When the Board determines that an establishment has violated Maryland's liquor laws, the Board is empowered to revoke or suspend licenses, or to impose fines on a licensee. The Board has taken such disciplinary action against those operating licensed establishments on piers that extend into the Potomac River from the Virginia shore. Exhibit 68 contains a genuine and authentic copy of a July 16, 1987 Order by the Board, which contains the Board's findings that Reno of Colonial Beach violated Maryland's laws prohibiting the sale of alcohol to a minor, and the Board's imposition of a seven day suspension of the establishment's liquor license. Exhibit 69 is a genuine and authentic copy of a letter to the owner of Reno of Colonial Beach informing him that, because of the seven day suspension, he would be required to "surrender your license to the Clerk of the Circuit Court for Charles County, Maryland" and that he could "pick up your license from the Clerk" after the suspension had ended. Exhibit 70 contains a genuine and authentic copy of a November 1, 1999 Order by the Board, in which the Board imposed a fine on Riverboat on the Potomac for a similar infraction.

I declare under penalty of perjury that the forgoing  
is true and correct.

                    /s/                      
Lisa Bailey

Executed on November 27, 2001.



**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF FREDERICK E. DAVIS**

Being more than 18 years of age and competent to testify, Frederick E. Davis states as follows:

1. I am the duly elected Sheriff of Charles County, having served in that office since 1994. I am a 1964 graduate of the Maryland State Police Academy, and served 30 years with the Maryland State Police, much of it in Charles County. As part of my duties as a State Patrolman, I ran backup calls at the request of the Office of the Sheriff for Charles County, Maryland. At least two of those calls took me onto the piers that extend into the Potomac from the Virginia side of the River. Specifically, there was a Town Pier extending from the shoreline in the Town of Colonial Beach, Virginia. There was another pier in King George County, Virginia at Fairview Beach. It was routine for the State Police to back up the Office of the Sheriff on the piers, if requested to do so. As part of my early training with the State Police, I learned that the jurisdiction of the Virginia authorities ended at the low-tide watermark on the Virginia side of the River, and that police jurisdiction over activities on the piers themselves rested with Maryland. That practice continued throughout

my career until it was slightly modified in 1998 and 1999, as described below.

2. When I took over as Sheriff of Charles County in 1994, it was apparent to me that we needed to address the problem of providing prompt and effective police work on the piers, especially the Town Pier in the Town of Colonial Beach, Virginia. Although serious crime on the piers was relatively rare, quality of life crimes were becoming increasingly common. Public intoxication, foul language, rowdy behavior, underage drinking and open marijuana use were occurring on a regular basis. Worse, perpetrators, particularly young people, were well aware that the town police from Colonial Beach had no authority to come onto the piers themselves to enforce the law. They were also aware that the response time for Charles County Deputies was at least 40 minutes. This led to open drug use and flagrant taunting of the town police. Ultimately, the situation worsened to an incident where pier occupants "mooned" the Colonial Beach town police, who stood on shore, helpless to intervene.

3. The Town of Colonial Beach had long asked Charles County to permit Colonial Beach police to exercise authority over activities on the pier. Attached as Exhibit 1 is a genuine and authentic copy of a September 26, 1989 letter from the Town Manager of Colonial Beach, making exactly that request. When I was elected Sheriff in 1994, I decided it was time to co-operate with Colonial Beach so that its police could be given the authority to operate on the piers jointly with the Sheriff for Charles County. Charles County and the Town of Colonial Beach entered into a Memorandum of Understanding on May 19, 1998, a genuine and authentic copy of which is attached as Exhibit 2. The Memorandum acknowledges that Charles County jurisdiction extends to the low-tide watermark of the Virginia shoreline and includes business located on the Town Pier, but permits

Virginia police to go into Maryland territory on the Town Pier, to arrest perpetrators and enforce Maryland law. Prosecutions are handled in Charles County, Maryland. This arrangement has virtually eliminated nuisance crimes on the pier, and greatly reduced the need for Charles County Sheriff's Deputies to travel long distances to reach the pier.

4. The arrangement proved satisfactory to both Virginia and Maryland authorities. A virtually identical agreement was reached on July 8, 1999 to allow the King George County Sheriff's Office of King George County, Virginia to patrol the pier and businesses located on the Fairview Beach Pier. A genuine and authentic copy of that agreement is attached as Exhibit 3. This arrangement has sharply reduced nuisance crimes on the Fairview Beach Pier, and greatly reduced the need for deputies from Charles County, Maryland to travel long distances to reach the pier.

5. As Sheriff, I am the official custodian of records for the Office. I can identify and authenticate the following documents as genuine copies of original documents prepared in the ordinary course of business by my Office, and kept as part of the records of that Office.

6. Exhibit 4 is a genuine and authentic copy of an Offense Report dated September 4, 1970, which demonstrates an investigation by the Charles County Sheriff's Office into Possession Of and Payoff On Slot Machines at the Reno Restaurant, Inc. at Colonial Beach, Virginia.

7. Exhibit 5 is a genuine and authentic copy of an Offense Report dated June 20, 1974, which demonstrates an investigation by the Charles County Sheriff's Office of Gambling and Possession of Slot Machines at the Little Reno, off shore, Colonial Beach, Virginia.

8. Exhibit 6 is a genuine and authentic copy of an Offense Report dated July 5, 1974, which demonstrates an investigation by the Charles County Sheriff's Office of Gambling and Possession of Slot Machines at the Little Reno, off shore, Colonial Beach, Virginia.

9. Exhibit 7 is a genuine and authentic copy of an Application For Statement of Charges and Statement of Probable Cause dated August 20, 1978, which demonstrates an investigation by the Charles County Sheriff's Office of a robbery with a handgun at the Little Reno Bar off shore, Virginia.

10. Exhibit 8 is a genuine and authentic copy of a Vice Complaint dated August 31, 1979, which demonstrates an investigation by the Charles County Sheriff's Office of illegal gambling occurring in the Little Reno Restaurant.

11. Exhibit 9 is a genuine and authentic copy of an Investigation Report dated August 5, 1981, which demonstrates an investigation by the Charles County Sheriff's Office of a murder at the Reno Pier, Colonial Beach, Virginia.

12. Exhibit 10 is a genuine and authentic copy of the Continuation of an Investigation Report dated August 5, 1981, which demonstrates an investigation by the Charles County Sheriff's Office of a murder at the Reno Pier, Colonial Beach, Virginia.

13. Exhibit 11 is a genuine and authentic copy of documents pertaining to an investigation by the Charles County Sheriff's Office of a July 20, 1992 military aircraft crash into the Potomac River, which killed all seven persons on board.

14. Exhibit 12 is a genuine and authentic copy of an Incident Report dated March 29, 1994, which

demonstrates an investigation by the Charles County Sheriff's Office involving a burglary on the Town Pier at Colonial Beach, Virginia.

15. Exhibit 13 is a genuine and authentic copy of an Offense/Incident Report dated August 12, 1995, which demonstrates an investigation by the Charles County Sheriff's Office of a death/accidental drowning at Colonial Beach, Virginia.

16. Exhibit 14 is a genuine and authentic copy of an Offense/Incident Report dated August 18, 1996, which demonstrates an investigation by the Charles County Sheriff's Office of a theft of between \$50.00 and \$200.00 at the Fairview Beach Crab House on Crain Highway, Fairview Beach on the Virginia Shoreline, Maryland.

17. Exhibit 15 is a genuine and authentic copy of an Offense/Incident Report dated February 2, 1997, which demonstrates an investigation by the Charles County Sheriff's Office of a theft of over \$200.00 (Amtote Credit Voucher) at the Riverboat Restaurant, Colonial Beach, Virginia.

18. Exhibit 16 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report stating that between July 7, 1998 and July 23, 1998, Jamaica Joe's Carribean Crab Shack had been burglarized three times and the burglar had removed from the premises (4) four outdoor weatherproof speakers and (11) eleven cases of beer.

19. Exhibit 17 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated August 16, 1998, detailing three accused persons that were apprehended by the Complainant, Officer Lucas of the Colonial Beach police department, for acting disorderly on the Town Pier. The accused persons were

handed over to the Charles County Sheriff's office upon their arrival to the Town Pier.

20. Exhibit 18 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated September 26, 1998, detailing an incident that took place at the Riverboat Bar & Restaurant and involved a suspect throwing rocks and damaging the window of a boat the victim was operating. The Colonial Beach police department, "straighten[ed] the matter out," and then handed the matter over to the Charles County Sheriff's Office.

21. Exhibit 19 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated August 5, 1999, in which the victim reported that she was raped in the waters off the Colonial Beach, Virginia shore. The Colonial Beach, police department took the initial report, and then handed the information over to the Charles County Sheriff's Office. The Charles County Sheriff's Office was given the name of a suspect. During the investigation, the suspect's employer proved that it was not possible for the suspect to be at Colonial Beach at the time that the victim said the rape occurred. The victim then named another suspect, and after questioning several persons supposedly involved, it was concluded by the investigator and the victim's mother that the victim's accounts of the events were not possible. Meanwhile, the results from the rape kit all came back negative, for sperm & blood. The Charles County Sheriff's Office closed the case as being unfounded and referred the case to the Westmoreland County, Virginia Commonwealth's Attorney, who stated that she would not pursue prosecution against the victim for making a false report due to the victim's mental status.

22. Exhibit 20 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated June 15, 1999, which describes a subject who was

intoxicated and disorderly. Officer Eagal of the Colonial Beach town police department detained the accused until the Charles County Sheriff's Office arrived. The Charles County Sheriff's Deputy was briefed by Officer Eagal as to the charges against the subject, and the Charles County Sheriff's Office arrested the subject and transported him to Charles County Detention Center, where he was held to see the Commissioner.

23. Exhibit 21 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated May 7, 2000, which states that the Victim and accused were involved in a verbal altercation at the end of the Colonial Beach Town Pier. The accused suspect then became violent, at which time he brandished a knife.

24. Exhibit 22 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated June 6, 2001, which details the discovery of a deceased victim in the Potomac River, in the area of Belvedere Beach, King George, Virginia.

25. Exhibit 23 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated, July 15, 2001, which states that the listed suspect assaulted a victim by pushing her to the ground twice with open hands during a verbal argument on the Town Pier at Colonial Beach, Virginia.

26. Exhibit 24 is a genuine and authentic copy of a Charles County Sheriff Offense/Incident Report dated August 2, 2001 taken at Jamaica Joe's Caribbean, 5453 Pavillion Drive, King Charles County, Maryland, which states that unknown suspects left the restaurant without paying after eating there, and then fled area by way of water in a red boat.

I declare under the penalty of perjury that the foregoing is true and correct.

MD App. 107

/s/

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Frederick E. Davis

November 29, 2001



TOWN OF COLONIAL BEACH, INC.  
18 N. IRVING AVENUE  
COLONIAL BEACH, VIRGINIA 22443  
(804) 224-7181

September 26, 1989

Mr. Thomas M. Middleton  
President, Charles County Commissioners  
P.O. Box B  
LaPlata, Maryland 20646

Dear Mr. Middleton,

The Town Council of the Town of Colonial Beach, has voted to make a special request of Charles County and the State of Maryland. As you may be aware, the Town owns a public pier which was built out into the Potomac River, many decades ago. Because of its location, in Maryland waters, even though it is attached to Virginia soil, the Town does not have jurisdiction over crimes Committed on 80% of the structure. Our Police are not able to make arrests, even when they personally witness illegal acts taking place on the pier. This has obviously created a severe law enforcement problem in the Beach. Vandalism alone is costing the Town \$100 each week, just to replace the boards broken or ripped out of the structure.

The only solution to the problem appears to be a relinquishing of sovereign rights over the pier by Charles County and the State of Maryland. If this was done, the Town would be able to extend its police powers over the entire pier, and take the responsibility for prosecuting all violations of the law. In return, Charles County would not be forced to drive forty miles to respond to pier problems.

The Town is not requesting jurisdiction over any other property in Maryland waters. Private businesses are able to hire their own security and do pay taxes to Maryland

for police protection. The Town pier is in a unique situation which requires us to make this unusual request for the public's protection. Without our police force, the pier ends up being a lawless area without an enforcement authority for thirty to forty minutes. This can not be benefiting anyone but the potential criminal.

A resolution passed unanimously by the Town Council of Colonial Beach is attached. Your consideration of our request is greatly appreciated.

Thanking you in advance.

I am,

/s/

William F. Bruton, Jr.  
Town Manager

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF JANICE C. DeATLEY**

Being more than 18 years of age and competent to testify, Janice C. DeAtley states as follows:

1. I am the Supervisor of Land and License Records for the Circuit Court of Charles County, Maryland. I am the custodian of license records maintained at the circuit court.

2. I have reviewed these records for licenses issued by Charles County to establishments and individuals that are located in the Potomac River offshore of the Commonwealth of Virginia. In accordance with the document retention schedule established by the circuit court, license records for the period prior to 1994 are no longer in the custody of the circuit court. To the extent such records still exist, they should be maintained by the Maryland State Archives.

3. The documents attached hereto as Exhibit 1, labeled MD-CHAS-10000-10001, are genuine and authentic copies of computerized license records maintained by the Circuit Court for Charles County. The

document attached hereto as Exhibit 2, labeled MD-CHAS-10002, is a genuine and authentic copy of an application for a business license maintained by the circuit court.

4. Exhibit 1 reflects that Riverboat on the Potomac, Inc. obtained traders licenses from 1994 through 2000. Exhibit 2 reflects that Riverboat on the Potomac, Inc., of offshore Colonial Beach, Virginia, obtained a traders license and a restaurant license in 2001. Based on my experience and the fact that Riverboat had a traders license from 1994 to 2000, the 2001 restaurant license was likely a renewal of a previously issued restaurant license.

5. The document attached hereto as Exhibit 3, labeled MD-CHAS-10003, is a genuine and authentic copy of computerized license records maintained by the Circuit Court for Charles County. The document attached hereto as Exhibit 4, labeled MD-CHAS-10004, is a genuine and authentic copy of an application for a business license maintained by the Circuit Court. The document attached hereto as Exhibit 5, labeled MD-CHAS-10005, is a genuine and authentic copy of a business license issued by the Circuit Court.

6. Exhibit 3 reflects that Fairview Beach Crabhouse obtained traders licenses from 1994 through 1998. Exhibits 4 and 5 reflects that Riverboat on the Potomac, Inc., of offshore King George, Virginia, obtained traders license, cigarette, special cigarette and restaurant licenses in 1998, the last year for which these licenses were issued. Based on my experience and the fact that Fairview Beach Crabhouse had a traders license from 1994 to 1998, the 1998 restaurant and cigarette licenses were likely renewals of previously issued licenses.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
Janice C. DeAtley

Executed on November 29, 2001.

[stamped "received" by the Supervisor  
of Assessments, La Plata, Maryland, on  
November 30, 2001]

IN THE  
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

DECLARATION OF ROBERT C. FARR

Being more than 18 years of age and competent to  
testify, Robert C. Farr states as follows:

1. I have been employed by the Maryland State  
Department of Assessments and Taxation ("SDAT" or the  
"Department") since 1974. During the period from 1974  
through September of 1996, I was employed in the  
Department's Baltimore City office as a tax assessor for  
residential and commercial properties. In September of  
1996, I transferred to the Department's office in Charles  
County, where I performed tax assessments for  
commercial properties located in Charles County. In  
April of 1998, I was appointed as the Department's  
Supervisor of Assessments for Charles County, and since  
that time have been continuously employed in that  
position.

2. The Department's Charles County office is responsible for performing real property tax assessments for all real property located in Charles County. As Supervisor of Assessments, I oversee the operation of the Office, which includes supervision of 14 tax assessors and additional support staff. I am the custodian of, and responsible for maintenance of, assessment records generated by this office for real properties located in Charles County.

3. Prior to 1974, real property assessments were under the control of county assessment offices. Assessments were performed under State supervision and in accordance with State guidelines and policies. Passage of legislation in 1974 transferred responsibility for real property assessments to the State Department of Assessments and Taxation. County assessors and supervisors were converted to State employees and continued to perform the same functions.

4. Attached hereto as Exhibits 1 through 14, are genuine and authentic copies of property tax assessment records presently maintained by SDAT's Charles County office, which reflect assessments for three commercial structures built on piers extending into the Potomac River off Charles County from Belvedere Beach, Fairview Beach and Colonial Beach on the Virginia shoreline. These documents generally consist of assessment worksheets and assessment forms that we in this office refer to as "Field Cards" upon which property assessments for individual properties are recorded by the assessors. Some of the attached assessment records are those that were created by the Charles County Assessment Office prior to the State takeover in 1974. Custody and control of Charles County assessment records was assumed by this office following the takeover. Although this office has some records that date back into the 1950's, most of the assessment records that pre-date 1960 were destroyed.

Belvedere Beach Pier

5. The documents attached as Exhibit 1 (consisting of numbered documents MD-CHAS-00227 and MD-CHAS-00228) are genuine and authentic copies of a Field Card and assessor's worksheet form prepared by SDAT and Charles County commercial property assessors for a restaurant and bar previously located at the end of a pier extending into the Potomac River off the Virginia shoreline known as the "Belvedere Beach Pier". The documents reflect assessments during the period from 1966 through 1976, including an assessment for the value of the land commencing in 1970. As indicated by the Field Card (MD-CHAS-00227), the building was torn down in 1972 and the entire property removed from the tax rolls in 1976.

6. The document attached as Exhibit 2 (MD-CHAS-00229) is a genuine and authentic copy of an assessment form reflecting an assessed value of \$15,360 for the Belvedere restaurant in 1962.

7. The document attached as Exhibit 3 (MD-CHAS-00230) is a genuine and authentic copy of an assessment worksheet for the Belvedere restaurant which dates back to 1957 and reflects an assessment of \$12,800.

Fairview Beach Pier

8. The documents attached as Exhibits 4 through 9 (MD-CHAS-00172 through MD-CHAS-00187; MD-CHAS-00195) consist of genuine and authentic copies of Field Cards, assessor worksheets and other assessment records for a crab house and tavern, which is constructed on a pier extending into the Potomac River from the Fairview Beach area of the Virginia shoreline. The establishment is now known as "Jamaica Joe's", but has previously operated under the names "Starlight Pavilion" and "Fairview Beach".



9. The document attached as Exhibit 4 (MD-CHAS-00195) is a genuine and authentic copy of an assessment record that reflects a real property tax assessment for the "Fairview Pier" in 1953. The remaining assessment records attached as Exhibits 5 through 9 are genuine and authentic copies of Field Cards and assessor worksheets reflecting tax assessments for the Fairview Beach Pier property during the period from 1957 through the present.

10. Exhibit 5 (documents MD-CHAS-00186 and MD-CHAS-00187) consists of genuine and authentic copies of the assessor worksheets for the Fairview Beach property reflecting the assessed value for the years 1957 through 1962.

11. Exhibit 6 (documents MD-CHAS-00182 and MD-CHAS-00183) consists of genuine and authentic copies of the assessor worksheets for the Fairview Beach property reflecting the assessed value for the years 1965 through 1979.

12. Exhibit 7 (documents MD-CHAS-00184 and MD-CHAS-00185) consists of genuine and authentic copies of the assessor worksheets for the Fairview Beach property reflecting the assessed value for the years 1979 through 1981.

13. Exhibit 8 (documents MD-CHAS-00178 through MD-CHAS-000181) consists of genuine and authentic copies of the Field Card and assessor worksheets for the Fairview Beach property reflecting the assessed value for the years 1981 through 1996.

14. Exhibit 9 (documents MD-CHAS-00172 through MD-CHAS-00177) consists of genuine and authentic copies of the Field Card and assessor worksheets for the Fairview Beach property reflecting the assessed value for the years 1990 through 2001.

Colonial Beach Pier

15. The Documents attached as Exhibits 10 through 14 are genuine and authentic copies of SDAT real property tax assessment records for a restaurant and tavern constructed on a pier extending into the Potomac River from Colonial Beach on the Virginia shoreline. The establishment is now known as "Flanagans", but has previously operated under the names of "Riverboat on the Potomac", "Little Reno" and "Reno of Colonial Beach". The present owner of the business is Flanagans of Colonial Beach, Inc.

16. Exhibit 10 (documents MD-CHAS-00223 and MD-CHAS-00224) consists of genuine and authentic copies of assessment worksheets reflecting property tax assessments for the Colonial Beach restaurant in 1957 and 1962.

17. Exhibit 11 (documents MD-CHAS-00219 and MD-CHAS-00220) consists of genuine and authentic copies of the Field Card and assessment worksheet reflecting assessments for the Colonial Beach property during the period from 1968 through 1979.

18. Exhibit 12 (documents MD-CHAS-00215, MD-CHAS-00216 and MD-CHAS-00218) consists of genuine and authentic copies of assessment worksheets reflecting assessments for the Colonial Beach property during the period from 1979 through 1988.

19. Exhibit 13 (documents MD-CHAS-00210 through MD-CHAS-00214 and MD-CHAS-00217) consists of genuine and authentic copies of the Field Card and assessment worksheets reflecting property tax assessments for the Colonial Beach property during the period from 1982 through 1997.

20. Exhibit 14 (documents MD-CHAS-00206 through MD-CHAS-00208) consists of genuine and authentic copies of photographs of the Colonial Beach property and the Field Card and assessment worksheet reflecting the assessment made in 1999 for the years 1999, 2000 and 2001.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Robert C. Farr

Executed on November 30, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF RICK FORRESTER**

Being more than 18 years of age and competent to testify, Rick Forrester states as follows:

1. I am a Regional Manager with the Maryland State Lottery Agency ("Lottery"). I have been employed by the Lottery since February 1992. My region encompasses Southern Maryland and the Eastern Shore. Prior to becoming a Regional Manager, I was a field representative and Riverboat on the Potomac was one of the lottery agents that I serviced.

2. As a field representative, I was responsible for servicing agents in all their lottery needs. This included supplying instant game tickets, and providing promotional education, player education, and points of sale. Ever since I began working for the Lottery, Riverboat on the Potomac has had one Virginia Lottery terminal in the front of the facility and two Virginia instant ticket machines.

3. The entrance of the facility is located on land in Colonial Beach, Virginia. Approximately six to

eight feet from the entrance there is a doorway and there is a sign at the header above the doorway that reads "Welcome to Maryland." Once you go through the doorway, there are Maryland Lottery and Keno terminals. Riverboat on the Potomac also has a permit to operate as a Maryland off-track betting parlor on the Maryland side of the facility. Upon entering the doorway to return to the entrance there is a sign above the doorway header that reads "Welcome to Virginia."

4. In early 1993, I recall the Lottery authorizing Riverboat on the Potomac to operate Keno terminals. There was opposition from the religious community in Colonial Beach that viewed the Keno terminals as an expansion of gaming in Colonial Beach. The local Virginia authorities and the Virginia Lottery did not raise any opposition to the Lottery authorizing Riverboat on the Potomac to expand its operation by Keno terminals.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Rick Forrester

Executed on November 27, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF FRANCIS "BUDDY" GARNER**

Being more than 18 years of age and competent to testify, Francis Garner states as follows:

1. I am a lifetime resident of Charles County, Maryland. After graduation from high school I served two years in the United States Army, including a tour of duty in Korea. Following that service, I became a Deputy Sheriff with the Sheriff's Office in Charles County in 1953. At the time, I was the youngest deputy, being 23 years of age. The other seven deputies were men in their 50's.

2. The Sheriff's Office was the main law enforcement agency in Charles County, providing 24-hour service. I was trained on the job, and as part of my training, I learned that the jurisdiction of the Office extended across the Potomac River to the low water mark on the Virginia side of the River. I further learned that the jurisdiction included certain businesses that had been established on piers that extended from the Virginia shore. These businesses had been established shortly before I joined the Office, and provided food, alcohol by the drink

and slot machine gambling. Alcohol by the drink and slot machine gambling were legal in Maryland, but not in Virginia. The businesses were successful and attracted large crowds, particularly on weekends.

3. In the normal course of events, the Sheriff's Office received calls to provide police service on the piers on a regular basis, and virtually every weekend. The calls were mostly of a routine nature, involving assaults, rowdy behavior, illegal drinking, and occasional breaking and entering. The piers could be accessed by boat relatively quickly, but crossing the River in winter by boat was difficult and sometimes dangerous. It was possible to cross the River by bridge, but that lengthened the response time to 40 minutes.

4. In order that prompt and effective police service could be maintained, the Office established a system of Special Deputies to work the businesses on the piers. The deputies were permanently posted to each business during business hours in order to maintain order. Each Special Deputy was a Charles County resident, was an employee of the business in Colonial Beach, Virginia, was paid by the business, was supervised by the Charles County Sheriff's Office, wore the uniform of the Office, and was licensed to carry firearms. The presence of the Special Deputies greatly enhanced peace and order on the piers. If additional backup or investigation was necessary, it was provided in the regular course by deputies dispatched from the Maryland side of the River.

5. In 1955, I was personally involved in what was known locally as the "Oyster Wars." Virginia watermen would set out from the Virginia shore at night in high powered boats to dredge for oysters in the Potomac River. Dredging was illegal under Maryland law as being destructive to the habitat of the oysters and because it quickly depleted the oysters themselves. Although Maryland law permitted Virginia watermen to

tong for oysters, these particular watermen rejected the method as too slow and too difficult. The River itself was policed by the Tidewater Fisheries Police, a Maryland agency. Their boats were not as fast as the high powered boats used by the Virginians, so they tried to sneak up on dredging boats to make arrests. One such attempt resulted in gunplay, and a Virginia waterman was shot dead. His partner escaped to the Virginia shore, where he was detained by Virginia authorities. They contacted the Charles County Sheriff's Office. I personally went to Virginia, took custody of the prisoner and returned him to Charles County to be charged, tried, convicted and punished for violation of Maryland law.

6. In 1958, I was elected Sheriff of Charles County. I continued the system of Special Deputies in the casinos. In the cases of more serious crimes, such as assaults or thefts, the Special Deputies held the perpetrators until they could be picked up by the Office, and returned to the Maryland side of the River to be charged and prosecuted under Maryland law. Business owners came to the Charles County Courthouse to swear warrants. Simple drunks were escorted to the end of the pier, where Virginia authorities either escorted them home, or held them overnight to sleep it off. The system of Special Deputies reduced the need for trips across the River to approximately one a month during the summer months.

7. In addition to regular police work, the Sheriff's Office enforced liquor laws on the piers. Regular inspections ensured that licenses were up to date, that underage drinking was not permitted, that proper hours of business were observed, and that liquor that had not been taxed by the State of Maryland was not served.

8. All of the regular activities described above continued under my supervision until I left office in 1978. In 1958, the Maryland Legislature outlawed slot



machines. That effectively killed the casino business on the piers, though bars and restaurants continue to do business there to the present day.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
Francis "Buddy" Garner

November 30, 2001

IN THE  
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,                \*      Before Special Master

v. \* Ralph I. Lancaster, Jr.

STATE OF \*  
MARYLAND,

Defendant.

\* \* \* \* \*

## DECLARATION OF FAYE GATTON

Being more than 18 years of age and competent to testify, Faye Gatton states as follows:

1. I am the Supervisor of Land Records and License Records for the Circuit Court of St. Mary's County, Maryland. I am the custodian of license records maintained at the circuit court.

2. I have reviewed these records for licenses issued by St. Mary's County to establishments and individuals that are located in the Potomac River offshore of the Commonwealth of Virginia. The documents attached hereto as Exhibit 1 and labeled MD-MARY-00061-00068 are genuine and authentic copies of license records maintained by the Circuit Court for St. Mary's County.

3. The court's records reflect that Loren L. Landman, operator of Coles Point Tavern, located offshore of Coles Point, Virginia, obtained traders, cigarette, special cigarette, restaurant, and music box licenses from the circuit court from 1980 through 2000.

Exhibit 1 (MD-MARY-00064-68). Mr. Landman also obtained billiards licenses from the circuit court in 1980 and from 1989 through 2000. Exhibit 1 (MD-MARY-00064-68). Exhibit 1, MD-MARY-00061, reflects that Mr. Landman obtained business licenses again in 2001, although the types of licenses had not been indexed as of the date of that record. Based on my review of the updated court records, traders, restaurant, music box, billiard, cigarette, and special cigarette licenses were issued to Mr. Landman in 2001.

4. In accordance with the document retention schedule established by the circuit court, license records for the period prior to 1980 are maintained by the Maryland State Archives.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Faye Gatton

Executed on November 21, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF PATRICIA HERRIMAN**

Being more than 18 years of age and competent to testify, Patricia Herriman states as follows:

1. I am a registered sanitarian in environmental health, and I am employed as a Maryland Department of Health and Mental Hygiene program manager by the Charles County Health Department ("CCHD"), in Charles County, Maryland. Sanitarians are licensed under the laws of the State of Maryland, and are responsible for interpreting and applying the Code of Maryland Regulations through the process of field evaluations and investigations in assigned program areas. I was first employed as a sanitarian by the St. Mary's County Health Department in 1979. In 1987, I became a sanitarian for the CCHD.

2. As part of my job duties, I am responsible for inspecting and supervising the inspection of food establishments located in Charles County and for issuing and renewing licenses for operating food establishments. I also have sampled and supervised the sampling of bathing beaches in Charles County in an effort to insure

the safety of the waters for recreational uses. As part of my duties, I have custody of and maintain the CCHD's records pertaining to environmental health. The Exhibits attached to this declaration are documents created by, received by, and maintained by the CCHD in the course of its ordinary business activities.

3. Among other things, CCHD is responsible for monitoring public establishments as to various health related issues. Under Maryland law, anyone who seeks to operate a food service facility in Maryland is required to annually apply for and obtain a license from the local county health department, and to pay a license fee. Failure to obtain or renew a license would be illegal and subject a restaurant owner to penalties or other legal remedies. CCHD is responsible for issuing such licenses in Charles County, Maryland.

4. CCHD also inspects food service facilities to insure that all necessary food service licenses have been obtained and that all required statutes and regulations pertaining to food service establishments are satisfied. CCHD also samples and tests bathing beach waters to insure the safety of recreational users, and conducts other such testing.

5. As part of my duties, I have inspected and supervised the inspection of restaurants located on piers in the Potomac River, which are adjacent to the Virginia shore but extend into the river. My first experience with such a food establishment occurred in 1979, within my first few weeks on the job at the St. Mary's County Health Department. At that time, I accompanied the Maryland police on a surprise raid of an establishment located on a pier in the Potomac River and accessed from the Virginia shore at Colonial Beach, Virginia. The Maryland police confiscated liquor and took away cigar boxes filled with money. While there, I performed a food service inspection.

6. Since then, I have inspected and supervised the inspection of two food establishments located in Charles County, Maryland. The first of these is currently named "Riverboat on the Potomac," and has formerly been named, among other things, "Reno" and "Little Reno." Riverboat on the Potomac is located on a pier in the Potomac River adjacent to Colonial Beach, Virginia. The second establishment is currently Jamaica Joe's, and has formerly been named, among other things, the Fairview Beach Crabhouse and Starlight Pavilion. Jamaica Joe's is located on a pier in the Potomac River adjacent to Fairview Beach, Virginia.

7. I have personal knowledge, by virtue of my employment, that the owners of Riverboat on the Potomac and its predecessors and the owners of Jamaica Joe's and its predecessors have applied to CCHD for new or renewal permits to operate a food service facility in Charles County since at least 1987. The records currently maintained by this department reflect such applications since at least 1982.

8. Exhibit 1 contains genuine and authentic copies of applications for food service permits filed by Little Reno, Inc. from 1982 to 1984. Exhibit 2 contains genuine and authentic copies of "void" permits that were not issued to Little Reno, Inc. in 1982 and 1983, and of permits that were issued to Little Reno in 1983 and 1984. From 1985 through 1990, the "Reno" facility was owned by Reno of Colonial Beach, Inc., which sought annual renewals of its permit to operate a food service facility in its restaurant and bar. The documents at Exhibit 3 are genuine and authentic copies of the applications filed by the owners of Reno of Colonial Beach from 1985 to 1990. Exhibit 4 contains genuine and authentic copies of the permits issued to Reno of Colonial Beach.

9. As shown on Exhibit 5, Reno on the Potomac, Inc. informed CCHD in 1990 that it had

assumed ownership of "Reno." Exhibit 5 is a genuine and authentic copy of Reno on the Potomac, Inc.'s 1990 and 1991 applications and renewal applications for food service permits from CCHD. Exhibit 6 contains genuine and authentic copies of the permits issued to Reno on the Potomac by CCHD in 1990 and 1991.

10. As shown on Exhibit 7, at MD-CHAS-00587-88, Flanagan's of Colonial Beach, Inc. informed the Department in 1992 that it had assumed ownership of "Reno" and changed its name to "Riverboat on the Potomac." Exhibit 7 is a genuine and authentic copy of the annual applications for food service permits filed by the owners of Riverboat on the Potomac from 1992 to the present. Exhibit 8 contains genuine and authentic copies of permits issued to Riverboat on the Potomac since 1992.

11. Exhibit 9 contains genuine and authentic copies of applications for food service permits filed by Starlight Pavilion, Inc. from 1983 to 1992 for its establishment named, at different times, the "Fairview Beach Restaurant" or the "Fairview Beach Crabhouse." Exhibit 10 contains genuine and authentic copies of permits issued to Starlight Pavilion, Inc. from 1983 to 1992. As reflected on Exhibit 11, a food service permit was sought for this facility in 1993 by Fairview Ventures, Inc. under the name "the Pier at Fairview Beach." Exhibit 11 is a genuine and authentic copy of the 1993 food service permit application filed by Fairview Ventures, Inc., and Exhibit 12 is a genuine and authentic copy of the 1993 permit issued for this facility.

12. As shown on Exhibits 13 and 14, food service permits were sought for this facility from 1994 to 1998 by Fairview Beach, Inc., under the name "Fairview Beach Crabhouse Restaurant." Exhibit 13 contains genuine and authentic copies of permit applications filed by Fairview Beach, Inc. from 1994 to 1998. Exhibit 14

contains genuine and authentic copies of the permits issued for this facility from 1994 to 1998.

13. As shown on Exhibits 15, 16, and 17, food service permits were sought for the Fairview Beach facility from 1998 to the present by Fabulous Enterprises at Fairview Beach, Inc., under the name "Jamaica Joe's." Exhibit 15 contains genuine and authentic copies of the 1999 to 2001 permit applications for Jamaica Joe's, and Exhibit 16 contains genuine and authentic copies of the permits issued for this facility. These records also reflect the CCHD's enforcement of its permitting authority. Exhibit 17 contains a genuine and authentic copy of a "Final Notice" letter from CCHD to the owners of Jamaica Joe's, informing them that if Jamaica Joe's did not file the necessary renewal application and fee for a food service license by March 2, 2001, charges would be filed against Jamaica Joe's in the Charles County Circuit Court. Exhibits 15 and 16 reflect that Jamaica Joe's subsequently applied for and received its 2001 permit.

14. As the applications at exhibits 1, 3, 5, 7, 9, 11, 13, and 15 reflect, in order to obtain a food service permit, the owners of these establishments are required to, among other things, pay a permit fee to CCHD each year. With respect to more recent applications, CCHD also requires each facility to certify each year that it carries workers' compensation insurance in compliance with Maryland's Workers' Compensation Laws. Exhibits 18 to 21 contain genuine and authentic copies of certifications submitted by the owners of Riverboat on the Potomac, the Fairview Beach Restaurant, the Fairview Beach Crabhouse, and Jamaica Joe's that they have complied with Maryland's Workers' Compensation Law.

15. CCHD has routinely conducted inspections of Jamaica Joe's and Riverboat on the Potomac and their predecessors for compliance with Maryland health and safety laws and regulations. When an inspection is



conducted by CCHD, a written inspection report is completed by the inspecting sanitarian at the time of the inspection. This report details any problems or other observations of the sanitarian during the inspection, and a copy of the report is maintained in CCHD's files in the course of its ordinary business practice. The earliest such record that has been retained by CCHD dates from 1967. Exhibit 22 is a genuine and authentic copy of a May 10, 1967 inspection report for Little Reno, which observes that the pier had "burned 1958?" and that Little Reno "started rebuilding September 66 and [started] food service early Dec. 1966." Exhibit 23 is a genuine and authentic copy of an inspection report for Little Reno that shows that Little Reno was again inspected on August 9, 1967.

16. According to CCHD's records, these establishments have been inspected at least 75 times since 1967. At least 42 inspections were conducted at Riverboat on the Potomac or its predecessors during this period. Exhibits 22 to 28 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 7 inspections conducted at Little Reno from 1967 to 1980. Exhibit 29 is a genuine and authentic copy of a March 11, 1982 letter from CCHD to the owners of Little Reno, informing them that Little Reno did not then have a valid food and drink permit, and would have to contact CCHD to arrange a time for inspection. Exhibits 30 to 35 are genuine and authentic copies of inspection reports, notes of inspections, and letters detailing inspection results that were completed by CCHD personnel for 6 inspections and follow-up inspections conducted at Little Reno from 1983 to 1984. Exhibits 36 to 43 are genuine and authentic copies of inspection reports completed by CCHD personnel for 8 inspections conducted at Reno of Colonial Beach from 1985 to 1988. Exhibits 44 to 46 are genuine and authentic copies of inspection reports completed by CCHD personnel for 3 inspections conducted at Reno on the Potomac in 1991.

Exhibits 47 to 64 are genuine and authentic copies of inspection reports completed by CCHD personnel for 18 inspections conducted at Riverboat on the Potomac between January 1992 and April 2001.

17. In addition, CCHD records reflect that at least 33 inspections have been conducted at Jamaica Joe's and its predecessors since 1977. Exhibits 65 to 67 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 3 inspections conducted at Starlight Pavilion/Fairview Beach Crabhouse in 1977 to 1978. Exhibit 68 is a genuine and authentic copy of a March 11, 1982 letter from CCHD to the owners of Starlight Pavilion, informing them that Starlight Pavilion did not then have a valid food and drink permit, and would have to contact CCHD to arrange a time for inspection. Exhibits 69 to 83 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 15 inspections conducted at Starlight Pavilion/Fairview Beach Crabhouse from 1983 to 1992. Exhibits 84 to 87 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 4 inspections conducted at The Pier at Fairview Beach in 1993 and 1994. Exhibits 88 to 91 and 114 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 5 inspections conducted at the Fairview Beach Crabhouse from 1995 to 1997. Exhibits 92 to 99 are genuine and authentic copies of inspection reports and results completed by CCHD personnel for 8 inspections conducted at Jamaica Joe's in 1998 and 1999.

18. Inspections of these facilities are a burden, because each inspection requires a Charles County sanitarian to drive a long distance in order to cross the Potomac and to reach these facilities from the Virginia shore. CCHD continues to conduct such inspections, however, because the restaurants are located within Charles County, Maryland. To the best of my knowledge,

CCHD has always inspected these restaurants in the same manner as other restaurants within Charles County, and Virginia does not conduct any such inspections of them.

19. As part of its regulatory responsibilities, CCHD has consistently notified the restaurants located on piers in the Potomac River that permits would not be issued or renewed unless health, building and environmental regulations were satisfied. Where a food service facility's problems are sufficiently numerous or severe, CCHD is empowered to require the facility to eliminate or correct the problem before it may continue to serve food. CCHD has, on numerous occasions required the facilities located on piers in the Potomac River to make such changes. Exhibit 100, for example, is a genuine and authentic copy of an October 30, 1985 letter from CCHD to the owners of Starlight Pavilion, informing them that on July 25, 1985, a CCHD inspector had noted "numerous violations," and that they were "required to report all 4 and 5 point violations as being corrected within a ten day period." This letter also reflects that the owners of Starlight Pavilion were informed that they could not make any changes to the facility without authorization from CCHD and a building permit from the Charles County Board of Public Works. Exhibit 101 contains a genuine and authentic copy of a similar letter sent to the owners of Little Reno on October 10, 1978, also informing them of inspection violations and the requirement that any changes to the facility be approved in advance by CCHD. Exhibit 102 contains genuine and authentic copies of four similar letters sent to the owner of the Fairview Beach Crabhouse on February 7, 1992, May 21, 1992, July 8, 1992, and August 24, 1992. Exhibit 103 contains genuine and authentic copies of three similar letters sent to Riverboat on the Potomac on May 5, 1995, June 7, 1995, and July 5, 1995.

20. The owners of these establishments have repeatedly made required corrections and reported them to

CCHD. Exhibit 104 contains a genuine and authentic copy of a July 25, 1985 letter from Reno of Colonial Beach to CCHD, setting forth how the violations found in a June 30, 1985 inspection had been addressed. Exhibit 105 contains genuine and authentic copies of similar correspondence from the owners of the Fairview Beach Crabhouse in April 1986 and April 1988. Exhibit 106 contains a genuine and authentic copy of July 1999 notes recorded by a CCHD inspector on a CCHD inspection form, showing that he had been informed by the owner of Jamaica Joe's that the major problem found in the prior inspection of that facility had been corrected, and recording the inspector's conclusion that the facility would be allowed to reopen to the public.

21. I have required the owners of such establishments to make corrections of noted violations. For example, on four occasions in 1992, I sent notices of violations to the Fairview Beach Crabhouse, as shown by the four letters at Exhibit 102. In the last such notice at Exhibit 102, numbered MD-CHAS-01208, I informed the owners on August 24, 1992 that "your failure to comply will require this Department to take such action as is necessary to prevent the handling of food in your establishment." In a subsequent report dated October 20, 1992, at Exhibit 83 on the page labeled MD-CHAS-01207, I warned that the facility would be closed as of November 1, and "cannot reopen [for the coming season] until the violations noted above are corrected and another environmental inspection is conducted."

22. As another example, Exhibit 107 contains a genuine and authentic copy of a July 29, 1996 letter in which I required Riverboat on the Potomac to exclude a food handler from working at the restaurant because she had been exposed to a person with a communicable disease. Exhibit 108 contains a genuine and authentic copy of an October 23, 1985 letter in which CCHD notified the restaurants located in the Potomac River of

Maryland's prohibition on the use of phosphate detergents in order to protect the water quality of the State waters from nutrient pollution. Exhibit 109 contains a genuine and authentic copy of a January 8, 1986 letter to Starlight Pavilion prohibiting the reuse of tableware by self service customers returning to the service area for additional food.

23. CCHD also works with other State and County agencies with respect to regulating the activities of those establishments located on piers in the Potomac River that extend from the Virginia shore. For example, exhibit 110 contains a genuine and authentic copy of a April 3, 1978 letter from a building inspector employed by the Charles County Department of Public Works to the management of Starlight Pavilion. This letter warned of a number of unsafe structural conditions, including rotten pilings, planking, and steps, and informed Starlight Pavilion that it would be required to obtain a Maryland registered structural engineer's report and a complete inspection by the State, and that, if the necessary work were not completed by April 10, 1978, the building and pier would be closed and posted "with an unsafe Building Notice," and Starlight Pavilion would not be able to "use or occupy the building except for the purposes of repairs and maintenance." As the fax cover sheet at Exhibit 110 reflects, the inspector also informed CCHD of these deficiencies. Similarly, Exhibit 111 contains a genuine and authentic copy of an August 18, 1987 letter from the Charles County Department of Public Works to CCHD, in which CCHD was advised of conditions that needed correction at Little Reno, and requesting CCHD's attention to them.

24. CCHD also responds to complaints received from members of the public, other Maryland or local agencies, and Virginia governmental agencies. Exhibits 38, 42, 63, and 96, for example contain genuine and authentic copies of the complaints received and recorded by CCHD personnel for one of the establishments located

on piers that extend from the Virginia shore of the Potomac River. As a result of each of these complaints, CCHD conducted a follow-up inspection, as shown by the inspection reports at Exhibits 38, 42, 63, and 96.

25. Virginia agencies frequently assist Maryland in enforcing its public health laws with respect to activities conducted in the Potomac River within Maryland, but adjacent to the Virginia shore. For example, the Rappahannock Area Health District, in cooperation with the Virginia Department of Health or the King George County Health Department, routinely refers complaints made to it about such establishments to Maryland to handle. For example, Exhibit 112, at MD-CHAS-1216, contains a genuine and authentic copy of a "record of complaint" form used by the King George County Health Department to supply information to CCHD regarding referrals. On these forms, the King George County Health Department indicates that it is not responsible for such complaints by checking the box that denotes that another agency is responsible, and by identifying the responsible agency as CCHD or, as in the case of Exhibit 112, the "Maryland Health Dept."

26. Exhibit 112 documents a complaint initially received by the King George County Health Department about a leaking sewer line at the Fairview Beach Restaurant. The complaint form, at MD-CHAS-01216, reflects that the King George County Health Department investigated the sewer line on the Virginia side of the boundary line, and concluded that there was "no leakage at Virginia sewer line at shoreline" and "contacted Maryland H.D. by phone [that] something is leaking under restaurant back portion." As the fax cover sheet at Exhibit 112 demonstrates, the complaint form was then sent to me from the King George County Health Department. Exhibit 82 contains a copy of my report of the follow-up inspection that I conducted at this facility.

27. The file reflects numerous similar complaints. For example, Exhibit 113 is a genuine and authentic copy of a July 1985 complaint referred to CCHD from King George County. The first page at Exhibit 113 reflects that CCHD received a telephone call from C.G. Chestnut on July 23, 1985, about a complaint that sewage was being discharged into the Potomac by the Fairview Beach Restaurant. The second page at Exhibit 113 reflects that a written referral form was received two days later. Exhibit 114 is a genuine and authentic copy of a July 29, 1985 letter from CCHD to the King George County Health Department, informing Mr. Chestnut of the results of CCHD's inspection.

28. Exhibit 115 is a genuine and authentic copy of a form documenting an August 8, 1996 complaint regarding possible food poisoning at the Fairview Beach Crabhouse, reflecting that the complaint was referred to CCHD by the King George County Health Department.

29. Exhibit 116 contains a genuine and authentic copy of a King George County Health Department Complaint Form dated September 19, 1996, reflecting the referral from King George County to CCHD of a complaint made by the King George County Director of Utilities regarding a possible sewer line break off of the Virginia shore. As this form shows, the King George Health Department deemed "Maryland State" and "Charles Co. Env." to be the responsible parties. Exhibit 117 contains a genuine and authentic copy of the notes taken by the Maryland inspector upon receiving the referral, detailing the inspector's conversation with Virginia officials regarding the problem. Exhibit 118 contains a genuine and authentic copy of a September 20, 1996 inspection report from the State of Maryland, which discloses that, as a result of the referral, a Maryland sanitarian inspected the sewer main two days later and conducted a dye test, which showed that the sewer line had been fixed.

30. CCHD also receives complaints directly from Virginia residents. For example, Exhibit 38 contains a genuine and authentic copy of a CCHD complaint form, reflecting that CCHD received a call from a Virginia resident on March 12, 1986 regarding alleged "sewage running in river." According to the CCHD inspector's notes on the back of this form, an inspection was conducted and the complaint was found to be "invalid."

31. As another example, the first page of Exhibit 96 is a genuine and authentic copy of a CCHD complaint form, reflecting a June 3, 1999 complaint by a Virginia resident about the bathroom facilities at Jamaica Joe's, among other things. The inspection report at Exhibit 96 documents CCHD's resulting follow-up inspection. Similarly, the first page of Exhibit 63 is a genuine and authentic copy of a CCHD complaint form, reflecting complaints by a caller from Virginia (with an "804" area code) to the CCHD on July 28, 1999. Exhibit 63 also contains a copy of CCHD's follow-up inspection.

32. In addition to referring complaints to CCHD, King George County Health Department officials have assisted Maryland in its regulation of these establishments in other ways. For example, the last page of the July 1999 inspection report at Exhibit 98 notes that, after Jamaica Joe's was ordered to cease business until plumbing repairs had been completed, the CCHD inspector "Notified Gary Switzer of King George County Environmental Health. Mr. Switzer informed us that his office will monitor establishment to see that business is closed until the time of a satisfactory reinspection." When the CCHD inspector authorized Jamaica Joe's to reopen, as reflected on Exhibit 106, the CCHD inspector noted that the King George County Health Department was notified of this decision.

33. Virginia agencies have acknowledged the CCHD's jurisdiction over establishments in the Potomac



River on the Maryland side of the line in other ways as well. For example, Exhibit 120 is a genuine and authentic copy of a letter to me from Gary Switzer, the Environmental Health Manager for the Rappahannock Area Health District, in Virginia. This letter sets forth the Virginia agency's concern over the sewage disposal system at the Fairview Beach restaurant, and observes that this restaurant was "located in the jurisdiction of the Charles County Health Department." The Virginia agency requested that CCHD not allow the restaurant to open "as long as it is connected to the on site sewage disposal system." Exhibit 1193 is a genuine and authentic copy of a July 20, 1993 telephone message left for me by Mr. Switzer regarding this same issue. Exhibit 122 is a genuine and authentic copy of a September 24, 1993 letter to me from Mr. Switzer, stating that the Virginia agency was withdrawing its objection to the opening of the Fairview Beach restaurant.

34. In addition to the activities described above, CCHD and the Maryland Department of Health and Mental Hygiene (DHMH) routinely sample water in the Potomac River offshore of Colonial Beach and Fairview Beach. This sampling task is performed by the Maryland agencies because the samples are taken from Maryland waters.

35. Since 1998, CCHD has implemented a Maryland Regulation, at COMAR 26.08.09, that sets standards for testing waters at public bathing beaches, including maximum acceptable levels of fecal coliform or enterococci in swimming waters. Such samples are collected by CCHD and analyzed by DHMH's laboratories in Baltimore, Maryland. As an example, Exhibit 123 contains genuine and accurate copies of the "Bacteriological Reports on Swimming Water" generated by DHMH as a result of recent testing performed on July 25, 2001 at Colonial Beach. CCHD generally collects one sample for each month of the summer swimming season

in June, July and August, and sometimes also collects samples in May and September. CCHD would increase the frequency of sampling when the bacteriological samples reveal that Maryland's water quality standards have been exceeded.

36. At the time that CCHD began to implement this regulation, CCHD determined that it was responsible for testing the water near Fairview Beach and Colonial Beach but that, because the beaches themselves were located on land in Virginia, the Virginia authorities were responsible for determining whether and when the beaches should be closed. Exhibit 124 is a genuine and authentic copy of my letter to the Maryland Department of the Environment, detailing this decision. Exhibit 125 is a genuine and authentic copy of a June 6, 2001 diagram of the sampling sites for the swimming waters off of Fairview Beach, demonstrating that the samples were taken approximately sixty five feet from the medium high tide line, just offshore of the beach. Exhibit 126 contains genuine and authentic copies of 40 letters sent to the Westmoreland County Health Department, King George County Health Department, and other Virginia agencies, informing them of the results of such testing. Exhibit 127 contains a genuine and authentic copy of a July 16, 1999 memorandum received by CCHD from the Rappahannock Area Health District, in which the Virginia agency recommended to King George County that the beach at Fairview Beach be closed as a result of Maryland's water testing.

37. In addition to this water testing and inspections, CCHD also performs other tests to determine whether public health and safety is maintained by the restaurant facilities operating on piers in the Potomac River. Exhibit 128 contains genuine and authentic copies of test reports, reflecting that the bacteriological content of the waters near the Fairview Beach and Colonial Beach restaurants has been periodically tested since at least

1992. Maryland has also periodically analyzed the surrounding Potomac River waters for wastewater problems potentially caused by the restaurants. Exhibit 129 contains genuine and authentic copies of wastewater analyses dating from 1992 to 1997. Exhibit 130 contains genuine and authentic copies of tests performed by CCHD of the drinking water at these facilities in 1983. Exhibit 131 contains genuine and authentic copies of "Hazard Analysis" reports for Riverboat on the Potomac from 1996 and 1999, which analyze the procedures used at Riverboat on the Potomac to determine if there is any risk of contamination. Exhibit 132 contains genuine and authentic copies of two "Sanitation Surveys" conducted by CCHD of Reno of Colonial Beach in 1988 and Starlight Pavilion in 1983.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/  
Patricia Herriman

Dated: December 3, 2001

RAPPAHANNOCK AREA HEALTH DISTRICT.  
608 JACKSON STREET  
FREDERICKSBURG, VIRGINIA 22401  
OFFICE (703) 899-4797  
FAX (703) 899-4599

August 12, 1993

Ms. Trish Herriman  
Charles County Environmental Health Department  
P.O. Box 777  
LaPlata, Md. 20646

Dear Ms. Herriman,

As we discussed in our telephone conversation, this health department has had difficulty in finding out who owns the restaurant on the pier at Fairview Beach. The onsite sewage disposal system which the restaurant is connected to is not adequate to handle the sewage from the establishment if it was to be open for business. There has been several major problems with the onsite sewage disposal systems located in the Fairview Beach Mobile Home and Trailer Park. One of the systems is currently being pumped by the County of King George because of a gross malfunction.

Since the restaurant is located in the jurisdiction of the Charles County Environmental Health Department, the Rappahannock Area Health District and King George County Health Department request that the restaurant not be allowed to open as long as it is connected to the onsite sewage disposal system. We would not have any objection to it opening if it was connected to the sewer system which is available. The Operator or Owner would need to contact King George County Public Works Department for information concerning this connection. The sewer manhole is located approximately 50' from the sewerline which exits the restaurant.

We appreciate your cooperation in this matter. Should you have any questions, please contact me.

Sincerely,

/s/

Gary E. Switzer  
Environmental Health Manager

Copy: King George County Administrator  
King George County Health Department

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

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No. 129 Original

Plaintiff,

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Before Special Master

v.

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Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF PATRICIA INSLEY**

Being more than 18 years of age and competent to testify, Patricia Insley states as follows:

1. I am Alcohol Beverage Administrator of the St. Mary's Alcoholic Beverage Board ("the Board). As such, I am the custodian of the records of the liquor licenses issued by the Board and other documents created by, obtained by, or maintained by the Board in the ordinary course of its business. The records of the Board are maintained in accordance with sections 10-633 to 10-637 of the State Government Article, Annotated Code of Maryland. The Board maintains such records for the period of 1974 to the present.

2. Exhibits 1 to 31 are records created or received by the St. Mary's County Alcohol Beverage Board in the ordinary course of its business, and maintained in accordance with its usual practice. These records relate to liquor licenses issued to the Coles Point Tavern, an establishment located in St. Mary's County, Maryland on a pier that extends into the Potomac River.

3. Exhibit 1 is a genuine and authentic copy of the current liquor license issued to the Coles Point Tavern on April 27, 2001, and the application for that license signed by applicant Loren Leo Landman. Exhibits 2 to 14 are genuine and authentic copies of annual liquor licenses issued to the Coles Point Tavern for the years 1988 through 2000, with the corresponding applications. Exhibits 21, 22, and 24 are genuine and authentic copies of annual liquor licenses issued to the Coles Point Tavern for the years 1975, 1980, and 1981, with the corresponding applications. Exhibits 15 to 20 and 23 are genuine and authentic copies of applications for annual liquor licenses for the Coles Point Tavern for the years 1979 and 1982 through 1987.

4. As part of its regulation and licensing of establishments that serve alcoholic beverages in St. Mary's County, the Board imposes limitations on the time and manner in which such beverages may be served. The license at Exhibit 1, for example, only permits the seasonal sale of alcoholic beverages from May 1 through December 31, 2001. Similarly, Exhibit 31 contains a genuine and authentic copy of a request by Loren L. Landman for special permission from the Board to remain open beyond the customary time for closing on New Years' Day, 1999.

5. The Board also imposes other restrictions, such as those imposed upon the transfer of a liquor license. As an example, Exhibit 33 contains a genuine and authentic copy of a December 5, 1974 letter to the personal representative of Loren L. Landman informing her that, if the holder of a liquor license has died, it would be necessary to transfer the license, and the new licensee "must be a resident of St. Mary's County for not less than two years."

6. In addition to restrictions upon a license itself, the Board imposes certain qualifications on those

who wish to obtain or to hold a liquor license. For example, the Board requires the holder of a liquor license to periodically attend and become certified or recertified by an approved Alcohol Awareness Program. The Board's records reflect that the holder of the liquor license for the Coles Point Tavern has attended such training at least three times. The applications at Exhibits 8 through 11 contain Loren L. Landman's statement, under oath, that he completed training in an approved Alcohol Awareness Program on August 7, 1990. Exhibit 25 contains a genuine and authentic copy of 1994 correspondence informing Loren L. Landman that, in order to retain his license, he must become re-certified on or before August 7, 1994. The applications at Exhibits 4 through 7 contain Loren L. Landman's statement, under oath, that he completed training in an approved Alcohol Awareness Program on September 14, 1994. The applications at Exhibits 1 through 3 contain Loren L. Landman's statement, under oath, that he completed training in an approved Alcohol Awareness Program on August 26, 1998.

7. Since at least 1990, the Board has required each applicant for a license to state whether he or she has been convicted of a felony or adjudged guilty of violating the laws governing the sale of alcoholic beverages or for the prevention of gambling in the State of Maryland. Exhibits 1 through 12 contain Loren L. Landman's averment, under oath, that he has not been so convicted.

8. Since at least 1994, the Board has required each applicant for a license to certify that he or she has paid all state or local taxes due to any Maryland State or local agency. The applications at Exhibits 1 through 8 contain Loren L. Landman's averment, under oath, that all such taxes were paid.

9. As part of its regulation of establishments that serve alcohol in St. Mary's County, the Board



receives reports of inspections and other activities that take place at such establishments. The St. Mary's County Sheriff's Office inspects establishments licensed by the Board, and provides the Board with a report of any such inspection. Exhibit 26 contains a genuine and authentic copy of an Alcoholic Beverage Inspection Report for the Coles Point Tavern, reflecting an inspection that took place in May 1998 and stating that several violations of Maryland's fire safety regulations were discovered and the State Fire Marshall was notified. Exhibit 27 contains a genuine and authentic copy of another Alcoholic Beverage Inspection Report for the Coles Point Tavern, reflecting an inspection that took place in August 1992.

10. The Board also receives reports of inspections by Maryland Fire Inspectors, who conduct safety inspections to insure that establishments that serve alcohol in St. Mary's County comply with the Maryland State Fire Prevention Code. Exhibit 28 contains a genuine and authentic copy of correspondence dated September 23, 1975 from Fire Inspector Charles Donaldson detailing the results of an inspection of the Coles Point Tavern and setting forth numerous deficiencies that required correction. Exhibit 29 contains a genuine and authentic copy of similar correspondence dated August 13, 1979 and referring to a subsequent inspection.

11. As part of its regulation of establishments serving alcohol in St. Mary's County, the Board also monitors any criminal activity that takes place at or in such establishments. Exhibit 30 is a genuine and authentic copy of a report by the St. Mary's County Sheriff's Office regarding its investigation of a burglary at the Coles Point Tavern on July 6, 1996. Exhibit 32 is a genuine and authentic copy of a newspaper article maintained in the Board's file for Coles Point Tavern and dated August 8, 1979, which describes the closing of the Coles Point Tavern by the Maryland State Police, the

State Fire Marshal, and the St. Mary's Health Department  
and Loren L. Landman's arrest.

I declare under penalty of perjury that the forgoing  
is true and correct.

/s/  
Patricia Insley

Executed on November 27, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

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Defendant.

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**DECLARATION OF DENNIS W. LELAND**

Being more than 18 years of age and competent to testify, Dennis W. Leland states as follows:

1. I am a Corporal in the Maryland Natural Resources Police ("NRP"), which is part of Maryland's Department of Natural Resources. The NRP is specifically charged with enforcing the natural resource laws of the State of Maryland, including boating and conservation laws. In addition, NRP officers have all of the police powers conferred on officers of the State. I joined the NRP in August 1973. I am assigned to Southern Region Area 4 located in Waldorf, Maryland, and I have served in this Region off and on for the past twenty-eight (28) years. My general law enforcement duties include investigations of thefts and other crimes against persons and property. My specific duties include patrolling the Potomac River south of the Woodrow Wilson Bridge.

2. Throughout my career, I have enforced Maryland laws against persons, structures and vessels on the Potomac River. For example, on June 6, 2001, I

investigated a drowning in the Potomac River that occurred in the waters of Belvedere Beach, in King George, Virginia. Although the drowning occurred off the Virginia shore, the NRP was called to investigate the matter because the drowning occurred on Maryland waters.

3. As another example, in 1994, a homicide occurred in Quantico, Virginia. I recovered the body in the Potomac River and conducted the criminal investigation jointly with the Prince Williams County sheriff's department. Prince Williams County took the lead, and we conducted separate witness interviews based upon the leads we independently developed. A year earlier, the NRP investigated a July 5, 1993 Potomac River drowning. We submitted a report to the Prince George's County Police Department, which then conducted its own investigation with our assistance. In the 1980s, the NRP and the Prince Williams County Sheriff's Department conducted a joint investigation of a Potomac River drowning off Whitestone Point, Virginia.

4. I have routinely investigated criminal activity in establishments located on piers extending from the Virginia shore over the Potomac River. For example, Coles Point Tavern is located south of Montross, Virginia, in Westmoreland County. The tavern is located on a pier that extends from the Virginia shore into the Potomac River, and sits on the Maryland side of the boundary line. Our officers have routinely responded by boat to bar fights in this tavern, along with the Maryland State Police and the St. Mary's County deputy sheriffs.

5. Another example is Remos Tavern, located in Colonial Beach, Virginia, also in Westmoreland County. Like Coles Point Tavern, this tavern also sits on the Maryland side of the boundary line on a pier that extends into the Potomac River from the Virginia shore. On occasions I have transported Maryland State Police

and Charles County deputy sheriffs by boat to this tavern to investigate use and distribution of controlled dangerous substances, and alcohol and gambling violations.

6. Attached hereto as Exhibit 1 is a genuine and authentic copy of my June 6, 2001 report regarding the Belvedere Beach drowning.

7. Piers and facilities on piers on the Potomac are required to pay obtain Maryland licenses and pay Maryland taxes. As part of my duties, I have taken the St. Mary's County assessor by boat to the Virginia side of the Potomac to measure the sizes of piers and structures for the purposes of calculating the tax assessment.

8. I also enforce Maryland boating laws on all vessels on the Potomac River, including vessels owned or used by Virginia residents.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Dennis W. Leland

Executed on November 27, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF JAMES LOFTUS**

Being more than 18 years of age and competent to testify, James Loftus states as follows:

1. I am employed by the Maryland Office of the Comptroller ("Comptroller") as Assistant Director, of the Compliance Division. My duties include enforcing compliance with State Sales and Use Tax ("SUT") and Admissions and Amusement Tax ("AAT") laws and all administrative matters related to the Division. I also have authority to retrieve and use those records filed with the State of Maryland and maintained by the Comptroller in the ordinary course of business. I have performed those functions since 1995, and have been employed continuously with the Comptroller since 1974.

2. The State of Maryland has imposed the Sales and Use tax upon the sale or use of tangible business personal property and certain enumerated services on an annual basis continuously from at least 1947. The tax is collected periodically, usually on a monthly (M) or quarterly (Q) basis. The Admissions and Amusements tax

is imposed by counties, incorporated cities, and towns on certain enumerated admissions and amusement charges. The Comptroller periodically collects and disburses AAT payments to the appropriate local taxing authority.

3. Pursuant to policy, the Comptroller is required to retain documents only for a period of four (4) years. Documents older than four years are periodically discarded. Exhibits 1 to 9 attached to this Declaration are genuine and authentic copies of tax filings received by the Comptroller from taxpayers in the ordinary course of business, as required by Maryland law, or genuine and authentic copies of information printed from the Comptroller's computer system, by means of printing the entire contents of a computer screen. The computer database from which these "screen prints" were taken contains records created and maintained by SDAT in the normal course of its business.

4. These records reflect that within at least the past four years, Starlight Pavilion, Inc. (T/A Jamaica Joes); Ralph Bott (T/A Fairview Beach Crabhouse); Reno on the Potomac, Inc.; and Loren L. Landman (T/A Coles Point Tavern), have all operated in Maryland and have paid SUT and/or AAT taxes reflecting their sales and business operations in Maryland.

5. Exhibit 1 is a genuine and authentic copy of a summary of the sales and use tax records for Starlight Pavilion, Inc., T/A Jamaica Joes, at 5435 Pavilion Drive, (originally referred to as Fabulods Enterprises at Fairview Beach, Inc., T/A Jamaica Joes Caribbean Crab Shack, page 5 at MDA-SDAT-00052), which has been generated from the Comptroller's computer system. Pages 2 at MDA-SDAT-00002, 6 at MDA-SDAT-000053, and 9 at MDA-SDAT-0016 reflect that SUT, penalties and interest were paid in 1998 and 1999 on sales reported for 1998 in Maryland.

6. Page 5 of Exhibit 1, at MDA-SDAT-00052, also reflects that on January 11, 1999, the Office approved the transfer of a liquor license to the Jamaica Joes/Starlight Pavilion account, CR Number 09178917 from a predecessor in interest, Ralph and Ruth Bott, T/A Fairview Beach Crabhouse, CR Number 08423454.

7. Exhibits 2 and 3 are genuine and authentic copies of summaries of the sales and use tax records for James J. Nikitakis and Ralph and Ruth Bott, T/A Fairview Beach Crabhouse, which has been generated from the Comptroller's computer system. Pages 1 and 2, at MDA-SDAT-00006 and MDA-SDAT-00007 reflect that SUT, and interest were paid in 1995 and 1996 on sales reported in those years in Maryland. Page 2, of Exhibit 3 at MDA-SDAT-00013, reflects that SUT was paid in 1997 on sales reported in that year in Maryland.

8. Exhibit 4 contains genuine and authentic copies of SUT filings by the Botts and Nikitakis T/A Fairview Beach Crabhouse for business conducted in Maryland in the years 1995, 1996 and 1997.

9. Exhibit 5 is a genuine and authentic copy of available summaries of the admissions and amusement tax records for Reno on the Potomac Inc., 301 Beach Terrace, Colonial Beach, Virginia, which has been generated from the Comptroller's computer system. Exhibit 5, at MDA-SDAT-00004, reflects that AAT was paid in 1991 and 1992 on business done in Maryland in 1991 and 1992.

10. Exhibit 6 contains genuine and authentic copies of AAT filings by Reno on the Potomac Inc for business conducted in Maryland in 1991.

11. Exhibit 7 is a genuine and authentic copy of a summary of the sales and use tax records for Loren L. Landman T/A Coles Point Tavern, which has been generated from the Comptroller's computer system. Page



1, at MDA-SDAT-00017, reflects that this entity has been doing business at that location since at least January 1, 1970 and paid taxes on a monthly cycle. Pages 1 through 12, at MDA-SDAT-00017 through MDA-SDAT-00028, reflect that SUT was paid in every year from 1991 through 2001 for sales reported in Maryland in each of those years. Page 3 at MDA-SDAT-00019 reflect payment of SUT interest and penalties in the year 1994.

12. Exhibit 8 is a genuine and authentic copy of a summary of the admissions and amusement tax records for Loren L. Landman T/A Coles Point Tavern, which has been generated from the Comptroller's computer system. Page 1, at MDA-SDAT-00029 reflects that this entity first began to be subject to the AAT on April 1, 1982. Pages 1 through 9, at MDA-SDAT-00029 through MDA-SDAT-00032 and MDA-SDAT-00072 through MDA-SDAT-00076, reflect that AAT was assessed and paid in every year from 1991 through 2000 for business done in Maryland in each of those years and penalties and interest were paid in 1996 and 1999.

13. Exhibit 9 contains genuine and authentic copies of SUT and AAT filings by Loren L. Landman T/A Coles Point Tavern for business conducted in Maryland from 1991 through 2001.

14. As discussed above, the policy of the Comptroller's office is to retain records for a period of four years. The policies of the Comptroller in enforcing the SUT and AAT have not changed with respect to establishments located in Maryland near the Virginia shore of the Potomac River. While the Comptroller's older records have been destroyed, it is my belief that, during the periods for which records have not been retained, taxes would have been collected by the Comptroller from these establishments and their predecessors in the same manner as shown in the attached records.

I declare under penalty of perjury that the forgoing  
is true and correct.

/s/  
James T. Loftus

Executed on December 3, 2001

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF ELINOR A. MATTINGLY**

Being more than 18 years of age and competent to testify, Elinor A. Mattingly states as follows:

1. I am a permits technician for the Department of Planning & Zoning of St. Mary's County, Maryland. I am a custodian of records maintained by the Department of fees paid to the county for bowling alleys, pool tables, and shuffle boards pursuant to Section 223-11.5 of the St. Mary's County Code.

2. I have reviewed these records for fees paid to St. Mary's County by establishments and individuals that are located in the Potomac River offshore of the Commonwealth of Virginia. The documents attached hereto as Exhibit 1, labeled MD-MARY-00070-00074, are genuine and authentic copies of records maintained by the Department.

3. The available records reflect that Loren Landman, trading as Coles Point Tavern, paid \$100.00 each year from 1997 to 2001 to the Department for the operation of a pool table. Exhibit 1 (MD-MARY-00070-

74). The presentation of a receipt for the payment of this fee, commonly referred to as a nuisance tax, is a precondition to the issuance of a billiards license by the Circuit Court of St. Mary's County.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Elinor A. Mattingly

Executed on November 29, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF SHEILA C. McDONALD**

Being more than 18 years of age and competent to testify, Sheila C. McDonald states as follows:

1. I am currently employed by the Board of Public Works of the State of Maryland ("Board of Public Works" or "Board") as Executive Secretary, a position established in Section 10-201 of the State Finance and Procurement Article of the Maryland Code. I have been employed with the Board since 1995, and was appointed Executive Secretary in 1999.

2. As part of my duties, I am a custodian of the Board's records, and I am personally familiar with the Board's record keeping practices. Exhibits 1 to 15 are genuine and authentic copies of minutes and agenda of the Board of Public Works for selected Board meetings from 1907 to 1986. These minutes and agenda have been maintained in the files of the Board of Public Works in accordance with its usual practice. Some of the attached exhibits have been mechanically reduced, during photocopying, from larger documents to a standard 8 1/2 by 11 inch size.

3. Exhibit 1 is a genuine and authentic copy of minutes of a meeting of the Board of Public Works on June 5, 1907. As shown on page 356 of these minutes, labeled MD-BPW-000037, these minutes reflect that, on that date, the Board considered a request by the Norfolk and Western Railway Company to build a bridge over the Potomac River. Page 361, at MD-BPW-000042, reflects the Board's grant of permission, in compliance with Maryland law, "to construct, maintain, and operate the said bridge." Exhibit C to the railway company's petition, at MD-BPW-000038, reflects that the company was a Virginia corporation.

4. Exhibit 2 is a genuine and authentic copy of minutes of selected meetings of the Board of Public Works on August 28, 1913, July 6, 1916, and July 19, 1916. Page 77 of those minutes, at MD-BPW-000049, details the Board's grant of permission to the Cumberland Valley Railroad Company on August 28, 1913 to build a bridge across the Potomac River. Pages 170 and 178 of those minutes, at MD-BPW-000052 and MD-BPW-000052, detail the Board's consideration of a request on July 6, 1916 from the Potomac River and Baltimore Railway Company to build a bridge across the Potomac, and the Board's grant of that request on July 19, 1916.

5. Exhibit 3 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on August 23, 1930. Page 136 of those minutes, at MD-BPW-000055, details the Board's approval of a request by the Western Maryland Railway Company to build a bridge across the Potomac River.

6. Exhibit 4 is a genuine and authentic copy of minutes from the Board of Public Works' meetings on January 14, 1966 and March 14, 1966. Page 329 of these minutes, at MD-BPW-000128, details the Board's approval on January 14, 1966 of a request by the Potomac Sand and Gravel Company for an "extension of time to

complete dredging for sand and gravel in the Potomac River at Dyke Marsh, Fairfax County, Virginia.” Pages 409 and 410 of these minutes, at MD-BPW-000130 and MD-BPW-000131, reflect the Board’s approval on March 14, 1966 of a request to construct “an aerial wire crossing over the Potomac River.”

7. Exhibit 5 is a genuine and authentic copy of minutes from the Board of Public Works’ meetings on June 20, 1967 and September 6, 1967. Page 216 of these minutes, at MD-BPW-000138, reflects the Board’s approval on June 20, 1967 of a request to install “two (2) submarine cables across the Potomac River.” Page 218 of these minutes, at MD-BPW-000139, reflects the Board’s approval on June 20, 1967 of a request to “erect an aerial wire crossing the Potomac River.” Page 216 of these minutes, at MD-BPW-000138, also reflects that, on June 20, 1967, the Board deferred consideration of a request for a permit “to install a 36-inch natural gas pipeline across the Potomac River.” Page 404 of these minutes, at MD-BPW-000140, reflects that the Board granted this request at its meeting on September 6, 1967.

8. Exhibit 6 is a genuine and authentic copy of minutes from the Board of Public Works’ meeting on February 27, 1968. Page 671 of these minutes, at MD-BPW-000144, details the Board’s grant of a permit to the Town of Leesburg, Virginia to “appropriate and use water from the Potomac River,” and “[t]o construct two intake pipes and a water intake structure for the purpose of obtaining water for public water supply from the Potomac River.” This page also details certain conditions imposed upon the permit by the Department of Water Resources, and states that the permit was granted by the Board “[w]ith the knowledge that a clause was included in the agreement that the permit could be voided for failure to comply with rules and regulations fo the State of Maryland.”

9. Exhibit 7 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on September 18, 1969. Page 9 of these minutes, at MD-BPW-000160, reflects that the Board granted a permit to the "Fairview Beach Yacht Club" to "construct bulkheads and to dredge and place fill material in Potomac River at Fairview Beach, King George County, Virginia."

10. Exhibit 8 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on April 1, 1970. Page 4 of these minutes, at MD-BPW-000162 reflects the Board's approval of a permit to the United States Marine Corps "to dredge in the Potomac River at Marine Corps Base, Quantico, Virginia."

11. Exhibit 9 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on November 5, 1970. Page 20 of those minutes, at MD-BPW-000164, reflects the Board's approval of "Procedure[s] for Issuance of State Wetlands Licenses" to "persons wishing to dredge or fill State wetlands." Pages 21 to 22 of those minutes contains a copy of these procedures.

12. Exhibit 10 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on February 8, 1971. Pages 7 and 8 of those minutes, at MD-BPW-000168 and MD-BPW-000169, detail the Board's approval of a permit to the Potomac Electric Power Company "for the construction of an aerial electric transmission line of 230,000 volts across the Potomac River."

13. Exhibit 11 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on March 13, 1972. Pages 5 to 6 of those minutes, at MD-BPW-000182 reflect the Board's consideration of a request by the Mansion House Yacht Club of Fairfax, Virginia, for a "wetlands license . . . to construct a curved,



double-bulkheaded breakwater extending a maximum of 235 feet into the Potomac River from the Virginia Shoreline's mean low water line," and to conduct dredging in the Potomac River. These minutes reflect that the Board heard testimony from an opposing Virginia property owner and the Commodore of the yacht club, and instructed the Hearing Officer to investigate several issues and report back to the Board.

14. Exhibit 12 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on December 6, 1972. Page 7 of these minutes, at MD-BPW-000189, reflects the Board's approval of the permit requested by the Mansion House Yacht Club.

15. Exhibit 13 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on April 16, 1975. Page 6 of those minutes, at MD-BPW-000211 reflects the Board's approval of a request to modify the location where a natural gas pipeline crossed the Potomac River.

16. Exhibit 14 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on June 4, 1975. Page 6 of those minutes, at MD-BPW-000222, reflects the Board's approval of a permit to the Mansion House Yacht Club to construct breakwaters and dredge in accordance with a revised plan.

17. Exhibit 15 is a genuine and authentic copy of minutes from the Board of Public Works' meeting on October 29, 1986. Page 9 of those minutes, at MD-BPW-000373, details the Board's approval of a license to place a communications cable across the bottom of the Potomac River between Charles County, Maryland and Fort Belvoir, Virginia, and imposing the payment of a license fee.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
Sheila C. McDonald

Executed on December 5, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF WALTER MILES**

Being more than 18 years of age and competent to testify, Walter Miles states as follows:

1. I began my employment with the State Department of Health in 1952 in the division of sanitary engineering. The division of sanitary engineering was responsible for regulating public water systems, wastewater treatment plants, solid waste facilities, and swimming pools. While with the division of sanitary engineering, I primarily conducted inspections of wastewater treatment plants and solid waste sites, and was promoted to Chief of the division of solid waste, which included landfills and incinerators. In 1956, I left the State Department of Health for the Baltimore County Health Department and in 1963, I went to the Saint Mary's County Health Department, where I was chief sanitarian from 1963 to 1971. As chief sanitarian, I basically ran the environmental health program for Saint Mary's County.

2. While employed at the State Department of Health and at the Saint Mary's County Health

Department, it was my understanding from my coworkers that Cole's Point Tavern, which is located over the Potomac River adjacent to the Virginia shoreline, was inspected by Maryland employees. When I joined the State Department of Health in 1952, I understood that the Potomac River was within the jurisdiction of Maryland because it was located in Maryland. At that time, Mr. George L. Hall, chief engineer of the State Department of Health, informed me that Maryland owned and regulated the Potomac River to the Virginia shore.

I declare under penalty of perjury that the foregoing is true and correct.

12/4/01

Date

/s/

Walter Miles

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**AFFIDAVIT OF DOLDON W. MOORE, JR.**

Being more than 18 years of age and competent to testify, Doldon W. Moore, Jr., states as follows:

1. I am currently employed by the State of Maryland, Board of Public Works ("Board"), as Wetlands Administrator. I have held this position within MDE since June 2, 1999. Before coming to the Board, I served as Chief of the Permit Review Section in the Tidal Wetlands Division within the Wetlands and Waterways Program, Water Management Administration of the Maryland Department of the Environment (MDE). I held that position since July 7, 1995. Prior to July 1995 and since April 8, 1987, I served as a Natural Resources Planner IV for the Southern Maryland Counties as Tidal Wetlands Permit reviewer in the Tidal Wetlands Division.

2. The Board administers the State's proprietary rights in its submerged lands and is specifically charged with the responsibility of administering the 1970 Tidal Wetlands Act (1970 Md. Laws Ch. 241), which regulates certain activities in tidal waters and wetlands. The Board has delegated to MDE

certain of its responsibilities under the 1970 Act, including its jurisdiction over piers, pilings, decks, and other related structures. COMAR 23.02.04.04A. All other activities involving the dredging or filling of tidal waters and wetlands remain subject to the Board's licensing authority. COMAR 23.02.04.04B.

3. I am familiar with the process by which the Board evaluates applications for, and the authorization of, the placement of structures or the conduct of regulated activities in the tidal waters and wetlands of the State of Maryland, including projects extending out from the Virginia shoreline.

4. Maryland issues the same types of authorizations for work along the Virginia shoreline that it issues for work elsewhere in Maryland. The most significant projects, such as dredging, groin fields, and open water fill are authorized through a Tidal Wetlands License issued by the Board. All other authorizations under the Tidal Wetlands Act are issued by MDE pursuant to its delegation from the Board.

5. I am personally familiar with the Board's record keeping practices for files that are made and kept in the course of the Board's regularly conducted business activities for compliance with the 1970 Tidal Wetlands Act. The documents attached to the Affidavit of Richard J. Ayella as Exhibits 1-16, 18, 19, 21, 26 and 28 and identified with the bates stamp code "MD-BPW-" are genuine and authentic copies of original records kept in the course of the Board's regularly conducted business activities relating to projects extending out from the Virginia shoreline. Attached to Mr. Ayella's affidavit is a summary of these licenses with each entry item corresponding to the number of the Exhibit attached to Mr. Ayella's affidavit.

6. Exhibit 1 to Mr. Ayella's affidavit contains a genuine and authentic copy of the license issued to Leona Dorsey for the dredging of approximately 500 cubic yards of material from the Potomac River at Widewater, Virginia, and to deposit the dredged material behind a bulkhead on the Virginia shoreline. The license indicates that Ms. Dorsey accepted the license on April 1, 1971.

7. Exhibit 5 to Mr. Ayella's affidavit contains genuine and authentic copies of records kept in the course of the Board's regularly conducted business activities relating to the license issued to the Mansion House Yacht Club for the construction of a double-bulkheaded breakwater and the dredging of material from the Potomac River. The document identified with the bates number MD-BPW-01516 is the initial license issued to the Yacht Club and it indicates that the Yacht Club accepted the license on October 11, 1972. MD-BPW-01520.

8. Included among the documents in Exhibit 5 to Mr. Ayella's affidavit is a letter dated November 17, 1971, from the Commonwealth of Virginia, State Water Control Board, to the Commodore of the Yacht Club indicating that the Commonwealth requested the Yacht Club to give consideration to certain recommendations "relative to that portion of the proposed project in the Potomac River under jurisdiction of the State of Maryland." MD-BPW-01509. Attached to this letter is a document described in the letter as a "Certificate of Assurance" in which the Commonwealth repeats its request that the Yacht Club give consideration to the recommendations set forth in the letter "relative to that portion of the proposed project in the Potomac River under jurisdiction of the State of Maryland." MD-BPW-01511, (§ 5).

9. The documents attached hereto as Exhibits 1-13 and identified with the bates stamp code "MD-BPW-

” are genuine and authentic copies of documents kept in subject matter files by myself and prior Wetlands Administrators concerning the “Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River” adopted by the Maryland Board of Public Works on August 12, 1987 (“the 1987 Policy” or “the Policy”).

10. Exhibit 1 is a genuine and authentic copy of an August 5, 1983, letter from Thomas C. Andrews, Director of the Water Resources Administration, Maryland Department of Natural Resources to Lawrence B. Goldstein, Wetlands Administrator for the Board of Public Works, indicating that Maryland officials had met with officials from Westmoreland County and the Virginia Marine Resources Commission on June 1, 1983, “to discuss wetlands licensing of projects within Maryland waters along the Virginia shore of the tidal portion of the Potomac River.” MD-BPW-000440. The letter indicates that projects built on the Virginia shoreline, if they extended beyond mean low water line, would potentially be subject to Maryland’s jurisdiction as well as that of the Virginia “local wetlands boards.” *Id.* The bates stamp numbers for this document are in reverse order.

11. Exhibit 2 is a genuine and authentic copy of a December 29, 1983, letter from Norman E. Larsen, Assistant Commissioner for Environmental Affairs, Commonwealth of Virginia, Marine Resources Commission, to Tom Andrews confirming that Maryland officials had met with Mr. Larsen at Montross, Virginia, on June 1, 1983.

12. Exhibit 3 is a genuine and authentic copy of a January 3, 1984, letter from Harold Cassell, Wetlands Permits Division, Maryland Water Resources Administration, to Mr. Norman E. Larsen, Virginia Marine Resources Commission, in which Mr. Cassell



gives the status of "Maryland's policy affecting the licensing of projects within Maryland waters along the Virginia shore of the tidal portion of the Potomac River."

13. Exhibit 4 is a genuine and authentic copy of a May 20, 1986, letter provided by Virginia in this litigation from Harold Cassell, Wetlands Administrator, Maryland Board of Public Works, to Norman E. Larsen, VMRC, stating that it is enclosing "a draft policy intended to clarify licensing requirements in Maryland waters along the Virginia shore of the tidal portion of the Potomac River."

14. Exhibit 5 is a genuine and authentic copy of a letter dated June 23, 1986, from Norman Larsen to Frederick S. Fisher, Assistant Attorney General, provided by Virginia in this litigation, indicating that Mr. Larsen and others had some three years earlier come to "verbal agreements" with Maryland officials regarding minor shoreline projects. The letter also indicates that it attached a draft policy statement forwarded to Mr. Larsen "recently" by the Maryland Wetlands Administrator and asked that Mr. Fisher "inform me if you see any reason why we should not concur in its content."

15. Exhibit 6 is a genuine and authentic copy of a draft "Policy Clarifying License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River" provided by Virginia in this litigation.

16. Exhibit 7 is a genuine and authentic copy of a letter dated July 9, 1986, from Frederick S. Fisher to Norman Larsen indicating that he had reviewed the draft policy and had two "concerns with this policy." The letter indicates that Mr. Fisher's first concern was "that the different meaning of 'wetlands' in Maryland and Virginia law would confuse Virginians reading the policy" and that his second concern was "that the reference to Maryland

Waters commencing at mean low water line would not always be accurate because the Matthews-Nelson [sic] Survey ran the line from headland to headland.” The letter goes on to state that, with respect to the first point, “since the local officials are already accustomed to working with Maryland’s laws, and since the different meaning of ‘wetlands’ is evident from reading the policy, no further explanation is necessary.” With respect to the second point, the letter indicates that “since the Matthew-Nelson [sic] Survey is cited in the footnote reference to ‘mean water line’, and since you advise that the actual boundary line is shown on the the [sic] quad sheets and that the officials in both states are accustomed to dealing with the line’s actual location, I believe the boundary line is sufficiently clear.” At the close of the letter, Mr. Fisher indicates “I therefore have no suggestion for changes.” The letter does not indicate any objection to Maryland’s jurisdiction.

17. Exhibit 8 contains genuine and authentic copies of letters from wetlands boards of King George County, Virginia, and Westmoreland County, Virginia, indicating that they had reviewed the draft policy forwarded with the Maryland Wetlands Administration letter of May 20, 1986 and that they offered comments on the policy. None of the comments offered indicate an objection to Maryland’s jurisdiction.

18. Exhibit 9 is a genuine and authentic copy of a September 16, 1986, letter from Michael G. Kelly, Environmental Engineer, Commonwealth of Virginia, Marine Resources Commission to Harold M. Cassell, Wetlands Administrator for the Maryland Board of Public Works, enclosing the comments received from two Virginia county wetlands boards and Mr. Frederick S. Fisher, “our Assistant Attorney General.” The letter suggests that the “final form of the policy define what is considered ‘wetlands’ in the State of Maryland and what would be required from an applicant when a Maryland

wetlands license is deemed necessary.” MD-BPW-000431. The letter indicates no objection to Maryland’s jurisdiction and expresses Mr. Kelly’s thanks to “the State of Maryland for cooperating and developing this policy.” MD-BPW-000432.

19. Exhibit 10 is a genuine and authentic copy of an August 13, 1987, letter from Harold M. Cassell, Wetlands Administrator for the Maryland Board of Public Works, to Norman E. Larsen, Virginia Marine Resources Commission, enclosing the final “Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River” adopted by the Maryland Board of Public Works on August 12, 1987 (“1987 Policy”). The letter states that “[t]he policy is intended to further our States’ mutual interests of improved coordination and clarification for Virginia riverfront owners as to which types of projects require that a wetlands license be obtained from the State of Maryland.” MD-BPW-000398. The letter also states that, “[t]hrough recent amendment of the Maryland Wetlands Act, Virginia citizens applying for Maryland licenses will no longer be inconvenienced and delayed by a required public hearing.” *Id.* Exhibits to Mr. Ayella’s affidavit indicate that a public hearing was previously part of the Maryland licensing process. *See, e.g.,* Exhibits 2 (MD-BPW-000486), 3 (MD-BPW-000504), 4 (MD-BPW-000495), and 5 (MD-BPW-01492).

20. Exhibit 11 is a genuine and authentic copy of the 1987 Policy. The 1987 Policy indicates that “[a]long the Virginia shore, Maryland waters generally commence at the low water mark or exist along a line from headlands and continue offshore therefrom and therefore dredging, filling, breakwaters, jetties, and groin projects affect Maryland waters and are subject to the requirements of Maryland law.” The Policy provides that a Maryland license will be required for dredging and overboard deposition of dredged material, MD-BPW-

000401, ¶1, filling activities, *id.* ¶2, breakwaters and jetties, *id.* ¶3, and certain groin fields. *Id.*, ¶4. The Policy provides that a Maryland license will not be required for “[b]ulkhead, revetment, boat ramps, landscaping, vegetative shoreline stabilization projects and related filling activities posing only nearshore impacts,” *id.* ¶5, and “[p]iers and related marine dependent structures on pilings.” *Id.*, ¶6.

21. The Policy attached hereto as Exhibit 11 advises that “Virginia property owners on the tidal portion of the Potomac River desiring to perform shoreline activities involving the above policies” should inquire with the Maryland Department of Natural Resources, Water Resources Administration, Wetlands Division “for assistance concerning pertinent licensing procedures and requirements.” MD-BPW-000401. After adoption of the 1987 Policy, officials of the Virginia Marine Resources Commission referred Virginia applicants to the Maryland Department of Natural Resources (DNR) for piers, jetties, bulkheads and every other variety of shoreline improvement. Maryland DNR would review these projects to determine whether a Maryland license was required, as reflected in the 1987 Policy. If a Maryland license was not required, Maryland DNR would send a letter to the Virginia applicant noting that the proposed project was subject to Maryland’s regulatory jurisdiction but that a Maryland license was not required. The projects authorized by one of these “no license” letters received the authorization code “NL.”

22. Exhibit 12 is an August 28, 1987, letter provided by Virginia in this litigation from Norman E. Larsen, VMRC, to representatives of Virginia counties along the Potomac River indicating that the Commonwealth had had discussions with the Maryland DNR concerning Virginia projects which “extend channelward of mean low water in the Potomac River over property which is within the political boundaries of

the State of Maryland.” The letter states that it encloses “an official policy” approved by the Maryland Board of Public Works, which is also included with the Exhibit.

23. In 1994, the Maryland Board of Public Works promulgated the 1987 Policy as a regulation. COMAR 23.02.04.21 (attached hereto as Exhibit 13). The 1994 regulation continued the policy of not requiring a formal license for Virginia shoreline improvements that meet certain criteria. After promulgation of COMAR 23.02.04.21, officials of the Virginia Marine Resources Commission continued to refer Virginia applicants to the Maryland Department of Natural Resources (DNR) for piers, jetties, bulkheads and every other variety of shoreline improvement. As it did under the 1987 Policy, Maryland DNR would review these projects to determine whether a Maryland license was required, as reflected in the 1994 regulations. If a Maryland license was not required, Maryland DNR would send a letter to the Virginia applicant noting that the proposed project was subject to Maryland’s regulatory jurisdiction but that a Maryland license was not required.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
Doldon W. Moore, Jr.

Executed on December 2, 2001.

STATE OF MARYLAND		POLICY AND PROCEDURE:
BOARD OF PUBLIC WORKS	APPROVED:	ADMINISTERING AGENCY: Board of Public Works- Wetlands Administration
COMAR:	REVISED:	SUBJECT: Licensing of Projects along the Virginia shore of the Potomac River

POLICY CLARIFYING WETLANDS LICENSE  
REQUIREMENTS FOR PROJECTS IN MARYLAND  
WATERS ALONG THE VIRGINIA SHORE  
OF THE TIDAL PORTION OF THE  
POTOMAC RIVER.

Purpose

To carry out the public policy of the State of Maryland to preserve its tidal wetlands and to prevent their despoliation and destruction by unregulated dredging, filling, and like activities the Wetlands Administration of the Board of Public Works shall use the policies outlined below in the project processing and formulation of recommendations attendant to consideration by the Board of Public Works of activities proposed along the Virginia shoreline of the Potomac River within state wetlands\* in Maryland and Maryland waters as documented in the Potomac River Compact of 1958.

The State of Maryland and Commonwealth of Virginia have similar but separate wetlands licensing jurisdictions over dredge, fill and related activities along the tidal portion of the Potomac River. The affected area is situated between Jones Point in Fairfax County and Smith Point in Northumberland County. Along the Virginia shore, Maryland waters generally commence at the low water mark\*\*\* or exist along a line from headlands and continue offshore therefrom and therefore dredging, filling, breakwaters, jetties, and groin projects affect Maryland waters and are subject to the requirements of Maryland law.

Virginia laws relating to "subaqueous lands, wetlands and coastal primary sand dunes" impose responsibility for permit processing upon the Virginia Marine Resources Commission and upon local wetlands boards. This circumstance has caused the Commission and certain of these wetlands boards (Westmoreland, King George and Northumberland Counties) to seek clarification from the State of Maryland as to the nature of projects for which Maryland will impose a wetlands license requirement. The following policy is to foster more efficient coordination among Maryland and Virginia officials involved with wetlands licensing. Due to the obligation for bistate licensing the affected shorefront owners will benefit from the following clarification of which types of projects require that a wetlands license be obtained from the State of Maryland.

## POLICIES

1. Dredging in Maryland waters in the tidal portion of the Potomac River offshore from the low water mark\*\*along the Virginia shore requires a wetlands license from the Maryland Board of Public Works. Except for federal navigation projects, overboard disposal of dredged material in Maryland waters also must be licensed by the State of Maryland.

2. The State of Maryland shall require a license for filling activities involving deposition of soil, sand, gravel, shells or other materials into Maryland's tidal waters, except for oyster propagation and as indicated in 5 below.
3. Construction of breakwaters and jetties in Maryland's tidal waters shall require a wetlands license.
4. Groin fields of more than five (5) structures, extending further than 50 feet offshore of the mean low water line and collectively affecting more than 500 linear feet of shoreline require a wetlands license from the State of Maryland.
5. Bulkhead, revetment, boat ramps, landscaping, vegetative shoreline stabilization projects and related filling activities posing only nearshore impacts along the Virginia shoreline of the tidal Potomac River do not require a wetlands license from the State of Maryland.
6. Piers and related marine dependent structures on pilings do not require a wetlands license from the State of Maryland.

Virginia property owners on the tidal portion of the Potomac River desiring to perform shoreline activities involving the above policies are advised to inquire with the following Maryland agency for assistance concerning pertinent licensing procedures and requirements.

Maryland Department of Natural Resources  
Water Resources Administration  
(Attn: Wetlands Division)  
Tawes State Office Building (301) 974-3871  
Annapolis, Maryland 21401



- \* In Maryland, State Wetlands mean any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide. An exception being that State Wetlands extend offshore from the low water mark along the Virginia shore of the Potomac River.
- \*\* Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof; as laid out on the Matthews-Nelson survey of 1927.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF EDWARD MUTH**

Being more than 18 years of age and competent to testify, Edward Muth states as follows:

1. I am a Program Manager of the Personal Property Division employed by the Maryland State Department of Assessments and Taxation ("SDAT"). In that capacity I oversee the assessment of all business personal property in the State of Maryland and all administrative matters related to that Division. I am custodian of personal property tax return records filed with the State of Maryland and maintained by SDAT in the ordinary course of business. I have performed those functions since 1981, and have been employed continuously with SDAT since 1975.

2. The State of Maryland has assessed the personal property tax on all tangible business property continuously for more than one hundred years, since at least the late nineteenth century. Tangible business property, for the purposes, is property that is not real property and that is used in the conduct of business in Maryland. SDAT collects Personal Property Returns

annually, and provides annual personal property tax assessment base information to the appropriate Maryland counties and subdivisions for billing and collection.

3. Pursuant to Department policy, SDAT is required to retain documents only for a period of five years, and documents older than five years are periodically and routinely discarded. Exhibits 1 to 17 attached to this Declaration are genuine and authentic copies of tax filings received by SDAT from taxpayers in the ordinary course of business, as required by Maryland law, or genuine and authentic copies of information printed from SDAT's computer system, by means of printing the entire contents of a computer screen. The computer database from which these "screen prints" were taken contains records created and maintained by SDAT in the normal course of its business.

4. These records reflect that, within at least the past five years, Riverboat on the Potomac, Inc., Starlight Pavillon, Inc. (T/A Jamaica Joe's), Ralph Botts (T/A Fairview Beach Crabhouse), and Loren Landman (T/A Coles Point Tavern), have all operated offshore of Virginia and have filed personal property tax returns reflecting that they did business in Maryland and owned and used tangible personal property located in Maryland as part of their business operations.

5. Exhibit 1 is a genuine and authentic copy of a summary of the property taxes and filing fees assessed against Riverboat on the Potomac, Inc. since 1995, which has been generated from SDAT's computer system. Page 1 of this Exhibit, at MD-SDAT-0095, indicates by the Status Date that this entity first obtained a Department ID number to file Personal Property Returns under that name on November 21, 1991. The MBES Assessment Inquiry/Summary, at page 2, MD-SDAT-00096, is a computer generated summary of tax property tax assessments for the years 1997 through 2000, indicating the State and County

assessment base for those years. The MBES Assessment Inquiry/Certification at page 3, MD-SDAT-00097, discloses that assessments for the State Base and/or the Subdivision (County) Base were certified annually by providing Charles County with certification for the years 1995 through 2001. An assessment base for the purpose of assessing fees for a trader's license was certified to the County Clerk for the years 1995-2001.

6. Exhibit 2 contains genuine and authentic copies of the Tax Return and Amended Tax Return filed for Riverboat on the Potomac, Inc. as of January 1, 2001. On page 1 of the Amended Tax Return, at MD-SDAT-00098, the owners of Riverboat on the Potomac, Inc. state that it has conducted business in Maryland since at least February 10, 1992, and identify the nature of this business as "Food Svc, Alcohol Beverages/OTB/Lottery." Page 2, at MD-SDAT-00099, identifies the location of the personal property owned and used by Riverboat on the Potomac, Inc. in the State of Maryland as "Offshore-301 Beach Terrace, Colonial Beach, VA," in Charles County, Maryland. On page three of the Tax Return, at MD-SDAT-00104, the owners state that Riverboat on the Potomac, Inc. conducted more than \$1.5 million in business in Maryland during the year 2000.

7. Exhibits 3, 4 and 5 contain genuine and authentic copies of the 2000, 1999, and 1997 personal property tax returns filed by Riverboat on the Potomac, Inc., for business conducted in the years 1999, 1998, and 1996. Page 3 of each return reflects that Riverboat on the Potomac, Inc. transacted more than \$1 million in business in Maryland during each of those years.

8. Exhibit 6 is a genuine and authentic copy of a summary of the property taxes and filing fees assessed against Starlight Pavillon, Inc. since 1997, which has been generated from SDAT's computer system. Page 1 of this Exhibit at MD-SDAT-00131 indicates by the Status Date

that this entity first obtained a Department ID number to file Personal Property Returns under that name on November 21, 1998, and that the entity at that time had a "Revived" status, indicating that the corporate status had been forfeit sometime prior to that date. The MBES Assessment Inquiry/ Summary, at page 2, MD-SDAT-00132, is a computer generated summary of tax property tax assessments for the years 1997 through 2000, indicating the State and/or County assessment base for those years. The MBES Assessment Inquiry/Certification at page 3, MD-SDAT-00133, discloses that assessments for the State Base and/or the Subdivision (County) Base were certified by providing Charles County with certification for the years 1997 through 2000. An assessment base for the purpose of assessing fees for a trader's license was certified to the County Clerk for the years 1997-2000.

9. Exhibit 7 contains a genuine and authentic copy of the 2000 Tax Return filed for Starlight Pavillon, Inc. On page 1 of the Tax Return, at MD-SDAT-00134, the owners of Starlight Pavillon, Inc. state that it had conducted business in Maryland under the name "Jamaica Joe's" since at least March 1, 1998, and identify the nature of this business as a restaurant. Page 2, at MD-SDAT-00135, identifies the location of the personal property owned and used by Starlight Pavillon, Inc. in the State of Maryland as "Potomac River," in Charles County, Maryland. On page three of the Tax Return, at MD-SDAT-00138, the owners state that Starlight Pavillon, Inc. conducted approximately \$350,000 in business in Maryland during the year 1999.

10. Exhibit 8 is a genuine and authentic copy of the 1999 Tax Return filed by Starlight Pavillon, Inc., under the name "Jamaica Joe's." Page 2 of this return, at MD-SDAT-00140, identifies the location as "Restaurant located over water. Water location is Faulkner, Md. Charles County. Business attached to Va." Page 3, at

MD-SDAT-00141, contains the owners' statement that Starlight Pavillon, Inc. conducted approximately \$440,000 in business in Maryland during the year 1998. Exhibit 9 is a genuine and authentic copy of the form filed by Starlight Pavillon, Inc., which informed SDAT that, on March 30, 1998, Starlight Pavillon received the personal property formerly owned by Ralph and Ruthann Bott.

11. Exhibit 10 is a genuine and authentic copy of a summary of the property tax assessments and filling fees of property owned by Ralph C. Bott for the past five years, which has been generated from SDAT's computer system. Page 1, at MD-SDAT-00145, reflects that Bott's restaurant used the name "Fairview Beach Crabhouse." The Status Date indicates that the entity first received a Department ID number to file Personal Property Returns on March 31, 1994, and that the entity has been active since that date. Page 2, at MD-SDAT-00146, reflects that on March 30, 1998, Bott sold his property to taxpayer number "D00202523," the number used for Starlight Pavillon, Inc., as shown on Exhibit 6. The MBES Assessment Inquiry/Summary of Page 3, MD-SDAT00147, reflects state and county assessment base and return fee billings for 1997 and 1998 under the Bott name.

12. Exhibit 11 is a genuine and authentic copy of the Personal Property Entity Maintenance screen for Fairview Beach Crabhouse. Page 1, at MD-SDAT-00148, reflects a second owner, William J. Williams, in addition to the Botts, and is maintained in the ordinary course of business as a cross reference. Page 2, at MD-SDAT-00149, reflects state and/or County (Sub Base) assessments were certified to Charles County for the years 1997 through 2000. An assessment base for the purpose of assessing fees for a trader's license was certified to the County Clerk for the years 1997-2000.

13. Exhibit 12 is a genuine and authentic copy of the 1997 personal property return filed by Ralph Bott for "Starlight Pavillon, Inc." The first page of this return reflects that Bott had been conducting this restaurant business in Maryland since June 1, 1959.

14. Exhibit 13 is a genuine and authentic copy of a summary of the personal property taxes and filing fees assessed to Loren Landman since 1997, which has been generated from SDAT's computer system. Page 1 of this Exhibit at MD-SDAT-00153 indicates by the Status Date that this entity trades as Coles Point Tavern and first obtained a Department ID number to file Personal Property Returns under that name on March 31, 1994. The MBES Assessment Inquiry/ Summary of page 2, MD-SDAT-00154 is a computer generated summary of property tax assessments for the years 1997 through 2001, indicating the State and/or County assessment base for those years. The MBES Assessment Inquiry/Certification at page 3, MD-SDAT-00155, reflects that assessments for the State Base and/or the Subdivision (County) Base were certified by providing Saint Mary's County with certification for the years 1997 through 2001. An assessment base for the purpose of assessing fees for a trader's license was certified to the County Clerk for the years 1997-2001.

15. Exhibit 14 is a genuine and authentic copy of the 2001 tax return filed by Loren Landman, which reflects that the Coles Point Tavern has been operated by Loren Landman since at least May 1973 and is located in St. Mary's County, Maryland. As Exhibit 14 reflects, Mr. Landman reported ownership of personal property and business equipment in Maryland, and \$44,207 in business in Maryland in 2001. Exhibits 15, 16, and 17 are genuine and authentic copies of the tax returns for the Coles Point Tavern for the years 2000, 1997, and 1996.

I declare under penalty of perjury that the forgoing  
is true and correct.

/s/  
Edward Muth

Executed on December 3, 2001



IN THE  
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH  
OF VIRGINIA,

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No. 129 Original

Plaintiff,

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Before Special Master

vs.

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Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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DECLARATION OF JANE T. NISHIDA

Being more than 18 years of age and competent to testify, Jane T. Nishida states as follows:

1. I serve as the Secretary of the Maryland Department of the Environment (MDE), a position I have held since March 27, 1995.

2. I have personal knowledge about the circumstances surrounding MDE's review of the application of the Fairfax County Water Authority (FCWA) for a Maryland waterway construction permit to build a second drinking water intake in the middle of the Potomac River.

3. As Secretary of the Department, I oversee the operation of the separate Administrations within the Department, including the Water Management Administration. As part of my duties, I am kept apprised of the major projects the Administrations are reviewing. In cases that involve unique or environmentally significant issues, I become personally involved in the decision-making process. The FCWA's application to

construct a drinking water intake in the middle of the Potomac River was one such project.

4. As I do with the most significant projects, I kept the Governor of Maryland, Parris N. Glendening, apprised of the Department's evaluation of the FCWA application throughout the permit process. That, however, was the extent of the Governor's involvement. In no way did Governor Glendening direct me to deny the permit.

5. As with all significant projects, the FCWA application went through a public notice and comment process, including a public informational hearing. The Department received scores of comments from interested parties, including citizens of Virginia who opposed the project. *See Exhibit 1* (Affidavit of Terrance W. Clark attaching and summarizing representative comment letters, including letters received from Virginians). Members of the Maryland legislature who were tracking the project for their constituents also commented on the project. The Department is required to consider all of the information before it – including public comments – in rendering permit decisions. Although some of those comments come from Maryland legislators, they are not given any greater weight than those submitted by others.

6. I was personally involved in the decision to deny the permit and consulted with staff before the decision was made. The decision to deny the permit was not based in any way on the fact that the Fairfax County Water Authority is a Virginia political subdivision or on comments received during the notice and comment process suggesting that issuing the permit would provide Northern Virginia with a competitive economic advantage over Maryland communities. These factors are not relevant to any project before the Department and played no role in the Department's decision.

/s/  
Jane T. Nishida

Executed on February 13, 2002.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

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No. 129 Original

Plaintiff,

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Before Special Master

vs.

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Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF JOSEPH W. NORRIS**

Being more than 18 years of age and competent to testify, Joseph W. Norris states as follows:

1. I have been employed as the Charles County Treasurer since 1994. The County Treasurer's Office is responsible for collecting all real property taxes assessed by the State Department of Assessments and Taxation ("SDAT") and owed to the State and Charles County for all real property located in Charles County. The County Treasurer's Office transmits the State's portion of the real property tax to the State Comptroller of the Treasury on a monthly basis.

2. Since 1991, the Charles County Treasurer's Office has maintained a "Property Tax" computer database. The database contains a separate account for each taxable property located in Charles County and reflects all real property taxes billed and paid for each property since 1991. Each property in the database is identified by a unique property number that corresponds to the account number assigned by SDAT for assessment purposes. In addition to the database, the County

Treasurer's Office maintains microfiche copies of payment records for many properties for the period from 1950 through 1991.

3. The documents attached as Exhibits 1 and 2 (MD-CHAS-10006 through MD-CHAS-00017 and MD-CHAS-10054 through MD-CHAS-10064) are true and genuine copies of the print screens, including the legal property description, which appeared in the property tax database on November 28, 2001 for two properties located in Charles County.

4. Exhibit 1 (documents MD-CHAS-10006 through MD-CHAS-00017) consists of genuine and authentic copies of the database print screens which reflect real property taxes paid in each tax year during the period between 1991 and November 28, 2001 on an account for property number 03-006085 presently owned by Fairview Beach, Inc. and described in the database file as "improvements on water—Fairview Bch—Starlight Pavilion". The documents reflect a total tax payment of \$12,759.27 for that period.

5. Exhibit 2 (documents MD-CHAS-10054 through MD-CHAS-10064) consists of genuine and authentic copies of the database print screens which reflect real property taxes paid in each tax year during the period between 1992 and November 28, 2001 on an account for property number 05-009413 presently owned by Flanagans of Colonial Beach, Inc. and described in the database file as "improved building offshore – Colonial Beach". The documents reflect a total tax payment of \$35,094.97 for that period.

6. Exhibit 4 consists of genuine and authentic hard copies of tax records maintained by this office on microfiche which reflect real property taxes paid to Charles County, Maryland on account number 03-006085, the Fairview Beach property, during the period from 1966

through 1990. The documents reflect consistent payment of property taxes in each tax year during the period from 1966 through 1990. Exhibit 3 is a true and accurate summary of the documents attached as Exhibit 4.

7. Exhibit 6 consists of genuine and authentic hard copies of tax records maintained by this office on microfiche which reflect real property taxes paid to Charles County, Maryland on account number 05-009413, the Colonial Beach property, during the period from 1973 through 1991. The documents reflect consistent payment of property taxes in each tax year during the period from 1973 through 1991. Exhibit 5 is a true and accurate summary of the documents attached as Exhibit 6.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Joseph W. Norris

Executed on November 30, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**AFFIDAVIT OF MATTHEW G. PAJEROWSKI**

Being more than 18 years of age and competent to testify, Matthew G. Pajerowski states as follows:

1. I am currently employed by the State of Maryland, Department of the Environment (the "Department"), as the Chief of the Water Rights Division within the Water Management Administration. I have held this position since November 1995. Prior to that time I served as a Section Chief within the Water Rights Division since November 1994, and as a Geologist within the Water Rights Division since January 1989.

2. I am personally familiar with the Department's record keeping practices for files that are made and kept in the course of the Department's regularly conducted business activities for compliance with State laws administered by the Water Rights Division.

3. The documents attached hereto as Exhibits 1 through 69 are genuine and authentic copies of documents kept in the course of the Department's regularly conducted business activities relating to water

appropriation permits issued to Virginia applicants for the withdrawal of water from the Potomac River.

4. Exhibit 1 is a genuine and authentic copy of a letter dated June 5, 1970, from the Director of the Maryland Department of Water Resources to Mr. Robert J. McLeod, Washington Suburban Sanitation Commission (WSSC) indicating that a water appropriation permit was issued to WSSC on January 20, 1938, authorizing the withdrawal of water from the Patuxent River, and that the permit was amended in 1941 and 1949.

5. Exhibit 2 contains genuine and authentic copies of the signature page of the permit issued to WSSC on January 20, 1938, and the amended permits issued in 1941 and 1949 authorizing the withdrawal of water from the Patuxent River.

6. Exhibit 3 is a genuine and authentic copy of correspondence dated September 23, 1955, between the U.S. Army Corps of Engineers ("Corps") and the Maryland Department of Geology, Mines, and Water Resources ("Department of Geology") indicating that the Potomac Electric Power Company (PEPCO) was considering constructing a power plant in Loudoun County, Virginia and was preparing an application to be submitted to the Maryland Department of Geology concerning the withdrawal of water from the Potomac in connection with the operation of the plant.

7. Exhibits 4 and 5 are genuine and authentic copies, respectively, of the application eventually submitted by PEPCO on March 14, 1956, and the permit subsequently issued on May 1, 1956, indicating that the PEPCO plant was eventually sited in Montgomery County, Maryland.

8. Exhibit 6 is a genuine and authentic copy of the October 10, 1956, application of Fairfax County,



Virginia, to the Maryland Department of Geology seeking authorization to withdraw up to 15 million gallons of water per day (mgd) from the Potomac River for use as a domestic and commercial water supply. The application does not indicate that it was submitted under protest or in any other way contested Maryland's jurisdiction over the withdrawal of water from the Potomac River.

9. Exhibit 7 is a genuine and authentic copy of the permit issued February 25, 1957, to Fairfax County, Virginia, authorizing the withdrawal of 15 mgd of water from the Potomac. The permit indicates that it was accepted by the Board of County Supervisors of Fairfax County, Virginia, on March 27, 1957, again without noting any objection to Maryland's jurisdiction.

10. Exhibit 8 is a genuine and authentic copy of a letter dated January 24, 1958, from the Fairfax County Water Authority to the Maryland Department of Geology reflecting that the Authority, which has been chartered on September 26, 1957, requested that the Maryland permit issued to Fairfax County be transferred to the Authority. Exhibit 9 is a genuine and authentic copy of the amended permit substituting the Authority for Fairfax County as of April 10, 1958. Neither document notes any objection to Maryland's jurisdiction over the withdrawal of water from the Potomac River.

11. Exhibit 10 contains genuine and authentic copies of correspondence between the Fairfax County Water Authority and the Maryland Department of Geology indicating that, between March 16, 1959, and March 15, 1963, the Authority annually requested and received extensions of its Maryland water appropriation permit.

12. Exhibit 11 contains genuine and authentic copies of correspondence between the Fairfax County Water Authority and the Maryland Department of

Geology indicating that Department asked the Authority to explain the long delay in the Authority's plans to withdraw water from the Potomac, which necessitated the repeated extensions of its permit term.

13. Exhibit 12 is a genuine and authentic copy of a letter from the Fairfax County Water Authority to the Department of Geology providing information in support of its request for an extension of its permit term in which indicates that, at the time, it purchased water from the City of Falls Church, Virginia, but that it considered further extensions of its permit "advisable so as to insure another source of supply whenever the need might arise." MD-MDE-13134-11.

14. Exhibit 13 is a genuine and authentic copy of the February 17, 1964, decision of the Maryland Department of Geology declining to extend the permit beyond 1964, but inviting the Authority to reapply "when your plans actually involve the taking of water from the Potomac River." MD-MDE-13134-10.

15. Exhibit 14 is a genuine and authentic copy of the Authority's March 6, 1964, reply letter in which the Authority expressed "regret" at Maryland's decision not to extend further its permit but stated that it "underst[ood] the reasons therefore" and expressed "hope that the Commission will give favorable consideration to the granting of another permit at such time as our need therefor becomes appropriate." MD-MDE-13134-09.

16. Exhibit 15 contains genuine and authentic copies of the April 24, 1964, application of the Great Eastern Utilities Corporation ("Great Eastern") to the Maryland Department of Geology seeking authorization to withdraw up to 3.5 mgd from the Potomac River for use by a large housing development and industrial park located in Loudoun County, just north of Dulles Airport, and the permit issued May 14, 1964, to Great Eastern

authorizing the requested withdrawal. The application does not indicate that it was submitted under protest or in any other way contested Maryland's jurisdiction over the withdrawal of water from the Potomac River, while the permit indicates that it was accepted by Great Eastern on June 10, 1964, again without noting any objection to Maryland's jurisdiction.

17. Exhibit 16 is a genuine and authentic copy of the permit issued effective November 10, 1966, to the Potomac Electric Power Company authorizing the withdrawal of up to 500,000 gallons per week from the Potomac at a point near the north end of Route 637, Sterling, Loudoun County, Virginia, for use in connection with the irrigation of an 18-hole golf course at the company's Loudoun County Employee Recreational Center. The permit indicates that it was accepted by PEPCO on November 9, 1966, without noting any objection to Maryland's jurisdiction.

18. Exhibit 17 contains genuine and authentic copies of the August 7, 1967, application of the Town of Leesburg, Virginia, to the Maryland Department of Water Resources seeking authorization to withdraw water from the Potomac River for use as the town water supply, and the permit issued effective April 1, 1968, to the Town of Leesburg, Loudoun County, Virginia, authorizing the withdrawal of up to 3 mgd from the Potomac at a point near the downstream end of Harrison Island, 2 3/4 miles due east of Leesburg. The application does not indicate that it was submitted under protest or in any other way contested Maryland's jurisdiction over the withdrawal of water from the Potomac River, while the permit indicates that it was accepted by the Town of Leesburg on March 27, 1968.

19. Exhibit 18 is a genuine and authentic copy of an article appearing in the Loudoun Times in which the Mayor of Leesburg, Kenneth B. Rollins, was reported to

have declared the date on which the permit issued as “[a] great day in the history of the town.”

20. Exhibit 19 is a genuine and authentic copy of the permit issued effective June 14, 1974, to the Fairfax County Water Authority authorizing the withdrawal of up to 24 mgd from the Potomac River on the Virginia shoreline opposite the mouth of Seneca Creek, Montgomery County, Maryland, for use as a municipal water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

21. Exhibit 20 is a genuine and authentic copy of the permit issued effective June 20, 1975, to the Town of Leesburg, Virginia, authorizing the withdrawal of up to 3 mgd from the Potomac River at an intake located at the downstream end of Harrison Island, 2.75 miles east of Leesburg for use as a municipal water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of a March 13, 1975, letter from the Town of Leesburg requesting that the Maryland Department of Water Resources renew the permit issued to the Town effective April 1, 1968.

22. Exhibit 21 is a genuine and authentic copy of the permit issued effective March 30, 1976, to the Northern Virginia Regional Park Authority authorizing the withdrawal of up to 500,000 gallons per week from the Potomac River at a point on the Virginia bank below Ten Foot Island for irrigation of a golf course at the Potomac Electric Power Company's Employees' Recreational Center in Loudoun County, Virginia.

23. Exhibit 22 is a genuine and authentic copy of the permit issued effective April 15, 1976, to the Consolidated System L.N.G. Company authorizing the withdrawal of up to 13,500,000 gallons of water from the Potomac River at a point on the Virginia shoreline south

of the confluence of Broad Run for use in the hydrostatic testing of a natural gas pipeline.

24. Exhibit 23 is a genuine and authentic copy of the permit issued effective March 31, 1982, to the Fairfax County Water Authority authorizing the withdrawal of up to 50 mgd from the Potomac River on the Virginia shoreline opposite the mouth of Seneca Creek, Montgomery County, Maryland, for use as a central water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of a September 1, 1981, letter from the Authority in which the Authority requests an amendment of its permit.

25. Exhibit 24 is a genuine and authentic copy of the permit issued effective May 1, 1986, to the Northern Virginia Regional Park Authority authorizing the withdrawal of up to 250,000 gallons per day from the Potomac River at an intake located at Algonkian Regional Park, at the north end of Route 637, Loudoun County, Virginia, for irrigation of a golf course. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

26. Exhibit 25 is a genuine and authentic copy of the permit issued effective October 1, 1986, to the Town of Leesburg, Virginia, authorizing the withdrawal of up to 3 mgd from the Potomac River at an intake located 0.5 miles south of the southeast end of Harrison Island, Montgomery County, Maryland, for use as a community water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

27. Exhibit 26 is a genuine and authentic copy of the permit issued effective January 1, 1987, to the Fairfax County Water Authority authorizing the withdrawal of up to 100 mgd from the Potomac River on the Virginia shoreline opposite the mouth of Seneca

Creek, Montgomery County, Maryland, for use as a municipal potable water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

28. Exhibit 27 is a genuine and authentic copy of the permit issued effective February 1, 1988, to the Town of Lovettsville, Virginia, authorizing the withdrawal of up to 400,000 gallons per day from the Potomac River at a point on the Virginia shoreline approximately 3 miles downstream of Harpers Ferry, opposite Brunswick, Frederick County, Maryland, for use as a municipal supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

29. Exhibit 28 is a genuine and authentic copy of the permit issued effective June 1, 1988, to the Transcontinental Gas Pipeline Corporation authorizing the withdrawal of up to 2.88 mgd from the Potomac River on the Virginia shoreline opposite the Washington Suburban Sanitation Commission's treatment plant approximately two miles upstream from Great Falls Park, Montgomery County, Maryland, for use as in the hydrostatic testing of a natural gas pipeline. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

30. Exhibit 29 is a genuine and authentic copy of the permit issued effective October 1, 1988, to P.D. Gravett authorizing the withdrawal of up to 115,200 gallons per day from the Potomac River at a point located on the Virginia shoreline in Fairfax County, Virginia, opposite Watkins Island, Montgomery County, Maryland, for use in maintaining water levels and filling a recreational pond. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

31. Exhibit 30 is a genuine and authentic copy of the permit issued effective February 1, 1990, to the Town of Lovettsville, Virginia, authorizing the withdrawal of up to 400,000 gallons per day from the Potomac River at a point on the Virginia shoreline approximately 3 miles downstream of Harpers Ferry, opposite Brunswick, Frederick County, Maryland, for use as a municipal supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the cover letter indicating that the Town requested a renewal of its permit.

32. Exhibit 31 is a genuine and authentic copy of the permit issued effective April 1, 1990, to the Fairfax County Water Authority authorizing the withdrawal of up to 150 mgd from the Potomac River on the Virginia shoreline opposite the mouth of Seneca Creek, Montgomery County, Maryland, for use as community water supplies. Included with the Exhibit behind the permit is a genuine and authentic copy of an April 5, 1990, letter from the Authority in which it requests an amendment of its permit.

33. Exhibit 32 is a genuine and authentic copy of the permit issued effective August 1, 1991, to the Town of Leesburg, Virginia, authorizing the withdrawal of up to 5.58 mgd from the Potomac River at an intake located 0.5 miles south of the southeast end of Harrison Island, Montgomery County, Maryland, for use as a municipal supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

34. Exhibit 33 is a genuine and authentic copy of the permit issued effective October 1, 1991, to the Xerox Realty Corporation authorizing the withdrawal of up to 576,000 gallons per day from the Potomac River at a point located 2.8 miles east of Leesburg, Loudoun County, Virginia for the irrigation of turf and ornamental

plants. Included with the Exhibit behind the permit is a genuine and authentic copy of an unsigned permit application.

35. Exhibit 34 is a genuine and authentic copy of the permit issued effective July 1, 1992, to the Bondy Way Development Corporation authorizing the withdrawal of up to 480,000 gallons per day from the Potomac River at a point on Lowes Island across from Seneca Creek State Park for irrigation of the Cascades at Lowes Island Golf Course. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

36. Exhibit 35 is a genuine and authentic copy of the permit issued effective June 1, 1994, to the River Creek Limited Partnership authorizing the withdrawal of up to 850,000 gallons per day from the Potomac River at a point east of Leesburg, Virginia, 0.5 miles west of Goose Creek, Loudoun County, Virginia, for irrigation at the River Creek Golf Course. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

37. Exhibit 36 is a genuine and authentic copy of the permit issued effective August 1, 1995, to the Fairfax County Water Authority authorizing the withdrawal of up to 200 mgd from the Potomac River on the Virginia shoreline opposite the mouth of Seneca Creek, Montgomery County, Maryland, for use as a community water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with a letter dated June 22, 1995, from the Authority in which the Authority provides information in support of its request for a permit amendment.

38. Exhibit 37 is a genuine and authentic copy of the permit issued effective April 1, 1996, to the Fairfax County Water Authority authorizing the withdrawal of up



to 200 mgd from the Potomac River at an intake 725 feet north of the Virginia shoreline opposite the mouth of Seneca Creek, Montgomery County, Maryland, for use as a community water supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

39. Exhibit 38 is a genuine and authentic copy of the permit issued effective June 1, 1996, to University Development Co., LLC, authorizing the withdrawal of up to 1.52 mgd from the Potomac River at a point on the Virginia shoreline 0.5 miles south of Goose Creek, 2.5 miles east of Leesburg for use as golf course and landscape irrigation. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

40. Exhibit 39 is a genuine and authentic copy of the permit issued effective July 1, 1998, to the Northern Virginia Regional Park Authority authorizing the withdrawal of up to 200,000 gallons per day from the Potomac River at an intake located at Algonkian Regional Park, at the north end of Route 637, Loudoun County, Virginia, for irrigation of a golf course. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

41. Exhibit 40 is a genuine and authentic copy of the permit issued effective September 1, 1999, to the Town of Leesburg, Virginia, authorizing the withdrawal of up to 8 mgd from the Potomac River at an intake located 0.5 miles south of the southeast end of Harrison Island, Montgomery County, Maryland, for use as a municipal supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

42. Exhibit 41 is a genuine and authentic copy of the permit issued effective September 1, 2000, to the

Williams Gas Pipeline – Transco authorizing the withdrawal of up to 2.88 mgd from the Potomac River on the Virginia shoreline opposite the Washington Suburban Sanitation Commission's treatment plant approximately two miles upstream from Great Falls Park, Montgomery County, Maryland, for use as in the hydrostatic testing of a natural gas pipeline. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

43. Exhibit 42 is a genuine and authentic copy of the permit issued effective November 1, 2000, to Lansdowne Conservancy, Inc. authorizing the withdrawal of up to 1.52 mgd from the Potomac River at a point on the Virginia shoreline 0.5 miles south of Goose Creek, 2.5 miles east of Leesburg for use as golf course and landscape irrigation. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application.

44. Exhibit 43 is a genuine and authentic copy of the permit issued effective March 1, 2001, to the Town of Lovettsville, Virginia, authorizing the withdrawal of up to 400,000 gallons per day from the Potomac River at a point on the Virginia shoreline approximately 3 miles downstream of Harpers Ferry, opposite Brunswick, Frederick County, Maryland, for use as a municipal supply. Included with the Exhibit behind the permit is a genuine and authentic copy of the permit application with cover letter.

45. None of the applications or cover letters included within Exhibits 19-43 indicates that it was submitted under protest or in any other way contested Maryland's jurisdiction over the withdrawal of water from the Potomac River.

## **Virginia's Participation in the Maryland Water Appropriation Permit Process**

46. Exhibits 44 through 50 are genuine and authentic copies of documents kept in the course of the Department's regularly conducted business activities relating to the water appropriation permit issued to the Town of Leesburg, Virginia, in 1968 (Exhibit 17).

47. Exhibit 44 is a genuine and authentic copy of a December 12, 1967, letter from Horace M. Hallett, Managing Director, Loudoun County Sanitation Authority, to Maryland Department of Water Resources indicating that the Authority urged that Maryland "not grant the subject application" of the Town of Leesburg because it would "frustrate and impede the creation of an integrated, county-wide water and sewerage system for Loudoun County." MD-MDE-13088-18-19.

48. Exhibit 45 is a genuine and authentic copy of a "Summary Statement of Proceedings" on the "Continued Hearing" on the Town of Leesburg's permit application held on December 12, 1967, indicating that Mr. Hallett and Stanley Franklin, General Counsel for the Authority, with the law firm of Bauknight, Prichard, McCandlish & Williams, attended the hearing on behalf of the Loudoun County Sanitation Authority and indicated at the hearing that the Authority did not oppose Leesburg's application provided that the withdrawal is limited to 3 mgd and is used only within the Town's limits. MD-MDE-13088-16.

49. Exhibit 46 is a genuine and authentic copy of a December 18, 1967, letter from Stanley M. Franklin to the Maryland Department of Water Resources in which the Authority "reiterate[d] its request that the State of Maryland not grant a permit which could be construed as granting license to the Town of Leesburg to deliver water in Loudoun County." *Id.* at MD-MDE-13088-14.

50. Exhibit 47 is a genuine and authentic copy of an October 20, 1967, letter from the Executive Secretary of the Virginia State Water Control Board (SWCB) to Francis B. Francois, Metropolitan Washington Council of Governments, indicating that the SWCB had been informed of Leesburg's application to withdraw water from the Potomac River for a public water supply and that the SWCB provided information in response to comments made by Prince George's County, Maryland, with respect to Leesburg's application.

51. Exhibit 48 is a genuine and authentic copy of a draft letter dated February 2, 1968, from Maryland Governor Spiro T. Agnew to Virginia Governor Mills E. Godwin, Jr., indicating that Governor Godwin had "inquired about the status of the permit for the Town of Leesburg to take water from the Potomac River."

52. Exhibit 49 is a genuine and authentic copy of a letter dated June 17, 1970, from Thomas P. Cradle of the Commonwealth of Virginia Governor's Office to Mr. James W. Ritter, Town Manager of Leesburg, Virginia, in which Mr. Cradle indicates that the Division of State Planning and Community Affairs had reviewed the town's Potomac River Water Supply Project and "[n]o conflict was found to exist at the State . . . ."

53. Exhibit 50 is a genuine and authentic copy of a letter dated August 10, 1971, from the Commonwealth of Virginia, Office of the Governor, to Mr. James W. Ritter, Town Manager of Leesburg, Virginia, in which the State Review Officer complements the Town of Leesburg for its "strong decisive action to provide its citizens with a reliable water source" and describes the town's Potomac River Water Supply Project as an "essential project." MD-MDE-13085-10.

54. Exhibits 51 through 64 are genuine and authentic copies of documents kept in the course of the

Department's regularly conducted business activities relating to the water appropriation permit issued to the Fairfax County Water Authority in 1974 (Exhibit 19).

55. Exhibit 51 is a genuine and authentic copy of a July 11, 1973, letter from Robert S. Noe, Jr., Town Manager of the Town of Herndon, Fairfax County, Virginia, to the Maryland Water Resources Administration in which the "Town respectfully requests that the Water Resources Administration of the State of Maryland make the provision of water to the Town of Herndon a condition of the Fairfax County Water Authority's application . . . ." MD-MDE-13123-10.

56. Exhibit 52 is a genuine and authentic copy of the "Proposed Statement" for the Town of Leesburg, dated July 11, 1973, and signed by Mayor Hill indicating that the Town of Leesburg had no objection to the Authority's application only if "the proposed withdrawal . . . will not have any adverse effect upon the ability of Leesburg to meet its future requirements for water supply from the Potomac River." MD-MDE-13123-09.

57. Exhibit 53 is a genuine and authentic copy of the record of the July 12, 1973, public hearing held on the Fairfax County Water Authority's application to withdraw up to 48 mgd for use as a public water supply. The record indicates that Mr. Noe attended the hearing and stated that the Town of Herndon would "support this application" only if "the permit require[s] that the FCWA furnish water to Herndon." MD-MDE-13122-32. The record also indicates that Mr. Dewey Hill, Mayor of the Town of Leesburg, Virginia, testified that "only with the understanding that this withdrawal by FCWA will not restrict increasing the Leesburg withdrawal in the future, can the Town of Leesburg recommend approval of this permit." *Id.* The record also indicates that a representative of the Virginia State Water Control Board

attended the hearing and stated that the Board "wants to state its support of this permit." MD-MDE-13123-01.

58. Exhibit 54 is a genuine and authentic copy of the record of a July 16, 1973, letter from E.T. Jensen, Executive Secretary, Virginia State Water Control Board, to the Maryland Water Resources Administration "in reference to the Fairfax County Water Authority's application to the Maryland Water Resources Administration for a permit to withdraw, appropriate and use water from the Potomac River." MD-MDE-13122-27. In the letter the Board states that "we support Fairfax County Water Authority's application for a withdrawal permit, and request that you act favorably on its application." MD-MDE-13122-28. The Board also states that it is "aware that low flows in the Potomac River in the Washington Metropolitan area will not be sufficient to meet the Authority's needs and other which presently exist," but that "we are hopeful that under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource." MD-MDE-13122-27.

59. Exhibit 55 is a genuine and authentic copy of an June 28, 1973, letter from R.K. Sheen, Chairman of the Loudoun County Sanitation Authority, to the Maryland Water Resources Administration indicating that the Loudoun County Sanitation Authority provided comments to the Administration in support of the Fairfax County Water Authority's proposal to develop a Potomac River water supply plant.

60. Exhibit 56 is a genuine and authentic copy of an August 7, 1973, letter from the County of Fairfax, Virginia, to the Maryland Water Resources Administration enclosing a resolution of the Board of Supervisors of Fairfax County, Virginia, adopted on August 6, 1973. The resolution indicates that the Fairfax

County Water Authority has applied "for a permit to appropriate upper Potomac water from the State of Maryland which has jurisdiction over the upper Potomac" and that "the Board of Supervisors concurs in and supports the application to the Administration by the Authority." MD-MDE-13132-10.

61. Exhibit 57 is a genuine and authentic copy of a February 27, 1974, letter from Prince William County, Virginia, to Maryland Governor Marvin Mandel enclosing a resolution of the Prince William County Board of Supervisors adopted on February 26, 1974, in which the County states that it "does support this application of the Fairfax County Water Authority" and that it "urges its favorable consideration and action thereon by the Honorable Marvin Mandel, Governor of the State of Maryland and by the Maryland Water Resources Director Herbert M. Sachs." MD-MDE-13121-02.

62. Exhibit 58 is a genuine and authentic copy of a September 28, 1973, letter from William C. Bauknight, Counsel for the Fairfax County Water Authority, to the Maryland Water Resources Administration in which the Authority requests that the Administration issue a water appropriation permit during the pendency of ongoing negotiations concerning the allocation of Potomac River water during periods of low flow. In the letter, the Authority states that "[t]he Administration has the authority to make allocations of Potomac River water among the users. It has specifically reserved such power in the permits granted to the present users" and that "[i]t certainly understands that any permit issued to it would specifically reserve the power of the Administration to curtail its appropriation of water in an equitable manner during low flow periods." MD-MDE-13122-11. The Authority also states in the letter that "[t]he issuance of the permit for the appropriation of water is a prerequisite to zoning and land acquisition

proceedings which in themselves will take considerable time." *Id.*

63. Exhibit 59 is a genuine and authentic copy of a November 7, 1973, letter from James J. Corbalis, Engineer Director of the Fairfax County Water Authority, to Herbert M. Sachs, Director of the Maryland Water Resources Administration, in which the Authority provides certain information in support of its permit application and requests "prompt issuance of a permit which is an absolute prerequisite to a number of time-consuming and expensive actions we must take in order to assure the availability of an additional supply of water by mid-1977." MD-MDE-13122-03.

64. Exhibit 60 is a genuine and authentic copy of a June 11, 1976, letter from James J. Corbalis, Engineer Director of the Fairfax County Water Authority, to Herbert M. Sachs, Director of the Maryland Water Resources Administration, in which the Authority requests an extension of the time period for initiating withdrawals under its water appropriation permit. *See* Exhibit 19. In the letter, the Authority states that "[t]he existence of a valid permit is an essential prerequisite to our proposed issuance of revenue bonds on July 29 and the continued expenditure of funds for the proposed facilities." MD-MDE-13117-07.

65. Exhibit 61 contains a genuine and authentic copy of a letter dated October 22, 1963, from R. Dennis McArver of the law firm of Bauknight, Prichard, McCandlish & Williams to the Department of Geology stating that information concerning whether Great Eastern had applied for, or obtained, a water appropriation permit or waterway construction permit from the State of Maryland would be presented at a hearing before the Virginia State Corporation Commission. MD-MDE-13144-08-09. Exhibit 61 also contains genuine and



authentic copies of correspondence from the Department of Geology indicating that the requested information was provided to Mr. McArver, MD-MDE-13144-09, and that the Department later provided the Virginia Department of Conservation and Economic Development a copy of the proceedings of the hearing on the application eventually submitted by Great Eastern. MD-MDE-13144-05 (with transcription).

66. Exhibit 62 is a genuine and authentic copy of a July 1973 letter from Paul Eastman, Executive Director of the Interstate Commission on the Potomac River Basin (ICPRB), to the Maryland Water Resources Administration enclosing a "Statement on Fairfax County Water Authority Request for Appropriation and Use of Potomac River Water" prepared by Yoram Gordon, Chief Planning Engineer, ICPRB. The enclosed statement recommends "to the Water Resources Administration of the state of Maryland that the requested permission to appropriate and use up to 48 MGD will be granted" to the Authority "with the above mentioned stipulations" relating to curtailing the Authority's withdrawal in times of low flow in the Potomac.

67. Exhibit 63 is a genuine and authentic copy of a June 26, 1991, letter from Roland Steiner, Associate Director, Water Resources, ICPRB, to the Maryland Water Resources Administration, which states that "Maryland Department of Natural Resources (DNR) has devoted considerable effort to water conservation programs. . . . It would seem appropriate that Xerox [Realty Corporation] be required to implement water conservation measures in order to reduce the amount of water requested in their permit application."

68. Exhibit 64 is a genuine and authentic copy of an August 6, 1991, letter from Roland Steiner, Associate Director, Water Resources, ICPRB, to the Director of the Maryland Water Resources

Administration, in which Mr. Steiner submits comments on the application of the Town of Leesburg, Virginia, to increase its water appropriation. In the letter he state that "I would urge you to consider including in any permit the requirement for an effective municipal water conservation plan in order to reduce impacts on the River." The letter also indicates that "Maryland Department of Natural Resources has devoted considerable effort to water conservation within the State, and I think it appropriate that the results of that work be applied to all permit applicants for appropriation of State waters."

69. Exhibit 65 is a genuine and authentic copy of a July 1973 letter from the Government of the District of Columbia, Department of Environmental Services, to the Maryland Water Resources Administration, in which the District of Columbia provides comments on the application of the Fairfax County Water Authority to withdraw water from the Potomac River. The letter states that the District "oppose[s] all future withdrawals" until a low flow allocation agreement is developed and that "[s]ince the Water Resources Administration of the State of Maryland does have legal control of the section of the river now used for water supply purposes we would suggest that the administration take the lead in developing the required legal document." MD-MDE-13123-07.

70. Exhibit 66 is a genuine and authentic copy of a November 24, 1987, memorandum prepared by Mark W. Eisner to the Town of Lovettsville water appropriation file stating that he had indicated in a teleconference with Jeff Chapin, of Dewberry and Davis, that "the nature of water appropriations law in the state of Maryland precludes and [sic] appropriator from holding water rights to water that he is not actually using (at least in theory). For this reason, and for good resource management, the Administration makes a concerted effort to write permits that meet the needs of the applicant, but that do not reserve water for a possible future use."

71. Exhibit 67 is a genuine and authentic copy of a March 1, 1976, letter from David Schultz, Water Resources Administration, to Mr. David V. Brown, Northern Virginia Regional Park Authority, in which the Water Resources Administration informs the Authority that its permit had been modified to include "a special condition restricting withdrawals when the flow of the Potomac River is low."

72. Exhibit 68 is a genuine and authentic copy of a March 12, 1976, letter from David V. Brown, Northern Virginia Regional Park Authority, to David Schultz, Water Resources Administration, in which the Authority requests that the low flow condition "be deleted." MD-MDE-13159-10.

73. Exhibit 69 is a genuine and authentic copy of a March 17, 1976, letter from David Schultz, Water Resources Administration, to David Brown, Northern Virginia Regional Park Authority, in which the Water Resources Administration states that the "the special condition must be retained" and the Authority must curtail its withdrawal of water for golf course irrigation during times of low flow in order to ensure that there is "enough water available to meet demands for the Washington Area's water supply." MD-MDE-13159-08.

74. The Washington Aqueduct, which serves the District of Columbia and localities in Virginia, is administered by the U.S. Army Corps of Engineers and has been withdrawing water from the Potomac River in Maryland since the 19<sup>th</sup> century. Although the Washington Aqueduct claims exemption from the requirement to obtain a Maryland water appropriation permit, the Department maintains a file on the Washington Aqueduct in order to track withdrawal reports, which it files on the same basis as those entities holding water appropriation permits.

75. Since the execution of the Low Flow Allocation Agreement in 1978, Maryland has issued water appropriation permits to four Virginia entities that did not sign the Agreement (the Northern Virginia Regional Park Authority, P.D. Gravett, the Williams Gas Pipeline Corp., and the Bondy Way Development Corp.) for withdrawals from the "subject portion" of the Potomac River governed by the Low Flow Allocation Agreement, which is defined in the Agreement as that portion of the River between Little Falls and "the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland."

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
MATTHEW G. PAJEROWSKI

Executed on December 4, 2001.

COMMONWEALTH OF VIRGINIA  
STATE WATER CONTROL BOARD

July 16, 1973

Water Resources Administration  
State of Maryland  
Natural Resources Building  
Annapolis, Maryland 21401

ATTENTION: Mr. Ira N. Curtis, Chief  
General Permits Section

This is in reference to the Fairfax County Water Authority's application to the Maryland Water Resources Administration for a permit to withdraw, appropriate and use water from the Potomac River. We understand that the Authority's proposal involves locating intake facilities on the Virginia shore-line immediately above Seneca Falls and adjacent to the boundary of Fairfax and Loudoun, Counties. The proposed withdrawal and treatment facilities will provide an average daily capacity of 32 million gallons and a maximum daily capacity of 48 million gallons. We further understand that the facility is anticipated to be operational by mid-1977 and is projected for expansion in future years.

While we are aware that low flows in the Potomac River in the Washington Metropolitan area will not be sufficient to meet the Authority's needs and others which presently exist, we believe that the construction of the intake facility will be a viable alternative water supply source for the Fairfax County Water Authority, provided that immediately steps are taken to develop and more effectively manage the water resource. We hope that the proposed facility will become an integral part of an interconnected water system to serve the Washington Metropolitan area during times of extreme drought and when other emergencies arise. Until further water

resource development occurs and long term additional management measures are implemented there will not be sufficient water available for withdrawal from the Potomac for the Washington Metropolitan area, but we are hopeful that under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource.

With regard to up-stream development of the resource, the State Water Control Board formally acted at its meeting on June 18-19, 1973, in support of the construction of the Verona Dam Project which will be of considerable assistance in meeting the long term base flow needs in the Washington Metropolitan area.

This is to advise that we support Fairfax County Water Authority's application for a withdrawal permit, and request that you act favorably on its application.

Very truly yours,

/s/

E. T. Jensen  
Executive Secretary

AWW:lnp

cc: Mr. James J. Corbalis, Jr.  
Engineer-Director  
Fairfax County Water Authority  
Mr. Robert R. Perry  
Task Force Director  
Washington Area Interstate  
Water Resources Program

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF  
EDWARD C. PAPENFUSE, Ph.D.**

Being more than 18 years of age and competent to testify, Edward C. Papenfuse, Ph.D., states as follows:

1. I am the State Archivist and Commissioner of Land Patents for the State of Maryland and custodian of certain records for the Circuit Courts of Maryland. I am also the custodian of certain records for the Maryland Courts of Appeal and for agencies of the State government. These records are maintained in the custody of the Archives in accordance with the Maryland State Government Code Annotated, Title 9, Subtitle 10, Part I, and Title 10, Subtitle 6, Part V. The attached exhibits have been examined by me and compared to the original records at the Maryland State Archives or to electronic copies of original records that have been duly certified by me as State Archivist. The attached exhibits are hereby certified as accurate facsimiles. Throughout this affidavit I provide citations to the original records maintained by Archives (designated "MSA \_\_\_\_\_") and to the bates numbers that were affixed to documents during the discovery process in this case.

Circuit Court for Charles County License Records

2. I have reviewed various records of the Circuit Court for Charles County for 1949 through 1986 of licenses issued by Charles County. Archives records reflect that a blank Charles County Circuit Court volume intended to contain certain license information for 1977 through 1979 was discarded. No volume containing this license information is maintained at Archives. A true and accurate summary of Charles County traders, cigarette, special cigarette, restaurant, music box soda fountain, amusement device, billiard and dance license records issued to establishments located offshore of Virginia is attached hereto as Exhibit 1. This exhibit summarizes documents from 1949 to 1976 and 1980 and 1986 that are attached hereto as Exhibit 2 and labeled MD-ARCH-00080-00173. Exhibit 2 is a genuine and authentic copy of Charles County Circuit Court license records maintained by the Maryland State Archives in MSA T 2163. Attached hereto as Exhibit 3 are MD-ARCH-00002, 00004-00009, which are genuine and authentic copies of Charles County Circuit Court Amusement Device Operators License [slot machines] records from 1958. Attached hereto as Exhibit 4 and labeled MD-ARCH-00256-00397 are genuine and authentic copies of Charles County Circuit Court liquor license records from 1952 to 1986 contained in MSA T 2182.

3. The records reflect that, following the legalization of gambling in Charles County, 1951 Laws of Maryland, Chapter 183, 1949 Laws of Maryland, Chapter 678, several establishments located offshore of Virginia came to the Circuit Court for Charles County to obtain traders licenses, cigarette licenses, restaurant licenses, music box licenses, vending machine licenses, dance licenses, soda fountain licenses, amusement licenses, and amusement device [slot machine] operators licenses and liquor licenses. Court records from this period also



reflect that other businesses offshore of Virginia obtained traders licenses and music box licenses in the 1950s and 1970s.

4. Slot machines on piers inaccessible by foot from fast land in Maryland were outlawed in 1958. See *Miedzinski v. Landman*, 218 Md. 3 (1958). A genuine and authentic copy of the complaint in that case, from the appendix filed in that appeal, is attached hereto as Exhibit 5. MD-CHAS-00035-00068. The complaint identifies the 1958 operators of casinos located in Charles County in waters offshore of Virginia as: Clara McGuigan T/A Belvedere Beach Pier; Roger D. Welch T/A Fairview Beach Pier; Little Reno, Inc.; Colonial Beach Piers, Inc.; The General Amusement Company; and Freestone Amusement Co., Inc. A genuine and authentic copy of the stipulations entered into in *Miedzinski v. Landman* and of the circuit court's opinion in that case is attached hereto as Exhibit 6. MD-CHAS-000071-00080. A genuine and authentic copy of a newspaper article covering that decision, "Court Bans River Slot Machines," The Baltimore Sun, October 15, 1958, is attached hereto as Exhibit 7. MD-ARCH-00075-00076.

5. According to license records, an establishment known as the Little Steel Pier, in Colonial Beach, Virginia, operated from at least 1951 to 1954. Court records reflect that William Earl Hindle, Little Steel Pier, Colonial Beach, obtained a traders license in 1950, 1951, and 1954 and a cigarette license in 1951 and 1954. Exhibit 2 (MD-ARCH-00084-00085, 00096-00097). Mr. Hindle, Earl Royster, and Lola Glover, T/A Colonial Amusement Company of Colonial Beach obtained a traders license and a cigarette license in 1952. Exhibit 2 (MD-ARCH-00086-00087). Mr. Hindle obtained a license for the sale of beer, wine, and liquor in 1952. Exhibit 4 (MD-ARCH-00259). The Colonial Amusement Company renewed the license in 1953 and 1954. Exhibit 4 (MD-ARCH-00261-00267). Records for 1953 reflect

that the Colonial Amusement Company of Colonial Beach also obtained a traders license, a cigarette license, and a music box license in 1953. Exhibit 2 (MD-ARCH-00092-00093). There are no license records at Archives relating to Little Steel Pier after 1954.

6. According to the records, a second establishment, Little Reno, operated from at least 1951 to at least 1986. In 1951, Hazel M. Bowie, T/A Little Reno, Colonial Beach, obtained a traders license, a cigarette license, and a restaurant license. Exhibit 2 (MD-ARCH-00080-00081). From 1953 to 1984, Little Reno obtained liquor licenses on an annual basis. Exhibit 4 (MD-ARCH-00262, 00265, 00268, 00272, 00276, 00281, 00286, 00293, 0299, 00305, 00312, 00318, 00322, 00330, 00332, 00337, 00341, 00356, 00357, 00363, 00368, 00369, 00374, 00377, 00379, 00381, 00382, 00385, 00387, 00389, 00391, 00393). In 1985 and 1986 the liquor licenses issued to Reno of Colonial Beach, Inc. Exhibit 4 (MD-ARCH-00395, 00397). In 1953, Little Reno, Inc. of Colonial Beach obtained a traders license and a cigarette license, which it renewed each year through 1958. Exhibit 2 (MD-ARCH-00098-00099, 00114-00115). Little Reno obtained a restaurant license in 1954, which it renewed in 1957 and 1958. Exhibit 2 (MD-ARCH-00098-00099, 00114-00115). Little Reno obtained a dance license in 1956, which it renewed in 1958. Exhibit 2 (MD-ARCH-00098-00099, 00114-00115). Little Reno obtained a special cigarette license and an amusement license in 1957 and 1958. Exhibit 2 (MD-ARCH-00114-00115). Southern Maryland Novelty obtained a music box license for Little Reno in 1957 and 1958. Exhibit 2 (MD-ARCH-00118-00119). On April 26, 1958, Southern Maryland Novelty Company paid \$43,350.00 for two Amusement Device Operators Licenses [slots] for the operation of 253 slot machines at Little Reno. Exhibit 3 (MD-ARCH-00007-00008). Slot machines were outlawed on piers inaccessible by foot from fast land in

Maryland in 1958. See 1958 Laws of Maryland, Chapter 18, and *Miedzinski v. Landman*, 218 Md. 3 (1958).

7. In 1962, Little Reno obtained a traders license and a restaurant license. Exhibit 2 (MD-ARCH-00136-00137). BZ Vending Service obtained a cigarette license for Little Reno in 1963. Exhibit 2 (MD-ARCH-00130-00131). According to the records, Little Reno suffered a fire in 1964, Exhibit 2 (MD-ARCH-00130-00131), but apparently reopened by 1966, obtaining a traders license, a cigarette license, a special cigarette license, a music box license, and a vending machine license on November 23, 1966. Exhibit 2 (MD-ARCH-00146-00147). These licenses were renewed in 1967 and all but the vending machine license were renewed annually through 1976. Exhibit 2 (MD-ARCH-00146-00147, 00152-00153, 00158-00159, 00164-00165). For each year from 1968 through 1976, Little Reno also obtained a restaurant license, a soda fountain license, and billiards licenses. Exhibit 2 (MD-ARCH-00152-00153, 00158-00159, 00164-00165). Vending machine licenses were obtained again in 1974, 1975, and 1976. Exhibit 2 (MD-ARCH-00164-00165). The court records reflect that Little Reno paid penalties for all its licenses on August 8, 1968, June 18, 1969, June 17, 1970, and January 1, 1971. Exhibit 2 (MD-ARCH-00152-00153, 00158-00159). According to State tax assessment records, Little Reno is still in existence today as Flanagan's. See paragraph 30 below.

8. As is noted above, except for liquor license records, licensing records from the Circuit Court for Charles County are missing for the period from 1977 through 1979. However, in 1980 Little Reno obtained a traders license, a cigarette license, a special cigarette license, a restaurant license, a music box license, a vending machine license, a soda fountain license, billiard licenses, and an amusement license. Exhibit 2 (MD-ARCH-00170-00171). Little Reno renewed all but the

vending and soda machine licenses in 1981, the last year for which license records other than liquor licenses are available at Archives. Exhibit 2 (MD-ARCH-00170-00171).

9. The circuit court records show that a third establishment, the Monte Carlo, was owned by Bruce Shymansky and operated from at least 1952 to at least 1963. The Monte Carlo was identified in court records for 1952 as located in Charles County, offshore Colonial Beach. Mr. Shymansky appears in liquor license records as renewing a beer, wine and liquor license in 1952, 1953, and 1959. Exhibit 4 (MD-ARCH-00257, 00262, 00288). Trading as Monte Carlo, Shymansky obtained a traders license, a cigarette license, and licenses for one or more music boxes in 1952, 1953, 1954, and 1955. Exhibit 2 (MD-ARCH-00090-00091, 00102-00103). He obtained a traders license and a cigarette license again in 1956. Exhibit 2 (MD-ARCH-00102-00103). The General Amusement Co. obtained music box licenses on behalf of Monte Carlo in 1956. Exhibit 2 (MD-ARCH-00094-00095). Mr. Shymansky, T/A Monte Carlo obtained a traders license, a cigarette license, a special cigarette license music box licenses in 1957, 1958, 1959, 1960, 1961, and 1962. Exhibit 2 (MD-ARCH-00116-00117, 00142-00143). Mr. Shymansky paid \$17,500 on April 29, 1958 for an Amusement Device Operators License for 100 slot machines for the Monte Carlo. Exhibit 3 (MD-ARCH-00009). Trading as the Monte Carlo, Shymansky obtained an amusement license in 1959 and 1961, 1962, and 1963. Exhibit 2 (MD-ARCH-00116-00117, 00142-00143). He also renewed his traders license and music box license in 1963. Exhibit 2 (MD-ARCH-00142-00143). The Macke Vending Co. obtained a special cigarette license in 1963 for the Monte Carlo. Exhibit 2 (MD-ARCH-00138-00139). This is the last entry for the Monte Carlo, and court records reflect it suffered a fire in approximately 1964. Exhibit 2 (MD-ARCH-00138-00143).

10. A fourth establishment, the Jack Pot, operated from at least 1953 to at least 1960. Court records reflect that "Colonial Piers, Inc., Jack Pot (offshore in Md. waters) Colonial Beach", obtained a traders license and a cigarette license in 1953, 1954, 1955, and 1956. Exhibit 2 (MD-ARCH-00092-00093). Colonial Piers obtained a traders license, a cigarette license, and a special cigarette license for Jack Pot in 1957 and 1958. Exhibit 2 (MD-ARCH-00108-00109). Court records reflect that \$3,300.00 was paid for an Amusement Device Operators License issued on April 26, 1958, to Colonial Piers, Inc., T/A Jackpot, offshore, Colonial Beach, Va., for 26 slot machines. Exhibit 3 (MD-ARCH-00006). Court records reflect that William E. Hitch, individually and trading as Jack Pot Pier, obtained liquor licenses in 1952 and 1953. Exhibit 4 (MD-ARCH-00258). Hitch transferred the liquor license to Florence A. Reese and Dennis R. Conner, t/a Colonial Piers, Inc., in 1953. Exhibit 4 (MD-ARCH-00261). Colonial Piers, Inc. renewed the liquor license annually from 1954 through 1959. Exhibit 4 (MD-ARCH-00264, 00269, 00274, 00277, 00280, 00287). Southern Maryland Novelty obtained music box licenses on behalf of Florence Reese from 1954 to 1956 and in the name of the Jack Pot in 1957 and 1958. Exhibit 2 (MD-ARCH-00104, 00105, 00118, 00119).

11. The liquor license for the Jack Pot transferred in 1959 from Colonial Piers, Inc. to Dennis R. Conner who maintained a liquor license through 1972. Exhibit 4 (MD-ARCH-00288, 00294, 00298, 00303, 00310, 00316, 00321, 00327, 00333, 00338, 00348, 00355, 00357 (t/a Jack Pot, Aqua Land Park), 00362). Dennis R. Conner, t/a Jack Pot, Aqualand Park, obtained a traders license and a restaurant license in 1959 and cigarette license and special cigarette licenses in 1960. Exhibit 2 (MD-ARCH-00110-00111). Conner obtained a traders license and a special cigarette license in 1960 and a music box license and a billiard license in 1961. Exhibit 2 (MD-ARCH-00110-00111).

12. Licenses were also issued to a fifth establishment, the Starlight Pavilion, beginning in 1957 and through at least 1986. The records reflect that Roger D. Welch, T/A Starlight Pavilion, of offshore Virginia or offshore Fairview Beach, Virginia, obtained traders, cigarette, special cigarette, restaurant, and music box licenses in 1957 and 1958. Exhibit 2 (MD-ARCH-00120-00121). On April 29, 1958, an Amusement Device Operator's License costing \$5,050.00 issued to Roger D. Welch, T/A Fairview Beach Pier, for the operation of 29 slot machines. Exhibit 3 (MD-ARCH-00004). From 1959 through 1976 and again in 1980 and 1981, traders, cigarette, special cigarette, restaurant, and music box licenses were issued to Starlight Pavilion, Inc. Exhibit 2 (MD-ARCH-00122-00123, 00140-00141, 00148-00149, 00154-00155, 00160-00161, 00166-00167, 00172-00173). Liquor licenses issued to Roger D. Welch from 1956 to 1958 (Exhibit 4 (MD-ARCH-00272, 00275, 00282)) and to Starlight Pavilion, Inc. from 1959 through at least 1986. Exhibit 4 (MD-ARCH-00289, 00291, 00295, 00302, 00307, 00315, 00323, 00329, 00336, 00344, 00346, 00352, 00359, 00361, 00365, 00370, 00373, 00376, 00378, 00380, 00383, 00384, 00386, 00388, 00390, 00392, 00394, 00396).

13. Licenses were first issued for a sixth establishment in 1957. Known as Freestone Yacht Club, Inc., it was identified as located in the "2<sup>nd</sup> Precinct, 7<sup>th</sup> Election District" of Charles County and also as "Potomac River offshore Virginia". Exhibit 2 (MD-ARCH-00112-00113). In 1957, traders and restaurant licenses issued to Freestone Yacht Club, Inc. and cigarette and special cigarette licenses issued to Louis Ferlazzo on behalf of the corporation. Exhibit 2 (MD-ARCH-00112-00113). In 1958, J. Grant Wright obtained 22 vending machine licenses for the Freestone Point Yacht Club located in the "Potomac River, 2<sup>nd</sup> Precinct, 7<sup>th</sup> Election District". Exhibit 2 (MD-ARCH-00124-00125, 00126-00127). Also in 1958, an Amusement Device Operator's License for

100 slot machines issued to "Freestone Amusement Co., Inc., T/A Freestone Amusement Co., Inc., in second precinct of seventh election district of Chas. Co., Md., offshore from Freestone Point in the Potomac River." Exhibit 3 (MD-ARCH-00005). Liquor licenses issued to Freestone Yacht Club in 1957 and 1958. Exhibit 4 (MD-ARCH-00279, 00284).

14. A seventh establishment, Belvedere Beach Pier, Inc. located offshore of Belvedere Beach, Virginia, obtained traders, music box, cigarette and special cigarette licenses from 1958 to 1964, amusement licenses from 1960 to 1964, and restaurant licenses from 1961 to 1964. Exhibit 2 (MD-ARCH-00106-00107, 00128-00129). An Amusement Device Operators License issued on May 2, 1958, allowing the operation of 10 slot machines at Belvedere Beach, Offshore, Belvedere Beach, Virginia. Exhibit 3 (MD-ARCH-00002). Belvedere Beach Pier, Inc. obtained liquor licenses from 1953 to 1970. Exhibit 4 (MD-ARCH-00263, 00266, 00270, 00271, 00278, 00283, 00285, 00292, 00297, 00306, 00308, 00314, 00324, 00326, 00331, 00342, 00345, 00353).

15. In addition to the casinos described above, music box licenses were obtained annually by Howard George of Southern Maryland Novelty Company on behalf of John Reese of Colonial Beach, Virginia from 1951 to 1956. Exhibit 2 (MD-ARCH-00082-00083). Mr. Reese obtained a liquor license in 1952. Exhibit 4 (MD-ARCH-00259).

16. A traders license issued to Robert C. Bailey, Recreation Center, Colonial Beach, in 1950. Exhibit 2 (MD-ARCH-00080-00081). A traders license and a cigarette license issued to Potomac Piers Inn, Colonial Beach, in 1950. Exhibit 2 (MD-ARCH-00088-00089). A traders license issued to Harry H. Hickey, Joyland Pier, Colonial Beach, in 1950 and a traders license and cigarette license issued to him in 1951. Exhibit 2 (MD-ARCH-

00084-00085). William T. Tate of Colonial Beach obtained a traders license in 1974 and 1975. Exhibit 2 (MD-ARCH-00168-00169). June L. Boyce of Colonial Beach obtained a traders license in 1976. Exhibit 2 (MD-ARCH-00162-00163).

### Circuit Court for St Mary's County License Records

17. Gambling became legal in St. Mary's County after the enactment of 1947 Laws of Maryland, Extra Session, Ch. 32, 1949 Laws of Maryland, Chs. 417 and 678, 1951 Laws of Maryland, Chs. 181 and 183. The original complaint in *Miedzinski v. Landman*, 218 Md. 3 (1958), reflects that plaintiff Loren L. Landman operated a casino known as Coles Point Tavern offshore of Coles Point, Virginia and was licensed in 1958 for 7 slot machines. Exhibit 5 (MD-CHAS-00036-00068, contained in MSA T 2088. Attached hereto as Exhibit 8 are genuine and authentic copies of license records of the Circuit Court for St. Mary's County, identified as MD-ARCH-00174-00200, 10000-10074 and taken from MSA C 1640, MSA T 3021, and MSA C 1553. The records reflect that Loren Landman or James V. Mattingly on his behalf obtained coin operated machine (slot) licenses annually from 1954 through 1958. Exhibit 8 (MD-ARCH-10000-10005). A genuine and authentic copy of Mr. Landman's 1958 license is attached hereto as Exhibit 9 and numbered MD-ARCH-00003. Loren Landman, Loren L. Landman, and Loren Leo Landman appear as having obtained liquor licenses annually from 1954 through 1980. Exhibit 8 (MD-ARCH-00175-00200). The same names appear in Exhibit 8 as having obtained restaurant licenses from 1954 to 1971 (10010-10012, 10026-10030, 10051-10055, 10069-10070), traders licenses from 1954 through 1971 (10013-10015, 10036-10040, 10060-10064, 10073-10074), cigarette and/or special cigarette licenses from 1955 through 1971 (10006-10007, 10016-10020, 10031-10035, 10041-10045, 10056-10059, 10065-10066, 10071-10072), and music box licenses from 1955 through 1971



(10008-10009, 10021-10025, 10046-10050). A summary chart of the records showing references for the licenses issued for this establishment from 1954 to 1980 is attached as Exhibit 10.

### Corporate Records

18. Attached hereto as Exhibit 11 and labeled MD-ARCH-00045-00047 is a genuine and authentic copy of the Articles of Incorporation formed under the laws of Maryland for Belvedere Beach Pier, Inc, contained in MSA T 2725-3, PCM 3, pp. 250-252. The Articles of Incorporation were executed on August 10, 1953 and filed with the State Tax Commission of Maryland. The stated purpose for which the corporation was formed was to operate a tavern, bakery and restaurant.

19. Attached hereto as Exhibit 12 and labeled MD-ARCH-00048-00051 is a genuine and authentic copy of a Certificate of Incorporation formed under the laws of Maryland for Freestone Yacht Club, Inc, contained in MSA T 3233-2, PCM 4, pp. 287-290. The Certificate of Incorporation was executed on January 31, 1957 and filed with the State Tax Commission of Maryland. The stated purposes for which the corporation was formed included the ownership and operation of a restaurant and tavern business.

20. Attached hereto as Exhibit 13 and labeled MD-ARCH-00052-00055 is a genuine and authentic copy of the Certificate of Incorporation formed under the laws of Maryland for Freestone Amusement Company, Inc, contained in MSA T 3233-2, PCM 4, pp. 291-294. The Certificate of Incorporation was executed on January 31, 1957 and filed with the State Tax Commission of Maryland. The stated purposes for which the corporation was formed included the ownership and operation of amusement parks, piers, "vessells", buildings and restaurants.

21. Attached hereto as Exhibit 14 and labeled MD-ARCH-00056-00059 is a genuine and authentic copy of the Certificate of Incorporation formed under the laws of Maryland for Aqua-Land, Inc, contained in MSA T 2725-4, PCM 5, pp. 416-419. The Certificate was executed on August 5, 1959 and recorded with the Maryland State Department of Assessments and Taxation. The stated purposes for which the corporation was formed include the ownership and operation of amusement parks, piers, buildings and restaurants.

22. Attached hereto as Exhibit 15 and labeled MD-ARCH-00060-00069 are genuine and authentic copies of Articles of Incorporation executed on October 5, 1951, Stock Issuance Statement dated October 19, 1951 and Articles of Revival dated June 22, 1962 for Little Reno, Inc., contained in MSA T 2725-3, PCM 3, pp. 1-7 & MSA T 2725-6, PCM 7, pp. 125-127. The corporation was formed for the purpose of owning and operating amusement parks, piers and restaurants. The Articles of Incorporation and the Stock Issuance Statement were recorded with the Maryland State Tax Commission. The Articles of Revival were recorded with the Maryland State Department of Assessments and Taxation.

23. Attached hereto as Exhibit 16 and labeled MD-ARCH-00070-00072 is a genuine and authentic copy of the Articles of Incorporation formed under the laws of Maryland for Starlight Pavilion, Inc., contained in MSA T 2725-4, PCM 5, pp. 382-384. The Articles of Incorporation were executed on May 15, 1959 and recorded with the State Tax Commission. The stated purpose for which the corporation was formed included the ownership and operation of a tavern and restaurant.

#### Land Records

24. The documents attached as Exhibits 17 through 24 (MD-ARCH-00010 -00042) are genuine and

authentic copies of deeds and other land records initially recorded in the Circuit Courts for St. Mary's and Charles Counties that are presently maintained either on hard copy or on microfilm by the Maryland State Archives.

25. The documents attached as Exhibit 17 (MD-ARCH-00010-00014) are genuine and authentic copies of three deeds dated September 30, 1960 (MSA CM 885-CBG 91, pp. 82-83), February 10, 1964, (MSA CM 885-CBG 112, pp. 119), and August 17, 1976, (MSA CM 885, DBK 269, pp. 271-272), respectively, each of which was recorded in the Circuit Court for St. Mary's County. Each deed transfers title to the property known as "Loren's or Landman's restaurant, pier and Bar", which is described in the text of the deeds as being located in the waters of the Potomac River *"near Cole's Point in the Third Election District of St. Mary's County, Md"*.

26. Exhibit 18 (MD-ARCH-00017-00019) is a genuine and authentic copy of a Petition For Authorization to Convey Real and Personal Property and to Settle Claims of the Estate of Loren Lee Landman, MSA T 2351, box 30, file 1840, 16, 190-191. The Petition seeks authorization of the Orphans' Court of St. Mary's County, Maryland to convey the wharf and restaurant known as "Cole's Point Tavern" from the Estate to Loren Leo Landman.

27. Exhibit 19 (MD-ARCH-00015- 00016) is a genuine and authentic copy of an Order of the Orphan's Court for St. Mary's County, Maryland dated August 14, 1975 authorizing conveyance of the property described in the preceding paragraph and settlement of the claims of the Estate of Loren Lee Landman, MSA T 2351, box 30, file 1840, 16, 193-194.

28. Exhibit 20 (MD-ARCH-00021) is a genuine and authentic copy of an agreement filed in the Orphan's Court for St. Mary's County, Maryland between the

Personal Representative for the Estate of Loren Lee Landman and Loren Leo Landman for the purchase of the Cole's Point Tavern from the Estate. MSA T 2351, box 30, file 1840.

29. Exhibit 21 (MD-ARCH-00023-00024) is a genuine and authentic copy of a deed dated March 11, 1985 and recorded in the Circuit Court for St. Mary's County, Maryland conveying the Cole's Point Tavern property from Loren Leo Landman to Anita Jane Cryer, MSA CM 885, MRB 215, pp. 133-134.

30. Exhibit 22 (MD-ARCH-00025-00027) is a genuine and authentic copy of a quit claim deed dated November 22, 1993 recorded in the Circuit Court for Charles County between Reno of Colonial Beach, Inc. and Flanagans of Colonial Beach, Inc., MSA CM 393, DGB 1929, pp. 491-493. The deed conveys title to a parcel of land along the Potomac River in the town of Colonial Beach, Virginia, including that pier formerly known as "Little Reno Pier", *along with all associated riparian rights, including those arising under the "compact of 1785 of the states of Maryland and Virginia, and any and all wharves, piers, pilings, structures built on piers. . . in the waters of the Potomac River, lying in Charles County, Maryland."*

31. Exhibit 23 (MD-ARCH-00028-00033) are genuine and authentic copies of two deeds dated September 2, 1964, MSA CM 393, PCM 171, pp. 4-6, and May 4, 1983, MSA CM 393, PCM 900, pp. 104-106, recorded in the Circuit Court for Charles County conveying title to a parcel of land in Fairview Beach, Virginia, *"including the pier extending into the Potomac River, and any and all other appurtenances assessed in Charles County, Maryland. . . ."*

32. Exhibit 24 (MD-ARCH-00034-00042) are genuine and authentic copies of three deeds dated May 12,

1993 and September 27, 1993 recorded in the Circuit Court for Charles County, Maryland, MSA CM 393, DGB 1797, pp. 98-100, and DGB 1848, pp. 1-2; 3-6, each of which convey title to “[i]mprovements on Water- - Fairview Beach - Starlight Pavilion located in the Third Election District of Charles County, Maryland . . .”

### Tax Assessment Records

33. The documents attached as Exhibit 25 are genuine and authentic copies of St. Mary’s County tax assessment records for Election District 3, which were transferred from the St. Mary’s County office of the State Department of Assessments and Taxation office to the Maryland State Archives in 1989, and are now maintained as MSA T 1753 by the Archives. Exhibit 25 includes documents MD-ARCH-00202-00221, which reflect entries on the St. Mary’s County real property tax assessment roll for years 1963 through 1982 of a commercial building constructed on a pier extending into the Potomac River from the Virginia shoreline off Cole’s Point, Virginia. During the period from 1963 through 1975, Loren Lee Landman appears on the assessment roll as the owner of the property. During the period from 1976 through 1982, Loren Leo Landman appears on the assessment roll as the owner of the property.

34. The documents attached as Exhibits 26 through 29 (MD-ARCH-00223-00249) are genuine and authentic copies of Charles County, Maryland tax assessment records for the commercial structures built on the piers extending into the Potomac River from the Virginia shoreline. These documents were transferred from the Charles County State Department of Assessments and Taxation to the Archives in 1992, and are now maintained by the Archives as MSA T 220.

35. Exhibit 26 (MD-ARCH-00223) is a genuine and authentic copy of a Charles County assessment record

for the "Little Reno", which is constructed on the pier extending into the Potomac River off Colonial Beach on the Virginia shoreline. The document reflects a tangible personal property assessment in 1951 of \$3,515.00.

36. Exhibit 27 (MD-ARCH-00225) is a genuine and authentic copy of a Charles County property tax assessment record that reflects the entry of tangible personal property tax assessments for personal property owned by Bruce Shymansky in Colonial Beach, Virginia in years 1956, 1957 and 1958. As is described in paragraph 9, Mr. Shymansky was the owner of the Monte Carlo during this time period.

37. Exhibit 28 (MD-ARCH-00224) is a genuine and authentic copy of a Charles County tax assessment record that reflects the entry of a tangible personal property assessment of \$1700 in 1953 for the "Monte Carlo."

38. Exhibit 29 (MD-ARCH 00226 -00249) are genuine and authentic copies of tax records for real property located in Charles County, Maryland that reflect a real property tax assessment for the improvements constructed on the Starlight Pavilion pier extending into the Potomac River from Fairview Beach on the Virginia shoreline during the years 1952 through 1986. Document MD-ARCH-00229 reflects the assessments for 1959 and 1961. Document MD-ARCH-00230 reflects the 1962 assessment. Document MD-ARCH-00231 reflects the 1963 assessment. Documents MD-ARCH-00232 and 00233 reflect a transfer of ownership of the Fairview Beach Starlight Pavilion property from Gerald F. Sonnenberg to Paul and Edith Floyd and G.R. Jones in 1964. Document MD-ARCH-00234 reflects the 1966 and 1967 tax assessments for the property. Document MD-ARCH-00235 reflects the 1968 tax assessment. Document MD-ARCH 00236 reflects the 1969 tax assessment. The Archives does not have the 1970 volume

of tax assessments for Election District 3, the district in which this property is located. Documents MD-ARCH-00237 through 00241 reflect tax assessments for the years 1971 through 1974, respectively. Documents MD-ARCH-00242 through 00249 reflect tax assessments for the years 1975 through 1986.

39. Exhibit 30 (MD-ARCH-00251-00255) are genuine and authentic copies of Washington County, Maryland tax assessment records at the Maryland State Archives reflecting assessments dating back to 1896 for a bridge operated by the Virginia and Maryland Bridge Company over the Potomac River between Shepherdstown, West Virginia and Ferry Hall Plantation in Washington County, Maryland. Document MD-ARCH-00251 is a copy of an entry in the 1896 Washington County tax assessment volume, MSA C 2107-1, reflecting an assessment of \$8,000 against the Maryland and Virginia Bridge Company for the Shepherdstown Bridge. Document MD-ARCH 00255, MSA C 2107-1, is a copy of an entry in the 1910 volume of Washington County tax assessment rolls that reflects an assessment of \$15,000 for the bridge. Documents MD-ARCH-00252 and MD-ARCH-00253 are copies of entries in the volume of Washington County tax assessments for the years 1917 through 1922, MSA C 2815-1, that reflect an assessment of \$15,000 for the bridge. Document MD-ARCH-00254 is a copy of an entry from the 1922-1928 volume of Washington County tax assessment record, MSA C 2815-2, that reflects an assessment of \$75,000 for the bridge.

#### Real Property Database Records

40. Exhibit 31 (MD-ARCH-00043) is a genuine and authentic printout of the Maryland SDAT Real Property System database account as of August 29, 2001, for the "restaurant and bar" located in the Potomac River off Cole's Point, Virginia. Anita Jane Cryer appears as the present owner. The printout reflects SDAT's current

assessed value of \$85,300 for the improvements. *See* paragraph 29, which reflects that Ms. Cryer purchased the Coles Point Tavern property in 1985.

41. Exhibit 32 (MD-ARCH-00044) is a genuine and authentic printout of the Maryland SDAT Real Property System database account as of September 4, 2001, for the “Fairview Beach Starlight Pavilion” located on the Potomac River. Fairview Beach, Inc. appears as the present owner. The printout reflects SDAT’s current assessed value of \$97,200 for the improvements.

### Photographs

42. Exhibits 33 (MD-ARCH-405, MSA L 23418-303) and 34 (MD-ARCH-404, MSA L 23418-302) are genuine and authentic copies of photographs published in *This Was Potomac River*, Alexandria, VA: Frederick Tilp, 1987, pp. 302-303. Exhibit 33 shows the exterior of Little Reno and the gap in the pier at the point of the Virginia-Maryland boundary. Exhibit 34 shows the interior of a casino over Maryland waters offshore of Fairview Beach, Virginia on July 4, 1959, with customers playing slot machines.

### Records of the Board of Natural Resources

43. The records of the Board of Natural Resources, a precursor to the Maryland Department of the Environment, are also maintained at the Archives. Attached hereto are genuine and authentic copies of excerpts from the Board’s annual reports from 1956, 1957, 1959 to 1965, and 1968. Exhibit 33 (MD-OAG-00306-00347). Also attached hereto are genuine and authentic copies of an addendum to the minutes of the Board’s October 15, 1956 meeting. Exhibit 34 (MD-OAG-00348-00351) taken from MSA S 1391-3260.



I declare under penalty of perjury that the forgoing  
is true and correct.

/s/  
Edward C. Papenfuse, Ph.D.

Executed on November 30, 2001.

**Affidavit of Jack N. Rakove**  
**W.R. Coe Professor of History and American Studies**  
**Professor of Political Science**  
**Stanford University**

**Qualifications**

I am the W. R. Coe Professor of History and American Studies, and Professor of Political Science, at Stanford University, where I have taught since 1980. Prior to joining the Stanford faculty, I completed undergraduate studies in history at Haverford College in 1968 and then earned my Ph. D. in History in 1975 from Harvard University, where I studied with Bernard Bailyn. I also taught for five years at Colgate University (1975-1980). Throughout the quarter century of my professorial career, my major teaching assignments have been in the realm of early American history (the 17<sup>th</sup> and 18<sup>th</sup> centuries), and more recently, constitutional history.

My principal research and publications have been broadly concerned with the creation of a national polity during the American revolutionary era, broadly defined as the period 1763-1800. My first book, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979) examines, among other issues, the debates surrounding the framing, ratification, amendment, and replacement of the Articles of Confederation, and therefore necessarily addresses in some detail the prevailing understandings of sovereignty prior to the adoption of the Federal Constitution. Sovereignty and the respective spheres of national and state authority also loom large in my more recent book, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which was the recipient of the Pulitzer Prize in History in 1997. Because of my interest in the general problem of ascertaining the "original meaning" of the Constitution, I have been involved in other litigation in which comparable questions have

arisen, and I have also had the opportunity to comment on contemporary legal and political disputes of a similar nature.

In presenting the general conclusions set forth in this affidavit, I have drawn upon and attempted to synthesize the more extensive research that went into many of my scholarly writings over the past quarter century. The most important and salient works in this respect would include *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979), especially chapters VII and VIII; *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), especially chapter VII; and "Making a Hash of Sovereignty," *Green Bag*, 2 (1998), 35-44, and 3 (1999), 51-59. Here and in other writings, my major scholarly project has involved the creation of a national polity and structure of constitutional governance during the Revolutionary era, and this has necessarily entailed closely examining the respective spheres of authority of the Union and the states.

Similar concerns have also been implicated in some of the other litigation for which I have been retained as a historian. The core issue in the Oneida Indian land claims litigation, in which I have represented, at different times and in different matters, both the defendant counties in New York State and the Oneida Indian Nation of New York, revolves around the respective powers of the Union and the states in the negotiation of Indian treaties, under both the Articles of Confederation and the Constitution. Like the present litigation, these suits involved efforts by states to retain and assert specific sovereign powers of governance even while conceding that other jurisdictions could exercise other powers.

## The Problem of Sovereignty

The suit between Maryland and Virginia over the use of the Potomac River is a dispute between two states exercising substantial powers of sovereignty. That suit is in turn submitted to the judgment of a third sovereign, the United States of America, acting through the jurisdiction its Supreme Court exercises over suits between the states under Article III, Sect. 2 of the Constitution. The constitutional provisions establishing federal jurisdiction over suits between states replaced a different set of procedures for such conflicts provided under the Articles of Confederation, the original federal charter that was in force when the Mount Vernon Compact was negotiated in 1785. These two documents reflected different assumptions about the nature and location of sovereignty in the American federal system. More than two centuries later, important aspects of the nature and extent of sovereignty in the American federal system remain subject to legal controversy and academic dispute. These questions extend to the original understanding of the concept of sovereignty that developed during the Founding era, which embraces both the coming of Independence in 1776 and the formation of new governments culminating in the Constitution drafted in 1787 and ratified in 1788. Because Maryland's concerns in this suit implicate its understanding of the nature and extent of its sovereignty, it is essential to explain what sovereignty meant during that period, and this in turn entails explaining how and why the concept was itself evolving in new ways under the pressure of revolutionary events.

Four major factors shaped Americans thinking about sovereignty during the Founding era: (1) an intellectual inheritance from European sources that treated sovereignty as an absolute, unitary, ultimate locus of authority within a state; (2) the traditions of law and governance that had evolved within each of the colonies

since their seventeenth-century origins; (3) the particular pressure that the imperial controversy with Britain placed upon these received ideas and traditions; and (4) the need to rationalize the practical divisions of the sovereign powers of government between the Union and the states that took place under both the Articles of Confederation (drafted in 1776-1777 and finally ratified in 1781) and the Federal Constitution (drafted in 1787 and ratified by all but two states by July 1788).

The modern concept of sovereignty arose in late sixteenth- and seventeenth-century Europe as a way of analyzing two problems of political authority raised by the general political crisis of the Reformation and its aftermath. One (which need not concern us here) was the relation between the independent political jurisdictions that were evolving into what we now call the modern nation-state. The second, and for our purposes more important, involved identifying the supreme legal authority within each of these independent jurisdictions. The traditional or conventional definition of sovereignty that Americans inherited from the political and legal thinkers of early modern Europe emphasized its absolute, unitary, and ultimate nature. In the English-speaking world, the principal authority for this view of sovereignty was Thomas Hobbes (1588-1679), especially in his famous work, *Leviathan*. Sovereignty, in this conception, was a matter of locating the final, ultimate source of legal authority within any polity. Sovereignty was therefore, by nature, unitary and indivisible. As a well known aphorism would have it, *Imperium in imperio* was a solecism in politics; that is, a state within a state, or two sovereign authorities claiming jurisdiction within one realm, was inconceivable and illogical. That conception of sovereignty was clearly expressed in William Blackstone's *Commentaries on the Laws of England*, the influential summary of English law which began to appear in 1765, the year of the Stamp Act, and which enjoyed a wide audience in the American colonies. In every state,

Blackstone observed, "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii*, or rights of sovereignty, reside."<sup>1</sup> A similar view of sovereignty was expressed in the Declaratory Act of 1766, which Parliament enacted concurrently with the repeal of the Stamp Act to affirm that it was not abandoning its claimed authority to enact legislation binding the colonists "in all cases whatsoever." In contrast to the American claim that the colonists could only be taxed and governed by legislatures in which they enjoyed actual representation, the Declaratory Act in effect asserted that the colonists were members of the larger imperial polity for which Parliament was evidently the supreme legislature, and that being the case, they ultimately had to yield to its dictates, regardless of the damage done to the principle of representation. In 1774, Parliament forcefully demonstrated how far this doctrine extended when it adopted the Coercive Acts punishing the town of Boston and the province of Massachusetts for the Boston Tea Party.<sup>2</sup>

In adopting both the Declaratory Act of 1766 and the Coercive Acts of 1774, Parliament applied and extended the concept of its own supremacy that had been secured in the Glorious Revolution of 1688 and the adoption of the Declaration of Rights of 1689. During the political turmoil of the seventeenth century, both the Stuart crown and its opponents in Parliament had vied with each other over the true nature of the English constitution and the respective authority of crown and Parliament. The crown had periodically asserted its right to make law without the consent of Parliament; its

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<sup>1</sup> Blackstone, 1 COMMENTARIES\* 49.

<sup>2</sup> For general discussion, see John Phillip Reid, *Constitutional History of the American Revolution*, vol. III, *Authority to Legislate* (Madison, 1991), 34-78.

opponents had argued, in response, that the crown enjoyed no such authority. The Declaration of Rights of February 1689 (n.s.) vindicated the claims of Parliament. While certain prerogative powers remained the possession of the crown, it was henceforth understood that the ultimate source of law in the realm of Britain was Parliament (of which the king himself remained a member, because his assent was necessary to legislation).

This principle of legislative supremacy, as codified in 1689, had a great appeal for the American colonists, not only during the final controversy with Britain that preceded independence, but even earlier. In each of the colonies, legislative institutions were created quickly, and they soon began to fashion a body of law that regulated every aspect of daily life. This devolution of authority to the colonial assemblies was an implicit but essential element of English imperialism from the outset. Although Parliament enacted occasional acts regulating colonial commerce, beginning with the first Navigation Act of 1651, the colonies were dependencies of the crown. It was the crown, not Parliament, that granted the charters under which the colonies were organized, originally to joint stock companies (as in Virginia and Massachusetts), then to individual proprietors (Cecil Calvert for Maryland, William Penn for Pennsylvania) or small groups of proprietors. But, with the exception of a brief period of centralization in the 1680s, the crown itself had no interest in exercising active powers of internal governance in America. Even after corporate or proprietorial government was revoked in various colonies, the authority of the crown was exercised primarily through the appointment of royal governors, councillors, and judges. Effective governance, however, remained largely the responsibility of the representative assemblies and the local institutions (town meetings and county courts) which were charged with enforcing the law and administering justice. American legislation was expected to conform, in a general way, with the laws of England, and legislative acts

were subject to veto by royal or proprietary governors and to review by the Privy Council. In practice, however, the British empire in America was highly decentralized. Americans lived under laws enacted by their own assemblies and enforced by local institutions in which citizens participated actively. Royal authority rested lightly on colonial society, and rarely penetrated into the countryside where most of the population resided.

The colonial legislatures did not enjoy the full panoply of legislative *privileges* that Parliament possessed after the Glorious Revolution of 1688; governors could prorogue sessions and dissolve legislatures in ways that were no longer permissible in Britain.<sup>3</sup> But the extent of legislative *power* was substantial and potentially unlimited. No form of human activity lay beyond the scope of legislative regulation. Colonial governments legislated broadly in pursuit of the common interest and the regulation of daily life. Prevailing legal norms established and reflected rules and procedures to which government had to conform in exercising its powers, but did not limit those powers in the ways in which we now understand constitutions to do. Provincial and local institutions enjoyed wide-ranging authority to legislate in behalf of public health, safety, and convenience; to license enterprises of benefit both to the general public and to consumers; to regulate markets and all forms of economic transactions; to provide for the construction of public thoroughfares; to charter corporations; and so on. That authority also extended, as a matter of course, to the regulation of waterways. As in England, much of this legislation took the form of grants of authority and responsibility to local communities or to designated groups of individuals to carry some activity that would be in the public interest.

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<sup>3</sup> Bernard Bailyn, *The Origins of American Politics* (New York, 1968), 67-71.



The extent of this authority was sometimes explicitly recognized in the charters granted by the crown. This holds with especial force for Maryland, the first colony to be organized as a grant of proprietary rights to a single individual, rather than through the joint stock corporation used for Virginia and Massachusetts. Article IV of the charter granted to Cecil Calvert the same “ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region, Islands, Islets, and Limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed, or of right could, or ought to have, hold, use, or enjoy.” This was a pointed comparison or equation, for within the domestic governance of England, this jurisdiction on the Scottish frontier was customarily regarded as possessing more extensive powers of governance within its respective bounds than any other corresponding unit of internal government.<sup>4</sup> Significantly, too, Article VII granted “free, full, and absolute Power, by the Tenor of these Presents, to Ordain, Make, and Enact Laws, of what Kind soever, according to their sound Discretions whether relating to the Public State of the said Province, or the private Utility of Individuals, of and with the Advice, Assent, and Approbation of the Free-Men of the same Province, or the greater Part of them, or of their Delegates or Deputies, whom We will shall be called together for the framing of Laws, when, and as often as Need shall require . . .” That is, Maryland was organized as a “province,” competent to its own internal government, with the stipulation that the powers vested in

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<sup>4</sup> The classic study is Gaillard Thomas Lapsley, *The County Palatine of Durham: A Study in Constitutional History* (New York, 1900).

the Calvert family as proprietors be exercised in conjunction with a suitable measure of popular consent.

In addition to the special recognition afforded by its charter's evocation of the County Palatine of Durham, Maryland enjoyed a further degree of autonomy by virtue of its status as a proprietorial colony. This was the dominant form of organization used by the Stuart crown after the original chartering of the Virginia and Massachusetts joint stock companies. In addition to Maryland, the settlements in the Carolinas, Pennsylvania, Delaware, and New Jersey were also organized as proprietorial colonies; and New York, acquired by conquest from the Dutch, was originally a proprietorial holding of James, Duke of York, until his accession to the crown upon the death of his brother, Charles II, converted it into a royal colony. By the early decades of the eighteenth century, the proprietorial governments in the Carolinas and New Jersey had also been converted into royal colonies, leaving Maryland, Pennsylvania, and Delaware as the sole proprietorial colonies—a status they retained down to the Revolution (although the Calvert family's rights were briefly revoked and then restored in the aftermath of the Glorious Revolution).

In the middle of the eighteenth century, then, Maryland retained the same autonomous powers enjoyed by all the colonies,<sup>5</sup> with some measure of a distinct status afforded by the association with Durham and its proprietorial government. To this point in colonial history, however, no one would have regarded any of the colonies as potential sovereign entities because there had been no

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<sup>5</sup> An exception should be noted for Connecticut and Rhode Island, the two "corporate" colonies where governors and councillors were elected within the province, not appointed by the crown (although other crown officials, such as customs officers, were present).

occasion or compelling need to consider or resolve their precise jurisdictional status. In retrospect, it can be said that they were effectively autonomous in practice, because virtually all the laws and regulations that mattered were enacted locally, with the exception of the parliamentary navigation acts establishing the rules for imperial trade, but something less than sovereign as that term would ordinarily be used. All of the colonies acknowledged their dependence on the empire, and the acts of the American legislatures were subject to veto and suspension by royal and proprietorial governors and also to review by the Privy Council to the king.

Sovereignty became an issue for the Americans because of the claims made on behalf of Parliament's jurisdiction over the colonies, first through taxation and then through its putative power of legislation more generally. The initial occasion for this was the Stamp Act controversy of 1765-1766. American opposition to this measure rested on the familiar principle that taxes were the free gift of the people and could only be levied when the people's representatives had approved the tax in question. Because Americans were unrepresented in Parliament, and by nature could never be truly represented there, Parliament had no authority to impose taxes upon them. The British response took the initial form of asserting that Americans were "virtually" represented in Parliament, in the same way that many communities in Britain that sent no members to the House of Commons could be said to be virtually represented. But this argument, which was itself controversial in Britain, was soon relegated as the government and its supporters instead relied on the theory of parliamentary sovereignty expressed in the Declaratory Act of 1766, which was adopted in order to facilitate the repeal of the Stamp Act by stating that Parliament was not abandoning its authority in principle even while withdrawing the particular offensive measure.

In this view, American obedience to Parliament “in all cases whatsoever” rested on these propositions: Parliament was the supreme, sovereign source of law within the British empire, as the Declaration of Rights of 1689 affirmed; sovereignty was by its nature indivisible and ultimate; and the colonies were indubitably members of that larger imperial community. Moreover, the colonists had acceded to some measure of parliamentary jurisdiction by living under the various Navigation Acts it had adopted since 1651. The colonists’ argument about representation could not withstand the more powerful claim of sovereignty. In response, Americans faced the difficult task of explaining why the orthodox conception of sovereignty no longer fit their situation. This involved emphasizing the consent- or representation-based nature of all legitimate government; describing the colonial assemblies as the legal equivalents of Parliament, vested with the same powers; arguing that the only proper connection between the colonies and the mother country lay through the crown, as evinced by the fact that all the colonies and their governments had been organized under grants from the crown, without parliamentary involvement or supervision; and finally suggesting that their previous acceptance of the Navigation Acts involved no concession of inherent parliamentary authority but rather was a practical admission that the trade of the empire had to be directed from one central source, and Parliament was the one institution best situated to discharge that function.<sup>6</sup>

The crucial clarification of this debate over sovereignty came in 1774, when Parliament responded to the Boston Tea Party of December 1773 by enacting the

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<sup>6</sup> There are numerous studies on this point. A concise but sophisticated short statement of the escalating positions can be found in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967), 161-175, 198-229.

Coercive Acts punishing both the town of Boston and the colony of Massachusetts. The scope of this legislation amounted to a sweeping demonstration and application of the principle of parliamentary sovereignty propounded in the Declaratory Act. In response, the delegates to the First Continental Congress stated the now-dominant American position. Parliament had no authority at all to legislate for America, though the colonists might still agree to abide by the Navigation Acts in the interests of conciliation. The only proper constitutional connection between the colonies and the empire would run through the crown. The colonies should be restored to their situation *circa* 1763, with their individual legislatures left free to manage all their internal affairs. In effect, the colonies were declaring their independence from Parliament, acknowledging their continued dependence on the crown as the only means to preserve the empire, and elevating their own legislative assemblies to a legal status equivalent to Parliament.<sup>7</sup> Because Americans never denied the fundamental principle underlying the Glorious Revolution—that Parliament was the supreme source of law within Great Britain proper—the effect of this equation between their assemblies and Parliament was to treat the former as possessing the same legislative sovereignty as the latter. The idea of state sovereignty was thus derived not from the prior understanding of colonial legislative power, but from the revolutionary developments that led Americans to reject parliamentary rule in its entirety.

Neither the king, his government nor Parliament found the American claims persuasive, however. The dispute proved unresolvable, and Congress declared independence in July 1776. Concurrently with that decision, individual states began writing new constitutions of government to replace the old colonial charters, while Congress itself began drafting articles of confederation to

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<sup>7</sup> Rakove, *Beginnings of National Politics*, 52-60.

formalize the federal union. These developments affected American thinking about sovereignty in two ways. At the state level, the new constitutions of government reflected the prevailing belief in legislative supremacy, and treated legislative power as inherently plenary in nature and potentially unlimited in extent. State constitutions did not use the device employed both in Article IX of the Confederation or Article I, Sect. 8 of the United States Constitution, explicitly enumerating the responsibilities and powers vested in the respective congresses. Nor did the bills of rights that accompanied some of the new constitutions impose any real restraints on legislative powers. Unlike the federal amendments proposed in 1789, these documents were statements of general principles rather than legally enforceable restrictions.

But to say that state legislatures were effectively supreme and sovereign within their own boundaries is not to say that they were the sole source or ultimate wielder of sovereign power within the United States. Some of the most important badges of sovereignty—notably authority over war and foreign affairs—were the responsibility of the Continental Congress from its inception. The power to legislate and tax was reserved to the states, but the equally important power to make war and treaties, to deal with other sovereign nations, belonged to the Union. In effect, the practice of American federalism divided sovereignty from the beginning, treating it not as some ultimate, unitary, irresistible source of authority, but rather converting it into a set of powers to be allocated between two levels of government.

The precise allocation of these powers became a source of discussion during the drafting of the Articles of Confederation. Several early drafts of the confederation, for example, contained clauses reserving to each state the sole governance of its “internal police,” the catch-all phrase used in the eighteenth century to describe the entire corpus of domestic or police powers relating to the

general welfare of a society.<sup>8</sup> More controversial were proposals to vest Congress with unilateral authority to ascertain the boundaries of the states and to resolve interstate disputes over territory. Under the terms of their seventeenth-century charters, different states had broad and sometimes overlapping claims to unsettled or unappropriated lands in the interior of the continent. States lacking such claims (notably Maryland, Delaware, Rhode Island, and New Jersey) believed that these lands should fall under the jurisdiction of Congress, and that the proceeds from their sale and settlement should accrue to the Union rather than individual states. The landed states, led by Virginia, argued that their claims were valid. Though eventually willing to see their interior claims transferred to the Union, they insisted that this had to be done through a process of cession, rather than by granting Congress power to ascertain boundaries, limit state domains, and thereby assert its own title to the interior.<sup>9</sup>

At no point did Congress undertake to ask how the establishment of a confederation dividing sovereign powers between two levels of government could be squared with the inherited orthodox conception of sovereignty as unitary, absolute, ultimate power. The closest the delegates came to this was during a brief debate in the spring of 1777, when Thomas Burke, a newly arrived delegate from North Carolina, proposed adding a new article to the existing draft of the confederation. In its final form, Article II declared that "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to

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<sup>8</sup> Rakove, *Beginnings of National Politics*, 139-151.

<sup>9</sup> Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia, 1983).

the United States in Congress assembled.” Notwithstanding the opening phrase of this Article, it cannot be read as an unequivocal endorsement of a general theory of state sovereignty. Congress still retained power over war and foreign affairs, and it would have been difficult, if not impossible, to imagine how any government lacking that authority could be deemed sovereign in the international sense of the term.<sup>10</sup> Moreover, the Confederation restricted the authority of the states in other ways. For example, Article VI declared that “No two or more states shall enter into any treaty, confederation or alliance between them, without the consent of the united states in congress assembled.”

In constitutional terms, the real significance of the Confederation was that it took the form of a positive delegation of powers accompanied by corresponding restrictions on the states. It could not assume, as the state constitutions did, that the power of Congress was as comprehensive or plenary as the corresponding legislative authority of the states. Congress could only exercise the powers that were specified, in the manner laid down. By contrast, the states were thought to possess and retain the entire corpus of legislative powers, except insofar as the Confederation transferred certain powers to Congress or imposed certain restrictions on the states. Although the final draft of the Confederation sent to the states in November 1777 and finally ratified in February 1781 omitted the reference to “internal police” found in earlier drafts, there is no question that the underlying understanding remained the same. It is only a slight oversimplification to say that the essential theory of the Confederation, the first federal constitution, rested on a simple division of powers of governance into two broad categories of external affairs and internal police, and that

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<sup>10</sup> Rakove, *Beginnings of National Politics*, 164-173.



the state legislatures retained full control—effective sovereignty—over the latter.

The idea that the states were effectively sovereign, at least for domestic purposes, rested on more than the language of the second Article of the Confederation. The states alone had the power to legislate, in the sense of making law binding on individuals, and enforced by penalties and sanctions; and only the states had the authority to tax. Congressional measures, by contrast, took the form of resolutions recommending measures to the states; requisitions on the states for troops, supplies, and money; and on rare occasions when an object fell entirely within its purview, enacting “ordinances,” a term which implied a somewhat defective measure of full law-making authority. The imbalance or disparity between the essentially recommendatory power of Congress and the true legislative authority of the states became more evident and significant after peace came in 1783. As the imperative for wartime deference to Congress disappeared, the residual “internal police” sovereignty of the states became the defining characteristic (and problem) of the confederation.

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Another measure of the residual sovereignty of the states can be found in the procedures that the Articles of Confederation established for the resolution of legal controversies between states. Under Article IX, clauses 2 and 3, Congress was “the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever.” The notion of being a “last resort on appeal,” it is worth noting, carried with it an implication that states could harmoniously resolve conflicts on their own authority in prior proceedings, notwithstanding the restrictions in Article VI against “two or more states . . . enter[ing] into

any treaty, confederation or alliance.”<sup>11</sup> The distinctive feature of this appellate process was that it did not in fact give Congress any role in the mediation or resolution of interstate disputes beyond sponsoring the courts that would be convened through a process whereby the contending states would either agree to the composition of the court or, failing to do so, Congress would establish a list of potential judges from which the contending states would eventually produce a court through a mutual winnowing of the names. Congress itself would not act in a judicial manner; nor, despite being described as “the last resort on appeal,” did the clauses in question empower it to act in appellate capacity, that is, by reviewing or altering the judgment of the court below. It would simply enable the appointment of a court and serve as a repository where the judgments reached would be “lodged . . . for the security of the parties concerned.”

Two such proceedings were launched during the life of the Confederation, one relating to a dispute between Pennsylvania and Connecticut over title to lands in the Wyoming Valley of the former state, the other between Massachusetts and New York over the status of lands in the western part of the latter state. The second of these disputes illustrates in interesting ways how two states could allocate rights of sovereignty among themselves in the midst of negotiating a dispute under circumstances in which each viewed the other’s motives with some suspicion.

The Massachusetts suit against New York rested on the fact that the former’s original charter contained a “sea-to-sea” clause granting it a right to the soil. That charter was subsequently revoked and replaced, but

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<sup>11</sup> An agreement like the Mt. Vernon Compact of 1785 could arguably fall below the threshold of qualifying as a treaty, depending on how that term was defined.

Massachusetts claimed that the original right to the soil remained intact. New York was acquired by conquest from the Dutch and lacked a charter specifying its boundaries. Its claims to the land that became western New York State rested on its political relation to the Iroquois confederacy, who had ostensibly recognized the sovereignty of the crown which was historically exercised through the government of New York. After Massachusetts filed suit, the two states attempted to constitute a court under the rules of Article IX of the Confederation, but after their efforts to constitute and convene a court failed, commissioners from the two states met at Hartford in 1786 and negotiated an agreement whereby Massachusetts acknowledged the jurisdiction and sovereignty of New York State over the territory in question, while New York granted to Massachusetts the right of soil. This in turn meant that Massachusetts received the rights of preemption and extinguishment in relation to the purchase of territory from its aboriginal occupants (principally members of the Seneca nation). The Hartford Compact was never formally approved by Congress, but by parliamentary maneuvering delegates from the two states succeeded in having the entire agreement entered on the journals of Congress.

The Hartford compact is noteworthy in several respects. First, it demonstrates how much authority the states retained even over the mediation of disputes that fell under the rubric of Article IX of the Confederation. When the respective commissioners decided to abort the effort to constitute a court, their determination to do so was sufficient to that end. Second, in its substance the Hartford Compact demonstrated the care and precision with which states could disaggregate particular elements of sovereignty and deal with them as distinct entities. The agreement rested on the capacity to distinguish the underlying jurisdictional rights which New York retained from the specific rights it had conceded to Massachusetts (and its assignees). What New York yielded was

substantial. It gave another state the authority to purchase land within its boundaries, as well as the power and responsibility to supervise the conduct of expected transactions with the Native American occupants of those lands, long described by New York's leaders as the "ancient dependants" of the colony and state. Massachusetts continued to exercise this responsibility actively for the next half century, at least through the controversial Buffalo Creek Treaty of 1838 and its sequel. Yet having conceded so much to Massachusetts, it seems equally evident that New York retained every other aspect of sovereign legislative authority that it could always exercise.

The Mount Vernon Compact of 1785 may be viewed similarly. Here, too, in the spirit and interest of bi-state amity and cooperation, Maryland acknowledged a substantial Virginia interest in the uses of the Potomac River. Without renouncing the underlying sources of its jurisdiction over the Potomac, in its original charter, the Maryland commissioners granted Virginia significant authority over the ordinary use and improvement of the waterway. Thus the eighth article of the Compact recognized that Virginia could enact "laws and regulations" relating to the fishery in the river, matters of quarantine, and the maintenance of navigation, conceding in effect that Maryland was recognizing some legislative jurisdiction in the neighboring state. Yet that concession was not open-ended. Such "laws and regulations" were to be "made with the mutual consent and approbation of both states." Moreover, the preceding seventh article of the Compact is drawn in narrower terms, granting to the "citizens of each state . . . full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements." Significantly, the grant is made to private persons exercising a reasonable property right, rather than the state or its agents. In effect, a relevant class of

Virginia citizens was being placed on a par with the citizens of Maryland, each being allowed to exercise similar or equivalent rights along the river or in its fishery; but the legislative authority to oversee the exercise of those rights remained where it had previously been vested, in the Maryland legislature. In conceding some regulatory authority to Virginia, the Maryland commissioners and legislature therefore did not renounce other facets of Maryland's regulatory authority. The Compact is thus consistent with both the state's conception of its sovereignty and the idea, fundamental to the Founding era, that such diminutions of a state's sovereignty as it chose to make had to be phrased in precise terms, with the residual authority not surrendered remaining among the larger body of police powers that the state retained.

In sum, Americans in the late eighteenth century inherited a traditional conception of sovereignty that was not easily applied to the division of sovereign power that was inherent in the structure of American federalism from its inception. Sovereignty was divisible, not unitary; and the idea that the people were the unitary sovereign who simply delegated discrete chunks of authority to different jurisdictions only disguised but did not alter this underlying fact. Like the famous conception of property as "a bundle of sticks," sovereignty consisted of a number of potential powers, some of which could be neatly assigned to one jurisdiction, but others of which overlapped between the Union and the states. Consistent with this pragmatic understanding, a state could freely yield or modify its authority to exercise certain powers without committing itself to a wholesale renunciation of others that might seem closely related. States, and especially state legislatures, were jealous of these powers, and did not abandon their authority freely or glibly.

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I declare under the penalties of perjury that the foregoing is true and correct.

/s/  
Jack N. Rakove

November 26, 2001

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF WALTER RAUM**

Being more than 18 years of age and competent to testify, Walter Raum states as follows:

1. I was employed by the Saint Mary's County Health Department as a sanitarian in 1960. I became Director of Environmental Health in 1967 and continued in that position until 1984. I was responsible for all environmental health programs, including individual water supply, individual sewage disposal, food safety, including inspections of food service facilities and food processors, and community health complaints.

2. I am aware that since approximately 1952, when Dr. Alan B. Houser became Health Officer, the Saint Mary's County Health Department inspected Cole's Point Tavern, which is located on the Potomac River adjacent to the Virginia shore. It was common knowledge that he personally assisted or conducted the food service inspection of Cole's Point Tavern. The inspections continued during the period of my employment with the St. Mary's County Health Department, from 1960 through 1984. In addition, the inspection of Cole's Point Tavern

continued to be a coveted assignment to my knowledge until 1984, when I left the Saint Mary's County Health Department.

3. Cole's Point Tavern was inspected and licensed by the Saint Mary's County Health Department because it was located in Maryland. It was well known that slot machines were located at Cole's Point Tavern because such slots were not legal in Virginia, but were in Saint Mary's County. Indeed, in an effort to sever any connection to Virginia, there was a gap in the walkway of approximately one foot that physically separated the Cole's Point Tavern property from the Commonwealth of Virginia. The walkway connected to Cole's Point Tavern ended near the beach and then the walkway started again after about a foot. I understood that one side of the gap was Maryland and that the other side of the gap was Virginia.

I declare under the penalty of perjury that the foregoing is true and correct.

12/3/01  
Date

/s/  
Walter Raum



**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF ANN ROSE**

Being more than 18 years of age and competent to testify, Ann Rose states as follows:

1. I am presently employed as the Environmental Health Director for the St. Mary's County, Maryland, Health Department ("the Department") and have held this position since August, 1999. The Environmental Health Director manages and directs a staff of clerical, para-professional and professional positions to fulfill environmental and public health concerns relating to air quality, individual water supply and sewage disposal systems, communicable disease, public and recreational facilities, community health complaints and food safety. Before assuming my present position as the Environmental Health Director for the Department, I was employed as a sanitarian from November 1988 to April 1990 at the Charles County Health Department, and from April 1990 to August 1999 at the Department. Sanitarians are licensed under the laws of the State of Maryland, and are responsible for interpreting and applying the Code of Maryland

Regulations (COMAR) through the process of field evaluations and investigations in assigned program areas.

2. The Department was established in 1955. Among other things, the Department is responsible for monitoring public establishments as to various health related issues. To fulfill these duties the Department issues licenses to food service facilities open to the public, and inspects such facilities for compliance with applicable laws and regulations. The Department also samples and tests drinking water supplies at public establishments. Attempts at routine water sampling of these facilities began in 1979.

3. An establishment named Cole's Point Tavern is located within St. Mary's County, Maryland on a pier/piling within the Potomac River off of the Virginia shore. Cole's Point Tavern is a food-service establishment that is open to the public, and the Department has regulated it in the same manner as any other food-service establishment located in St. Mary's County.

4. Some food service licenses were issued beginning in 1974. These early licenses had no expiration date. By 1981, the Department began a routine local food inspection and licensing program. Currently, an application for a food service license is mailed by the Department to the operator of an existing licensed facility one month before the current license expires. The operator/license holder must complete the application and return it to the Department with the permit fee. An inspection specifically for license requests and processing is not required on existing facilities holding a license. New facilities are subject to a pre-opening inspection.

5. Attached hereto as Exhibits 1 through 14 are genuine and authentic copies of documents maintained by the Department that relate to licenses issued to Cole's

Point Tavern from 1987 to 1995. These records show that for the years 1987, 1988, 1989, 1990, 1991, 1992, and 1995, the St. Mary's County, Maryland, Health Department received applications from and issued permits to Cole's Point Tavern for the operation of a food service facility.

6. Inspections of licensed facilities for health violations require a trip to the site. Seasonal facilities are subject to one inspection per season. Violations observed during an inspection are addressed in an established time frame for reinspection. Violations of a critical nature or quantity could result in immediate closure of the facility.

7. Attached hereto as Exhibits 15 through 24 are genuine and authentic copies of documents maintained by the Department that relate to inspections conducted by the Department of the food service facility at Cole's Point Tavern. These records reflect inspections conducted between August, 1979 and December, 1999. Frequency of inspections was affected by the location of the facility, its seasonal operation schedule, and staffing levels at the Department.

8. Current water sampling procedures require a trip to the site by someone trained and certified to collect samples. The water is analyzed for presence of chlorine residual. If chlorine is not present, a sample is collected in a sterile container according to sample collection standards and iced for transport back to the Department. Appropriate laboratory forms are completed. Bacteriological water samples are packed for transport by courier to the State's laboratory in Baltimore. Water samples for chemical analysis are fixed with concentrated acid before transport to the State laboratory in Baltimore. If the test results of a bacteriological water sample are unsatisfactory, a repeat sample is collected. A second consecutive unsatisfactory sample test result would require the facility to disinfect the water supply. Failure

to comply could result in revocation of the food service license.

9. Attached hereto as Exhibits 25 through 28 are genuine and authentic copies of documents maintained by the Department that relate to water sampling and analysis for Cole's Point Tavern. This sampling was performed by the Department in August, 1979, and May, 1998.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Ann Rose

Executed on November 30, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA

\* No. 129 Original

Plaintiff,

\* Before Special Master

vs.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF HERBERT M. SACHS**

Being more than 18 years of age and competent to testify, Herbert M. Sachs states as follows:

1. I am currently employed by the State of Maryland, Department of the Environment (MDE or the "Department"), as the Director of Special Projects. I began working for the State of Maryland in 1962, when I was hired by the Maryland Department of Planning to review and comment on the 1962 U.S. Army Corps of Engineers' ("the Corps") Interim Report on the North Branch of Potomac River. As a result of its study, the Corps proposed the construction of what became the Bloomington Reservoir, which has since been renamed Jennings-Randolph Reservoir.

2. Throughout the forty years following my introduction to the Corps study in 1962, I have been involved with Potomac River water supply issues, both within Maryland State government and, from 1992 to 1997, as the Director of the Interstate Commission on the Potomac River Basin (ICPRB).

3. On September 26, 2001, I gave an 8-hour deposition in this matter. The deposition covered a variety of aspects of my involvement in the regulation of the Potomac River water supply, including my interaction with representatives of the Virginia State Water Control Board (SWCB). In 1974, while serving as the Director of the Water Resources Administration of the Maryland Department of Natural Resources with responsibility for the administration of the water appropriation permitting program, I issued a water appropriation permit to the Fairfax County Water Authority for the withdrawal of water from the Potomac River. A copy of the permit has previously been identified in this matter as Exhibit X-19. During the course of my deposition I testified that Mr. R. V. Davis, at the time an official with the SWCB, had approached me and urged me to issue the Fairfax County Water Authority water appropriation permit to the Commonwealth and not the Authority. *See* Deposition Excerpts, Exhibit 1, 109-111.

4. I have reviewed footnote 520 on page 148 of Virginia's Brief on the Merits of Maryland's Remaining Claims (VA Br.). In that footnote, Virginia states that at pages 161 and 162 of my deposition (*see* Exhibit 1) I was "uncertain if [I] was confusing this memory with a different communication [I] had with a Virginia official about whether riparian rights in the Potomac River *belonged* to the Commonwealth or to the individual Virginia riparian owner." VA Br. at 148 (citing VX 139). The Commonwealth bases this statement on my testimony about a letter I wrote to Mr. Eugene T. Jensen, Executive Secretary of the SWCB, dated September 15, 1976, concerning a draft agreement between the two states on Potomac River water supply issues. *See* Exhibit 2. There is no confusion in my memory about Mr. Davis' request that I issue the Fairfax County Water Authority permit to the Commonwealth; that conversation occurred, as I have testified. My only "confusion" in my testimony was whether the later 1976 letter, which referred to "whether

the riparian rights belong to the actual user along the stream or to the Commonwealth,” *id.*, addressed the same subject that was addressed in my earlier conversation with Mr. Davis, which was whether I should issue the Fairfax County Water Authority permit to Virginia instead of the Authority. While it is hard for me to tell whether these are one and the same subject, I did not then, nor do I now, have any confusion concerning the fact that Mr. Davis approached me and urged me to issue the Authority’s permit to the Commonwealth.

5. With respect to augmentation of the water supply for the Washington area, it was Maryland, and not Virginia or the Fairfax County Water Authority that took the lead in developing the Jennings-Randolph (formerly Bloomington) Reservoir. In 1962, the U.S. Army Corps of Engineers recommended the construction of a reservoir on the North Branch of the Potomac River to provide additional water for water supply, flood control, and water quality purposes. *See* Exhibit 3, MD-MDE-20033 (Table of Contents and excerpts from Corps transmission to Congress of Interim Report on the North Branch of the Potomac River). Although Congress authorized the project, *see* Flood Control Act of October 23, 1962, § 203 (P.L. 87-874, 76 Stat. 1173), construction of the reservoir could not begin until non-federal interests had come forward to agree to pay the initial costs associated with the water supply portion of the reservoir’s storage capacity. *See* Water Supply Act of 1958, § 301 (P.L. 85-500, 72 Stat. 297).

6. Maryland took the lead among the states and agreed to cover the non-federal cost of the project, culminating in 1969 with the creation of the Maryland Potomac Water Authority (MPWA). 1969 Md. Laws 411; MD. CODE ANN., ENV’T. ART. § 5-401 *et seq.*, Exhibit 4; *see generally* Herbert M. Sachs, “Payment of Non-Federal Costs for Water Storage in Federal Reservoirs – the Bloomington Example” (1969), Exhibit 5. The MPWA

was comprised of representatives of the Maryland counties along the non-tidal Potomac and the Washington Suburban Sanitation Commission, the Department of Water Resources (which later became the Water Resources Administration within the Department of Natural Resources), and the Department of State Planning. It was empowered to enter into a contract with the federal government for repayment of the non-federal portion of the reservoir costs and to assess costs on the Maryland counties according to their level of use. MD. CODE ANN., ENV'T. ART. § 5-408. The MPWA also assessed costs on non-Maryland users of Potomac River water, including those situated in Virginia, on the same basis as the Maryland counties. *Id.*

7. The MPWA entered into a contract with the United States to pay the initial costs of the water supply storage capacity of Bloomington Reservoir on August 25, 1970. *See* VA Ex. 207F (Novation Agreement at VA-Gen-00085). Although the Washington Metropolitan Area utilities eventually assumed MPWA's payment obligations in 1982, it was because Maryland stepped forward to guarantee the payment of these costs in the first place that construction of the Bloomington Reservoir went forward and eventually came on-line in September 1981.

8. Maryland took this action on its own. Attached hereto as Exhibit 3 is a genuine and authentic copy of a letter dated October 9, 1961, indicating that, when the Corps circulated its Interim Report proposal to Virginia, the Commonwealth made no comment, stating that "no action, financial or otherwise, by Virginia or any of its political subdivisions is needed to satisfy the requirements for local cooperation" and recommending that "future action on the interim report be in keeping with the desires expressed by appropriate officials of the State of Maryland and the State of West Virginia." Exhibit 3, MD-MDE-20009. The letter indicates that, in Virginia's view, the only benefits it would see from the project



would be “due to regulation of flow in the Potomac River,” which the attached letter from the Virginia Commission of Game and Inland Fisheries clarifies “would have some effect upon the fishery in the Potomac River proper which borders Loudoun and Fairfax counties in Northern Virginia.” *Id.*, MD-MDE-20010. The attached letter from the game commission goes on to state that “[t]he Potomac, however, is Maryland water and, therefore, it appears we have no direct concern.” *Id.*

9. Maryland is presently involved in seeking to create additional water supplies on the Potomac River for the future by working with the Corps to re-allocate storage within the Jennings-Randolph Reservoir. Jennings-Randolph has a capacity of approximately 42 billion gallons of storage allocated to four separate uses: approximately 28 percent of its capacity is allocated to flood control and is held vacant to capture floodwaters and lessen their impact downstream; 31 percent is allocated to water supply for releases during low flow events; 39 percent is allocated for water quality to ensure enough water flow to dissipate and wash away industrial and municipal wastewater discharges; and 2 percent at the bottom of the reservoir is allocated for the storage of sediments. In 1990, Maryland stepped forward as the non-Federal sponsor of a Corps study evaluating the possibility of shifting some of the reservoir’s storage capacity from flood control to water supply. *See Exhibit 6.* While the Corps suspended the study to pursue structural improvements to the reservoir, the Corps plans to resume the study in the near future and Maryland has indicated to the Corps its intent to continue on as the non-Federal sponsor of the study.

10. The Maryland water appropriation permitting program (MD. CODE ANN., ENVT. ART. § 5-501 *et seq.*; COMAR 26.17.06, attached hereto as Exhibits 7 and 8 respectively) is principally responsible for the protection and maximization of Potomac water supplies in

three separate ways. First, Maryland has taken the lead in conserving the area's existing supply by carefully limiting the amount of water users are permitted to withdraw to only that amount necessary to meet the user's current needs. For example, with respect to Virginia users, Maryland reduced Leesburg's initial request for 15.4 millions of gallons per day (mgd) in 1967 to the 3 mgd Leesburg ultimately indicated it needed. *See* MD Ex. X-44 (indicating 15.4 mgd request); MD Ex. X-17, MD-MDE-03392 (1968 Leesburg permit limiting withdrawals to 3 mgd). By husbanding water in this fashion, the Maryland permit system works to maximize the region's use of its water resources and thus postpone the day when storage releases from upstream reservoirs are a common occurrence. In fact, to date, 1999 has been the only year in which releases from upstream reservoirs were needed to avoid triggering the restriction requirements of the LFAA.

11. The Maryland permit system is also the only tool for managing withdrawals from the Potomac upstream of the Washington Metropolitan Area. Although the three major Washington metropolitan water utilities (the Washington Suburban Sanitation Commission, the Fairfax County Water Authority, and the Washington Aqueduct) are all required under the LFAA to reduce their withdrawals during low flow events, upstream users that do not withdraw from the "subject portion" of the Potomac River (App. 82a) are not. Maryland, however, has placed low flow restrictions on its water appropriation permits since the 1950s, decades before the negotiation of the LFAA. *See, e.g.*, MD Exs. X-7, MD-MDE-13134-06-07; X-15, MD-MDE-13144-02; X-19, MD-MDE-13117-02. Since 1978, Maryland has used its permit authority to make the LFAA's restrictions applicable to all of the Potomac users who are not parties to the LFAA, including Virginia users. *See, e.g.*, MD Ex. X-24, MD-MDE-03074, X-25, MD-MDE-03397. Maryland's right to do so is recognized in the LFAA, *see* App. 94a (Article 3.C), and it is only through the application of the Maryland

permitting system that Virginia users within the “subject portion” of the Potomac who did not sign the LFAA comply with its terms.

12. Finally, the Maryland permitting system also maximizes the available Potomac River water supply through the application of its so-called “consumptive use regulations.” These regulations, codified at COMAR 26.17.07, require consumptive users – *e.g.*, power plants that withdraw water for cooling purposes and return little if any water to the river in the form of wastewater – either to reduce their use to below 1 mgd or to secure upstream storage rights sufficient to cover their withdrawals above 1 mgd. *See* Exhibit 9. This requirement facilitates the development of upstream storage as a means of covering water demand during low flow events.

13. Maryland’s permitting authority over Virginia withdrawals is one of the principal reasons why the regional cooperation over the Potomac water supply has developed over the past 25 years. Maryland imposed low flow conditions in its water appropriation permits long before the initiation of the discussions that led to the development of the Low Flow Allocation Agreement, and it was Maryland’s consideration of the WSSC and Fairfax County Water Authority applications in the early 1970s that eventually culminated in the Agreement itself. I was the principle Maryland representative in the LFAA negotiations and it was always understood throughout those negotiations that it was Maryland’s permitting authority that would serve as the enforcement mechanism for the Agreement.

I declare under penalty of perjury that the foregoing is true and correct.

/s/

Herbert M. Sachs

Executed on February 13, 2002.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\* No. 129 Original

Plaintiff,

\* Before Special Master

v.

\* Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\* \* \* \* \*

**DECLARATION OF KENNETH A. SCHERTLE**

Being more than 18 years of age and competent to testify, Kenneth A. Schertle states as follows:

1. I am the Executive Director at the Maryland Racing Commission ("MRC"), a body created by the Legislature that governs and regulates horse racing and betting on horse racing in the State. The MRC approves the prices for admission to races, services performed at races, and articles sold at a track, and has the authority to set the size of the purse, reward, or stake to be offered at a race. The MRC also regulates the conduct of licensees, which include owners, trainers, and jockeys.

2. I have been the Executive Director for the past fifteen years. My duties are statutorily mandated and include the daily operation of the office of the MRC, collecting taxes and fees imposed by the MRC, the administration of the licensing process for individuals working in connection with racing, attending public hearings and making a record for each proceeding, making recommendations to the MRC regarding off-track

betting and other permits, and maintaining and keeping the records and papers of the MRC.

3. On or about February 15, 1994, the MRC issued a permit to Flanagan's of Colonial Beach, Inc., authorizing the company to engage in off-track betting at Riverboat on the Potomac, 301 Beach Terrace, Colonial Beach, Virginia. I have reviewed the MRC's records relating to this off-track betting permit. These documents are attached hereto at Exhibits 1 to 16. These documents are genuine and authentic copies of off-track betting permit records created in the ordinary course of the MRC's business and maintained in the MRC files relating to the Riverboat on the Potomac in accordance with MRC's usual practice.

4. These records reflect that on November 12, 1993, the Laurel Racing Association Limited Partnership and the Maryland Jockey Club of Baltimore City, Inc. ("the Tracks") and Flanagan's of Colonial Beach, Inc., entered into a Satellite Simulcast Betting Agreement which authorized Flanagan's of Colonial Beach, Inc., to use Riverboat on the Potomac as an off-track betting facility. A genuine and authentic copy of this Agreement is attached at Exhibit 5. Applicants for off-track betting permits are required to obtain such an agreement from the Tracks and submit the Agreement to the MRC as part of the permitting process.

5. The Tracks hold a license issued by the MRC to operate Laurel and Pimlico Race Courses and are authorized by the MRC to conduct off-track betting. The MRC's issuance of an off-track betting permit to a particular facility means that the MRC accepts that facility as a place where off-track betting can be conducted. The off-track betting operation at Riverboat on the Potomac is conducted by employees of the Tracks.

6. On December 3, 1993, the Maryland Office of Planning concluded that the use of Riverboat on the Potomac as an off-track betting facility was consistent with State and Charles County development policies. A genuine and authentic copy of a letter dated December 3, 1993, and an attached Planning Analysis dated November 1993, from the Charles County Maryland Planning Office to Kenneth Schertle at the MRC is attached at Exhibit 9.

7. As the Executive Director, I am required to review documentation submitted by applicants during the off-track betting permitting process. A genuine and authentic copy of a Memorandum to Kenneth Schertle from Joseph Poag regarding information submitted to the MRC from Flanagan's of Colonial Beach, Inc., is attached at Exhibit 11.

8. On February 9, 1994, a public hearing was held on the proposed off-track betting permit at Riverboat on the Potomac in the portion of the facility that is situated in Maryland. I attended this hearing and the MRC's public meeting that followed the hearing. A genuine and authentic copy of the combined minutes from the hearing and meeting that followed is attached at Exhibit 1. Local Virginia officials attended the hearing at Riverboat on the Potomac and did not object to the issuance of the off-track betting permit. Following this hearing, the MRC voted unanimously to grant to Flanagan's of Colonial Beach the permit to conduct off-track betting at Riverboat on the Potomac.

9. On May 4, 2001, I conducted a site visit at Riverboat on the Potomac and reviewed financial information with two of the owners, Thomas and Penny Flanagan. Upon entering the facility, I observed Virginia lottery machines near the entrance. These machines were located on the part of the facility that is situated on dry land in Colonial Beach, Virginia. The Maryland lottery machines, off-track betting parlor, and bar are located

towards the rear of the building, which is situated on pilings in the Potomac River and located in the State of Maryland. During past site visits, I recall there being a line on the floor that served as the boundary between the Maryland and Virginia sides of the facility.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Kenneth A. Schertle

Executed on November 27, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\*      No. 129 Original

Plaintiff,

\*      Before Special Master

vs.

\*      Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

\*

\*

Defendant.

\*      \*      \*      \*      \*      \*      \*      \*

**AFFIDAVIT OF AMANDA SIGILLITO**

Being more than 18 years of age and competent to testify, Amanda Sigillito states as follows:

1. I am currently employed by the State of Maryland, Department of the Environment (the "Department"), as the Chief of the Nontidal Wetlands and Waterways Division within the Water Management Administration. I have held this position since December 13, 2000, and have been employed by the Department since May 1994. I am familiar with the waterway construction permits issued by the Department and with the records maintained by the Department in the ordinary course of business that relate to those permits.

2. The Department has repeatedly issued waterway construction permits for activities that take place within the Potomac River near the Virginia Shore. Exhibits 1 through 18 contain genuine and authentic copies of permits, authorizations, applications for permits and authorizations, and related diagrams, which detail such construction activities and that have been maintained in the Department's files in accordance with its regular



practice. Exhibits 19 through 34 contain genuine and authentic copies of correspondence and other documents relating to these permits, which have been created or received by the Department in the ordinary course of business and maintained in its files in accordance with its regular practice.

3. Exhibit 1 is a genuine and authentic copy of a permit issued to the Town of Leesburg, Virginia and dated April 1, 1968, which authorizes the Town of Leesburg to construct "two intake pipes and a water intake structure for the purpose of obtaining water for public water supply." Page 4 of Exhibit 1, at MD-MDE-13109-04 contains a schematic drawing of the proposed construction. As shown on page 3 of Exhibit 1, at MD-MDE-13109-03, the permit imposes a recurring annual charge on the Town of Leesburg. This page also contains an acceptance clause, which states that it was signed by Kenneth B. Rollins, Mayor of the Town of Leesburg, Virginia on March 27, 1968.

4. Exhibit 2 contains genuine and authentic copies of a permit issued to James K. and Joyce S. Rocks of McLean Virginia and dated November 29, 1973 to construct "a low-level bridge from Virginia to Mason Island," and the September 30, 1973 application seeking this permit.

5. Exhibit 3 contains genuine and authentic copies of a permit dated November 5, 1973 and issued to the Potomac Electric Power Company to construct an aerial transmission line, and the July 3, 1973 application and cover letter requesting this permit.

6. Exhibit 4 contains genuine and authentic copies of a permit dated December 1, 1975 and issued to the Northern Virginia Regional Park Authority, approving a project for "bank stabilization to control erosion and sedimentation," and the November 21, 1975 application

for this permit, filed by the Northern Virginia Regional Park Authority.

7. Exhibit 5 contains a genuine and authentic copy of a permit dated May 11, 1976 and issued to James K. Rocks of McLean, Virginia, authorizing "installation of riprap wingwall protection on the approaches" of a bridge, and a genuine and authentic copy of the letter submitted by Mr. Rocks on May 7, 1976, requesting this permit.

8. Exhibit 6 contains genuine and authentic copies of a permit dated April 27, 1977 and issued to the Fairfax County Water Authority to construct "a raw water intake to be located on the Virginia shore just upstream of the mouth of Seneca Creek," the application submitted by the Fairfax County Water Authority dated September 28, 1976, and a cover letter to the Maryland Department of Natural Resources from the Engineer-Director of the Fairfax County Water Authority. This cover letter, at MD-MDE-16224-01, observes that the Fairfax County Water Authority received a permit to appropriate water from the Potomac River on July 14, 1974, and that the Authority had "selected an intake site and are now proceeding with final design," and that the application for a construction permit had been submitted "[i]n accordance with the requirements of the State of Maryland."

9. Exhibit 7 contains a genuine and authentic copy of a permit dated November 17, 1977 and issued to James K. Rocks of McLean, Virginia, authorizing Mr. Rocks to construct a "16" pipe 40' long under an existing bridge connecting the Virginia shoreline with Mason Island in Frederick County, Maryland."

10. Exhibit 8 contains genuine and authentic copies of a permit dated August 2, 1979 and issued to the Northern Virginia Regional Park Authority, authorizing that agency to replace an "existing boat ramp with a 50 foot wide reinforced concrete boat ramp in the Algonkian

Regional Park in Loudoun County, Virginia,” and of the application submitted by that agency, dated May 6, 1979.

11. Exhibit 9 contains genuine and authentic copies of a permit dated June 2, 1980 and issued to the Colonial Pipeline Company of Richmond, Virginia to construct “a thirty six (36) inch pipeline” and the May 15, 1979 application for this permit.

12. Exhibit 10 contains genuine and authentic copies of a “Permit for Temporary Construction in a Waterway,” dated July 24, 1980 and issued to the Town of Leesburg, Virginia, authorizing the installation of “two 24 inch steel intake pipes and a water intake structure for the purpose of obtaining water for public water supply,” and the March 31, 1980 application for this permit.

13. Exhibit 11 contains a genuine and authentic copy of a permit to the Maryland State Highway Administration dated June 11, 1984, authorizing various construction activities related to bridges across the Potomac River.

14. Exhibit 12 contains a genuine and authentic copy of a permit to AT&T Communications dated April 12, 1988, authorizing the installation of “fiber optic communications cable across the [Potomac] River.”

15. Exhibit 13 contains a genuine and authentic copy of an “Authorization to Proceed” dated October 22, 1993 and issued to the Colonial Pipeline Company of Herndon, Virginia, authorizing that company to “[c]ross[] the Potomac River and Muddy Branch with a tracked backhoe by fording the waterways in order to excavate and inspect two sites,” with the restriction that “[t]he Potomac River must be crossed from the Virginia side to access Elm Island.” Exhibit 13 also contains a genuine and authentic copy of the “Joint Federal/State

Application” for this authorization, which details the work plans and contains diagrams of the proposed crossing.

16. Exhibit 14 contains a genuine and authentic copy of an “Authorization to Proceed” dated February 27, 1995 and issued to the Town of Leesburg, Virginia, authorizing the Town to “impact approximately 4 linear feet of the Potomac River to facilitate the construction of a 30-inch concrete cased pipe proposed to discharge treated effluent from the Town of Leesburg water pollution control facility.”

17. Exhibit 15 contains a genuine and authentic copy of a “Letter of Authorization After-the-Fact” issued to the Columbia Gas Transmission Corporation and retroactive to October 8, 1997, authorizing the applicant to “[p]erform repairs to exposed sections of 16-inch gas transmission pipes in the Potomac River.” Exhibit 15 also contains a genuine and authentic copy of a diagram submitted to the Department in support of the Columbia Gas Transmission Corporation’s request for authorization.

18. Exhibit 16 contains a genuine and authentic copy of an “Authorization to Proceed” dated January 28, 1999 and issued to Washington-Virginia Traditional Development Sites, Inc. of Great Falls, Virginia, authorizing that organization to “[c]onstruct a municipal wastewater treatment plant outfall pipe into the Potomac River.” The Authorization observes that “[t]he project is located on the Virginia side of the Potomac River at Nolands Island, across from Frederick County.” Exhibit 16 also includes genuine and authentic copies of a diagram submitted to the Department, showing the proposed location of the pipe, and a “Modification of Authorization” issued by the Department effective February 2, 1999, which modified the fees charged to Washington-Virginia Traditional Development Sites, Inc.

19. Exhibit 17 contains a genuine and authentic copy of an "Authorization to Proceed" dated July 16, 1999 and issued to Mark R. Millsap of Potomac Falls, Virginia, authorizing the construction of a "boat ramp armoring & a floating pier, as shown on the approved plans."

20. Exhibit 18 contains a genuine and authentic copy of a Waterway Construction Permit dated January 24, 2001 and issued to the Fairfax County Water Authority, authorizing the construction of a concrete water intake structure on the Potomac River.

21. The permits and authorizations at Exhibits 1 through 18 demonstrate that each of them was issued subject to a number of conditions. For example, the permit at Exhibit 1, to the Town of Leesburg, includes a number of limitations on the manner in which construction of the water intake pipes may proceed, such as limiting the handling of backfill and requiring a further permit from Maryland before explosives may be used. As another example, pages 2 and 3 of Exhibit 2 detail a number of conditions and limitations upon the permit to James K. and Joyce S. Rocks, including a requirement that the applicants "obtain the approval from the Frederick Soil Conservation District of a grading and sediment control plan," a prohibition on blasting "unless written authorization for this is obtained from the Director, Maryland Fisheries Administration," a requirement that the applicant remove "[t]he culvert pipes now located at the site of this bridge" before June 30, 1974, and a requirement that the permit "be filed in the land records of Frederick County, Maryland." The permit to the Town of Leesburg, Virginia, at Exhibit 10, requires the Town to maintain the banks alongside the construction for "five (5) years after completion of the construction," and "[a]ny undercutting, meandering or degrading of the channel or banks . . . shall be corrected by the Permittee as directed by the Administration."

22. The permit files for these permits do not reveal that they were sought "under protest" or that Maryland's jurisdiction to issue the permits was challenged at any time prior to the Fairfax County Water Authority's recent application for its second mid-river intake, which resulted in the permit at Exhibit 18. Exhibits 1, 4, 6, 8, 10, 14, and 18 contain permits that were sought by and granted to Virginia governmental agencies, namely the Town of Leesburg, Virginia, the Fairfax County Water Authority, and the Northern Virginia Regional Park Authority. Another permit, at Exhibit 16, was sought by a corporation to enable it to construct a "municipal wastewater treatment plant" to serve Loudoun County, Virginia.

23. The permit files for these permits also do not reflect that Maryland's issuance of permits was merely *pro forma* exercise, but reflect that Virginia governmental agencies have recognized limitations imposed upon them under permits issued by Maryland. Exhibit 19, for example, is a genuine and authentic copy of a March 20, 1969 letter submitted to the Department by the Town Manager of Leesburg, Virginia, updating the Department on the steps taken by Leesburg to comply with the conditions on the permit, and requesting a 1 year extension of time to begin using the permit. Exhibit 20 is a genuine and authentic copy of a similar letter dated December 4, 1978 from the Fairfax County Water Authority.

24. Exhibits 21 and 22 are genuine and authentic copies of correspondence between the Department and the Northern Virginia Regional Park Authority regarding an erosion problem at the boat ramp authorized in the permit at Exhibit 8. Exhibit 21 is a genuine and authentic copy of a letter dated November 4, 1982 to the Northern Virginia Regional Park Authority from the Department's Enforcement Division, detailing the results of an inspection of the boat ramp, and stating

that "[t]his administration has determined that rip rap is necessary to stop the bank erosion" at the site. Exhibit 22 is a genuine and authentic copy of a letter to the Department dated November 30, 1982, in which the Northern Virginia Regional Park Authority informed the Department that the rip rap had been installed.

25. These files also reflect that Maryland has enforced its permitting authority against Virginians. Exhibit 23 is a genuine and authentic copy of a letter sent to James K. Rocks of McLean, Virginia by the Department, dated June 6, 1973, in which Mr. Rocks was informed that a Department inspector had, on May 21, 1973, "found a waterway obstruction constructed of earth, rock and pipe placed in the Potomac River" between the Virginia shore and an island in the River. Exhibit 24 is a genuine and authentic copy of an Order dated July 3, 1973, in which the Department ordered Mr. Rocks to "remove the existing pipe and restore the subject site to approximately the original conditions." Exhibit 25 is a genuine and authentic copy of an application for a permit filed by Mr. Rocks on August 2, 1973. Exhibit 26 is a genuine and authentic copy of a Record of Public Hearing dated September 10, 1973, which details Mr. Rocks' presentation to the Department. Exhibit 27 is a genuine and authentic copy of a letter to Mr. Rocks from the Department dated September 24, 1973, which states that "this Administration cannot approve the work as requested." Exhibit 2 contains a copy of a subsequent application filed by and permit received by Mr. Rocks for a modified project.

26. The documents contained in these permit files reveal that Virginia governmental agencies have actively participated in Maryland's permitting process in ways other than by directly seeking a permit. For example, Exhibit 28 is a genuine and authentic copy of a letter dated May 6, 1979 to the Department from William M. Haussmann, which states that he was an architect hired

by the Northern Virginia Regional Park Authority "to design, and obtain the necessary permits for the construction of, a reinforced concrete boat ramp," that he had "been advised by the Marine Resources Commission and by the State Water Control Board, both in Virginia that permits will not be required by them," and that the Water Control Board had sent him a letter with the statement that "any work done in the waterway will take place in the Potomac River and will be under the jurisdiction of the State of Maryland."

27. Similarly, Exhibit 29 is a genuine and authentic copy of a letter dated January 19, 1977 to the Water Resources Administration from the Chairman of the Fairfax County Board of Supervisors, written in support of the Fairfax County Water Authority's request for a construction permit and requesting "that processing of the Authority application be given expeditious review." Exhibit 30 is a genuine and authentic copy of a letter dated January 10, 1977 to the Department from the Regional Representative of the Virginia Historic Landmarks Commission, providing information to be considered at a public hearing on the Fairfax County Water Authority's 1976 permit application.

28. Other documents in Maryland's permit files reflect Virginia's knowledge that such permits have been sought from and issued by Maryland. Exhibit 31 is a genuine and authentic copy of a June 17, 1970 letter from the Virginia Governor's Office to the Town Manager of Leesburg, Virginia, a copy of which was provided to the Department and which reports Virginia's favorable view of the Leesburg, Virginia project, but contains no objection to Leesburg's actions in obtaining a Maryland permit. Exhibit 32 is a genuine and authentic copy of a letter dated September 10, 1973 from the Department to the Executive Director of Virginia's "Governors Council on the Environment," which provides "a copy of the summary of the proceedings" of a hearing on the Potomac



Electric Power Company's permit application, at Exhibit 3. Exhibit 33 contains genuine and authentic copies of two letters dated August 23, 1973 from the Potomac Electric Power Company's Associate General Counsel to the Board of Supervisors of Prince William County and the Prince William County Executive, informing them in advance of this same hearing. Exhibit 34 contains a genuine and authentic copy of an "Affidavit of Publication" submitted to the Department in reference to the Potomac Electric Power Company's permit, which states that notices regarding this hearing were published in a Manassas, Virginia newspaper.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
AMANDA SIGILLITO

Dated: December 4, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\*

No. 129 Original

Plaintiff,

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Before Special Master

vs.

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Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF JAMES W. SPENCE**

Being more than 18 years of age and competent to testify, James W. Spence states as follows:

1. I have been employed by the Maryland State Department of Assessments and Taxation ("SDAT" or the "Department") in St. Mary's County since 1974. I have been employed as Supervisor of Assessments since 1988.

2. The Department's St. Mary's County office is responsible for performing real property tax assessments for all real property located in St. Mary's County. As Supervisor of Assessments, I oversee the operation of the office, supervise the tax assessors and support staff who are employed here and, as custodian of records, am responsible for the maintenance of assessment records generated by this office. Responsibility for maintenance of assessment records generated by the St. Mary's County Tax Assessment Office prior to 1974, when St. Mary's County performed assessments of real property located within the County, was assumed by this office after the State takeover of real property assessments.

3. Attached hereto as Exhibits 1 through 4 (documents MD-MARY-00077 through MD-MARY-00079) are genuine and authentic copies of property tax records presently maintained by the SDAT St. Mary's County office for a restaurant and bar built in the 1940's on a pier extending into the Potomac River from Cole's Point on the Virginia shoreline. These documents consist of the forms used by assessors to record assessments of real properties located in St. Mary's County. The documents maintained by this Office reflect that the Cole's Point restaurant has been consistently assessed by this Office and the St. Mary's County Tax Assessment Office since at least 1961.

4. Exhibit 1 (document MD-MARY-00077) is a genuine and authentic copy of the 1961 assessment form reflecting an assessed value of \$5,800 for the Cole's Point restaurant in 1961.

5. Exhibit 2 (document MD-MARY-00078) is a genuine and authentic copy of an assessment form reflecting an assessed value of \$13,000 for the Cole's Point restaurant in 1967 and 1975, and an assessed value of \$13,850 in 1976. Exhibit 2 further reflects an assessed value of \$14,680 for the restaurant in 1977 and 1978.

6. Exhibit 3 (document MD-MARY-00079) is a genuine and authentic copy of an assessment form reflecting an assessed value of \$29,360 for the Cole's Point restaurant in 1981, \$38,370 in 1982 and 1983, \$51,730 in 1984, \$54,050 in 1987 and 1988, \$62,290 in 1990, \$103,410 in 1993, and \$86,860 in 1996.

7. Exhibit 4 (document MD-MARY-00080) is a genuine and authentic copy of an assessment form reflecting an assessed value of \$85,300 for the Cole's Point restaurant in year 1999 for tax years 1999, 2000 and 2001. The total assessment in years 1987 through the

present reflects an assessed value of \$1,000 in each year for the land portion of the total assessment.

8. Records previously maintained by this office that pre-date 1961 are either lost or destroyed. However, I have no reason to believe that the practice of assessing the Cole's Point restaurant was any different prior to 1961.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
James W. Spence

Executed on November 29, 2001.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\*      No. 129 Original

Plaintiff,

\*      Before Special Master

vs.

\*      Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF RICHARD VOORHAAR**

Being more than 18 years of age and competent to testify, Richard Voorhaar states as follows:

1.      I am Richard Voorhaar, Sheriff of St. Mary's County, Maryland. I am a lifetime resident of St. Mary's County. I have served with the Sheriff's Department since 1974, and have served as Sheriff since 1994. Currently, the Department has 220 employees, including 106 sworn deputies. Headquarters is located in Leonardtown, the county seat, and has been so located for many decades.

2.      Within my jurisdiction is a business known as the Cole's Point Tavern. The tavern sits on a pier that projects from the Virginia side of the Potomac River in the town of Cole's Point, Virginia. Although the tavern has a Virginia address, it sits over St. Mary's County waterways, and is subject to Maryland laws, which are enforced by my department.

3.      Crimes at the tavern fall into the general categories of assaults, disorderly conduct and break-ins. Attached as Exhibit 1 is a genuine and authentic copy of a

case file from a typical breaking and entering investigation. In this case, as in all such cases, primary investigative responsibility rested with the St. Mary's County Sheriff's Department. Leads in the case tended to show that the perpetrators were likely Virginia residents. Therefore, Westmoreland County, Virginia authorities performed some of the detective work, and provided the fruits of that work to my Department. Eventually a suspect was arrested in Virginia and charged with a string of Virginia burglaries. He confessed to the Cole's Point Tavern burglary as well. Virginia retains the right to prosecute for the Virginia burglaries. After punishment is served, the suspect may be returned to Maryland for prosecution under Maryland law for crimes committed at the Cole's Point Tavern.

4. My Department also performs regular alcohol enforcement at the Cole's Point Tavern, which consists of ensuring that the proper Maryland liquor licenses are in effect and on display, after hours inspections to enforce Maryland liquor laws, and fire/safety inspections required under Maryland regulations. We also ensure that liquor served at the Tavern has been taxed properly by the State of Maryland.

5. St. Mary's County law enforcement officers reach the Cole's Point Tavern either by boat, which takes 20 minutes, or by vehicle, which takes two hours by bridge. The law enforcement functions described in this Affidavit have been so conducted for as long as I can remember.

I declare under penalty of perjury that the foregoing is true and correct.

/s/  
Richard Voorhaar

11/28/01  
Date

**IN THE  
SUPREME COURT OF THE UNITED STATES**

COMMONWEALTH  
OF VIRGINIA,

\*

No. 129 Original

Plaintiff,

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Before Special Master

v.

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Ralph I. Lancaster, Jr.

STATE OF  
MARYLAND,

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Defendant.

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**DECLARATION OF MICHAEL WILLIAMS**

Being more than 18 years of age and competent to testify, Michael Williams states as follows:

1. I am the Sales/Agent Administration Manager at the Maryland State Lottery Agency ("Maryland Lottery"), an independent State agency that promotes gaming products to generate revenue for the State. The Maryland Lottery began operating in 1973. The Maryland Lottery offers its various product lines for sale to the public by means of Lottery agents, which are retail service establishments that are licensed by the Maryland Lottery. The Maryland Lottery's agents are monitored and supervised by field representatives, who are Maryland Lottery employees that are responsible for providing frontline communication with the Lottery's agent network.

2. I have been the Sales/Agent Administration Manager since 1994. My duties include overseeing the Lottery agent licensing process. I was a Regional Manager from 1988 to 1994. In this position, I supervised Maryland Lottery field representatives or Lottery

specialists to ensure that the Maryland Lottery agent applications were processed in a timely fashion without compromising Lottery policies and procedures. I was employed as a Maryland Lottery field representative from 1974 to 1988. As a field representative, I ensured that Lottery agents properly completed sales and other reports, assisted agents in maximizing their Lottery sales by furnishing them with signs and providing information about upcoming games and promotions, and monitored agents for compliance with the Maryland Lottery's rules and regulations.

3. As I stated above, Maryland Lottery agents are retail service establishments that obtain a license from the Maryland Lottery that allows them to sell Lottery products to the public. As part of the licensing process, the Maryland Lottery subjects all license applicants to financial and criminal background checks. To obtain a license, retail businesses must meet and comply with a number of requirements. For example, newly approved retail businesses and agents with Agent Plus status, or those with the approval to cash tickets up to five thousand dollars, are required to establish and maintain separate bank accounts for Lottery activities, provide evidence of credit worthiness and financial stability, agree to abide by and sign the Maryland Lottery's rules and regulations. Lottery agents are also monitored and supervised by the Lottery's field representatives.

4. Riverboat on the Potomac, 301 Beach Terrace, Colonial Beach, Virginia, has been a Maryland Lottery agent and subject to the regulatory authority of the Maryland Lottery since February 1992. Prior to that time, the facility was a licensed Maryland Lottery agent operating under the names of Reno on the Potomac and Little Reno. On July 29, 1976, the Maryland Lottery introduced its online games. Shortly, thereafter Little Reno, which had already been operating as a licensed agent selling pre-printed Maryland Lottery tickets, began



offering online Lottery activities. I believe that Little Reno was one of the first agents licensed by the Maryland Lottery in 1973.

5. Approximately fifteen years ago, I visited this facility when it was known as Little Reno. The facility extends from the Virginia shore of the Potomac River out into the river, and the only way to access the facility by dry land is to travel to Colonial Beach, Virginia. The Maryland side of the facility is situated on pilings in the Potomac River, and is located in Charles County, Maryland. At the time of my visit, there was a line on the floor a few feet from the entrance of the facility, which served as the boundary between the Virginia and Maryland sides of the facility. The Maryland Lottery terminals are situated on the Maryland side of the facility, and all Maryland Lottery activities have always taken place in this area.

6. As part of my duties as the Sales/Agent Administration Manager, I am also a custodian of agent license and sales records. Exhibits 1 to 29 attached to this Declaration are genuine and authentic copies of documents created by or received by the Maryland Lottery in the usual course of its business, and maintained in the files of the Maryland Lottery in accordance with its usual practice.

7. The Maryland Lottery's records relating to Riverboat on the Potomac reflect the steps that Riverboat on the Potomac was required to take in order to become a licensed Maryland Lottery agent, including financial and criminal background checks. Exhibit 1 is a genuine and authentic copy of the original 1991 application for Riverboat on the Potomac, Inc., in which the new owners of this facility sought to be designated as Lottery Agents so as to continue the sale of Maryland Lottery products at that location. Exhibit 2 is a genuine and authentic copy of a January 1992 "On-Line Terminal Survey," which

evaluates Riverboat on the Potomac for continued operation as a Lottery Agent and notes that "[t]his has been a licensed Lottery location on and off since 1976." Exhibit 3 is a genuine and authentic copy of the Maryland Lottery's requests for criminal background checks on the owners of Riverboat on the Potomac, Inc. Exhibit 4 is a genuine and authentic copy of the check-off form used by the Maryland Lottery in evaluating this application by Riverboat on the Potomac, Inc., which details the steps followed in the evaluation, including the receipt and evaluation of financial statements.

8. In order to become and remain a licensed Maryland Lottery agent, the owners of Riverboat on the Potomac were and are required to abide by the Maryland Lottery's rules and regulations. Exhibit 5 is a genuine and authentic copy of an acknowledgement by the owners of Riverboat on the Potomac, Inc. that they have received and will abide by the Maryland Lottery's rules and regulations and that they will operate their business during the hours approved by the Maryland Lottery. Exhibit 6 is a genuine and authentic copy of the agreement by the new owners of Riverboat on the Potomac, Inc. that, in consideration for continuing to allow the establishment to serve as a Maryland Lottery agent, they would assume responsibility to pay all winning instant game tickets in the amount of \$25 or less that had been sold by the establishment's owners before February 1992.

9. The owners of Riverboat on the Potomac were also required to provide the Maryland Lottery with guaranties and security in order to obtain a license. Exhibit 7 is a genuine and authentic copy of the February 6, 1992 letter informing the new owners of Riverboat on the Potomac that they were authorized to continue operating the pre-existing Maryland Lottery terminal, subject to the filing of a \$20,000 bond, a personal guaranty, and the completion of mandatory training. Exhibit 8 is a genuine and authentic copy of the personal

guaranty required of the owners of Riverboat on the Potomac, Inc. to pay any indebtedness incurred by Riverboat on the Potomac, Inc. to the Maryland Lottery. Exhibit 9 is a genuine and authentic copy of the \$20,000 bond provided by Riverboat on the Potomac, Inc. in February 1992.

10. The Maryland Lottery's files relating to Riverboat on the Potomac also reflect the Maryland Lottery's monitoring and evaluation of Riverboat on the Potomac's performance as a Maryland Lottery agent. For example, Exhibit 10 is a genuine and authentic copy of the report of an inspection of Riverboat on the Potomac, Inc. performed by the Maryland Lottery 6 months after the current owners were designated as Lottery Agents.

11. The file reflects that, in December 1992 and March 1993, Riverboat on the Potomac sought to expand its operations and applied to become a "Special Agent" authorized to operate the Maryland Lottery game "Keno," and that the Maryland Lottery again conducted an extensive review of Riverboat on the Potomac before granting this request. Exhibit 11 is a genuine and authentic copy of the Maryland Lottery's checklists used to evaluate Riverboat on the Potomac's applications to operate Keno in December 1992 and March 1993, which reflect the Maryland Lottery's receipt and review of financial statements submitted by Riverboat on the Potomac, and conduct of a marketing survey. Exhibit 12 is a genuine and authentic copy of the forms signed by the owners of Riverboat on the Potomac in December 1992 and March 1993, agreeing to abide by Maryland Lottery rules and regulations and operate the establishment in accordance with approved hours, in order to become special agents.

12. The Maryland Lottery's files reflect that the owners of Riverboat on the Potomac were again required to provide the Maryland Lottery with guaranties and

security in order to become a Special Agent. Exhibit 13 is a genuine and authentic copy of approval letters from the Maryland Lottery dated December 1992 and March 1993, appointing Riverboat on the Potomac as a Special Agent licensed to sell Keno, subject to a \$15,000 bond, personal guaranties, security deposit, security clearance, and mandatory training. Exhibit 14 is a genuine and authentic copy of a \$10,000 bond provided by Riverboat on the Potomac in January 1993 in order to operate the "Keno" game. Exhibit 15 is a genuine and authentic copy of an additional \$5,000 bond provided by Riverboat on the Potomac in March 1993. Exhibit 16 is a genuine and authentic copy of personal guaranties provided by the owners of Riverboat on the Potomac in January 1993 and March 1993 in order to operate Keno.

13. The Maryland Lottery's files reflect that, in November and December 1993, Riverboat on the Potomac again sought to expand its Maryland Lottery operations, and requested and received additional Maryland Lottery terminals, after the Maryland Lottery conducted another evaluation of Riverboat on the Potomac and its owners. Exhibit 17 is a genuine and authentic copy of November and December 1993 notes from the field representative for the Riverboat on the Potomac noting that the establishment would like to place additional terminals on the location, which "would help agent complete with the Virginia Lottery" and because Maryland off-track betting would begin in January 1994 and would likely generate additional floor traffic. Exhibit 18 is a genuine and authentic copy of three "On-Line Agent Surveys" completed at the same time in December 1993, recommending that Riverboat on the Potomac be approved to operate seven lottery terminals. Exhibit 19 is a genuine and authentic copy of the check off forms used by the Maryland Lottery in evaluating this request for additional terminals, showing that Riverboat on the Potomac's financial information was once again received and reviewed. Exhibit 20 is a genuine and authentic copy

of the Maryland Lottery's December 23, 1993 approval letters for the fifth, sixth and seventh terminals at Riverboat on the Potomac.

14. According to these records, in 1998, after another evaluation by the Maryland Lottery, Riverboat on the Potomac became an "Agent Plus" location, which allowed it to cash winning on-line lottery tickets up to \$5,000 and instant lottery tickets up to \$600, and required the provision of 20 different instant games on sale at all times. Exhibit 21 is a genuine and authentic copy of the Riverboat on the Potomac's 1997 application for this designation. Exhibit 22 is a genuine and authentic copy of the check-off form used by the Maryland Lottery in evaluating Riverboat on the Potomac's application, which reflects the Maryland Lottery's receipt and evaluation of financial statements, credit reports, and bank and trade references. Exhibit 23 is a genuine and authentic copy of the Maryland Lottery's review sheet completed following this review and summarizing the results. Exhibit 24 is a genuine and authentic copy of the 1997 authorizations by the owners of Riverboat on the Potomac, Inc. for another criminal background check. Exhibit 25 is a genuine and authentic copy of the Maryland Lottery's July 6, 1998 approval of Riverboat on the Potomac as an Agent Plus Location. Exhibit 26 is a genuine and authentic copy of the August 6, 1998 personal guaranty submitted by the owners of Riverboat on the Potomac. Exhibit 27 is a genuine and authentic copy of a letter from the Maryland Lottery informing Riverboat on the Potomac that, as an Agent Plus Location, it is required to maintain a separate business checking account for all Lottery transactions, and requiring submission of an affidavit to that effect.

15. The Maryland Lottery's files relating to Riverboat on the Potomac also demonstrate other ongoing requirements that Riverboat on the Potomac has been required to meet in order to retain its Maryland Lottery license. For example, Exhibit 28 is a genuine and

authentic copy of a certification by the owners of Riverboat on the Potomac that it carries adequate workers' compensation insurance as required by Maryland State law. Exhibit 29 is a genuine and authentic copy of a certification by the owners of Riverboat on the Potomac that it is accessible to persons with physical disabilities.

I declare under penalty of perjury that the forgoing is true and correct.

/s/  
Michael Williams

Executed on November 27, 2001.

COMMONWEALTH OF VIRGINIA



Office of the Attorney General  
Supreme Court Building  
1101 East Broad Street  
Richmond, Virginia 23219  
804-786-2071

July 29, 1977

Mr. R. V. Davis  
Executive Secretary  
State Water Control Board  
Post Office Box 11143  
Richmond, Virginia 23230

Re: Potomac River Riparian Rights

Dear Mr. Davis:

After the meeting of the State Water Study Commission on July 27, 1977, you asked for my opinion on the following questions:

1. Does the State Water Control Board, or any other state agency, have authority to issue permits for allocating the waters of the Potomac River?
2. Does the Potomac River Low Flow Agreement signed by Virginia, Maryland, and the Washington Suburban Sanitary District, but not yet signed by the Corps of Engineers, diminish Virginia's riparian rights in the Potomac River?

In answer to the first question, I know of no authority for the State Water Control Board, or any other state agency, to require permits for the use of the waters of the Potomac River or to allocate such waters.

To answer the second question, some background is necessary. A number of years ago the state of Maryland enacted a permit system for the use of all waters within Maryland. See §§ 8-801, et seq. of the Natural Resources Article of the Annotated Code of Maryland. The state of Maryland owns the entire Potomac River bed south to a line established by the Mathews-Nelson Survey: This line follows the low water mark of the south shore of the Potomac, but runs from headland to headland rather than following the indentations of the coast. Thus Virginia's ownership of the bed of the Potomac River extends only to the low water mark except for certain bays. Virginia also has full riparian rights to use of the Potomac River. See Article VII, § 1, of the Potomac River Compact with Maryland, § 28.1-203 of the Code of Virginia (1950), as amended.

Maryland asserts that because it owns the bed of the Potomac River it has the authority to require anyone taking water from the Potomac River to secure a Maryland permit. Under the concept of riparian law, any riparian owner can make a reasonable use of the river. To the extent that Maryland requires permits of Virginia riparians, it is restricting the normal exercise of their riparian rights and thus infringing on Virginia's riparian rights.

While the language of the low flow agreement itself is ambiguous as to the relationship of the Maryland permit program to the Virginia riparian owners, the fact that the county of Fairfax has accepted a permit from Maryland and this action has not been challenged by the Commonwealth, and that the Low Flow Agreement was drafted with full knowledge of that fact, could lead to an



inference that the Commonwealth has acquiesced in the Maryland permit program. It could thus be said that Virginia acquiesced to the diminution of her riparian rights to the extent of the Maryland permit program.

It should be noted that acquiescence to the infringement of one's right can lead to its loss. The Black-Jenkins boundary arbitration of 1877 held that length of time which raises a right by prescription in private parties also raises such a presumption in favor of States. It awarded Virginia title to the south shores of the Potomac River to the low water line on the basis that Virginia had exercised dominion to the low water mark as if she owned it, and thus acquired rights to it through prescription. This rationale was followed by the Supreme Court in Maryland v. West Virginia, 217 U.S. 577 (1910).

To avoid any inference of Virginia's acquiescence to a diminution of its riparian rights, the Low Flow Agreement should be amended. The amendment could be a simple statement that "nothing in this agreement shall be deemed to in any way affect riparian rights to the Potomac River except as explicitly provided." The insertion of the wording from the savings clause (§ 181(c)) of the Water Resources Development Act of 1976 which was proposed in the response to the counteroffer from the Corps of Engineers could also be used to achieve the same effect. That wording reads as follows:

Except as expressly provided herein, nothing in this Agreement shall alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, the Commonwealth of Virginia, or any political subdivision thereof, or the District of Columbia, or authority of the Corps of Engineers existing on the date of this Agreement relative to the appropriation of water from, or the use of, the Potomac River.

In my opinion, however, such an amendment to the Low Flow Agreement, unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, in time by prescription, authority to subject Virginia's riparian rights to the Maryland permit system. Since some permit system for the Potomac is probably needed, the Board should consider recommending that the General Assembly assert Virginia's continued intent to claim its riparian rights to the Potomac by enacting and enforcing its own permit system.

With kindest regards, I remain

Very truly yours,

/s/

Frederick S. Fisher  
Assistant Attorney General

FSF:lgw

MEMORANDUM

TO: Members of the State Water Control Board

FROM: Frederick S. Fisher

RE: Letter to Maryland Concerning the Permit  
Program for the Potomac River

DATE: August 4, 1977

Attached is a proposed letter to Mr. Herbert Sachs, the Maryland Director of the Water Resources, which I drafted pursuant to the agreement reached in the conference call of August 2, 1977. As discussed then, because the Low Flow Agreement recognizes the Maryland permit system and was drafted with full knowledge that Fairfax County had submitted thereto, it provides some evidence that Virginia acquiesces in Maryland's exercise of authority over Virginia's use of the Potomac, although admittedly there is language in the Agreement which could be taken as an indication to the contrary. I suggested that the Agreement be amended to state that it was not to be considered as a waiver of any riparian rights except as specifically stated. For various tactical and strategic reasons, the members of the Board on the conference call decided not to amend the Agreement, but rather to attack the problem of Virginia's seeming acquiescence by means of the attached letter.

The background of this problem is as follows:

Maryland owns the bed of the Potomac River south to a line running along the low water mark on the Potomac's south shore. Virginia, under various compacts, retains full riparian rights to use the River. Some years ago Maryland enacted a Water Resource Management statute which

requires anyone withdrawing any Maryland waters, including the Potomac, to secure a permit. Requiring a riparian owner to get a permit to exercise his right to make a reasonable use of a river is a restriction on his riparian rights. There is no question about Maryland's authority to restrict the riparian rights of its own citizens. However, there is substantial question as to whether Maryland has any authority to restrict the riparian rights of Virginians.

For some time no Virginia locality was interested in using the Potomac River. In recent years, however, the county of Fairfax and the Town of Leesburg have both secured a Maryland permit.

In my opinion, under the compacts giving Virginia riparian rights in the Potomac River, Maryland does not have any authority to require permits from Virginia riparians. But Maryland is exercising that right. If Maryland continues to require permits of Virginia localities, and if its permit program is not challenged by Virginia, in time Maryland will acquire by prescription the right to require a permit from Virginia riparian users. Prescription has worked along the Potomac before. Although Maryland was originally granted the bed of the Potomac River to the high water mark along the south shore, Virginia acquire the ownership of the shore down to the low water mark by prescription, since throughout history Virginians exercised jurisdiction over that strip of land as it they owned it. See Maryland v. West Virginia, 217 U.S. 577 (1910).

The purpose of this letter is to provide evidence in a written document that Virginia is aware of its rights and intends to protect them. In the attached letter, the State Water Control Board, speaking for the Commonwealth, authorizes Maryland to operate a permit program on behalf of Virginia, in effect as its agent. The Letter also serves notice that at some point Virginia may wish to

operate its own permit system for the use of Potomac water in Virginia.

Because the Water Board lacks authority to require permits itself, there is a good question how it could grant this authority to others. However, under § 62.1-44.41 of the Code of Virginia (1950), as amended, the Board is authorized to speak for the State:

In all matters directly related to conservation or use of the State's water resources, except as otherwise provided by law, the Board is authorized to speak and act for the State in all relations with the federal government or with the interstate agencies or authorities directly concerning conservation or use of the State's water resources.

In actuality the Board, speaking on behalf of the Commonwealth, is agreeing to allow Maryland to issue permits to those Virginia riparians who voluntarily submit to the Maryland system. Since we believe that Maryland cannot compel Virginia riparians to get a permit, any permit issued by Maryland must be voluntarily accepted by the Virginia applicant. However, there is some question about how voluntary such acceptance is, since the alternative would be exposure to legal challenges by the state of Maryland. For this reason, Virginia localities have preferred to get a permit rather than expose themselves to the delay and uncertainty of litigation.

It appears that a permit system is needed for the Potomac River, that Maryland has a workable permit system, and that Maryland's system is being administered in a way which is fair to Virginians. For Virginia to set up its own permit system just for the Potomac River would probably be costly, and would require an agreement as to what share of the flow of the Potomac river each State

was entitled to use. Failing agreement, allocation of the Potomac's waters would have to be made by the courts.

It may very well be that a continuation of the present Maryland permit system is in the best interest of Virginia until Virginia adopts a statewide system, provided it does not compromise any of Virginia's rights to the water. If, after study, it is concluded that the Maryland permit system is the best way to go, a more formal act by the General Assembly may be desirable. Such an act might specify that Maryland could issue permits on behalf of Virginia until further action by the General Assembly.

FSF:lgw  
Attachment







