129

No. __, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

APPENDIX

MARK L. EARLEY
Attorney General
WILLIAM H. HURD
Solicitor General
ROBERT C. METCALF
Deputy Attorney General
ROGER L. CHAFFE
Senior Assistant Attorney General
FREDERICK S. FISHER*
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-3870

* *Counsel of Record* *Attorneys for Plaintiff*

February 18, 2000

157871 Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF APPENDICES

Page

Appendix A — Compact of 1785 (1786 Md. Laws c. 1) 1a

Appendix B — 1874 Md. Acts c. 247, Designating Arbitrators to Ascertain and Fix the Boundary Between the States of Virginia and Maryland 9a

Appendix C — Opinion of Arbitrators — 1877 Opinion Regarding Boundary Line Between Virginia and Maryland 11a

Appendix D — Act of March 3, 1879, ch. 196, 20 Stat. 481, Providing Congress' Consent to The Black-Jenkins Award of 1877 ..... 45a

Appendix E — Report of the Commissioners to The Governors of Maryland and Virginia, *The Potomac River Compact Of 1958*, reprinted in Virginia House Document No. 22 (1960) 50a

Appendix F — Potomac River Low Flow Allocation Agreement of 1978 ..... 78a

Appendix G — Water Supply Coordination Agreement of 1982 ..... 107a

Appendix H — Letter from Bruce F. Williams to Martin B. Sultan Dated January 31, 1997 ..... 124a

Appendices

Page

Appendix I — Letter from Del. Heller to Sec. Nishida Dated May 8, 1997 ..... 127a

Appendix J — Letter from Del. Cryor to Sec. Nishida Dated May 19, 1997 ..... 128a

Appendix K — Letter from Virginia Commissioner of Health Randolph Gordon to Charlie Crowder Dated October 29, 1997 ..... 130a

Appendix L — Letter from J.L. Hearn to Bruce F. Williams Dated December 10, 1997 ..... 132a

Appendix M — Letter from Governor Parris Glendening to John Mathwin Dated February 9, 1998 ..... 134a

Appendix N — Stipulations of the Parties Dated October 9, 1998 ..... 136a

Appendix O — Stipulation of Parties Concerning Section 401 Water Quality Certification Dated November 1998 ..... 139a

Appendix P — Opinion of Final Decision Maker Dated June 7, 1999 ..... 141a

Appendix Q — Letter from Fred C. Morin to Jane T. Nishida Dated September 23, 1999 ..... 170a

Appendices

Page

Appendix R — Letter from J.L. Hearn to Fred C. Morin Dated October 29, 1999 ..... 174a

Appendix S — Letter from Mark L. Earley to J. Joseph Curran, Jr. Dated November 30, 1999 ..... 176a

Appendix T — Letter from J. Joseph Curran to Mark L. Earley Dated January 4, 2000 ..... 180a

Appendix U — Maryland House Bill 395 (Introduced February 3, 2000) 183a

Appendix V — Maryland Senate Bill 729 (Introduced February 4, 2000) 187a

APPENDIX A — COMPACT OF 1785 (1786 Md. Laws c. 1)

At a SESSION of the GENERAL ASSEMBLY of MARYLAND, begun and held at the CITY of ANNAPOLIS, on Monday, the 7th of November, in the year of our Lord 1785, and ended the 12th day of March, 1786, the following laws were enacted,

WILLIAM SMALLWOOD, ESQUIRE, GOVERNOR.

CHAP. I.

An ACT to approve, confirm and ratify, the compact made by the commissioners appointed by the general assembly of the commonwealth of Virginia, and the commissioners appointed by this state, to regulate and settle the jurisdiction and navigation of Patowmack and Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia. Lib. TBH. No. A. vol. 584.

WHEREAS, at a meeting of the commissioners appointed by the general assemblies of the commonwealth of Virginia, and the state of Maryland, for forming a compact between the two states, to regulate and settle the jurisdiction and navigation of Patowmack, Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia, to wit: George Mason and Alexander Henderson, Esquires, on the part of the commonwealth of Virginia, and Daniel of Saint Thomas Jenifer, Thomas Stone and Samuel Chase, Esquires; on the part of the state of Maryland, at

Mount Vernon, in Virginia, on the twenty-eighth day of March, in the year one thousand, seven hundred and eighty-five, the following compact was mutually agreed to by the said commissioners. First, The commonwealth of Virginia disclaims all right to impose any toll; duty or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be for ever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of its citizens, or carrying on commerce to or from the said state, or with any of its citizens, and that any such vessel, inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also that the before-mentioned parts of Chesapeake and Pocomoke river be free for the navigation of vessels from one port of the state of Maryland to another. Second, The state of Maryland agrees, that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said Commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty, or any other charge. Third, Vessels of war, the property of either state, shall not be subject to the payment of any port duty, or other charge. Fourth, Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and

having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges. Fifth, All merchant vessels (except such as are described in the fourth article) navigating the river Patowmack, shall enter and clear at some naval-office on the said river in one or both states, according to the laws of the state in which the entry shall be made; and where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state, only in proportion to the commodities carried to or taken from such state. Sixth, The river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland. Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seanes on the shores of the other. Eighth, All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and navigation thereof, or of the

river Pocomoke within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states. Ninth, Light-houses, beacons, buoys or other necessary signals, shall be erected, fixed and maintained, upon Chesapeake bay, between the sea and the mouths of the rivers Patowmack and Pocomoke, and upon the river Patowmack, at expense of both states; if upon Patowmack river, at the joint and equal charge of both states, and if upon the before-mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts, of such expense, and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode and plans, for erecting and fixing light-houses, buoys, beacons, and other signals, as aforesaid, both states shall, upon the application of either to the other, appoint an equal number of commissioners, not less than three or more than five from each state, to meet at such times and places as the said commissioners, or a major part of them, shall judge fit, to fix upon the proper places, mode and plans, for erecting and fixing such light-houses, beacons, or other signals, and report the same, with an estimate of the expense, to the legislatures of both states, for their approbation. Tenth, All piracies, crimes or offences, committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Patowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful, and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two states upon the said river is doubtful, by any persons not citizens of the

commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offences. And all piracies, crimes and offences, committed on the before-mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offences. All piracies, crimes and offences, committed on the said parts of Chesapeake bay, and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences. And all piracies, crimes and offences, committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Patowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river in every respect, except in the case of piracies, crimes and offences, committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought; and if the inhabitants of either state shall commit any violence, injury or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate, of the state where the offense shall have been committed, having jurisdiction thereof, may enter the

appearance of such person, and proceed to trial and judgment in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of offender, both in the state where the offender shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment properly authenticated being produced to any court of magistrate of the state where such offender may reside, having jurisdiction within the state or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment, in the same manner and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited. Eleventh, Any vessel entering in any port on the river Patowmack, may be libelled or attached for debt by process from the state in which such vessel entered; and if the commercial regulations of either state shall be violated by any person carrying on commerce in Patowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized by process from the state whose laws are offended, in order for trial; and if any person shall fly from justice in a civil or criminal case, or shall attempt to defraud creditors, by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers upon any person, or property of any person, not a

citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury having been by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court or magistrate having jurisdiction, being served by a proper officer of the county where such citizen shall reside. Twelfth, The citizens of either state having lands in the other, shall have full liberty to transport to their own state the produce of such lands, or to remove their effects, free from any duty, tax or charge whatsoever, for the liberty to remove such produce or effects. Thirteenth, These articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed or altered by either without the consent of the other; And whereas this general assembly are of opinion, that the said compact is made on just and mutual principles, for the true interest of both governments, and if executed with good faith, will perpetuate harmony, friendship and good offices, between the two states, so essential to the prosperity and happiness of their people;

II. BE IT ENACTED, *by the General Assembly of Maryland*, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the commonwealth of Virginia, thereupon, and

immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this state and the citizens thereof, and shall be for ever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this state is hereby solemnly pledged and engaged to the general assembly of the commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by this legislature of this government, without the consent of the government of Virginia.

APPENDIX B — 1874 Md. Acts c. 247, DESIGNATING ARBITRATORS TO ASCERTAIN AND FIX THE BOUNDARY BETWEEN THE STATES OF VIRGINIA AND MARYLAND

AN ACT to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland.

WHEREAS, a controversy exists as to the true line of the boundary between the States of Virginia and Maryland; and,

WHEREAS, the State of Virginia, by an act of its General Assembly, entitled an act to designate the arbitrators to ascertain and fix the boundary between the States of Maryland and Virginia, approved on the twenty-eighth day of March, in the year of our Lord, one thousand eight hundred and seventy-four, has declared its willingness to submit the said controversy to arbitration, and to accept as final and conclusive, such award as may be made in the premises; therefore —

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between the said States of Virginia and Maryland, and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe;

and the State of Maryland hereby pledges its faith to accept and abide by the award of said arbitrators in the premises as final and conclusive; provided, however, that neither of the States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said States and the citizens thereof, forever.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake Bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States; and the Governor is hereby requested to forward a copy of this act to the Governor of Virginia.

SEC. 3. *And be it enacted*, That this act shall be in force from its passage.

Approved, April 11th, 1874.

APPENDIX C — OPINION OF ARBITRATORS — 1877 OPINION REGARDING BOUNDARY LINE BETWEEN VIRGINIA AND MARYLAND

The undersigned are requested by the States of Virginia and Maryland to ascertain and determine the true line of boundary between them. Having consented to do this in the capacity of arbitrators, we are about to make our award.

To examine the voluminous evidence, historical, documentary, and oral; to hear with due attention the able and elaborate arguments of counsel on both sides, and to confer fully on the merits and demerits of this ancient controversy, required all the time we bestowed on it.

The death of Governor Graham in the midst of our labors was a great loss to the whole country; but to us it was a special misfortune, for it deprived us suddenly of the industry, the talent, the wise judgment, and the scrupulous integrity upon which we had relied so much. Though these high qualities were fully supplied by his distinguished successor, the vacancy occurring when it did, set back our proceedings nearly to the place of beginning and caused a delay of almost a year.

Our first intention was to make a naked award, without any statement of the grounds upon which it rested; but after more reflection it seemed that the weight of the cause, the dignity of the parties, and the wide differences of opinion, grown inveterate by centuries of hostile discussion, made some explanation of our judgment desirable, if not necessary.

The *charter* of Charles I to Cecilius, Baron of Baltimore, dated June 20th, 1632, gave to the grantee dominion over

the territories described in it, and made him Governor of the colony afterwards planted there, with succession to his heirs at law. These rights, proprietory as well as political, became vested in the State of Maryland at the Revolution. Inasmuch as that State claims *under* the charter, she must claim *according* to it.

Virginia, by her first Constitution, as a free State (June 29th, 1776) disclaimed all rights of property, jurisdiction, and government over territories contained within the charters of Maryland and other adjoining colonies. The force of this solemn acknowledgment is not, in our opinion, diminished by the dissatisfaction which Maryland, as well as other States of the Confederation, afterwards expressed with Virginia's claim to a Northern and Western border, including all lands ceded by France to Great Britain at the pacification of 1763.

Insasmuch as both of the States are bound by the King's charter to Lord Baltimore, and both confess it to be the only original measure of their territory, it becomes a point of the first importance to ascertain what boundaries were assigned to Maryland by that instrument. By what lines was the colony of Maryland divided from those other possessions of the British Crown to which Virginia afterwards succeeded as a result of her independence?

The original patent delivered to Lord Baltimore by the King is irrecoverably lost, and it is denied — at least it is not admitted — that we have an accurate copy. It was registered in the High Court of Chancery when it passed the seal, and an attested transcript from the Rolls Office is produced. It is written in the law Latin of the period to which

it belongs, and many of the words are abbreviated. Another copy nearly, if not exactly, like that from the Rolls, was deposited in the Colonial Office, and thence removed to the British Museum. The latter copy was changed long subsequent to the date of the charter by a person who added some words, and extended others by interlining omitted terminations. This is alleged to have been done for the purpose of making it correspond with the original, which, according to the same allegation, was borrowed from a member of the Calvert family for that purpose. We reject this whole story as apocryphal. The interlineations were unauthorized except by the judgment of the person who wrote them that he was supplying elipses or giving in full the true words meant by the contracted orthography. We are obliged to believe that the patent was enrolled with perfect accuracy. The conclusive presumption of law is that the high and responsible officers charged with that duty did see it performed with all due fidelity. No doubt of this can justly be raised upon the fact that abbreviated words are found in the registry. Why should not these be in the original? Nay, why should we expect them not to be there? That mode of writing was the universal custom of the time. It was used in all legal papers and records as long as the law spoke Latin. A deed in which these abbreviations occurred was not thereby vitiated. What was the harm of writing A.D. for *anno domini*, fi. fa. for *fieri facias*, or ca. sa. for *capias ad satisfaciendum*? *Hered. et assignat.* was as good as *heredibus et assignatus suis*, if all legists understood that one as well as the other was a limitation of the fee to heirs and assigns. Adjectives and substantives without terminations to indicate gender, number, or case did not lose their meaning, and the omission of the concluding syllable might be some advantage to a

conveyancer who was rusty in his syntax. This habit of contracting words, pervades, not only the deeds, but the criminal pleadings of that time. A public accuser, doubtful if the offense he was prosecuting violated two acts of Parliament or only one, charged it as *contra formam statut.*, and read the last word *statuti* or *statutorum*, as the state of the case might require. The defendant's averment of his innocence was recorded as a plea of *non cul.* When the Attorney General reasserted the guilt of the accused and declared his readiness to prove it, he took one Latin and one Norman-French word, truncated them both, and said — *cul. prit.* Even the last and most tragical part of the record in a capital case, the judge's order to hang the prisoner by the neck, was curtly, but very intelligibly written — *sus. per col.*

We are satisfied that the office copy is true; that it is exactly like the original; and that the use of abbreviated words does not impair the validity of the instrument. Moreover, that part of the charter which defines the boundaries of the province speaks, not equivocally, but in terms so clear and apt that the intent is readily perceived. It remains to be seen whether we can apply the description to the subject-matter by laying the lines on the ground. To that end it is necessary to ascertain how the geography of the country was understood by the King and Lord Baltimore at the time when the charter was made.

In the great litigation between Penn and Lord Baltimore, a bill drawn up by Mr. Murray, (afterwards Lord Mansfield,) or by some equity pleader under his immediate direction, avers in substance that Charles I and the ministers whom he

consulted on Lord Baltimore's application had the map of Capt. John Smith before them when the boundaries of the colony were agreed on. This was neither denied nor admitted in the answer of the defendant, who, being third in descent from the applicant, had no personal knowledge about it. But we take the fact to be certainly true, not only because we have the assertion of it by Penn and his very eminent counsel, but because it is well known that Smith's map was the only delineation then extant of that region, and his History of Virginia, to which the map was prefixed, had been before, and continued for a long time afterwards, to be the only source of information concerning its geography. Besides, a comparison of the map with the charter will show by the similarity of names, spelling, &c., that one must have been taken from the other.

The editions of Smith's History, published by himself in 1612 and 1629, have been produced, with the map thereto prefixed. Besides, we have one printed in 1819 by authority of Virginia from the same plate used by Smith himself two hundred years before, and found, by a curious accident, in a promiscuous heap of old metal which had been imported from England to some town in Pennsylvania.

With the charter in one hand and the map in the other it may seem an easy task to run these lines. But there are difficulties still. The map, though a marvellous production, considering how and when it was made, is not perfectly correct. Smith could not see and measure everything for himself, nor always depend upon the observations of others. With his defective instruments he could not get the latitude and longitude truly. He laid down some points and places in

the wrong relation to each other, and some not unimportant to us he left out altogether. There are inaccuracies here and there in the configuration of a coast, the shape of an island, or the course of a river. Unfortunately the style of his *History* is so confused and obscure that it throws no light on the dark parts of the map. As a writer he had great ambition and small capacity. He could give some interest to a narrative of his own adventures, but any kind of description was too much for his powers. There is another trouble: scarcely any of the places marked on Smith's map are now popularly known by the names he gave them. Not only the names, but the places themselves have been much changed. Considerable islands are believed to have been washed away or divided by the force of the waters. Headlands which stretched far out into the bay have disappeared, and the shore is deeply indented where in former times the water line was straight, or curved in the other direction. Add to this a certain amount of human perversity with which the subject was handled in colonial days, and it is not surprising that representatives of the two States have, with the most upright intentions, failed to agree in their views of it. We are to reach, if possible, the truth and very right of the case.

The boundaries of Maryland are described in the charter as beginning at Watkins' Point and running due east to the sea, up the shore of the ocean and the Delaware Bay, to the fortieth degree of latitude; thence westward along that degree to the longitude of the headwater of the Potomac; thence southward to that river, and by it, or one of its banks, to Cinquack on the Chesapeake, and from Cinquack straight across the Bay to the place of beginning. With the eastern and western borders we have nothing to do. Our interest in

the description of the Maryland line begins at the northwest angle, where her territory becomes contiguous to that of Virginia.

That line, on the western side, has been run and marked along its whole course, and at both termini, in a way which commands the acquiescence of both States. No question is raised here about the location of it. But it is necessary to look somewhat narrowly into the call for it which the charter makes, because that may influence our judgment on the lines which run from the head of the river to the sea, every inch of which is contested.

The State of Virginia, through her Commissioners and other public authorities, adhered for many years to her claim for a boundary on the left bank of the Potomac. But the gentlemen who represent her before us expressed with great candor their own opinion that a true interpretation of the King's concession would divide the river between the States by a line running in the middle of it. This latter view they urged upon us with all proper earnestness, and it was opposed with equal zeal by the counsel for Maryland, who contended that the whole river was within the limits of the grant to Lord Baltimore.

When a river is called for as a boundary between two adjacent territories, (whether private property or public domains,) the line runs along the middle thread of the water. A concession of lands *to* a stream does not stop at one bank or cross over to the other, but finds its limit mid-way between them. But a river may be included or excluded, if the parties choose to have it so. If the intent is expressed that the line

shall be upon one bank or another, the mere force of construction cannot put it anywhere else. The natural interpretation is the legal and proper one.

This is too obviously just to need the support of authority. But it was well illustrated by the Supreme Court of the United States, in the case of Ingersoll *v.* Howard, (13 How., 381.) Alabama claimed to the middle of the Chatahoochee by virtue of a boundary described in a concession from Georgia thus: "Beginning *on the western bank* of the Chatahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river and *along the western bank* thereof," &c. The court held that these words established the line of boundary upon the western bank. There is some resemblance between that case and the one under consideration.

The northern boundary of Maryland is by the charter to run westward to the true meridian of the first fountain of the Potomac. That point being ascertained, it shall turn at right angles and run towards (literally against) the south — "*vergendo versus meridiem*" — where? "*ad ulterioram predicti fluminis ripam*" — to the further bank of the aforesaid river. Approaching the river from the north, the further bank is the south bank of course. The description proceeds, without a pause, thus: "*et eam sequendo qua plaga occidentalis ad meridionalem spectat usque ad locum quendam appellatum* Cinquack." Now, the words "*eam sequendo*" are a direction that something shall be followed in running the line between the point already fixed on the south bank of the Potomac, where it rises in the mountain and Cinquack, which is on the same side of the river, near to

its mouth. What shall we follow? Clearly *eam ripam* and clearly not *id flumen*, if we take the grammatical sense of the phrase. Another consideration impresses us a good deal. Lawyers in the reign of Charles I wrote Latin in the idiom of the vernacular tongue. We would naturally expect to see the thought of these parties expressed by words arranged in the English order, thus: *ad ulterioram ripam predicti fluminis et sequendo eam*. The other and more classical collocation was not adopted for its euphony, but for the sake of precision. It brought *ripam* and *eam* into close juxtaposition, and made the antecession so immediate that it could not be mistaken. The interjected phrase, "*qua plaga occidentalis ad meridionalem spectat*," has had its share of the minute verbal criticism bestowed upon the whole document; but we see nothing in it except an attempt (perhaps not very successful) to describe the aspect of the Western Shore, where it turns to the south. Certainly there is nothing there which requires the line to leave the river bank. Apart from all this, it looks utterly improbable that the two *termini* of this line should both have been fixed on the south side of the river without a purpose to put the line itself on the same side. The intent of the charter is manifest all through to include the whole river within Lord Baltimore's grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*.

For these reasons we conclude that the charter line was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth and "*usque ad locum quendam appellatum Cinquack*."

Appendix C

Where is the place called Cinquack? It must have had a certain degree of importance in Smith's time as a landing place, a village, or the residence of some aboriginal chief. But there is now no visible vestige of it. Even its name has perished from the memory of living men. Nevertheless, the place where it once was can be easily found. The charter describes it as "*prope fluminis ostium*" — near the mouth of the river; and Smith has marked it on his map about six miles south of the place where the river joins the bay. This point was no doubt chosen as the terminus of the long river line, because it was the only place near the mouth of the Potomac, on that side, to which Smith's map gave a name; and it furnishes one among many circumstantial proofs that no other map was consulted in drafting the charter. Having found this corner, it becomes our duty to trace the lines which lead us thence over the bay and across the eastern shore to the sea.

From Cinquack to the ocean the charter gives only two lines. One, starting at Cinquack, goes straight to Watkins' Point, the other runs from Watkins' Point due east to the sea shore. There will be no possible mistake about these lines if we can but find out the precise situation of Watkins' Point.

This point being the commencement and closing place of the boundary is twice named, and once its locality is given with reference to other objects. It is described as lying "*juxta sinum predictum prope flumen de Wighco*;" that is to say, on (or close to) the aforesaid bay (the Chesapeake) and near the river Wighco. Looking at Smith's map we find a cape extending southwestwardly from the mainland of the eastern shore. This cape is called Watkins' Point by Smith himself on his map, and he has marked the waters on one side

Chesapeack Bay, and on the other *Wighco flumen*. Turning to the modern maps, and especially to those of the Coast Survey, where everything is measured with fractional accuracy, we find the same point of land laid down, not quite in the same latitute nor delineated with exactly the same shape, but bordered by the same waters, and with no variance which makes its identity at all doubtful. It is at present the extreme southwestern point of Somerset county in Maryland at Cedar Straits, *juxta* the Chesapeake and *prope* the Pocomoke, which is now the name for Wighco. Being the Watkins' Point of Smith's map, it is the Watkins' Point of the charter.

This conclusion appears to be inevitable from the premises stated; but it does not receive universal assent. We must therefore notice the principal grounds on which its correctness is impugned.

In the first place, the fundamental fact is denied that Smith by his own map affixed the name of *Watkins' Point* to the headland in question. In other words, it is alleged, that though the point is laid down and the name written in proximity to it, the one does not apply to the other. Let the map speak for itself. An inspection of it will show that all the names of such points are written in the same way. Nor is there any other point to which it can with reasonable propriety be referred.

The map has been uniformly read as we read it. Lord Baltimore showed how he understood it. In 1635, only three years after the date of his charter, he printed what he called a "Relation of Maryland," and prefixed to it a map on which

Appendix C

Watkins' Point is laid down at Cedar Straits, with the beginning and closing lines of his boundary running from and to it. It is not likely that he could be mistaken, nor is it supposed that he fraudulently misstated the fact, and he was not contradicted by the ministers of the Crown or by anybody interested in the Virginia plantation.

In 1670 Augustin Herrman, the Bohemian, published a map fuller than the previous ones, and there we have Watkins' Point at Cedar Straits very conspicuously marked, and the two lines closing at its southern end. What makes this stronger is that in 1668 the line between the colonies had been marked east of the Pocomoke by Calvert and Scarborough on a latitude considerably higher than an eastern line from Watkins' Point; but Herrman considered Watkins' Point so definitely fixed, and the call for a straight eastern line thence to the ocean so over-ruling, that he assumed the coincidence of the Scarborough line with his own, and so laid it down.

In the map of Peter Jefferson and Joshua Fry, of which a French copy was engraved and printed at Paris in 1755 and a second English edition at London in 1775, dedicated by the publishers to the Lords Commissioners of Trade and Plantations, we find Watkins' Point unmistakably laid down at the mouth of the Pocomoke, with the Scarborough and Calvert line from the sea to the Pocomoke so drawn that a westward extension of it would strike exactly or very nearly that place.

Mr. Thomas Jefferson published his Notes on Virginia in 1787, with a map, on which the strongly-marked boundary

runs to the ocean by an East line from Watkins' Point at Cedar Straits; and he, like Herrman and the others, took it for granted that this, and no other, was the line marked by Scarborough and Calvert.

Mitchell's map (1750-1755) bears similar testimony to the situation of Watkins' Point. So do several others of the last century and many of more recent times.

It is useless to particularize more authorities like these. Let it be enough to say that all geographers for two centuries and a half have understood Smith's map as calling what is now the Southern extremity of Somerset County Watkins' Point; nor is it known otherwise in the general speech of the country. Smith's designation has adhered to it through all changes. If that be not its true name, it never had any name at all.

But the fact rests on stronger proof than that. It is established by the uniform and universal consent of both States and all their people. Maryland steadily claimed it as her actual border, and Virginia never practically denied the claim by taking territory immediately above it. Eastward and Westward, where the lines were invisible, both parties made mistakes. But Watkins' Point or the territory near it was not debatable ground. All men, except perhaps Col. Scarborough, recognized and respected the great landmark when they came within sight of it.

But even that is not all. In 1785 some of the most eminent men of the two States came together at Mount Vernon to arrange the difficulties between them. Standing face to face,

those commissioners concurred in saying that Watkins' Point was the boundary mark to which the line from the Western shore should run; and they described its situation very unequivocally when they spoke of it as "Watkins' Point, near the mouth of the Pocomoke river." Remembering that this compact was drawn up with most conscientious care, agreed to after cautious examination, ratified by the Legislatures of both States, rigidly adhered to by all parties ever since, and still regarded as of such sacred obligation that all power to touch it is withheld from us, we feel ourselves literally unable to fix the Watkins' Point of the charter anywhere else than at the place then referred to as the true one.

It is suggested that the charter could not have meant the point at Cedar Straits, because it is called a *promontory*, which implies high land, whereas this is a dead level, rising but slightly above the waters on either side. That argument is easily disposed of. The map did not indicate whether the land was high or low, and therefore care was taken to employ two alternative terms, of which one would surely fit the case if the other would not. The charter says that the beginning line shall run east to the ocean "*a promontorio* SIVE CAPITE TERRE *vocato* Watkins' Point;" from the promontory *or* headland. The same abundant caution is observed again when the point comes to be mentioned as the terminus of the closing line, which is required to run "*per lineam brevissimam usque ad predictum promontorium* SIVE LOCUM *vocatum* Watkins' Point." Thus the controlling call of the charter is for Watkins' Point, by its given name, whether it be a high promontory or a low headland, or merely a *place* whose character is not properly signified by either word.

Appendix C

We proceed to another objection. Smith, in his account of the explorations made by himself and others with him, says, in effect, that they landed at divers places mentioned, (among others Watkins' Point,) and at all those places marked trees with crosses, as "a notice to any, Englishmen had been there." Now there are not, and probably never were, trees capable of being so marked on the Watkins' Point which lies at Cedar Straits; therefore it is argued that Watkins' Point is not Watkins' Point. Those who think this deduction legitimate would remove the point in question from the place where Smith puts it on his map, where all geographers have placed it, where the charter describes it to be, and where by the general consent it is, rather than believe that Smith, in his confused way of writing, exaggerated the truth or committed an error about so unimportant a matter as that of marking trees at *all* points where he landed.

It is alleged that another place, higher up the shore and near to the mouth of the Annamessex, is the true Watkins' Point of the charter. There is (or rather there was) a point there of considerable magnitude and some elevation, which has now entirely disappeared. Smith noted it as a triangular extension of the mainland into the bay; in 1665 persons, who had then recently seen it, described it as "a small spiral point," whatever that may mean; and later evidence shows that there was a peach orchard upon it. In a sworn affidavit of Captain Jones, used in 1665 by Virginia, it is referred to as "a small point described on Capt. Smith's map without a name." Why should we suppose this to be the place called for in the charter as Watkins' Point? It was not so nominated on the map, or anywhere else. Smith, so far from ever speaking or writing about it as Watkins' Point, gave it another and a different

name. Dr. Russell, who was with him when he made his explorations, says that it was called Point Ployer, "in honour of that most honorable house of Monsay, in Brittaine, that in an extreme extremity once relieved our Captaine." Can anything be more complete than the failure of this effort to substitute the place *called* Point Ployer for the place *called* Watkins Point?

But it said that Scarborough and Calvert agreed in 1668 that the line from the sea should run to the Annamessex, and not to the Pocomoke. That is not the point of the present question. We are now inquiring where the boundaries were originally fixed. A conventional arrangement of those Commissioners might bind their constituents for the after time, but it could not change the pre-existing facts of the case or make that a false, which before was a true, interpretation of the charter. Nor is any opinion or conclusion expressed or acted upon by them entitled to much consideration as evidence. If Philip Calvert *thought* that the charter limit was at Point Ployer, he was grossly deceived, and Col. Scarborough *knew* very well that it was *not* there, for he had previously declared on his corporal oath that the "small spiral point" near the Annamessex was South of the charter call "about as far as a man could see on a clear day."

Some stress is laid upon another fact. In 1851 the Fashion, a vessel of which John Tyler, a Marylander, was owner and master, was arrested for dredging in Maryland waters. The justice of the peace before whom the proceeding was instituted condemned her, but on appeal to the County Court the judgment was reversed. The record does not show the grounds of the condemnation or the reasons of the

reversal; but Tyler himself deposes from memory that he was finally cleared on the testimony of two old men, who swore to a State line running across Smith's Island about three-quarters of a mile above Horse Hammock, and over the Bay to the mouth of the Annamessex, which would throw the *locus in quo* of the offense within the jurisdiction of Virginia. If we assume that the issue, the evidence, and the legal reasons of the judgment, are correctly reported by an unlearned man a quarter of a century after the trial, the inference is a fair one that the court of Somerset county believed the line to be where the witnesses said it was, and not at Horse Hammock on one side of Tangier Sound, or at Watkins' Point on the other. But are we now bound to accept that evidence as infallibly true? If it were delivered before us in the pending cause by the witnesses themselves, we would take it at its worth. Its probative force is certainly not increased by being fished up from the oblivion of twenty-five years and produced to us at second hand. We do not understand that anybody supposes the judgment itself to be binding as a determination of the subject-matter between the two States. The traditionary line of Tyler's grandfather and old Mr. Lawson must stand or fall by the natural strength of the facts which support and oppose it. Now it is perfectly ascertained that Virginia in 1851 did not pretend to have any claim on Smith's Island above Horse Hammock, nor within the limits of Somerset county on the Bay shore above Watkins' Point. This record of the Fashion case, considered as evidence of a line at Annamessex, is illegal, insufficient, and unsatisfactory, while the proofs which show that in truth the line was at Watkins' Point are irresistible and overwhelming.

Appendix C

If we are right thus far, it follows that the original line as fixed and agreed by the King and Lord Baltimore runs from Cinquack by a straight line to the extreme south-western part of Somerset county, Maryland, which we find to be the true Watkins' Point of the charter, and thence by a straight line to the Atlantic ocean. These lines will be seen on the accompanying map, marked and shaded in blue.

But this is not the present boundary. How firmly so-ever it may have been fixed originally, a compact could change it, and long occupation inconsistent with the charter is conclusive evidence of a concession which made it lawful.

Usucaption, prescription, or the acquisition of title founded on long possession, uninterrupted and undisputed, is made a rule of property between individuals by the law of nature and the municipal code of every civilized country. It ought to take place between independent States, and according to all authority it does. There is a supreme necessity for applying it to the dealings of nations with one another. Their safety, the tranquility of their peoples, and the general interests of the human race do not allow that their territorial rights should remain uncertain, subject to dispute, and forever ready to occasion bloody wars. (See Vattel, Book II, chap. 11, and Wheaton, Part II, chap. 4, sec. 4, citing Grotius Puffendorf and Rutherforth.) The length of time which creates a right by prescription in a private party raises a presumption in favor of a State, that is to say, twenty years. (Knapp's Rep., 60 to 73.) It is scarcely necessary to add that the exercise of a privilege, the perception of a profit, or the enjoyment of what the common law calls an easement, has the same effect as the possession

of corporeal property. It behooves us, then, to see whether the acts or omissions of these States have or have not materially changed their original rights and modified their boundaries, as described in the charter. We will look first at the Potomac.

The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water-mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved "the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon." By the compact of 1785, Maryland assented to this, and declared that "the citizens of each State respectively shall have full property on the shores of Potomac and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements." We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below. Taking all together, we consider it established that Virginia has a proprietory right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

To that extent Virginia has shown her rights on the river so clearly as to make them indisputable. Her efforts to show that she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part, have been less successful.

To throw a cloud on the title of Maryland to the South half of the river, the fact is proved that in 1685 the King and Privy Council determined to issue a *Quo Warranto* against the Proprietary of Maryland, "whereby the powers of that charter and the government of that province might be seized into the King's hands" for insisting on "a pretended right to the *whole* river of Potowmack" and for other misdemeanors. This was a formidable threat, considering what a court the King's Bench was at that time; but it never was carried out, and we can infer from it only that the then Lord Baltimore was not in favor with the ministry of James II.

What is called the Hopton grant was confirmed to the Earl of St. Albans and others in 1667 by Charles II. It included all the land between the Rappahanock and the Potomac, *together with the islands within the banks of those rivers and the rivers themselves.* The rights of the original grantees became vested in Lord Fairfax and his heirs, who sold large portions of it, and as to the rest, the Commonwealth first took it be forfeiture and afterwards bought out the Fairfax title from the alienees of his heirs. It is not pretended that this grant could, *proprio vigore*, transfer the title of the Potomac islands from Lord Baltimore to the Earl of St. Albans; but it is argued that, as Lord Baltimore must have known of it, and did not protest or take any measure to have it cancelled, his silence, if not conclusive against him by way of equitable estoppel, was at least an admission that

he did not own the islands or the bed of the river in which they lay. We answer that he had a right to be silent if he chose; his elder and better title, which was a public act, seen and known of all men, spoke for him loudly enough. Besides that, his subsequent possession of the islands was the most emphatic contradiction he could give to any adverse claim, or pretense of claim, under the Hopton grant.

But these conflicting grants of the islands increased the importance of knowing how and by whom they had been occupied. The exclusive possession of Maryland was affirmed and denied upon evidence so uncertain that we thought it right to postpone our determination for several weeks, so as to give time for the collection of proper proofs. When these came forth they showed satisfactorily that Maryland had granted all the islands, taxed the owners, and otherwise exercised proprietary and political dominion over them. Three Virginia grants were produced which purported to be for islands in the Potomac, but on examination of the surveys it appeared that they were not *in*, but *upon*, the river. One is in Nomini Bay, and the other two are called islands only because they lie with one side on the shore, while the other sides are bounded by inland creeks. All are on the Virginia side of the low water-mark, which we have said was the boundary between the States.

It being thus shown that there is nothing to deflect the line from the low-water mark, we are next to see whether its eastern terminus has been changed. That it certainly has. Cinquack was quietly ignored so long ago that no recollection, nor even tradition, exists of any claim by Maryland on the Bay Shore below the Potomac. When the

Appendix C

Compact of 1785 was made, Smith's Point, precisely at the mouth of the river, on the south side, was assumed by both States to be the starting place of the line across the bay.

Nor does the line now run from Smith's Point, *per lineam brevissimam*, to Watkins' Point. It holds a course far north of that, so as to strike Sassafras Hammock, on the western shore of Smith's Island, and take in Virginia's old possession there. It reaches Watkins' Point, not by the one straight line called for in the charter, but by a broken line, or rather by several lines uniting at angles more or less sharp. Before we explain how this came about it is necessary to observe some facts in the general history of the eastern-shore boundary.

While the situation of Watkins' Point at the mouth of Pocomoke was not doubted, nobody knew where the lines running to and from it would go, or what natural objects they would touch in their course. East and west, wherever the solitary landmark could not be seen, a search for the boundary was mere guess-work, and some of the conjectures were amazingly wild. The people there seem to have had none of that ready perception of courses and distances which an Indian possesses intuitively, and which a pioneer of the present day acquires with so much facility.

Almost immediately after the planting of the Maryland colony, some of its officers claimed jurisdiction on the Eastern Shore, nearly twelve miles south of a true east line from Watkins' Point. Sir John Harvey, then Governor and Captain-General of Virginia, with the advice of the council, conceded the claim, and on the 14th of October, 1638, issued a proclamation, declaring the boundary to be on the

Anancock, and commanding the inhabitants of his colony not to trade with the Indians north of that river. We discredit the allegation that this was a fraudulent collusion between the Governor of Virginia and the agents of the Maryland proprietary. It was a mutual mistake — a very gross one to be sure — and not long persisted in. It serves now only to show how loose were the notions of that time about these lines.

Soon after this (but the time is not ascertained) a similar blunder was made westward of Watkins' Point. This was not a claim by Maryland below the true line, but by Virginia above it. Smith's Island lies out in the Chesapeake Bay, quite north of any possible line called for by the charter. But the relative situation of that island being misapprehended, Virginia took quiet and unopposed possession upon it, and holds a large part of it to this day.

No willful transgression of the charter boundary took place before 1664. Then rose Col. Edmond Scarborough, the King's Surveyor General of Virginia. His remarkable ability and boldness made him a power in Virginia, and gave him great mental ascendency wherever he went. He had no respect for Lord Baltimore's rights, and when he could not find an excuse for invading them, he did not scruple to make one. At the head of forty horsemen, "for pomp and safety," he made an irruption into the territory of Maryland, passing Watkins' Point and penetrating as far as Monoakin, where he arrested the officers of the Proprietory and harried the defenseless people.

Appendix C

To justify this proceeding he referred to an act of the Grand Assembly of Virginia, (passed without doubt by his influence,) which declares Watkins' Point to be above Manoakin, authorizes the Surveyor General to make publication commanding all persons south of Watkins' Point to render obedience to His Majesty's Government of Virginia, and requiring Col. Scarborough, with Mr. John Catlett and Mr. John Lawrence, or one of them, to meet the Maryland authorities upon due notice, (if they were not fully convinced of their intrusions,) and debate and determine the matter with them. Scarborough did none of these things. His conduct throughout violated the act of the Virginia assembly as grossly as it violated the Maryland charter.

To vindicate the claim for a boundary as high up as Manoakin, he put in his own affidavit and that of seven others that the place described in Capt. Smith's map for Watkins' Point, was not at the Pocomoke nor at the Annamessex, but as far above the small spiral point at the mouth of the latter river as a man could see in a clear day, and that the Pocomoke was never called or known by the name of Wighco. This was sworn to in the very face of the map itself, where Watkins's Point was described as lying on the Pocomoke, and where the Pocomoke was distinctly named the Wighco.

In June, 1664, Charles Calvert, Lieutenant Governor of Maryland, sent Philip, the Chancellor, on a special mission to Sir William Berkeley, then Governor of Virginia, to demand justice upon Scarborough for entering the Province of Maryland in a hostile manner, for outraging the inhabitants of Annamessex and Manoakin by blows and imprisonment, for attempting to mark a boundary thirty miles north of

Watkins' Point, and for publishing a proclamation at Manoakin wholly unauthorized. Col. Scarborough was too great a man to be punished, but his acts were repudiated, the claim for his spurious boundary was disavowed, Watkins' Point was again fully acknowledged to be where it always had been, and so the land had rest for a season.

But the quiet time did not last long. The very next year we find Colonel Scarborough on the east side of the Pocomoke, north of the boundary, cutting out a large body of Lord Baltimore's' land, and dividing it by surveys to himself and his friends. The necessity was manifest for having the true line traced and marked on the ground between Watkins' Point and the sea. To do this Colonel Scarborough was appointed a commissioner on one side, and Philip Calvert on the other. But, instead of closing the controversy as their respective constituents intended, their work was done so imperfectly that it has been a principal cause of error and misunderstanding ever since.

Their instructions, as recited by themselves, required them to "meet upon the place called Watkins' Point." That they did meet there does not appear, but they say that, "after a full and perfect view of the point of land made by the north side of Pocomoke Bay and the south side of Annamessex, we have and do conclude the same to be Watkins' Point, from which *said point, so called,* we have run an east line, agreeable with the extremest part of the western angle of said Watkins' Point, over the Pocomoke river, to the land near Robert Holston's, and there have marked certain trees which are continued by an east line to the sea," &c.; and they agreed that this should be received as the bounds of the

two provinces "on the eastern shore of the Chesapeake Bay." Whosoever shall try to get at the sense of this document, will find himself "perplexed in the extreme." What was it that they concluded to be Watkins' Point? Not the whole body of the territory between the Annamessex and the Pocomoke. Nobody understands it in that way. Not Point Ployer; for they both knew, and one of them swore, it was not there. Did they actually run any line west of the Pocomoke? If yes, they must have known with perfect certainty where the true line would cross the river; and in that case, what was the necessity for founding a mere conclusion about it upon the lay of the land between the two bays? If it was then ascertained by actual demonstration with the compass that a western extension of the marked line would strike Watkins' Point, why does it not strike that point now, instead of terminating, where it does, far above, at the Annamessex? Again, why was it not marked? Why was it never recognized, acknowledged, or claimed by either party afterwards? Our rendering may seem a strain upon the words, but we infer from the paper and the known facts of the case, that the commissioners, instead of meeting at Watkins' Point, came together on the east bank of the Pocomoke, from thence took a view of the country on the other side, and thereupon erroneously concluded that an east line running from Watkins' Point would cross the Pocomoke at the place near Holston's, where they marked certain trees. This being satisfactory to themselves, they proceeded, without further preliminary, to mark the eastern end of the line between the river and the sea.

Scarborough may have known that he was not on the true line, but if so, he kept his knowledge to himself. It is

very certain that Calvert had full faith in the correctness of his work. No doubt he lived and died in the belief that the marks he assisted to make were on a due east line from the westernmost angle of Watkins' Point, properly so called. If any one thinks this a blunder too gross to be credited, let him remember by whom it was shared. Herrman and all subsequent mapmakers place the marks on the straight line where Calvert thought it was. All the public men of the colonies had the same opinion. The error was not discovered, nor even suspected, for more than a hundred years.

But it is argued that the call of the charter is for a straight line; that commissioners were appointed to ascertain where it ran; that they did ascertain it, and marked a part of it; that their judgment being conclusive, the whole line is established as certainly as if it had been marked. So far as this is a geometrical proposition, it is undoubtedly true. But mathematics cannot determine this case against law and equity.

Their own description of the line they agreed upon is inconsistent with itself. They call it an east line from Watkins' Point, and give it an outcome by a course corresponding with Holston's tree. If this be a straight line, how shall we find it? If we begin at Watkins' Point and run east to the sea, we go far below the marked line; if we begin at the marks and run west to the bay, we reach the Annamessex, which is equally wide of the fixed terminus at that end. Yet by one way as much as by the other, we follow the agreed line of the commissioners. We reconcile these contradictions, and carry out the whole agreement, if we run the east line from Watkins' Point until it begins to conflict

with the marked line, and from there to the ocean let the marked line be taken for the exclusively true one.

Plainly, it never was intended by the commissioners, or anybody else, that the territory west of the Pocomoke should be divided by a line extending westward from Holston's to the mouth of the Annamessex. If that was the technical effect of the agreement it was instantly repudiated by the common consent of both provinces. Maryland had held before, and continued afterwards to hold and possess, all the territory between the Pocomoke and the Bay down to the latitude of Watkins' Point, granting the lands, taxing them in the hands of her grantees, and ruling all the inhabitants according to her laws and customs. Her jurisdiction was not intermitted, nor any of her rights suspended, for a moment. Virginia never expressed a suspicion that this possession of Maryland was inconsistent with any right of hers under the agreement. Scarborough himself acquiesced in it to the day of his death as a true construction of his covenants with Calvert.

Our conclusion is that Virginia, by the agreement and her undisturbed occupancy, has an undoubted title to the land east of the Pocomoke, as far north as the Scarborough and Calvert line, while Maryland, by the charter and by her continued possession under it, has a perfect right to the territory west of the Pocomoke and north of Watkins' Point.

We must now go back to Smith's Island. That island is clearly north of the charter line, and all the rights which Virginia has there must depend on the proofs which she is able to give of her possession. The commissioners, agents, and counsel on both sides have, with infinite labor, collected

a great volume of evidence on this part of the case, and discussed it at much length.

In early times Virginia granted lands high up on the island; and Maryland, without expressly denying the right of Virginia, made grants of her own in the same region. The lines of these grants are so imperfectly defined by the surveys that it is not at all easy to tell where they are, and some of them are believed to lie afoul of others. The occupancy, like the titles, was mixed and doubtful. The inhabitants did not know which province they belonged to; at least that was a subject on which there were divers opinions.

A line running nearly across the middle of the island was at first claimed by Virginia as being the old boundary; but a subsequent personal examination and a more careful reconsideration of the evidence brought the counsel themselves to the opinion that a claim by that line could not be supported. They insisted, however, and do still insist, that another line, which runs about three-quarters of a mile above that from Sassafras Hammock to Horse Hammock was and is the true division. There is some evidence that this was once thought to be the boundary.

Two grants, one by Maryland and one by Virginia, each calling for the divisional line between the States, without describing where the divisional line was, were so located on the ground that they met on the line in question. It is inferred from this that a line had been previously run at that place, which was understood to be the division between the provinces or the States. But this argument *a priori* is all that supports the theory of a State line there. If it ever was actually

run, it cannot now be told by whom, when, for what purpose, by what authority, or precisely where. All the evidence relating to it is very doubtful. It dates back to what may be called the prehistoric times of the island. Some witnesses affirm and others deny, on the authority of their forefathers, that this was the dividing line of the States. But none of them can give any substantial grounds for his belief.

Out of this contradictory evidence and above the obscurity of vague tradition there rises one clear and decisive fact, which is this: That for at least forty years last past Maryland has acknowledged the right of Virginia up to a line which, beginning at Sassafras Hammock, runs eastward across the island to Horse Hammock, and Virginia has claimed no higher. By that line alone both States have limited their occupancy for a time twice as long as the law requires to make title by prescription. By that line Maryland has bounded her election district and her county. North of it all the people vote and pay taxes in Maryland, obey her magistrates, and submit to the process of her courts. South of it lies, undisturbed and undisputed, the old dominion of Virginia. We have no doubt whatever that we are bound to regard that as being now the true boundary between the two States. There are not two adjoining farms in all the country whose limits are better settled by an occupancy of forty years, or whose owners have more carefully abstained from all intrusion upon one another within that time.

We have thus ascertained to our entire satisfaction the extent and situation of the territory which each State has held long enough to make a title by prescription, and the boundary now to be determined must conform to those

possessions, no matter at what expense of change in the original lines. We know therefore how the land is to be divided. But how does prescriptive title to land affect the right of the parties in the adjacent waters?

It has been argued with great force and ingenuity that a title resulting merely from long possession can apply only to the ground which the claimant has had under his feet, together with its proper appurtenances; that a river, a lake, or a bay is land covered with water; that land cannot be appurtenant to land; that therefore title by prescription stops at the shore. But this is unsound, because the water in such a case is not claimed as *appurtenant* to the dry land, but as *part* of it. One who owns land to a river owns to the middle of the channel. Upon the same principle, if one State has the territory on both sides the whole river belongs to her. Nor does it make any difference how large or how small the body of water is. The Romans called the Mediterranean *Mare Nostrum*, because her territory surrounded it on all sides. This construction applies with equal certainty to every kind of title, whether it be acquired by express concession, by lawful conquest, or by the long continuance of a possession which, at first, may have been but a naked trespass. In the last case the silent dereliction of the previous proprietor implies a grant of his whole right as fully as if it had been given by solemn treaty.

A few observations upon the several sections of the broken line which we adopt in place of the straight line of the charter will suffice to apply the principles we have endeavored to set forth.

Appendix C

We run to Sassafras Hammock and from that to Horse Hammock, because we cannot in any other possible way give Virginia the part of Smith's Island to which she shows her right by long possession.

We go thence to the middle of Tangier Sound and from thence downward we divide Tangier Sound equally between the two States, because the possession of Virginia to the shore is proof of a title whose proper boundary is the middle of the water. We give Maryland the other half of the sound for the same or exactly a similar reason, she being incontestibly the owner of the dry land on the opposite shore.

The south line dividing the waters stops where it intersects the straight line from Smith's Point to Watkins' Point, because this latter is the charter line, as modified by the compact, and Maryland has no rights south of it.

From that point of intersection to Watkins' Point we follow the straight line from Smith's Point, there being no possession or agreement which has changed it since 1785.

At Watkins' Point the charter line has stood unchanged since 1632, and the call for a due east line from thence must be followed until it meets the middle thread of the Pocomoke. At the place last mentioned the boundary turns up the Pocomoke, keeping the middle of the river until it crosses the Calvert and Scarborough line. It divides the river that far because the territory on one side belongs to Maryland and on the other to Virginia.

Appendix C

From the angle formed by the Scarborough and Calvert line with the line last described through the middle of the Pocomoke, the boundary follows the marked line of Scarborough and Calvert to the seashore.

It will be readily perceived that we have no faith in any straight-line theory which conflicts with the contracts of the parties, or gives to one what the other has peaceably and continuously occupied for a very long time. The broken line which we have adopted is vindicated by certain principles so simple, so plain, and so just, that we are compelled to adopt them. They are briefly as follows:

1. So far as the original charter boundary has been uniformly observed and the occupancy of both has conformed thereto, it must be recognized as the boundary still.

2. Whereever one State has gone over the charter line taken territory which originally belonged to the other and kept it, without let or hindrance, for more than twenty years, the boundary must now be so run as to include such territory within the State that has it.

3. Where any compact or agreement has changed the charter line at a particular place, so as to make a new division of the territory, such agreement is binding if it has been followed by a corresponding occupancy.

4. But no agreement to transfer territory or change boundaries can count for anything now, if the actual possession was never changed. Continued occupancy of the granting State for centuries is conclusive proof that the

agreement was extinguished and the parties remitted to their original rights.

5. The waters are divided by the charter line where that line has been undisturbed by the subsequent acts of the parties; but where acquisitions have been made by one from the other of territory bounded by bays and rivers, such acquisitions extend constructively to the middle of the water.

Maryland is by this award confined everywhere within the original limits of her charter. She is allowed to go *to* it nowhere except on the short line running east from Watkins' Point to the middle of the Pocomoke. At that place Virginia never crossed the charter to make a claim. What territory we adjudge to Virginia north of the charter line she has acquired either by compacts fairly made or else by a long and undisturbed possession. Her right to this territory, so acquired, is as good as if the original charter had never cut it off to Lord Baltimore. We have nowhere given to one of these States anything which fairly or legally belongs to the other; but in dividing the land and the waters we have anxiously observed the Roman rule, *suum cuique tribuere.*

J.S. Black,
Pennsylvania.

Chas. J. Jenkins,
Georgia.

A.W. Graham,
Secretary.

APPENDIX D — ACT OF MARCH 3, 1879, ch. 196, 20 Stat. 481, PROVIDING CONGRESS' CONSENT TO THE BLACK-JENKINS AWARD OF 1877

Chap. 196 — An Act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland respecting the boundary between said States.

Whereas arbitrators duly appointed on the part of the State of Virginia and on the part of the State of Maryland for the purpose of ascertaining and fixing the boundary between the States of Virginia and Maryland, did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

"Award.

"And now, to wit, January sixteenth, anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the states of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said states, and examined the proofs on both sides, do find, declare, award, ascertain, and determine that the true line of boundary between the said states, so far as they are coterminous with one another, is as follows, to wit:

"Beginning at the point on the Potomac River where the line between Virginia and West Virginia strikes the said river at low-water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's Point, at or

near the mouth of the Potomac, in the latitude thirty-seven degrees fifty-three minutes eight seconds, and longitude seventy-six degrees thirteen minutes forty-six seconds; thence crossing the waters of the Chesapeake Bay, by a line running north sixty-five degrees thirty minutes east, about nine and a half nautical miles, to a point on the western shore of Smiths Island, at the north end of Sassafras Hammock, in latitude thirty-seven degrees fifty-seven minutes thirteen seconds, longitude seventy-six degrees two minutes fifty-two seconds; thence across Smith's Island south eighty-eight degrees thirty minutes east, five thousand six hundred and twenty yards, to the center of Horse Hammock, on the eastern shore of Smith's Island, in latitude thirty-seven degrees fifty-seven minutes eight seconds, longitude seventy-five degrees fifty-nine minutes twenty seconds; thence south seventy-nine degrees thirty minutes east, four thousand eight hundred and eighty yards, to a point marked A on the accompanying map, in the middle of Tangier Sound, in latitude thirty-seven degrees fifty-six minutes forty-two seconds, longitude seventy-five degrees fifty-six minutes twenty-three seconds, said point bearing from Jane's Island light south fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees thirty minutes west, four thousand seven hundred and forty yards, by a line dividing the waters of Tangier Sound, to a point where it intersects the straight line from Smith's Point to Watkins' Point said point of intersection being in latitude thirty-seven degrees fifty-four minutes twenty-one seconds, longitude seventy-five degrees fifty-six minutes fifty-five seconds, bearing from Jane's Island light south twenty-nine degrees west, and from Horse Hammock south thirty-four degrees thirty minutes east; this point of intersection is

marked B on the accompanying map; thence north eighty-five degrees fifteen minutes east, six thousand seven hundred and twenty yards, along the line above mentioned, which runs from Smith's Point to Watkins' Point until it reaches the latter spot, namely, Watkins' Point, which is in latitude thirty-seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees fifty-two minutes forty-four seconds; from Watkins' Point the boundary line runs due east seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke Sound, which is marked C on the accompanying map, and is in latitude thirty-seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees forty-seven minutes fifty seconds; thence by a line dividing the waters of Pocomoke Sound, north forty-seven degrees thirty minutes east, five thousand two hundred and twenty yards, to a point in said sound marked D on the accompanying map, in latitude thirty-seven degrees fifty-six minutes twenty-five seconds, longitude seventy-five degrees forty-five minutes twenty-six seconds; thence following the middle of the Pocomoke River by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eighth, eighteen hundred and sixty-eight, at a point in the middle of Pocomoke River, and in the latitude thirty-seven degrees fifty-nine minutes thirty-seven seconds, longitude seventy-five degrees thirty-seven minutes four seconds; thence by the Scarborough and Calvert line, which runs five degrees fifteen minutes north of east, to the Atlantic Ocean: the latitudes, longitudes, courses, and distances here given have been measured upon the Coast Chart, number thirty-three, of the United States Coast Survey

(sheet number three, Chesapeake Bay) which is herewith filed as part of this award, and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five, between Smith's point and Watkins' point; in further explanation of this award, the arbitrators deem it proper to add that —

"First. The measurements being taken and places fixed according to the Coast Survey, we have come as near to a perfect mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line, or in the latitude or longitude of a place, the natural objects called for must govern.

"Second. The middle thread of Pocomoke River is equidistant as nearly as may be between the two shores, without considering arms, inlets, creeks, or affluents as parts of the river, but measuring the shore lines from headland to headland.

"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.

"Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of

low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

"In testimony whereof we have hereunto set our hands the day and year aforesaid.

"J. S. Black, of Pennsylvania,
"Chas. J. Jenkins, of Georgia.
"A.W. Graham
"Secretary"

And whereas the said award has been ratified and confirmed by the legislatures of the States of Virginia and Maryland respectively:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress of the United States is hereby given to the said agreement or award and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

Approved, March 3, 1879.

APPENDIX E — REPORT OF THE COMMISSIONERS TO THE GOVERNORS OF MARYLAND AND VIRGINIA, *THE POTOMAC RIVER COMPACT OF 1958*, REPRINTED IN VIRGINIA HOUSE DOCUMENT NO. 22 (1960)

Mount Vernon, Virginia

December 20, 1958

To

THE HONORABLE THEODORE R. MCKELDIN,
Governor of Maryland

and

THE HONORABLE J. LINDSAY ALMOND, JR.,
Governor of Virginia

This report is respectfully submitted to perpetuate and improve the fisheries of the Potomac River to the mutual advantage and enjoyment of the citizens of the State of Maryland and the Commonwealth of Virginia.

The legislative proposals attached to this report are necessary and are brought about by the accidents of geography and history. When the colony of Maryland was formed, its southern boundary was the Potomac River. Virginia was given the Capes which form the entrance to the Chesapeake Bay and its tributaries.

When the colonies separated from England, each became to all intents and purposes a sovereign and independent

nation. The rights which the citizens of the two new "nations" sought to exercise soon brought about conflict. Maryland controlled the Potomac River and Virginians could not enjoy the fisheries thereof while Virginia controlled the Capes and the Maryland citizens could not pass through the Capes without the payment of toll.

It was not long before those men who had the vision and courage to separate from England saw the need for a solution to the problems confronting the citizens of their two states.

The commissioners from the two states who were appointed to compose the differences, and who were successful in doing so, met at Mount Vernon on March 28, 1785, upon the invitation of that towering figure of American history — George Washington. The success of the conference is undoubtedly due in large measure to his wisdom, although each state was well represented by men of broad vision well endowed with capacities which had met the test of the dark days of the American Revolution. The work of these men in agreeing to the Compact of 1785 led directly to the call for the Constitutional Convention in Philadelphia and subsequently to the adoption of the Constitution of the United States.

The commissioners prepared a compact which was thereafter submitted to the respective legislatures and approved in 1785. The compact dealt with matters other than the fisheries and free passage of the Capes, for these were sovereign contracting parties intending to agree upon all subjects of possible dispute.

Appendix E

Many of the provisions of the original compact became obsolete with the adoption of the Federal Constitution in 1789 which gave the federal government sole jurisdiction over interstate trade and maritime matters. Notwithstanding this, the other provisions of the compact have long enjoyed unquestioned vitality and have been honored by the two states.

The means employed for regulation of the fisheries was the adoption by the two states of similar concurrent legislation. Over the years, it was the custom for the states to adopt the same legislation governing the fisheries upon the Potomac River. In the early years of the compact, these fisheries were not sufficiently important to require the adoption of similar concurrent legislation concerning the Potomac River. This process went on and a striking degree of similarity was achieved and maintained in the laws of the two states dealing with the Potomac River fisheries.

All thinking citizens realize the adoption of laws does not insure their enforcement. The problems of enforcement may arise from honest difference of opinion as to the proper means for engaging in certain activities, or a calculated disregard of the law, or sympathy on the part of local juries sitting in the trial of cases of persons charged with violation of law. Whatever the reasons, enforcement of the Potomac River statutes became increasingly difficult. As the problems of enforcement increased, so did the expenditures for enforcement. Violation of the Potomac River statutes has not been the exclusive privilege of the citizens of either state.

Appendix E

In recent years attempts have been made from time to time to establish a bi-state commission to regulate the fisheries of the Potomac River. Differences of opinion have arisen as to the scope of the commission's jurisdiction and the method of appointment. Some bitterness has developed over alleged failure or refusal to enforce the Potomac River statutes and, after a long series of disagreements, the State of Maryland in 1957 adopted an act purporting to repeal the Compact of 1785. At the same session Maryland also repealed portions of her concurrent Potomac River statutes and assumed exclusive jurisdiction and control over the Potomac River. There was further legislation at Annapolis following the repeal, which provided that the citizens of Virginia should receive the same treatment as to the issuance of licenses and other matters having to do with fisheries on the river as the citizens of Maryland.

Virginia also in 1957 instituted a proceeding to invoke the original jurisdiction of the Supreme Court of the United States and to have the court rule invalid the Maryland acts which were designed to repeal the compact and place exclusive jurisdiction of the Potomac River in Maryland. After taking jurisdiction of the case, the Supreme Court of the United States assigned Mr. Justice Stanley Reed to act as a Special Master in the taking of evidence and the preparation of a report for the Court. In discussions among Mr. Justice Reed and Messrs. C. Ferdinand Sybert, Attorney General of the State of Maryland, and A.S. Harrison, Jr., Attorney General of Virginia, it was suggested that the parties should attempt to resolve their differences by the appointment of commissioners from each state to meet and

discuss the matters in dispute with a view to arriving at a satisfactory settlement of the controversy out of court if possible.

The appointment of the Commission arose from the situation in the Potomac River, and the jurisdiction of the Commission was restricted to that area.

Pursuant to this suggestion, Governor McKeldin appointed as commissioners to represent the State of Maryland the following: Carlyle Barton, Esquire, M. William Adelson, Esquire, Judge Stephen R. Collins, Judge Edward S. Delaplaine and William J. McWilliams, Esquire. Governor Almond appointed as commissioners to represent Virginia the following: Mills E. Godwin, Jr., Esquire, John Warren Cooke, Esquire, Howard H. Adams, Esquire, Robert Y. Button, Esquire, and Edward E. Lane, Esquire. The commissioners from each state were assisted by the respective officials in charge of the fisheries program, Attorneys General and staffs, and staffs of the legislative councils.

Following the organization of each commission, a joint meeting was held at Mount Vernon on May 19, 1958. A general discussion was had of the problems confronting the two groups and some tentative proposals were made for further consideration. Thereafter, on June 23-24, 1958, a joint meeting of the two commissions was held in Annapolis and testimony was received concerning the scientific aspects of the Potomac River fisheries. The commissioners from Virginia were the guests of Governor and Mrs. McKeldin. Subsequently the two commissions held joint hearings in

La Plata, Maryland, on the morning of July 12 and in Warsaw, Virginia, on that afternoon.

We were impressed by the desire of those dependent upon the Potomac fisheries for a living whereby some means might be found for improving the fisheries instead of seeing a constant decline in this production from the Potomac. There seemed to be no major differences of opinion among them as to what ought to be done.

We also heard the testimony of expert marine biologists who assured us that the Potomac River fisheries are on the decline, large areas of the river are barren, and a program is badly needed in which the two states might unite in jointly restoring the fisheries of the Potomac River. There also appeared no area of disagreement between the scientific personnel of Maryland and Virginia as to the problems of the Potomac River.

Upon the conclusion of the hearings, the two commissioners went to Williamsburg and held a joint meeting on the 14th day of July. While in Williamsburg Governor and Mrs. Almond entertained the commissioners and their wives. At the Williamsburg meeting agreement was reached upon many matters and its was then decided that a bi-state agency offered the most practical solution to the conservation and development of the Potomac River Fisheries. The staffs were directed to prepare drafts of measures to carry out the general agreements.

The respective commissions held frequent separate meetings after appointment, but the next joint meeting of

the commission was held on November 14, 1958, at the Decatur House in Washington, D.C. Final agreement was reached upon all but a few minor matters and committees were appointed to reach satisfactory conclusions upon these. Mr. Justice Reed was present for luncheon and was informed of the progress being made.

The final meeting of the commission took place at Mount Vernon on December 20, 1958, at which time agreement was reached upon all matters which were entrusted to the two commissions. A new compact governing the Potomac River fisheries was unanimously approved by the members of the two commissions and a copy marked Appendix I is attached to this joint report, which is signed by all the members of each commission.

The solution proposed is a new compact entitled "The Potomac River Compact of 1958". It sets froth in general the reasons leading to the adoption of the Compact, the jurisdictional area of the Potomac River Fisheries Commission, creates the Commission and provides that it shall consist of six members with three each to be chosen from the respective fisheries commissions of Maryland and Virginia. The Commission is vested with the necessary powers as to employment of personnel, establishment of offices, etc., to enable it to discharge its duties. The Commission is required to make a survey of the oyster bars, required to conduct research relative to the conservation and repletion of fisheries resources, and is empowered to regulate the taking of finfish, crabs, oysters and clams. It may issue licenses to the citizens of each state on the same terms for taking fish and shellfish, and may call upon the agencies of

the respective states to assist it in its duties. It may impose a license tax on oysters taken within the limits of the Potomac River but not to exceed 25¢ per bushel. The Commission is authorized to adopt rules and regulations and provision is made for due notice thereof; judicial review is provided in case of appeal from any such rule or regulation.

It should be pointed out that the laws of Maryland in force on December 1, 1958, and applicable to the Potomac River will remain in force until changed by regulation of the Commission. No regulation may be adopted unless concurred in by at least four members of the Commission, which, it is felt, adequately protects both states. Regulations of the Commission may be amended, modified or rescinded by joint action of the General Assemblies of each of the states.

Enforcement of the regulations will be through the law enforcement agencies of each of the two states. Penalties are provided for violations of the regulations and violators may be taken to an appropriate court in either state in a county adjacent to that part of the Potomac River where the offense occurred. Fines imposed are to be paid to the state in which the case was tried.

Each state pledges that it will appropriate no less than $25,000.00 a year for the expenses and other purposes of the Commission. Provision is made for auditing the expenditures of the Commission.

The new compact would take the place of the Compact of 1785 and would become effective at the expiration of sixty days after the completion of the last act necessary to make it

legally effective. It would also provide that once the new Compact was adopted and ratified by each state, neither could repeal or alter the same without the consent of the other. Thus further litigation between the States before the Supreme Court would be unnecessary and the case would be dismissed.

Clause VII of the Compact of 1785 is reflected in Section 4 of Article 3 and in Section 1 of Article 7 of the new Compact and carries forward certain rights of the citizens of Maryland and Virginia which have not been in controversy. Clause XIII is contained in Article VIII of the new Compact and provides that once ratified, the Company is not to be repealed or amended without the mutual consent of the two states.

We contemplate and respectfully suggest to Your Excellencies that the attached bill be introduced and enacted into law at the first session of your General Assemblies occurring after the making of this report. We further suggest that arrangements be made for the introduction of the Compact in the Congress of the United States, and that steps be taken to assure its adoption in the Congress. As soon as the Compact has been approved by the two states and the Congress, it will become effective upon the expiration of sixty days.

CONCLUSION

We have been impressed by the spirit of cooperation and good will which has prevailed in all of our meetings. In an undertaking of this kind there is seldom a winner or a loser. Those who have participated in the framing of the newly-proposed Compact have approached this task in a

spirit which they hope is worthy of that exhibited by George Washington and the commissioners from the two states who first met at Mount Vernon and reconciled their differences. The shadow of this influence and the imprint of history have inspired us. We have sought to measure up to the responsibilities and trust conferred upon us and in a spirit of mutual confidence, we now submit to Your Excellencies, "The Potomac River Compact of 1958".

Respectfully submitted,

For the State of Maryland:
CARLYLE BARTON
WILLIAM J. MCWILLIAMS
M. WILLIAM ADELSON
STEPHEN R. COLLINS
EDWARD S. DELAPLAINE
Commissioners

For the Commonwealth of Virginia:
MILES E. GODWIN, JR.
HOWARD H. ADAMS
EDWARD E. LANE
ROBERT Y. BUTTON
JOHN WARREN COOKE
Commissioners

Appendix E

PREAMBLE

Whereas, Maryland and Virginia are both vitally interested in conserving and improving the valuable fishery resources of the tidewater portion of the Potomac River, and

Whereas, certain provisions of the Compact of 1785 between Maryland and Virginia having become obsolete, Maryland and Virginia each recognizing that 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, and that Virginia is the owner of the Potomac River bed and waters southerly from said low water mark, as laid out, and the citizens of Virginia have certain riparian rights along the southern shore of the River as shown on said Matthews-Nelson survey, and in common with the citizens of Maryland, the right of fishing in said River. Maryland and Virginia have agreed that the necessary conservation and improvements of the tidewater portion of the Potomac fishery resources can be best achieved by a Commission comprised of representatives of both Maryland and Virginia, charged with the establishment and maintenance of a program to conserve and improve these resources, and

Whereas, at a meeting of the Commissioners appointed by the Governors of the State of Maryland and the Commonwealth of Virginia, to-wit: Carlyle Barton, M. William Adelson, Stephen R. Collins, Edward S. Delaplaine and William J. McWilliams, Esquires, on the part of the State of Maryland and Mills E. Godwin, Jr., Howard H. Adams, Robert Y. Button, John Warren Cooke and

Appendix E

Edward E. Lane, Esquires, on the part of the Commonwealth of Virginia, at Mount Vernon, in Virginia, on the twentieth day of December, in the year one thousand nine hundred and fifty-eight, the following Potomac River Compact of 1958, between the Commonwealth of Virginia and the State of Maryland was mutually agreed to by the said Commissioners:

Now, Therefore, Be it Resolved by the Commissioners appointed by the Governors of the State of Maryland and the Commonwealth of Virginia, meeting in joint session, that they do unanimously recommend to the said respective Governors that there be a new Compact, to be designated as the "Potomac River Compact of 1958," and that the said new Compact be referred as promptly as possible to the Legislatures of the State of Maryland and the Commonwealth of Virginia for appropriate action, and to the end that after ratification and adoption by said Legislatures the same be submitted to the Congress of the United States for approval.

ARTICLE I. COMMISSION — MEMBERSHIP AND ORGANIZATION

Section 1. *Commission Created*

The Potomac River Fisheries Commission, hereinafter designated as "Commission," is hereby created.

Section 2. *Members*

The Commission shall consist of six members, three from Maryland and three from Virginia. The Maryland

members shall be the members of the Tidewater Fisheries Commission of Maryland or its successor agency and the Virginia members shall be the members of the Virginia Fisheries Commission or its successor agency. If the membership of either of the respective State Commissions exceeds three, then the three Commission members from that state shall be selected by the Governor thereof from the members of the State Commission; and if the membership of either of the respective State Commissions is less than three, the three Commission members from that state shall be the member or members of the State Commission, and such additional person or persons who shall be appointed by the Governor, as may be necessary to constitute a total of three Commissioners.

Section 3. *Term, Vacancies*

The term of Commissioners who are members of their respective State Commissions shall be coterminous with their term on their State Commission. The term of Commissioners who are not members of their State Commission shall be four years. Vacancies on the Commission shall be filled by appointment of the Governor of the state entitled to fill the vacancy, except that where the State Commission has three members, the person filling a vacancy on the State Commission shall *ex officio* become a member of the Commission.

Section 4. *Chairman*

The Chairman of the Commission shall alternate from year to year between representatives of Maryland and

Virginia. Subject to such alternation, the Chairman shall be elected by the Commissioners for a term of one year.

Section 5. *Compensation, Expenses*

Commissioners shall be entitled to receive from the General Fund of the Commission compensation of twenty-five dollars ($25.00) for each day or portion thereof spent in the performance of their duties, and reimbursement for reasonable expenses incident to the performance of their duties.

Section 6. *Meetings, Quorum*

Commission meetings shall be held at least once each quarter, and at such other times as the Commission may determine. Four members shall constitute a quorum for the transaction of business.

Section 7. *Office and Employees*

The Commission shall establish and maintain an office at such locations as it may select, and may employ an Executive Secretary who shall serve at the pleasure of the Commission, and such other administrative, clerical, scientific, and legal personnel as it deems necessary. The powers, duties and compensation of all employees shall be as prescribed by the Commission and the employees shall not be subject to the provisions of Article 64A of the Annotated Code of Maryland nor to the provisions of the Virginia Personnel Act, as the same may be from time to time in effect. The Commission may extend to any employee

or employees membership in the Virginia Supplemental Retirement System or the Maryland Employees' Retirement System, whichever is applicable, subject to the laws relating to each such retirement system.

ARTICLE II. JURISDICTIONAL BOUNDARIES

The territory in which the Potomac River Fisheries Commission shall have jurisdiction shall be those waters of the Potomac River enclosed within the following described area:

Beginning at the intersection of mean low water mark at Point Lookout and an established line running from Smiths Point to Point Lookout, marking Chesapeake Bay waters; thence following the mean low water line of the shore northwesterly across the respective mouths of all creeks to Gray Point at the westerly entrance into Rowley Bay; thence in a straight line northwesterly to the southerly extremity of Kitts Point; thence along the mean low water line to the southwesterly point of St. Inigoes Neck; thence in a straight line westerly to the most easterly point of St. Georges Island; thence following the mean low water line in a general northwesterly direction, across the respective mouths of all creeks and inlets to the southwesterly point of Huggins Point; thence in a straight line southwesterly to the eastern extremity of the sand bar known as Heron Island; thence northwesterly following the ridge of Heron Island Bar to its westerly extremity; thence southwesterly in a straight line to the most southerly point of Blackiston Island; thence in a straight line northwesterly to the southern extremity of Colton's Point; thence following the mean low water line, westerly,

excluding all creeks and inlets, to the point marking the southeasterly entrance into St. Catherine Sound; thence westerly in a straight line to the southern extremity of St. Catherine Island Sandbar; thence northwesterly, along the westerly edge of said sand bar continuing along the mean low water line of the southwesterly side of St. Catherine Island to the northwesterly point of said island; thence westerly in a straight line to Cobb Point Bar Lighthouse; thence northwesterly along the ridge of Cobb Point Sandbar to the southerly extremity of Cobb Point; thence following the mean low water line in general northwesterly and northerly directions across the respective mouths of all creeks and inlets to a point at the easterly entrance into Port Tobacco River, due east of Windmill Point; thence in a straight line westerly to Windmill Point; thence southwesterly following the mean low water line across the respective mouths of all creeks and inlets to Upper Cedar Point; thence southwesterly in a straight line across the mouth of Nanjemoy Creek to a point on shore at the village of Riverside; thence following the mean low water line, southwesterly, northwesterly and northerly, across the respective mouths of all creeks and inlets to Smith Point; thence northerly in a straight line to Liverpool Point; thence northerly in a straight line to Sandy Point; thence following the mean low water line northerly, across the respective mouths of all creeks and inlets to Moss Point; thence northerly in a straight line across Chicamuxen Creek to the southernmost point of Stump Neck; thence following the mean low water line northeasterly, across the respective mouths of all creeks and inlets, to a point at the southerly entrance into Mattawoman Creek; thence in a straight line northeasterly across the mouth of Mattawoman Creek to the southwesterly point of Cornwallis Neck; thence

following the mean low water line northeasterly, across the respective mouths of all creeks and inlets, to Chapman Point; thence in a straight line northeasterly to Pomonkey or Hollis Point; thence following the mean low water line in a northerly direction across the respective mouths of all creeks and inlets, to a point on Marshall Hall shore, due south of Ferry Point; thence northeasterly in a straight line to Bryan Point; thence northeasterly in a straight line to the northwest extremity of Mockley Point; thence northeasterly in a straight line to Hatton Point; thence northerly in a straight line to the southwesternmost point of Indian Queen Bluff; thence following the mean low water line northerly across the respective mouths of all creeks and inlets, to Rosier Bluff Point; thence in a straight line northerly to the intersection with the District of Columbia Line at Fox Ferry Point; thence following the boundary line of the District of Columbia southwesterly to a point on the lower or southern shore of the Potomac River, said point being the intersection of the boundary line of the Commonwealth of Virginia with the boundary line of the District of Columbia; thence following the mean low water line of the Potomac River on the southern, or Virginia shore, as defined in the Black-Jenkins Award of 1877 and as laid out in the Matthews-Nelson Survey of 1927, beginning at the intersection of the Potomac River and the District of Columbia Line at Jones Point and running to Smiths Point; and thence in a straight line across the mouth of the Potomac River on the established line from Smiths Point to Point Lookout, to the mean low water mark at Point Lookout, the place of beginning.

Appendix E

ARTICLE III. COMMISSION POWERS AND DUTIES

Section 1. *Oyster Bars*

The Commission shall make a survey of the oyster bars within its jurisdiction and may reseed and replant said oyster bars as may from time to time be necessary.

Section 2. *Fish and Seafood*

The Commission may by regulation prescribe the type, size and description of all species of finfish, crabs, oysters, clams and other shellfish which may be taken or caught within its jurisdiction, the places where they may be taken or caught, and the manner of taking or catching.

Section 3. *Research*

The Commission shall maintain a program of research relating to the conservation and repletion of the fishery resources within its jurisdiction, and to that end may cooperate and contract with scientists and public and private scientific agencies engaged in similar work, and may purchase, construct, lease, borrow or otherwise acquire by any lawful method such property, structures, facilities, or equipment as it deems necessary.

Section 4. *Licenses*

(a) The Commission shall issue such licenses as it may prescribe which shall thereupon be required for the taking of finfish, crabs, oysters, clams,

or other shellfish from the waters within the jurisdiction of the Commission, and for boats, vessels and equipment used for such taking. Recognizing that the right of fishing in the territory over which the Commission shall have jurisdiction is and shall be common to and equally enjoyed by the citizens of Virginia and Maryland, the Commission shall make no distinction between the citizens of Virginia or Maryland in any rule, regulation or the granting of any licenses, privileges, or rights under this Compact.

(b) Licenses for the taking of oysters and clams and the commercial taking of finfish and crabs within the jurisdiction of the Commission shall be granted only to citizens of Maryland or Virginia who have resided in either or both states for at least twelve months immediately preceding the application for the license. Within six months after the effective date of this Compact, the Commission shall adopt a schedule of licenses, the privileges granted thereby, and the fees therefor, which may be modified from time to time in the discretion of the Commission.

(c) The licenses hereby authorized may be issued at such places, by such persons, and in accordance with such procedures as the Commission may determine.

Appendix E

Section 5. *Expenditures*

The Commission is authorized to expend funds for the purposes of general administration, repletion of the fish and shellfish in the Potomac River, and the conservation and research programs authorized under this Compact, subject to the limitations provided in this Compact.

Section 6. *Grants, Contributions, Etc.*

The Commission is authorized to receive and accept (or to refuse) from any and all public and private sources such grants, contributions, appropriations, donations, and gifts as may be given to it, which shall be paid into and become part of the General Fund of the Commission, except where the donor instructs that it shall be used for a specific project, study, purpose, or program, in which event it shall be placed in a special account, which shall be administered under the same procedure as that prescribed for the General Fund.

Section 7. *Cooperation of State Agencies*

The Commission may call upon the resources and assistance of the Virginia Fisheries Laboratory, the Maryland Department of Research and Education, and all other agencies, institutions and departments of Maryland and Virginia which shall cooperate fully with the Commission upon such request.

Appendix E

Section 8. *Regulations*

The Commission shall have the power to make, adopt and publish such rules and regulations as may be necessary or desirable for the conduct of its meetings, such hearings as it may from time to time hold, and for the administration of its affairs.

Section 9. *Inspection Tax*

The Commission may impose an inspection tax, in an amount as fixed from time to time by the Commission, not exceeding 25¢ per bushel, upon all oysters caught within the limits of the Potomac River. The tax shall be paid by the buyer at the place in Maryland or Virginia where the oysters are unloaded from vessels and are to be shipped no further in bulk in vessel, to an agent of the Commission, or to such officer or employee of the Virginia Fisheries Commission or of the Maryland Department of Tidewater Fisheries, as may be designated by the Commission, and by him paid over to the Commission.

ARTICLE IV. COMMISSION REGULATIONS — PROCEDURES AND REVIEW

Section 1. *Notice, Hearing, Vote*

No regulation shall be adopted by the Commission unless: (a) a public hearing is held thereon, (b) prior to the hearing the Commission has given notice of the proposed regulation by publication thereof at least once a week for three successive weeks in at least one newspaper published,

or having a general circulation in each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction. The first such publication to be at least thirty days but not more than 45 days prior to the date of the hearing; (c) a copy of the proposed regulation is mailed at least 30 days but not more than 45 days prior to the hearing, to the clerk of the court of each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction, who shall post the same in a conspicuous place at or in the courthouse; and (d) the regulation is approved by at least four members of the Commission.

Section 2. *Recording, Effective Date*

(a) Regulations of the Commission shall be exempt from the provisions of Chapter 1.1 of Title 9 of the Code of Virginia (1950 Edition, as amended from time to time), and of Section 9 of Article 41 of the Annotated Code of Maryland (1957 Edition, as amended from time to time). Copies of Commission regulations shall be kept on public file and available for public reference in the offices of the Commission, the office of the clerk of court in each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction, the office of the Virginia Division of Statutory Research and Drafting, the office of the Maryland Department of Legislative Reference, the office of the Virginia Fisheries Commission, and the office of the Maryland Department of Tidewater Fisheries.

(b) No regulation of the Commission shall become effective until thirty (30) days after the date of its adoption, or such later date as may be fixed by the Commission.

Section 3. *Review*

Any person aggrieved by any regulation or order of the Commission may at any time file a petition for declaratory judgment with respect to the validity or construction thereof, in the circuit court of any county in Maryland or Virginia contiguous to the waters within the Commission's jurisdiction. A review of the final judgment of the circuit court may be appealed to the court of highest appellate jurisdiction of the state in accordance with the rules or laws of procedure in such state.

Section 4. *Revision by Legislative Action*

Regulations of the Commission may be amended, modified, or rescinded by joint enactment of the General Assembly of Maryland and the General Assembly of Virginia.

ARTICLE V. ENFORCEMENT OF LAWS AND REGULATIONS: PENALTIES

Section 1. *Responsibility for Enforcement*

The regulations and orders of the Commission shall be enforced by the law enforcement agencies and officers of Maryland and Virginia.

Appendix E

Section 2. *Penalties*

The violation of any regulation of the Commission shall be a misdemeanor. Unless a lesser punishment is provided by the Commission, such violation shall be punishable by a fine not to exceed one thousand dollars ($1,000.00) or confinement in a penal institution for not more than one (1) year, or both, in the discretion of the court, and any vessels, boat, or equipment used in the taking of finfish crabs, oysters, clams or other shellfish from the Potomac River in violation of any regulation of the Commission or of applicable laws may be confiscated by the court, upon the abandonment thereof or the conviction of the owner or operator thereof.

Section 3. *Jurisdiction of Court*

The officer making an arrest or preferring a charge for violation of a regulation of the Commission or an applicable state law respecting the waters within the Commission's jurisdiction shall take the alleged offender to a court of competent jurisdiction in either State, in a county adjacent to the portion of the Potomac River where the alleged offense occurred, which shall thereupon have jurisdiction over the offense.

Section 4. *Disposition of Fines and Forfeitures*

All fines imposed for violation or regulations of the Commission or applicable state laws respecting the waters within the Commissions' jurisdiction shall be paid into the court in which the case is prosecuted, and accounted for under the laws applicable to that court. Any property confiscated

under the provisions of this Compact shall be turned over to the Commission, which may retain, use or dispose of as its deems best.

ARTICLE VI. COMMISSION FINANCES

Section 1. *Budget*

The Commission shall approve and adopt a proposed annual budget showing estimated income, revenues, appropriations, and grants from all sources, and estimated necessary expenditures and shall send a copy thereof to the Governors of Maryland and Virginia.

Section 2. *Appropriations*

The said Governors shall place in the proposed Budget of their respective states for each year the sum of not less than twenty-five thousand dollars ($25,000.00) for the expenses and the other purposes of the Commission for that year; and the General Assembly of each of the two states agrees to appropriate annually not less than this sum to the Commission.

Section 3. *General Fund*

(a) The General Fund shall consist of: (1) all income and revenue received from the issuance of licenses under this Compact; (2) the proceeds of the disposition of property confiscated pursuant to the provisions of this Compact; (3) the proceeds of the inspection tax upon

oysters imposed pursuant to this Compact; and (4) the funds appropriated to the Commission by the two states.

(b) The General Fund of the Commission shall be kept in such bank or depository as the Commission shall from time to time select. The General Fund shall be audited annually by the Auditor of Public Accounts of Virginia and the State Auditor of Maryland acting jointly, and at such other times as the Commission may request.

ARTICLE VII. EFFECT ON EXISTING LAWS AND PRIOR COMPACT

Section 1.

The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact, and the decisions of the courts construing that portion of Article VII of the Company of 1785 relating to the rights of riparian owners shall be given full force and effect.

Section 2. *Existing Laws*

The laws of the State of Maryland relating to finfish, crabs, oysters, and clams in the Potomac River, as set forth in Article 66C of the Annotated Code of Maryland and as in

effect on December 1, 1958, shall be and remain applicable in the Potomac River except to the extent changed, amended, or modified by regulations of the Commission adopted in accordance with this Compact.

Section 3. *Existing Licenses*

The rights and privileges of licensees to take and catch finfish, crabs, oysters, clams, and other shellfish in the Potomac River, which are in effect at the time this Compact becomes effective, shall continue in force subsequent to the adoption of this Compact, subject to the power of the Commission, by regulation, to modify or abolish any class of licenses or the rights of any particular class of licensees.

ARTICLE VIII. EFFECT OF RATIFICATION

These articles shall be paid before the Legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed or altered by either, without the consent of the other.

ARTICLE IX. EFFECTIVE DATE

This Compact, which takes the place of the Compact of 1785 between Maryland and Virginia, shall take effect at the expiration of 60 days after the completion of the last act legally necessary to make it operative, and thereupon the said Compact of 1785 shall no longer have any force or effect.

Appendix E

IN TESTIMONY WHEREOF, the Commissioners, on the part of the State of Maryland and the Commonwealth of Virginia, evidence their agreement to the provisions of this Compact by becoming parties signatory this, the twentieth day of December, in the year one thousand, nine hundred and fifty-eight, at Mount Vernon, in Virginia; and now witnesseth:

Commissioners of the Part of Maryland	Commissioners of the Part of Virginia
CARLYLE BARTON	MILES E. GODWIN, JR.
WILLIAM J. MCWILLIAMS	HOWARD H. ADAMS
M. WILLIAM ADELSON	EDWARD E. LANE
STEPHEN R. COLLINS	ROBERT Y. BUTTON
EDWARD S. DELAPLAINE	JOHN WARREN COOKE

APPENDIX F — POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT OF 1978

POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of January 1978, by and among the UNITED STATES OF AMERICA (hereinafter called "the Government") acting by the Secretary of the Army through the Chief of Engineers, the STATE OF MARYLAND (hereinafter called "the State") acting by the Governor and the Secretary of the Department of Natural Resources, the COMMONWEALTH OF VIRGINIA (hereinafter called "the Commonwealth") acting by the Governor and the Chairman of the State Water Control Board; the DISTRICT OF COLUMBIA (hereinafter called "the District") acting by its Mayor, the WASHINGTON SUBURBAN SANITARY COMMISSION (hereinafter called "the Commission") acting by its Chairman; and the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called "the Authority") acting by its Chairman;

PREFACE

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the primary purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Government situate in the District of Columbia and its environs, and thereafter of providing a public water supply for the inhabitants of the District of Columbia; and

Appendix F

WHEREAS, the Secretary of the Army is authorized, subject to certain conditions, to supply treated water from the Washington Aqueduct to any competent state or local authority in the Washington Metropolitan Area in Virginia, and to that end has entered into agreements with the County of Arlington and the City of Falls Church, Virginia; and

WHEREAS, the sole source of raw water treated by the Washington Aqueduct and dispensed therefrom is the Potomac River, and the Washington Aqueduct is now maintaining intake facilities for this purpose at Little Falls and Great Falls, Maryland; and

WHEREAS, the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the State's Department of Natural Resources (hereinafter called "the Administration") to appropriate or use the water of the Potomac River; and

WHEREAS, the parties to this Agreement recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made herein requiring that access by any of them to such water be made subject to the provisions of this Agreement; and

WHEREAS, the Commission is charged with the responsibility of providing a safe and adequate public water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into

agreements to provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission maintains a water treatment plant and an intake therefrom on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement, and in addition the Commission maintains a water treatment plant with intake on the Patuxent River, and requires water from both sources in order to fulfill its above-mentioned responsibilities for providing a public water supply; and

WHEREAS, the City of Rockville, Maryland, is operating and maintaining water treatment facilities and a water distribution system and maintains an intake facility about one mile upstream from Great Falls on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement; and

WHEREAS, the Fairfax County Water Authority is an authority in the Commonwealth of Virginia proposing to withdraw water from that portion of the Potomac River which is covered by this Agreement and has applied for a permit to construct a water intake structure for such purpose; and

WHEREAS, in the absence of adequate upstream impoundments and associated flow regulation, the quantity of water which may flow in the Potomac River between Little Falls Dam and the farthest upstream limit of the pool of water

behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland, during periods of low flow in that portion of the River, may be less than the quantity needed to meet the demand for all customary public water supply purposes during such periods; and

WHEREAS, in light of the Federal legislative enactments providing for the Corps of Engineers to supply water to the District of Columbia, enactment of legislation was deemed by the Government to be a prerequisite to its participation in a Potomac River Low Flow Allocation Agreement; and

WHEREAS, the consent of Congress to a Potomac River Low Flow Allocation Agreement is expressly stated in Section 181 of the Water Resources Development Act of 1976, Public Law 94-587; and

WHEREAS, the consent of Congress, pursuant to Section 9 of the Rivers and Harbors Act of 1899, to the construction of a water diversion structure by the Commission from the north shore of the Potomac River at the Commission's water filtration plant to the north shore of Watkins Island is conditioned in Section 181 of the aforesaid Water Resources Development Act of 1976 upon an enforceable Low Flow Allocation Agreement; and

WHEREAS, it is the judgment of the Chief of Engineers and the Secretary of the Army, acting pursuant to Section 10 of the Rivers and Harbors Act of 1899, that the public interest requires that such a Low Flow Allocation Agreement be a requirement for issuance of the permits for the

construction of water intake structures in the subject portion of the Potomac River by the Commission and the Fairfax County Water Authority;

NOW, THEREFORE, in consideration of the premises and of the public and governmental interests deemed to be served hereby, the parties hereto do mutually agree as follows:

Article I. Enforcement.

A. Certain Definitions:

1. Pertinent Portion of the River. The portion of the Potomac River subject to this Agreement is that located between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland. This portion is referred to herein as "the defined portion" or, alternately "the subject portion" of the Potomac River.

2. Parties. The Government, the State, the Commonwealth, and the District shall be termed "the governing parties." All other parties hereto shall be termed "member parties." The term "parties" shall mean all parties, both governing and member, except when the context otherwise requires.

B. Moderator. Authority to enforce the provisions of this Agreement shall be vested in an unbiased Moderator. It shall be the duty of the Moderator and he shall have the authority:

Appendix F

1. To take all actions necessary to enforce the provisions of this Agreement and his decisions hereunder, and for this purpose he may sue in his own name.

2. To decide all disputes between or among the parties arising under this Agreement not disposed of by consent.

The authority of the Moderator shall not restrict those powers reserved to the parties, including those specified in Article 3, Section C.

C. The decision of the Moderator shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, or not supported by substantial evidence. All parties agree to accept and implement every decision of the Moderator unless and until said decision is overturned by a court of competent jurisdiction.

D. The parties specifically grant to the Moderator the authority to inspect documents, records, meters, facilities, and other items necessary to decide any question or verify reports made by any party as a consequence of this Agreement. Upon the request of any party, the Moderator shall provide said party any or all of the information held by him relevant to this Agreement.

E. Should the Moderator decide to commence or defend any action or otherwise have need of legal services relating to this Agreement, he shall have the right to contract with

counsel for such purpose, and the cost of such services shall be repaid in equal shares by the governing parties. In the interest of prompt action; the Moderator may accept legal services, or an advance of funds, for such purpose from any party. Nothing herein shall require a party being sued by the Moderator to advance funds for such purpose.

F. The Moderator shall not be liable for injury or damage resulting from any decision or action taken in good faith without malice under apparent authority of this agreement, even though such decision or action is later judicially declared to be unauthorized or invalid.

G. The Moderator shall be selected, and may be relieved of his duties for any reason, by unanimous action of the governing parties expressed in a signed memorandum. Should the office of Moderator become vacant through death, resignation, or otherwise, a new Moderator shall be selected as soon as practicable by such unanimous action. During any period in which the office of Moderator remains vacant through a failure of unanimous action or otherwise, the full functions of the office of Moderator shall be exercised by a Standby Moderator who shall, except as expressly otherwise provided, be treated as the Moderator for all purposes under the provisions hereof. The duty to designate the Standby Moderator shall rotate annually among the Government, the State, the Commonwealth, and the District in the order stated, beginning on the date this agreement becomes effective and rotating thereafter on the first day of each calendar year. Written notice of such annual designation shall be sent to all other parties by January 15 of each year. The first Moderator for this Agreement is designated in Annex A hereto.

H. Subject to the availability of funds, the reasonable expenses, including legal fees, and compensation of the Moderator shall be paid in equal shares by the governing parties. Any expense shall be deemed reasonable if at least three of the governing parties so agree or if so determined by a court. If any such party accepts as reasonable a particular expense not accepted as reasonable by the other such parties, that party may pay that expense, in addition to that party's proportionate share of all other expenses. At the time of each annual review as provided in Article 4 of this agreement, the governing parties shall set, by majority vote, the per diem fee to be paid a Moderator in the event his services shall be necessary. A Standby Moderator, who is an employee of the designating party or one of its political subdivisions or agencies, shall serve without fee in exercising the functions of the Moderator.

I. The Moderator or any party may bring an action against any one or more other parties to enforce this Agreement or a decision of the Moderator made hereunder. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in said court and to service of process upon it from said court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States. In any such action the joinder of all parties hereto shall not be deemed necessary or indispensable merely because they are parties to this Agreement. Application for or receipt of a determination by the Moderator shall not be a prerequisite to the maintenance of an action by a party, but any decision made by the Moderator on a matter involved in said action, whether before

or after commencement thereof, shall be given the effect set forth in Article I, Section C. Nothing herein shall be deemed to be a waiver of any immunity any party may have from a claim for monetary damages or a claim which has substantial fiscal impact, except for the fees and expenses which are provided to be paid pursuant to the agreement. It is the intention of the parties that any matters involving the technical aspects of maintenance of litigation be resolved in a manner which ensures rapid and certain enforcement of this Agreement.

Article 2. Administration.

A. Washington Aqueduct. The Government will provide a communication control center at the Washington Aqueduct for the administration of the allocation plan as provided herein. The Washington Aqueduct Division, U. S. Army Engineer District, Baltimore ("the Aqueduct"), will collect, receive, record and accumulate daily reports regarding the flow of the Potomac River and the quantities of water being withdrawn from the defined portion of the Potomac River, and the quantities of water withdrawn and available from all other sources for use within the Washington Metropolitan Area, by the parties and the political subdivisions, authorities, and permittees of any of them, and by any other water withdrawing entity which may formally be added or made subject to this Agreement subsequent to its initial execution. Subject to the parties' rights of appeal to the Moderator, the parties grant to the Aqueduct, and to each other, the right to inspect documents, records, meters, facilities and other items necessary to decide any question or verify reports made by any party as a consequence

of this agreement. Beginning with the Alert Stage, the Aqueduct will keep the Moderator informed as to the stage of flow in the Potomac River, and, during the Restriction and Emergency Stages the fair share allocated to each user, and all information utilized for determining the allocation. The Aqueduct will provide all parties with the same information relating to allocation, the quantities of water being withdrawn by all users from any and all sources, and the flow of the Potomac River. To permit uniformity of reports and to implement the administrative measures specified herein, reports and calculations, by or to the Aqueduct, of daily withdrawals or daily flows, will be based on the twenty-four hour period from one midnight to the following midnight, unless the parties subsequently agree to a different twenty-four hour measuring period. The Aqueduct will calculate the total daily flow by adding the withdrawals during the previous 24 hours at all withdrawal points and the remaining daily flow over the Washington Aqueduct Dam at Little Falls, as determined by the readings recorded on the USGS gage at Little Falls during the preceding twenty-four (24) hours. The average reading will determine the flow over the dam for the previous day.

B. Stages of Flow in the Potomac River. The Aqueduct will determine from the information accumulated when the following stages exist in the defined portion of the Potomac River.

1. Alert Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than fifty percent (50%) of the total daily flow, but less than 80%, the Aqueduct will declare an "Alert Stage" to be in effect.

2. Restriction Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than eighty percent (80%) of the total daily flow, the Aqueduct will declare a "Restriction Stage" to be in effect and the Aqueduct will request the U. S. Park Service to discontinue putting Potomac River water into the C&O Canal.

3. Emergency Stage. When the estimated total daily withdrawal for any day within the ensuing five (5) days from the subject portion of the Potomac River is expected to exceed the daily river flow anticipated, the Aqueduct will declare an "Emergency Stage" to be in effect.

C. Allocation of Flow. Whenever the Restriction Stage or the Emergency Stage is in effect, the Aqueduct shall daily calculate and advise each user (as defined herein), and the Moderator, of each user's allocated fair share of the water available from the subject portion of the Potomac River in accordance with this Section C. In calculating the amount of water available for allocation, the Aqueduct will determine, in consultation with the parties and based upon then current conditions and information, any amount needed for flow in the Potomac River downstream from the Little Falls dam for the purpose of maintaining environmental conditions ("environmental flow-by"), and shall balance such need against essential human, industrial and domestic requirements for water. The Aqueduct's determination shall be based upon the data and shall give substantial weight to conclusions for environmental flowby submitted by the State.

Appendix F

1. For the purposes of this Section C, the term "users" refers to the following entities which are or may be appropriating water for public water supply purposes from the subject portion of the Potomac River; namely, the Government (including its water customers), the Commonwealth for and on behalf of herself and each of her political subdivisions and authorities (including the Authority), the State and the Administration (for and on behalf of its permittees whether or not parties to this Agreement), the District of Columbia, the Commission, and such entities which may formally be added or made subject to this Agreement subsequent to its initial execution.

2. Each user shall report to the Aqueduct (and to each other) the number of gallons of processed water pumped daily to all its customers from all sources during each winter period (the months of December through February), commencing with the winter period 1977-78. The amounts pumped during the 5 most recent winter periods which have elapsed as of the time of allocation, or less than 5 if fewer have so elapsed, shall be combined for the purpose of computing each user's average daily winter use; except that, in the case of a user first withdrawing water subsequent to the initial execution of the Agreement, the average daily winter use of such user shall be the average of the amounts of water pumped during all of the winter periods, commencing December 1 of the year immediately prior to its first withdrawal from the subject portion of the river, which have elapsed as of the time of allocation, but not exceeding the 5 most recent winter periods. The ratio which the average daily

winter use of each user bears to the average daily winter use of all users will be applied to the daily amount of water available at the time of allocation from the subject portion of the Potomac River (after deduction for environmental flow-by) and all other sources as specified in Paragraph 5 below (calculated at maximum capacity practicable). The resulting amount, less the amount then available to said user by use of the maximum capacity practicable from all such other sources, will be such user's allocated fair share of the flow of the Potomac River.

3. a. The formula set forth in Article 2.C.2. shall continue in effect unless changed by unanimous consent of the governing parties or as set forth below. After January 1, 1988, any of the governing parties which desires to change the allocation formula shall give written notice to all other parties. Within 60 days thereafter, both the governing and member parties shall meet for the purpose of negotiating a replacement formula. In the event that no such replacement formula is agreed on by the governing parties within one year after receipt of the aforesaid notice, the allocation ratio which would have been in effect for the summer of the year in which the notice was given shall be used as in interim allocation ratio for the withdrawal of water during subsequent periods of low flow until such time as the governing parties agree upon a replacement formula. Any governing party, at any time after the expiration of one year from the receipt of such notice and after the exhaustion of such administrative procedures as may be applicable if it is a permittee for

water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it or users associated with it may have to a greater share of water than set by the interim allocation ratio, provided that all parties shall adhere to the interim allocation ratio until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be received and processed during periods in which the interim allocation ratio is in effect, but such ratio shall be recalculated only in the event of the grant of an application to a new user as set forth in Section E of Article 3.

b. Any formula negotiated pursuant to subparagraph a hereof shall allocate water on a fair and equitable basis and shall take into consideration, among other things, (a) steps taken by parties which can do so to minimize dependence upon the Potomac River during periods of low flow, (b) the nature and effectiveness of water conservation methods put into effect, (c) steps taken to increase the water supply available for the Washington Metropolitan Area, (d) then current population growth and planning for future growth, (e) feasibility and availability of new sources of water, and (f) technological advances in water treatment and water quality measurement.

c. In any court proceeding instituted pursuant to subparagraph a, neither the signing of this agreement nor the passage of time thereafter shall be asserted as a waiver or diminution of any party's rights to, or right to

seek, a greater share of water from the subject portion of the river. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in such court and to service of process upon it from such court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States.

4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct for reallocation.

5. The water subject to the allocation formula under the terms of this Agreement includes the maximum capacity practicable from Patuxent and Occoquan as it exists in each case on December 31, 1977, and both the natural flow and the augmented flow from existing upstream reservoirs, in addition to Bloomington Lake, of the subject portion of the Potomac River. Any other augmentation to flow, reservoir storage, or treating capacity developed by a user after December 31, 1977, shall not be made subject to the allocation formula, but those users who incur, or participate in the payment of, the expenditures for such augmentation may agree as to how it is to be divided and shall file a copy of said agreement with the other parties. In recognition that the sole source of water supply for the District of Columbia is the Potomac River, each other party will offer the District an opportunity to participate in a portion of any

additional augmentation for use during the Restriction and Emergency stages on reasonable terms, unless such party shows that it is infeasible to do so.

6. In the event a disaster, such as a major fire or water main break, results in an abnormal loss of a significant portion of any user's water supply, the Aqueduct shall determine suitable adjustments in low flow allocation during the emergency period created by the disaster only, taking into consideration all sources available to the users.

7. Water from the emergency pumping station having its intake at the estuary of the Potomac shall not be considered as water available from other sources for the purposes of Section 2.C.2. or otherwise included in computations made under this agreement.

Article 3. Obligations of the Parties.

A. The Government agrees to cause the Aqueduct as the operating agency to perform the functions and requirements which are required of the Government and the Aqueduct in this Agreement, including the furnishing of information to the other parties relating to the Aqueduct's water withdrawal and use, the same as required by other parties to be furnished to the Aqueduct under Subparagraphs B and D, of this Article. These functions and responsibilities of the Aqueduct shall be carried out under the supervision of the District Engineer, U. S. Army Engineer District, Baltimore, or his designee, who shall be responsible for making the determinations required in the discharge of these responsibilities.

Appendix F

B. The parties agree to provide the Aqueduct with all the information relating to the withdrawal and use by them, their permittees, entities reporting through them and their political subdivisions, as applicable, of the waters of the subject portion of the Potomac River and availability from other sources which is needed for the administration of the allocation system.

C. The State agrees that all appropriation permits granted by the Administration for any appropriation of water from the subject portion of the Potomac River shall include a provision subjecting the permittee to the provisions of this Agreement. Nothing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River; nor any such authority as the Commonwealth may have; nor the authority of the Government with respect to navigable waters, including the regulation of commerce among the states and with foreign nations.

D. The parties will comply with the determinations made by the Aqueduct pursuant to this Agreement, unless and until overturned pursuant to the terms of Article 1.

E. Any community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which includes the low flow allocation formula and such other provisions as are necessary to effect

the purposes of this Agreement. Any such community or entity may apply for permits necessary to build water intake structures or to appropriate water, and such permits shall be processed in accordance with the rules and regulations of the permit-issuing agency, notwithstanding the pendency of negotiations or the imposition of an interim allocation ratio pursuant to Section 2.C.3. If the necessary permits are granted to a community or entity not previously withdrawing water from the subject portion of the river, the existing interim allocation ratio shall be recalculated based on winter period use for the year immediately prior to the first withdrawal from the subject portion of the river by such new user. The average daily winter use of the new user for such winter period and those of the other users employed in determining the interim allocation ratio shall be employed to compute a revised interim allocation ratio which shall remain in effect until a replacement formula is determined pursuant to Section 2.C.3.

F. This Agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages.

Article 4. Review

In the month of April in each year during the term of this Agreement the parties shall convene for the purpose of

reviewing the provisions of this Agreement and considering any modifications thereof, and make such modifications as the governing parties agree upon. Upon agreement among the governing parties, review and modifications as might be agreed upon can occur at any time and not be necessarily limited to the annual, April consideration. Entities shall be admitted as new member parties upon unanimous agreement of the governing parties.

Article 5. Revocation.

This Agreement shall not be revoked without the unanimous consent of the governing parties.

Article 6. Effective Date.

This Agreement shall become binding when: (1) it is executed by the parties, and (2) a Moderator has been selected as provided in Article 1.G, and (3) the Government issues one or more permits for the construction of any water diversion structure or water intake in the subject portion of the Potomac River to any party hereto or political subdivision or authority thereof, and (4) all acts have been taken by each of the parties hereto necessary to make this agreement binding and enforceable with respect to each of them, including, if necessary, ratification by the legislatures of the signatory states. Notice that all such necessary acts have been taken by each of the parties shall be delivered to the other parties along with the opinion of its respective counsel or attorney general that the acts taken are sufficient to cause this agreement to become effective, binding and enforceable under the laws or charter of such parties. The parties will,

however, commence to record and maintain the consumption figures and other base data called for under the foregoing provisions of this Agreement, at the time they execute this Agreement. This Agreement may be executed in one or more counterparts.

Article 7. Severability.

The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of the agreement is declared to be unconstitutional or the applicability thereof to any party is held invalid, the remainder of such agreement shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written, except as a different date of execution may be noted following any party's signature.

ATTEST:

/s/ _____

THE UNITED STATES OF AMERICA

BY /s/ _____
Secretary of the Army

/s/ _____
Chief of Engineers

Appendix F

THE STATE OF MARYLAND

/s/ _____ BY /s/ _____
Governor

/s/ _____
Secretary of Natural Resources

THE COMMONWEALTH OF VIRGINIA

/s/ _____ BY /s/ _____
Governor

/s/ _____
Vice Chairman, State Water Control Board

THE DISTRICT OF COLUMBIA

/s/ _____ BY /s/ _____
EXECUTIVE SECRETARY, D. C. Mayor

/s/ _____
Director of Environmental Services

Appendix F

THE WASHINGTON
SUBURBAN SANITARY
COMMISSION

/s/ _____ BY /s/ _____
Chairman

FAIRFAX COUNTY WATER
AUTHORITY

/s/ _____ BY /s/ _____
Chairman

Appendix F

MODIFICATION NO. 1
POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT
DATED AS OF JANUARY 11, 1978

ARTICLE 2.C.2. is modified by adding the phrase "On or before March 15 of each year," at the beginning of the first sentence.

ARTICLE 2.C.3.a. is modified by adding the following paragraphs at the end thereof:

> "During such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the District, the Authority and the Commission providing for the regional management of all their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the foregoing paragraph shall be inoperative and the following paragraph shall become operative.
>
> The allocation formula set forth in Article 2.C.2., or any subsequently revised or replacement formula, may be revised or replaced by unanimous agreement of the governing parties as herein provided. At the April 1985 meeting of the parties and at each fifth annual April meeting thereafter, the parties shall review and evaluate the fairness and reasonableness of the formula then in effect in the light of: experience gained in the operation of the agreement during the preceding five year period; then current estimates of future water demands in the

Washington Metropolitan Area; adequacy of then available and prospective future supplies of water to satisfy future demands; experience gained in the regional management of available water supply facilities to optimize their use; factors listed in subparagraph 2.C.3.b.; and such other factors as may be pertinent. If as a result of any such review and evaluation the governing parties shall determine that the formula then in effect is not fair and reasonable, they shall revise or replace the formula in such manner as they shall deem appropriate. Notwithstanding the foregoing, if at any other time any party desires to secure a revision or replacement of the formula, it shall give written notice thereof to all other parties and, within 60 days after such notification, the parties shall meet for the purpose of negotiating a revision or replacement of the formula. Unless and until a revised or replacement formula is agreed upon by unanimous agreement of the governing parties, the formula then in effect shall continue in effect. However, any party, at any time after the expiration of one year from the filing of such notice and after the exhaustion of such administrative procedures as may be applicable if it is a permittee for water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it or users associated with it may have to a greater share of water than set by the formula then in effect. All parties shall adhere to the formula then in effect until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be received and processed during periods in which negotiations of a revised or replacement formula

are in effect and during the pendency of any litigation relating thereto."

ARTICLE 2.C.4. is modified to read as follows:

"4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct and the Aqueduct shall reallocate said excess amount among the other users in a reasonable manner."

ARTICLE 2.C.5. is modified to read as follows:

"5. The water subject to the allocation formula under the terms of this Agreement includes (i) the maximum capacity then practicable from the Patuxent River and the Occoquan River; (ii) the natural flow of the subject portion of the Potomac River; and (iii) augmented flow of the subject portion of the Potomac River resulting from releases (for whatever purpose) from existing upstream reservoirs, including Bloomington Lake and Savage Lake and from the proposed Little Seneca Lake when completed and operational."

ARTICLE 2.C. is modified by adding the following new paragraph:

"8. In April 1990 and in April of each fifth year thereafter during such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the

District, the Authority, and the Commission providing for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the Aqueduct, the District, the Authority, and the Commission shall review and evaluate the adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding twenty year period. If as a result of any such review and evaluation it is determined that additional water supplies will be required to meet the expected demands, the Aqueduct, the District, the Authority, and the Commission shall undertake negotiations to provide the required additional water supplies and, when provided, water from such additional water supplies shall be included as water subject to the allocation formula under the terms of this Agreement."

ARTICLE 3.E. is modified by adding the following paragraphs at the end thereof:

"During such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the District, the Authority, and the Commission providing for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the foregoing paragraph shall be inoperative and the following paragraph shall become operative.

Appendix F

Any community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which includes the low flow allocation formula and such other provisions as are necessary to effect the purposes of this Agreement. Any such community or entity may apply for permits necessary to build water intake structures or to appropriate water, and such permits shall be processed in accordance with the rules and regulations of the permit-issuing agency, notwithstanding the pendency of negotiations or litigation pursuant to Section 2.C.3."

ADOPTION BY GOVERNING PARTIES

At a meeting held on the 15th day of April 1982, and by subsequent correspondence and telephone polling, representatives of the governing parties unanimously recommended adoption of the foregoing Modification No. 1 of the Potomac River Low Flow Allocation Agreement, dated as of January 11, 1978, and the same is hereby agreed to and adopted by the governing parties as of the dates indicated opposite their signatures.

Appendix F

Witness the following signatures:

ATTEST:	THE UNITED STATES OF AMERICA
/s/ _____	BY /s/ _____ Secretary of the Army
22 JUL 1982 (Date)	/s/ _____ Chief of Engineers
	THE STATE OF MARYLAND
/s/ _____	BY /s/ _____ Governor
22 JUL 1982 (Date)	/s/ _____ Secretary of Natural Resources
	THE COMMONWEALTH OF VIRGINIA
/s/ _____	BY /s/ _____ Governor
22 JUL 1982 (Date)	/s/ _____ Chairman, State Water Control Board

Appendix F

THE DISTRICT OF COLUMBIA

/s/ _____ BY /s/ _____
Mayor

22 JUL 1982 /s/ _____
(Date) Director, Department of Environmental Services

APPENDIX G — WATER SUPPLY COORDINATION AGREEMENT OF 1982

WATER SUPPLY COORDINATION AGREEMENT

THIS AGREEMENT, dated for convenience of reference as the 22 day of July, 1982, made and entered into by and among the UNITED STATES OF AMERICA acting through the Baltimore District, Corps of Engineers, U.S. Army, functioning through the Washington Aqueduct Division (hereinafter called the "Aqueduct"); the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called the "Authority"); the WASHINGTON SUBURBAN SANITARY COMMISSION (hereinafter called the "Commission"); the DISTRICT OF COLUMBIA (hereinafter called the "District"); and the INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC (hereinafter called the "CO-OP").

WITNESSETH

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Federal Government situated in the District and its environs, and of providing a public water supply for the inhabitants of the District, and certain communities in northern Virginia; and

WHEREAS, the Authority is an authority established pursuant to the laws of the Commonwealth of Virginia charged with responsibility for providing a safe and adequate

public water supply within certain geographic areas of northern Virginia, and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission is a public authority established pursuant to the laws of Maryland, is charged with the responsibility of providing a safe and adequate water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the District is authorized and empowered to contract to provide a safe and adequate water supply to the inhabitants and entities within its jurisdiction and accomplishes this purpose through cooperation with the Washington Aqueduct Division, Corps of Engineers, United States Army, and is also authorized to contract for the purposes described herein, and

WHEREAS, the Interstate Commission on the Potomac River Basin (ICPRB) has created CO-OP devoted to forecasting demand and supply in the Washington Metropolitan Area; and

WHEREAS, CO-OP has developed a program for optimal utilization of all available water supply facilities in the Washington Metropolitan Area, particularly during drought periods; and

Appendix G

WHEREAS, the Aqueduct, the Authority, and the Commission (hereinafter called the "suppliers") now have in place, on the Potomac River, water intakes installed in accordance with appropriate Federal and state laws; and

WHEREAS, the suppliers are governed by the provisions of the Potomac River Low Flow Allocation Agreement, dated January 11, 1978, which is hereby incorporated by reference into this agreement and made part thereof; and

WHEREAS, it is in the mutual benefit of the suppliers to manage Potomac River flows, reservoir releases, and water supply withdrawals so as to reduce or eliminate the possibility that the Emergency Stage of the Low Flow Allocation Agreement will ever be reached or that the allocation formula set forth therein becomes operative.

NOW, THEREFORE, in consideration of the mutual covenants herein contained the parties hereto do hereby agree as follows:

ARTICLE 1. — The suppliers agree to operate their respective water supply systems in a coordinated manner so as to provide the optimal utilization of all available water supply facilities for the benefit of the inhabitants of the Washington Metropolitan Area.

ARTICLE 2. — The Authority and the Commission agree to operate their non-Potomac water supplies (Occoquan River and Patuxent River) so as to maximize the availability of reservoir storage associated therewith for use during periods of low flows in the Potomac River.

Appendix G

ARTICLE 3. — The District, the Authority, and the Commission agree that, notwithstanding the extent to which they each may participate in the cost of construction, operation and maintenance of Bloomington Lake, and the proposed Little Seneca Lake and in the operation and maintenance costs of the Savage Reservoir, releases of water from Bloomington Lake water supply storage and Little Seneca Lake shall be made as provided by this agreement.

ARTICLE 4. — The suppliers agree that all available water supply facilities shall be managed and operated as provided in the attached Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers (hereinafter called the "Operations Manual"), which manual is hereby made part of this agreement.

ARTICLE 5a. — CO-OP agrees to provide the administrative, technical, supervisory and managerial services set forth in the attached Operations Manual and the District, the Authority, and the Commission agree to pay the costs thereof in the following proportions: District-30%, Authority-20% and Commission-50%.

ARTICLE 5b. — The District shall take all necessary actions to procure the required appropriations to meet its cost sharing obligations hereunder; provided, however, that no payments shall be made by the District until appropriations for such purposes have been made pursuant to the requirements of the Budget and Accounting (Anti-Deficiency) Act of 1921 (31 U.S.C. 665) as amended.

Appendix G

ARTICLE 6. — The parties agree that the services to be provided by CO-OP may be terminated at any time either by the unanimous agreement of the District, the Authority and the Commission or by CO-OP, in which event CO-OP shall deliver to the suppliers all computer hardware and software, equipment, supplies, records, etc., which may have been acquired or developed at the expense of the District, the Authority, and the Commission and thereupon the suppliers shall make appropriate arrangements for continuing the functions, duties and responsibilities theretofore performed by CO-OP. The District, the Authority and the Commission agree to pay necessary termination expenses incurred by CO-OP.

ARTICLE 7. — The suppliers do hereby establish an Operations Committee which shall comprise a representative of each supplier. The Committee shall be responsible for overseeing implementation of this agreement and the Operations Manual and shall be empowered, upon unanimous agreement, to revise the Operations Manual as circumstances may require. The Operations Committee shall:

(a) as necessary, review decisions of the Director of CO-OP and by unanimous agreement, change such decisions and so inform the Director of CO-OP,

(b) monitor compliance with the terms of this agreement and the Operations Manual,

(c) provide executive support to the Director of CO-OP within their agencies,

(d) approve expenditures of CO-OP relevant to the terms of this agreement,

(e) establish joint and coordinated operating procedures for use by the suppliers to monitor supply (including rainfall forecasts) and demand during emergencies and droughts, and

(f) establish CO-OP as the agency responsible for executing the procedures in 7 (e) above and for the establishment and maintenance of a system for monitoring supply and demand and performing drought management analysis.

ARTICLE 8. — The consideration for this agreement is the promises herein exchanged based upon the premises above mentioned and the public and governmental interests deemed necessary and desirable by the parties to this agreement.

ARTICLE 9. — It is agreed that the waters released from Bloomington Lake water supply storage and Little Seneca Lake are to be utilized to achieve the objectives of this agreement without regard to any cost-sharing by the District, the Authority, and the Commission in Bloomington Reservoir and Little Seneca Lake.

ARTICLE 10. — In April 1990 and in April of each fifth year thereafter during such time as this agreement is in effect and the proposed Little Seneca Lake has been constructed and is operational, the Aqueduct, the Authority, the Commission and the District shall review and evaluate the

adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding twenty year period. If as a result of any such review and evaluation it is determined that additional water supplies will be required to meet the expected demands, the Aqueduct, the Authority, the Commission and the District shall undertake negotiations to provide the required additional water supplies and, when provided, water from such additional water supplies shall be included as water subject to the allocation formula under the terms of the Potomac River Low Flow Allocation Agreement. Such facilities shall be operated under the terms of this agreement. The District, the Authority, and the Commission agree that the costs of construction, operation and maintenance of such additional water supplies shall be shared among these parties in accordance with the following formulae:

$$\text{District's Share} \quad -\%= \frac{(A-B)}{(A-B)+(C-D)+(E-F)} \times 100$$

$$\text{Authority's Share} \quad -\%= \frac{(C-D)}{(A-B)+(C-D)+(E-F)} \times 100$$

$$\text{Commission's Share} \quad -\%= \frac{(E-F)}{(A-B)+(C-D)+(E-F)} \times 100$$

Where:

A = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during

the month of July in each of the five (5) years immediately preceding the award of a contract(s) for the construction of the additional water supply facilities.

B = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during the month of July in each of the years 1981 through 1985.

C = Same as A, except substitute the number of gallons of processed water pumped daily by the Authority.

D = Same as B, except substitute the number of gallons of processed water pumped daily by the Authority.

E = Same as A, except substitute the number of gallons of processed water pumped daily by the Commission.

F = Same as B, except substitute the number of gallons of processed water pumped daily by the Commission.

Whenever application of the above formulae results in a negative amount for any one of these parties, such party's share of the costs shall be zero. Thereupon, the formulae applicable to the other two parties shall be revised by eliminating therefrom the term which relates to the party with zero cost share (e.g., if the District's share is zero, the term (A-B) shall be eliminated; if the Authority's share is zero, the term (C-D) shall be eliminated; and if the Commission's share is zero, the term (E-F) shall be eliminated) and the revised formulae shall be applied to

determine the respective shares of costs to be borne by the other two parties. Whenever application of the above formulae results in negative amounts for any two of these parties, their respective shares of the costs shall be zero and the entire costs shall be borne by the third party.

ARTICLE 11. — The suppliers, the District and CO-OP agree to utilize their best efforts to resolve any disputes which arise under this agreement or the Operations Manual by informal negotiation, the resolution of which shall require unanimous agreement of the suppliers, and the District. However, any party may initiate litigation, the purpose of which is to construe a provision of or resolve a dispute that arises under this agreement or the Operations Manual. The parties to this agreement hereby agree the issues to be litigated may be litigated in any court of competent jurisdiction sitting in Maryland, Virginia, or the District of Columbia and consent to venue in any such court and to the service of all papers and pleadings related thereto. Pending final resolution of any dispute, the provisions of this agreement and the Operations Manual shall continue in effect.

ARTICLE 12. — The effective date of this agreement shall be the date on which the last party executes the same.

ARTICLE 13. — Unless sooner terminated by unanimous agreement of the suppliers, and the District, this agreement shall continue in effect for as long as the water systems of the suppliers remain in existence and operation.

Appendix G

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date which appears with their respective signatures.

Approved in form and in legal sufficiency:	UNITED STATES OF AMERICA
/s/ _____	By: /s/ _____ District Engineer, Baltimore District, Corps of Engineers, U.S. Army
Date: 22 July 1982	Date: 22 July 1982
	FAIRFAX COUNTY WATER AUTHORITY
/s/ _____	By: /s/ _____ Chairman
Date: 22 July 1982	Date: 22 July '82
	WASHINGTON SUBURBAN SANITARY COMMISSION
/s/ _____	By: /s/ _____ General Manager
Date: 22 July 1982	Date: 22 Jul 82

Appendix G

THE DISTRICT OF COLUMBIA

/s/ _____ BY /s/ _____
Mayor

Date: _____ Date: 7-22-82

INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC

/s/ _____ BY /s/ _____

Date: July 22, 1982 Date: July 22, 1982

Appendix G

Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers

(Attachment to Water Supply Coordination Agreement, dated July 22, 1982)

I. Introduction

This manual details operations rules and procedures for reducing the impacts of severe droughts in the Potomac River Basin. Although the primary emphasis is on water supply for the Washington Metropolitan Area, the rules and procedures are consistent with maintaining instream flow and water quality in both upstream and downstream portions of the basin.

II. Objectives

A. Make the most efficient use of all water supply facilities, including but not limited to the Potomac River, Bloomington Lake, Occoquan Reservoir, Triadelphia Reservoir, Duckett Reservoir, and the proposed Little Seneca Lake to meet all water supply needs for the Washington Metropolitan Area.

B. Maintain the probability of invoking the Restriction Stage of the Potomac River Low Flow Allocation Agreement at less than 5 percent during a repeat of the historical streamflow record.

C. Maintain the probability of entering the Emergency Stage of the Potomac River Low Flow Allocation

Agreement at less than 2 percent with full reservoirs on June 1 of any year.

D. Maintain the probability of not refilling any reservoir used for Washington Metropolitan Area water supply to 90 percent of useable capacity by the following June 1 at less 5 percent during a repeat of the historical streamflow record.

E. Maintain flows in the Potomac River below Seneca Pool as agreed to by the signatories to the Potomac River Low Flow Allocation Agreement.

F. Minimize conflict between normal utility operations and drought operations.

G. Provide consistency with the requirements of the Potomac River Low Flow Allocation Agreement.

III. Facilities and Operations Directly Affected.

A. Potomac River facilities of the Washington Aqueduct Division, U.S. Army Corps of Engineers, Washington Suburban Sanitary Commission, and the Fairfax County Water Authority.

B. Washington Suburban Sanitary Commission water supply facilities on the Patuxent River.

C. Fairfax County Water Authority water supply and power generating facilities on the Occoquan River.

D. Finished water interconnections between the Fairfax County Water Authority and the Washington Aqueduct Division, U.S. Army Corps of Engineers supplied water utilities in Virginia, subject to the approval of Arlington County and/or the City of Falls Church.

E. Water supply releases from the proposed Little Seneca Lake.

F. Water supply releases from water supply storage in Bloomington Lake.

IV. Implementation

A. Whenever gauged flows at Point of Rocks are below 2000 cfs, CO-OP will compute flows in the Potomac River at Little Falls Dam, including all prior water supply withdrawals for the Washington Metropolitan Area on a daily basis.

B. CO-OP will issue long-range water supply outlooks on a monthly basis from May through October. Additional outlooks will be issued as needed. These outlooks will contain estimates of the probability of meeting long-range unrestricted demands from current storage, and then refilling every reservoir to at least 90 percent of useable capacity by the following June 1.

When computing probabilities, CO-OP shall consider gross storage in all local reservoirs, less

the following allowances for unuseable storage: a) Occoquan — 1 billion gallons; b) Patuxent (Triadelphia plus Duckett) — 2 billion gallons; and c) Little Seneca Lake — .5 billion gallons.

C. The rules set forth in Section V. shall take effect when one or both of the following conditions exist.

1. The probability of meeting all unrestricted demands and refilling all reservoirs to 90 percent of useable capacity by the following June 1 is less then 98 percent.

2. Flow in the Potomac as computed in IV-A above, less the amount required for flow-by over Little Falls Dam is projected to be less than twice the projected withdrawals for any of the next five days.

V. Operating Rules

A. During such time as the rules are in effect (per IV-C above) each supplier shall report daily to CO-OP, no later than 8:30 A.M., its 24 hour demand ending at 6:00 A.M. on that day.

B. During such times as these rules are in effect, the Director of CO-OP shall, following the objectives outlined in II above, and using techniques approved by the Operations Committee:

(1) Consult with the suppliers and the U.S. Army Corps of Engineers as required and direct the appropriate releases from water supply storage in Bloomington Lake and Little Seneca Lake.

(2) Prior to 10:00 A.M. daily set withdrawal rates from the Potomac for the Authority and the Commission for the 24 hour period beginning at 6:00 A.M. on that day.

C. As early as practicable during each day, the Director of CO-OP shall revise the Authority's and the Commission's Potomac withdrawal rates in light of actual river flow and water demands.

D. Whenever the Aqueduct declares the Restriction or Emergency Stage of the Potomac River Low Flow Allocation Agreement to be in effect, the allocation provisions of the Potomac River Low Flow Allocation Agreement shall determine Potomac withdrawals.

E. During such times as these rules are in effect power generation at the Occoquan River shall cease.

F. Should the probability of meeting unrestricted demand with existing storage fall below 95 percent, each supplier agrees to so advise the governing bodies of the jurisdictions which they serve and to recommend restrictions on water use.

Appendix G

G. Raw water released from Lake Manassas and reimpounded in the Occoquan Reservoir shall be treated as Occoquan storage under these rules.

VI. Review by Operations Committee

A. The Operations Committee shall be responsible for overseeing the administration and implementation of this manual and, by unanimous agreement, shall be empowered to overrule or modify any action taken, or proposed to be taken, hereunder by the Director of CO-OP.

APPENDIX H — LETTER FROM BRUCE F. WILLIAMS TO MARTIN B. SULTAN DATED JANUARY 31, 1997

[Letterhead of Department of the Army]

January 31, 1997

Mr. Martin B. Sultan
Fairfax County Water Authority
8560 Arlington Boulevard
P. O. Box 1500
Merrifield, Virginia 22116-0185

Dear Mr. Sultan:

This is in reference to your permit application for Department of the Army authorization to construct a new intake structure located in the river extending channelward about 725 feet from the Virginia shoreline, a 10-foot diameter concrete pipe extending from the new intake to the existing intake, a connection to the existing intake, a clean-out shaft, and approximately 3200 feet of 9-foot diameter pipeline extending from the existing intake to the existing raw water pumping station. The project is located on the Potomac River, north of Lowes Island and approximately 2000 feet upstream of the Seneca Dam, in Loudoun County, Virginia and Montgomery County, Maryland.

After evaluating your application, we have determined that it qualifies for our Abbreviated Standard Permit 92-ASP-18 for activities of minimal environmental consequence. Provided your project adheres to the proposal you submitted

on December 16, 1996, the conditions of the abbreviated standard permit (enclosure) and the following special conditions, no further authorization will be required from this office:

1. Construction of the mid-river intake will use the "velocity cap" intake design to reduce impacts to juvenile fish;

2. Blasting of the river bed will not occur between March 1 and June 15 of any year to minimize impacts to fish during the breeding period;

3. A silt curtain will be utilized to reduce sedimentation impacts.

4. Non-erodible materials should be used, as practicable, in construction and stabilization of the temporary construction berm. All materials placed temporarily will be removed and the area restored to pre-project contours upon completion of the project.

If you should decide to change any aspect of your proposal, you must first apply for and be granted a permit modification. Your authorization to perform work under this regional permit expires on September 10, 1997.

Before you begin work, you should obtain all required State and local authorizations.

The party performing the work authorized by this permit will have a copy of this letter and the enclosed documents

with them at the project site during construction. These documents will be made available to any Corps representative upon their request.

Sincerely,

/s/
Bruce F. Williams
Chief, Northern Virginia
Regulatory Section

Enclosures

Copies Furnished:

Virginia Marine Resources Commission, Newport News
Virginia Department of Environmental Quality, Woodbridge
U.S. Fish and Wildlife Service, White Marsh
Environmental Protection Agency, Philadelphia
National Marine Fisheries Service, Oxford

APPENDIX I — LETTER FROM DEL. HELLER TO SEC. NISHIDA DATED MAY 8, 1997

HOUSE OF DELEGATES
Annapolis, Maryland 21401-1991

May 8, 1997

Ms. Jane Nishida
Secretary
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Dear Secretary Nishida:

Enclosed is a letter I received from my constituent's Mr. and Mrs. West, regarding the Fairfax County Water Authority Mid-River Intake project. As outlined in their letter they have grave concerns regarding this project.

In order to assist the West's, I am requesting that you review their letter and provide me with an explanation so that I may respond to them. In addition to the environmental concerns, I am also interested in why the State of Maryland would be establishing a less restrictive building environment on the Virginia side of the river for competition against Maryland builders in Montgomery and Frederick Counties.

I look forward to your response. If I can be of assistance, please feel free to contact me at any time.

Sincerely,

Henry B. Heller

Enclosure

APPENDIX J — LETTER FROM DEL. CRYOR TO SEC. NISHIDA DATED MAY 19, 1997

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND

JEAN B. CRYOR
May 19, 1997

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

Dear Secretary Nishida:

As you know, on Wednesday, May 21, in Montgomery County, the Maryland Department of Environment is holding a hearing regarding a request by Fairfax County, Virginia, to install a new water intake pipe in the Potomac River. The pipe is to be located near Seneca. Presently, Virginia draws its river water using a shore line pipe. The new pipe will be in the middle of the river. It will be capable of taking at lease double the amount of water presently removed. The new pipe does not automatically remove usage of the shore line pipe.

In April, I was contacted about the new pipe by a Montgomery County high school teacher with a strong interest in the environment. Upon hearing from Mr. John Mathwin, I contacted the Department of Environment. The staff of the department has been most courteous and responsive and agreed to schedule a hearing. As I said to you when we spoke on Friday, May 16, I am concerned about

the pipe and its impact on the environment as well as my concerns about the river being used as a resource for Virginia's continuing economic development.

It has become clear to me that Virginia's planners regard the Potomac River as key to their burgeoning development. Maryland has taken a view, particularly regarding the enlightened Smart Growth plan, to team economic development and careful environmental planning. However, Virginia does not appear to have the same thoughtful view. As Virginia continues to develop and build in the northern part of the Commonwealth, we in Maryland, I believe, will continue to experience tremendous pressure, both for jobs and for changing our own protective environmental stand.

It appears time for Maryland to look at the Potomac River and its place in the growing regional economy. Do we want to continue to exploit the river for the sake of Virginia's development?

I have asked for a meeting with Governor Glendening to discuss the river.

All my best,

Jean Cryor

APPENDIX K — LETTER FROM VIRGINIA COMMISSIONER OF HEALTH RANDOLPH GORDON TO CHARLIE CROWDER DATED OCTOBER 29, 1997

COMMONWEALTH OF VIRGINIA
Department of Health
P.O. Box 2448
Richmond, VA 23218

October 29, 1997

Mr. Charlie C. Crowder, Jr.
General Manager
Fairfax County Water Authority
8560 Arlington Boulevard
Merrifield, Virginia 22116-0815

Dear Mr. Crowder:

SUBJECT: Potomac Mid-River Intake

This letter is to confirm our position on the proposed mid-river intake on the Potomac River with respect to water quality and public health. It has long been the policy of the Virginia Department of Health that each waterworks use the best quality raw water source available. In fact, both the Virginia and national drinking water regulations are predicated on this assumption.

The use of a mid-river raw water intake has many water quality and public health advantages over the continued use of the existing shoreline intake. Of particular importance, is the inescapable fact that the water near the center of such a large river is not nearly as susceptible to shoreline sources of contamination. These contamination sources include

everything from urban and agricultural storm runoff to accidental discharges from such occurrences as pipeline breaks or vehicle accidents. The water at mid-river will also be of more consistent quality making it easier and more economic to treat. With our growing concern about treatment resistant pathogenic organisms such as Giardia and Cryptosporidium, it is even more critical that the best quality water sources be used.

We, at the Virginia Department of Health, consider the move to a mid-river water intake to be an essential public health initiative for the more than one million Virginians and their visitors who use Fairfax County Water Authority drinking water on a daily basis. We commend the FCWA for its insight in identifying such a simple solution to the increasingly complex problem of providing the safest possible drinking water to its customers.

Sincerely,

Randolph L. Gordon, M.D., M.P.H.
Commissioner

APPENDIX L — LETTER FROM J.L. HEARN TO BRUCE F. WILLIAMS DATED DECEMBER 10, 1997

[Letterhead of Maryland Department of the Environment]

December 10, 1997

Bruce F. Williams
Chief, Northern Virginia Regulatory Section
Norfolk District
U.S. Army Corps of Engineers
Fort Norfolk, 803 Front Street
Norfolk, Virginia 23510-1096

Re: Fairfax County Water Authority
Potomac River Intake
Lowes Island, Virginia
Maryland Nontidal Wetlands and Waterways
Tracking Number 96-NT-0024/199661481

Dear Mr. Williams:

The Maryland Department of the Environment has considered all information submitted by the applicant, Fairfax County Water Authority, the public, and other agencies to reach a decision on the above referenced permit application to construct a 300 million gallon per day capacity intake approximately 600 to 725 feet into the Potomac River. Based on the evidence submitted, the Department believes the general public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake. The public need for a safe and adequate supply of drinking water may reasonably be accomplished using the existing intake on the Virginia shore of the Potomac

River. As an unneeded project, proceeding with construction would be viewed as a wasteful endeavor, therefore, the Department has denied authorization. This has prevented the Department from proceeding far enough in its review to arrive at an acceptable construction method. Since the need and value of the project has not been justified and a method of construction selected, the project *was not evaluated* for a water quality certificate under the federal 401 requirement for consistency with State water quality standards.

If you have any questions about the decision of the Department in this matter, please do not hesitate to contact me.

Sincerely,

/s/ J. L. Hearn
J. L. Hearn, Director
Water Management Administration

JLH:twc
cc: Charlie C. Crowder, Jr.

APPENDIX M — LETTER FROM GOVERNOR PARRIS GLENDENING TO JOHN MATHWIN DATED FEBRUARY 9, 1998

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

February 9, 1998

Mr. John Mathwin
13515 Crispin Way
Rockville MD 20853

Dear Mr. Mathwin:

Thank you for your letter regarding Fairfax County's proposal to construct a mid-river water intake on the Potomac River. I am pleased that the State of Maryland was able to address your concerns and protect this nationally important natural resource.

The State reached its decision to deny authorization of this project by considering all the information submitted by the Fairfax County Water Authority. Based on the evidence provided, I decided that the public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake.

Thank you again for your letter of support. If you have any further questions concerning this project, please contact Mr. J.L. Hearns, Director, Maryland Department of the Environment, Water Management Administration, at (410) 631-3567.

Appendix M

Sincerely,

/s/ Parris N. Glendening
Parris N. Glendening
Governor

cc: J.L. Hearns [sic], Director, Water Management Administration, Department of the Environment

APPENDIX N — STIPULATIONS OF THE PARTIES DATED OCTOBER 9, 1998

BEFORE NEILE FRIEDMAN
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE OF
ADMINISTRATIVE HEARINGS

OAH Case No.: 98-MDE-WMA-116-044

FAIRFAX COUNTY WATER AUTHORITY

v.

MARYLAND DEPARTMENT
OF THE ENVIRONMENT

STIPULATIONS OF THE PARTIES

The Maryland Department of Environment ("MDE") and the Fairfax County Water Authority (the "Authority"), by the signatures of their undersigned counsel of record, stipulate to the following matters for purposes of this contested case hearing and any appeal:

1. The Authority will agree to accept as a condition on the requested waterway construction permit a provision requiring that the proposed intake be constructed such that the top of the intake structure (with velocity cap) will be at least 3 ½ feet below the normal water elevation (180.8) of the Potomac River at the site of the proposed intake, and at least 2 ½ feet below the minimum water level elevation at historic low flow (179.5). MDE stipulates that the construction of the proposed intake, with this permit condition, will not have an adverse impact on aesthetic or

boating interests. This stipulation is based on the representation by the Maryland Department of Natural Resources that no markers or buoys are necessary under these circumstances and that the Authority, therefore, will not place such markers or buoys at the site of the proposed intake.

2. MDE agrees in this contested case hearing that the construction of the proposed offshore intake, together with a velocity cap approved by the U.S. Fish and Wildlife Service and the Army Corps of Engineers, will not have an adverse impact on Potomac River fisheries.

3. Should MDE issue a waterway construction permit for the proposed offshore intake, or be required by judicial action to issue such a permit, a water quality certification under section 401 of the Clean Water Act will be issued at the same time.

4. As provided for at COMAR 08.01.04.16, in this contested case hearing the Department bears the burden of going forward to establish a prima facie case as to the existence of grounds for the proposed denial, and the burden of persuasion that the permit should be denied.

5. As provided for at COMAR § 28.02.01.10, in this contested case hearing the parties may file requests for production for inspection or copying any file, memorandum, correspondence, document, object, or tangible thing relevant to the subject matter of the case and not privileged.

6. The document attached as "Attachment A" is a true and accurate copy of a note written by Matthew G. Pajerowski, Chief, Water Rights Division, WMA, MDE, to

Appendix N

Terrance W. Clark, Chief, Nontidal Wetlands and Waterways Division, WMA, MDE, dated October 3, 1997, and was attached to MDE's copy of the Authority's Supplemental Submission dated August 29, 1997.

7. The parties shall exchange their exhibit lists and copies of exhibits, premarked for identification, on or before Friday, November 13, 1998, by the close of business.

SO STIPULATED:

Dated: October 9, 1998

/s/ Adam Snyder
Adam D. Snyder
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL
DEPARTMENT OF THE
ENVIRONMENT
2500 Broening Highway
Baltimore, Maryland 21224
(410) 631-3000

Counsel for the Maryland
Department of Environment

/s/ Stuart A. Raphael
Michael C. Powell
GORDON, FEINBLATT,
ROTHMAN, HOFFBERGER
& HOLLANDER, LLC
The Garrett Building
233 East Redwood Street
Baltimore, MD 21202
(410) 576-4175

Stuart A. Raphael
Randolph W. Church
HUNTON & WILLIAMS
1751 Pinnacle Drive,
Suite 1700
McLean, Virginia 22207
(703) 714-7400

Counsel for Fairfax County
Water Authority

APPENDIX O — STIPULATION OF PARTIES CONCERNING SECTION 401 WATER QUALITY CERTIFICATION DATED NOVEMBER 1998

MARYLAND:

OFFICE OF ADMINISTRATIVE HEARINGS

BEFORE THE HON. NEILE FRIEDMAN
AN ADMINISTRATIVE LAW JUDGE
OF THE OFFICE OF
ADMINISTRATIVE HEARINGS
CASE NO. 98-MDE-WMA-116-044

IN THE MATTER OF

FAIRFAX COUNTY WATER AUTH./
POTOMAC RIVER INTAKE

STIPULATION OF PARTIES CONCERNING § 401 WATER QUALITY CERTIFICATION

The Maryland Department of Environment ("MDE") and the Fairfax County Water Authority (the "Authority") hereby stipulate that MDE's opportunity to review the Authority's application to construct an offshore intake with respect to the issuance of a water quality certification under section 401 of the Clean Water Act is deemed waived by operation of law, pursuant to 33 U.S.C. § 1341. Accordingly, the question of whether MDE should issue a water quality certification in connection with the offshore intake project is no longer at issue in this proceeding.

Appendix O

SO STIPULATED:

Date: 11/12/98

/s/ Adam Snyder
Adam D. Snyder, Esquire
OFFICE OF THE
ATTORNEY GENERAL
DEPARTMENT OF THE
ENVIRONMENT
2500 Broening Highway
Baltimore, Maryland 21224

Counsel for the Maryland
Department of Environment

Date: 11/11/98

/s/ Stuart A. Raphael
Stuart A. Raphael
Randolph W. Church
Kevin J. Finto
Hunton & Williams
1751 Pinnacle Drive,
Suite 1700
McLean, Virginia 22102

Michael C. Powell
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander, LLC
The Garrett Building
233 East Redwood Street
Baltimore MD 21202

Counsel for Fairfax County
Water Authority

APPENDIX P — OPINION OF FINAL DECISION MAKER DATED JUNE 7, 1999

BEFORE THE FINAL DECISION MAKER FOR THE MARYLAND DEPARTMENT OF THE ENVIRONMENT CASE NO. 98-MDE-WMA-116-044

FAIRFAX COUNTY WATER AUTHORITY/ POTOMAC RIVER INTAKE

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT'S WATER MANAGEMENT ADMINISTRATION

OPINION OF THE FINAL DECISION MAKER

This matter came before the Maryland Department of the Environment (Department) on February 5, 1999, upon Exceptions filed by the Department's Water Management Administration (Administration) to the January 21, 1999 MEMORANDUM AND ORDER ON MOTION (proposed decision) of the Administrative Law Judge (ALJ) overruling a water construction permit denial issued by the Director of the Administration, J. L. Hearn (Director). The Fairfax County Water Authority (Authority) filed a Conditional Cross-Exception on or about February 15, 1999 requesting that the Final Decision Maker consider the Cross-Exception if the ALJ's proposed decision was modified or remanded back to the Office of Administrative Hearings (OAH). As set forth below, after hearing oral argument from both the

Administration and the Authority, I find the ALJ erred when she ruled that "need" was not an appropriate consideration in determining whether to grant a construction permit and subsequently overruled the Department's denial of a waterway construction permit, finding that the Department had not presented sufficient evidence to establish a prima facie case. Accordingly, this matter is remanded back to the ALJ for further consideration in accordance with the guidance provided herein.

STATEMENT OF THE CASE

On December 10, 1997, the Administration issued a Notice of Decision to the Authority denying the Authority's permit application number 96-NT-0024/199661481 (Notice of Decision). The permit application sought the Administration's approval of the Authority's construction of a new mid-river drinking water intake in the Potomac River. The new intake would be in addition to an existing intake that the Authority has in the Potomac River near the Virginia shoreline.

In the Notice of Decision, the Administration stated that based on the evidence submitted, "it believe[d] the general public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake." Specifically, the Administration indicated that the proposed construction project did not: provide for the greatest feasible utilization of waters of the State, adequately preserve public safety, and promote the general public welfare. For the above reasons, the Administration determined that the project was not necessary and therefore, was wasteful and

detrimental to the public interest. The Authority appealed the Administration's permit denial on December 23, 1997.

The request for a contested case hearing was transmitted to the Office of Administrative Hearings (OAH) on February 4, 1998 by Gary T. Setzer, Program Administrator of the Department's Wetlands and Waterways Program. A pre-hearing conference was held at the OAH on September 3, 1998 and, thereafter, each party filed pre-hearing Memoranda. The Administration's memorandum was filed on October 21, 1998 and the Authority also filed its memorandum on October 21, 1998. The ALJ filed her MEMORANDUM AND ORDER ON PREHEARING MOTION (Pre-hearing Order) on November 24, 1998. After considering the issues which she believed were raised in the Pre-Hearing Memoranda, the ALJ opined that the Administration was incorrectly interpreting the statute (Md. Code Annotated, Environment Article Section 5-507 (1996 rpl. vol.)) "to require applicants to demonstrate that their projects are necessary or have no practicable alternative." (Pre-hearing Order p. 4, 8). According, to the ALJ, the applicable construction permit regulation, COMAR 26.17.04.04, did not require an applicant to demonstrate that there is no practicable alternative to a proposed construction project. Therefore, the ALJ found that the Administration could not require the Authority to demonstrate that there were no practical alternatives to its proposed construction of a mid-river water intake. The ALJ further ruled that, "need is not an appropriate criteria for determination of construction eligibility, [and that] evidence related to [this] issue will not be relevant to this proceeding." (Pre-hearing Order p.9). The ALJ also found that undue political influence was not

relevant to the proceeding and did not grant the Authority's motion to compel documents.

The ALJ made no findings of fact or conclusions of law concerning the Authority's assertion that the permit should issue in accordance with the interstate Compact of 1785.

Following these rulings, a hearing on the merits was held at the OAH on December 3, 1998 and December 7, 1998. At the conclusion of the Administration's case, the Authority moved for Summary Disposition. The Authority's Motion was briefed and filed with the OAH on December 15, 1998. The Administration filed a response on December 22, 1998 and the Authority replied on January 4, 1999.

On January 21, 1999, the ALJ granted the Authority's Motion for Summary Disposition and overruled the Administration's denial of the water intake construction permit, holding that the Administration had failed to present sufficient evidence to establish a prima facie case that the permit was properly denied.

Thereafter, the Administration filed exceptions to the ALJ's proposed decision. The Administration's exceptions, filed on February 5, 1999, raise the following issues:

1) whether the ALJ erred when she ruled that the Administration's interpretation of Md., Code Annotated, Environment Article, Section 5-507 (1996 rpl. vol.) requiring a demonstration by the Authority that the proposed project was needed was legally impermissible;

2) whether the ALJ erred when she ruled that the Administration did not have authority to deny a waterway construction permit on the ground that practical alternatives exist that would achieve the Authority's stated purpose and which would have fewer environmental impacts;

3) whether the ALJ erred when she found that the Administration may not deny a waterway construction permit unless the proposed project would eliminate or significantly and adversely affect benthic or any other habitat or related flora or fauna;

4) whether the ALJ erred when she found that the Administration had not provided evidence that the proposed water intake would impede the flow of a scenic and wild river;

5) whether the ALJ erred in finding that the Administration could not consider the environmental impacts of operating a water intake project, as opposed to just constructing it, in denying a waterway construction permit; and

6) whether the ALJ erred in finding that the Administration did not prove that the construction of the proposed water intake would cause the environmental impacts urged by the Administration or that those environmental impacts would be detrimental to the public interest under Md. Code Annotated, Environment Article, Section 5-507 (1996 rpl. vol.).

Appendix P

The Authority filed a CONDITIONAL CROSS-EXCEPTION on February 15, 1999. The conditional cross-exception concerned: whether the ALJ erred in failing to compel the production of internal departmental documents and whether the Administration had properly denied the Authority's construction permit.

The Department filed a RESPONSE TO THE CONDITIONAL CROSS-EXCEPTION OF THE FAIRFAX COUNTY WATER AUTHORITY on March 22, 1999.

Oral argument on the exceptions was held on April 30, 1999. The parties were informed prior to each presentation, that this Opinion would be based only on the evidence presented at the December 3 and 7, 1998 hearing at the Office of Administrative Hearings. The Affidavit of Terrance W. Clark, which was attached to the Administration's Exceptions to the Proposed Decision, was not considered. In accordance with the requirements of the Administrative Procedure Act, Md., Code Annotated, State Government Article, Section 10-201, *et seq.* (1995 rpl. vol.), my findings of fact, conclusions of law, decision on the Administration's exceptions and the Authority's cross-exceptions follow.

FINDINGS OF FACT

Although both written and some oral stipulations between the parties were entered, at the hearings on December 3 and December 7, 1998, in her proposed opinion the ALJ did not make any specific factual findings in this case. This is contrary to both Maryland law and various regulations that require such findings to be made.

Specifically, Md. Code Annotated, State Government Article, Section 10-220(a) (1995 rpl. vol.) states that, "If the Office conducts a hearing under this subtitle, the Office *shall* prepare proposed findings of fact . . ." Similarly, COMAR 26.01.02.31(C) states, "A . . . proposed decision shall be prepared in writing by the hearing examiner and *shall* contain findings of fact . . ." See also COMAR 08.01.04.22(B) regarding proposed decisions which states, "A decision on the merits of a case shall be in writing and *shall* include findings of fact . . . Findings of fact shall consist of the underlying facts of record to support the decision."

The record created at the evidentiary hearing did not resolve many factual issues because of the ALJ's pre-emptive Pre-Hearing ruling that evidence of "need" for the proposed intake structure was irrelevant to the proceeding. The ALJ's sweeping Pre-hearing Order precluded the introduction of relevant evidence. Much of the evidence considered by the Administration never came before the ALJ. Although some of the evidence that the parties sought to introduce might have been irrelevant, other excluded evidence was relevant. Without this evidence it is impossible to make the factual findings required to resolve this matter.

Of particular significance is that the ALJ made no findings of fact pertaining to the construction permit at issue. Principally, if the Administration is ordered to grant the permit, the factual questions of how long the intake pipe should be, what the diameter of the pipe should be, and the construction method, remain unresolved. The ALJ declined in her Order to deal with these questions and in its present state the record provides no guidance.

For these reasons, this portion of my Opinion cannot disclose any factual findings, except for those facts that were stipulated by the parties and what few findings of fact that could be extracted from the record:

1. On December 10, 1997, the Maryland Department of Environment's Water Management Administration denied Fairfax County Water Authority's permit application for an offshore drinking water intake in the Potomac River. (Notice of Decision)

2. The Administration's denial of the construction permit was supported by the following reasons:

   a. Historical operating records indicate that the existing water intake structure is adequate to provide safe and reliable water to meet the needs of the Fairfax County Water Authority service area. On average, water quality problems in the River have only required the intake valve to be turned off for several hours on average of less than two days per year and that treated water quality has not been impacted.

   b. The applicant has not sufficiently demonstrated that water in mid-river is significantly improved in quality to the extent that it would have a measurable benefit for the reduction of risk associated with *Cryptosporidium* and *Giardia*.

   c. Based on a variety of ongoing watershed management and pollution control efforts by the

Commonwealth of Virginia and local governments, it is reasonable to expect that water quality will improve in the area of the existing water intake and that this project would not be necessary. This is especially true with regard to the federal requirement that Virginia develop appropriate TMDLs to assure fishable and swimmable waters.

d. Insufficient justification was provided to support the need to construct a 600-725 foot new intake structure. In fact, information submitted as part of the application indicates that, should this type of structure ever be needed, a project considerably shorter in length (approximately 300-400 feet) would be more than adequate.

e. The proposed capacity of the 300 mgd is not supported by the existing and projected use. An intake of lower capacity could be operated in conjunction with the existing intake structure to meet the demands of the system.

f. The application did not provide sufficient documentation to allow the Department of Natural Resources to determine that the project meets the intent of the State Scenic and Wild Rivers Act. Specifically, evidence was not provided in the application which demonstrates that the project enhances water quality, promotes wise use of the resource, and protects the outstanding scenic value of the Potomac River.

g. The project is at best premature as to need based on existing long-term water allocation agreements in the watershed and does not adequately take into consideration ongoing efforts to improve water quality in the Potomac Basin. The pending U.S. Geological Survey Potomac River NAWQA results, the Interstate Commission on the Potomac River Basin basinwide water study, and the American Heritage River designation will provide information about basinwide water quality and quantity that could affect the accuracy of supply and demand projections. (Notice of Decision)

3. The portion of the Potomac River between Frederick County and Montgomery County is designated as a scenic river under the State's Wild and Scenic Rivers Act. T. 209-210.

4. A scenic river designation means that the free flowing state of a river is protected and that the shore of the river would be relatively undeveloped. T.209-210.

5. The Potomac River is also designated as an American Heritage River. T. 210, 235.

6. The American Heritage designation does not affect the regulation of construction in the Potomac River. T. 235.

7. The Authority's proposed intake would be located in that portion of the Potomac River known as the

Seneca Pool, which is located from Points of Rock to Chain Bridge. T. 144.

8. The Seneca Pool is a significant recreational area in the Washington Metropolitan Area for activities such as swimming, boating and fishing. (T. 144; State's Ex. 39.)

9. The Authority requested a construction permit for a mid-river intake with a 725 foot pipe, but the Authority will consider a reduced pipeline of 600 feet. (T. 146; Joint Ex. 161.)

DISCUSSION

The ALJ's proposed decision granted the Authority's Motion for Summary Disposition on the basis that the Department had not presented a prima facie case justifying denial of the permit application. In reaching this conclusion, the ALJ relied on her Pre-hearing Order, which addressed preliminary motions filed by the parties and the admissibility of certain evidence. She ruled that evidence presented concerning the "need" for the proposed project was not relevant. The ALJ's far-reaching pre-hearing ruling incorrectly confused the relevance of several discrete factual considerations under the single heading of "need."

Most notably, the ruling failed to distinguish evidence concerning the need for a specific *quantity* of water from evidence regarding water *quality*. The Authority argued in its pre-hearing brief (p.5) that the issue of whether a new intake would allow Virginia to take more than its fair share

of water was irrelevant because the quantity of water, to be drawn from the Potomac, was the subject of an extensive set of water use agreements. (pre-hearing brief p. 5-13.)

The Authority asserted that the adequacy of the future water supply for the Washington metropolitan area was not relevant in this proceeding (Authority brief pp. 5-13). That entire argument however revolved around the question of water quantity not the factual determination of what is causing the Authority's operational problems and whether the mid-river intake would fix those problems. Finally, even in arguing that the Department's interpretation of Md. Code Annotated, Environment Article Section 5-507 (1996 rpl. vol.) was incorrect the Authority did not contend that its need for an intake location which would provide the Authority with better water quality was irrelevant to the proceeding. The thrust of the argument was that by requiring the applicant to demonstrate "need," the Department had improperly shifted the burden of persuasion to the applicant.

While, the ALJ may have properly excluded evidence as it related to water quantity, she went too far when she also excluded the issues relating to water quality on the grounds of relevance. At issue are the advantages and disadvantages of the proposed intake structure. In it's pre-hearing brief the Authority stated that it was prepared to present data and expert testimony to demonstrate that offshore water is significantly better than the water at its existing shore intake and will provide an additional barrier against waterborne pathogens. The Authority also asserted they had evidence indicating that the offshore intake will eliminate operational problems the Authority has with

clogging from trees, leaves, grass and ice. Furthermore the Authority was also prepared to present evidence that Virginia's sediment and erosion control policies are not the cause of the Authority's water quality and operational problems. (Authority brief p.3-4). Nowhere did the Authority suggest that these issues were irrelevant. The Authority simply argued that it would factually prevail on these issues.

Although water quantity is not an issue, water quality is relevant and important in understanding why the new intake structure is needed. Both sides were prepared to address this issue at the hearing but were prevented from doing this due to the Pre-hearing Order. (Authority Pre-hearing brief, pp.3-9: Department Pre-hearing brief, p 2).

The ALJ reasoned that although the Department framed the reasons for its denial as being relevant to the waterway construction permit at issue, in fact the reasons for the denial were based on criteria properly related to a water appropriation permit rather than a waterway construction permit. The ALJ stated:

> There is no basis in the applicable law which would support a conclusion that the criteria for the appropriation permit is legally permissible to use as the basis to deny a waterway construction permit. Therefore, I find that MDE failed to thoroughly address relevant issues when interpreting the statutory language and that the considerations utilized were not valid (Pre-hearing Order p.8).

Appendix P

The ALJ noted in the Pre-hearing Order that the Department originally sought to resolve the following factual issues at the hearing related to the "need" for the project:

> [1] whether quality of water at the site of the proposed mid-river intake is better than that at the current shore intake;
>
> [2] whether the water at the current shoreline intake presents a greater risk of Cryptosporidium than the water at the site of the proposed mid-river intake; and
>
> [3] whether improving sediment and erosion control and non-point source run-off in the Run and Broad Run watersheds would address the problems Fairfax County is experiencing at its current intake (Pre-hearing Order p.9).

The ALJ ruled that:

> Inasmuch as these issues concern the need for the proposed project, and as I have found that need is not an appropriate criteria for determination of construction permit eligibility, evidence related to these issues will not be relevant to this proceeding. (Pre-hearing Order p. 9).

As a result of her conclusion that "need" was not an appropriate criteria for determining eligibility for a waterway construction permit, the ALJ excluded all evidence relating to whether a new intake was needed to improve water quality. Rather than excluding all the evidence related to the

Authority's need for water of better quality, the ALJ should have allowed both parties an opportunity to introduce the evidence they felt they needed to establish their case. Then, if the evidence was objected to, the ALJ could rule on each piece of evidence, individually, as it was presented.

I. The "Need" for a Proposed Project is a Permissible and Relevant Consideration for Construction Permit Eligibility

The "need" for a proposed intake structure is relevant to the determination of whether or not to grant a waterway construction permit. The statute and applicable regulations demonstrate that the criteria for granting a waterway construction or appropriation permit are inextricably linked, Maryland Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) requires the Department "weigh all respective public advantages and disadvantages . . ." of a permit application to determine whether the, "applicant's plans provide greatest feasible utilization of the waters of the State . . ." regardless of whether the permit under consideration is a water appropriation or construction permit. The Department may reject either an appropriation or a construction permit application if it believes from the evidence that, "the proposed appropriation . . . or proposed construction is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest . . ." The statutory considerations for either type of permit are identical.

In interpreting a statute a reading of the plain language of the statute is the appropriate starting point. *Brown v.*

Brown, 119 Md. App. 289, 294, 705 A.2d 7 (1998). In this case Md. Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) provides that the Department must consider the advantages and disadvantages of a permit application as well as determining whether the applicant's plan provides for the greatest feasible utilization of the waters of the state, in determining whether to grant a construction or appropriations permit. The plain language of the statute also directs the Department to determine whether the applicant's proposed construction or appropriation is "inadequate" or "wasteful."

The ALJ's Pre-hearing Order improperly excluded evidence regarding water quality based on grounds of relevance. She determined that water quality concerned the need for the project, and "need" was not a permissible criteria in considering a request for a waterway construction permit. As a general rule, to be admissible, evidence must be relevant and material. *Kelly Catering, Inc. v. Holman*, 96 Md. App. 256, 271, 624 A.2d 1300 (1993), *cert. granted*, 332 Md. 480, 632 A.2d 446 (1993), *aff'd* 334 Md. 480, 639 A.2d 201 (1994). Evidence is material if it tends to establish a proposition that has legal significance to the litigation, and it is relevant if it is sufficiently probative of a proposition that, if established would have legal significance to the litigation. *Id.* at 271.

"Need" is a relevant consideration in determining whether the proposed construction constitutes "greatest feasible utilization of the waters of the State" or whether the proposed project is "inadequate" or "wasteful." Certainly the construction of unnecessary intake structures would be

wasteful simply because of the environmental disruption caused by the act of construction and the resources consumed to build them. The statute authorizes the Department to deny a construction permit application if the structure is wasteful.

Although the ALJ referred generally to COMAR 26.17.04.04, she did not specifically consider COMAR 26.17.04.04 B which expressly requires that construction permit applications, "shall include evidence of the benefits to be derived from the project." According to the regulation, "[t]his evidence shall be stated in monetary terms or, when more appropriate, other quantitative or qualitative terms."

Evidence regarding the need for a project tends to establish the project's benefits, the public interests served by the project, as well as advantages and disadvantages. A project which is not needed serves a diminished public interest, if any. Consequently, it is difficult to reconcile the ALJ's holding that "need" is not an appropriate criteria for determination of construction permit eligibility (Pre-hearing Order p.9) with the language of COMAR 26.17.04.11.A, which includes:

> As the basis for approval, denial, or modification of a [construction] permit, the Administration *shall weigh all public advantages and disadvantages*. The Administration shall grant the permit, if approval of the project is in the *best public interest* and the plans for the project provide the *greatest feasible utilization* of the waters of the State, adequately preserve the public safety, and promote the general public welfare. (emphasis added.)

Appendix P

COMAR 26.17.04.11A gives the Administration a broad discretion in determining whether to grant a construction permit. Despite the language of this regulation, the ALJ, in her proposed decision narrowly focuses her analysis on the seven general criteria of 26.17.04.11B as relevant considerations for permit eligibility.

COMAR 26.17.04.11B provides that:

B. General Criteria.

(1) In all cases where the proposed project is on a stream in the State Scenic and Wild Rivers program and, in the case of other streams, when necessary, the Administration shall advise the applicant of the outstanding scenic, fish, wildlife, and other recreation values to the citizens of the State. In these cases, the applicant shall consider alternatives less harmful to the stream's value as a scenic and wild resource. Construction of an impoundment upon a scenic or wild river is contrary, to the public interest, if that project floods an area of unusual beauty, blocks the access to the public of a view previously enjoyed, or alters the stream's wild qualities.

(2) A dam or other structure impeding the natural flow of a scenic and wild river may not be constructed, operated, or maintained in a scenic and wild river, and channelization may not be undertaken unless specifically approved. The Secretary's approval authority under Natural

Resources Article, §-406, is delegated to the Director of the Water Management Administration or the Director's designee. The Director or the designee shall consider the comments received from the Department of Natural Resources as well as the standards established in §B(1) of this regulation to protect the river's scenic and wild qualities.

(3) In the evaluation of permit applications, the Administration shall consider the blockage of free passage of fish to be contrary to the public interest, except as provided in Natural Resources Article, §4-502(d), Annotated Code of Maryland.

(4) Category II, III, or IV dams may not be built or allowed to impound water in any location where a failure is likely to result in the loss of human life or severe damage to streets, major roads, public utilities, or other high value property.

(5) Proposed projects that eliminate or significantly and adversely affect aquatic or terrestrial habitat and their related flora and fauna are not in the public interest. At a minimum, all in-stream construction shall be prohibited from October through April, inclusive, for natural trout waters and from March through May, inclusive, for recreational trout waters. In addition, the construction of proposed projects, which may adversely affect anadromous fish spawning

areas, shall be prohibited from March 15 through June 15, inclusive. For projects when there is no reasonable alternative to the adverse effects on nontidal wetlands or other aquatic or terrestrial habitat, the applicant shall be required to provide measures to mitigate, replace or minimize the loss of habitat.

(6) Proposed projects which increase the risk of flooding to other property, owners are prohibited, unless that area subject to additional risk of flooding is purchased, placed in designated flood easement, or addressed by other means acceptable to the Administration.

(7) The construction or substantial improvement of any residential, commercial or industrial structure in the 100-year frequency floodplain and below the water surface elevation of the 100-year frequency flood may not be permitted. Minor maintenance and repair may be permitted. In addition, the modifications of existing structures for flood-proofing purposes may be permitted. Flood-proofing modifications shall be designed and constructed in accordance with specifications approved by the Administration.

Of the seven general criteria, three are obviously inapplicable to water intake construction permits. General criteria number 4 only concerns category II, III, or IV dams. Criteria number 6 concerns projects which increase the risk of flooding to other property owners, and criteria number 7

concerns construction in the flood plain. This leaves only four criteria for the Department's Water Management Administration to consider.

Of the four remaining criteria:

— number 1 concerns the State Scenic and Wild Rivers Program, and requires that the applicant, "shall consider alternatives less harmful to the streams value as a scenic and wild resource."

— number 2 governs structures which impede the natural flow of a scenic and wild river,

— number 3 concerns blocking the free passage of fish, and

— number 5 deals with projects that eliminate or adversely impact aquatic or terrestrial habitat.

In light of the statutory and regulatory language requiring the Administration to weigh all public advantages and disadvantages of a proposed project, the ALJ's conclusion that these four criteria are the only permissible considerations, in determining whether to grant or deny a water intake construction permit, is unnecessarily restrictive. While the Administration must consider the listed criteria, I find nothing in the law which limits the Administration to considering only those criteria.

In the present case, the factual question of the relative water quality available from the shoreline as opposed to mid

stream, remains unresolved despite the fact that both the applicant and the Department submitted reams of evidence on the subject. The ALJ held that although the question of "need" would have been permissible and relevant to the Department's grant or denial of the water appropriation permit, it was not relevant to the grant or denial of the related intake structure construction permit.

II. Appropriation Permits and Construction Permits Involve Concurrent Considerations

The ALJ's decision is not supported by the relevant Maryland regulations. COMAR 26.17.06 et seq. governs water appropriation permits. COMAR 26.17.06.04 sets out the appropriation permit application procedures. Subsection A.(1) states that "an applicant may not build or operate a structure requiring a permit until the Department has issued the permit." Subsection A.(4)(e) also requires the application to include complete plans and specifications for any facility or structure requiring a permit. This regulation further requires the applicant to obtain both an appropriation and a construction permit. The regulations anticipate that both water appropriation and intake construction permit applications for the same project can be considered concurrently.

COMAR 26.17.04 governing construction permits and chapter .06 governing water appropriation permits are directly related to each other by COMAR 26.17.04.03 B which states:

Appendix P

> If the construction, reconstruction, repair, or alteration of the proposed works is for the purpose of obtaining a new or increased supply of water for any use for which an appropriation permit is required by law or regulation, the applicant shall also apply to the Administration for this [i.e. waterway construction] permit. The Administration shall establish the order in which the applications may be considered or may require the applications to be submitted and considered concurrently.

This regulation clearly indicates when the purpose of the construction is to appropriate water, the Administration may consider both applications simultaneously. The language reiterates that for any water appropriation project the Department's consideration of the permit to construct is linked to the underlying appropriation permit. Furthermore, the regulation requires that an applicant who has a water appropriation permit must also seek a construction permit when the purpose of the construction is to obtain a new or increased supply of water. Once again, the purpose of the construction is inextricably linked to the water appropriation. If the water appropriation permit is not granted, the construction would be pointless.

In the present case, a water appropriation permit has already been granted. The question posed by the Pre-Hearing Order is whether evidence of "need" for the construction project is relevant to the Department's weighing of all public advantages and disadvantages associated with the construction of this particular water intake structure.

COMAR 26.17.04.04 requires that a construction application include evidence of the monetary, or when appropriate the quantitative or qualitative benefits to be derived from the project. Based on the language of Md. Code Annotated, Environment Article 5-507(a) (1996 rpl. vol.), COMAR 26.17.04 and 26.17.06 the Department may properly consider evidence pertaining to water quality.

III. No Practical Alternative

The ALJ properly held that neither the statute nor the regulations authorize the Department to impose a requirement that an applicant demonstrate the project has no practical alternative in order to obtain a construction permit. Although, COMAR 26.17.04.11.B.1 requires the applicant to consider alternatives less harmful to the stream's value as a scenic and wild resource, this consideration falls short of requiring the applicant to establish that there is no practical alternative to the entire project or risk denial of the permit. However, agreeing that the Authority and the ALJ were correct that the Department must carry the burden of persuasion and show that the proposed project is unnecessary, does not prevent the Department from presenting evidence to meet its burden of persuasion.

IV. The Authority's Conditional Cross-Exception

Prior to the hearing in this matter, the Authority sought discovery of the Department's internal documents that reflect the Administration's decision to deny the Authority's intake construction permit. The Authority claims that these internal documents reflect the undue political influence that was

brought to bear on the Administration's decision to deny the construction permit.

In her pretrial order of November 24, 1998, the ALJ found that possible evidence of undue influence is not relevant to determining whether the Department properly denied the Authority's permit application. The Authority claims that the information is relevant and requests that, if the ALJ's proposed decision is modified or remanded, I find that the ALJ's failure to compel production of the internal documents was in error.

In support of its conditional exception, the Authority enumerates several reasons why the internal documents are relevant. However, internal documents are covered by executive privilege, sometimes referred to as deliberative process privilege, and relevance alone does not determine whether internal documents should be disclosed. *Hamilton v. Verdow*, 287 Md. 544, 562, 414 A.2d 914 (1980). Instead, a balancing process must be undertaken that weighs the need for the public's interest in the confidentiality of government communications of a deliberative or advisory nature and a litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice. *Id.*, at 563. Also see, *Cranford v. Montgomery County*, 300 Md. 759, 481 A.2d 221 (1984) and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952, 88 S.Ct. 334 (1967).

This analysis was not undertaken below. Hence, there is no evidence in the record that permits me to weigh the

competing interests of the State in protecting its ability to engage in frank expression and discussion among the Department's decision makers and the Authority's need for the documents in presenting its case to obtain its construction permit. Therefore, the issue of whether the Department should be compelled to produce the internal documents requested by the Authority is remanded to the Office of Administrative Hearings for an analysis and decision consistent with the authorities cited above.

V. CONCLUSION

The ALJ's Memorandum and Proposed Order dated January 21, 1999, although detailed and thoughtful, is flawed because the underlying factual basis relied on did not include evidence of "need." By excluding evidence of "need" the ALJ severely restricted the ability of both parties to submit evidence and argue their case. In its opening statement, the Authority continued to raise issues related to water quality. The ALJ repeatedly admonished the Authority not to raise the issue of "need" as she previously ruled it to be irrelevant in her Pre-hearing Order. Not allowing the evidence of "need" to be addressed at the hearing, ultimately effected the issues to be litigated, the interpretation of the law and finally the proposed decision of the ALJ.

With regard to the exceptions of the Department:

Exception #1: The ALJ erred in ruling that "MDE's interpretation of the waterway construction statue so as to require a demonstration of the need for the proposed project is not legally permissible.

To the extent that the ALJ's ruling prevents the Department from considering and presenting evidence concerning the need for the project the Department's exception is granted.

> *Exception #2*: The ALJ erred in ruling that the Department did not have the authority to deny a waterway construction permit on the ground that there exist practicable alternatives to a project that will achieve the project's stated purpose and that will involve fewer environmental impacts.

To the extent that the ALJ's ruling on the Department's interpretation of the Md. Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) prevents the Department from denying a construction permit simply because the applicants failed to demonstrate that a project lacks a practicable alternative, the Department's exception is denied.

> *Exceptions # 3, 4, 5 & 6*: Inasmuch as this matter is being remanded for further evidentiary hearing and MDE's third, fourth, fifth, and sixth exceptions concern either the sufficiency or the relevance of evidence presented at the hearing these exceptions are not reviewable at this time.

Upon consideration of the proposed decision, the Exceptions filed by the Maryland Department of the Environment's Water Management Administration and the Conditional Cross-Exception filed by Fairfax County Water Authority, the responses to the Exceptions and Conditional Cross-Exception and the record in this matter, and for the reasons stated above:

I find, as a matter of law, that the Administration's requirement under Section 5-507 of the Environment Article that the Authority demonstrate that there is no practical alternative to its proposed water intake is legally impermissible.

I further find that the ALJ erred when she determined that the need for the intake was an impermissible consideration under Md. Code Annotated, Environment Article, Section 5-507. Both parties are entitled to put on evidence concerning the need for the proposed water intake construction.

In addition, if the ALJ finds that the permit should be granted, other factual issues still need to be addressed, such as, but not limited to: determining the appropriate size and length of the proposed intake, the diameter of the pipe, and the appropriate construction method of the proposed intake. The present record before me is incomplete and on remand these issues should be addressed.

ORDER

It is therefore, this 7th day of June, 1999, by Bernard A. Penner, Enforcement Compliance Coordinator, appointed by the Secretary of the Maryland Department of the Environment as the final decision maker in this matter, hereby

Appendix P

ORDERED that the proposed decision issued by the Office of Administrative Hearings in this matter is reversed and is remanded to the Office of Administrative Hearings for further proceedings consistent with this opinion.

/s/ Bernard A. Penner
Bernard A. Penner,
Final Decision Maker
for The Maryland Department
of the Environment

NOTICE

In accordance with Section 10-222 of the State Government Article, the parties are *not* entitled to seek judicial review of this Order in the Circuit Court as it is not the Departments Final Administrative Decision. This Order *is not final* because it does not determine or conclude the rights of the parties nor does it deny the parties the means to further prosecute or defend their rights and interests in this matter. *See Maryland Commission on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 56-57 (1983).

APPENDIX Q — LETTER FROM FRED C. MORIN TO JANE T. NISHIDA DATED SEPTEMBER 23, 1999

FAIRFAX COUNTY WATER AUTHORITY

September 23, 1999

The Honorable Jane T. Nishida
Secretary, Maryland Department
of the Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Secretary Nishida:

Since January 1996 Fairfax County Water Authority has been seeking to find a basis upon which the Maryland Department of the Environment would agree to permit it to construct an off-shore intake in the Potomac River to supply water to the Authority's Corbalis Treatment Plant pursuant to an appropriation permit that Maryland has already granted.

The Authority does not need and does not wish to acquire a greater physical capability to withdraw water from the River than it already has. Its existing intake on the Virginia shore is large enough to allow it to take as much water as it can now see that it will ever need to take from the River. The Authority's counsel offered you personally a number of assurances in our meeting with you in Baltimore on November 24, 1998, to guarantee that the new intake would not be used to enlarge its withdrawal capability or as a wedge to gain more water at some time in the future. We asked, in

the event these assurances were not adequate, that you or your counsel suggest others that could be incorporated into any settlement agreement and made binding. Neither you nor your counsel has asked for any additional assurances, and subsequent to our meeting, both Judge Friedman and Bernard Penner (your appointed "final decision-maker") have stated that water quantity is not an issue that is relevant to the issuance of the permit that the Authority seeks. We assume the assurances that were offered are satisfactory.

The Authority desires to build the intake (1) to obtain cleaner raw water to treat in the interest of the public health, (2) to reduce or avoid serious operating problems associated with its existing intake that pose personal risks to its employees and could interrupt water service to over a million people, and (3) to save money for its customers.

The Authority has attempted to settle this case by non-binding mediation. After a settlement conference with a Maryland Administrative Law Judge in Hunt Valley on September 21 and September 22, 1998, we were hopeful that a basis for resolving this matter was at hand.

On June 2, 1999, in a meeting called for the sole purpose of discussing settlement between our counsel and J. L. Hearn and your counsel, Adam Snyder, in Baltimore, the Authority sought to find grounds of accommodation with Maryland. Our counsel specifically inquired if there was *any set of conditions or restrictions at all* upon which the Department of the Environment would even discuss the issuance of a permit. Subsequently, your counsel advised our counsel that MDE was unwilling to respond to any of the proposals made by the Authority and unwilling to suggest any basis whatsoever upon which a permit might be issued.

Appendix Q

To date MDE has refused to negotiate at all or to make any counter-proposal to any of the Authority's suggestions. The Authority, on the other hand, has unilaterally made significant modifications to its proposal. Most significantly, it has agreed to submerge the intake entirely to a depth that would be safe for recreational use and that would not require the presence of any buoys or other markers. If the new intake is sized for the ultimate capacity of the Corbalis Plant (300 mgd), it has agreed not to use its shore intake except in emergencies under the strict scrutiny and control of MDE.

The Authority is willing to consider additional modifications to its proposal to take into account the kind of conditions contained in versions of the legislation that was pending before the Maryland General Assembly when it adjourned in April 1999, but MDE has never indicated what, if any, conditions would make it possible for it to issue the permit.

We hope you have not irrevocably rejected negotiations as a means of resolving this matter. Inasmuch as a Maryland Administrative Law Judge, after hearing all of MDE's evidence, concluded that the project would have no adverse environmental impact on the Potomac River and your final Decision-Maker agrees that water quantity is nor an issue, we believe there should be a basis on which the matter could be resolved short of continued litigation.

As you know the parties are scheduled to resume their adversarial relationship before the ALJ on November 11, 1999. We would like to find a way to avoid the expenditure of further public funds for litigation, and we would like to

restore the era of cooperation with regard the Potomac which was a signal accomplishment of the region from 1978 until 1996.

We are communicating directly with you now in the hope that you have either not understood the Authority's flexibility, or that you have reviewed this matter again and may feel that it is now timely to enter into good faith negotiations to resolve this matter.

We would like to reiterate that the Authority is willing to take further steps to accommodate any concerns that you may have. If you could authorize someone to enter into a give-and-take negotiation with the Authority to seek a reasonable solution, we will be ready instantaneously to meet with you or your representative.

If, however, Maryland remains unwilling to negotiate or to discuss the issuance of a permit for an offshore intake under any conditions whatsoever, we would appreciate a letter from you confirming this so we can proceed down the long road of administrative and legal proceedings with the knowledge we have done all that we can to resolve the matter without litigation.

Sincerely yours,

/s/ Fred C. Morin
Fred C. Morin
Chairman

cc: Members, FCWA
Adam D. Snyder, Esquire
Stuart L. Raphael, Esquire

APPENDIX R — LETTER FROM J.L. HEARN TO FRED C. MORIN DATED OCTOBER 29, 1999

[Letterhead of Maryland Department of the Environment]

October 29, 1999

Fred C. Morin
Chairman
Fairfax County Water Authority
8570 Executive Park Avenue
P.O. Box 1500
Merrifield, Virginia 22116-0815

Dear Mr. Morin:

Secretary Jane Nishida has asked me to respond to your recent letter regarding the proposed mid-river intake and negotiations with the Fairfax County Water Authority (FCWA). As a matter of policy and professional courtesy, the State of Maryland is always open to the discussion of any project that affects Maryland's waters and wetlands, especially in matters of interstate significance. Maryland met frequently with the FCWA staff prior to the permit decision and has continued to give full consideration to proposals that have been made through the FCWA attorneys. Unfortunately, the concerns that are the basis for the Maryland's position, which were also raised by the citizens of Maryland and Virginia, have not been addressed.

The information submitted by FCWA in support of its application shows that water quality in the Potomac River has continually improved in recent years and is generally good at the existing intake. FCWA has indicated that

operational difficulties are few and of short duration, and that increases in turbidity are most often related to weather events in the Sugarland Run and Broad Creek watersheds. FCWA has not demonstrated that an off-shore intake will be effective in providing significant improvements in public health and safety.

In our negotiations, the State of Maryland must take into account uses of the Potomac River in addition to water supply. Improving the quality of the source water is the preferred option because it benefits all uses. I am still awaiting a positive proposal from FCWA that addresses the many significant outstanding issues raised by the Department.

Sincerely,

/s/ J. L. Hearn
J.L. Hearn
Director
Water Management Administration

JLH:GTS:twc

cc: Secretary Jane T. Nishida

APPENDIX S — LETTER FROM MARK L. EARLEY TO J. JOSEPH CURRAN, JR. DATED NOVEMBER 30, 1999

[Letterhead of Commonwealth of Virginia —
Office of the Attorney General]

November 30, 1999

The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

Dear Attorney General Curran:

On behalf of the Commonwealth of Virginia, I am writing to call to your attention the unfortunate failure by the State of Maryland to honor the property rights held by Virginia and her citizens under the Potomac River Compact of 1958, and to call upon Maryland to take steps to ensure that those rights are honored.

For more than 200 years, the river that forms the border between our two States has been the subject of formal agreements under which Virginia and her citizens have enjoyed the right to make and carry out improvements extending into the river from the Virginia shores. Originally set forth in the Compact of 1785, those rights were carried forward in the Potomac River Compact of 1958. These rights are not subject to any prerogative in the State of Maryland to judge the necessity of any such improvements, and are only subject to the requirement that Virginia's improvements not obstruct or injure the navigation of the river, or disturb fisheries.

Appendix S

Desiring to exercise its rights under the Compact of 1958, the Fairfax County Water Authority ("the Fairfax Authority"), a political subdivision of Virginia, has proposed constructing a pipe from the Virginia shore into mid-river to provide a new water intake point. Nothing in the Compact of 1958 requires the Fairfax Authority to obtain the approval of — or obtain any permit from — any official in the State of Maryland in order to construct any such improvement; however, as a matter of comity and for ease of administration, the Fairfax Authority made application for a permit to the Maryland Department of the Environment. This was four years ago. Still no permit has been issued.

During the intervening years, the Fairfax Authority has agreed with all reasonable suggestions by the State of Maryland about the construction of the pipe, including the suggestion that the structure be kept at last 2 ½ feet below the surface of the river, as measured by its lowest flow of record. Maryland officials have stipulated that such a structure would not obstruct or injure the navigation of the river, nor disturb fisheries. The United States Army Corps of Engineers has also given its approval, subject only to a successful resolution of the permit question. Still the permit has not been issued. Instead, Maryland officials have demanded that Virginia now demonstrate to the satisfaction of your State the necessity of the pipe. This is not acceptable. Nothing in the Compact of 1958 permits the State of Maryland to sit in judgment on the necessity of improvements undertaken by Virginia and its citizens. As I am sure you will understand, the Commonwealth cannot acquiesce in such an infringement on the riparian rights exercised by Virginians

for more than 200 years — just as Maryland could not do so if the facts were reversed.

Solely as a matter of comity between our States — and not to suggest any power of review on the party of Maryland — I must also bring to your attention the reasons why Virginia views this matter with such seriousness. More than one million Virginians depend on the Potomac River for their water. The intake pipe that is now in use is quite close to the shore and the quality of water drawn into it has deteriorated markedly over the years, making it more expensive to treat and less reliable as a source of clean, healthful water. The new mid-river intake would be more reliable, provide a better quality of water and require less expensive treatment procedures. These are substantial advantages, which I trust demonstrate Virginia's resolve and purpose in the matter.

Four years is long enough to wait for your State's assent. The people of Virginia are entitled to the benefits the new pipe will bring them without further delay. Accordingly, the Commonwealth of Virginia hereby calls upon our sister State of Maryland to bring this issue to a successful resolution by the end of the year. This can be done either by causing a fully effective permit to be issued by that date or by making formal acknowledgement that, under the Potomac River Compact of 1958, the Fairfax County Water Authority needs no permit from Maryland before proceeding with the construction of this improvement.

Appendix S

Your careful attention to these concerns will be most appreciated.

Very truly yours,

/s/ Mark L. Earley
Mark L. Earley

APPENDIX T — LETTER FROM J. JOSEPH CURRAN TO MARK L. EARLEY DATED JANUARY 4, 2000

[Letterhead of State of Maryland —
Office of the Attorney General]

January 4, 2000

The Honorable Mark L. Earley
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Dear Attorney General Earley:

Thank you for your recent letter concerning the Fairfax County Water Authority's proposal to construct a mid-river water intake in the Potomac River. While I appreciate your concerns and am available to discuss the matter further, I cannot comply with your request to issue a permit for the intake or otherwise waive Maryland's jurisdiction over the matter.

The state of Maryland does not share your interpretation of the 1958 Compact. Article Seven of the Compact preserves the traditional riparian rights of the citizens of Virginia to make and carry out wharves and other improvements into the Potomac. Those rights have always been subject to government regulation in both Maryland and Virginia under the police power. There is no jurisdiction in the Compact that our two states intended to create a new breed of riparian rights in the Potomac that would forever be insulated from state regulation.

Appendix T

Furthermore, the Maryland Court of Appeals — the highest court in this State — has twice ruled that the Compact of 1785 applies only to the tidal stretches of the Potomac downstream of the District of Columbia. These decisions were carried forward in the Compact of 1958, which itself is expressly limited to the tidal portions of the river. In light of these considerations, the State of Maryland cannot agree that the Fairfax County Water Authority is entitled to construct the proposed intake under the Compact.

As you point out in your letter, the Fairfax County Water Authority submitted an application to the Department of the Environment (MDE) for authorization to build the intake, which application was denied in 1997. The Fairfax County Water Authority exercised its right under Maryland law to initiate a contested contested case hearing challenging MDE's denial of the permit. An initial hearing was held in December, 1998. The proposed decision that resulted from that hearing was rejected by the MDE final decision maker in June, 1999, and a second hearing held in November, 1999. The parties are currently preparing post-trial briefs. The contested case process is mandated by Maryland law and must be allowed to run its course.

The State of Maryland takes very seriously its responsibility to manage the Potomac River and its other natural resources in the public interest. Of particular import is the Chesapeake Bay and its tributaries, among which the Potomac is one of the largest. At the same time, Maryland takes very seriously its obligations to Virginia under the 1958

Appendix T

Compact. While I cannot provide the relief you ask for, I am open to any meeting to discuss our position.

Very truly yours,

/s/ Joe Curran
Attorney General

APPENDIX U — MARYLAND HOUSE BILL 395 (INTRODUCED FEBRUARY 3, 2000)

Maryland General Assembly
HOUSE BILL 395

Unofficial Copy 2000 Regular Session
M3 0lr0921
HB 615/99 – ENV

By: **Delegates Cryor, Barkley, Barve, Bronrott, Boutin, Cadden, Cane, Carlson, Clagett, Conroy, Dembrow, Dypski, Frush, Glassman, Goldwater, Grosfeld, Heller, Howard, Kach, Leopold, Petzold, Rosso, Riley, Sher, Stern, Stocksdale, Walkup, Kopp, Phillips, La Vay, and Shriver**

Introduced and read first time: February 3, 2000
Assigned to: Environmental Matters

A BILL ENTITLED

AN ACT concerning

Potomac River Protection Act

FOR the purpose of prohibiting a person from constructing or blasting in the Potomac River under certain circumstances; prohibiting the Secretary of the Environment from issuing a waterway construction permit to construct a water intake pipe in the Potomac River unless certain circumstances exist; making provisions of this Act severable; providing for the

legislative intent of this Act; defining a certain term; and generally relating to the protection of the Potomac River.

BY adding to

Article — Environment
Section 5-12A-01 through 5-12A-04, inclusive, to be under the new subtitle

"Subtitle 12A. Potomac River Protection Act"

Annotated Code of Maryland
(1996 Replacement Volume and 1999 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article — Environment

SUBTITLE 12A. POTOMAC RIVER PROTECTION ACT.

5-12A-01.

IN THIS SUBTITLE, "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.

Appendix U

5-12A-02.

THE PURPOSE OF THIS SUBTITLE IS TO:

(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION; AND

(2) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.

5-12A-03.

(A) UNTIL STUDIES CONCERNING THE POTOMAC RIVER AND WATER RESOURCES IN THE WASHINGTON METROPOLITAN AREA ARE COMPLETED AND SUBMITTED TO THE GOVERNOR AND GENERAL ASSEMBLY, A PERSON MAY NOT:

(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;

(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE; OR

(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

Appendix U

5-12A-04.

THE SECRETARY MAY NOT GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:

(1) THE PIPE WILL BE USED AS AN ALTERNATIVE FOR A PIPE ALREADY IN USE;

(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;

(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE CAPACITY OF THE INTAKE ALREADY IN USE; AND

(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000

APPENDIX V — MARYLAND SENATE BILL 729 (INTRODUCED FEBRUARY 4, 2000)

SENATE BILL 729

Unofficial Copy 2000 Regular Session
M1 0lr2488

By: **Senators Van Hollen, Hogan, Roesser, Frosh, Pinsky, Forehand, and Sfikas**

Introduced and read first time: February 4, 2000
Assigned to: Economic and Environmental Affairs

A BILL ENTITLED

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to submit certain reports to the General Assembly; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; and generally relating to the waters in the Potomac River basin.

Appendix V

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article:

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin;

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment; and

(4) If Chapter __ (H.B. 64) of the Acts of the General Assembly of 2000 takes effect, the report of the Task Force to Study the Minimum Flow Levels in the Potomac River.

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The new pipe will replace a pipe already in use;

(2) The new pipe cannot be used concurrently with the pipe to be replaced;

(3) The new pipe cannot withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

(4) The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.