Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

Motion of the Audubon Naturalist Society for Leave to File an Amicus Curiae Brief Opposing the Commonwealth of Virginia's Motion for Leave to File a Bill of Complaint and Amicus Curiae Brief of the Audubon Naturalist Society

KATHLEEN A. BEHAN
CHRISTOPHER D. MAN*
ARNOLD & PORTER
555 12th Street N.W.
Washington, D.C.20004
(202) 942-5000

Counsel for Audubon Naturalist Society

**Counsel of Record*

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INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully moves the Court to grant it leave to file this *amicus curiae* brief opposing the Commonwealth of Virginia's motion for leave to file a bill of complaint.[1] Established in 1897, ANS is the oldest naturalist organization in the Washington metropolitan area, with more than 10,000 members from Virginia, Maryland and Washington, D.C. ANS and its members have a considerable stake in this controversy because they use the very portion of the river where the Fairfax County Water Authority (the "Authority") proposes to build a mid-river intake.

In addition, ANS' Virginia members oppose the Commonwealth's claim that it represents them as *parens patriae*. To demonstrate this point, ANS has attached affidavits from two of its many members who oppose the Authority's proposed intake on environmental grounds and who object to the Commonwealth's claim to represent their interests as *parens patriae*. (Affidavit of Dr. John De Noyer (App. C); Affidavit of Marrie Ridder (App. D).) Dr. De Noyer is among the country's most respected geophysicists, with nearly 50 years of experience, and has served as the Chairman of the Fairfax County Environmental Quality Advisory Council. He also is a customer of the Authority and, as an elected member of the Herndon Town Council, represents an entire community that drinks the Authority's water. (App. C.) Affiant Marrie Ridder has been appointed Chairman of the Virginia Council on the Environment by two Virginia Governors and is a riparian

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The State of Maryland has consented to the filing of this brief, (Letter from Baida to Man of 5/23/00 (App. A)), but the Commonwealth of Virginia has refused to give its consent. (Letter from Fisher to Man of 5/28/00 (App. B).)

land owner on the Virginia side of the Potomac River. (App. D.)

ANS and its members have a long history of using this segment of the Potomac River. For well over 40 years, ANS has organized bird watching and guided nature tours near the location of the proposed intake. ANS also conducts kayaking and canoe trips along this portion of the Potomac. For example, a kayaking trip has been scheduled for this Fall that actually would traverse the area where the proposed intake would be built. Periodically, ANS also offers nature photography courses and graduate environmental courses for Virginia's teachers.

ANS depends on those activities to attract new members and promote member participation. These activities also provide a forum in which ANS can teach its members and the public about the importance of conservation. ANS has found that the natural environment provides the best classroom for teaching environmental values.

The Authority's proposed construction of the intake threatens the activities that ANS and its members enjoy and depend upon. The Authority's proposal involves blasting a trench that is 18 feet deep, 18 feet wide, and that would extend 725 feet into the center of the river. A hole also would need to be blasted in the center of the riverbed that would be large enough to accommodate an intake structure 35 feet wide. The construction would last several months, and there can be little question that blasting and the operation of heavy machinery would injure the aesthetic and recreational attributes that the area now provides ANS and its members. Among other detriments, kayaking and canoeing on the river would be severely limited if not rendered impossible by the serious danger posed by blasting and the related construction.

Aside from the short-term impacts from construction, ANS and its members are concerned that the construction and

operation of the intake will have serious long-term consequences. Blasting and construction would generate a great deal of sediment, which may have irreversible effects on the ecology. Once built, the intake may cause erosion of the riverbed, which could disturb the ecology by altering the flow and course of the river. Suction from the intake also may threaten the ecology through the entrapment and entrainment of aquatic life.

In opposing ANS' submission of its views as *amicus curaie*, the Commonwealth mistakenly suggests that any interest ANS has in this litigation "can be adequately represented by the State of Maryland." (App. B.) This contention lacks merit for two reasons. First, ANS has much narrower interests to protect in this case than the State of Maryland. To be sure, environmental preservation is an important goal that ANS shares with the State of Maryland, but the State, unlike ANS, represents countless other interests that it must balance against the goal of environmental preservation in making its decisions. This distinction alone would justify ANS' intervention in its own right,[2] and is more than adequate to justify ANS' submission of its own views as an *amicus curaie*.

Second, the State of Maryland cannot vindicate the interests of ANS' Virginia members when the Commonwealth alleges that it is acting as a class representative for those

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[2] *See, e.g., Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of Interior*, 100 F.3d 837, 844-45 (10th Cir. 1996); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303-04 (8th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994); *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The burden of making this showing for intervention is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (noting that "it is not unusual to permit intervention of private parties in original actions").

persons. If the Commonwealth is permitted to act as a representative for ANS' Virginia members as *parens patriae*, those persons could be bound by representations made by the Commonwealth in this litigation.[3] These members may be involved in future litigation against the Commonwealth or the Authority concerning this proposed intake and should not be bound by the representations of an adverse party. The Commonwealth's argument does not demonstrate that Maryland adequately represents ANS' interests, but conclusively demonstrates that the Commonwealth is an inappropriate representative of ANS' Virginia members in a *parens patriae* capacity.

STATEMENT OF THE CASE

Due to the rapid and largely unchecked development of Northern Virginia, considerable urban runoff empties into Sugarland and Broad Runs and then flows into the Potomac River. The adverse impact of this sedimentation on the Potomac River and its users is considerable; however, the Commonwealth's complaint focuses only upon the impact to the Authority. The Authority is concerned that its shoreline intake withdraws these waters and the associated sediment and it must filter out and dispose of the sediment at great expense. Assuming that Virginia's sedimentation problem will not improve, the Authority seeks to move its intake away

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[3] *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) "[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.' " (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

from the Virginia shoreline. The Authority does not seek an increase in its appropriation of water.

For more than twenty years, the Commonwealth has ignored its legal obligation to control sedimentation. Since 1977, it has been "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. . . ." 33 U.S.C. § 1251(a)(7) (1994). This Court has explained that this policy reflects Congress' belief that "'it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)).

The Clean Water Act places the burden of preventing nonpoint source pollution, including urban runoff, on the states in the first instance. The Commonwealth is required to identify areas where nonpoint source pollution, including "construction related sources of pollution," are present and "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(H). Congress made grants available to the states to assist them in this endeavor, *id.* at § 1288(f), and provided technical assistance from federal agencies. *Id.* at § 1288(h),(i). In addition, "Section 1329, added to the Act in 1987, requires States to adopt nonpoint source management programs and similarly provides for grants to encourage reduction in nonpoint source pollution." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

States are required to establish water quality standards that are designed, *inter alia*, to protect the water body's "use and value for public water supplies," 33 U.S.C. § 1313(c)(2)(A), and, where those standards are not met, states are required to set a total maximum daily load ("TMDL") for pollutants, including sediment, that would allow those standards to be achieved. 33 U.S.C. § 1313(d)(2). If EPA rejects the state's designation of an area where a TMDL is needed or the

proposed TMDL for that area, EPA is required to make those determinations. 33 U.S.C. § 1313(d)(2).

Once an area is designated and a TMDL is set, the Commonwealth must then devise and implement a plan that will bring the water body into compliance with the TMDL. 33 U.S.C. § 1313(e). EPA's anti-degradation policy prevents back-sliding after the standards are met by requiring, *inter alia*, that the Commonwealth use "all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 131.12(a)(2); *see also* 33 U.S.C. § 1313(d)(4)(B).

TMDL's are highly effective in restoring water quality. "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impaired by non-point source pollution." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994); *see American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (endorsing TMDL for the Great Lakes).

Although the Commonwealth concedes that nonpoint source pollution into Sugarland and Broad Runs compromises the Potomac's "use and value for public water supplies." 33 U.S.C. § 1313(c)(2)(A), it has not implemented the required controls. The Commonwealth's Bill of Complaint makes this concession explicit: "[t]he Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms. . . . These conditions significantly interfere with the smooth operation of the water treatment plant. . . ." (Bill of Compl. at 10, ¶ 21.)

The Commonwealth's failure to comply with the Clean Water Act is a pervasive problem. Although "Virginia was to have submitted initial TMDLs to EPA by June 26, 1979, and thereafter from 'time to time,' " *American Canoe Ass'n v. EPA*, 54 F. Supp.2d 621, 623 (E.D. Va. 1999), the

Commonwealth never has taken this obligation seriously. As one court recently discovered, "[i]n the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

After twenty years of noncompliance by the Commonwealth, environmental organizations sued EPA to set TMDLs for Virginia. *Id.* at 622. The District Court approved a consent decree that establishes a time-table for the Commonwealth to submit TMDLs and that compels EPA to issue TMDLs if the Commonwealth misses those deadlines. *Id.* at 629. As a result of the consent decree and the Commonwealth's acknowledgment of sedimentation problems in Sugarland and Broad Run, the Commonwealth is obligated to implement a program to control the sedimentation.

Despite the existence of the consent decree, the Authority evidently questions the Commonwealth's intention of honoring its obligations under the Clean Water Act. In assessing its future water needs, the Authority's model assumes that the sedimentation levels affecting the current shoreline intake will remain constant over the next 40 years. (Draft Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake (Dec. 1996) (App. E).) Consequently, the Authority proposes to spend $5.3 million on a new intake in the middle of the river to avoid the sediment contamination along the Virginia shoreline. *Id.* If the Commonwealth controlled sedimentation to even a modest degree, the Authority's report demonstrates that the intake would not be cost-justified.[4]

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[4] The Authority's study estimates the present value of solids and handling costs for the next 40 years at $7.2 million and the cost of constructing the proposed intake at $5.3 million. (App. E.) The conclusion in the

Because the Authority proposes building this mid-river intake on soil that is both owned by and within the territorial jurisdiction of the State of Maryland, Maryland law requires the Authority to seek a permit from the state. The permitting section of the Maryland Department of the Environment ("MDE") denied the Authority's permit as unnecessary because the Authority already provides water that meets and exceeds all state and federal water quality standards. (Va. App. L.)

The Authority filed an administrative appeal claiming that it is entitled to the permit under Maryland law and pursuant to various interstate compacts between Virginia and Maryland. A contested case hearing was held before an Administrative Law Judge ("ALJ") with Maryland's Office of Administrative Hearings and the ALJ will issue her opinion by June. Once the opinion is issued, the Authority and MDE will have the opportunity to file exceptions, and a Final Decisionmaker from MDE is expected to make a final decision this Fall. Either party may appeal that decision to an intermediate appellate court based upon the record developed before the ALJ. After exhausting state appeals, review of Compact issues may be had from this Court by Certiorari.

Authority's report that the project will save $1.9 million rests upon the assumption that the Authority's consumption of water from the shoreline intake will increase by a factor of three and one-third and that sediment levels will remain the same over the next 40 years. *Id.* Even a modest reduction in solids handling costs, spread out over 40 years, would eliminate the narrow margin of profitability for this project.

SUMMARY OF THE ARGUMENT

The central question presented by this case is whether riparian land owners along the Virginia side of the Potomac River who attempt to exercise property rights in Maryland are subject to Maryland's police power. Although Virginia views Maryland's preliminary decision not to authorize the Authority's proposed construction of a mid-river intake on the State of Maryland's property as "a direct challenge to Virginia's sovereignty," (Br. at 21) it is hard to conceive how this could be so. The Commonwealth has no jurisdiction in the State of Maryland, the undisputed site of the proposed intake construction.

This Court should refuse to entertain the Commonwealth's suit because its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). None of the Commonwealth's legal claims are ripe, and the Commonwealth would lack standing to bring them if they were. No Virginia riparian land owner is seeking to increase its appropriation of water from the Potomac, and only the Authority has proposed a construction project in the river. The Authority needs both a permit from MDE and a federal permit to begin construction, and neither has made a final permitting decision. Consequently, no ripe controversy now exists and it is uncertain whether one ever will.

In the event that a legal claim does become ripe, the Commonwealth is not the proper party to assert it. The rights that the Commonwealth asserts are not its own rights, but the rights of third-party riparian land owners on the Virginia side of the Potomac. The Commonwealth has not established that it has suffered or could ever suffer any direct injury as a result of the claims it makes here. The real party in interest would be the Virginia riparian land owner who has been denied a permit by Maryland.

This Court repeatedly has held that a state cannot manipulate the original jurisdiction of this Court by suing on behalf of the real party in interest. If this Court were to permit the Commonwealth to bring a *parens patriae* action, it would distort the Article III distinction between suits brought by "Citizens" and suits brought by "States." It also would circumvent the abstention doctrine that prevents the Authority from bringing a collateral federal suit after initiating litigation in Maryland, and would subject ANS' Virginia members to a class representative adverse to their interests.

I. The Commonwealth's Legal Claims Are Not Ripe.

The Commonwealth is frustrated that the Authority's legal claims have not yet been resolved in the Maryland litigation, and is seeking to litigate the Authority's claims collaterally before this Court. No case or controversy has arisen for Article III purposes, however, precisely because MDE has not decided whether or not to issue the permit. In the event that the Authority's contentions are as meritorious as the Commonwealth contends, there will be no need for the Court to exercise its jurisdiction. Nevertheless, it is important to recognize that no claim for a mid-river intake will be ripe until the Authority also obtains a permit from the Army Corps of Engineers ("ACE").

The Commonwealth also seeks to raise its legal claims by arguing that Virginia riparians are not obligated to seek Maryland's consent before increasing their appropriation of water from the Potomac. It would be frivolous for the Commonwealth to assert that these claims are ripe. The Commonwealth has failed to identify any Virginia riparian landowner who is now seeking or who intends to appropriate additional water from the Potomac in the near future.

A. No Controversy Concerning the Authority's Proposed Intake Will Be Ripe Unless ACE Issues Its Own Permit.

The Commonwealth apparently misunderstands the status of the Authority's dredge and fill permit before ACE. *See* 33 U.S.C. § 1344 (requiring an ACE permit). The Commonwealth advised the Court that "[t]he United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question." (Br. at 1.) In truth, the previously-issued permit was suspended by ACE more than two years ago. (Letter from Reardon to Sultan of 1/28/98 (App. F) ("Based on this new information, I have no recourse other than to suspend your Department of the Army permit. . . .").) ACE emphasized that "[f]ollowing this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit." *Id.*

ACE also has made it clear to ANS' counsel that the permit will not be reinstated as a matter of right if MDE ultimately issues a waterway construction permit. After ANS learned that ACE had approved the initial permit without following applicable procedure, ANS' counsel wrote to ACE requesting that the permit be revoked on numerous legal grounds. (Letter from Dubrowski to Zirschky of 12/22/97 (App. G).) ACE responded by informing ANS' counsel that the issue had been mooted because ACE already had suspended the permit. ACE then advised ANS' counsel that "[i]f the county resolves the State's concerns and obtains required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify, or revoke the Department of the Army permit." (Letter from Zirschky to Dubrowski of 3/5/98 (App. H).)[5]

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[5] In addition to the legal obligation for ACE to make a separate permitting decision now that the permit has been suspended, 33 C.F.R.

The fact that the Authority lacks the necessary authorization to construct the intake, regardless of any action taken or not taken by Maryland, demonstrates that this claim is not ripe. In *Anderson v. Green*, 513 U.S. 557 (1995), this Court dismissed a claim as not ripe under similar circumstances. In *Anderson*, this Court took jurisdiction to consider whether California's proposal to reduce Aid to Families with Dependent Children ("AFDC") payments to new residents violated the right to interstate travel. *Id.* at 559. For California to establish a payment differential for new residents receiving AFDC payments, Health and Human Services ("HHS") had to grant a waiver and such a waiver had been granted to California. *Id.* After the Court of Appeals had ruled in that case below, however, it vacated the HHS waiver in a separate proceeding. *Id.* Recognizing that no differential in payments would be made "[a]bsent favorable action by HHS on a renewed application for a waiver," this Court held that there is "no live dispute now, and whether one will arise in the future is conjectural." *Id.*

Similarly, in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), this Court rejected a challenge to a Forest Service management plan as allowing excessive logging because it was unclear whether future permits that were required for the logging to take place ultimately would be issued. The general Forest Service management plan would have allowed the logging in question, but the plan did "not itself authorize the cutting of any trees." *Id.* at 729. Because logging would require compliance with the management plan and future site-specific permitting, this Court held that legal challenges would have to be made to the site-specific permits that would

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§ 325.7(c), ACE's offer of a hearing to ANS would obligate ACE to provide a fair hearing even if the offer was made only voluntarily. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

come later – "at a time when harm is more imminent and more certain." *Id.* at 734; *see also New Hanover Township v. United States Army Corps of Eng'rs.*, 992 F.2d 470, 472-73 (3d Cir. 1993) (rejecting a challenge to a federal permit because no permit was obtained from the state).

As in *Anderson* and *Ohio Forestry*, the Commonwealth's claim against Maryland concerning the waterway construction permit is not ripe because future regulatory action is necessary for the project to take place. Until the Authority obtains the necessary permit to proceed with its project from ACE, there is no ripe claim against Maryland.

B. The Commonwealth's Request for an Advisory Opinion Concerning Water Appropriation Is Not Ripe.

Out of apparent concern that this Court would not take jurisdiction over the MDE permitting claim that already is being litigated in Maryland, the Commonwealth adds a request for this Court to rule that Maryland cannot regulate water withdrawals from the Potomac by Virginia riparians. The Commonwealth offers no evidence that any sort of controversy exists between Virginians and Maryland concerning water apportionment.

The Commonwealth rightly concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River. . . ." (Br. at 29.) Nevertheless, the Commonwealth complains that, if invoked, Maryland's permitting process for such appropriations is burdensome and time consuming. The Commonwealth has not identified any water appropriation permits that are pending and it is not clear that any will be sought in the near future. Consequently, no claim for appropriation is ripe. *See e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future").

II. The Commonwealth Lacks *Parens Patriae* Standing to Pursue The Authority's Claim for a Construction Permit.

The Commonwealth has no legally protected interest concerning the Authority's claim for a waterway construction permit, but is merely lending its name to the Authority in an effort to manipulate a forum before this Court where the Authority's claims can be heard. By its express terms, the Compact provision that the Commonwealth relies upon dealing with the "privilege" of making improvements in the river was given to the "*citizens* of each state . . . in the shores of the Patowmack river *adjoining their lands*." (Va. App. A (emphasis added).) Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit by MDE, it initiated litigation before a Maryland ALJ to obtain the permit. Plainly, it is the Authority and not the Commonwealth that is the real party in interest.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state can become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, § 1332. Even then, jurisdiction is limited to the lower federal courts. By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a State shall be a Party," U.S. Const., Art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue.

Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana*, 176 U.S. at 16; *compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states) *with* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland*, 451 U.S. at 737 ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil of California*, 405 U.S. 251, 258 n. 12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *State of Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana*, 176 U.S. at 16. The Commonwealth cannot circumvent this requirement by supplementing the Authority's claims with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more importantly, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits

> brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania, 426 U.S. at 665-66.

Having initiated litigation in Maryland, the Authority would be barred from raising these same issues in a collateral federal suit under numerous abstention doctrines, including *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315, 334-35 (1943), *Younger v. Harris*, 401 U.S. 37, 43 (1971), and their progeny. The principles of comity toward state tribunals that animate these doctrines would be circumvented if they could be avoided simply by having the Commonwealth reassert the Authority's arguments through a collateral proceeding in this Court. [6]

B. The Commonwealth Is an Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal challenges to a permit denial by Maryland. This Court cannot

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing a state to sue another state on behalf of its citizens. *See e.g.*, *Maryland*, 451 U.S. at 745 n.21 (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil*, 405 U.S. at 259 n.12; *Cook*, 304 U.S. at 392-93.

hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

The Commonwealth's position also is antagonistic to the interests of Virginia riparians because it is responsible for the nuisance that affects their property. Equity does not allow a wrong-doer to represent its injured in shifting the responsibility for the injury to a third-party, particularly when the requested relief is incomplete. The Commonwealth should honor its own legal obligations and control nonpoint sources.

Applying *parens patriae* standing also would bind an enormous class to a litigating position that is hostile to the interests of many of its class members, including ANS' Virginia members who are customers of the Authority (App. C) and riparians on the Potomac. (App. D.); *see also supra* note 2 (listing cases finding *parens patriae* actions binding on the state's citizens). Allowing direct actions by individuals, like the one the Authority is pursuing, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

The Commonwealth does not claim standing on the basis of any direct injury to itself, and its claim of *parens patriae* standing on behalf of the people of Northern Virginia is not convincing. According to the Commonwealth, "[a]lthough it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action." (Br. at 22 n.8.) The only support the Commonwealth offers to buttress this claim are citations to two equitable apportionment cases. *Id.* (citing *Colorado v. New Mexico*,

459 U.S. 176 (1982) and *United States v. Nevada*, 412 U.S. 534 (1973)).

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment, but this is not such a case. This Court never has applied the equitable apportionment doctrine to a, river, like the Potomac, that is owned almost exclusively by one state. Moreover, the Commonwealth has assented to Maryland's jurisdiction to decide appropriation for more than 30 years, and this has become the settled course of conduct under the Compact. *See Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (acquiescence is binding); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (compact displaces equitable apportionment).

In addition, there are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth cannot identify even a single Virginia riparian who has a pending appropriation request from Maryland, and the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.)

In any event, the Commonwealth cannot leverage its standing claim for equitable apportionment to obtain standing to bring the Authority's claim for a construction permit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S.Ct. 693, 706 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hearing Brief of Fairfax County Water Authority (App. I at 47a-48a).)" The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. *Id.* at 47a. The Authority also claimed that the capacity of the treatment plant would prevent it from in-

creasing its appropriation. *Id.* at 48a. ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").

Finally, the Commonwealth does not assert standing on the basis of potential harm from *Cryptosporidium* or *Giardia*, and this Court should not be concerned by the alarmist claims asserted in the Commonwealth's statement of facts. (Br. at 11.) Contrary to the Commonwealth's suggestion, there is no evidence that consumers of the Authority's water are threatened by either *Cryptosporidium* or *Giardia* and there is no evidence that moving the intake would reduce any risk that may exist.[7] 1.2 million people consume the Authority's water every day and have done so for the four years since the construction permit was requested, yet the Commonwealth has not identified a single person to have been affected by *Cryptosporidium* or *Giardia* from drinking the Authority's water. This is not surprising. The Authority operates a state-of-the-art facility that should eliminate virtually all *Cryptosporidium* and *Giardia* with a combination of filtration, chlorination and ozonation. Neither *Cryptosporidium* nor *Giardia* even have been detected in the water the Authority distributes to consumers, and the Commonwealth's brief is devoid of any

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[7] The water at the center of the river is more likely to contain *Cryptosporidium parvum*, the only species of *Cryptosporidum* known to harm humans, than waters along the shore. *C. parvum* is passed by mammalian waste, which is less likely to be in urban runoff from Sugarland and Broad Runs than waters from the middle of the river. More likely sources of *C. Parvum* do exist farther up the river, such as wastewater treatment discharge points and animal farms, and those waters are deflected from the shoreline intake by the waters from Sugarland and Broad Run. Consequently, by moving the intake to the center of the river, the Authority is more likely to withdraw water contaminated by *C. parvum*. The Commonwealth does not even suggest that there would be less *Giardia* at the center of the river.

evidence to the contrary. As the Commonwealth reminds us, "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." (Br. at 11.) The Authority itself does not appear seriously concerned as it has not issued boil alerts or even targeted warnings to persons with compromised immune systems.

If made, the Commonwealth could not demonstrate *parens patriae* standing on the basis of these claims. "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of a serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. . . . The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof. . . ."). In addition, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical,' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The purported threat from *Cryptosporidium* and *Giardia* comes no where close to satisfying this standard.

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that this Court grant its motion for leave to file an *amicus curiae* brief and deny the Commonwealth leave to file a bill of complaint.

Respectfully submitted,

KATHLEEN A. BEHAN
CHRISTOPHER D. MAN *
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5616
Attorneys for Amicus Curiae
Audubon Naturalist Society
**Counsel of Record*

APPENDICES

APPENDIX A

J. Joseph Curran, Jr.
Attorney General

Carmen M. Shepard
Donna Hill Staton
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

Telecopier No.
(410) 576-6955

Writer's Direct Dial No.
(410) 576-6318

March 23, 2000

Christopher D. Man, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re. *Virginia v. Maryland, No. 129 Original (S.Ct)*

Dear Mr. Man:

The State of Maryland consents to the submission of an amicus curiae brief to be filed in this case on behalf of the Audubon Naturalist Society.

Thank you for your consideration.

Sincerely,

/s/Andrew H. Baida
ANDREW H. BAIDA
Assistant Attorney General

200 Saint Paul Place • Baltimore, Maryland 21202-2021
Telephone Numbers: (410) 576-6300 • D.C. Metro 470-7534
Telephone for Deaf: (410) 576-6372

APPENDIX B

Commonwealth of Virginia
Office of the Attorney General
Richmond 23219

Mark L. Early
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 – 786 – 2071

March 28, 2000

Christopher D. Man, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: 129 Original – *Commonwealth of Virginia v. State of Maryland*

Dear Mr. Man:

The Commonwealth of Virginia does not consent to the submission of an *amicus curiae* brief on behalf of the Audubon Naturalist Society in opposition to the Commonwealth's motion for leave to file a bill of complaint.

The Commonwealth believes the Audubon Naturalist Society has no legitimate interest in this dispute between two sovereigns, or in denying Virginia the forum provided by the United States Constitution. To the extent the Audubon Naturlaist Society may have an interest in the underlying issues, that interest can be adequately represented by the State of Maryland.

With kindest regards, I remain

Sincerely yours,

/s/ Frederick S. Fisher
Frederick S. Fisher
Assistant Attorney General

Cc: The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
The Honorable Parris N. Glendening
Governor of Maryland

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

No. 129, Original

AFFIDAVIT OF JOHN M. DE NOYER, PH.D.

JOHN M. DE NOYER, PH.D., being duly sworn, deposes and says:

1. I am a member of the Audubon Naturalist Society and live in Herndon, Virginia, where I am a customer of the Fairfax County Water Authority.

2. I have close to 50 years of experience in earth studies. I obtained both my masters (1953) and Ph.D. (1958) in geophysics from the University of California at Berkley and taught geology at the University of Michigan. From 1969-72, I was the Director of Earth Observation Systems for NASA and, from 1972-79, 1 was the Director of Earth Resources Observation Systems Program for the U.S. Geological Survey. I continued working for the U.S. Geological Survey as a research geophysicist from 1979 until 1991, when I retired from the agency, and I now privately contract my services as an earth sciences consultant.

3. I have considerable expertise in addressing environmental issues in Northern Virginia. From 1989-96, I was a member of the Fairfax County Environmental Quality Advisory Council and served as its Chairman from 1991-94. I also am a member of the Herndon, Virginia Town Council, where I have served since I was first elected in 1988.

4. I am strongly opposed to the construction of the mid-river intake structure that has been proposed by the Fairfax County Water Authority and I oppose the Commonwealth of Virginia's attempt to represent my interests before the Supreme Court. The problems that the Authority now faces from sedimentation are caused by the Commonwealth's failure to implement a non-point source control program in Northern Virginia. Rapid development is taking place in Northern Virginia without adequate land use planning or other appropriate environmental controls. Consequently, there is considerable urban runoff into Sugarland and Broad Runs and that runoff later empties into the Potomac River upstream from the Authority's present shoreline intake. The preferable solution to this problem would be to implement a non-point source program to control the cause of the sedimentation, rather than to address what is merely one of the impacts from the sedimentation.

5. Controlling the source of the sedimentation through non-point source controls would serve recreational and environmental interests, as well as the Authority's interest in reducing solids handling and disposal costs. The area where the proposed intake structure would be built lies on a portion of the river that is widely used for boating and other forms of recreation. The sedimentation in the river makes water-related activities more dangerous (particularly if the Commonwealth's assumption that *Cryptosporidium parvum* is present is correct) and adversely impacts the ecology. Controlling the sedimentation at its source advances everyone's interest, without requiring the Authority to spend millions of dollars on the proposed construction project.

By contrast, blasting a mammoth trench through the bed of the Potomac River would be extremely detrimental for recreational activities, especially activities that take place on the water. Perhaps more importantly, the blasting and related construction would generate additional sediment that could have serious long-term effects on the environment. Given the considerable risks that the proposed intake would cause and the availability of less invasive and more beneficial alternatives through nonpoint source controls, there is no adequate justification for constructing the proposed intake structure.

/s/ John M. DeNoyer, Ph.D.
JOHN M. DENOYER, PH.D.

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

No. 129, Original

AFFIDAVIT OF MARIE W. RIDDER

MARIE W. RIDDER, being duly sworn, deposes and says:

1. I am a member of the Audubon Naturalist Society and a riparian land owner along the Virginia side of the Potomac River down-stream from the point at which the Fairfax County Water Authority has proposed constructing a mid-river intake. My water is supplied from the Potomac River.

2. I have served as a board member on numerous environmental organizations, including the Virginia Parks Foundation, Environmental Policy Institute, Friends of the Earth, Chesapeake Bay Foundation and Piedmont Environmental Council. I also have held numerous environmentally-oriented governmental positions on behalf of the Commonwealth of Virginia. For example, I was appointed Chairman of the Virginia Council on the Environment by Governor Baliles, and later by Governor

Wilder, and Governor Dalton appointed me to serve on the Virginia Outdoors Federation.

3. I strongly oppose the Commonwealth and the Authority's efforts to construct a mid-river intake up-stream from my property. I do not want the Commonwealth to speak for me in this lawsuit. There are serious environmental implications associated with the heavy blasting of the river bed that this project would require. Certainly, it would disturb the beauty and tranquility of this area, which is widely used for recreation by myself, the Audubon Naturalist Society and its members, and countless others. Activities that take place on the river would be restricted, if not prohibited, during the construction. Depending upon how the intake is designed and operated, the project also may impact upon the aesthetic beauty of the river and threaten wildlife through the entrainment and entrapment of aquatic life. As a down-stream riparian land owner, I am concerned that these environmental impacts may adversely affect both the river and my property.

4. In my view, the proposed intake addresses only a symptom of the problem that is created by the Commonwealth' s failure to control non-point discharges of sediment into Broad Run and Sugarland Run. Even if the proposed intake were effective in resolving the Authority's concerns, the impacts from the sedimentation on the ecology of the river and for other users of the Potomac River would remain the same. Indeed, the heavy blasting associated with the construction of the intake may add to the sedimentation problems for the ecology and for other users of the river. For these reasons, the preferable solution to the sedimentation problem should focus on the source of the problem and not on one of its discreet effects.

/s/ Marie W. Ridder

MARIE W. RIDDER

APPENDIX E

Draft
Response to U. S. Army Corps of Engineers
Regarding U. S. Fish and Wildlife Service Comments
on Joint Application for Permit for Potomac Mid-River Intake

Prepared for
Fairfax County Water Authority

by

HARZA
Engineering Company

December, 1996

I. Introduction

This document provides the responses of the Fairfax County Water Authority ("Authority") to the comments of the U.S. Fish and Wildlife Service ("FWS") on the Authority's Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia for the proposed Potomac Mid-River Intake. The comments were transmitted to the Authority in a letter dated June 10, 1996 (Exhibit 1) from the U.S. Army Corps of Engineers, Northern Virginia Regulatory Section ("USACE").

The document includes five sections as follows:

- A short discussion of the purpose of the proposed Potomac Mid-River Intake;
- Response to the FWS comment on entrainment and impingement of fish eggs and larvae;
- Response to the FWS comment on best management practices;
- Response to the FWS comment on "done in the dry" construction; and

- Response to the FWS comment on conditioning of the permit.

II. Purpose of the proposed Potomac Mid-River Intake

The purposes of the proposed Potomac Mid-River Intake are to reduce the anticipated costs of handling solids generated in the Corbalis treatment plant, to reduce operation and maintenance requirements compared to the existing intake, and to improve the quality of raw water withdrawn for water supply purposes.

Construction of the proposed intake will not increase the Authority's ability to withdraw flow from the Potomac River. This capacity is limited by regulations and by several physical parameters including the dimensions of the pipelines between the existing intake and the raw water pumping station, the raw water pump characteristics and the physical dimensions of the raw water pumping station. The maximum amount that the Authority can withdraw from the Potomac River is regulated by the Interstate Commission on the Potomac River Basin during restricted times. Additionally the Authority must obtain permission from the State of Maryland Water Resources Administration to appropriate any water. Currently, the Authority is permitted to withdraw a yearly average of 100 million gallons daily (MGD) and a maximum daily flow of 200 MGD. The physical parameters limit the maximum flow rate that can be withdrawn from the Potomac River at normal water level to approximately 400 MGD whether the mid-river intake is constructed or not. The proposed mid-river intake is intended to supplement the existing intake and to operate alone or in tandem. Its design capacity is 300 MGD operating alone.

II.A Solids Handling Costs

Raw water withdrawn from the Potomac River contains suspended solids and sediments which are removed in the Corbalis Treatment Plant settling basin, dewatered in the plate presses, stockpiled on site and intermittently hauled off-site for disposal.

Approximately 30,000 tons of solids are estimated to be removed from the plant in an average year. Authority expenditures related to handling these solids are the costs of coagulants and flocculants in the settling basin, operational costs for the plate presses and disposal costs. It is estimated[1] that the annual costs of these items at the current rate of water consumption (approximately 60 MGD) are approximately $ 1.5 million, roughly equally divided between the costs of chemicals and the costs of disposal. The population of the service area, water consumption and annual solids disposal requirement are expected to increase over the next 40 years. The estimated average rate of water consumption in 2040 is 200 MGD and the annual solids disposal requirements are estimated to increase proportionately to approximately 80,000 tons. The present value of the disposal and related costs over this period will be approximately $26 million.

The Authority has observed that a large portion of the raw water sediment load is delivered to the treatment plant immediately following locally heavy storms. These storms cause erosion of soil and runoff into the Potomac River and its tributaries. The effect is pronounced in the two tributaries, Sugarland and Broad Runs, which enter the Potomac River on the Virginia side approximately 1 mile and 4 miles upstream, respectively, of the existing intake (located on the Virginia bank). The watersheds of these streams are undergoing development as the Washington metropolitan area expands. During storms, sediment plumes from these streams are noticeable and extend downstream of the intake to the submerged Seneca Dam. On many occasions, the water in the middle of the Potomac River is relatively clear compared to that along the banks. Aerial photographs and water quality sampling confirm the large difference in sediment and solids concentrations between the Virginia shore and mid-river

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[1] Harza Engineering Company, 1994, *Investigation of Improvements, Potomac River Raw Water Supply Intake*, for the Fairfax County Water Authority.

during local storms. The yearly average sediment concentration along the shore is estimated to be approximately 60 milligrams per liter (mg/l) compared to 30 mg/l in the middle of the river.[2] It is estimated that the amount of solids delivered to the treatment plant can be reduced by approximately 40 percent with a new intake located off-shore. The recommended location is 725 ft off-shore of the existing intake.

The savings in costs of handling solids resulting from the new intake would have a present value of approximately $7.2 million. The estimated reduction in the weight of disposed solids would be approximately 800,000 tons over 40 years.

The estimated cost of the mid-river intake facilities proposed in the permit application is $5.3 million. Thus, the Authority would realize a net benefit of $1.9 million, and this is the economic justification for the proposed intake.

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[2] Harza Engineering Company, 1996, *Preliminary Design Report, Potomac Mid-River Intake*, for the Fairfax County Water Authority.

APPENDIX F

January 28, 1998

Northern Virginia Regulatory Section
96-0017-40 (Potomac River)

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 Department of the Army authorization to construct a raw intake structure located in the river extending channel ward 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.

On December 10, 1997, we received a letter from the Maryland Department of the Environment, stating that they had denied their authorization of the project. Based on this new information, I have no recourse other than to suspend your Department of the Army permit in accordance with Corps regulations outlined in 33 CFR 325.7(c). By regulation, you may request a meeting with me, within 10 days of the receipt of this letter, to present all pertinent information on this matter. Following this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit.

If you have any questions about this suspension notification, please Contact Mr. Ron Stouffer at (703) 221-6967.

Sincerely,

/s/ Robert H. Reardon, Jr.
ROBERT H. REARDON, JR.
Colonel, Corps of Engineers
District Engineer

APPENDIX G

LAW OFFICE
FRANCES A. DUBROWSKI
11 DUPONT CIRCLE, N.W.
SUITE 800
WASHINGTON, D. C. 20036

TELEPHONE (202) 588-7618
FACSIMILE (202) 588-5185

December 22, 1997

Dr. John H. Zirschky, Assistant Secretary for Civil Works
U.S. Department of the Army
108 Army Pentagon, Room 2E570, MC OASA(CW)
Washington, D.C. 20310-0108

Re: Potomac River's proposed new water supply intake

Dear Dr. Zirschky:

On behalf of the Audubon Naturalist Society (ANS), I am writing to notify you of ANS' objections to Army Corps of Engineers permit #960017, which purportedly authorizes Fairfax County Water Authority ("Authority") to construct a new water supply intake and related structures[1] approximately 725 feet from the shoreline in the middle of the Potomac River, upstream of the Seneca Dam in Montgomery County, Maryland. We urge the Corps to reconsider and revoke this wholly illegal permit. This letter sets forth:

[1] The related structures in Maryland waters include a 10-foot diameter concrete pipe connecting the new to the existing intake and a tee structure in the conduit approximately 75 feet from the new intake to facilitate future addition of a third intake. The Corps also authorized the Authority to construct a 9-foot by 3200-foot pipeline from the existing intake to the raw water pumping station along the Virginia shore in Loudoun County.

- why construction is barred or inadvisable due to lack of support from other federal and state agencies,
- why ANS believes this Corps permit is not authorized by statute, contrary to regulation, unsupported by the evidence, arbitrary and capricious, and unduly vague; violates ANS right to due process; and violates the President's Executive Order on Environmental Justice; and
- why ANS recommends the Corps reconsider this permit.

1. Lack of support among other federal and state agencies.

Construction of the proposed intake cannot proceed because the Maryland Department of the Environment (MDE) refused to grant the Authority's request for a nontidal wetlands and waterway construction permit. MDE determined that the Authority failed:

- to provide acceptable responses to technical design and construction issues (including the effects of blasting and construction-generated sediment, the size of the intake pipe, and its impact on aquatic life, public safety, aesthetics, and river currents),
- to substantiate the need for the project relative to future appropriations and impacts on the Potomac and other users, and
- to demonstrate that the proposed intake meets legal criteria for a permit (including serving "the best public interest").[2]

In addition, since the Authority claims the proposed intake is primarily intended to avoid sediment, nutrients, and pollutants

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[2] See letter dated June 25, 1997 from J.L. Hearn, Director, Water Management Administration, Maryland Department of the Environment, to Charlie Crowder, Jr., General Manager, Fairfax County Water Authority (Appendix A).

from Broad and Sugarland Runs upstream,[3] MDE concluded the public interest is best advanced by addressing the "contributing causes to the water quality problems in the vicinity of the existing intake," citing the success of such an effort at the Occoquan Reservoir, the Authority's other raw water source.[4]

MDE recommended that the Authority either pursue "a comprehensive basin-wide approach to the management and allocation of the water resources of the Potomac . . . using the Interstate Commission of Potomac River Basin for technical assistance" or withdraw its application.[5]

The Authority responded by supplementing its application. On December 10, 1997, MDE denied the amended application, citing public interest, environmental, and water management concerns. MDE noted that clogging of the existing intake (the ostensible reason for a new intake) occurred on average less than two days per year, only for several hours at a time, and did not affect treated water quality. Noting ongoing efforts to improve water quality in the area, potential interference with the river's wild and scenic attributes, and the absence of justification for an intake of this size and length in light of existing water allocation agreements, MDE advised the Authority to await the results of both the U.S. Geological Survey's Potomac River National Water Quality Assessment and the Interstate Commission on the Potomac River Basin's basin-wide water study before proceeding.[6]

Second, the President has directed the Corps to consult with the National Park Service when, as here, a proposed permit has

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[3] U.S. Army Corps of Engineers Statement of Findings accompanying Permit #960017, p. 1.

[4] See Appendix A and n. 2, *supra*.

[5] Id.

[6] Appendix B.

the potential to affect wild and scenic river values.[7] This portion of the Potomac is listed on the Nationwide Inventory of river segments that, after preliminary review, appear to qualify for inclusion in the National Wild and Scenic Rivers System. The National Park Service maintains that this segment is one of the largest free-flowing, relatively undeveloped, high order rivers in the northeast, containing an exceptional diversity of flow gradients, a significant and diverse juxtaposition of land, water, and vegetative elements, rare gorges, and cliffs up to 150 feet in height. The segment is of particular concern to the Service because the Service's National Capital Region manages the Chesapeake & Ohio Canal National Historic Park within and parallel to the river corridor. The Park, in turn, depends for the integrity of its structures on adequate water flow past the Authority's proposed intake. Consultation with the National Park Service is imperative because the Service has special environmental expertise to evaluate this application and because such consultation could avoid adverse effects until the river can be fully assessed for inclusion in the National Wild and Scenic Rivers System. The record, however, contains no evidence that the Corps consulted with the National Park Service on this permit.[8]

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[7] See Memorandum for Heads of Agencies, August 10, 1980. Responsibilities there given to the Heritage Conservation and Recreation Service were subsequently transferred to the National Park Service.

[8] On May 29, 1997, ANS sent the Corps a Freedom of Information Act request seeking "all documents relating to [this] application," including "the permit application, any records relating to the building of new structures in connection therewith by the Fairfax County Water Authority (including excavation and any associated structures), and NEPA documentation such as an environmental assessment, a list of those notified concerning the pendency of the application, the record of decision if any, the permit, and any post-permit communication between corps and the permitee." ANS analyzed all documents received in response to this request.

Finally, EPA has raised significant environmental concerns which, under the National Environmental Policy Act, "should be considered during the preconstruction period and not be put off until renewal of the current [water appropriation] permit," according to EPA.[9]

2. Summary of ANS' objections to the permit.

ANS believes that permit #960017 is not authorized by statute, contrary to regulation, unsupported by the evidence, arbitrary and capricious, and unduly vague; violates ANS' right to due process; and violates the President's Executive Order on Environmental Justice. Specifically:

A. Permit #960017 purports to fall within the ambit of "Abbreviated Standard Permit 92-ASP-18." However, the Authority's proposed intake does not meet the terms of "Abbreviated Standard Permit 92-ASP-18" because:

- ASP-18, by its terms, authorizes work solely "within the geographical limits of the Commonwealth of Virginia." Since the proposed construction of the new intake, the 10 foot diameter pipe, and the tee structure to accommodate a future intake will take place in Maryland waters, ASP-18 does not authorize this project.[10]

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[9] Letter dated August 29, 1997 from Thomas J. Maslany, Director, Water Protection Division, Region III, U.S. Environmental Protection Agency, to J.L. Hearn, Director, Water Management Administration, Maryland Department of the Environment. (Appendix C).

[10] *After* permit issuance, the Authority apparently realized the permit did not cover work outside Virginia and requested clarification. The Corps attempted to "modify" the permit by letter to authorize work in Maryland as well. (See letter dated May 5, 1997 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to the Fairfax County Water Authority.) The purported "modification" has no

- ASP-18, by its terms, authorizes work solely "under the regulatory jurisdiction of the Norfolk District" of the Corps. Since the proposed construction of the new intake, the 10 foot diameter pipe, and the tee structure to accommodate a future intak will take place outside of the Norfolk District (i.e., in Maryland waters), ASP-18 does not authorize this project."[11]
- ASP-18, by its terms, requires the Corps to determine that a project is "of minimal environmental consequence." The Corps

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validity because a permit cannot be modified by letter; instead, the Corps must follow the process outlined in its regulations. See 33 C.F.R. 325.7(a). Where, as here, significant increases in permit scope (such as inclusion of work in another State) are contemplated. Corps regulations require a new permit application. Id. In addition, there is no ASP-18 permit process anywhere in the nation outside Virginia. A similar permit process cannot be created in Maryland by letter. Instead, an ASP-18 for Maryland would require, among other things, a change to the Corps' permit regulations, an Environmental Assessment or Environmental Impact Statement addressing impacts within Maryland and its environs, adequate public notice and comment, and clear definition of the nature of the activities covered by the permit.

[11] The Norfolk District handled this application because the project originated in Virginia. See letter dated May 5, 1997 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to the Fairfax County Water Authority. Corps regulations, however, require regulatory compliance to be determined by the district where the discharge or impacts occur. 33 C.F.R. 230.5. This makes sense because it ensures familiarity with local regulations and environmental concerns and in particular here because the Baltimore District is responsible for ensuring an adequate, uninterrupted water supply to the District of Columbia via the Washington Aqueduct. Had the Corps followed correct process, it could have avoided many permit errors such as permit conditions which refer to Virginia, rather than the applicable Maryland, water quality standards and certification (see Paragraph C, below) and failure to consider the District of Columbia's water supply interests.

never made the requisite finding. Instead, the Statement of Findings accompanying permit # 960017 merely notes that permit conditions minimize the impacts of the original proposal; the Statement made no finding that residual impacts are of "minimal environmental consequence."

- If the Corps were to conduct the requisite examination, the permit could not issue because the proposed intake does not meet the essential qualifying test of ASP-18: i.e., it is not of "minimal environmental consequence." To the contrary, the proposed intake will have *significant* environmental consequences, including:
  - *Navigational hazards.* The proposed intake will involve an intake structure in a shallow, flat portion of the river as well as an above-water walkway from the bank to the intake. EPA has determined that both structures may present a hazard to navigation.[12]
  - *Scenic attributes.* EPA has determined that the project's above-water structural components may compromise the river's wild and scenic attributes.[13]
  - *Aquatic resources and habitat.* Construction of three proposed structures — the new intake, the 18-foot by 18-foot trench in the rock bottom of the

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[12] See Appendix C and n. 9, *supra.*

[13] Id.

river for the mid-river connecting pipe, and the 15-foot wide trench for the near shore, 3200-foot long conduit from the existing intake to the raw water pumping station — will generate sediment and necessitate blasting, disturbing aquatic species and habitat. The silt curtains proposed as mitigation will have limited effectiveness, as their manufacturer notes, for three reasons: (i) Silt curtains are designed for "quiescent environments," not blasting situations, (ii) "They are not designed to control fluid mud," and (iii) "Most of [the] fine-grained suspended material in the water column escapes with the flow of water and fluid mud under the curtains."[14] The record shows no analysis of the impacts of this material on bottom-feeding organisms. Finally, once construction is complete, EPA still worries that "especially during low flow periods, . . . these withdrawals . . . will . . . have a detrimental effect on the living resources of the Potomac River."[15]

- *Water allocation and quantity.* The Authority's current water consumption rate (60mgd) is substantially below

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[14] Fairfax County Water Authority Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake, December, 1996 (hereafter "Authority's Response"), Exhibit 10.

[15] See Appendix C and n.9, *supra*.

both its current water appropriation permit limits (100 mgd annual average, 200 mgd daily maximum) and its own physical intake capacity (400 mgd).[16] The proposed intake, designed to accom ·iodate 300 million gallons per day and to operate alone or in tandem with the existing intake, would only increase the amount of excess capacity. However, the Authority projects that water consumption will increase to 300 mgd within 40 years,[17] precisely the excess capacity the Authority proposes to add now. In addition, the proposed pipeline will include a mid-river tee structure, approximately 75 feet from the new intake, to accommodate a third, future intake. With so much excess capacity and the initial structural components for a third intake in place, many parties, including EPA, have expressed concern the Authority will request a larger allocation if the new intake is constructed. EPA has questioned whether both intakes will "affect the natural flow of the river," especially during low flow periods.[18] The Authority apparently shares this concern since it is making provisions for a

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[16] Authority's Response, pp. 1 -2.

[17] Id. at 4.

[18] See Appendix C and n.9, *supra*.

third intake "to improve hydraulic performance at low Potomac River water levels when raw water withdrawals are near maximum."[19]

- *Secondary and cumulative impacts on development.* The watersheds along Sugarland and Broad Runs and elsewhere in the county are undergoing such intense development that the Authority expects water consumption to increase five-fold in 40 years.[20] Allowing the Authority to construct structural components for three water intakes will fuel this development and decrease pressure for water conservation measures. Excess capacity, among other things, caused EPA to term this a "significant environmental project [requiring] a thorough analysis of secondary impacts."[21]

- ASP-18, by its terms, requires the Corps to determine that a project is not "contrary to the public interest." The Statement of Findings accompanying permit # 960017 makes this claim but could not possibly be sustained because:

  - The Maryland Department of the Environment had not yet finished its re-

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[19] U.S. Army Corps of Engineers Statement of Findings accompanying Permit # 960017, p.1.

[20] Authority's Response, pp.2-4.

[21] See Appendix C and n.9, *supra*.

view, so the Corps could not consider the State's interests.

- The interagency review was so cursory as to be virtually nonexistent. Indeed, the record contains no evidence that several key agencies were even notified of the application. (See Paragraph I below.)
- The public, not properly notified of this proposed permit, did not have an appropriate opportunity for input. (See Paragraph I below.)
- The Corps did not conduct the environmental analysis required by the National Environmental Policy Act. (See Paragraph B below.)
- The permit violates numerous constitutional, statutory, regulatory, and executive branch requirements, as set forth more fully below.
- The proposed intake is, in fact, "contrary to the public interest." Both EPA and MDE have found the potential adverse environmental impacts to be significant and not justified by any showing of need. Indeed, EPA found:

> "The [Authority] notes that the existing intake is prone to clogging due to aquatic plant growth along the shallow banks, a higher sediment load along the banks (which may increase the potential for water borne dis-

> ease), and water freezing along the shallow banks in winter blocking the intake. A significant portion of the problem with aquatic plant growth may stem from excess nutrients from upstream runoff. Similarly, excess sediment may be the result of discharges upstream from development and runoff. The [Authority] and other agencies should work cooperatively to prevent and control upstream erosion at the source. Building a new intake cannot be a substitute for proper management of these problems at their source upstream."[22]

B. Permit #960017 violates the National Environmental Policy Act (NEPA) and implementing regulations because:

- NEPA requires either an Environmental Assessment (EA) or Environmental Impact Statement (EIS) for activities such as this which do not qualify for a categorical exclusion. See, e.g., 33 C.F.R 230.6, 230.7(a), and 325.2(a)(4). The Corps failed to require either an EA or EIS before issuing permit #960017. Instead, the Corps appears to have relied upon a purported "Final Environmental Assessment" of ASP-18 itself. This document cannot substitute for an assessment of the proposed intake because:

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[22] Id.

- The document does not identify a class of activities which includes the proposed water intake. To the contrary, the Corps claims that the nature of the activities grouped under ASP-18 "var[ies] so widely" that identification is "not practicable." Because the Corps did not identify proposed water intakes as subjects for evaluation, the final document does not take a "hard look" at the impacts of, and alternatives to, such intakes as NEPA requires.
- The thrust of this document is entirely intra-State. The document considers only environmental impacts and alternatives within the Commonwealth of Virginia, whereas this construction takes place in Maryland waters and has environmental impacts both within Maryland and the District of Columbia.

- ASP-18 itself violates NEPA. The Corps' purported Final Environmental Assessment of ASP-18 is wholly inadequate because:
  - It was issued without the public input and interagency coordination required by NEPA. Instead, the Corps relied on purported public review of "General Permit #18" 15 years ago.[23] This cannot suffice for compliance with NEPA because:
    - ASP-18 differs from GP-18 in key respects: it has no expiration date, in-

[23] See Final Environmental Assessment for Norfolk District Abbreviated Standard Permit, ASP-18, p. 3.

volves a different interagency review process, and different permit conditions, as the Corps acknowledges.[24] These differences were sufficient to compel the Corps to prepare a "Final Environmental Assessment" before issuing ASP-18.

- In the intervening 15 years, the composition of the public, the nature and understanding of the environmental impacts, and the applicable regulatory requirements have changed.
- In any event, ASP-18 was designed by the Corps to apply to "many" projects which do not meet requirements for nationwide or regional permits.[25] These disparate projects are not "similar in nature" and therefore not eligible for general permits. See 33 U.S.C. 1344(e) and 33 C.F.R. 322.2(f).

- This purported assessment does not examine the impacts of, and alternatives to, any defined group of activities. Instead, the Corps admits that the nature of the activities grouped under ASP-18 "var[ies] so widely" that identification is "not practicable."[26]

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[24] See Public Notice of April 29, 1997 announcing ASP-18.

[25] See Final Environmental Assessment for Norfolk District Abbreviated Standard Permit, ASP-18, p.1.

[26] Id., p. 3.

- This purported assessment does not identify and compare "all reasonable alternatives" as required by NEPA. To the contrary, it considers using only Corps-issued individual permits or State-issued regional permits.[27] It never considers the obvious alternative of categorizing some of these varied activities and deciding upon the suitability of abbreviated permitting in light of category-wide cumulative impacts.

- This purported assessment uses an inappropriate test for determining environmental significance, excluding "issues of only local or regional significance."[28] NEPA does not limit EIS requirements only to nationally significant impacts, but may require an EIS even for activities of purely regional or local significance.

- CEQ and Corps regulations require that agencies "rigorously explore and objectively evaluate *all reasonable alternatives*" to a proposal, including alternatives "not within the jurisdiction of the lead agency." 40 C.F.R. 1502.14(a), (c), and (d) and 33 C.F.R. 230. 1. The Evaluation of Alternatives[29] affixed to this permit application in lieu of an EA or EIS does not meet this standard because:

    - The "evaluation" purports to address erosion control but, in so doing, analyzes only "*local government* enactment and enforce-

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[27] *Id.*

[28] *Id.*, p.1.

[29] See Attachment 7 to the permit application.

ment of erosion control ordinances," rather than federal and State action such as:

- using the Clean Water Act's water quality standards and nonpoint source provisions to control pollution from Sugarland and Broad Runs.
- using the Coastal Zone Act Reauthorization Amendments of 1990 provisions on nonpoint source management measures in the vicinity of Sugarland and Broad Runs.
- using the Interstate Commission on the Potomac River Basin's authority to control the pollution from Sugarland and Broad Runs. The Commission has broad-reaching statutory authority to "promot[e] uniform laws, rules, or regulations for the abatement and control of pollution of streams and the utilization, conservation and development of the water and associated land resources" in the basin, to "make . . . reasonable minimum standards" for waste treatment and stream cleanliness, and to "establish reasonable physical, chemical and bacteriological standards of water quality."
- adopting a comprehensive basin-wide approach to the management and allocation of the water resources of the Potomac, as suggested by MDE.

- The Authority did not analyze other obvious alternatives such as:

- reducing nutrient loads from poultry farmers in the upper watershed,
- enhanced maintenance of the existing water intake (because, the Authority claims, this alternative would not reduce the Authority's solids handling costs),
- water conservation measures to reduce projected water consumption rates and minimize dependence on the Potomac River.

- The Evaluation of Alternatives is not credible. The Authority claims erosion control measures will achieve only "limited success" (i.e., a 10-20% reduction in solids), but provides no basis for this conclusory appraisal.

- The Corps did not comply with its own practice which has subjected intakes of considerably less volume to detailed NEPA analyses.

C. Permit #960017 violates the Clean Water Act and implementing regulations because:

- It was issued without the requisite 401 certificate (or waiver).
- It only requires compliance with a water quality certification from "the Commonwealth of Virginia," whereas the appropriate certifying agency for the intake, connecting pipe, and tee structure is the State of Maryland. (See ASP-18, Special Condition # 6.)
- It only requires compliance with the water quality standards and regulations of the "Commonwealth of Virginia," whereas the appropriate standard-setting and regulatory body for the intake, connecting pipe, and tee

structure is the State of Maryland. (See ASP-18, General Condition # 11.)

- It was issued without requisite notice to the District of Columbia, contrary to sections 401, 402, 404, and 502(3) of the Clean Water Act.[30]

D. Permit #960017 violates the Rivers and Harbors Act.

- The Corps has determined that Section 10 of the Rivers and Harbors Act of 1899 and the public interest require a Low Flow Allocation Agreement as a precondition for permitting water intake structures on this portion of the Potomac to ensure that water quantity is adequate to meet demands during low flow periods.[31]
- The Low Flow Allocation Agreement relied upon here is wholly inadequate to fulfill this statutory precondition because:
  - It is outdated, having been signed in 1978 and not updated since.
  - It does not account for the Interstate Commission on the Potomac River Basin's more recent projections that water consumption will produce a 21-100 mgd deficit in needed Potomac River system flow by the year 2020.[32]

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[30] See, e.g., the Statement of Findings accompanying permit #960017, Interagency Coordination Form Distribution List, and Public Notice mailing list.

[31] See text of Low Flow Allocation Agreement.

[32] 1995 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, April, 1996, prepared by the Section for Cooperative Water Supply Operations on the Potomac of the Interstate Commission on the Potomac River Basin to implement the study required by the Low Flow Allocation Agreement.

- It does not restrict allocations until withdrawals equal 80% of the total daily flow of the river,
- It does not treat anything short of a completely dry river (i.e., 0% flow) as an "emergency,"
- It bases allocations on prior consumption, penalizing those who engage in effective water conservation.

E. Permit #960017 violates the Coastal Zone Act Reauthorization Amendments of 1990 and implementing regulations because:

- It was issued without the requisite certification that the proposed intake complies, and will be consistent with, the Coastal Zone Management Act as amended. The 1990 amendments to this Act extend the geographic reach and strengthen the nonpoint source protections of the prior law; the record contains no indication that the Corps considered the applicability of these amendments here.

F. Permit #960017 is not sufficient to comply with the Corps' responsibilities regarding the National Historic Preservation Act.

- The permit application indicates that the Authority never contacted the Virginia Department of Historic Resources and does not know whether there is a report on file with that agency concerning this property.
- The archeological survey the Authority supplied has not been updated in almost 20 years.
- The conduit connecting the proposed with the existing intake would appear to require construction and blasting in an area identified as "44LD3" in the Authority's 1979 archaeological report. The report describes this area as a "major site that extended to a depth of at least

80cm below the existing ground surface, . . . [was] continuous throughout the length of the [existing] intake easement, . . . continued laterally beyond the Fairfax County Water Authority easement," and required mitigation. The report further recommended an "excavation program," "final analysis," and "full literature search on Potomac River archeology." The permit application does not contain the results of any of these efforts.

- In short, although the permit requires notice to the Corps before the Authority knowingly impacts historic properties, neither the permit nor the permit process required the applicant or the Corps to examine the possibility of such impacts.

G. Permit # 960017 is unsupported by the evidence and arbitrary and capricious for the foregoing reasons and because none of the critical allegations in the permit application are supported by adequate documentation in the record, including:

- the existence of a clogging problem with the current intake,
- the limited utility of erosion control and other water quality management measures in reducing sediment, nutrients, and other pollutants in the vicinity of the current intake,
- the need for a new intake,
- the need for an intake designed of this size and distance from the shoreline,
- the ability of a new intake to improve water quality,
- the purported savings in solids handling costs from the new intake, and
- the effectiveness of the proposed mitigation.

H. Permit #960017 is unduly vague because:

- The letter accompanying permit #960017 warns the Authority that a change in "any aspect of your proposal" requires permit modification.[33] The letter does not identify the Corps' position on whether increased withdrawals constitute a change requiring permit modification.

- The permit does not contain a condition preventing increased water withdrawals without an application for permit modification. Initially, the Corps insisted on such a provision.[34] When the Authority objected—ostensibly because Maryland Department of the Environment must first authorize withdrawals, the Corps withdrew the provision.[35] MDE's water appropriation

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[33] See letters dated January 31, 1997 and May 27,1997 from Bruce Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers, to Fairfax County Water Authority.

[34] The Corps informed the Authority: "The permit conditions should state that the conditions of the Maryland Department of the Environment regarding the maximum amount of water that can be withdrawn from the Potomac River are a condition of this Department of the Army permit. If, at any time, Fairfax County Water Authority proposes to modify this permit for an additional amount of water to be withdrawn, such a proposal shall be submitted as a permit modification. The modification will be forwarded to the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Environmental Protection Agency for review. The Corps will fully consider all comments received before making a decision on whether or not to modify the permit." (See letter dated June 10, 1996 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to Fairfax County Water Authority.)

[35] The Authority also argued that the Potomac River Low Flow Allocation Agreement adequately regulated withdrawals by requiring the Authority to reduce water consumption during a " restrictions stage." However, these restrictions only apply when total daily withdrawal equals or exceeds 80% of the river's total daily flow. These emergency provisions do not protect long-term water flow and aquatic resources and are no substitute for adherence to

statute, however, focuses on "waters of the State." It is not clear that MDE will interpret the statute to protect the interests of the District of Columbia. In any event, MDE's review does not satisfy the Corps' statutory responsibilities to ensure an adequate, uninterrupted flow of water to the District of Columbia and a wise use of the Potomac resource.

I. Permit #960017 violates due process because:

- Permit #960017 was issued without statutory authorization; in contravention of NEPA, the Clean Water Act, the Rivers and Harbors Act, the Coastal Zone Act Reauthorization Amendments of 1990, and the National Historic Preservation Act; and without complying with the Corp's own permit regulations. 33 C.F.R. 325.2.
- The "Public Notice" accompanying permit #960017 was inaccurate and misleading. Specifically:
    - The notice did not apprise reviewing agencies or the public of the possibility that the proposed intake could be used for increased water withdrawals. The notice merely stated: "The purpose of the project is to provide . . . an alternative intake structure." The notice failed to mention that the alternative structure was designed to be used *in tandem* with the existing intake, increasing the capacity for water withdrawals.
    - The notice states: "Comments are used in the preparation of an Environmental Assessment and/or an Environmental impact Statement pursuant to the National Environmental Policy Act." In

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the Corps' statutory responsibilities for adequate planning, management, and environmental analysis in advance of emergencies. (See also Paragraph D above.)

fact, the Corps planned to bypass both an EA and EIS by using the ASP-18 process. The notice did not alert reviewing agencies or the public to the absence of any NEPA-type deliberative process.

- The notice states: "The Corps of Engineers is soliciting comments from the public; Federal, *state, and local agencies* and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity." In fact, the Corps distributed the notice to only four state agencies, all located in Virginia.[36] The record contains no evidence the notice was sent to other affected agencies, including:
    - the District of Columbia, which uses the Potomac as its sole water source,
    - the National Capital Planning Commission,
    - Montgomery County
    - Prince George's County
    - the Interstate Commission on the Potomac River Basin.
- Permit #960017 was issued without adequate public notice. No notice appeared in the Federal Register, and the record shows no evidence of notice in a newspaper of general circulation in the affected area. Instead, the Corps apparently mailed notice only to a limited list of parties who had previously registered to receive information about the activities of the *Norfolk* District of the Corps. This practice was insufficient to notify residents of Mary-

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[36] Three federal agencies—EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service—also received copies.

land and the District of Columbia, who would not normally follow the activities of the Norfolk District, about the pending application.

- Permit #960017 was issued without appropriate interagency review.
    - As noted earlier, the public notice was inaccurate and misleading and the record contains no evidence that the National Park Service was even consulted, contrary to 40 C.F.R. 1501.5 and 1501.6.
    - The "fast track" (i.e. 16 day) interagency review process compounded these errors, preventing federal agencies from focusing effectively on the possibility and magnitude of increased water withdrawals.
    - Since the permit issued, at least one federal agency (EPA) has expressed concern over the detrimental effects increased withdrawals could have on both the natural flow of the river and the river's living resources.
- Permit #960017 is unduly vague. (See Paragraph H above.)

J. Permit #960017 violates the President's Executive Order on Environmental Justice (Executive Order #1 2898, issued February 11, 1994).

- The Executive Order directs federal agencies to ensure that their actions: a) do not discriminate on the basis of race, color, or national origin, b) address "disproportionately high and adverse human health or environmental effects" on minority and low income populations, and c) provide additional outreach, notification, and opportunities for input in the NEPA process to minority and low income communities.

- Both CEQ and EPA have issued draft guidance for complying with the Executive Order. Both guidance documents direct federal agencies to apply the Executive Order's analytical and outreach provisions whenever the percent of minority or low income people in the area potentially affected by a proposed project equals or exceeds 50% of the population.
- The District of Columbia is directly affected by the proposed project since the District draws its water supply solely from the Potomac River immediately downstream of the proposed water intake and the District, along with Maryland and Virginia, is a signatory to the Potomac River Basin Compact and the Potomac River Low Flow Allocation Agreement.
- The District of Columbia meets the definition of a minority or low income population for purposes of Executive Order #12898 because the District has a population that is roughly 67% African-American and has large numbers of Hispanic and Asian residents.
- Contrary to the Executive Order, the Corps in issuing permit #960017 did not address the potential impacts of the proposed project on the downstream District of Columbia. The Statement of Findings accompanying permit #960017 makes no mention of:
    - Executive Order #12898,
    - the principles of environmental justice,
    - potential impacts on the District of Columbia, or
    - the District of Columbia' s interest in the proposed project.
- Contrary to the Executive Order, the Corps in issuing permit #960017 apparently made no attempt to notify and obtain comment from the District of Columbia

government or environmental justice community representatives within that jurisdiction.[37]

3. ANS' recommendations to the Corps.

Because MDE's refusal to issue a permit bars construction of the proposed intake, ANS has not otherwise challenged permit #960017. ANS, however, reserves the right to do so should the Authority persuade MDE to issue a waterway construction permit, allowing the proposed intake to proceed. In the meantime, ANS respectfully requests that the Corps reconsider this permit.

ASP-18 explicitly notifies a permittee that the Corps may re-evaluate a permit whenever the supporting information or data prove to be "false, incomplete, or inaccurate" or when "significant new information surfaces which [the Corps] did not consider in reaching the original decision." (See ASP-18, General Conditions # 20 and 23).

At the time the Corps issued permit # 960017, it lacked the benefit of the significant issues of inadequate technical design and construction, unsubstantiated project need, interference with wild and scenic river attributes, absence of public interest, and availability of alternative pollution control solutions raised by Maryland Department of the Environment in its June 25, 1997 and December 10, 1997 letters. (Appendices A and B). The Corps also lacked the benefit of the significant issues of potential navigational hazards; interference with wild and scenic river attributes; disturbance of aquatic resources and habitat; interference with water allocation, quantity, and river flow; and inadequate analysis of secondary and cumulative impacts on development raised by EPA in its August 29, 1 997 letter. (Appendix C). Finally, due to inadequate public notice and comment, the Corps lacked the benefit of the legal and factual analysis out-

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[37] See Statement of Findings accompanying permit #960017, Interagency Coordination Form Distribution List, and Public Notice mailing list.

lined above. Any one of these letters gives the Corps ample reason to reevaluate this permit.

Reconsideration of this permit is essential to serve the public interest. Reconsideration will:

- prevent irreversible environmental damage,
- protect the wild and scenic attributes of this magnificent river,
- promote sound, comprehensive, and basin-wide management and allocation of the Potomac's precious water resources,
- preserve the region's economic future by preserving the water supply which is key to development and growth,
- foster pollution prevention,
- avoid navigational hazards,
- advance environmental justice,
- allow appropriate public participation in the Corps' decision-making,
- support the State of Maryland's statutorily protected right (under Section 401 of the Federal Clean Water Act) to make water quality decisions free of the pressure of a prior federal imprimatur, and
- fulfill the Corps' statutory responsibilities.

Reconsideration of this permit will not prejudice the applicant. ASP-18 expressly notifies the permittee of the "need to obtain other Federal, state or local authorizations required by law." (See ASP-1 8, General Conditions #21.) In addition, the Corps notified the Authority that "this permit is not valid until

you have obtained a 401 certificate or waiver."[38] The Authority's failure to obtain either a nontidal wetlands and waterway construction permit or a 401 certification from the State of Maryland bars construction, leaving the permit without operative effect so long as the State of Maryland takes no further action.

We request that you meet with us as promptly as possible to discuss how you intend to proceed to reevaluate this permit. The Potomac River is the nation's showpiece. We look forward to working with you to protect its future.

Sincerely,

/s/ Frances A. Dubrowski,
FRANCES A. DUBROWSKI,
Attorney for the Audubon
Naturalist Society

cc: Martin B. Sultan, Director, Engineering and Construction Division, Fairfax County Water Authority
Joseph Ballard, Chief of Engineers, U.S. Army Corps of Engineers
Donald Barry, Assistant Secretary for Parks, Conservation, and Wildlife, Department of Interior
Dinah Bear, General Counsel, CEQ
Colonel Bruce A. Berwick, District Engineer, Baltimore District
Jonathan Z. Cannon, General Counsel, EPA
Terry Carlstrom, Director, National Capital Region, National Park Service
Doreen Cook, Attorney Advisor, DC Environmental Regulation Administration

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[38] Letter dated May 27, 1997 from Bruce F. Williams, Chief. Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers, to Fairfax County Water Authority.

Honorable J. Joseph Curran, Jr., Attorney General, Maryland

Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers

John M. Ferren, Corporation Counsel, District of Columbia

John R. Griffin, Secretary, Maryland Department of Natural Resources

J.L. Hearn, Director, Maryland Water Management Administration

Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, EPA

John Leshy, Solicitor, Department of Interior

Thomas Maslany, Director, Region III Water Protection Division

Michael McCabe, Regional Administrator, Region III EPA

Honorable Kathleen A. McGinty, Chair, Council on Environmental Quality

Jane Nishida, Secretary, Maryland Department of the Environment

Robert Perciasepe, Assistant Administrator for Water, EPA

Colonel Robert H. Reardon, Jr., District Engineer, Norfolk District

Robert Stanton, Director, National Park Service

Angelo Tompross, Administrator, District of Columbia Environmental Regulation Administration

Bruce Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers

APPENDIX H

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY

CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20010-0108

05 Mar.1995

Mr. Frances A. Dubrowski
11 Dupont Circle, N. W.
Suite 800
Washington, D. C. 20036

Dear Mr. Dubrowski:

This is in response to your letter of December 22, 1997, regarding your concerns about the Army Corps of Engineers Norfolk District issuance of a permit to the Fairfax County Water Authority to construct a new water supply intake and related structures in the Potomac River. You urged the Corps to reconsider and revoke this permit.

The District confirms that they issued this permit after providing an opportunity for public comment. Although no comments from the public were received, the District included several special conditions in the permit, to minimize the effects of the construction and the operation of the intake on aquatic resources.

A condition of the District's permit required the county to obtain all necessary State permits before commencing construction. As indicated in the copy of the December 10, 1997, correspondence from the Maryland Department of the Environment, the State denied the Fairfax County Water Authority's application for a nontidal wetlands and waterways permit. Because of this denial, the District has suspended the Department of the Army permit.

If the county resolves the State's concerns and obtains the required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify, or revoke the Department of the Army permit.

In light of these circumstances, I do not believe that intervention in the District's action is warranted. However, if you have additional questions about Corps Regulatory Program, please contact Mr. John F. Studt, Chief, Regulatory Branch, at (202) 761-0199.

Sincerely,

/s/ John Zirschky
JOHN H. ZIRSCHKY
Acting Assistant Secretary of
the Army
(Civil Works)

APPENDIX I

MARYLAND:

OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF

FAIRFAX COUNTY WATER AUTH./
POTOMAC RIVER INTAKE

BEFORE THE HON. NEILE FRIEDMAN

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

PRE-HEARING BRIEF OF
FAIRFAX COUNTY WATER AUTHORITY

The Fairfax County Water Authority (the "Authority") submits this pre-hearing brief, pursuant to Judge Friedman's letter ruling of September 4, 1998. Following a series of meetings, the parties have narrowed the substantive legal issues involved in this contested case hearing to the following: the effect of the Compact of 1785 and its progeny (the "Compact") on the Authority' s right to build the intake; the applicable legal standard under section 5-507 of the Environmental Article concerning the issuance or denial of the waterway construction permit; and whether MDE has waived its authority to refuse to issue a section 401 certificate under the Clean Water Act. This memorandum sets forth the Authority's position on these purely legal issues. It also argues that the Administrative Law Judge should rule that the adequacy of the future water supply for the Washington Metropolitan Area is not relevant to whether the requested permits should be issued.

THE STIPULATIONS OF THE PARTIES

In a written Stipulation of the Parties, filed on October 9, 1998, MDE and the Authority resolved a number of previously disputed issues. The first four of these stipulations affect the

scope of the legal issues to be resolved by this tribunal. A copy of those Stipulations is attached as Exhibit I.

* * * *

This political pressure is no doubt responsible for MDE's refusal to concede that the adequacy of the future water supply for the Washington Metropolitan Area is *not* a proper issue for consideration in this contested case hearing. As noted above, a number of Maryland politicians had attacked the Authority's intake application during the comment period as some sort of covert or untoward attempt by Virginia to "grab" more than its fair share of water, suggesting that approval of the permit for the intake might result in a water shortage for Marylanders sometime in the future. The Authority believes, for the reason set out more fully below, that this attack is without basis in fact or law, and that the Administrative Law Judge should rule in advance of the hearing that this issue is not relevant to the permit decision in question.

ARGUMENT

A. THE ADEQUACY OF THE FUTURE WATER SUPPLY FOR THE WASHINGTON METROPOLITAN AREA IS NOT RELEVANT IN THIS PROCEEDING.

Most of the critics of the Authority's proposal for an offshore intake complained that it would allow Virginia to take more than its "fair share" of water from the Potomac River, to the detriment of residents of Maryland. This criticism reflected a complete lack of understanding not only about the existing water supply and coordination agreements in place to ensure an adequate water supply, but also about the mechanics of adding a second intake structure to the Authority's existing mixing chamber and conduit.

Moroever, in April 1996, MDE *approved* the Authority's revised water appropriation permit, explicitly recognizing that water could be taken both from the shore and from the proposed offshore intake. Ex. 4. This proceeding, by contrast, involves a waterway construction permit and § 401 certification. Because

the Authority does *not* seek an increase in its water appropriation authorization In this proceeding, the Quantity of water to be taken from the Potomac in the future is simply irrelevant.

* * * *

However, the offshore intake essentially adds a "Y" to the existing intake, mixing chamber and conduit on the shore. Accordingly, the mixing chamber and conduit establish a "bottleneck" and physically limit increases in the maximum intake capacity beyond that of the existing intake.

Third, as demonstrated above, there is no factual basis for the allegation that the Authority, by constructing an offshore intake, would be in a position to take more than its fair share of water from the Potomac. Water allocation in times of shortage is governed by the terms of the 1978 Low Flow Allocation Agreement, regardless of the maximum intake capacity any of the water suppliers might otherwise have. Moreover, as stated by the ICPRB, the needs of water consumers in the Washington Metropolitan Area are secure through the year 2020, and the 1982 co-OP Agreement provides the mechanism for meeting their needs thereafter based on cost-sharing agreements already in place between the WSSC, the Authority and the District of Columbia.[5]

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[5] MDE appears to concede (and indeed claims vigorously) that it has the right to regulate the amount of water withdrawn from the River by any party though the water appropriation permitting process. What MDE purports to fear is a "camel's nose under the tent" or a foot-in-door" argument by the Authority, some time in the future, that the Authority has the right to take-more water because it has two intakes. As shown above, however, the factual predicate tbr any such fear—that the offshore intake somehow increases the Authority's intake capacity—is plainly wrong. Nonetheless, in an effort to alleviate this misplaced concern, the Authority even stated in it's August 29,1997 Supplemental Submission to MDE that it would agree to accept as a permit condition a provision stating that the issuance of the waterway construction permit does not increase the Authority's water appropriation level and "give rise to no inference that the withdrawals permitted by such permit will be increased."