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# WHY DOES THE CHESAPEAKE BAY NEED LITIGATORS?

*Jon A. Mueller* \*  
*Joseph Tannery* \*\*

*“[The] Chesapeake 2000 [Agreement] is an oxymoron—an agreement implies commitment and we must not look at it as ‘voluntary.’”*<sup>1</sup>

—Former Virginia Secretary of Natural Resources,  
W. Tayloe Murphy

*“There are times when ‘voluntary’ works, and times when it doesn’t.”*<sup>2</sup>

—Former Maryland State Senator, Bernie Fowler

*“You [do not] do things voluntarily without some enforcement.”*<sup>3</sup>

—Chesapeake Bay Commission Citizen  
Representative from Pennsylvania, George Wolff

## I. INTRODUCTION

The Chesapeake Bay Foundation, Inc. (“the CBF” or “the Foundation”) is an independent Section 501(c)(3) organization

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1. Frances H. Flanigan, *Dialogue Calls for More Action, Less Talk*, CHESAPEAKE BAY J., May 2001, <http://www.bayjournal.com/article.cfm?article=1429>.

2. *Id.*

3. *Id.*

dedicated solely to restoring and protecting the Bay and its tributary rivers and streams.<sup>4</sup> Since 1967, its mission has been to improve water quality by reducing pollution.<sup>5</sup> The Foundation is recognized by its motto, "Save the Bay."<sup>6</sup>

Historically, the CBF has worked to restore and preserve the Bay through advocacy, communications, education, and resource restoration efforts throughout the region.<sup>7</sup> While the CBF has been involved in litigation, there was no dedicated department or staff to support the Foundation's objectives through a consistent litigation presence.

In 2004, the CBF's Board of Trustees determined that despite the best efforts of the Foundation and others over the prior thirty-seven years, the tide was not turning toward an improved Chesapeake Bay.<sup>8</sup> New approaches to motivate the public and decision-makers to pursue necessary but tough policy choices were required.<sup>9</sup> Strategic and focused litigation could provide some of those new approaches. Thus, the Board created a Litigation Department, provided it with a dedicated source of funding, and authorized the hiring of a litigation director.<sup>10</sup>

This article explores the CBF's past and present litigation, and explains why a litigation department is a necessary adjunct to the Foundation's other departments for further improvement of the Chesapeake Bay ecosystem.

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4. Chesapeake Bay Foundation, Bay Resources: The Chesapeake Bay Foundation, [http://www.cbf.org/site/PageServer?pagename=resources\\_facts\\_cbf](http://www.cbf.org/site/PageServer?pagename=resources_facts_cbf) (last visited Apr. 2, 2006).

5. *See id.* To learn more about the CBF's past, present, and future, see its website at <http://www.cbf.org>.

6. Chesapeake Bay Foundation, About CBF, [http://www.cbf.org/site/PageServer?Pagename=about\\_index](http://www.cbf.org/site/PageServer?Pagename=about_index) (last visited Apr. 2, 2006).

7. The Philip Merrill Environmental Center, CBF's Platinum Award "green" headquarters, is located in Annapolis, Maryland. The Foundation maintains offices in Salisbury, Maryland; Harrisburg, Pennsylvania; Richmond and Hampton Roads, Virginia; and Washington, D.C. *See* Chesapeake Bay Foundation, Philip Merrill Environmental Center, [http://www.cbf.org/site/PageServer?pagename=about\\_Merrillcenter\\_index](http://www.cbf.org/site/PageServer?pagename=about_Merrillcenter_index) (last visited Apr. 2, 2006).

8. *See generally* TOM HORTON & WILLIAM M. EICHBAUM, TURNING THE TIDE: SAVING THE CHESAPEAKE BAY (rev. & expanded ed. 2003).

9. *See* HOWARD R. ERNST, CHESAPEAKE BAY BLUES: SCIENCE, POLITICS, AND THE STRUGGLE TO SAVE THE BAY 43, 138 (2003). The author suggests that lawsuits be used more regularly to improve the Bay. *See id.* at 140.

10. The Lenfest Foundation has provided matching grant funds for the litigation department. Working with external resources, such as pro bono counsel, law school clinics, and public-interest law firms, the CBF hopes to leverage its reach. Interested volunteers can contact either of the authors by e-mail at [jmueller@cbf.org](mailto:jmueller@cbf.org) or [jtannery@cbf.org](mailto:jtannery@cbf.org).

## II. THE CHESAPEAKE BAY FOUNDATION'S PRIMARY ADVOCACY TOOLS

Through print, visual, and electronic media, CBF's Communications Department informs and engages the public and the private sector, elected officials and government employees, regarding the health of the Bay, the efforts of the Foundation, and the objectives of its other departments.

The CBF is best known for its award-winning educational program. The Education Department provides "hands on" Bay-oriented cultural and ecological experiences to students and leadership certification for teachers. Department staff lead a variety of single and multi-day field trips throughout the region, which include voyages aboard skipjacks, canoes and kayaks, visits to working farms, and resource restoration activities.<sup>11</sup> The CBF maintains educational facilities in Maryland, Pennsylvania, Virginia, and Washington, D.C.<sup>12</sup>

The Foundation's Environmental Protection and Restoration ("the EPR") staff, working with students, local citizens, and other conservation organizations, undertakes buffer zone, aquatic vegetation, and oyster restoration activities throughout the Bay watershed.<sup>13</sup> EPR land-use planners, lawyers, and scientists review and comment upon proposed local, state, and federal laws covering a myriad of issues, including air pollution, fisheries management, land-use planning, oyster introduction, and water quality.

Members of the EPR also engage in citizen outreach and lobby elected officials to press the CBF's agenda for a restored and pro-

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11. Last summer, the CBF undertook its first *Expedition Chesapeake* which took six-teen high school students from Rockingham County, Virginia, on a thirty-day, 355-mile trip down the Shenandoah and Potomac Rivers to Tangier Island in the Chesapeake Bay. In January 2006, the Virginia General Assembly recognized the CBF and the students for their participation in this fantastic voyage. See H.D. Res. 204, 2006 Gen. Assem., Reg. Sess. (Va. 2006).

12. Residential education centers include Clagett Farm, Maryland; the Karen Noonan Study Center, Maryland; Fox Island Study Center, Virginia; Port Isobel Island Study Center, Virginia; and Smith Island Study Center, Virginia. See Chesapeake Bay Foundation Education Site, Residential Programs, [http://www.cbf.org/site/PageServer?pagename=edu\\_sfe\\_residentlanding](http://www.cbf.org/site/PageServer?pagename=edu_sfe_residentlanding) (last visited Apr. 2, 2006).

13. The Chesapeake Bay region or watershed comprises portions of Maryland, New York, Pennsylvania, Virginia, West Virginia, and Delaware as well as all of the District of Columbia. See Chesapeake Bay Foundation, Bay Resources: General Information About Chesapeake Bay, [http://www.cbf.org/site/PageServer?pagename=resources\\_facts\\_general](http://www.cbf.org/site/PageServer?pagename=resources_facts_general) (last visited Apr. 2, 2006).

tected Bay.<sup>14</sup> Recent successes include the passage of a “flush fee” in Maryland,<sup>15</sup> nutrient-trading legislation in Virginia,<sup>16</sup> and the multimillion dollar “Growing Greener II” bond referendum in Pennsylvania.<sup>17</sup>

The Foundation is currently engaged in a significant multi-departmental effort to obtain increased state and federal funding for farm conservation and management practices. While other environmental and regulatory entities have sought to reduce agricultural pollution via increased regulation and litigation, the CBF has formally decided to work cooperatively with farmers and farming interests to obtain necessary funding so that farms may be operated in a cost-effective and environmentally sensitive manner.

### III. THE PROBLEMS FACING THE BAY

More than sixteen million people live in the Chesapeake Bay watershed—a six-state area of 64,000 square miles.<sup>18</sup> Approximately 100,000 more people move into the region each year.<sup>19</sup> The environmental pressures placed upon the watershed by its residents are tremendous. Land-use practices such as the loss of wetlands and three types of pollution have the greatest impact on Bay water quality. These pollutants include nutrients, such as ni-

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14. The CBF's accomplishments would not be possible without the support of all the volunteers, concerned citizens, advocates, and members who contribute to our work. Our membership, 150,000 strong, includes nearly 10,000 active volunteers. Nearly eighty percent of CBF's budget comes from private philanthropic and membership contributions.

15. MD. CODE ANN., ENVIR. § 9-1605.2(b) (LexisNexis 1996 & Supp. 2005).

16. VA. CODE ANN. §§ 62.1-44.19:12 to 19:19 (Supp. 2005). In 2005, the General Assembly of Virginia appropriated \$50 million for point source upgrades and earmarked ten percent of future surplus monies for both point source and non-point source projects on the Bay. S.B. 1235, 2005 Gen. Assem., Reg. Sess. (Va. 2005). The CBF seeks legislation that will increase the funding for point sources and push for laws that will provide a long term, dedicated funding mechanism to support water quality needs.

17. H.R. 2, 2005 Gen. Assem., Reg. Sess. (Pa. 2005).

18. See Chesapeake Bay Program, Population Estimates & Projections for Portions of States in the Chesapeake Bay Drainage Basin, <http://chesapeakebay.net/info/popstate.htm> (last visited Apr. 2, 2006); see also Chesapeake Bay Program, Location Map of Chesapeake Bay Watershed, [http://www.chesapeakebay.net/maps/thumbnails/pages/basin\\_inset.htm](http://www.chesapeakebay.net/maps/thumbnails/pages/basin_inset.htm) (last visited Apr. 2, 2006).

19. See Chesapeake Bay Program, Population Trends, <http://www.chesapeakebay.net/land.htm> (follow “Population Trends” hyperlink under “Topics of Interest”) (last visited Apr. 2, 2006).

trogen and phosphorous, toxics (especially mercury and polychlorinated biphenyls; or PCBs), and sediment.<sup>20</sup>

Nitrogen and phosphorous are choking the Bay and many of its tributary rivers. These pollutants lead to large algae blooms that eventually die and decay.<sup>21</sup> That process sucks oxygen from the water. In the summer of 2005, forty-one percent of the volume of the Bay was considered hypoxic, which is an area with too little dissolved oxygen to support fish or bottom-dwelling species, such as blue crabs and oysters.<sup>22</sup> This is the largest “dead zone” ever reported in the Bay.

The sources of this pollution are as varied as the watershed. The primary sources are sewage treatment systems, agricultural, urban, and suburban runoff, and air emissions.<sup>23</sup> While some progress has been made in reducing the level of pollution in each of these areas, the funding levels, programs, and strategies currently in place are insufficient. Further, in some areas, regulations and permits are too lax and enforcement is spotty.

Toxic pollutants wreak havoc on our ability to safely consume Bay and tributary shellfish and finfish. Mercury, for example, is discharged into the air by a variety of natural and anthropogenic sources including coal-fired power plants<sup>24</sup> and chlorine manufacturers.<sup>25</sup> This pollution eventually falls to earth on land or into a body of water, becomes entrained in the food web, is taken up by fish, and is ingested by humans and other fish-eating species.

Mercury is a harmful neuro-toxin that is especially harmful to developing fetuses and young children.<sup>26</sup> Effects include autism,

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20. Chesapeake 2000, available at <http://www.chesapeake.org/stac/C2KAgreement1.pdf>.

21. See Lawrence Latame III, *Parts of Bay Can't Sustain any Life*, RICH. TIMES-DISPATCH, Aug. 25, 2005, at B4.

22. See Karl Blankenship, *Bay's Water Quality Lives Up-or-Down-to Scientists' Predictions*, CHESAPEAKE BAY J., Sept. 2005, available at <http://www.bayjournal.com/article.cfm?article=2600>; CHESAPEAKE BAY PROGRAM, WHAT IS DISSOLVED OXYGEN AND WHY IS IT IMPORTANT TO THE CHESAPEAKE BAY? (2003), available at [http://www.chesapeakebay.net/pubs/doc-do\\_101\\_backgrounder.pdf](http://www.chesapeakebay.net/pubs/doc-do_101_backgrounder.pdf).

23. Chesapeake Bay Program, Nutrient Pollution, <http://www.chesapeakebay.net/info/nutr1.cfm> (last visited Apr. 2, 2006).

24. See MARTHA H. KEATING ET AL., E.P.A., EPA-452/R-97-003, MERCURY STUDY REPORT TO CONGRESS, 3-6 to 3-7 (1997), <http://www.epa.gov/mercury/report.htm>.

25. See OCEANA, POISON PLANTS II (2006), available at <http://www.oceana.org/fileadmin/oceana/uploads/mercury/poisonplants2FINAL.pdf>.

26. See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, E.P.A., NATIONAL

cerebral palsy, and I.Q. loss. The estimated economic impacts of mercury on children's I.Q. in the United States are staggering—\$8.7 billion annually in lost productivity alone.<sup>27</sup> Within the Chesapeake Bay watershed, health advisories are in effect for the consumption of fish for all waters within Maryland and Pennsylvania and a growing number of waters in Virginia.<sup>28</sup> Especially disturbing, striped bass (rockfish), the premier sport fish and delicacy of the Bay, is listed as contaminated with mercury throughout Maryland waters.<sup>29</sup>

Unfortunately, the Environmental Protection Agency (“the EPA” or “the Agency”) has promulgated regulations governing emissions from coal-fired power plants that do not meet the requirements of the Clean Air Act (“the CAA”) and are not protective of public health.<sup>30</sup> Further, while some Bay states are poised to either pass legislation or propose regulations that are stricter than the federal rules, others may do no more than ratify the weak federal rule.<sup>31</sup>

Sedimentation from stormwater and erosion from construction sites cloud the water and suffocate benthic life. While there are laws in place to control stormwater and construction erosion,

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ALERT: A WARNING ABOUT CONTINUING PATTERNS OF METALLIC MERCURY EXPOSURE (1997), available at <http://www.atsdr.cdc.gov/alerts/970626.html>.

27. Leonardo Trasande, et al., *Public Health and Economic Consequences of Methyl Mercury Toxicity to the Developing Brain*, 113 ENVTL. HEALTH PERSP. 590, 593, 594 tbl. 1 (2005), available at <http://ehponline.org/members/2005/7743/7743.html>.

28. See MD. DEP'T OF THE ENV'T, MARYLAND FISH CONSUMPTION ADVISORIES (2005), available at [http://www.mde.state.md.us/assets/document/Fish%20Consumption%20Advisory%207-06-05\(1\).pdf#](http://www.mde.state.md.us/assets/document/Fish%20Consumption%20Advisory%207-06-05(1).pdf#); PA. DEP'T OF ENVTL. PROT., PENNSYLVANIA FISH CONSUMPTION ADVISORIES 8 (2006), [http://www.depweb.state.pa.us/watersupply/lib/watersupply/fishadvisory\\_06-tbl.pdf](http://www.depweb.state.pa.us/watersupply/lib/watersupply/fishadvisory_06-tbl.pdf); see generally Va. Dep't of Health, Div. of Health Hazards Control, Virginia Fish Consumption Advisories, <http://www.vdh.state.va.us/HHControl/fishingadvisories.asp> (last visited Apr. 2, 2006).

29. MD. DEP'T OF THE ENV'T, *supra* note 28, at 3.

30. The CBF has joined several other citizen groups and numerous states in challenging two rules issued by the EPA last year. See *New Jersey v. EPA*, No. 05-1097, 2005 U.S. App. LEXIS 26926 (D.C. Cir. Dec. 8, 2005).

31. Both the Maryland legislature and its Department of Environment have proposed laws and regulations, respectively, which are stronger than the federal rules. See S. 154, 2006 Gen. Assem., 421st Sess. (Md. 2006). Additionally, the Pennsylvania Department of Environmental Protection has proposed significantly stronger regulations. See Proposed Standards for Contaminants, available at [http://www.dep.state.pa.us/dep/subject/adv coun/aqtac/2006/3-30-06%20meeting/Proposed\\_Hg\\_Annex\\_A\\_3-22-2006.pdf](http://www.dep.state.pa.us/dep/subject/adv coun/aqtac/2006/3-30-06%20meeting/Proposed_Hg_Annex_A_3-22-2006.pdf) (last visited Apr. 10, 2006). Unfortunately, West Virginia and Virginia appear prepared to do no more than what the EPA would require. See W.V. Dep't of Env'tl. Prot., Rule 45-CSR-37 (1995); S. 651, 2006 Gen. Assem., Reg. Sess. (Va. 2006).

permits are rarely tailored to the site, inspections are spotty, and enforcement is rare.<sup>32</sup>

During the last several years, the urgency of CBF's goals have been validated by major national and international reports that point to pollution and dead zones around the world as the leading environmental problem of this century.<sup>33</sup> Success in the Chesapeake Bay can be a model for estuarine, coastal, and marine waters worldwide. To become that model, however, federal, state, and local governments and all residents of the watershed must do their respective parts. While there are numerous local,<sup>34</sup> state,<sup>35</sup> and federal laws,<sup>36</sup> several regional agreements,<sup>37</sup> and a federal program<sup>38</sup> all designed to improve air and water quality in the Bay region, they have fallen short of their respective goals. The Bay ecosystem remains at a dismal score of 27 out of 100 and has stayed at that level for the last two years.<sup>39</sup>

Clearly, the Bay is not improving simply by maintaining the status quo. The solution is straightforward: reduce pollution from sewage treatment facilities and other industrial sources; reduce agricultural, urban and suburban runoff; and reduce air emissions. The CBF has used, and will continue to use, advocacy, com-

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32. Due to persistent sediment runoff problems throughout the watershed, the CBF has begun a major initiative to investigate construction sites in Maryland, Virginia, and Pennsylvania for failure to comply with local, state, and federal erosion and sediment control laws. The CBF anticipates making the results of that investigation public this spring.

33. See generally Cheryl Lyn Dybas, *Dead Zones Spreading in World Oceans*, 55 *BIO-SCIENCE* 552 (2005), available at <http://www.bioone.org/archive/0006-3568/55/7/pdf/i0006-3568-55-7-552.pdf>; Tom Horton, *Chesapeake: Why Can't We Save the Bay?*, *NAT'L GEOGRAPHIC*, June 2005, at 22.

34. See, e.g., Dorchester County, Md., Code § 155 (1999); York County, Va., Code § 10-3 (1996).

35. See, e.g., Maryland Critical Area Act, MD. CODE ANN., NAT. RES. §§ 8-1807 to -1817 (LexisNexis 2000); The Chesapeake Bay Preservation Act, VA. CODE ANN. § 10.1-2100 (1998).

36. See Clean Water Act of 1977, 33 U.S.C. §§ 1245-1287 (2000); Clean Air Act of 1990, 42 U.S.C. §§ 7401-7671q (2000).

37. See Chesapeake Bay Agreement of 1983, available at <http://www.chesapeakebay.net/pubs/1983ChesapeakeBayAgreement.pdf>; Chesapeake Bay Agreement of 1987, available at <http://www.chesapeakebay.net/pubs/1987ChesapeakeBayAgreement.pdf>; Chesapeake Bay Basinwide Toxics Reduction and Prevention Strategy (1994), available at <http://www.chesapeakebay.net/pubs/233.pdf>; Chesapeake 2000, available at <http://www.chesapeake.org/stac/C2KAgreement1.pdf>.

38. 33 U.S.C. § 1267 (2000) (establishing Chesapeake Bay Program).

39. See CHESAPEAKE BAY FOUNDATION, 2005 STATE OF THE BAY REPORT 3, available at <http://www.cbf.org/site/DocServer/sotb2005lores.pdf?docID=4564>; CHESAPEAKE BAY FOUNDATION, 2004 STATE OF THE BAY REPORT 4, available at <http://www.cbf.org/site/DocServer/w33475.pdf?docID=2563>.



munication, education, lobbying, and restoration to achieve these goals. The CBF will now use litigation in a more consistent and strategic manner to ensure that laws are sufficient and followed.<sup>40</sup>

#### IV. WHAT CAN LITIGATION ACHIEVE?

Although the CBF cannot address every pollutant source category or every polluter within the Bay region, carefully chosen litigation can:

- define and drive Bay restoration and protection goals;
- deliver concrete and enforceable progress including systematic change; and
- strengthen and supplement advocacy, educational, and media efforts.

##### A. *Define and Drive Bay Restoration and Protection Goals*

One of CBF's long-term goals is to reduce point source nitrogen and phosphorous discharges. How to achieve such reductions is a cornerstone of CBF's advocacy, education, media, and restoration efforts. The technology to significantly reduce the quantity of these pollutants discharged in tributaries to the Bay exists. Until very recently, however, governmental entities responsible for issuing National Pollution Discharge Elimination System ("NPDES") permits that govern these discharges have not mandated the installation of this technology or numeric limits in permits which would require such technology.<sup>41</sup>

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40. Historically, CBF has used litigation on a limited basis. Some examples of those efforts include: *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 335 (4th Cir. 1983) (suit brought by the CBF, several other environmental groups, and the Commonwealth of Virginia against an individual for violations of the Resource Conservation and Recovery Act); *Chesapeake Bay Found., Inc. v. Bethlehem Steel*, 608 F. Supp. 440, 442 (D. Md. 1985) (suit against a Baltimore steel manufacturer under the Clean Water Act which raised important issues concerning citizen standing to sue); and *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987) (suit against a major meatpacking facility for failing to comply with its wastewater discharge permit which took the CBF all the way to the Supreme Court of the United States, where the Court found the facility in violation and held that for a suit to be maintained by a citizen group, the alleged violations must not be wholly in the past).

41. NPDES permits are issued according to federal law. Clean Water Act, 33 U.S.C. § 1342 (2000). Authority to administer this program may be delegated to the states. 33 Id. U.S.C. § 1342(b).

To highlight the desperate need for action, in December 2003, the CBF submitted an administrative petition to the EPA.<sup>42</sup> The CBF requested that the EPA promulgate regulations designed to limit the dumping of these pollutants by significant dischargers within the Bay watershed.<sup>43</sup> In its petition, CBF provided specific guidance to the EPA on the writing and implementation of such regulations. The Foundation also requested, among other things, that the EPA review all NPDES permits issued within the watershed to “significant point source” dischargers and revoke its right to waive review of those permits.<sup>44</sup>

Despite repeated assurances that the Agency would respond to the petition in a timely fashion, the EPA sat on the petition for over ten months. With no other recourse available, the CBF filed a complaint in the United States District Court for the District of Columbia seeking an order compelling the EPA to respond.<sup>45</sup> Shortly thereafter in June 2005, the EPA agreed to, and did, provide a written response.<sup>46</sup>

Although the EPA did not agree to propose new regulations, the Agency and the six Bay governments (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and Washington, D.C.) did address some of the concerns raised in the petition by entering into an agreement entitled “NPDES Permitting Approach for Discharges of Nutrients in the Chesapeake Bay Watershed” (“the Agreement”).<sup>47</sup> The Agreement provides that each of the authori-

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42. CHESAPEAKE BAY FOUNDATION, PETITION OF THE CHESAPEAKE BAY FOUNDATION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO AMEND ISSUE OR REPEAL RULES AND TAKE CORRECTIVE ACTION TO ADDRESS NUTRIENT POLLUTION FROM SIGNIFICANT POINT SOURCES IN THE CHESAPEAKE BAY WATERSHED (2003), available at [http://www.cbf.org/site/DocServer/EPA\\_petition\\_final\\_120103.pdf?doc10=1244](http://www.cbf.org/site/DocServer/EPA_petition_final_120103.pdf?doc10=1244). The petition was made pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) (2000).

43. CHESAPEAKE BAY FOUNDATION, *supra* note 42, at 5.

44. *Id.* at 19–20, 22. Under the CWA, the EPA has the discretion to review NPDES permits issued by delegated states. The EPA has ninety days within which it may submit comments to the issuing state. If the EPA does not act within that time period, the EPA waives its right of review and the permit becomes final. 33 U.S.C. § 1342(d) (2000); 40 C.F.R. § 123.24 (2005).

45. Complaint at 1, Chesapeake Bay Found., Inc. v. Leavitt, (D.D.C. filed Nov. 9, 2004) (No. 04-1959(GK)).

46. Letter from Benjamin H. Grumbles, Assistant Adm’r, Office of Water, E.P.A., to Will Baker, President, Chesapeake Bay Foundation, June 13, 2005, available at <http://www.epa.gov/water/cbfpetition/index.html>.

47. NPDES Permitting Approach for Discharges of Nutrients in the Chesapeake Bay Watershed (Dec. 2004), available at [http://www.wvnet.org/downloads/posted%20jan112005%20PSIG/USEPA%20Dec04\\_CB%20Watershed%20Permitting%20Approach%20Summary.pdf](http://www.wvnet.org/downloads/posted%20jan112005%20PSIG/USEPA%20Dec04_CB%20Watershed%20Permitting%20Approach%20Summary.pdf).

ties that issue NPDES permits in the region will require specific nitrogen and phosphorous load limits on all permits issued to significant dischargers after Maryland's water quality standards are finalized.<sup>48</sup>

The EPA agreed with the CBF and withdrew its right to waive review of NPDES permits for significant dischargers within the Bay watershed.<sup>49</sup> The Foundation will continue to monitor NPDES permits as they are published for notice and comment to insure compliance with the Clean Water Act ("the CWA") water quality standards, tributary strategies, the Bay Agreements, and the Permitting Approach.

While not all of CBF's requests were implemented, the Foundation's petition and subsequent lawsuit did drive the EPA and the watershed states to institute a program of permitting and allow review that essentially achieves some of the objectives sought by the petition. If the terms of the Permitting Approach are followed, water quality in the Bay and its tributaries will improve.

Another goal of the Foundation is to eliminate harmful levels of toxic pollutants within the Bay. In furtherance of that goal, the CBF is a co-plaintiff in the citizen group challenges to EPA's regulations delisting coal-fired power plants from strict mercury emissions regulation and the regulations which set up a cap and trade program for mercury emissions.<sup>50</sup> In response to these actions, the Agency has begun to reconsider those regulations but has obtained a stay of judicial proceedings until May 2006. Unfortunately, implementation of the regulations has begun despite the petitioners' requests that they be stayed.

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48. "Significant point sources" are defined in the Permitting Approach as: a subset of all municipal and industrial point sources located in the Chesapeake Bay watershed (from MD, VA, DE, WV, PA, NY, and DC) that have been identified by EPA and its partner jurisdictions as either discharging significant amounts of nitrogen (N) and phosphorus (P), or listed as potentially significant sources contributing N and P pending development of appropriate data.

*Id.* at 2. Maryland's Bay water quality standards became final in November 2005. MD. CODE REGS. § 26.08.02.03-3 (2005).

49. E.P.A., DECISION ON PETITION FOR RULEMAKING TO ADDRESS NUTRIENT POLLUTION FROM SIGNIFICANT POINT SOURCES IN THE CHESAPEAKE BAY WATERSHED 63 (2005), available at <http://www.epa.gov/water/cbfpetition/petition.pdf>.

50. See *New Jersey v. EPA*, No. 05-1097, 2005 U.S. App. LEXIS 26926 (D.C. Cir. Dec. 8, 2005).

The Foundation seeks to protect and restore natural resources such as wetlands that are essential to improving fisheries and water quality in the Bay. In support of this objective, the CBF has repeatedly filed amicus curiae briefs in support of wetlands protections and federal jurisdiction over these areas.<sup>51</sup> Such “friend of the court” briefs, however, can only go so far in favorably resolving litigation and establishing precedent.<sup>52</sup> To more directly further its goals in this regard, the CBF has participated in two actions that have focused public debate on wetlands issues and, in one respect, have resulted in positive victories for citizen litigants in Virginia.

### 1. King William Reservoir

The City of Newport News, Virginia, has proposed to construct a reservoir in King William County that will destroy over 460 acres of wetlands along the Mattaponi River.<sup>53</sup> If completed, this project will be the largest permitted wetland destruction in the Mid-Atlantic region since the inception of the CWA Section 404 permitting process. Despite heated opposition to the project,<sup>54</sup> the Virginia State Water Control Board (“the SWCB”) issued a water protection permit to the city to construct the reservoir.<sup>55</sup> Shortly thereafter the Alliance to Save the Mattaponi, the Mattaponi Tribe, the CBF, and the Sierra Club sued the state challenging the validity of the permit.<sup>56</sup>

In response, the Commonwealth moved to dismiss the matter for lack of standing, arguing that the petitioners did not have the

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51. See, e.g., *State Water Control Bd. v. Crutchfield*, 578 S.E.2d 762, 763 (Va. 2003). In addition, the CBF has frequently been involved as a party in cases in the Fourth Circuit Court of Appeals. See *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 409 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 701 (4th Cir. 2003).

52. In some cases, reviewing courts rely upon amicus briefs in reaching decisions. See generally *Newdunn*, 344 F.3d 407 (citing various amici briefs).

53. See generally *The King William Reservoir Project, About the Proposed King William Reservoir Project*, <http://www.kwreservoir.com/project.shtml> (last visited Apr. 3, 2006).

54. See Buddy Norris, *Do We Need a Reservoir? King William Project Draws Sharp Battle Lines*, DAILY PRESS (Newport News, Va.), July 23, 2000, at A1.

55. *Alliance to Save the Mattaponi v. Commonwealth*, 519 S.E.2d 413, 415 (Va. Ct. App. 1999) (“On December 16, 1997, the Board issued a V[irginia] W[ater] P[rotection] P[ermit] to the City.”).

56. *Id.* (listing the various groups opposed to the reservoir and noting that they appealed the Board’s decision).

right to challenge the SWCB's actions.<sup>57</sup> The trial court granted the motion and the Court of Appeals of Virginia affirmed.<sup>58</sup> The Supreme Court of Virginia overruled those decisions, holding that the petitioners had standing to challenge the permit under Virginia Code section 62.1-44.29.<sup>59</sup> The court determined that the injuries alleged by the petitioners were fairly traceable to SWCB's decision to award the permit and were not solely the result of the independent action of a third-party not before the trial court.<sup>60</sup> While the CBF and the other non-tribal petitioners lost their subsequent appeal on the merits,<sup>61</sup> the court's ruling on standing will pave the way for future citizen suits.

## 2. Stumpy Lake

In another wetlands-related matter involving a proposed development project near Chesapeake, Virginia, the CBF and another citizen group, Citizens for Stumpy Lake, challenged a decision of the SWCB to issue a permit for the project.<sup>62</sup> There, the Commonwealth again demurred to the claims of the petitioners arguing that Virginia Code section 62.1-44.29 does not allow citizen groups to represent their members and the petitioners had failed to prove that they had been injured in fact to allow individual standing.<sup>63</sup>

While the trial court granted the Commonwealth's motion, the Court of Appeals of Virginia held that the CBF and the Citizens for Stumpy Lake could challenge the SWCB's decision if they met the "case or controversy" test for standing under Article III of the United States Constitution.<sup>64</sup> This standard allows an organiza-

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57. *Id.* at 415 & n.2 (describing the collective allegations of lack of standing raised in the circuit court).

58. *See id.* at 415, 421.

59. *Mattaponi Indian Tribe v. Commonwealth*, 541 S.E.2d 920, 925 (Va. 2001).

60. *Id.*

61. *Alliance to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78, 89-90 (Va. 2005). Treaty issues raised by the Mattaponi tribe are still pending. *Id.* at 98 (remanding Mattaponi treaty claims to the circuit court).

62. *Chesapeake Bay Found., Inc. v. Commonwealth*, No. CH03-1987-R, 2004 WL 2004774 (Va. Cir. Ct. Sept. 8, 2004).

63. *Id.* at 2. The circuit court applied a standing test also referred to as an "owner aggrieved" standard in which the challenger must show that they have been directly injured by a decision of the SWCB. *Id.* at 3.

64. *Chesapeake Bay Found., Inc. v. Commonwealth*, 616 S.E.2d 39, 45 (Va. App. 2005), *cert. denied* (on procedural grounds), <http://www.courts.state.va.us/scv/home.html>

tion to represent its members when it can show: (1) an injury in fact that is (a) concrete and particularized, and (b) actual or imminent;<sup>65</sup> (2) a causal connection between the injury and the conduct complained of; (3) the injury complained of would likely be redressed by a favorable decision,<sup>66</sup> and (4) the suit is germane to the organization's purposes.<sup>67</sup>

The organization may represent itself in its own right either as an "aggrieved owner" or as a person who has participated in the public comment process related to a final decision of the SWCB under Virginia Code section 62.1-44.15(5). Such persons are entitled to judicial review of that decision if they "meet[] the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution."<sup>68</sup>

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(case no. 051767). Thus, the *Stumpy Lake* decision stands as the controlling precedent in Virginia on these issues.

65. With respect to the "injury in fact" prong of representational standing, the Supreme Court has held "that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). At least one member of the association must have standing in his or her own right. See *Chesapeake Bay Found., Inc.*, 616 S.E.2d at 45; see also *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (recognizing a three-prong test for associational standing: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"); *Warth v. Seldin*, 42 U.S. 490, 511 (1975) (explaining that for associational standing "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.").

66. *Chesapeake Bay Found.*, 616 S.E.2d at 43 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

67. *Concerned Taxpayers of Brunswick County v. Dep't of Env'tl. Quality*, 525 S.E.2d 628 (Va. Ct. App. 2000) (citing *Hunt*, 432 U.S. at 343), *rev'd on other grounds*, *Aegis Waste Solutions v. Concerned Taxpayers of Brunswick County*, 544 S.E.2d 660 (Va. 2001).

68. VA. CODE ANN. § 62.1-44.29 (2005); see also *Chesapeake Bay Found.*, 616 S.E.2d at 45.

A plaintiff has standing to institute a . . . proceeding if it has a "justiciable interest" in the subject matter of the proceeding, either in its own right or in a representative capacity. In order to have a "justiciable interest" in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant, such that his rights will be affected by the outcome of the case.

*W.S. Carnes, Inc. v. Bd. of Supervisors*, 478 S.E.2d 295, 299 (Va. 1996) (internal citations omitted). Further, the claim must be more than one that the general public could allege. *Chesapeake Bay Found.*, 616 S.E.2d at 45 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000)) ("This [injury in fact] requirement precludes a plaintiff from alleging a generalized grievance to vindicate an interest shared by the entire public.").

The court's decision on these two points establishes that a citizen petitioner, either as an individual or in a representative capacity, has standing to challenge decisions of the Virginia Department of Environmental Quality or the SWCB under Virginia Code section 62.1-44.29. Thus, the *Stumpy Lake* decision represents a significant systematic result as it should end the Commonwealth's repetitive, boilerplate attacks on a citizen's right to sue (despite thirty years of federal jurisprudence).

### B. *Concrete Progress and Systematic Change*

Like rain on the ground in Cooperstown, New York,<sup>69</sup> some of the CBF's activities take time to "percolate" through the lives of Bay citizens and flow through rivers of governmental and private entities to produce measurable benefits to the Bay. Educational programs teach children about the wonders of the Bay and the importance of good stewardship. But that experience may not manifest itself as beneficial action for the Bay until many years later when a former student decides not to dump used motor oil into the local storm sewer drain.

Similarly, advocacy efforts may not find a receptive legislative or regulatory audience to adopt Bay-friendly statutes or regulations until a suitable political and economic climate is present. Such a climate may not occur for several years despite prodigious human effort and financial investment.<sup>70</sup> And despite the passage

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69. Cooperstown is one of the northernmost cities within the Bay watershed. Rain falling in this area flows into the Susquehanna River and, after 444 miles, discharges into the head of the Chesapeake Bay. See Chesapeake Bay Program, The Cherry Creek Watershed, [http://www.chesapeakebay.net/wspv31\(uldh3te4gnqxqsnzvcv3qe45\)/WspAbout.aspx?basno=54&topic=5](http://www.chesapeakebay.net/wspv31(uldh3te4gnqxqsnzvcv3qe45)/WspAbout.aspx?basno=54&topic=5) (last visited Apr. 3, 2006).

70. For example, one of the major goals set by the 1987 Chesapeake Bay Agreement is to eliminate forty percent of the nitrogen discharged into the Bay. Despite almost twenty years of trying, this goal has not been met. See CHESAPEAKE BAY FOUNDATION, 2003 STATE OF THE BAY REPORT, available at <http://www.cbf.org/site/DocServer/2003SOTBREport.pdf?docID=1201> (noting the worst nitrogen and phosphorus loads in twenty-five years). And while in 2005, Virginia made the historic decision to provide \$50 million in funds to support better Bay practices, see Press Release, House of Delegates, House Republicans Announce Water Quality Improvements for the Chesapeake Bay and Virginia's Bay Tributaries (Jan. 31, 2005), available at <http://www.kirkcox.com/News/ChesapeakeBayImprovements.pdf>, and the former governor has proposed that over \$200 million be directed to the Bay in coming years, see Press Release, Chesapeake Bay Foundation, Va. Governor Pledges \$257 Million to Clean Up the Bay (Dec. 14, 2005), available at [http://www.cbf.org/site/News2?page=NewsArticle&id=13286&security=1&news\\_iv\\_ctrl=1081](http://www.cbf.org/site/News2?page=NewsArticle&id=13286&security=1&news_iv_ctrl=1081), the Commonwealth still has no long term dedicated source of funding for resolving Bay nitrogen pollution.

of favorable legislation or regulation, it may take decades before implementation and enforcement of those laws yield appreciable results.

Focused litigation can provide specific quantifiable results. A judicial decision against a coal-fired power plant for violating its CAA permit by not adhering to its nitrogen oxides (“NO<sub>x</sub>”) emission limit, for example, would reduce a quantifiable amount of NO<sub>x</sub> from the atmosphere.<sup>71</sup> Thus, a specific amount of nitrogen would be eliminated from the Bay watershed.

Further, litigation against a governmental entity that has failed to implement or enforce construction erosion and sediment control laws, for example, whether successful or not, can bring about measurable results. Such litigation can highlight the issue for environmental regulators and foster programmatic changes to address the problem, or require that specific violators pay penalties and implement injunctive relief. Again, quantifiable reductions in pollution are achieved.

These examples do not present an exhaustive menu of judicial actions that could result in specific pollution reductions. But they do suggest that focused litigation can bring about measurable results from either a specific entity, a broad category of pollution sources, or governmental bodies charged with implementing and enforcing environmental laws or regulations aimed at restoring and protecting the Bay.

### *C. Strengthen and Supplement Advocacy, Educational, and Media Efforts*

One of the CBF’s primary objectives is to reduce nitrogen pollution. This message is extolled by the Foundation’s various departments in the media, during educational field trips, and before legislative bodies and regulatory agencies. In those arenas, however, that message can be ignored. Litigation brought to mandate nitrogen reductions can directly further the goals of those de-

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71. In large part, NO<sub>x</sub> either forms ground level ozone or other compounds that eventually fall to earth and contribute nitrogen to soil or water. See generally Chesapeake Bay Foundation, Water Pollution in the Chesapeake Bay, [http://www.cbf.org/site/PageServer?PageName=resources\\_facts\\_water\\_pollution](http://www.cbf.org/site/PageServer?PageName=resources_facts_water_pollution) (last visited Apr. 3, 2006) (noting that smoke stacks from industrial sources such as power plants are a major source of nitrogen pollution in the Chesapeake Bay).



partments. Moreover, such judicial action provides tangible evidence to the public, other citizen groups, elected officials, the regulated community, and governmental regulators that the CBF is prepared to seek redress in the courts if its message and objectives are, in fact, ignored.

Examples of how litigation can support the efforts of the Foundation's other departments can be found in two actions filed in Virginia state courts. The CBF has long advocated that the Bay state governments need to support the nitrogen and phosphorous reduction goals set in the various Bay Agreements and regional loading agreements<sup>72</sup> by requiring specific nitrogen and phosphorous limits in NPDES permits. In 2004, despite these agreements, state law, and CBF's administrative comments, the SWCB issued two pollution discharge permits without such limits.<sup>73</sup> One permit was issued to Philip Morris who operates a tobacco processing plant which discharges its waste water into the James River. The other was issued to the Town of Onancock for operation of its municipal sewage treatment plant which discharges into a Bay tributary on Virginia's Eastern Shore.

In response, the CBF filed two legal actions against the SWCB.<sup>74</sup> These suits assert that the Board failed to follow state and federal law by not strictly limiting the amounts of these pollutants discharged into already impaired waters. Although these two suits are still pending in court, a recent article suggests that the 2005 legislation establishing "nutrient trading" between point sources was driven by CBF lawsuits.<sup>75</sup> Thus, regardless of the judicial outcome, litigation supported the CBF's advocacy efforts by highlighting the issues, focusing the debate, and sparking legislative reforms.

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72. See 33 U.S.C. § 1342 (2000); MD. CODE REGS. 28.08.04.01 (2006); 25 PA. CODE § 102.1 (2006); VA. CODE ANN. § 45.1-254 (2001).

73. *Infra* note 74.

74. Chesapeake Bay Found., Inc. v. Commonwealth, CH04001390-00, (Cir. Ct. Va. filed Aug. 13, 2004) (Richmond City) (naming Town of Onancock as co-defendant); Chesapeake Bay Found., No. 1175-05-2 (Ct. App. Va. argued Feb. 21, 2006) (naming Philip Morris as co-defendant).

75. Christopher D. Pomeroy et al., *Nutrient Credit Trading: The New Bay Cleanup Tool*, VA. LAW., Oct. 2005, at 38, 39.

#### D. *Pressing Issues*

Given the variety of impairments to the Chesapeake Bay, the myriad pollution sources, and the size of the watershed, there is no shortage of potential legal actions which could be brought to assist restoration efforts; however, none of them can be characterized as “low hanging fruit.” Litigation in support of restoring the Bay will require significant effort and resolution of some complex legal issues. In addition to the matters addressed earlier, the following are four examples of issues that must be addressed if Bay restoration efforts are to succeed.

*Point source permitting*—To attain the necessary reductions in nitrogen and phosphorous, NPDES permits must have specific limits, and those limits must be followed. To ensure sufficiency and compliance, permits must be reviewed and challenged if lax, violators must be ferreted out, and jurisdictional issues must be resolved. Such efforts will consume significant physical and financial resources, but if pollution levels are to be reduced, point source discharges must be limited.

*Adherence to regional agreements*—As noted above, it is apparent that the signatories to the Chesapeake 2000 Agreement are not going to meet a number of their 2010 goals. As this and the prior agreements recognize, resolving Bay pollution must be addressed regionally and comprehensively. If the signatories to these voluntary agreements cannot meet their individual goals after twenty years of trying, then different approaches must be considered and implemented.

*Land use*—Urban sprawl and improperly planned development threaten Bay water quality. In 1987, the Chesapeake Bay Agreement partners determined that there was a clear connection between population growth and associated development and environmental degradation.<sup>76</sup> In the Chesapeake 2000 Agreement, these same parties agreed to:

Develop, promote and achieve sound land use practices which protect and restore watershed resources and water quality, maintain reduced pollutant loadings for the Bay and its tributaries, and restore and preserve aquatic living resources.<sup>77</sup>

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76. Chesapeake Bay Agreement of 1987, available at <http://www.chesapeakebay.net/pubs/1987ChesapeakeBayAgreement.pdf>.

77. Chesapeake 2000, available at <http://www.chesapeakebay.net/agreement.htm> (last

With 100,000 new residents moving into the watershed each year, local ordinances and state laws designed to limit land use that can impact the Bay and its tributaries must be strengthened and vigorously enforced.<sup>78</sup>

*Air pollution*—Emissions from mobile and stationary sources deposit approximately one-quarter of the nitrogen pollution into the Bay.<sup>79</sup> Close examination of CAA permits issued to stationary sources and compliance with those permits is essential to Bay restoration. Further, state and federal laws and regulations promulgated to address air pollution must be scrutinized and challenged if insufficient.

No single entity can tackle these large and complex problems. If, however, they are addressed in a cohesive and systematic way by individual, local, state, and federal entities, including citizen groups like the CBF, these issues can be resolved.

## V. CONCLUSION

In the thirty-nine years since its inception, the CBF has grown in size and stature. Well respected by the public, elected officials, and regulators throughout the Bay region, the CBF is recognized as a leader in negotiating effective resolutions to complex issues. While education and environmental advocacy will remain its staple for change, litigation has been and will continue to be a tool of the Foundation. Litigation will be a weapon of last resort but will be used in a continuous and strategic fashion to *Save the Bay!*

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visited Apr. 3, 2006).

78. See, e.g., Critical Area Act, MD. CODE REGS. 27.01.01.01 (2006); Chesapeake Bay Preservation Act, VA. CODE ANN. § 10.1-2100 (1998).

79. Chesapeake Bay Program, Air Pollution, [http://www.chesapeakebay.net/info/air\\_pollution.cfm](http://www.chesapeakebay.net/info/air_pollution.cfm) (last visited Apr. 3, 2006).