

August 5, 2020

Jaime Robb
Virginia Department of Environmental Quality (DEQ)
Piedmont Regional Office
4949-A Cox Coad
Glen Allen, VA 23060

CC: David K. Paylor, Director, Virginia Department of Environmental Quality

RE: Public Comment on Draft Virginia Water Protection Permit Number 19-2036 and Joint Permit Application 2012-02369 (Wegmans Distribution Center)

Dear Ms. Robb,

As interested parties to the permit process, Protect Hanover and the undersigned partners submit the following comments regarding the draft Virginia Water Protection Permit No. 19-2036 ("VWP Permit") and accompanying Joint Permit Application 2012-02369 ("Application"). The VWP Permit would allow Wegmans Food Markets, Inc. ("Wegmans") to permanently impact several acres of wetlands situated south of Ashcake Road, northwest of Sliding Hill Road, and east of Egypt Road in Hanover County, Virginia ("Air Park site"). Thank you for this opportunity to submit written comments.

Based upon the issues discussed in this comment letter, DEQ and the Board must deny the VWP individual permit requested by Wegmans Food Markets, Inc. ("Wegmans"). Permit denial is warranted because the regulated activity will unavoidably impair state waters and resources. Furthermore, State Water Control Board ("Board") denial is warranted because the permitting process and Wegmans' application have critical flaws.

I. BACKGROUND

Wegmans seeks to construct a distribution center that would help the company grow in the Southeastern United States. However, the Air Park site cannot sustain the proposed development. The site is an environmentally, culturally, and historically significant area that DEQ and the Board must protect. In addition, the site is located in an environmental justice community that is over-burdened with industrial development.

Wegmans' development would permanently impact several acres of wetlands on the Air Park site, which help protect water quality locally and regionally. At the local level, the wetlands drain into Totopotomoy Creek, Kersey Creek, and Campbell Creek. Permanent impacts to these wetlands would risk destabilizing these waterways and further degrade their uses. At the regional level, these wetlands protect the Chesapeake Bay by filtering pollutants, reducing flooding and runoff from upland areas, and providing habitat to wildlife.

The Air Park site is at least 217 acres in size and has been assessed for wetlands several times in the past decade. The engineering firm RK&K conducted a delineation in early October 2019 and found 34 acres of wetlands on the Air Park site. However, this number was significantly decreased shortly after RK&K conducted a second site visit with the U.S. Army Corps of Engineers (“USACE”), the Timmons Group, and DEQ on October 16, 2019. To reach 6.12 acres of expected impact due to filling and draining, USACE purportedly applied a mosaic approach to the wetland delineation, a methodology that has seldom been used in Central Virginia.

II. SUBSTANTIVE CONCERNS

A. The Board must deny the wetlands permit because the proposed project raises environmental-justice issues unavoidable by DEQ and the Board.

Protect Hanover stands in solidarity with our neighbors in the Brown Grove community. We submit the following comments because we cannot stay silent on environmental injustices and want to amplify the voices of Brown Grove, as they are owed this opportunity to tell their story.

The distribution center will impermissibly compound upon the environmental injustices that have splintered the Brown Grove community. During Reconstruction, freed slaves settled near the Air Park site and thus created Brown Grove. It remains a predominantly African American community today, and has been significantly displaced by industrial encroachment, including Interstate-95, Hanover County Airport, a landfill, and a concrete plant. The proposed development will contribute to the pollution generated by these other industrial sources and accelerate the degradation of Brown Grove. Moreover, the development will eviscerate possible graves and historic markers unless Brown Grove has an earnest opportunity to inspect the site and provide insight; several members of the community have invaluable oral histories and can recount seeing graves onsite.

DEQ and the Board cannot turn a blind eye to the disproportionate impacts that environmental decisions inflict on underrepresented communities. As of July 1, 2020, a host of statutes now implore the Commonwealth and its agencies to actively secure environmental justice. HB 1162, for example, explicitly provides that a purpose of DEQ is to “further environmental justice and enhance public participation in the regulatory and permitting processes.” A recent Fourth-Circuit case, *Friends of Buckingham v. State Air Pollution Control Board*, Case No. 1152, decided January 7, 2020, also highlights that DEQ and permit-related boards must assess whether proposed activities might cause disproportionate harm to underrepresented communities, as was articulated by Brown Grove community members at the Board’s July 20th public hearing. In light of these mandates, as well as the inequities highlighted through COVID-19 and nationwide demonstrations on race, DEQ and the Board must independently assess how the proposed development will impact the Brown Grove community.

B. The Board must deny the Wetlands Permit because the wetlands delineation does not comply with USACE’s wetlands delineation guidance.

The Board cannot issue the VWP permit because the current wetlands delineation does not comply with USACE’s “Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report,”

("Wetlands Manual") and the USACE-approved Regional Supplement. Instead, the delineation (1) incorrectly applies a mosaic approach to wetlands that should be subject to different analyses; (2) omits data altogether; and (3) overlooks how Hanover County's drought alters interpretation of site data.

1. USACE should not have applied the mosaic analysis to Wetlands 7 and 9.

Wegmans' wetlands delineation does not comply with the VWPP Program because USACE did not follow its own guidance when it applied a mosaic approach to Wetlands 7 and 9. The Regional Supplement describes a "mosaic" as a landscape "where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately," often due to complex microtopography. The Regional Supplement suggests applying a mosaic analysis if hydrophytic vegetation or hydric soil are absent from microtopographic highs, or if small changes in elevation result in repeating sequences of hydric and non-hydric soils. However, data from sites in Wetlands 7 and 9 do not indicate these triggers are present and make no mention of complex microtopography or difficult terrain. Thus, USACE should not have applied the mosaic method, and neither DEQ nor the Board can rely upon USACE's findings.

USACE also did not follow the mosaic methodologies outlined in the Regional Supplement. Under the main mosaic method, delineators must establish transects to calculate the percentage of wetland within a mosaic. Alternative mosaic methods include high-quality aerial photography and point-intercept sampling, which also requires transects. However, the delineators did not follow any of these methods. USACE's and DEQ's internal correspondence indicates both agencies agreed upon mosaic percentages without applying transects, as required by two methods in the Regional Supplement. Furthermore, USACE made no mention and shared no data on transects, measurements, or mosaic calculations after it visited the Air Park site to conduct the delineation. Without more, agreeing to mosaic percentages shirks the Regional Supplement, violates the VWPP regulations, and cannot receive Board approval.

2. The most recent jurisdictional determination omits data that would increase the acres of wetland impacted by the proposed development.

Wegmans' wetlands delineation also does not comply with the VWPP Program because it excludes data necessary to identify all wetlands onsite. RK&K completed a wetlands jurisdictional determination in early October 2019, which it sent to DEQ. The determination identified wetlands at sampling site DP-2, connecting what are now Wetlands 9 and 13. USACE has since omitted DP-2 and accompanying wetlands from its jurisdictional determination map, although the data for DP-2 suggests the site and surrounding area should retain wetlands designations: RK&K found hydrophytic vegetation, hydric soil, and wetland hydrology at DP-2. Because the DP-2 data is omitted from the WOTUS map and runs counter to the current jurisdictional determination, the determination underestimates the acres of wetlands impacted and therefore fails to meet the requirements of the VWPP Program.

3. The most recent jurisdictional determination does not consider that Hanover County's drought changes how delineators should have interpreted site data.

The current delineation inaccurately identifies non-wetlands because USACE overlooked that Hanover's

2019 drought changes how the agency should interpret Air Park site data. If a site lacks wetland hydrology indicators but (a) has hydrophytic vegetation and hydric soils, (b) experiences “no significant hydrologic manipulation,” and (c) sits in a region affected by drought, the site should be considered a wetland. At least two sites, DP-6 and DP-8, should be re-designated as wetlands in light of these requirements. RK&K noted that Hanover County “is either abnormally dry or has moderate drought” for all sites sampled on October 11, 2019. The engineering firm did not identify DP-6 and DP-8 as having “significant hydrologic manipulation” or wetland hydrology but did indicate the sites had hydrophytic vegetation and hydric soils. Therefore, USACE’s current delineation is inaccurate, and both sites should be designated as wetlands under the Regional Supplement.

C. The Board must deny the Wetlands Permit because Wegmans has not identified all Chesapeake Bay Preservation Areas on the Air Park Site

Wegmans has prevented the Board from accurately assessing the proposed development’s impacts under the Chesapeake Bay Preservation Act (“Bay Act”) by providing the board with misleading information. The Bay Act protects Chesapeake Bay Preservation Areas (“CBPAs”), characterized as either Resource Protection Areas (“RPAs”) or Resource Management Areas (“RMAs”), which developers cannot disturb unless their impacts are minimized.

First, Hanover County provided inaccurate and misleading CBPA maps to DEQ as part of the Coastal Management Zone Act review: their maps highlighted a single tax parcel (GPIN 7798-54-5903) on the Air Park Site although the site consists of all or a portion of 22 separate parcels, some of which are excluded from the maps entirely. Also, Hanover stated the single tax parcel has no CBPAs, although DEQ identified that the property is located within an RMA, a type of CBPA. Because the property is within an RMA, Wegmans must satisfy several obligations under the Bay Act by minimizing their impacts. The maps the County provided prevent the Board from assessing the Air Park site. Board approval of these actions goes against the purpose of the Bay Act’s protections for wetlands.

Second, Wegmans has not provided the Board a thorough analysis of whether Wetland 13 might constitute an RPA. Under the Bay Act, RPAs include “nontidal wetlands connected by surface flow and contiguous to...water bodies with perennial flow.” The Timmons Group concluded that Wetland 13 is not an RPA because it is not contiguous to Totopotomoy Creek, a water body with perennial flow located southwest of the site. Timmons Group overlooks how the county’s drought conditions may have altered the channel’s ephemeral or perennial designation and does not include wetlands delineation data on lands adjacent to the channel. Thus, Timmons Group cannot conclusively state Wetland 13 is not contiguous to Totopotomoy Creek and therefore is not RPA. Further investigation into Wetland 13 is required before the Board can independently assess the development under the Bay Act.

D. The Board must deny the Wetlands Permit because the proposed development set precedent for allowing permits that cause significant impairments of state waters and fish and wildlife resources.

The Board cannot issue the VWP permit because the distribution center will contradict the Commonwealth’s conservation priorities and degrade valuable waters and resources. VWP permits are issued only if the proposed activity will not “cause or contribute to a significant impairment of state

waters or fish and wildlife resources.” The distribution center will not meet this threshold. Instead, it will destroy resources the state has prioritized for conservation initiatives: Governor Northam recently established a new land-conservation strategy that protects the most important environments through a data-driven tool, ConserveVirginia. Under ConserveVirginia, the project will fragment ecological cores of notable integrity, which the Department of Conservation and Recreation (DCR) believes will impair biodiversity, habitat quality, and water quality. Portions of the Air Park site have also been designated with the penultimate conservation priority because they help preserve watershed integrity.

Regardless of any mitigation and compensatory measures, the proposed development will irrevocably bulldoze land the Commonwealth wants to protect, which also sets a dangerous precedent that ConserveVirginia and the Governor’s conservation priorities can be easily dismissed. Therefore, the project will cause or contribute to the significant impairment of state waters, and pursuant to VWPP regulations, Wegmans’ permit must be denied.

III. PROCEDURAL CONCERNS

A. VWP Permitting Process has not allowed for reasonable Public Participation

The public’s capacity to participate in the VWP permitting process was violated when DEQ (1) provided inadequate opportunity for public participation; (2) produced insufficient public notices of the draft permit and public hearing; and (3) opted for an electronic-only hearing. Participants did not have adequate opportunity to make verbal statements during the DEQ permit hearing because the rules that govern such statements were made available only at the hearing itself. In addition, Hanover County is well known to have inadequate broadband access and infrastructure, hampering its residents’ abilities to participate in public processes. Many complained about inadequate access and lost connection during the hearing.

Exacerbating these problems is the fact that a local cell tower in Hanover was downed due to lightning, effectively preventing people from calling into the hearing. This array of issues exemplifies how opportunity for public participation has been deficient, despite best efforts.

B. Wegmans’ Joint Permit Application is Incomplete.

The Board should not approve the incomplete application provided by Wegmans. Wegmans has yet to satisfy the following requirements under the VWPP Program, rendering its application incomplete and unavailable for approval. First, Wegmans provided an inadequate alternatives analysis and EPA confirmed inadequacy in a May 1st email to USACE. Second, the application did not include a complete description of the impacts to the surface waters of Totopotomoy Creek, Kersey Creek, and Campbell Creek. Third, the compensatory mitigation plan is inadequate because it relies on an incorrect determination that the proposed development will impact only 6.12 acres of wetlands, and therefore, does not provide a sufficient amount of mitigation efforts. Finally, the application does not state an analysis of the wetlands’ functions.

IV. CONCLUSION

The above information provides an overview of the record of available information that should lead both VA DEQ and the Board to one logical outcome – the permit as presented is both incomplete and flawed. Also, the failure of the state to consider Environmental Justice issues is another gap that must be filled in order for any permit to be granted.

Until these matters are adequately addressed, the permit should be denied.

Respectfully,

Rod Morgan

Protect Hanover

David Reed, Co-Executive Director

Chesapeake Legal Alliance

Queen Zakia Shabazz, Coordinator

Virginia Environmental Justice Collaborative

Michael Town, Executive Director

Virginia League of Conservation Voters

Mary Rafferty, Executive Director

Virginia Conservation Network

Joe Brancoli, Chair

Falls of the James Group, Sierra Club

Muriel Miller Branch, President

AMMD Pine Grove Project

Bonnica Harris Cotman

Brown Grove Preservation Group

Kenneth Spurlock Sr., Chairman of
Deacons/Trustee

Brown Grove Baptist Church

Fionnuala Fisk, Co-Hub Coordinator

Sunrise Richmond

Lee Anne Williams

Green New Deal Virginia

Christiane Riederer

Virginia Poor Peoples Campaign

Sonja Taylor

Sunrise Roanoke

Bob Wendelgass, President

Clean Water Action

Queen Zakia Shabazz, Founder

United Parents Against Lead & Other
Environmental Hazards (UPAL)

Victoria Ronnai

Virginia Network for Democracy and Environmental Rights

Martha Wingfield

Partnership for Smarter Growth

Garry Harris, Managing Director

Center for Sustainable Communities

Pattie P. Bland, Chair, Board of Directors

Coalition for Hanover's Future

Matt Shudtz

Center for Progressive Reform