

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

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JAMES RIVER ASSOCIATION, )  
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 Appellants, )  
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 v. )  
 )  
 COMMONWEALTH OF VIRGINIA, ex rel. )  
 WASTE MANAGEMENT BOARD, )  
 )  
 Appellee, ) Chancery No. CHO3-1514-4  
 )  
 and )  
 )  
 WASTE MANAGEMENT OF VIRGINIA, INC., )  
 CHARLES CITY COUNTY, )  
 )  
 Appellee Intervenors )  
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**MEMORANDUM OF LAW IN SUPPORT OF APPELLANT  
JAMES RIVER ASSOCIATION’S PETITION FOR APPEAL**

**STATEMENT OF THE CASE**

On August 22, 2003, pursuant to Rule 2A of the Supreme Court of Virginia, Appellant James River Association (“JRA”) filed a Notice of Appeal challenging two regulations adopted by the Waste Management Board (“the Board”) on July 25, 2003 pertaining to waste barge container standards and testing requirements, 9 Va. Admin. Code § 20-170-70, and to the monthly fee assessed per tonnage of waste barged, 9 Va. Admin. Code § 20-170-195. JRA is a 2,200 member, not-for-profit association dedicated to the conservation and responsible stewardship of the natural and historic resources of the James River watershed.

JRA filed its Petition for Appeal on September 22, 2003. JRA claims that these two regulations violate the plain requirements of the Waste Management Act (“the Act”), Va. Code

Ann. §§ 10.1-1454.1(A),(C)(1) (Michie 2003), as well as the proper procedures set forth in the Virginia Administrative Process Act (“VAPA”), Va. Code Ann. §§ 2.2-4007, 4012, for the adoption of regulations.

On October 14, 2003, Waste Management of Virginia, Inc. (“Waste Management”) and Charles City County (“the County”) moved to intervene as defendants in this case. On October 16, the Commonwealth moved to dismiss the Petition for Appeal, asserting that JRA lacked standing and that the Petition failed to allege cognizable grounds for relief.

In a letter opinion dated February 17, 2004, this Court denied the Commonwealth’s motions, holding that JRA has standing as a “person aggrieved” under Va. Code Ann. § 10.1-1457, the judicial review provision of the Act. This Court also granted the motions to intervene. The Commonwealth and the Intervenors filed their Answers and Affirmative Defenses in March 2004. The parties agreed to a briefing schedule on the merits, and oral argument has now been set for January 13, 2005.

## **RELATED LITIGATION**

### State and Federal Challenge to December 2000 Waste Barge Regulations

In February 2001, Defendants-Intervenors Waste Management, the County and others simultaneously filed state and federal court actions challenging waste barge regulations that the Board adopted as final on December 18, 2000, contending that the strict requirements to ensure that waste containers were watertight violated various state and federal laws. AR 06907 (Compl.); AR 07166 (Pet. for Appeal). On March 12, 2001, the Board subsequently suspended the challenged regulations to allow an additional comment period. 17 Va. Regs. Reg. 2076 (Mar. 12, 2001). The courts subsequently dismissed the suits on ripeness grounds. AR 11483.

### Constitutional Challenge to Stacking Limitation and Other Restrictions of 1999 Legislation

In 1999, the General Assembly broadly restricted the transportation of waste by barge, limiting, in particular, the number of containers that could be stacked on the barges and banning waste barge traffic altogether on the James River. Va. Code Ann. §§ 10.1-1454.1(A)(d), (B), 1454.2 (Michie 1999).

Defendants-Intervenors Waste Management and Charles City County, with other members of the waste and barge industry, filed suit in federal court challenging the constitutionality of the restrictions. The district court overturned the provisions on constitutional grounds. WMH v. Gilmore, 87 F.Supp.2d 536 (E.D. Va. 2000). In June 2001, the Fourth Circuit affirmed in part but remanded the stacking limit for a trial on factual issues. 252 F.3d 316. In the opinion remanding the stacking limit, the Fourth Circuit stated that the barge transport of municipal solid waste presents “the potential for a health and environmental disaster on a Virginia waterway....” Id. The parties entered into a settlement on or about December 2002/January 2003 [hereinafter “2002 Settlement Agreement”] in which the Commonwealth agreed to repeal the challenged restrictions. The General Assembly so amended the statute in February 2003.

## **BACKGROUND**

### Waste Barging In Virginia

By 1997, Virginia was the second largest importer in the nation of waste annually, importing 4.5 million tons in 2000. See Waste Mgmt. Holdings v. Gilmore, 252 F.3d 316, 325 (4th Cir. 2001), cert. denied Murphy v. Waste Mgmt. Holdings, Inc., 535 U.S. 904 (2002) (hereinafter WMH v. Gilmore); AR 19996. Until 1997 all of the imported waste was transported by truck and rail.

Following the announcement in 1997 that New York City's Fresh Kills Landfill would close in 2001, Defendant-Intervenor Waste Management and related entities entered into a 20-year contract to dispose of a significant portion of New York City's solid waste. 252 F.3d at 325-26. Waste Management plans to transport large volumes of waste by barge up the James River to Port Weanack in Charles City County,<sup>1</sup> where the containers would be unloaded and taken to the nearby Charles City County Landfill. Waste Mgmt. Mem. in Supp. Motion for Leave to Intervene at 2.

Each barge can carry approximately 5,000 tons of waste, 252 F.3d at 326, amounting to 225-450 truckloads of waste, AR 07147, depending on the size of the containers. While the size may vary, containers generally are either 20' or 40' long, 8 or 12 feet tall, with end doors and a top lid. See, e.g., AR 05278, 005291-92, 03668, 03672, 11476. The Virginia Department of Environmental Quality ("DEQ") estimates that several thousand gallons of leachate, or "garbage juice," may accumulate in the bottom of a container hauling waste. AR 17528.<sup>2</sup>

From August 1997 to approximately April 1998, Waste Management shipped waste by barge to Port Weanack. AR 06924. In March 1998, inspections by DEQ and the U.S. Coast Guard discovered leachate leaking out of waste barge containers into the James River, in violation of both the Waste Management Act and the State Water Control Law. AR 07147-48.

#### The Waste Management Act.

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<sup>1</sup> Weanack Port is located adjacent to Shirley Plantation on the James River and was traditionally known as Shirley Port.

<sup>2</sup> Leachate is liquid that passes through or emerges from waste and which contains materials from that waste. AR 07147. According to the Commonwealth, municipal solid waste "frequently contains disease-causing organisms, toxic materials, and hazardous waste." AR 07143.

Not long thereafter, the General Assembly adopted legislation governing the transport of solid waste on the waters of the Commonwealth. Va. Code Ann. § 10.1-1454.1 (Michie 1998).<sup>3</sup> The 1998 Act directed the Board to adopt regulations requiring that containers holding wastes be “watertight and be designed, constructed, secured and maintained so as to prevent the escape of wastes, liquids and odors and to prevent the loss or spillage of wastes in the event of an accident.” § 10.1-1454.1(A) (Michie 1998). In 1999, the legislature added a provision that required that containers “be tested at least two times a year and be accompanied by a certification from the container owner that such testing has shown that the containers are watertight.” § 10.1-1454.1(A)(b) (Michie 1999).

The 1998 legislation also directed the Board to adopt regulations establishing a fee payable by the owner or operator of a vessel transporting waste, “sufficient to recover the administrative and enforcement costs of this article associated with such operations including, but not limited to, the inspection and monitoring of such ships, barges or other vessels to ensure compliance with this article....” § 10.1-1454.1(C) (Michie 1998).

In 2003, the legislature revised the fee provision, directing the Board to charge fees to fund not only the administrative and enforcement costs, as originally set forth in the 1998 legislation, but also to fund “activities authorized by this section to abate pollution caused by barging of waste, to improve water quality, or for other waste-related purposes.” Va. Code Ann. § 10.1-1454.1(C)(1) (Michie 2003). The 2003 legislation also replaced the 1998 language directing that the fee be “sufficient to recover” costs with language that the fee be “for the purpose of funding” costs and the other activities described above. *Id.*

### Regulatory Actions

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<sup>3</sup> “Solid waste” means any garbage or refuse discarded from a variety of sources, including community, industrial, and commercial waste. Va. Code Ann. § 10.1-1400 (Michie 2004).

On July 6, 1998, the agency published the Notice of Intended Regulatory Action (NOIRA) for the barge regulations, and comments were received between July 6 and August 14, 1998. AR 04514. DEQ also convened a Technical Advisory Committee (TAC) of various stakeholders, including Patricia Jackson, the Executive Director of JRA, Waste Management, the County, Port Weanack, and others, to assist in the development of the regulations. AR 01296.

#### Proposed Regulations September 2000

On September 11, 2000, the agency published proposed regulations for public comment (“the September 2000 regulations.” AR 00590-627. Public comments were received through November 13, and a public hearing was held on October 18, 2000. AR 01415. The September 2000 regulations included a proposal put forth by the waste industry that “watertightness” of containers would be demonstrated by a “standing water test.” AR 04088. The specific test set forth in the September 2000 regulations involved filling each container with 24 inches of water for 15 minutes; the container would be deemed to have passed the test if no water leaked out. AR 00600.

#### The December 2000 Regulations

In response to criticisms of the standing water test that it did not comply with the statutory requirements for watertightness, the Board replaced it with a “soap bubble” or “pressure test.” DEQ stated that the “requirements for containers have been changed in response to comments to assure that they meet the criteria in the statute. . .” AR 01427. Under the pressure test, containers are coated with a soap solution and air is pumped into the container, causing bubbles to form in the soap if there is a leak. AR 01455.

The Board adopted the December revisions as final regulations on December 18, 2000. AR 01442, 01749. The regulations were published in the Virginia Register on January 15, 2001. 17 Va. Regs. Reg. 1297 (Jan. 15, 2001).

#### Suspension of December 2000 Regulations

On February 15, 2001, the Board suspended the December 2000 final regulations, AR 07095, effective March 12, 2001, AR 02301, in response to a petition for an additional comment period. The Board allowed an additional 30-day public comment period, and a public meeting was held on April 10, 2001. AR 04384.

#### 2003 Final Regulations

In the 2002 Settlement Agreement resolving the WMH v. Gilmore litigation referred to above, the Commonwealth also agreed to take all reasonable and necessary steps to secure the promulgation of regulations that would replace the pressure test adopted in the December 2000 final regulations with the 24-inch standing water test. See AR 07452 (transmittal letter dated Jan. 30, 2003 attaching Memorandum of Agreement, Re: Waste Management Holdings, Inc., et al. v. James S. Gilmore, III, et al., and attached regulations). Waste Management also consented in the agreement to the imposition of a fee not to exceed \$1.00 per ton on wastes carried by barge. AR 07454. The terms provided that the “Agreement shall remain confidential and neither this Agreement nor any of its terms shall be disclosed....” AR 07454.

On March 28, 2003, the Board revised the December 2000 final regulations to adopt the 24-inch standing water test and the \$1.00 fee. AR 02787-93, 02779. The Board then suspended the container and fee regulations to allow for public comment. AR 02868. During the March 2003 meeting the Board held a closed executive session for about an hour. AR 02035-36.

Following the public comment period, the Board adopted the revised container and fee regulations as final on July 25, 2003. AR 03139, 3160. The Board met in closed session for over an hour and a half at the July meeting. AR 19827. Neither the agency nor the Board revealed the terms of the 2002 Settlement Agreement pertaining to the container test and fee amount before the Board adopted the regulations as final.

In August 2003, following public outcry over the regulations and the extensive closed sessions during the March and July Board meetings, DEQ Director Robert Burnley released the 2002 Settlement Agreement to the Richmond Times-Dispatch as the newspaper was preparing an article about the secret agreement.

### **SUMMARY OF ARGUMENT**

The container regulations adopted by the Board violate the mandates of the Waste Management Act. The legislature has unambiguously directed that the Board “shall” adopt regulations that require that waste containers 1) are watertight, 2) are designed and constructed so as to prevent the escape of wastes and liquids, and 3) are designed and constructed so as to prevent loss or spillage in the event of an accident. Va. Code Ann. § 10.1-1454.1(A)(a) (Michie 2003). The statute further requires the Board to require a test for containers that shows that the containers are watertight. § 10.1-1454.1(A)(b). The 24-inch standing water test adopted by the Board tests only the bottom 24 inches of the 8 or 12 foot high waste containers. The test therefore cannot show that the entire container is watertight, as the agency has admitted, or will prevent leaks, especially in the event of an accident. The container regulation is contrary to the plain mandate of the statute and is therefore invalid as a matter of law.

The container regulation was the result of the settlement agreement in other litigation that committed the Commonwealth to adopt the standing water test in violation of the statutory requirements. The regulation is therefore unauthorized by the statute and unenforceable.

Likewise, the agreement improperly drove the Board's decision on the fee. Defendant-Intervenor Waste Management consented to pay a fee of no more than \$1 per ton on barged waste. The Board adopted the agreed fee in the regulations, again without regard to the fee purposes set forth in the statute. The Act directs the Board to establish a fee schedule for funding the administrative and enforcement costs associated with barging waste and to fund other waste-related activities. Va. Code Ann. § 10.1-1454.1(C)(1). However, the Board turned a blind eye to known risks to public health and safety and to the environment and failed to consider significant issues regarding the needed enforcement program. The fee schedule adopted by the Board therefore runs contrary to the purposes of the statute and must be set aside.

The Board also failed to disclose the terms of the Settlement Agreement until after it adopted the final regulations. The concealment of the Agreement made a sham of the public process and deprived the public of any meaningful opportunity to comment on the regulations, in violation of the VAPA. Va. Code Ann. §§ 2.2-4007(E), (F) (Michie 2003). Further, the Board's failure to disclose its true rationale for the regulations violates the VAPA. Va. Code Ann. §§ 2.2-4007(I), 4012(E).

Because the regulations violate the clear requirements of the Act, they are invalid as a matter of law. Therefore, the Court need not reach the issue of whether the Board's decision was supported by substantial evidence. In addition, even if a decision were supported by substantial evidence, which is not the case here, such decision must be set aside if it fails to comply with "a

substantial statutory directive,” as here. Browning-Ferris Indus. v. Residents Involved in Saving the Env’t, Inc., 254 Va. 278, 284, 492 S.E.2d 431, 434 (1997) (hereinafter RISE).

## ARGUMENT

### Standard of Review

In reviewing agency action, courts must “construe and determine compliance with the statutes governing adoption of administrative regulation irrespective of the agency’s construction.” Commonwealth ex rel. State Water Control Bd. v. Appalachian Power Co., 9 Va. App. 254, 259-60, 386 S.E.2d 633, 636 (1989), aff’d en banc, 12 Va. App. 73, 402 S.E.2d 703 (1991). Under the VAPA, the court shall suspend or set aside a regulation that it finds does not comply with statutory authority or the stated objectives for which regulations may be made. Va. Code Ann. §§ 2.2-4029, 4027 (Michie 2003).

Matters of statutory interpretation fall outside the “specialized competence” of the agency, and “little deference is required to be accorded the agency decision.” Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 246, 369 S.E.2d 1, 9 (1988); see also 7-Eleven, Inc. v. Dept. of Env’tl. Quality, 42 Va. App. 65, 73, 590 S.E.2d 84, 88 (2003) (en banc). The distinction between matters of fact and matters of law “recognizes the special competence of the judiciary to decide issues of . . . statutory interpretation and a concomitant responsibility not to merely rubber-stamp an agency determination.” Virginia Natural Gas, Inc. v. State Air Pollution Control Board, 42 Va. Cir. 371, 374 (Cir. Ct. City of Richmond 1997), citing Brown-Forman Corp. v. Sims Wholesale Co., Inc., 20 Va. App. 423, 429-30, 457 S.E.2d 426, 429 (1995), rev’d on other grounds 251 Va. 398, 468 S.E.2d 905 (1996) (citations and quotation marks omitted).

With respect to factual issues, the agency’s findings of fact must be supported by substantial evidence, based on the whole evidentiary record before the agency. Va. Code Ann. §

2.2-4027. While the court must “take due account of the presumption of official regularity [and] the experience and specialized competence of the agency,” § 2.2-4027, the purposes of the basic law are also “crucial to the determination of a reviewing court.” Johnston-Willis, Ltd., 6 Va. App. at 244, 369 S.E.2d at 8. The Court may set the Board’s decision aside “even if it is supported by substantial evidence, if the court’s review discloses that the agency failed to comply with a substantial statutory directive.” RISE, 254 Va. 278, 284, 492 S.E.2d, 431, 434 (1997). Further, a court is not bound by the substantiality of the evidence standard if the fact-finding process has been tainted. See Virginia Board of Medicine v. Fetta, 12 Va. App. 1173, 1177, 408 S.E.2d 573, 576 (1991), aff’d 244 Va. 276, 283, 421 S.E.2d 410, 414.

**I. THE BOARD HAS FAILED TO SATISFY THE STATUTORY MANDATE THAT THE REGULATIONS FOR WASTE CONTAINERS SHALL INCLUDE REQUIREMENTS THAT THE CONTAINERS ARE WATERTIGHT, ARE DESIGNED AND CONSTRUCTED SO AS TO PREVENT THE ESCAPE OF WASTE AND LOSS OR SPILLS IN THE EVENT OF AN ACCIDENT, AND ARE TESTED AND SHOWN TO BE WATERTIGHT.**

The Waste Management Act sets forth several specific requirements regarding containers used for holding solid waste transported by water. The Act directs the Board to develop regulations that “shall” require containers to be 1) “watertight,” 2) “designed, constructed, and maintained so as to prevent the escape of wastes, liquids and odors”; and 3) designed, constructed, and maintained so as “to prevent the loss or spillage of wastes in the event of an accident.” Va. Code Ann. § 10.1-1454.1(A)(a). The statute also directs that the regulations shall require that “containers be tested at least two times a year and be accompanied by a certification from the container owner that such testing has shown that the containers are watertight.” § 10.1-1454.1.A(b). As the agency has acknowledged, the statute mandates “zero tolerance of any deposits [of waste] into state waters.” AR 19599. The statute was adopted following the discovery of waste barge containers used by Waste Management that were leaking garbage juice

or leachate into the James River at Port Weanack. See AR 17507; AR 07147-48. The statute reflects the General Assembly's clear intent to prevent future spills and to ensure that the waste barge containers are watertight.

The test that the Board adopted in the final regulations will not show whether the containers meet these specific statutory standards. The regulations adopt a 24-inch "standing water" test to evaluate the container for leaks. The test is satisfied if the exterior of the container is free from the penetration of water after the container is filled with 24 inches of water for 15 minutes. AR 03111; AR 00439. When this test was first proposed in the September 2000 draft regulations, DEQ staff admitted that the test "deals solely with the bottom 24 inches of the container." AR 17613. The doors, sides, and tops of these containers, which are 8 or 12 feet high, are not evaluated; only the bottom 2 feet of the container is tested. The rest of the container is certainly vulnerable to leaks, as evidenced by the 1998 waste barge incident in which DEQ observed leachate coming from the waste containers at Weanack Port. AR 17507. The DEQ inspectors concluded that the leak was a result of stresses on the door seals from moving the containers. AR 17507 (DEQ Site Visit Report); see also AR 6233 (Shippers Guide, U.S. Dept. of Transp., Maritime Admin.).

The comments received on the proposed September 2000 regulations heavily criticized the standing water test on the grounds that it did not meet the statutory requirements that the entire container be watertight. See AR 11482 (Governor's Papers); AR 11476 (DEQ briefing paper, Apr. 2002); AR 00919-20 (Resp. to Comment Dec. 2000). In addition, the test offered no indication whether the containers would leak if they were turned on their sides, or if they fell

overboard in the event of an accident.<sup>4</sup> AR 11476; accord AR 00919-20. Members of the General Assembly also questioned whether the standing water test met the legislative intent of the statute. See, e.g., AR 20141 (Richmond Times Dispatch article, Nov. 27, 2000).

The lead DEQ staff person on the regulations expressed his view that the 24-inch standing water test did not comply with the statute, remarking that the General Assembly “said that the container must be watertight, presumably the entire container, not a portion thereof.” AR 11728 (Dec. 4, 2002). He explained that if “the container is said to be watertight . . . [t]hat would mean all its seams, edges, etc., are watertight.” AR 11728. For the same reason, the test does not comply with the statutory requirement that containers must be tested and shown to be watertight, in violation of the statute. See AR 00919-20. As DEQ staff also acknowledged, passing the 24-inch standing water test and ensuring that no liquids escape are two separate things. AR 17613 (DEQ Oct. 2, 2000).

In response to these concerns,<sup>5</sup> the Board replaced the standing water test in the draft September 2000 regulations with a gas pressure or “soap bubble” test in the final regulations adopted in December 2000. The agency explained that the container requirements were changed “to assure that they meet the criteria in the statute....” AR 00919. The agency explained that this testing requirement was “based upon tests currently used to evaluate whether petroleum storage tanks are leak-proof.” AR 11482. The test “involved soaping the seams, filling the

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<sup>4</sup> Evidence in the record showed that containers may be lost overboard in the event of icing, high winds, or heavy seas, or in the event of a barge accident or collision. AR 06489-90.

<sup>5</sup> See also AR 00737 (Comments of State Water Control Board member requesting that “containers be as water-tight as possible so that if there were an upset that dropped one or more containers into the State’s waters, the contents of the container would not readily pollute the State’s waters.”)

container with air pressure and checking for bubbles.” AR 11482; see AR 19639; AR 11476.<sup>6</sup>

The presence of bubbles would indicate a leak of air, AR 19639, thereby also revealing an opening through which leachate or waste could escape. According to DEQ, the gas pressure test was the “easiest, minimum test procedure” that “would truly meet the statute requirements for performance.”<sup>7</sup> AR 11476 (DEQ Apr. 2002).

The Board approved the December 2000 regulations as final and published the regulations in the Virginia Register on January 15, 2001. AR 04384. However, on March 12, 2001, the Board suspended the regulations and reopened the public comment period for an additional month in response to a petition.<sup>8</sup> AR 04384. Two years later, on July 25, 2003, the Board adopted final regulations that completely abandoned the gas pressure test and reinstated the discredited 24-inch standing water test -- despite the clear record before it that the standing water test would not meet the criteria of the statute. AR 02780, AR 02787-89.

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<sup>6</sup> There are various examples of pressure tests from which to choose. DEQ staff indicated that they selected the Petroleum Institute pressure test because it set forth more clearly the testing protocol than other similar tests for storage tanks containing liquids. AR 19639. Similar pressure tests are also used in other contexts. For example, the U.S. Dept. of Transportation (USDOT) establishes an analogous pressure test for containers used to transport hazardous liquids. 49 C.F.R. § 178.813. Under the USDOT test, the seams and joints of the container are coated with an oil or soap solution, and air is pumped into the container to a pressure of at least 2.9 pounds per square inch. § 178.813(c). To pass the USDOT test, there may be no leakage of air. § 178.813(d). Notably, both the December 2000 regulations and the final regulations require containers to meet all applicable USDOT specifications. 9 Va. Admin. Code § 20-170-70(B)(4) (2003). While the USDOT pressure test is not directly applicable to the barge containers since the barge containers cannot be used to transport hazardous liquids, the gas pressure test adopted by the Board used a similar method, and the USDOT regulations were before the agency in its decisionmaking process. AR 07756.

<sup>7</sup> DEQ also obtained a letter from the manufacturer of waste barge containers for Waste Management indicating that containers meeting the pressure test could be built. AR 11482; AR 04935.

<sup>8</sup> In response to the suspension, one General Assembly member stated that the Dec. 2000 regulations met the intent of the legislation, asking DEQ to “uphold its obligation” and implement the regulations. AR 01903.

The Board's 2003 container regulations violate the plain language and directive of the statute. The Act directs the Board to develop regulations that shall include the requirements that the containers are watertight and designed to prevent the escape, loss, or spill of wastes, and that the containers shall be tested and shown to be watertight. The agency has acknowledged that the standing water test adopted only assesses the bottom 24 inches of the container, and not the entire container. Thus the standing water test cannot assure that the statutory criteria are met.

The legislature's intent is clear from the plain language of the statute. The General Assembly first enacted the statute in the spring of 1998, following the discovery of leaking waste containers at Weanack Port. The General Assembly sought to assure that the waste barge containers are watertight, and it sought to prevent, rather than simply penalize, the future escape of waste or loss or spills of leachate, even in the event of an accident.

Statutes are also to be construed so as to remedy the "mischief" at which the statute is directed. See also Board of Supervisors of King and Queen County v. King Land Corp., 238 Va. 97, 104, 380 S.E.2d 895, 898 (1989) (adoption of waste provision during a period of heightened awareness regarding the situation statute sought to prevent was relevant to legislative intent.); see also Natrella v. Board of Zoning Appeals, 231 Va. 451, 461, 345 S.E.2d 295, 302 (1986). As this court found in another case, the "statute's plain language gives a very limited amount of discretion to the Board." Virginia Natural Gas, Inc. v. State Air Pollution Control Board, 42 Va. Cir. 371, 377 (Cir. Ct. City of Richmond 1997). Because the regulations clearly do not conform to the mandates of the statute, the regulations must be overturned. See Virginia Natural Gas, 42 Va. Cir. at 376-78. In Virginia Natural Gas, this court elaborated that, because the court is charged with construing the laws as written, "an erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute. The intention of

the legislature must always control.” 42 Va. Cir. at 374. Here too, the Board’s faulty construction of the requirements of the statute cannot override the clear mandates of the Act that the containers be watertight and designed to prevent loss or spills.

It is clear that the Board adopted the standing water test in the July 2003 final regulations as a result of the 2002 Settlement Agreement between the Commonwealth and the waste industry settling the litigation over the stacking restrictions. In addition, the Settlement Agreement also obligated the Commonwealth to adopt the 24-inch standing water test in its waste barge regulations. AR 07453. Specifically, the Settlement Agreement committed the Commonwealth, “through its appropriate agencies,” to “take all reasonable and necessary steps to promulgate” the regulations attached to the agreement, which included the 24-inch standing water container test.<sup>9</sup> AR 07453, 07471-73. The Settlement Agreement expressly provided that the Agreement “shall remain confidential and neither this Agreement nor any of its terms shall be disclosed without the written concurrence of the Parties hereto.” AR 07454.

As discussed more fully below, the secret deal regarding the container test made a sham of the public process for the adoption of the container regulations. It also led the Board unlawfully to adopt a test that the agency knew would not meet the statutory requirements relating to watertightness, the prevention of spills, and the corresponding testing requirements. DEQ advised staff of the likelihood of a settlement in the litigation over the stacking restrictions on October 22, 2002. At the same time the DEQ Policy Director instructed staff to return to the standing water test while acknowledging that “passing the [standing water] test merely means

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<sup>9</sup> The transmittal letter to the Settlement Agreement included in the record is dated January 30, 2003. In the attachment to the Agreement, the container regulations were incorporated in the larger set of waste barge regulations dealing with other provisions not at issue here. The combined set of regulations appeared as one attachment to the memorandum rather than as two separate attachments. AR 07453, AR 07458-07536. The Agreement also was the source of the \$1.00 per ton fee included in the final regulations. AR 07454.

you've passed the test, it doesn't mean you are water-tight regardless of what happens." AR 17607. In other words, the bottom twenty-four inches of the container may be free of leaks for the 15-minute duration of the test, but the test gives no indication of the watertightness of the rest of the container. See AR 11728 (Dec. 4, 2002) (Staff said watertight "would mean all [the container's] seams, edges, etc. are watertight".)

The Board adopted the 2003 regulations knowing full well that the 24-inch standing water test would not satisfy the statutory requirements. At no time in the regulatory process did the Board reveal the relevant terms of the 2002 Settlement Agreement, however. Instead, the agency relied on several unsupported rationalizations to justify its actions. The basic justification was that the addition of other tests and inspections in the regulations would enhance the 24-inch standing water test. The "tests" referred to are visual inspections, certifications of compliance with the standards of the International Convention for Safe Containers ("CSC") and the general specifications of the American Bureau of Shipping ("ABS"), and the requirements that containers be completely enclosed and constructed of nonpermeable material. AR 03109. The agency claimed that this combination would "provide robust protection of the environment while remaining practical." AR 03109. Whatever the agency may mean by "robust protection," these tests most assuredly will not establish whether the containers are watertight or will prevent the loss or spillage of waste in case of an accident.

First, there is nothing in the record to support the notion that a visual examination on its own can "show" that a container is watertight, the criteria set forth in the statute. Second, the construction standard specifying use of nonpermeable material does not address leaks from door seals and hinges, from the top lid, or from seams or joints of the container. Nor can a standard relating to materials substitute for the requirement that containers be tested and shown to be

watertight. Third, neither the CSC nor the ABS examinations and certifications are designed, or sufficient, to show watertightness. The CSC standards do not include a “watertight” test or standard; nor do they otherwise address the matter of liquids leaking out of a container. Instead, compliance with the CSC’s standards relates only to the integrity of the container to withstand the stress of normal handling without becoming deformed and unsafe. 9 Va. Admin. Code § 20-170-70(D)(1); see AR 03111, AR 05182, 05203, 05215 (CSC). While the ABS specifications require weathertightness for general service, 9 Va. Admin. Code § 20-170-70(D)(2), as the agency has acknowledged, the ABS specifications do not include a protocol or standard for watertightness. See AR 04088; AR 19600 (DEQ staff advised at August 1999 Board meeting that “water tightness testing. . . is not being addressed by ABS standards.”).

Thus, none of the other tests that the Board identifies is sufficient either alone or taken together to meet the statutory requirement of watertightness and prevention of spills or loss of waste. Like this Court’s decision in Virginia Natural Gas, Inc., 42 Va. Cir. 371, 374, because the regulations are contrary to the mandates of the statute, the regulations were not authorized by statute and are unenforceable. 42 Va. Cir. at 371. As this Court noted, because the issue is a matter of statutory interpretation, the Board’s reasons for enacting the nonconforming regulations were irrelevant. 42 Va. Cir. at 374. Here too, the Board’s justifications for its action carry no weight because the regulations do not conform to the statutory criteria.

The other rationalizations that the agency uses are equally unavailing. For example, the agency’s assertion that the standing water test “conforms more closely with the statutory standard of ‘watertight’ than the test for escaping air,” AR 01860, is simply a play on semantics involving the mechanics of the pressure and standing water tests. It ignores the fact that the pressure test assures watertightness, while the 24-inch standing water test plainly cannot be used

to make this determination. If the agency otherwise believed that the pressure test was inappropriate, it could certainly have adopted a different type of watertight test. DEQ staff itself suggested some alternative watertight tests, which included a pressure test with a slightly lower pressure than the test set forth in the December 2000 final regulations and a “standing water” variation in which the container would be filled with water to the top, rather than just to the bottom two feet. AR 04388 (DEQ email Nov. 16, 2001). The agency did not include the 24-inch standing water test as a watertight test. Notably, other watertight tests were also suggested to the agency. AR 20013 (JRA, test for sides, top and bottom).

Lastly, the agency’s argument that the 24-inch test “is the most stringent in the nation for the type of waste involved,” AR 03111, misses the point. Regardless, the General Assembly has imposed a strict standard to ensure the container is watertight and designed to prevent the escape of wastes and the loss or spillage of wastes in case of accident, and that the test adopted will show that the container is watertight.

It is plain that the agency has unlawfully overstepped the bounds of its authority and attempted to substitute its judgment for that of the legislature. For example, agency staff told the Board that no one had presented facts indicating that there would be “an exceptional risk of loss, exceptional damage resulting from such a loss or a level of difficulty of cleanup that would justify a change” from the standing water test. AR 02253 (July 25, 2003). The Act, however, sets an absolute standard. The Act mandates that the regulations require containers to be watertight and to prevent loss or spillage in cases of accident -- not simply in situations in which there is an exceptional risk of loss or damage from such loss.<sup>10</sup> For these reasons, the container

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<sup>10</sup> In addition, the agency’s statement regarding the nature and consequences of a leachate spill are contradicted by the agency’s other statements in this record, AR 00408, 00411, and in the other related litigation discussed herein.

regulation fails to comply with the requirements of the Act; therefore it is unauthorized and invalid as a matter of law. Thus, the court need not reach the issue of the substantiality of the evidence.

**II. THE FEE SCHEDULE INCLUDED IN THE REGULATIONS SUBVERTS THE REQUIREMENTS OF THE WASTE MANAGEMENT ACT.**

A. The Fee Amount Selected Was The Result Of A Secret Deal Between Industry And The Commonwealth Rather Than The Result Of An Objective Decision Based On The Requirements And Purposes Of The Act.

The Waste Management Act directs that the Board “shall, by regulation, establish a fee schedule . . . for the purpose of funding the administrative and enforcement costs of this article associated with such operations including, but not limited to, the inspection and monitoring of [barging vessels] to ensure compliance with this article, and for funding activities authorized by this section to abate pollution caused by barging of waste, to improve water quality, or for other waste-related purposes.” Va. Code Ann. § 10.1-1454.1(C)(1) (Michie 2003). The 2003 legislation amended the Act as enacted in 1998 to expand the scope of the fee purposes set forth in the Act. AR 02222 (Del. Louderback). The 1998 legislation had limited the statutory fee to the monitoring of waste barge activity and enforcement of waste barge regulations. *Id.* The 2003 legislation expands the authorized purpose of the fee to include “funding activities . . . to abate pollution caused by barging of waste, to improve water quality, or for other waste-related purposes.” § 10.1-1454.1(C)(1).<sup>11</sup> The fee schedule established in the regulation sets the fee for each ton or partial ton of waste off-loaded at the facility at \$1.00. 9 Va. Admin. Code § 20-170-195(B)(4).

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<sup>11</sup> The regulations repeat the authorized funding purposes of the statute. 9 Va. Admin. Code § 20-170-195(B)(5).

The fee amount does not reflect a good faith assessment of what is necessary or reasonable to fulfill the purposes of the statute. Rather, here again, it was the result of the 2002 Settlement Agreement between the defendants that led to the adoption of the container test in the Board's July 2003 final regulations. The agreement fixed the amount of the fee at \$1.00 per ton. More specifically, under the terms of the Agreement, defendant-intervenor Waste Management "consent[ed] to the imposition of a fee not to exceed \$1.00 per ton on waste carried by barge or vessel, in regulations adopted pursuant to Va. Code § 10.1-1454.1.C." AR 07454.

In papers filed with the court, the parties to the litigation had advised the court that the agreement would resolve the underlying litigation regarding the legality of the stacking legislation. Mot. and Mem. In Supp. Continuance of Trial Date Pending Final Effectuation of Settlement, WMH v. Gilmore, E.D. Va., Case No. 3:99CV425 (filed Nov. 20, 2002). But the parties did not make public the terms included in the Agreement for the container standards and the fee amount, and these provisions were not at issue in the underlying litigation.<sup>12</sup> The 2002 Settlement Agreement was adopted only a few months before the 2003 regulations were issued for public notice and comment in March 2003. The settlement terms relating to these matters were concealed until the newspapers broke the story following the Board's adoption of the regulations at its July 25, 2003 meeting.

The agency's response to public comments regarding the amount of the fee in the 2003 regulations also indicates that the expediencies of litigation, rather than an appropriate consideration of the statutory fee purposes, dictated the fee amount. The agency explained :

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<sup>12</sup> In addition, in February 2001, the waste industry filed suit both in state and federal courts challenging the Board's adoption of the December 2000 regulations regarding the pressure test and standard for containers. The suits were eventually dismissed following the Board's suspension of the December 2000 regulations. AR 11483; AR 07281.

“The amount of the fee is very low and is clearly for administration and support of the programs needed to protect public health and the environment. The fees are so low that no reasonable person can construe them to interfere with interstate commerce or navigation. The extent that they raise all necessary funds is not and cannot be clearly determined at this time.” AR 03120-21 (Background Doc. July 28, 2003).

The Board’s fee regulation should be set aside as a matter of law. Under the VAPA, the court shall suspend or set aside a regulation that the court finds does not comply with statutory authority or the stated objectives for which the regulation may be made as in this case. See Va. Code Ann. § 2.2-4027(ii).

B. The Fee Amount Is Not Supported By Substantial Evidence In The Record.

Even if the Board’s regulation regarding the fee amount were viewed under the substantial evidence standard, the regulation still must be overturned. There are only a handful of documents in the record that even purport to deal with cost estimates for the funding objectives, and these are very limited in scope.<sup>13</sup> In response to a comment that the fee should “cover the full cost of regulation, enforcement, monitoring, and clean-up,” the Board admitted that the extent to which the \$1 fee “raises all necessary funds is not and cannot be clearly determined at this time.”<sup>14</sup> AR 03120-21. Instead, the sole rationale for selecting the \$1.00 per ton fee was to avoid litigation with the waste industry on this issue. Presumably the agency was able to state with confidence that the “fees are so low that no reasonable person can construe

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<sup>13</sup> For example, two documents estimate merely the cost of a 2-3 minute inspection of each container. AR 03834; AR 06902.

<sup>14</sup> Counsel for the agency, in addressing the Board regarding the 2003 regulations, stated that it was his understanding that DEQ believed the fee amount “not only will more than cover what we need in inspectors, but then some.” AR 02027 (Mar. 28, 2003). But the agency admitted that it had not made that determination. DEQ also acknowledged that it did not know the amount of revenues that would be generated, stating that “[a]ctual revenue will vary and is difficult to estimate at this time.” AR 02055.

them to interfere with interstate commerce or navigation,” AR 03120-21, given the secret deal on the fee.

Nor does the Board’s apparent intent to reopen the matter, see AR 03121 (Background Doc. July 2003), excuse the Board’s action in adopting the fee. The Board’s ability to engage in future rulemaking is not relevant to this Court’s review of the regulations before it. Further, the Board’s consideration of the fee in the 2003 regulations was tainted from the beginning because the fee amount was driven by the Settlement Agreement.

The Board’s cursory consideration of an appropriate fee schedule is at odds with the information from the agency in other litigation regarding public health and environmental threats from waste barging and the lack of compliance with waste laws. In the federal litigation, the former Director of DEQ submitted a sworn statement that “barge transport of [municipal solid waste] presents serious and unique health and safety threats to Virginia’s citizens....” WMH v. Gilmore, 252 F.3d at 344. In another filing, the Commonwealth asserted that a “fully loaded barge can hold 225 [or] 450 truckloads of waste and an accident can put that waste in the water.” AR 07147 (Mot. to Dismiss). In addition, as set forth above, both the DEQ and the Coast Guard, on two separate occasions in March 1998, found that a Waste Management barge was leaking putrid garbage juice into the James River. AR 07147-48; AR 17507.

One key concern was that the waste exported from other states may include items not allowed to be disposed of in Virginia as municipal solid waste, such as blood and urine or small amounts of hazardous waste.<sup>15</sup> See WMH v. Gilmore, 252 F.3d at 337, 341-42. The Commonwealth identified specific components of an “effective screening program” to detect unauthorized waste. Id. at 342-43.

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<sup>15</sup> The court referred to the laws of Maryland, New York, and North Carolina. 252 F.3d at 342.

In other litigation, the Commonwealth described several incidents between May 1997 and February 1999 in which defendant-intervenor Waste Management allegedly improperly concealed and transported certain medical waste that Virginia law prevented from being disposed of in municipal landfills, and which were bound for Virginia landfills including the Charles City County landfill. AR 07144-46 (Mot. to Dismiss). The Commonwealth characterized Waste Management's actions as involving the "surreptitious transportation and attempt to dispose of regulated medical waste," in "wholesale violations" of the Commonwealth's laws and regulations.<sup>16</sup> AR 07145.

All of this information on noncompliance by industry and the difficulties of enforcement would certainly be relevant to the Board's consideration of the appropriate amount of the fee to fund inspections, enforcement and other waste barge related activity. Yet the record is largely silent on this issue. The Board instead simply settled on a fee that would not be vulnerable to industry challenge. Because the Board did not consider the significant issues regarding the need for and effectiveness of the enforcement program, the Board's decision also runs contrary to the purposes of the statute. See Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 244, 369 S.E.2d 1, 8 (1988) (purposes of the basic law are "crucial to the determination of a reviewing court"). Accordingly, the Board's fee regulation must be set aside.

### **III. THE WASTE MANAGEMENT BOARD'S RELIANCE UPON, AND CONCEALMENT OF, THE TERMS OF THE SETTLEMENT AGREEMENT MADE A SHAM OF THE PUBLIC REGULATORY PROCESS IN VIOLATION OF THE VAPA.**

In adopting the challenged regulations, the Board failed to disclose that the 2002 Settlement Agreement bound the Commonwealth to adopt the 24-inch standing water test and

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<sup>16</sup> The Commonwealth flatly alleged in one brief that Waste Management was "the largest enforcement problem in the garbage business." AR 07143.

fixed the amount of the fee at no more than \$1 per ton. AR 07453-54, 07471. The Board's concealment of, and reliance upon, the 2002 Settlement Agreement for establishing the terms of the regulations made a sham of the regulatory process. The Board's action deprived the public of any meaningful opportunity to participate and comment on the proposed regulations in violation of Va. Code Ann. § 2.2-4007(E), (F) (Michie 2003). By failing to disclose the true rationale for its decision, the Board also subverted the VAPA requirement that the Board include a statement reflecting the rationale or justification for its regulation. Va. Code Ann. §§ 2.2-4007(I), 4012(E).

Specifically, under the VAPA, the agency, in formulating a regulation, "shall afford interested persons an opportunity to submit data, views, and arguments" to the agency. Va. Code Ann. § 2.2-4007(E). The agency must publish in the Virginia Register the proposed regulation and a notice of opportunity to submit comments on the regulation. Va. Code Ann. § 2.2-4007(F). VAPA procedures allow "public participation in the formation of an agency's policies and agency dissemination to the public of information about the proposals." Commonwealth ex rel. State Water Control Board v. Appalachian Power Co., 9 Va. App. 254, 257, 386 S.E.2d 633, 634 (1989), aff'd en banc 12 Va. App. 73, 402 S.E.2d 703 (1991).

Under the VAPA, agencies must openly disclose the rationale or justification behind their regulations. Before promulgating a regulation, the agency must prepare a summary of the regulation and a "concise statement" setting forth, among other things, the "basis" or "statutory authority" for the regulation; the "purpose" of the regulation, defined as the "rationale or justification . . . for the regulation, from the standpoint of the public's health, safety or welfare";

and the issues presented by the regulation.<sup>17</sup> § 2.2-4007(I)(i)-(iv). The form used by the Board for the statement as to basis and purpose further instructs that “[a] statement of a general nature is not acceptable; particular rationales must be explicitly discussed.”<sup>18</sup> See, e.g., AR 02781 (Mar. 2003)( “Final Regulation Agency Background Document”).

In this case, the agreement, without question, was the true “rationale or justification” for resurrecting the discredited standing water test and fixing the amount of the fee in the regulations. Both actions have implications from the standpoint of the public’s health, safety and welfare. § 2.2-4007(I)(ii). Although the agency prepared two statements as to basis and purpose relating to the promulgation of the final 2003 regulations, see AR 02779-85 (Mar. 28, 2003), AR 03106-25 (July 25, 2003), neither statement discloses the existence or terms of the settlement agreement. Nor did the agency make this disclosure at any other time before the Board adopted the regulations as final on July 25, 2003 -- not surprising since the agreement bound the parties not to do so. AR07454.

The Board’s failure to comply with these required procedures was not “mere harmless error” under Va. Code §2.2-4027(iii). The Board’s action completely undermined the integrity of the process. The public’s ability to provide relevant “views and arguments,” or participate “in the formation of an agency’s policies,” § 2.2-4007(E), was meaningless because the agency’s course had already been determined by the agreement, unbeknownst to the public. These fundamental defects in the process can be cured only by setting aside the regulations and

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<sup>17</sup> When the final regulation is adopted, the agency must prepare a then-current summary and statement as to basis and purpose of the regulation. § 2.2-4012(E)(ii).

<sup>18</sup> Additionally, the statement must explain the “issues” involved. § 2.2-4007(I)(iv). The Background Document further explains that “issues” include “other pertinent matters of interest to the regulated community, government officials, and the public.” AR 03190. Certainly the terms and existence of the settlement agreement would appear to be a pertinent matter of interest to the public.

directing the agency to promulgate new regulations consistent both with the Waste Management Act and VAPA. Cf. North v. Landmark Communications, Inc., 17 Va. App. 639, 440 S.E.2d 156 (1994)(reh'g en banc denied)(Commission's failure to require production of relevant report and significant factor for Commission's consideration not harmless error). Moreover, because the Board's failure to disclose the terms of the 2002 Settlement Agreement tainted the regulatory process, the court is not bound by the substantiality of the evidence standard set forth in VAPA, Va. Code Ann. § 2.2-4027(iv), regarding the Board's findings of fact. See Virginia Board of Medicine v. Fetta, 12 Va. App. 1173, 1177, 408 S.E.2d 573, 576 (1991), aff'd 244 Va. 276, 283, 421 S.E.2d 410, 414.

### CONCLUSION

For the forgoing reasons, Appellant respectfully requests that this Court grant Summary Judgment in its favor on all assigned errors, declare invalid 9 Va. Admin. Code 20-170-70 and 9 Va. Admin. Code 20-170-195, and remand these regulations to the Waste Management Board for further proceedings consistent with the Waste Management Act and the Administrative Process Act. Appellant further requests that this Court award any other such relief as the Court may find appropriate, including an award of reasonable costs, including attorneys fees.

Dated this 27th day of October 2004.

Respectfully submitted,

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Sarah A. Francisco (VSB # 48292)

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Deborah M. Murray (VSB # 19000)

Southern Environmental Law Center

201 West Main Street, Suite 14  
Charlottesville, VA 22902  
Telephone 434.977.4090  
Facsimile 434.977.1483  
Counsel for Appellant James River Association