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EMBARGOED – NOT FOR CIRCULATION UNTIL 10/29/08 AT 12:01 AM

October 29, 2008

By Certified Mail

Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Notice of Intent to Sue for Failure to Comply With the Chesapeake 2000 Agreement

Dear Sirs:

Pursuant to Clean Water Act Section 505, the Honorable C. Bernard Fowler, the Honorable Harry R. Hughes, the Honorable W. Tayloe Murphy, Jr., the Honorable Anthony A. Williams, along with the following organizations, the Virginia State Waterman's Association, the Maryland Watermen's Association, the Maryland Saltwater Sportfishermen's Association, the Chesapeake Bay Foundation, Inc., and their respective members, hereby inform you of their intent to file suit against the United States sixty (60) days after the date of this letter if a satisfactory response to the claims discussed below is not provided. As discussed more fully below, we base our claims on the failure of the Administrator of the United States Environmental Protection Agency (EPA) to comply with the terms of the Clean Water Act, the Administrative Procedure Act, and the Chesapeake Bay Agreements. These failures have led to the continued decline of water quality in the Chesapeake Bay (Bay) and the resulting catastrophic loss of blue crabs, fish, oysters, and underwater grasses. These natural resources fuel the economic engine of the Chesapeake Bay which is of significant importance to the region and the nation.

PHILIP MERRILL ENVIRONMENTAL CENTER | 6 HERNDON AVENUE | ANNAPOLIS, MD 21403
410/268-8816 | FAX: 410/268-6687 | CBF.ORG

While the United States has undertaken programs designed to restore the Bay, they have failed to achieve the water quality goals set by Congress and the Chesapeake Bay Agreements to which the United States is a signatory. This failure has persisted for decades despite repeated acknowledgements by the United States of its responsibility to the public and the environment, *e.g.*, the 1987 Bay Agreement, its 1992 amendment, and numerous federal memoranda of agreement. Most recently, in July 2008, EPA admitted that it again would not meet the water quality goals; specifically, the Chesapeake 2000 Agreement goal of removing the Chesapeake Bay and its tidal tributaries from the Clean Water Act section 303(d) impaired waters list by 2010.

The failure of the Administrator to comply with the federal laws and interstate agreements designed to achieve and maintain essential water quality goals for the Bay is directly related to Secretary of Commerce Gutierrez' recent declaration that the Chesapeake Bay commercial blue crab fishery is a resource disaster. With less than two years until the 2010 deadline, it is time for the Administrator to honor his commitment to the citizens of the United States.

THE SIGNATORIES TO THIS AGREEMENT

The Honorable C. Bernard "Bernie" Fowler is a former State Senator from Prince Fredrick, Maryland. During the 1950s and 60s, Senator Fowler was a crabber and fisherman on his home river the Patuxent. Since 1988, on the second Sunday in June, Senator Fowler wades into the Patuxent River at Broomes Island in order to see how deep he can walk and still see his white sneakers. While there has been some improvement in water clarity since 1988, he still cannot see his sneakers at the depth he could when he was a waterman.

Senator Fowler has been a member of the Chesapeake Bay Commission since the mid 1980s. He signed the 1992 amendment to the 1987 Bay Agreement as Chairman of the Commission. Senator Fowler is currently the Maryland citizen representative to the Commission.

The Honorable Harry R. Hughes was the Governor of Maryland from 1979 to 1987. He currently resides in Denton, Maryland. Governor Hughes signed the historic 1983 Chesapeake Bay Agreement, the first interstate compact between the Bay states, the District of Columbia, and the United States designed "to improve and protect the water quality and living resources of the Chesapeake Bay estuarine systems."

The Honorable W. Tayloe Murphy, Jr., is an attorney in Warsaw, Virginia, who resides on a farm along the shores of the Potomac River. He was the Secretary of Natural Resources for the Commonwealth of Virginia from 2002 to 2006. During a portion of that period he was Chairman of the Chesapeake Bay Program's Principals' Staff Committee. Secretary Murphy was a Delegate of the Virginia General Assembly from 1982 to 2000. He was an instrumental leader behind the General Assembly's passage of both the Chesapeake Bay Preservation Act and the Virginia Water Quality Improvement

Act. Secretary Murphy was Vice Chairman in 1987, three times the Chairman (1988, 1991, and 1997), and a member of the Chesapeake Bay Commission for 22 years.

During his lifetime, Secretary Murphy has watched a vibrant commercial seafood industry die. He is deeply disturbed that watermen he has known all his life, whose livelihoods depended on healthy resources, have lost their jobs because of the lack of commitment to protect the Bay and its tidal tributaries like the Potomac River.

The Honorable Anthony A. Williams was the mayor of Washington, D.C., from 1997 to 2007. From 2000 to 2002 he chaired the Bay Executive Council. Mayor Williams is a strong advocate for the clean up of the Anacostia and Potomac Rivers. He signed the Chesapeake Bay 2000 Agreement on behalf of the District of Columbia. When he signed the Agreement, Mayor Williams believed that the goal of removing the Bay and its tidal tributaries from the Clean Water Act impaired waters list by 2010 was a binding commitment of all the signatories including the United States.

The Virginia State Waterman's Association is comprised of the various waterman groups on both Virginia's eastern and western shores, including Tangier Island. Those groups are: Virginia Watermen's Association; Eastern Shore Watermen's Association; Tangier Watermen's Association; Upper River Watermen's Association; Twin Rivers Watermen's Group; York River/Croaker Landing Working Waterman's Association; and Coastal Virginia Waterman's Association.

The Maryland Watermen's Association is comprised of the various waterman groups on both Maryland's eastern and western shores, including Smith Island.

The members of both watermen's associations are working Bay watermen who spend long hours in all kinds of weather searching the Bay and its tidal tributaries for crabs, fish, and oysters to bring to market. Their culture and livelihood have been severely damaged by the poor water quality in the Bay and the United States government's failure to comply with the Clean Water Act and the Chesapeake Bay Agreements. *See*, below.

The Maryland Saltwater Sportfishermen's Association (MSSA) is devoted to protecting and enhancing recreational fishing and conserving marine resources. The MSSA is the voice for more than 7,000 recreational anglers in the Chesapeake Bay and mid-Atlantic region.

The Chesapeake Bay Foundation, Inc. (CBF) is a regional, nonprofit, nonpartisan, public-interest advocacy organization with members throughout the nation. CBF was created in 1967 under the laws of the state of Maryland. CBF maintains regional offices in: Annapolis, Maryland; Richmond, Virginia; Harrisburg, Pennsylvania; and Washington, D.C.

CBF is the only independent organization dedicated solely to restoring and protecting the Bay and its tributary rivers. Its goal is to improve water quality by reducing

pollution including nitrogen and phosphorous. CBF's vision for the future: a restored Bay with healthy rivers and clean water; sustainable populations of crabs, fish, and oysters; thriving water-based and agricultural economies; and a legacy of success for our children and grandchildren.

CBF has approximately 200,000 total members and nearly 10,000 active adult and student volunteers. Approximately 5,000 members reside in the District of Columbia, 98,800 in Maryland, 13,800 in Pennsylvania, and over 66,000 members reside in Virginia. The majority of CBF's remaining members reside in the states of Delaware, New York, and West Virginia.

CBF operates fifteen (15) educational programs that conduct student leadership projects, in-the-field educational experiences, and other activities in and around the Chesapeake Bay. CBF operates several marine vessels in the Chesapeake Bay and its tributaries. During the last fiscal year, CBF spent approximately $4.3 million on these educational programs.

CBF also conducts numerous advocacy and restoration programs within the watershed designed to improve water quality in the Bay and its tributaries such as working with farmers to reduce runoff from agriculture, planting buffers along rivers and streams as well as growing oysters and underwater grasses for planting. This fiscal year, CBF spent approximately $6.5 million on these programs in the Bay region.

Both CBF and its members are adversely affected by poor water quality in the Chesapeake Bay and its tidal tributaries. Thus, they are harmed by the failure of the Administrator to comply with the Clean Water Act, the Administrative Procedure Act, and the Chesapeake Bay Agreements.

Each of the individuals and groups listed here are represented by counsel for CBF: Jon A. Mueller, Esq. and Amy McDonnell, Esq., 6 Herndon Ave., Annapolis, MD 21403; telephone – (410) 268-8816.

THE CHESAPEAKE BAY IS A NATIONAL TREASURE

The Chesapeake Bay is the largest estuary in the United States. Its watershed covers 64,000 square miles from Cooperstown, New York, in the north to Virginia in the south and from West Virginia in the west to Delaware in the east.

Congress has recognized that the Chesapeake Bay is a "national treasure and resource of worldwide significance." Chesapeake Bay Restoration Act of 2000, Nov. 7, 2000, P.L. 106-457, Title II, § 202, 114 Stat. 1967. The restoration and preservation of the Chesapeake Bay is essential for a healthy and vibrant economy. The economic value of the Bay has been estimated at well over a trillion dollars.[1]

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[1] "In Maryland, for example, economists have measured recreational boating activity at some $2 billion a year. In Pennsylvania, the estimate is $4.7 billion a year for fishing activities across the whole state, resulting in 43,000 jobs outfitting, lodging and guiding anglers. A University of Maryland study completed

The Chesapeake Bay region is home to approximately 17 million people many of whom rely on the Bay and its tributaries as not only a source of income but as a place to recreate and commune with nature – a priceless commodity. The ports of Baltimore and Norfolk provide thousands of jobs and generate millions of dollars in revenue. The town of Reedville, Virginia, on the Bay's western shore consistently records the second largest catch of fish in the nation. Moreover, some of our nation's most treasured historical places are located within close proximity of the Chesapeake Bay and its tributaries – Antietam (Potomac River), Cooperstown (Susquehanna), Jamestown and Williamsburg (James River), Yorktown (York River), and Washington, D.C. (Potomac and Anacostia Rivers).

In short, the value of the Chesapeake Bay is immeasurable and its virtues should not remain sullied by the federal government's failure to act.

I. Poor Water Quality Has Destroyed the Blue Crab Population

Perhaps no other creature best exemplifies the Chesapeake Bay than the blue crab, *Callinectes* ("beautiful swimmer") *sapidus* ("savory"). Aggressive predators and a key indicator species of the Bay's health, blue crabs comprise one of the most valuable commercial and recreational fisheries in the Bay. As discussed in more detail below (the Chesapeake Bay Waterman), blue crabs are a critical link in the Bay food web – without the blue crab, the Bay as we have known it for centuries would no longer exist.

Crabs feed on plankton, fish, and thin shelled bivalves, among other things. However, blue crabs are prey for other fish, birds, and other blue crabs. In fact, crabs comprise a large portion of the juvenile diet of other key Bay species such as the striped bass (rockfish) - a linchpin of a huge commercial and recreational fishery. *See*, below. People also love eating the savory swimmer either as crab cakes, steamed, or soft shelled. Apart from the commercial fishery, countless children spend their summer days on docks all along the Bay's shores delighting in catching crabs. Thousands of adults spend their summer mornings running trot lines hung with chicken parts hoping to catch a bushel of crabs for that night's dinner.

For more than a half century, the blue crab has been at the apex of the Bay's commercial fisheries. Over one-third of the nation's blue crab harvest comes from the Chesapeake Bay. The average commercial harvest between 1968 and 2005 was about 73 million pounds. The commercial blue crab harvest in 2000 was valued at approximately $55 million.[2] The recreational fishery also provides a financial off-set for Bay residents – catching crabs provides an inexpensive meal. However, since the 1990's, landings have significantly decreased despite increased crabbing effort.

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15 years ago attempted to place a number on the value of the Bay and came up with $678 billion. Today inflation alone would likely push that number above a trillion." 2004 Chesapeake Bay Watershed Blue Ribbon Economic Panel Report, "Saving a National Treasure: Financing the Cleanup of the Chesapeake Bay," at p. 9.

[2] See http://www.chesapeakebay.net/bluecrab.aspx?menuitem=19367

Given the public's love of the blue crab and its financial importance, the crab has become an icon of the Bay region. Sadly, the numbers of blue crabs within the Bay have fallen dramatically within the last decade dropping from 680 million in 1997 to 283 million in 2008. That is a 70% drop since 1990. According to the most recent winter crab survey, the population of catchable crabs in the Bay is estimated to be approximately 120 million crabs – one of the lowest in history.

In 2007, eighty-eight percent of Chesapeake Bay waters had levels of dissolved oxygen below that approved by EPA and required by the District of Columbia, Maryland, and Virginia. Low oxygen levels drive blue crabs from their preferred habitat and kill many of the small bottom organisms on which the blue crabs feed. The low dissolved oxygen conditions caused by excess nutrients are the primary reason large sections of the Bay have become unsuitable as blue crab habitat.

Moreover, water clarity in the Bay has been decreasing. In 2007, only 12% of the Bay had acceptable water clarity. Poor water clarity is caused by algae blooms and sediment run-off. Limited water clarity has reduced the amount of underwater grasses necessary to protect juvenile crabs, molting crabs, and adults from predation. *See*, below. Studies have shown that crabs living in areas with little or no underwater grasses suffer higher mortality.[3]

The inability of the crab population to rebound has led to severe harvest limitations placed on crabbers. In response, members of Congress from Maryland and Virginia have requested a federal fisheries disaster declaration for Bay crab fishermen. The Secretary of Commerce granted that request on September 22, 2008. The cause of the decline and the disaster declaration has largely been due to poor water quality and clarity in the Chesapeake Bay. Disaster relief will not address the systemic problems of the Bay or restore crabs to their natural abundance.

Until water quality improves, the blue crab population will not recover.[4]

II. Poor Water Quality Has Destroyed Underwater Bay Grasses

Submerged aquatic vegetation (SAV) or underwater grasses are a key indicator species of water quality in the Bay. SAV are found throughout the Bay and its tributaries. Because they are not subject to harvesting and grow best when water quality is good, SAV provide an excellent measure of Bay health.

SAV are of critical importance to the Bay because they provide food and shelter to a variety of Bay residents including crabs, fish, and waterfowl. Molting crabs hide from predators in the grass beds. Juvenile crabs, menhaden, and shad also use the grasses as cover. Zooplankton feed on decaying underwater grasses and in turn become food for larger organisms.

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[3] http://www.chesapeakebay.net/crabs.aspx?menuitem=14700

[4] http://www.mdsg.umd.edu/issues/chesapeake/blue_crabs/about/

Moreover, SAV improve Bay water quality by generating oxygen as a part of photosynthesis. The grasses trap and hold sediment suspended in the water keeping the water clear and preventing bottom dwellers like oysters from being smothered. SAV can buffer shorelines and protect them from wave induced erosion. Most importantly, they take up nutrients like nitrogen and phosphorous.

Like terrestrial plants, SAV require light to grow.[5] Consequently, for SAV to grow the water must be clear enough to allow sunlight to reach the bottom. Pollution entering the water from run-off and direct air borne deposition has reduced the growth of SAV in the Bay. Muddy stormwater run-off from construction on the land clouds the water so sunlight cannot reach the grasses. The run-off also carries nutrients. Increased algae growth due to excess nutrient run-off also blocks sunlight harming the grasses.[6] Although SAV are sensitive to pollution, they can rebound quickly if water quality improves.[7] Despite extensive efforts to replant SAV in the Bay, total acreage stands at approximately 40% of the Bay goal. Without improved water quality, SAV acreage will continue to remain diminished in the Bay leading to further losses of crabs and fish.

III. The Bay Oyster Fishery

Another critical Bay species, commercially, recreationally, and as an important part of the Bay ecosystem, is the oyster. According to Captain John Smith, oysters were so plentiful in the Bay in the 1600s that oyster reefs posed a threat to navigation. Such reefs provide habitat for countless Bay creatures including juvenile crabs and fish. Moreover, oyster larvae provide food to filter feeders like menhaden. As they mature, they become food to worms, mud crabs, blue crabs, some fish and birds.

Oysters were a tremendous source of income and food to humans. From the 1800s to the mid-1900s, the commercial oyster industry employed thousands of people catching, selling, shucking, and shipping oysters to market. Hundreds of skipjacks, bugeyes and schooners, sail powered oyster dredgers, as well as thousands of oyster tonging boats plied the waters of the Bays in search of the delectable oyster. The industry generated millions of dollars a year to the Bay economy. Until the mid-1980s, the oyster was the leading commercial fishery in the Bay. Like the blue crab, Bay oysters spawned a rich cultural heritage.

In addition to their commercial and recreational value, oysters improve water quality because they are filter feeders. An individual adult oyster can pump over 50 gallons of water a day through its gills which strain out food, chemicals, nutrients, and sediment. This process cleans the water. Scientists believe that historically oysters were able to filter a volume equivalent to the Bay's volume, approximately 19 trillion gallons,

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[5] http://www.mdsg.umd.edu/issues/chesapeake/SAV/
[6] http://www.mdsg.umd.edu/issues/chesapeake/SAV/sav/index.php
[7] http://www.chesapeakebay.net/baygrasses.aspx?menuitem=14621

in less than a week.[8] Today, it takes the remaining Bay oysters more than a year to do the same job.[9]

Unfortunately, overharvesting in the late 1800s and early 1900s significantly reduced the ranks of the Bay oyster. Harvest restrictions kept the population reduced but stable until the 1970s.[10] Beginning in the 1960's disease began to severely deplete the stocks of this Bay icon. Today, the oyster population in the Bay has been estimated at between 1% and 4% of its historic numbers.[11] In addition to disease, poor water quality has limited the ability of the species to rebound.[12]

The small oyster reefs of today provide less habitat for juvenile oysters (spat) and other reef dwellers. Reduced numbers of worms and other invertebrates reduce the food supply to fish and blue crabs that live near the reefs. Moreover, due to their diminished size, oyster reefs are susceptible to being smothered by runoff-induced sediment.

Continuing development of the land surrounding the Bay and the resulting loss of forests have led to an ever increasing load of nutrients and sediment to the Bay. In addition to smothering by sediment, oysters are subject to depleted oxygen levels in the water they depend on to breathe. Unlike the blue crab and fish, oysters cannot move so when oxygen levels drop during the summer due to increased algae blooms caused by more nutrients, oysters either die or become stressed. Stressed oysters are more susceptible to disease.[13]

IV. Poor Water Quality Has Severely Harmed Bay Fish

Approximately 350 species of fish live in the Chesapeake Bay. Some species are year round residents. Others move out to the ocean for part of their life cycle, *e.g.*, menhaden and striped bass, or up freshwater tributaries of the Bay to breed, *e.g.*, shad. Menhaden and striped bass are of particular importance to the Bay - commercially, recreationally, and to the health of the Bay. The shad once was a signature species for the Bay. Spring shad runs provided the Bay's most valuable fishery for over two hundred years. Sadly, overfishing and poor water quality have severely depleted the species.

Menhaden, like oysters, are filter feeders that consume algae and other forms of plankton. This form of feeding removes excess nutrients that harm water quality in the Bay. Menhaden are a primary source of food for larger fish like striped bass and bluefish. Birds like bald eagles and ospreys also prey on menhaden.

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[8] http://www.chesapeakebay.net/oysters.aspx?menuitem=19368

[9] Newell, R.I.E., 1988, Ecological changes in Chesapeake Bay: Are they the result of overharvesting the Eastern oyster (*Crassostrea virginica*)? In: M.P. Lynch and E.C. Krome (eds.), Understanding the Estuary: Advances in Chesapeake Bay Research, Chesapeake Research Consortium Publication 129 (CBP/TRS 24/88), 536-546 (hereafter Newell, 1998).

[10] http://www.mdsg.umd.edu/issues/chesapeake/oysters/history

[11] (Newell, 1988); 2007 State of the Bay, http://www.cbf.org/site/DocServer/2007SOTBReport.pdf?docID=10923, at p. 9, *see* score.

[12] *Id.*

[13] http://www.chesapeakebay.net/oysterharvest.aspx?menuitem=14701

Moreover, menhaden comprise one of the oldest commercial fisheries on the Atlantic coast and one of the largest in the nation. During the last several years, the menhaden fishery located in the Chesapeake Bay at Reedville, Virginia, has reported the second largest catch of fish in the nation.[14] The 2006 harvest of 376 million pounds was valued at over $22.5 million. Unfortunately, like the blue crab, menhaden stocks have diminished in recent years. Scientists believe overfishing and poor water quality are key factors in the decline.[15]

Historically, the most valuable fish in the Chesapeake Bay was the American shad. Native Americans living along the tidal tributaries of the Bay relied on this species for their survival. In the 1800s, almost 41,000 metric tons of shad were caught a year. Tragically, the Atlantic population has been significantly depleted and it no longer supports a commercial fishery. Maryland closed its commercial fishery in 1980 and Virginia did the same in 1984. While overfishing and dams blocking spawning runs contributed to the decline, poor water quality was a significant factor in the loss of this once flourishing fishery and remains an impediment to its return.[16]

A key Bay predator, striped bass or rockfish primarily feed on menhaden and bay anchovies. Thus, the numbers of those species must remain high for the striper population to remain strong and maintain balance in the Bay ecosystem. A pronounced drop in striped bass numbers could have adverse economic and food chain consequences.

The rockfish has been and remains the most popular commercial and recreational fish in the Bay. In fact, Maryland named it the state fish in 1965. Faced with a catastrophic collapse in the fishery, commercial and recreational fishing were banned in the Maryland portion of the Bay from 1985-90 and in Virginia during 1989.[17] The dramatic decline of the population was due to several factors including overfishing and low dissolved oxygen in deeper parts of the Bay. As explained below, anoxic or hypoxic conditions in the Bay are caused by dying algae whose blooms are fostered by an over abundance of nitrogen and phosphorous in the water. Today, the rockfish population is at a high level. However, scientists are concerned about the adverse impacts of disease, water quality stresses, and low numbers of forage species.[18]

In sum, increased harvest pressure and poor water quality have led to historic declines in populations of blue crabs, fish, and oysters. However, restrictions on harvest limits have not led to population rebounds because of long term water quality impairments. Until water quality improves, Bay resources will not improve.

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[14] http://www.chesapeakebay.net/atlanticmenhaden.aspx?menuitem=19375
[15] http://www.chesapeakebay.net/atlanticmenhadenharvest.aspx?menuitem=14702
[16] http://www.chesapeakebay.net/americanshadharvest.aspx?menuitem=15315
[17] http://www.chesapeakebay.net/stripedbass.aspx?menuitem=19389
[18] http://www.chesapeakebay.net/stripedbassharvest.aspx?menuitem=15316

THE CHESAPEAKE BAY WATERMAN

Since colonial times, the Bay's bounty has been harvested by a unique water borne farmer known as a "waterman." While the term can refer to those who catch only one species, a typical Bay waterman will harvest several varieties of shell and fin fish depending upon the season. For example, a waterman may dredge for oysters in the winter but crab during the summer. Some crabbers will fish exclusively with wire pots or cages while others will use trot lines.

Unfortunately, the Bay's bounty has been greatly diminished over the years. Thus, it has become increasingly difficult to eke out a living on the water. The numbers of full time commercial watermen has dramatically declined since the mid-1900s. For example, in 1993 there were 3,858 commercial watermen in Virginia. Today, there are 2,980. While most watermen will admit that overharvesting has contributed in part to their plight, poor water quality has caused and continues to cause the greatest harm to commercial and recreational shell and fin fishing.

Sadly, poor water quality has led to reduced shellfish and fish stocks that have lead to greater restrictions on harvesting; further reducing the ability of the watermen and their families to survive. During the mid-1900s an average waterman could make enough money to own a home and a boat and raise a family. Today, the typical waterman barely makes minimum wage. The 2007 Bay-wide crab harvest of 43.5 million pounds is the lowest recorded since 1945.[19]

The loss of crabbing revenue has been especially difficult for small traditional fulltime watermen communities such as Guinea, Virginia; Smith and Hooper's Islands, Maryland; and Tangier Island, Virginia - their way of life passed down from father to son to grandson. The economies of these communities are almost wholly based on the seafood industry, and the blue crab fishery provides the bulk of their income. Three of these locations are remote islands where residents cannot easily transition to mainland-based jobs that may be available to displaced fishermen in other geographic areas. Moreover, these watermen have gear that is specifically designed to harvest blue crabs, not other commercial species. Thus, they cannot turn to other forms of fishing to offset the crabbing losses.

In response to the lack of income, many watermen are leaving their way of life to work on tug boats or as prison guards far from their homes and families. Due to government's unwillingness to act, a way of life and a valuable commercial and cultural resource is disappearing perhaps forever.

The impact of poor water quality has been equally felt by recreational fishermen and the sportfishing industry. The revenues derived by the states from recreational fishing licenses and taxes on gear and related expenses are significant. However, poor water quality can directly affect recreational fishing by harming prey for sportfish such as striped bass and blue fish in addition to direct impacts to the sport fish and their habitats.

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[19] 2008 Chesapeake Bay Blue Crab Advisory Report.

As sportfish stocks decline, so do public revenues associated with sportfishing and private sales of sportfishing gear.

THE CHESAPEAKE BAY AGREEMENTS – A HISTORY OF MISSED DEADLINES

As Bay oyster, crab, and fish populations declined, the federal government realized that something had to be done to improve water quality in the Bay or this natural treasure would be lost. In 1976, Congress directed U.S. EPA to undertake a comprehensive study of the Bay including water quality and its resources to determine how best to manage this national resource. 94 P.L.116.[20] In accordance with this mandate, EPA created the Chesapeake Bay Program which developed approximately 40 research projects over seven years. In 1983, EPA published its "Framework for Action" which described the findings of the research and identified management strategies that could be utilized to restore the Bay. These findings and recommendations were further explained in a companion document released by EPA entitled "Chesapeake Bay Program Findings and Recommendations."

In 1980, Congress passed the Chesapeake Bay Research and Coordination Act (16 U.S.C. § 3001-3007). In so doing, Congress found that the Chesapeake Bay "is one of the greatest natural resources of the United States of America." The Act mandated that the Secretary of Commerce create an Office for Chesapeake Bay Research Coordination and created a research board comprised of members selected from the federal government, Maryland and Virginia. The board was to develop a research plan and coordinate federal research within the Bay area. Congress appropriated $500,000 a year for four years to carry out these mandates.

At the same time, state governments also began to examine ways to restore and protect the Bay. In 1978, the Maryland-Virginia Chesapeake Bay Legislative Advisory Commission evaluated existing and proposed management structures and made recommendations for strengthening interstate ties and better coordinating the management of the Bay.[21] After considering a number of alternatives, including direct federal involvement, the advisory commission recommended the establishment of a bi-state commission.

In 1980, Maryland and Virginia each adopted their own legislation recognizing and implementing an agreement to create the Chesapeake Bay Commission (the "Commission") to coordinate interstate planning and programs.[22] Pennsylvania signed similar legislation and joined the Commission in 1985. This "tri-state agreement" marked the beginning of ongoing interstate legislative efforts to protect the estuarine habitat of the Chesapeake Bay. The Commission includes fifteen legislators (five from each state), three natural resource cabinet secretaries and three citizen representatives,

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[20] The referenced Public Law does not specifically mention this directive as the law is an appropriation to EPA. However, the Senate Appropriations Committee report does reference this directive.

[21] http://www.chesbay.state.va.us/history.html

[22] Maryland Natural Resources Code Ann. §8-301 (2003); Pennsylvania 32 P.S. §820.11, §820.12 (2004); Virginia Code §30-240 (2004).

one each from Maryland, Pennsylvania, and Virginia.[23] Senator Fowler and Secretary Murphy have both been chairmen and members of the Commission.

The Commission is a signatory to all the Bay Agreements and amendments beginning in 1987 and is a member of the Executive Council of the Chesapeake Bay Program.[24] The Commission acts as the legislative arm of the Bay Program and each state's representatives advise their respective legislatures.[25]

The United States Environmental Protection Agency (on behalf of the United States), Maryland, Virginia, Pennsylvania and the District of Columbia signed the first Chesapeake Bay Agreement in 1983 (the "1983 Bay Agreement").[26] Former Governor Hughes signed the Agreement on the behalf of Maryland. The Agreement outlined a cooperative, voluntary approach to improve management of the Bay's resources. The 1983 Bay Agreement created an Executive Council to assess and oversee implementation of coordinated plans, to improve water quality and the living resources of the Bay, and to establish an implementation committee[27] to coordinate and evaluate management plans. The Executive Council later created several other committees[28] including a Principals' Staff Committee, a Scientific & Technical Advisory Committee, a Citizens Advisory Committee (CAC), and a Local Government Advisory Committee.[29]

In 1987, a subsequent interstate agreement was signed by the United States, the three Bay states, the District of Columbia, and the Chesapeake Bay Commission.[30] (hereinafter referred to as the "1987 Bay Agreement"). In this agreement, the 1983 Bay Agreement was amended to include more specific quantitative goals and commitments. The most "critical element" of the 1987 Bay Agreement was the decision to reduce point and non-point nitrogen and phosphorous pollution loadings to the Bay by 40 percent by 2000. To reach this goal, the parties agreed to develop, adopt, and begin implementation of a basin-wide strategy by July 1988.

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[23] http://www.chesbay.state.va.us/history.html

[24] The signing of the 1983 Bay Agreement, *see* below, is considered the genesis of the Chesapeake Bay Program which is broader than the CBP developed by US EPA in response to Congress' 1976 directive to evaluate Bay resources and develop management alternatives. Hereafter, reference to the Bay Program refers to this latter partnership.

[25] http://www.chesbay.state.va.us/mission.html

[26] http://www.chesapeakebay.net/pubs/1983ChesapeakeBayAgreement.pdf

[27] The Implementation Committee is responsible for implementing the policy decisions and technical studies of the Commission Executive Council and coordinating restoration and protection activities under the Bay Agreements and directives.

[28] http://www.chesapeakebay.net/committee.htm.

[29] The CAC assists the Executive Council Implementation Committee and participates in the work of the various subcommittees in implementing the Chesapeake Bay Agreement. Membership includes representatives from agriculture, business, conservation, industry, and civic groups. Since 1984, this group has provided a non-governmental perspective on the Bay cleanup effort and on how Bay Program policies affect citizens who live and work in the Chesapeake Bay Watershed. The CAC's by-laws provide that the purpose of the CAC is to represent the residents and stakeholders in the watershed. http://www.chesapeakebay.net/pubs/subcommittee/cac/CAC_Bylaws.pdf. The CAC was actively involved in drafting the Chesapeake 2000 Agreement.

[30] http://www.chesapeakebay.net/pubs/199.pdf .

Congress supported this agreement by enacting the federal Water Quality Act of 1987 and authorizing $52 million in federal assistance for the Bay Program.[31]

In 1992, the United States and the other signatories reaffirmed their commitment to achieve "an overall 40 percent reduction of nitrogen and phosphorous entering the mainstem Chesapeake Bay by the year 2000" and thereafter.[32] Senator Fowler signed the amendment on behalf of the Commission. The amended 1987 Bay Agreement reflected the critical importance of the tributaries in the ultimate restoration of Chesapeake Bay. The signatories specifically stated that they would "[r]educe and control point and nonpoint sources of pollution to attain the water quality condition necessary to support the living resources of the Chesapeake Bay *and its tributaries*." *Id.* (emphasis in the original).

The parties also committed to develop and begin implementation of tributary-specific strategies by August 1993 to achieve the water quality requirements necessary to restore living resources in both the Bay mainstem and its tributaries. By 1998, it was clear that the 40% nutrient reduction goal of the 1983 and 1987 agreements would not be attained and the development of a new Bay Agreement was begun.

On June 28, 2000, the United States signed the interstate agreement Chesapeake 2000 Agreement (the "2000 Agreement") with the Bay Commission, Maryland, Pennsylvania, Virginia, and the District of Columbia.[33] Mayor Williams signed the Agreement on behalf of the District of Columbia. The 2000 Agreement incorporated and reaffirmed the commitments made in 1983, 1987, and 1992 and outlined specific targets in five areas including the protection and restoration of the Bay's living resources, vital habitat, and water quality. The 40 percent nutrient reduction goal was repeated. In addition, the 2000 Agreement stated that the signatories would reduce the nutrient and sediment pollution loads to the Bay and its tidal tributaries sufficiently to remove the Bay from the Clean Water Act section 303(d) impaired waters list by 2010.

In concert with the 2000 Agreement, Congress passed the Estuaries and Clean Water Act of 2000 (106 P.L 457). This Act included the Chesapeake Bay Restoration Act of 2000 (the "2000 Act").[34] The 2000 Act noted that there is "a need to expand Federal support for monitoring, management, and restoration activities in the Chesapeake Bay and the tributaries of the Bay in order to meet and further the original and subsequent goals and commitments of the Chesapeake Bay Program."

Further, Congress reauthorized and amended Section 117 of the Clean Water Act; "Chesapeake Bay." 33 U.S.C. §1367.[35] In doing so, Congress made the following findings:

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[31] Feb. 4, 1987, Pub.L. 100-5, Title I, § 103, 101 Stat. 10.

[32] http://www.chesapeakebay.net/content/publications/cbp_12507.pdf

[33] http://www.chesapeakebay.net/pubs/chesapeake2000agreement.pdf

[34] *See* 33 USC § 1267. The purpose of the 2000 Act was to, "to expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and to achieve the goals established in the Chesapeake Bay Agreement."

[35] At this time, the funding authorization was increased to $40 million. The Energy and Water Development Appropriations Bill for 2000 includes the recommendation for the full amount of the budget request for the Bay

(1) the Chesapeake Bay is a national treasure and a resource of worldwide significance;

(2) over many years, the productivity and water quality of the Chesapeake Bay and its watershed were diminished by pollution, excessive sedimentation, shoreline erosion, the impacts of population growth and development in the Chesapeake Bay watershed, and other factors;

(3) the Federal Government (acting through the Administrator of the Environmental Protection Agency), the Governor of the State of Maryland, the Governor of the Commonwealth of Virginia, the Governor of the Commonwealth of Pennsylvania, the Chairperson of the Chesapeake Bay Commission, and the mayor of the District of Columbia, as Chesapeake Bay Agreement signatories, have committed to a comprehensive cooperative program to achieve improved water quality and improvements in the productivity of living resources of the Bay;

(4) the cooperative program described in paragraph (3) serves as a national and international model for the management of estuaries; and

(5) there is a need to expand Federal support for monitoring, management, and restoration activities in the Chesapeake Bay and the tributaries of the Bay in order to meet and further the original and subsequent goals and commitments of the Chesapeake Bay Program.

In addition, Congress stated that the purposes of the Act were to "(1) expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay, and; (2) to achieve the goals established in the Chesapeake Bay Agreement." *Id.* (emphasis added).

Congress has continually approved appropriations that fund the Chesapeake Bay Program and pursue the Bay Agreement goals.[36]

Despite these findings and purposes, the water quality goal will be missed for a third time. As early as 2006, EPA announced that the goal of removing the Bay from the CWA § 303(d) list by 2010 would not be met. 2006-2011 EPA Strategic Plan, *Charting Our Course*, Subobjective 4.3.4, pg. 98.[37] That conclusion has been repeated several times since, *see, e.g.*, Chesapeake Bay Commission Meeting, January 4, 2007; U.S. EPA Chesapeake Bay Program Report to Congress "Strengthening the Management, Coordination, and Accountability of the Chesapeake Bay Program," July 2008, Appendix D.

Program. Additionally, the Energy and Water Development Appropriations Bill for 2000 includes the recommendation for the full amount of the budget request for the Bay Program. *See* Committee on Appropriations, 106th Congress 1st Session. Report 106-253, July 23, 1999.

[36] For example, in 2006 Congress approved a $20.75 million earmark for the Bay Program. *Available at:* Sarbanes.senate.gov/pages/press/063005_interior>06>senate>pass?somd.html

[37] http://www.epa.gov/ocfo/plan/2006/entire_report.pdf

CLAIMS

I. The Administrator Has Failed to Comply With the Clean Water Act

Section 117 of the Clean Water Act (CWA) provides:

> (g) Chesapeake Bay Program
>
> (1) Management strategies
>
> The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain –
>
> (A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed.
>
> (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem; ...[38]

33 U.S.C. § 1267(g)(1)(A)-(g)(1)(B). This section was re-codified as part of the Estuaries and Clean Water Act of 2000, Title II Chesapeake Bay Restoration. One of the explicit purposes of the Restoration title was "to achieve the goals established in the Chesapeake Bay Agreement." Pub.L. 106-457, Title II, Sec. 202(b)(2), Nov. 7, 2000, 114 Stat. 1967.

The Bay Agreement goal for reducing nutrient pollution by 40 percent by the year 2000 was set in 1987. It was reaffirmed in 1992. It was not met by the 2000 deadline. In the 2000 Agreement, the signatories altered this goal by committing to improving water quality so that the Bay could be removed from the Clean Water Act impaired waters list by 2010. EPA has admitted that the 2010 goal will not be met.[39]

The failures of the Administrator to address on-going concerns about the ability of the United States and the other Bay Agreement signatories have been documented in several reports by EPA's Office of Inspector General and Congress' General Accounting Office.[40] Moreover, the living resources of the Bay and its water quality have not been

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[38] There are three other goals identified by the CWA: toxics reduction; habitat restoration and wetlands protection, and; restoration for living resources, *e.g.*, oysters and grasses. The majority of these goals will also not be met.

[39] http://www.epa.gov/ocfo/plan/2006/entire_report.pdf. *See also* Chesapeake Bay Commission 2007 Annual Report at p. 7. http://www.chesbay.state.va.us/Publications/CBC%20annual%20report%202007.pdf.

[40] "Congressionally Requested Review of EPA Region III's Oversight of State National Pollutant Discharge Elimination System Permit Programs," EPA Office of Inspector General, Report No. 2005-S-00002, October 29, 2004; "Chesapeake Bay Program: Improved Strategies are Needed to Better Assess, Report and Manage Restoration Progress," GAO-06-96, July 12, 2006; "Saving the Chesapeake Bay Watershed Requires Better Coordination of Environmental and Agricultural Resources, EPA Office of the Inspector General, Report No. 2007-P-00004 and US Department of Agriculture Report No. 50601-10-Hq, November 20, 2006; "Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay," EPA Office of the Inspector General, Report No. 2007-P-00031, September 10, 2007;

restored and continue to decline, all to the detriment of those who have signed this notice of intent letter.

Congress required that the Administrator achieve the goals of the Bay Agreements, not merely develop plans and begin implementation. Pub.L. 106-457, Title II, Sec. 202(b)(2), Nov. 7, 2000, 114 Stat. 1967. However, the Administrator has failed to comply with that directive. Accordingly, the Administrator is subject to suit pursuant to Section 505(a)(2) of the CWA. 33 U.S.C. § 1365(a)(2).[41]

II. The Administrator Has Failed to Comply With the Administrative Procedure Act

The Administrative Procedure Act allows citizens to challenge federal agency decisions that are unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706. Actions may also be challenged as arbitrary and capricious. *Id.* Here, the Administrator has unreasonably failed to meet the nutrient pollution reduction and water quality goals set forth in the Chesapeake Bay Agreements. The failure to act was arbitrary and capricious.

Moreover, federal agency actions which violate the terms of the Bay Agreements are "not otherwise in accordance with the law" and are per se arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See, Humane Society v Glickman*, 217 F.3d 882 (D.C. Cir. 2000)(holding that federal agency action in violation of Migratory Bird Treaty Act violates the "otherwise not in accordance with law" provision of the APA).

Because the Administrator has failed to comply with the Clean Water Act and the Bay Agreements he has also violated the Administrative Procedure Act. Thus, the United States is subject to suit. 5 U.S.C. §§ 701, 702.

III. The Administrator Has Failed to Comply With the Chesapeake Bay Agreements

The Chesapeake Bay Agreements including the 2000 Agreement are interstate compacts among the signatory states and the United States. The Bay Agreements address matters appropriate for Congressional legislation, increase the power of the states over the federal government, and were ratified by Congress. Thus, they may be enforced pursuant to federal law. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)("congressional

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"Despite Progress, EPA Needs to Improve Oversight of Wastewater Upgrades in the Chesapeake Bay Watershed," EPA Office of the Inspector General, Report No. 08-P-0049, January 8, 2008; "EPA Needs to Better Report Chesapeake Bay Challenges, A Summary Report," EPA Office of the Inspector General, Report No. 08-P-0199, July 14, 2008.

[41] An example of the broad powers Congress has granted to the Administrator is the emergency authority provided in Section 504 of the Clean Water Act. That provision allows the Administrator to undertake a judicial action to eliminate an "imminent and substantial endangerment to the health and welfare of persons where such endangerment is to the livelihood of such persons, such as the inability to market shellfish..." 33 U.S.C. § 1364. Undoubtedly such conditions exist in the Chesapeake Bay today. Accordingly, the Administrator could take such action as appropriate to eliminate this threat to public health and the welfare.

consent transforms an interstate compact within [the Compact] Clause into a law of the United States").

The Bay Agreements were expressly approved by Congress. The Clean Water Act specifically states that Congress consents to the states entering into "agreements or compacts, ..., for (1) cooperative effort and mutual assistance for the prevention and control of pollution...." 33 USC § 1253(b)(1).[42] The Clean Water Act defines the "Chesapeake Bay Agreement" as the "formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council." 33 U.S.C. § 1267(a)(2). Moreover, the Bay Agreements are cooperative efforts to control pollution in the Bay. Thus, the Bay Agreements have been expressly approved by Congress.

"[C]onsent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them..." *Virginia v Tennessee,* 148 U.S. 503, 543-44(1893). Here, Congress sanctioned the Bay Agreements and has provided "aid" to support them. Also, Congress' stated findings and purposes in amending section 117 of the Clean Water Act make it clear that Congress implicitly approved of the Bay Agreements and full participation by the United States in those agreements. Estuaries and Clean Water Act of 2000 (106 P.L 457) and Chesapeake Bay Restoration Act of 2000 ("2000 Act").[43]

Congressional approval of federal involvement in the Bay Agreements was provided in the Chesapeake Bay Restoration Act of 2000 that allocated further funds in support of the purposes of the "Chesapeake Bay Agreement".[44] US EPA, the Department of Defense, and the Department of the Army have signed memoranda of understanding and cooperative agreements designed to uphold and implement the directives and goals of the various Chesapeake Bay Agreements. Hence, the federal government has accepted the Agreements.

Thus, while Congress did not use the word "consent" in the Chesapeake Bay Restoration Act of 2000 or sign the Agreement, it most certainly implied its consent to the cooperative Chesapeake Bay Agreements to prevent and control pollution to the Bay. Thus, the Bay Agreements are enforceable federal laws. *See Green v. Biddle,* 21 U.S. 1 (1823); *Virginia v. Tennessee, supra.*

The Bay Agreements were signed for the benefit of those who rely on the Bay for their livelihood such as the Maryland and Virginia watermen who are signatories to this

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[42] The statute also provides that "[n]o such agreement or compact shall be binding or obligatory upon any State or party thereto unless and until it has been approved by the Congress." *Id.* As explained, Congress has approved the Chesapeake Bay Agreements.

[43] *See* 33 USC § 1267. The purpose of the 2000 Act was to, "to expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and to achieve the goals established in the Chesapeake Bay Agreement."

[44] Public Law 106-457, 106th Congress (November 7, 2000) codified as 33 USC § 1267, Section 117.

notice letter. In addition, the signatories to the Bay Agreements specifically recognized that they must take action to protect public health and the environment.

For example, the 2000 Agreement makes the following statements:

-For almost two decades, we, the signatories to these agreements, have worked together as stewards to ensure the public's right to clean water and a healthy and productive resource. We have sought to protect the health of the public that uses the Bay and consumes its bounty. Preamble.

- Our efforts to preserve the integrity of this natural infrastructure will protect the Bay's waters and living resources and will ensure the viability of human economies and communities that are dependent upon those resources for sustenance, reverence and posterity. Vital Habitat Protection and Restoration, pg. 4.

As a signatory to that agreement and its predecessors, the United States has failed to honor its commitments to achieve and maintain the water quality goals of reducing nutrient pollution by 40% and removing the Bay from the Section 303(d) list. Thus, the signatories of this notice of intent letter may sue the United States to enforce the terms of the Bay Agreements - specifically the water quality and living resource goals identified as early as 1987.

RELIEF

The signatories to this notice of intent letter ask the United States to take, among other things, the following actions:

1. Comply with the statutory requirements of Section 117 (g) of the Clean Water Act by:

    a. Completing and implementing plans that will achieve and maintain the nutrient and sediment reduction goals of the Chesapeake 2000 Agreement;

    b. Developing legislative, regulatory, and funding mechanisms, *see* Executive Council Directive, No. 04-2, to ensure that the nutrient reduction plans not only achieve but maintain necessary reductions;

    c. Creating a Bay wide Total Maximum Daily Load (TMDL) by 2010. The TMDL must require strict deadlines and reasonable assurances, along with the imposition of sanctions for the failure to meet the requirements of the TMDL;

    d. Implementing the Bay wide TMDL by 2011 with full implementation by 2015; and

e. Requiring the states and federal agencies within the Chesapeake Bay watershed to implement plans to achieve and maintain the nutrient and sediment reduction goals of the Chesapeake 2000 Agreement.

2. Comply with the water quality and living resource goals of the Chesapeake 2000 Agreement by, among other things:

   a. Ensuring that all partners to the Chesapeake 2000 Agreement comply with its terms;

   b. Developing legislative, regulatory and funding mechanisms to insure that the nutrient reduction plans not only achieve but maintain necessary reductions.

3. Require other federal agencies to play a more active role in controlling non-point pollution. In addition, ensure that the White House Office of Management and Budget immediately releases the 2008 Farm Bill funds designated for the Chesapeake Bay.

4. Design a program to assist watermen to continue working on the water by providing funding and expertise to help, for example, develop cooperative associations, build and operate oyster hatcheries, and promote aquaculture.

5. The Administrator should exercise his emergency powers pursuant to Section 504 of the Clean Water Act.

6. Provide such other relief as is necessary and appropriate to achieve the water quality goals of the Clean Water Act and the Bay Agreements. For example: prevent backsliding on point source reductions via strong point source permits and enforcement; target agriculture conservation dollars by practice and geography; strictly regulate nitrogen oxide emissions from power plants including year round controls; require pollution loads from new development be consistent with TMDLs; and adopt stringent loading limits, pollution prevention requirements, and TMDL linkage in all municipal separate storm sewer system permits.

CONCLUSION

Congress has recognized the Chesapeake Bay as a national treasure worthy of restoration and preservation. Congress empowered EPA to take a leadership role in cleaning up the Bay. EPA recognized its Congressional mandate by signing three Bay Agreements spanning 25 years, yet, water quality in the Bay has not improved. It is time for EPA to take the action Congress and the citizens of the United States asked it to take. Accordingly, we ask to meet with the Administrator or his designate to discuss this matter at his earliest convenience.

Sincerely,

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