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Piedmont Regional Office
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Glen Allen, Virginia 23060
Jaime.Robb@deq.virginia.gov
Via email

Re: Proposed Wegmans Distribution Center, revised draft Virginia Water Protection Permit No. 19-2036

Dear Ms. Robb,

Please accept these comments from the Southern Environmental Law Center and the Chesapeake Bay Foundation on the pending application of Wegmans Food Markets, Inc. (“Wegmans,” or the “Applicant”), for a Virginia Water Protection (“VWP”) permit from the Department of Environmental Quality (“DEQ”) to fill wetlands in order to construct a distribution center on approximately 219.6 acres of land in Hanover County, Virginia. Of particular importance for DEQ’s review of this application, this project would destroy 14.8 acres of wetlands (or more), would be located on land that is part of the historic African-American community of Brown Grove and adjacent to the current community, and would impact two sites that are potentially eligible for listing on the National Register of Historic Places (“NRHP”). The Southern Environmental Law Center appreciates the opportunity to submit comments to DEQ regarding this proposal.

Wegmans’s proposed regional grocery distribution center would involve the construction of 1.1 million square feet of contiguous dry and refrigerated warehouse and office space, in addition to parking and staging areas for tractor-trailers, and support buildings.¹ Wegmans also has a near-term expansion planned to increase the size of the distribution center to 1.3 million square feet, and could increase the size of the distribution center to a maximum size of 1.7

¹ Individual Permit Request, Project Tiger – Airpark Site (November 2019) at i.

million square feet as currently zoned.² This distribution center would serve current, planned, and future grocery stores in the mid-Atlantic region, including five new stores in North Carolina and six new stores in the Washington, D.C. metropolitan area in the next five years.³

The Virginia State Water Control Law provides that the State Water Control Board (the “Board”) “shall, after providing an opportunity for public comment, issue a Virginia Water Protection permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses.”⁴ Based on the project’s significant impacts, and the Applicant’s inadequate analysis of key issues, DEQ and the Board cannot make such a determination.

Moreover, “[n]o VWP permit shall be issued where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations.”⁵ Landmark environmental justice legislation passed by the General Assembly and signed into law this year, including the Commonwealth’s environmental justice policy for DEQ, bears on DEQ’s treatment of this proposal and similar ones which affect or may affect environmental justice communities. The public process around Wegmans’s application to date has failed to meaningfully involve the Brown Grove community, and so has not complied with the environmental justice policy.

Furthermore, the U.S. Army Corps of Engineers (the “Corps”) cannot find that this proposal is the “least environmentally damaging practicable alternative” or that issuing a permit would be in the “public interest” – two independent findings the Corps must make in order to issue a Clean Water Act Section 404 permit.⁶ For these reasons, we respectfully request that DEQ and the Board deny the permit.

If the Application is not denied at this time, we request that DEQ, in coordination with the Corps: (1) require additional alternatives analysis to fully consider whether less damaging practicable on-site or off-site alternatives exist, (2) ensure that additional analysis is conducted to determine the total number of wetland acres impacted by the proposal, 3) conduct a thorough assessment of the potential impacts of the project on the Brown Grove community, its residents, and associated historic and cultural resources, and 4) ensure that an adequate environmental

² Individual Permit Application, Additional Information Package, Wegmans Distribution Center (September 2020) at i; VWP Individual Permit N. 19-2036, Draft Fact Sheet at 4 (hereinafter, “Draft Fact Sheet”).

³ Individual Permit Request, Project Tiger – Airpark Site (November 2019) at 3.

⁴ Va. Code § 62.1-44.15:20(B); *see* § 62.1-44.15:20(D) (“Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act[.]”).

⁵ 9 VAC 25-210-50(B)(1).

⁶ *See* 40 C.F.R. § 230.10(a); 33 C.F.R. § 320.4(a).

justice analysis is conducted to examine the impact of the proposal on the predominantly Black community of Brown Grove adjacent to the project site, including meaningful involvement by the Brown Grove community, which has been inadequately facilitated to date. Moreover, because there are two sites within the project area that are potentially eligible for listing on the NRHP, review by the Corps under Section 106 of the National Historic Preservation Act (“NHPA”) must be completed before a permit may be issued.⁷ We encourage DEQ to ensure that this important review is carried out, in coordination with the Corps and with relevant state agencies, such as the Department of Historic Resources.

Without such additional analysis, DEQ and the Board cannot make the requisite findings to determine whether to issue a permit.

If the permit is not denied, robust additional public input opportunities must be provided in order to ensure a careful, comprehensive review. We appreciate DEQ’s request that Wegmans provide information regarding the applicant’s review and consideration of environmental justice concerns, DEQ’s decision to hold a second public hearing on November 19th, and the additional time DEQ is taking to review this application. While these are helpful steps, we believe that DEQ must undertake further efforts to facilitate the meaningful involvement of the public, especially the Brown Grove community, and to avoid disproportionate impacts on the Brown Grove community, as will be discussed in these comments. It is important to underscore that it is DEQ, not the applicant, which ultimately has responsibility for analyzing this application, developing the information necessary to fully consider this permit, its impacts, and alternatives, and furthering environmental justice in making decisions about this application. In addition, affirmatively seeking and incorporating public input could increase support for DEQ’s decision-making and reduce objections. The significant impacts of this proposal, the substantial concern and opposition the public and other interested groups have expressed, and the inadequacy to date of the factual development and analysis regarding key issues elaborated upon in these comments, merit cautious and careful consideration by DEQ. Similarly, in light of the significant impacts and controversy surrounding the proposed project, we have urged the Corps to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act.

DEQ Should Deny the Application Because It Fails to Demonstrate That Wetlands Impacts Cannot be Avoided

As Wegmans’s permit application notes, the project would permanently impact, or destroy, approximately 14.8 acres of wetlands, consisting primarily of palustrine forested

⁷ 54 U.S.C. § 305108; 36 C.F.R. § 800.1(c).

wetlands.⁸ This figure is a revised estimate that increased the amount of wetlands to be impacted by the proposed project,⁹ and the total amount of impacted wetlands remains a matter of contention that should be analyzed further. Even if the 14.8 acre estimate is correct, under the Clean Water Act and U.S. Environmental Protection Agency 404(b)(1) Guidelines, avoidable wetland and stream impacts such as those proposed here cannot be permitted since “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”¹⁰ Moreover, the Guidelines recognize that “[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.”¹¹ DEQ regulations provide that the alternatives analysis submitted in an application for a VWP permit must “first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with” the Guidelines.¹²

Wegmans bears a heavy burden in demonstrating that the proposed impacts cannot be avoided. For this type of development activity, which does not require water access, “practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.”¹³ Courts have recognized that “[t]his presumption of practicable alternatives is *very* strong, . . . creat[ing] an incentive for developers to avoid choosing wetlands when they could chose an alternative upland site.”¹⁴ To meet this burden, the Applicant must demonstrate “why it is necessary for the [development] to be located on the wetlands rather than the uplands, except for its preference to build on the wetlands.”¹⁵

⁸ Individual Permit Application, Additional Information Package, Wegmans Distribution Center (September 2020) at 3; Draft Fact Sheet at 3-4, 20.

⁹ Draft Fact Sheet at 3; *see* Public Notice 2012-02369, Norfolk District, U.S. Army Corps of Engineers (April 1, 2020), <https://www.nao.usace.army.mil/Media/Public-Notices/Article/2128033/public-notice-2012-02369/> (stating the project would impact approximate 6.1 acres of wetlands) (**attached**).

¹⁰ 40 C.F.R. § 230.10(a).

¹¹ 40 C.F.R. 230.1(d).

¹² 9 VAC 25-210-80(B)(1)(g).

¹³ 40 C.F.R. § 230.10(a)(3).

¹⁴ *National Wildlife Federation v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994) (citing *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989)) (emphasis in original).

¹⁵ *Shoreline Associates v. Marsh*, 555 F.Supp. 169, 179-80 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

Wegmans has failed to carry its burden of demonstrating that no practicable off-site alternatives exist. Of four alternatives considered, two would involve far fewer acres of impacted wetlands: the Archie Cannon site would only impact 0.5 acres of wetlands, and the Graymont site would only impact 1.1 acres of wetlands.¹⁶ These sites were dismissed for various cost, zoning, and logistical reasons. Wegmans told DEQ that it did not complete full site design for these alternatives because “other factors (offsite improvements, logistics, costs, zoning, etc.) eliminate[d] those locations from contention.”¹⁷ Wegmans has approached the alternatives analysis exactly backwards. In fact, its application states that the selected site was “identified as the preferred location for development based on location, size, accessibility, offsite improvements, and other characteristics that facilitate the end user’s goals. *Based on this* the Applicant has worked . . . to place the project on the site while minimizing environmental impacts.”¹⁸

Wegmans has failed to justify its need to destroy nearly fifteen acres of wetlands in order to construct a distribution center at its preferred site. Other sites it considered would entail far less wetland destruction, and other as-yet-unidentified sites might similarly avoid wetlands impacts while being more to Wegmans’s liking based on other characteristics.

Similarly, Wegmans has failed to demonstrate that no practicable on-site alternatives exist. Wegmans states that the proposed impacts are “the minimum necessary to meet the Applicant’s purpose and need[,]” but then states that the “proposed [single-warehouse, L-shaped] configuration is the most efficient . . . Using a different layout would mean a less efficient operation.”¹⁹ It then notes that its Pottsville, Pennsylvania facility is arranged in two non-contiguous warehouses.²⁰ Likewise, Wegmans dismisses the possibility of adding an additional level to its parking facility in order to reduce the necessary footprint, noting that proposed building heights are already near the maximum height allowed by local and zoning regulations.²¹ Wegmans does not appear to disclose whether it considered seeking, or sought, variances from those regulations, or its reason for failing to do so. It is possible that wetlands impacts could be

¹⁶ Individual Permit Application, Additional Information Package, Wegmans Distribution Center (September 2020) at 8-9.

¹⁷ Joint Permit Application Number 19-2036 - Wegmans Distribution Center - Hanover County Virginia, *Additional Information Letter Responses to Additional Information Request* (Sep. 15, 2020) at 3-4.

¹⁸ Individual Permit Request, Project Tiger – Airpark Site (November 2019) at 2 (emphasis added).

¹⁹ Individual Permit Application, Additional Information Package, Wegmans Distribution Center (September 2020) at 13.

²⁰ *Id.*

²¹ *Id.*

minimized or avoided by a site design including non-contiguous warehouses, use of parking decks, or other modifications.

If the permit application is not rejected, these are the types of options that should be considered as public input is sought and further analysis is conducted to determine whether this proposal can be permitted under the Clean Water Act and Virginia law. Further, if the application is not denied, a comprehensive review of reasonable and less-damaging alternatives for this project would also be required to comply with the VWP permit regulations,²² including a thorough evaluation of potential alternative locations and site designs, and would be essential to provide the many interested members of the public adequate opportunities to review and provide further input before a permit decision is made.

The Clean Water Act and its regulations, and DEQ's obligations under the State Water Control Law,²³ presume that avoidance of streams and wetlands is feasible, and nothing in the Application overcomes that presumption. Wegmans has not demonstrated "why it is necessary for the [development] to be located on the wetlands rather than the uplands, except for its preference to build on the wetlands."²⁴ While other sites with far fewer acres of impacted wetlands may involve increased costs, this alone is not determinative. DEQ appears to take Wegmans at its word that alternative sites are not practicable.²⁵ Before a permit can be issued, Wegmans must demonstrate, and DEQ must determine, that the wetlands *cannot* be avoided.²⁶ Based on the information available, DEQ cannot defensibly reach that conclusion and the application should be denied.

²² See 9 VAC 25-210-80(B)(1)(g) ("The [alternatives] analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.").

²³ See *Id.* (requiring that application for VWP individual permit include "[a]n alternatives analysis for the proposed project detailing the specific on-site and off-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230.").

²⁴ *Shoreline Associates*, 555 F.Supp. at 179-80.

²⁵ See, e.g., Draft Fact Sheet at 12-13 (discussing the Archie Cannon site, with projected impacts to approximately 0.5 acres of wetlands and 1,953 linear feet of stream, and stating that "The applicant concludes that this alternative is not practicable considering cost.").

²⁶ Because the Applicant has not demonstrated that the proposed impacts are unavoidable, compensatory mitigation should not be considered, and DEQ cannot use mitigation to offset the proposed impacts. Compensatory mitigation is only available for "unavoidable impacts." 40 C.F.R. § 230.91(c).

DEQ Has Not Adequately Furthered the Fair Treatment and Meaningful Involvement of the Brown Grove Community and Cannot Issue a VWP Permit

During the 2020 legislative session, the Virginia General Assembly passed four bills pertaining to environmental justice. Relevant here, SB 406, also known as the Virginia Environmental Justice Act, is a broad policy declaration, similar to several other broad declarations located throughout the code.²⁷ SB 406 declares that, “[i]t is the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.”²⁸ This policy applies to all state agencies, authorities, commissions, councils and boards, including the State Water Control Board.²⁹ In another bill specific to DEQ, the General Assembly enacted HB 1162, which amends the section of the code specifically governing DEQ.³⁰ First, HB 1162 inserts the term “environmental justice” into the definitions section of the Virginia Code chapter governing DEQ.³¹ Second, HB 1162 amends DEQ’s statement of policy, Va. Code § 10.1-1183, making it an express DEQ policy “to *further* environmental justice.”³² These bills became effective on July 1, 2020.

Each of these two bills contains the same definition of “environmental justice”, namely, “the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, faith, disability, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies.”³³ In addition, Va. Code § 2.2-234 contains important definitions for the terms “meaningful involvement” and “fair treatment”. Within the context of environmental justice, “fair treatment” means “the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative

²⁷ See Va. Code Ann. § 2.1-715 (stating, “[i]t is the policy of the Commonwealth . . . [t]o safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; to preserve the public safety, health and general welfare; and to further the interests, rights, and privileges of individuals within the Commonwealth.”). See also Va. Code Ann. § 51.5-4(B) (stating, “[i]t is the policy of this Commonwealth that persons with disabilities shall be employed in the state service, the service of the political subdivisions of the Commonwealth, in the public schools, and in all other employment supported in whole or in part by public funds . . .”).

²⁸ 2020 Va. Acts Ch. 1257, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB406>.

²⁹ *Id.*

³⁰ 2020 Va. Acts Ch. 454, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1162>.

³¹ Va. Code § 10.1-1182.

³² *Id.* (emphasis added).

³³ *Id.*

environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.”³⁴ “[M]eaningful involvement” is defined as “the requirements (i) that affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed activity that will affect their environment or health and (ii) decision makers will seek out and consider such participation, allowing the views and perspectives of community residents to shape and influence the decision.”³⁵

Given the definitions within these bills, DEQ’s express policy requires the furtherance of the fair treatment and meaningful involvement of environmental justice populations in agency decisions. Accordingly, DEQ must further the fair treatment and meaningful involvement of the Brown Grove community within the decision-making process for the VWP permit for the proposed Wegmans distribution center in Hanover County.

Founded during the Reconstruction era after the Civil War, the historic African-American community of Brown Grove has been subjected to industrial and developmental encroachment for over 50 years.³⁶ The current Brown Grove community borders the northern side of the project site, although its historical extent included the project site and nearby areas such as the area that was developed into Hanover County Municipal Airport, which borders the project site to the west. Many residents in the project area descend from founding matriarch Caroline Dobson Morris. The community is also home to the Brown Grove School, an African American schoolhouse that operated during the Jim Crow era until the 1950s.³⁷

The industrial and developmental encroachment over the past 50 years into the Brown Grove community would be compounded by the proposed Wegmans distribution center. It is no wonder, then, that over the past several months, local groups and citizens have raised concerns about the proposed project’s impact on the Brown Grove community, calling for a more thorough study to ensure that the residents of Brown Grove have the acknowledgement and

³⁴ Va. Code § 2.2-234.

³⁵ *Id.*

³⁶ See Williams, Reed, *Fighting for Survival*, The Richmond Times Dispatch (Apr. 15, 2008) (updated Sep. 2019), https://richmond.com/business/fighting-for-survival/article_d16fb93b-446d-5bf7-97ad-af2e888c3320.html (noting that “Interstate 95 clipped part of Brown Grove when it opened in the early ‘60s. The Hanover County airport opened in 1971, and industries popped up nearby, spreading development toward Brown Grove. In 1997, residents on Johnson Town Road opposed an extension of an airport runway, but to no avail.”) (**attached**).

³⁷ Report, *Phase I Cultural Resource Survey of the ±87.9-Hectare (±217.4-Acre) Wegmans Distribution Center Project Area*, Dutton + Associates, LLC (June 2020) at i (**attached**).

consideration necessary to address their concerns.³⁸ These concerns about the proposed project include, but are not limited to, change in community character, increased traffic, including large tractor-trailers and associated air pollution, exacerbation of existing runoff and flooding problems by the destruction of wetlands, and threatened cultural and historical resources, including the site of the Brown Grove School, and community burial sites on the property. Community oral history holds the project site to be the location of graves associated with the Brown Grove community. In an unfortunate and wholly inadequate response, an attorney representing Wegmans, speaking at the DEQ hearing on July 20, 2020, dismissed this as “lots of talk,” claiming that there is “no historic evidence” of the presence of gravesites.³⁹ Not only do we believe that ensuring that the residents of Brown Grove have the acknowledgement and consideration necessary to address their concerns is the right thing to do to adequately safeguard this community, which has experienced persistent developmental encroachment for over 50 years, it is also consistent with DEQ’s express new policy—furthering environmental justice.

DEQ’s initial 30 day comment period for the permit began on March 31 and ended on April 30, 2020.⁴⁰ This occurred during the early, most chaotic days of the ongoing global COVID-19 pandemic. Then, on June 20, 2020, DEQ published a public hearing notice that scheduled a public hearing for July 20, 2020.⁴¹ That spirited public hearing lasted almost three hours, and a total of 35 concerned citizens spoke.⁴² This hearing was conducted virtually, only a month after Virginia’s stay at home order expired,⁴³ but still in the midst of the pandemic. As many Brown Grove residents are without access to internet,⁴⁴ there is no telling how many Brown Grove residents were precluded from participating in this virtual meeting. After many of these speakers raised concerns held by the Brown Grove community, DEQ sent a letter on

³⁸ See Rojas, C. Suarez, *Virginia residents worry for Black community’s future*, The Washington Post (July 26, 2020), https://www.washingtonpost.com/local/virginia-residents-worry-for-black-communities-future/2020/07/26/989d6d9e-cf48-11ea-826b-cc394d824e35_story.html (noting that the board of trustees for the Brown Grove Baptist Church and the Hanover NAACP sent letters to the Corps, “alleging a lack of engagement with the community.”) (**attached**).

³⁹ Hearing Transcript, Public Hearing/Informational Teleconference, *In re: VSP Individual Permit No. 19-2036, Wegmans Distribution Center, Hanover County, Virginia* (July 20, 2020) at 47-48 (hereinafter, “July Hearing Transcript”).

⁴⁰ Fact Sheet, Virginia Water Protection (VWP) Individual Permit No. 19-2036, DEQ, at 2.

⁴¹ *Id.*

⁴² July Hearing Transcript at 1; 3-6, 167.

⁴³ Commonwealth of Va. Office of the Governor, Exec. Order No. 55, (March 30, 2020) (**attached**).

⁴⁴ See Hearing Transcript, Public Hearing/Informational Teleconference, *In re: VWP Individual Permit No. 19-2036, Wegmans Distribution Center, Hanover County, Virginia* (Nov. 19, 2020) at 100 (hereinafter “November Hearing Transcript.”) (noting that many in the Brown Grove community, especially the elderly, are “not on the internet.”).

August 11, 2020 to Wegmans⁴⁵, requesting additional information, specifically asking Wegmans to provide “any supporting information that demonstrates actions taken by Wegmans to review and address Environmental Justice concerns related to the project and specifically the Brown Grove Community[.]”⁴⁶ In response to DEQ’s letter, Wegmans provided only two pieces of information. The first was notes summarizing a meeting between Wegmans representatives and Brown Grove community members in February 2020, listing expressed concerns about the project design and characteristics, and a follow-up email to community members describing Wegmans’ efforts to address concerns or investigate further (but not responding to the listed concern about drainage and flooding problems).

Its response to DEQ’s request for additional information reflects Wegmans’s knowledge of the existence of the predominantly Black community of Brown Grove adjacent to its project site. But remarkably, the second and final environmental justice-related item submitted by Wegmans was census block demographic data and a print-out of EPA’s EJSCREEN environmental justice screening tool, without elaboration, summary, or explanation. Wegmans seems to intend to convey, in submitting this information, that there is no environmental justice community implicated by the project.

However, Wegmans in fact admits that it considers Brown Grove to be an environmental justice community, by providing the meeting notes in response to DEQ’s request for information about its review of environmental justice concerns. A fundamental problem with the limited response Wegmans provided is that EJSCREEN “is a pre-decisional screening tool,” and nothing more.⁴⁷ EJSCREEN is not “designed to be the basis for agency decision-making or determinations regarding the existence or absence of [environmental justice] concerns.”⁴⁸ It should not form the entirety of an environmental justice analysis, nor obviate the need for one, especially in the face of additional information, in the hands of the applicant, pointing to the

⁴⁵ The Corps sent its own letter to Wegmans on August 11, 2020, asking it to respond to comments and to “re-evaluate the offsite alternatives with a focus on Environmental Justice.” It is unclear to us what specific response Wegmans provided to the Corps.

⁴⁶ Letter from Matt Neely, Senior Environmental Project Manager, Timmons Group, to Jaime Robb and Bryan Jones, Virginia Department of Environmental Quality, Re: Joint Permit Application Number 19-2036 – Wegmans Distribution Center – Hanover County, Virginia – Additional Information Letter Responses to Additional Information Request Letters Dated: 8/11/2020 and 8/19/2020 at 2 (Sept. 15, 2020) (hereinafter the “Neely Letter”) (**attached**).

⁴⁷ Environmental Protection Agency, EJSCREEN: Environmental Justice Screening and Mapping Tool, <https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen> (**attached**).

⁴⁸ *Id.*

possibility of a project having environmental justice impacts. It is disingenuous for Wegmans to acknowledge the existence of Brown Grove as an environmental justice community by meeting with local residents to hear their concerns, while simultaneously attempting to undermine that characterization with demographic data from a screening tool looking at a circle of arbitrary radius, uninfluenced by known facts on the ground.

Nonetheless, it is ultimately not Wegmans's decision whether an environmental justice community exists. Since the United States Court of Appeals for the Fourth Circuit's decision in *Friends of Buckingham v. State Air Pollution Control Bd.*, it is clear that it is ultimately up to the responsible agency, in the face of conflicting evidence, to determine whether a community constitutes an environmental justice community.⁴⁹ It was DEQ's and the State Air Pollution Control Board's overreliance on EJSCREEN⁵⁰ to constitute an environmental justice analysis, in part, which led the Fourth Circuit to note that "environmental justice is not merely a box to be checked," in overturning a permit granted to the proposed Atlantic Coast Pipeline's Buckingham Compressor Station.⁵¹

Based on DEQ's August 11, 2020 letter to Wegmans, which requested information regarding "Environmental Justice concerns related to the project and specifically the Brown Grove Community," DEQ correctly identified that Brown Grove is an environmental justice community.⁵² Having recognized that an environmental justice community would be affected, the Commonwealth's new environmental justice laws oblige the agency to further the fair treatment and meaningful involvement of the Brown Grove community in its public engagement and decision-making on this VWP permit application.

On November 19, 2020, DEQ held a second public hearing for the VWP permit for the proposed Wegmans Distribution Center. During this equally spirited second public hearing which, including the immediately preceding public information session, lasted over 3 hours, 25 citizens presented comments on the proposed permit.⁵³ All of the commenters opposed the issuance of a permit. Two commenters at this second public hearing raised issues that call into

⁴⁹ See 947 F.3d 68, 87-88 (finding that the Virginia Air Pollution Control Board's failure to resolve the issue of whether Union Hill was a "minority" environmental justice population was "improper under both federal law, and Virginia administrative law.") (4th Cir. 2020).

⁵⁰ The EJSCREEN analysis in the case of the Atlantic Coast Pipeline was not reliable in the face of on-the-ground information about who lived in the Union Hill community, *i.e.*, a door-to-door survey performed by Friends of Buckingham.

⁵¹ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

⁵² Neely Letter.

⁵³ November Hearing Transcript at 3-4; 5; 176.

question whether DEQ has furthered environmental justice throughout the consideration of the permit at hand.

The first commenter, Ms. Bonnica Cotman, a 49 year old lifelong resident of Brown Grove and descendent of founding matriarch Caroline Dobson Morris, stated that at the February meeting that Wegmans had with Brown Grove, she was the *only* person in attendance who actually lives in Brown Grove—the others involved were Brown Grove Church members.⁵⁴ Moreover, Ms. Cotman was notified of this meeting with Wegmans representatives just the morning of the actual meeting date. In regards to this meeting, Ms. Cotman rightly pointed out that she does “not represent the whole community.”⁵⁵ Of course the views of all concerned citizens are important, but it is equally important to understand that, when Wegmans responded to DEQ’s request for additional information, it actually only provided DEQ with the concerns of *one* Brown Grove resident. Ms. Cotman’s revelation that she was the only actual Brown Grove resident at the Wegmans meeting is just one example of how facts around this situation continue to develop and relevant information continues to come to light, highlighting the procedural deficiencies throughout this entire process.

The second commenter, Ms. Renada Harris, representing her parents who own property adjacent to the proposed project site, raised two important concerns regarding the hearings conducted by DEQ thus far. First, Ms. Harris pointed out that many within the Brown Grove community, especially among the elderly population, are “not on the Internet. They can’t even get on this phone call to receive the info.”⁵⁶ Second, Ms. Harris stated that the July DEQ hearing only garnered comments from “a few people out of 100 homes” in Brown Grove.⁵⁷

These comments indicate that, in considering this proposal, DEQ has not yet met its obligation to further environmental justice by meaningfully involving affected community residents and, in fact, actively seeking out such participation. The key question, then, is whether DEQ has furthered the meaningful involvement of the Brown Grove community in regard to this permit. The comments given at the November public hearing by Ms. Cotman and Ms. Harris indicate two ways in which DEQ has not.

First, Ms. Harris explained that many people within Brown Grove, especially among the elderly, are without internet, and as such are unable to participate at all in virtual public hearings. To this point, public hearings for this permit have been conducted virtually, and DEQ has

⁵⁴ *Id.* at 152.

⁵⁵ *Id.*

⁵⁶ *Id.* at 100.

⁵⁷ *Id.* at 99-100.

thereby necessarily excluded those Brown Grove residents without internet access from the decision-making process. For this reason, Brown Grove residents without internet access have not had “access and opportunities to participate in the full cycle of the decision-making process”⁵⁸

Second, while DEQ did request additional information regarding environmental justice from Wegmans, all it received from Wegmans were the concerns of *one* Brown Grove resident, Ms. Cotman.⁵⁹ While Wegmans’s attempt to meet with Brown Grove community members was commendable, it is now clear that Wegmans didn’t actually meet with a representative group of the Brown Grove community. Additionally, the first public hearing only garnered comments from a “few people out of 100 homes” in Brown Grove.

The recent second hearing was a useful step. However, the recent environmental justice legislation tasks DEQ with “seek[ing] out and consider[ing]” the participation of environmental justice communities “and allowing the views and perspectives of community residents to shape and influence the decision.”⁶⁰ Given such sparse participation of Brown Grove residents in the Wegmans community meeting and the first public hearing, and a limited number of Brown Grove resident participants in the second hearing, and given what we know about the community members’ issues accessing virtual hearings, it is difficult to see how DEQ has adequately sought out and considered the views and perspectives of Brown Grove residents. It is likewise difficult to see how DEQ can use such a limited set of views and perspectives to “shape and influence the decision.”⁶¹

Pursuant to Governor Northam’s Executive Order 6, issued more than two years ago, DEQ has undertaken public meetings and internal studies in an effort to improve its day-to-day operations and public engagement.⁶² Subsequently, Governor Northam’s Executive Order Number Twenty-Nine established a Virginia Council on Environmental Justice (“Council”) in 2019, stating that “[t]he Commonwealth requires a consistent, action-oriented approach to

⁵⁸ *Id.*

⁵⁹ November Hearing Transcript at 152.

⁶⁰ 2020 Va. Acts Ch. 1257, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB406>.

⁶¹ 2020 Va. Acts Ch. 1257, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB406>.

⁶² Among other provisions, Executive Order Six directed DEQ to “Work with stakeholders to improve communication with the public and the regulated community and provide more opportunities for proactive education, especially among underserved and lower income populations.” *See also* DEQ, About Us, www.deq.virginia.gov/get-involved/about-deq/executive-order-6 (last visited 12/3/2020).

incorporating environmental justice into decision-making.”⁶³ In the Council’s 2020 Annual Report, the Policies, Permits, Programs, and Procedures Committee Report recommended that agency outreach should “be unique and specific. Rather than prescribing a minimum standard for communications, agencies should be able to show how and why their approach was warranted.”⁶⁴ DEQ should conform its community outreach and engagement to that recommendation in order to prevent the type of deficiencies which have characterized this particular permit application.

Indeed, just this October, DEQ published an Environmental Justice study conducted for the agency by its consultants, which makes specific recommendations about how DEQ “can better incorporate environmental justice into its strategic planning *and programs* to advance environmental justice outcomes for the Commonwealth of Virginia.”⁶⁵ The study elaborates that “DEQ must create the space for a *cultural* shift that centers and aligns environmental justice within its core mission and everyday activities within each program[.]”⁶⁶

Among recommendations for community engagement, the study states that DEQ should “[p]roactively and effectively notify . . . Environmental Justice and Tribal communities early in regulatory permitting processes . . . and share relevant information and educational resources[;]” utilize timelines for permits to accommodate community engagement and extended comment periods; and proactively engage with affected communities on decisions by “[c]larify[ing] decision points, discussing potential benefits and adverse impacts; clarify[ing] to what extent the community can influence decisions and how the public input ultimately influenced final decision-making[.]” and “[h]old[ing] meetings in the impacted community at a time and location that are convenient for residents.”⁶⁷

As the study puts it, its recommendations “represent an opportunity for DEQ to move into a dramatically different approach to their work in the environmental justice space.”⁶⁸ For that to occur, however, changes must be implemented in how DEQ carries out its program work, including permitting actions like this one. “Both DEQ’s new purposes and the Commonwealth’s environmental justice policy authorize DEQ to incorporate environmental justice considerations

⁶³ E.O. 29, Establishment of the Virginia Council on Environmental Justice (Jan. 22, 2019) (**attached**).

⁶⁴ Virginia Council on Environmental Justice, 2020 Annual Report (July 15, 2020) at 9 (**attached**).

⁶⁵ Skeo Solutions, Inc. and Metropolitan Group, Environmental Justice Study for the Virginia Department of Environmental Quality 1 (Oct. 2020) (emphasis added) (**attached**) (hereinafter “DEQ EJ Study”).

⁶⁶ *Id.* at 3 (emphasis in original).

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 43.

in its decisions and actions to ensure its programs do not disproportionately impact environmental justice communities.”⁶⁹ We sincerely hope that DEQ will move expeditiously to effectively implement the study’s recommendations where possible, including in its consideration of Wegmans’s application for a VWP permit.⁷⁰ It is our understanding that a community group known as the Brown Grove Preservation Group has been reconstituted and reactivated, in large part in response to this proposal. We encourage DEQ to make contact with this group, which includes Ms. Bonnica Cotman, as it undertakes efforts to more substantially engage Brown Grove community members.

In Virginia, within the administration of the VWP program, the State Water Control Board may not issue a permit where the proposed activity, or the terms and conditions of the VWP permit, do not comply with state law or regulations.⁷¹ After the 2020 legislative session, it is now state law that it is DEQ’s express policy, among several others, to “further environmental justice . . . in the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁷² It is also the Board’s policy to “promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.”⁷³ Given the issues raised at the November public hearing and discussed above, it is clear that DEQ has not yet completed its statutory obligations to further environmental justice by ensuring the meaningful involvement of the Brown Grove community throughout this permit process and the fair treatment and equitable consideration of this community to avoid disproportionate impacts of new industrial or commercial operations.⁷⁴ Therefore, the State Water Control Board cannot issue a VWP permit for the proposed distribution center until the Board and DEQ meet these obligations.⁷⁵

Likewise, in the Corps’ process, under the National Environmental Policy Act, impacts to the Brown Grove community (and any others the Corps identifies) must be analyzed, disclosed,

⁶⁹ *Id.* at 19.

⁷⁰ The study includes numerous other recommendations, including some which may be especially relevant here, *e.g.*, recommendations regarding impacts analyses in permitting. *See* DEQ EJ Study at 23.

⁷¹ 9 VAC 25-210-50(B)(1).

⁷² Va. Code § 10.1-1183.

⁷³ Va. Code § 2.2-235.

⁷⁴ *Id.*

⁷⁵ *See* 9 VAC 25-210-50(B)(1) (stating that “[n]o VWP permit shall be issued: 1) Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations.”).

and considered in the Corps' EIS or Environmental Assessment,⁷⁶ and these issues should drive the consideration of less damaging alternatives pursuant to NEPA and Clean Water Act requirements. Moreover, without an actual assessment of the project's impacts on the Brown Grove community, the Corps cannot find that issuing a permit would be in the "public interest".⁷⁷ This is a further finding that the Corps must make in order to issue a Clean Water Act Section 404 permit.⁷⁸ An important part of the Corps' public interest review is the evaluation of cumulative impacts – a potentially significant factor for Brown Grove, given the history of industrial encroachment on the community.⁷⁹ The Board must determine that the proposed activity is "consistent with the provisions of the Clean Water Act" before it may issue a permit.⁸⁰ DEQ should strongly encourage the Corps to complete a rigorous public interest review that fully characterizes the impacts of the proposal, including impacts to the Brown Grove community. DEQ should not present a VWP permit to the Board for its consideration and decision before this issue has been rectified and the Corps' process, and its Section 404 permit, are complete.

DEQ Should Ensure That the Corps Thoroughly Reviews the Proposal Under Section 106 of the National Historic Preservation Act

Section 106 of the NHPA requires federal agencies to consider the effects of federal actions on historic properties. The NHPA requires that when the Section 106 process applies, it must be completed prior to the issuance of a license or permit.⁸¹ The Corps' procedures for implementing Section 106 note that the analysis must "take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S.," and must "consider the effects of undertakings on any known historic properties that may occur outside the permit area".⁸²

⁷⁶ See *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1036 (9th Cir. 2009) ("A Section 404 permit is a major federal action requiring review under the National Environmental Policy Act"); see also 33 C.F.R. § 325.2(a)(4) (providing that "[a] decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.").

⁷⁷ See 33 C.F.R. § 320.4(a).

⁷⁸ *Id.*

⁷⁹ *Id.* at § 320.4(a)(1) ("All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof . . .").

⁸⁰ Va. Code § 62.1-44.15:20(B).

⁸¹ 54 U.S.C. § 305108; 36 C.F.R. § 800.1(c).

⁸² 33 C.F.R. Part 325, App. C §§ 2(a), 5(f).

Furthermore, the Section 106 process involves a thorough consultation process with the State Historic Preservation Officer (SHPO), local governments, the applicant, and other parties “with a demonstrated interest in the undertaking . . . due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.”⁸³ This comprehensive review process must take into account potential direct and indirect effects of the proposed project on historic and cultural resources, and the Corps must seek to avoid or minimize any adverse effects to the greatest extent possible.⁸⁴

As discussed previously in these comments, the issue of unmarked burial sites on the proposed project site is one of high importance for the Brown Grove community and is a crucial question which needs to be fully investigated and the results publicly disclosed. In addition, in November 2019, Dutton + Associates (“D+A”) conducted a Phase I cultural resource survey of the Wegmans Distribution Center project area in Hanover County, Virginia. In the course of this survey, D+A identified two sites that it recommended for potential eligibility for the NRHP.

The first of these sites, designated VDHR# 44HN0452, is the location of Brown Grove School, “an African American schoolhouse that operated during the Jim Crow era until the 1950s.”⁸⁵ D+A explained that “the site’s primary importance is in its association with the African American community of Brown Grove during the Jim Crow era.”⁸⁶ The second site, designated VDHR# 44HN0326, is a dwelling associated with the Merry Oaks Tavern, the site where Patrick Henry organized Virginia’s first company of revolutionary volunteers in 1774.⁸⁷

Based on the scale and intensity of this project and its close proximity to the resources identified in the Phase 1 cultural resource survey, it is clear that the proposed project would have direct and indirect effects on two cultural resources that are eligible for listing in the NRHP. This warrants careful review under Section 106 of the National Historic Preservation Act,⁸⁸ as

⁸³ 36 C.F.R. § 800.2(c).

⁸⁴ See 33 C.F.R. Part 325, App. C., § 2(f) (noting that the Corps’ historic resource review procedures are “intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program.”).

⁸⁵ Report, *Phase I Cultural Resource Survey of the ±87.9-Hectare (±217.4-Acre) Wegmans Distribution Center Project Area*, Dutton + Associates, LLC (June 2020) at i (**attached**).

⁸⁶ *Id.*

⁸⁷ See Federal Public Notice, US Army Corps of Engineers, NAO-2012-02369 (Oct. 16, 2020) at 2 (noting that “the project will adversely affect Site 44NO326), <https://www.nao.usace.army.mil/Media/Public-Notices/Article/2381594/nao-2012-02369/> (**attached**); Survey of Historic Resources, Hanover County, Virginia, Prepared for: Hanover County Planning Department (1990) at 23 (**attached**).

⁸⁸ See 54 U.S.C. § 306108; 36 C.F.R. § 800.1(a).

well as the National Environmental Policy Act. DEQ should coordinate with the Norfolk District in order to ensure that this review is completed—and any avoidance, minimization, and mitigation measures agreed upon—before it considers issuing the requested permit. In ensuring that impacts to all affected historic and cultural resources are studied and avoided or minimized, DEQ should coordinate with other relevant state agencies, including the Department of Historic Resources, which was not listed as a consulted agency in the draft permit fact sheet.

Conclusion

The proposed Wegmans distribution center would have significant impacts on state waters and affected communities, particularly by destroying valuable wetlands, and impacting the historic African-American community of Brown Grove and associated cultural and historic resources in ways that have not yet been fully studied. The Application fails to demonstrate that the selected site and site design are the least environmentally damaging practicable alternative, and fails to show that the project, as proposed, is in the public interest.

Moreover, the public process to date has failed to facilitate the fair treatment and meaningful involvement of the predominantly Black community of Brown Grove in DEQ’s decision-making. This contravenes the policy of the Commonwealth, and DEQ should not recommend issuance of a permit until measures have been taken to rectify this.

As a result, DEQ should deny the permit application. If DEQ does not deny the application at this time, it should at the least, in coordination with the Corps, require substantial additional factual development and analysis by Wegmans, and/or conduct such analysis itself, as discussed in these comments – especially with respect to off-site and on-site alternatives, impacts to natural, historic, and cultural resources, and impacts to the environmental justice community of Brown Grove.⁸⁹ This should include robust opportunity for and facilitation of public input from the Brown Grove community.

Thank you for your consideration of these comments.

Sincerely,



Jonathan M. Gendzier
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⁸⁹ See 9 VAC 25-210-55 (board may request “such other information as may be necessary to accomplish the purposes of [the VWP permit regulation].”).

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List of Attachments

1. Public Notice 2012-02369, Norfolk District, U.S. Army Corps of Engineers (April 1, 2020), <https://www.nao.usace.army.mil/Media/Public-Notices/Article/2128033/public-notice-2012-02369>.
2. Williams, Reed, *Fighting for Survival*, The Richmond Times Dispatch (Apr. 15, 2008) (updated Sep. 2019), https://richmond.com/business/fighting-for-survival/article_d16fb93b-446d-5bf7-97ad-af2e888c3320.html.
3. Report, *Phase I Cultural Resource Survey of the ±87.9-Hectare (±217.4-Acre) Wegmans Distribution Center Project Area*, Dutton + Associates, LLC (June 2020).
4. Rojas, C. Suarez, *Virginia residents worry for Black community's future*, The Washington Post (July 26, 2020), https://www.washingtonpost.com/local/virginia-residents-worry-for-black-communitys-future/2020/07/26/989d6d9e-cf48-11ea-826b-cc394d824e35_story.html.
5. Commonwealth of Va. Office of the Governor, Exec. Order No. 55, (March 30, 2020).
6. Letter from Matt Neely, Senior Environmental Project Manager, Timmons Group, to Jaime Robb and Bryan Jones, Virginia Department of Environmental Quality, Re: Joint Permit Application Number 19-2036 – Wegmans Distribution Center – Hanover County, Virginia – Additional Information Letter Responses to Additional Information Request Letters Dated: 8/11/2020 and 8/19/2020 (Sept. 15, 2020).
7. Environmental Protection Agency, EJSCREEN: Environmental Justice Screening and Mapping Tool, <https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen>.
8. E.O. 29, Establishment of the Virginia Council on Environmental Justice (Jan. 22, 2019).
9. Virginia Council on Environmental Justice, 2020 Annual Report (July 15, 2020).
10. Skeo Solutions, Inc. and Metropolitan Group, Environmental Justice Study for the Virginia Department of Environmental Quality 1 (Oct. 2020).
11. Federal Public Notice, US Army Corps of Engineers, NAO-2012-02369 (Oct. 16, 2020) at 2, <https://www.nao.usace.army.mil/Media/Public-Notices/Article/2381594/nao-2012-02369/>.
12. Survey of Historic Resources, Hanover County, Virginia, Prepared for: Hanover County Planning Department (1990).