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SAVING FISH TO SAVE THE BAY: PUBLIC TRUST DOCTRINE PROTECTION FOR MENHADEN'S FOUNDATIONAL ECOSYSTEM SERVICES IN THE CHESAPEAKE BAY

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Abstract: The Chesapeake Bay menhaden population provides a number of ecosystem services that help keep the bay's waters suitable for marine life, and enjoyable and profitable for the bay's human users. Overfishing of menhaden within the bay may, however, be eroding the ability of the species to provide these services, which are foundational to rights traditionally secured by the public trust doctrine: fishery, commerce, and navigation. The Virginia courts' failure to protect these foundational ecosystem services threatens the viability and sustainability of these public trust rights. Given the chance, Virginia courts should protect menhaden by expanding the state's narrow conception of the public trust doctrine to comport with developments in ecology and state constitutional, statutory, and case law.

INTRODUCTION

A system of environmental law based on ecology has been evolving in tandem with the public's growing understanding of the interdependence of nature's processes over the past fifty years.¹ During the same period, the state of Virginia has witnessed the collapse of its once-robust menhaden fishery.² An individual menhaden—diminutive, oily, and bone-filled—would not excite the interest of a typical angler or seafood connoisseur.³ This unassuming fish, however, might be the most

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¹ See RICHARD O. BROOKS, ROSS JONES & ROSS A. VIRGINIA, LAW AND ECOLOGY 4 (2002).

² See, e.g., Kathy Bergren Smith, *The Omega Men*, NAT'L FISHERMAN, Nov. 1, 2006, at 28.

³ See H. BRUCE FRANKLIN, THE MOST IMPORTANT FISH IN THE SEA 26 (2007); Sara Jean Gottlieb, Ecological Role of Atlantic Menhaden (*Brevoortia Tyranus*) in Chesapeake Bay and Implications for Management of the Fishery 6 (1998) (unpublished M.S. thesis, University of Maryland) (on file with the Boston College Environmental Affairs Law Review) [hereinafter Gottlieb, Ecological Role of Atlantic Menhaden].

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