Blue Ridge Environmental Defense League

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March 13, 2009

Dina Sprinkle
NC Div. of Water Quality
512 N. Salisbury St.
Raleigh, NC 27604
dina.sprinkle@ncmail.net

Re: Duke Power's Belews Creek Steam Station, Permit No. NC0024406

Dear Ms. Sprinkle:

On behalf of the Blue Ridge Environmental Defense League, I write to provide comments on the Belews Creek Steam Station permit. Also, I hereby request that a public hearing be held to receive local comments on this permit. Further, I ask that the DWQ kindly notify me when the hearing is scheduled.

Duke Energy's Belews Creek Steam Station currently operates with a permit allowing it to discharge 5 million gallons per day into the Roanoke River Basin. The facility is classified as a major source.[1] However, the NC Division of Water Quality has stated that the Belews Creek Steam Station does not need a temperature variance for its thermal pollution discharge. Although Duke Energy uses Belews Lake for cooling purposes, we believe that the lake remains waters of the United States under the federal Clean Water Act. We recommend that the NC Division of Water Quality require either that the plant meet water quality standards or that it obtain the proper variance required under federal regulations.

A recent court decision in Virginia[2] remanded an NPDES permit because it violated the federal Clean Water Act. In 2007 the Virginia State Water Control Board approved a permit for Dominion Virginia Power to discharge hot water from its North Anna nuclear power plant into Lake Anna. The permit was illegal for several reasons. First, under the US Clean Water Act the states must protect water quality; heat from power plants is a pollutant. Second, the state did not establish limits on the power plant's hot water discharges into the man-made lake. Third, the EPA requires that a scientific study be done before a state grants a variance from the requirements of the Clean Water Act.

The judge found that the state erred when it re-issued the permit. In her ruling the judge stated:

> The Virginia State Water Control law must be consistent with federal law. And, the Court will find that what happened here was that state law was violated. The Board's

[1] CAUSES AND SOURCES OF WATER POLLUTION IN THE ROANOKE RIVER BASIN, Chapter 3, Table 3.10, http://h2o.enr.state.nc.us/basinwide/roanoke/roanokech3.DOC

[2] Petition for Appeal was filed in Circuit Court for the City of Richmond on December 28, 2007 pursuant to Virginia Code §§ 62.1-44.29 and 2.2-4026 and Rule 2A:4 of the Rules of the Supreme Court of Virginia.

> reissuance of the permit was inconsistent with the state program and with state law, because, as I said, the state program, which is the Virginia Pollutant Discharge Elimination System, must comply with the federal Clean Water Act. And, there is abundant authority for that. The Code, 9 Virginia Administrative Code, 25-31-50(C)(1), which states that no permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the Clean Water Act or the law and regulations promulgated under the Clean Water Act or the law. There is also a Virginia Supreme Court case, Smithfield, which states that the state program must have standards as stringent as the federal one. So, the Commonwealth's appellees here in applying state law must also apply federal law. Therefore, issuing the permits consistent with the Virginia State Water Control law and the Virginia Pollutant Discharge Elimination System, they must issue permits that are consistent with the Clean Water Act. [3]

As you know, federal regulations define what may and what may not be classified as waters required to meet water quality standards. 40 CFR Subpart A states:

> Waters of the United States or waters of the U.S. means:…(d) All impoundments of waters otherwise defined as waters of the United States under this definition;[4]

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.[5]

Congress stated that the use of rivers, lakes, streams, or the ocean as waste treatment systems was unacceptable.[6] Therefore, the Clean Water Act prohibits the discharge of any pollutant into "navigable waters" except in compliance with its provisions.[7] The Act defines "navigable waters" as "waters of the United States" and classifies heat as a pollutant subject to regulation.[8] Power plant cooling ponds are waters of the United States.[9] North Carolina's NPDES program must comply with the mandates of the

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[3] *The Blue Ridge Environmental Defense League, Inc., et al versus the Commonwealth of Virginia, ex rel*, In the Circuit Court of the City of Richmond Virginia, Case No. CL070006083-00, Court Ruling, February 20, 2009

[4] Title 40: Protection of Environment Subpart A—Definitions and General Program Requirements PART 122—EPA Administered Permit Programs: The National Pollution Discharge Elimination System § 122.2 Definitions.

[5] *Id.*

[6] Ohio Valley, 2007 WL 2200686, at *11 (quoting S. Rep. No. 92-414, at 7 (1971), as reprinted in 1971 U.S.C.C.A.N. 3668, 3674.

[7] 33 U.S.C. § 1311(a), 1362(12) (2007).

[8] Id. § 1362(6)-(7).

[9] as defined in 40 CFR 423.11(m)

CWA.[10]

Please find attached to this letter the transcript of the Virginia Court's ruling

Respectfully submitted,

Louis A. Zeller, Science Director
Blue Ridge Environmental Defense League

Attachment: Transcript of Court Ruling, Circuit Court of the City of Richmond Virginia, Case No. CL070006083-00, February 20, 2009

[10] See State Water Control Bd. v. Smithfield Foods, Inc., 261 Va. 209, 212, 216, 542 S.E.2d 766, 768, 770 (2001) (quoting 40 C.F.R. § 122.1(a)(2)).

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., a Virginia corporation,

PEOPLE'S ALLIANCE FOR CLEAN ENERGY, a chapter of Blue Ridge Environmental Defense League, Inc.,

BARBARA J. CRAWFORD,

GARY MULLER, and

ARDEN "TERSH" NORTON, CASE NO. CL070006083-00

APPELLANTS,

-vs-

COMMONWEALTH OF VIRGINIA, ex rel, VIRGINIA STATE WATER CONTROL BOARD,

DAVID K. PAYLOR, and

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a DOMINION VIRGINIA POWER,

APPELLEES.

* *

COURT RULING

* *

Richmond, Virginia

February 20, 2009

CHANDLER and HALASZ, INC.
Registered Professional Reporters
P. O. Box 9349
Richmond, Virginia 23227
Reported by: Theresa S. Griffith, CCR

Transcript of Court Ruling in the above-styled matter, when heard on February 20, 2009, before the Hon. Margaret P. Spencer.

APPEARANCES:

BOWMAN and BROOKE
By: ROBERT L. WISE, ESQ.
Counsel for Appellants

MCGUIRE WOODS
By: DAVID E. EVANS, ESQ.
Counsel for Appellee Virginia Electric and Power company

OFFICE OF THE ATTORNEY GENERAL
By: DAVID C. GRANDIS, ESQ.
Assistant Attorney General, counsel for Appellees Commonwealth of Virginia, ex rel, Virginia State Water Control Board, and David K. Paylor

NOTE: (Court Reporter sworn).

THE COURT: Good afternoon. This is the matter of The Blue Ridge Environmental Defense League versus the State Water Control Board. And, it's before the Court for the Court to announce its decision. But, would the attorneys present please stand and identify yourselves for the Court Reporter, and spell your last name for the record.

MR. WISE: Yes. My name is Robert Wise, here from Bowman and Brooke, and I represent the appellants. My last name is W-i-s-e.

MR. EVANS: David Evans, representing the appellee, Dominion Virginia Power, spelled E-v-a-n-s.

MR. GRANDIS: David Grandis, here on behalf of the State Water Control Board, G-r-a-n-d-i-s.

THE COURT: Counsel and parties, I would like to thank you for waiting. The Court has had a number of very long hearings and a number of complex cases this morning. And, I want to express gratitude and I want to apologize, because it is the Court's fault that we are starting this 30 minutes late. The Court has about five pages that I was going to read to announce the decision. I am now going to try to summarize it and get to key points so that I won't keep you here any longer.

The first issue before the Court was the standing

issue and the representation of standing of the organizational appellants. The Court will rule that those appellants do have standing. The Court looked at the 2007 Virginia Supreme Court case, Philip Morris versus Chesapeake Bay Foundation. The individual standing test for representational standing is not the Virginia statutory review standing test that's at 62.1-44.29. The Court had ruled that Mr. Muller lacked individual standing per this statute, 62.1-44.29. However, the individual standing test for representational standing, pursuant to the Philip Morris case, is the test that's laid out in Lujan. I don't have the correct spelling here in this note. And, the Court looked at the three prongs in the Lujan test and found that Mr. Muller does have that standing, but it's clear here I'm making a distinction between the Virginia statutory judicial review standing and the test for standing for representational standing in which the Court said in Philip Morris that its members would otherwise have standing to sue in their own right. Upon reconsideration of this Court's 2008 decision regarding Mr. Muller, the Court was asked to look at new authority not presented to the Court initially to support the appellant's claim that the Court could review the affidavits. The Court looked at the Chesapeake Bay

Foundation. That was the Stumpy case, 2005 Court of Appeals. And, there was a footnote which said it is within the trial Court's power to allow or to require the plaintiff to supply by amendments to the complaint or by affidavits further particularized allegations of fact which would support Mr. Muller's individualized -- individual standing claim. Upon reconsideration the Court has decided that it will not allow or require supplementation by additional affidavits. The Court's decision is based on the cases underlined, the Chesapeake Bay Foundation, this is the Stumpy case from 2005, based on dicta in a Brunswick County case in which that issue didn't really come up. The Court also could find no authority that it had to allow it. And, I think considering the factors that are relevant to this case, considering the cases on which that footnote was based, the Court declines to exercise that option in this case.

Now, let's get to the merits. And, let me reach the conclusion and then I will go back and tell you how we reached that conclusion. The conclusion is that Virginia law requires regulation of the appellee, Dominion's thermal pollution discharge because the exception for waste treatment simply doesn't apply here.

All right. Let's start back. The appellant asked the Court to suspend, set aside, or remand this

permit. And, the allegation was that reissuance of the permit violated federal and state law. One of the issues was whether the appellant was basing its claim on federal law, on the Clean Water Act, because the appellant had stated in an earlier hearing that it was not basing its claim on the Clean Water Act, there was no independent Clean Water Act. And, the Court's decision is not based on federal law. The Virginia State Water Control law must be consistent with federal law. And, the Court will find that what happened here was that state law was violated. The Board's reissuance of the permit was inconsistent with the state program and with state law, because, as I said, the state program, which is the Virginia Pollutant Discharge Elimination System, must comply with the federal Clean Water Act. And, there is abundant authority for that. The Code, 9 Virginia Administrative Code, 25-31-50(C)(1), which states that no permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the Clean Water Act or the law and regulations promulgated under the Clean Water Act or the law. There is also a Virginia Supreme Court case, Smithfield, which states that the state program must have standards as stringent as the federal one. So, the Commonwealth's appellees

here in applying state law must also apply federal law. Therefore, issuing the permits consistent with the Virginia State Water Control law and the Virginia Pollutant Discharge Elimination System, they must issue permits that are consistent with the Clean Water Act.

I neglected to mention the standard that this Court, the standard of review that this Court had to consider in its ruling, and that is whether the agency acted within the scope of its authority and whether that decision is supported by substantial evidence. Because if the agency did act within the scope of its authority then there is no basis for a remand here. The error, according to the appellants here, is that the Commonwealth appellees issued a permit without limiting Dominion -- Dominion owns and operates the facility -- without limiting their thermal pollution discharges into the lake as to the hot side. And, the main issue is whether the facility here is entitled to the waste treatment system exception.

I am going to skip over a couple of things. Nine Virginia Administrative Code Section 25-31-10, 2007, is the state surface waters definition. It's identical to the federal waters of the U.S. definition, which is in CFR 122.2, with one exception, both have the exemption for waste treatment systems that the appellee says is

applicable to this case. The federal definition excludes cooling ponds from that exemption. The state definition includes "treatment ponds or lagoons designed to meet the requirements of the Clean Water Act and the law in the exemption." So, the initial consideration before the Court is how should it construe the waste treatment systems exemption. And, from looking at a number of cases, the Court had to conclude as the state has and, this is, I think the Ohio Valley case is one example, it has to construe this waste treatment system exception narrowly. And, at the same time it has to construe the term surface water or water of the United States broadly. And the support for this construction for the construing surface waters or waters of the United States broadly, the Court will cite a U.S. Supreme Court case, U.S. versus Riverside Bayview Homes. I think that's a 1985 case. And, the Court will rule that the exemption does not apply here because Lake Anna's hot and cold side would be a cooling lake. The Court also looked at the definitions of cooling ponds and cooling lakes. I am not going to quote them; 40 CFR 423, the former is because it existed in 1979; 40 CFR 423.11(m), definition of cooling pond; definition of cooling lake. Again, I have a long quote I will not read. 40 CFR 423.11(n). The Court also looked at the

AG's opinion. I don't think the AG's opinion addressed the situation where the Board was faced with a cooling lake. But, given the mandate to treat the exemption narrowly, and to treat the surface waters or waters of the U.S. definition broadly, the classification of a cooling lake controls. Cooling lakes are included in the definition of waters of the United States. The Court will note here it also looked at the Reilly case, which I think is 1989 Southern District of West Virginia. And, while the state can protect more than is protected by the Clean Water Act, it cannot protect less. And, the Court had Virginia authority for this. It's in the AG's opinion. It's in the Smithfield Foods case. It's in 9 Virginia Administrative Code, 25-350(C). I think that's the correct citing. So, to the extent the state is protecting less than what is protected by the CWA, the state is violating state law. The waste treatment system exemption simply does not include cooling ponds or lakes. And, the Virginia law therefore requires regulation of the thermal pollution discharges from the plant into the hot side.

Now, having said this, the Court is not going to address the other claims made by appellant involving whether Dominion can meet Virginia's water quality standards for thermal pollution discharges from the

plant to the hot side. I think that's the outfall 101. Therefore, the Court can't address Dominion's entitlement to a variance, and, that's the 316(a) as to this issue, because the Board declined jurisdiction over the hot side and erred as a matter of law in applying the waste treatment system exemption. The case is remanded for further proceedings before the Board and the Board will make that determination.

All right. There are a number of other issues that are raised by appellant, the variance issue as to outfall 001. That's the hot side to the cool side, not the plant to the hot side. And, the claim was that the Board erred in reviewing this 316(a) variance because the Board only looked at very old factual support. And, the claimed error is that this decision was not supported by substantial evidence. I mentioned the standard of review earlier inconsistent with controlling authority or not within the scope of the authority. That's the legal one. Or the decision wasn't support by substantial evidence. The annual reports here provide that support. So, the Court rejects appellants' claims as to this issue. There are annual reports from '94, '97, 2000 to 2006. The Court also notes, and I won't go into the long definition, that the standard is in 40 CFR 125.7(3)(a). Another claim the appellant made was that

the Board failed to consider alternative heat reduction technologies. Again, this Court cannot review the Board's action as an appellate court and say, well, I think the Board erred for a reason an appellate court would say it erred. It has to be either inconsistent with law or not supported by substantial evidence. And, the same years of information, the data and the information, support the Board's action here. And, I couldn't find law that requires the Board to act differently as to this issue, and that is when it failed to consider the alternative is that a basis for some type of relief when what the Board considered was supported by substantial evidence.

All right. The Board's decision that reissuance of the permit does not violate Virginia's anti-degradation policy as to the cool side is also supported by the requisite evidence, 9 Virginia Administrative Code 25-260-30(b), which says that any determination concerning thermal discharge limitations made under 316(a) will be considered to be in compliance with the anti-degradation policy. And, the record supports the Board's decision here. The Court concurs in the arguments that are made at pages 36 to 38 of appellee's brief.

And, I think the final issue is whether the Board

was required to make specific findings. And, the Court looked at the Browning-Ferris case, which I think was a '97 case. And, that case just involved a different statutory directive, and a very specific statutory directive that's not applicable here.

All right. The Court will ask that the appellants' counsel prepare an order consistent with the decision.

MR. WISE: Thank you, Your Honor. So, from the transcript then will there be a memorandum, letter opinion, or anything like that?

THE COURT: I could do one but the order needs to get out as quickly as possible.

MR. WISE: I just wanted to know if I was waiting for anything else or just go ahead and --

THE COURT: No. Just go ahead and do the order as quickly as possible based on the transcript. And, because it was announced in open Court, all of the objections are in the pleadings. If you do one that's consistent with the transcript and send it to counsel, the Court will rule that the objections are the objections that are already stated on both sides. The objections are the objections that are already stated in the record.

MR. EVANS: The objections are noted?

THE COURT: Yes. They are noted today. So, pursuant to Rule 1:13, we can waive the signatures. But, I do want you to send a copy. If there are additional objections you can send them. But, the Court must get the order out as quickly as possible.

MR. WISE: I will certainly send it quickly out to counsel.

THE COURT: All right. Please.

MR. WISE: And, so I understand, the ultimate disposition is that the case is permanently remanded, set aside and remanded to the State Water Control Board for further proceedings consistent with the Court's statements on the record?

THE COURT: Yes.

MR. WISE: Thank you, Your Honor.

CERTIFICATE OF COURT REPORTER

I, Theresa S. Griffith, CCR, hereby certify that I was the Court Reporter in the Circuit Court of the City of Richmond on February 20, 2009, at the time of the hearing herein.

I further certify that the foregoing transcript is true and accurate, to the best of my ability.

Given under my hand this 21st day of February, 2009.

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Theresa S. Griffith, CCR