

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

THE BLUE RIDGE ENVIRONMENTAL)	
DEFENSE LEAGUE, INC., et al.,)	
)	
Appellants,)	
)	
v.)	Case No. 07-6083
)	
COMMONWEALTH OF VIRGINIA, ex rel.)	
VIRGINIA STATE WATER CONTROL BOARD,)	
et al.,)	
)	
Appellees.)	

FINAL ORDER ON APPELLANTS' PETITION FOR APPEAL

On this day came the parties, Appellants THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC. ("BREDL"), PEOPLE'S ALLIANCE FOR CLEAN ENERGY, BARBARA J. CRAWFORD, GARY MULLER, and ARDEN "TERSH" NORTON, and Appellees COMMONWEALTH OF VIRGINIA, ex rel., VIRGINIA STATE WATER CONTROL BOARD ("the Board"), DAVID K. PAYLOR, and VIRGINIA ELECTRIC AND POWER COMPANY, doing business as Dominion Virginia Power ("Dominion"), in this administrative appeal brought pursuant to Part 2A of the Rules of the Supreme Court of Virginia and Virginia's Administrative Process Act, Virginia Code Sections 2.2-4000 *et seq.*, and Virginia's State Water Control Law, Virginia Code Section 62.1-44.29. Appellants challenge the Board's issuance of Virginia Pollutant Discharge Elimination System Permit No. VA0052451 ("the Permit") on several grounds.

The parties fully briefed the issues and presented oral argument on December 18, 2008. Upon consideration of the parties' filings and the argument of counsel, for the reasons stated in open court on February 20, 2009 as set out in the attached transcript and incorporated herein by reference, and applying the appropriate standards of review, this Court rules as follows:

Ruling No. 1: The Court concludes that Mr. Muller lacks individual standing to pursue this appeal. On Appellants' motion for the Court to reconsider its July 3, 2008 Order granting Appellees' Motion to Dismiss as to Mr. Muller, the Court considered the additional filings and case law presented, and upon reconsideration, the Court declines to allow or require supplementation by additional affidavits concerning Mr. Muller's individual standing. However, as to the representational standing of the organizational appellants, the Court further finds and concludes that the individual standing test for representational standing is not the Virginia statutory review standing test found at Virginia Code § 62.1-44.29. Rather, the individual standing test for representational standing, pursuant to *Philip Morris USA, Inc. v. Chesapeake Bay Foundation, Inc.*, 273 Va. 564, 643 S.E.2d 219 (2007), is the test laid out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court finds and concludes that Mr. Muller does have standing under the three-prong *Lujan* test to support representational standing on his behalf by, and as a member of, BREDL. Thus, the Court finds and rules that the organizational Appellants have standing to pursue all of the issues in the appeal.

Ruling No. 2: The Court concludes that Virginia law requires regulation of Appellee Dominion's thermal discharge from its Outfall 101 into the "hot side" of Lake Anna¹ because the "hot side" comprises "waters of the United States," the exemption for "waste treatment systems" does not apply, and the "hot side" of Lake Anna is not entitled to the "waste treatment system" exemption. The Court concludes that by declining regulatory jurisdiction over the "hot side," the Board erred as a matter of law, as explained more fully in the attached transcript. As a result, Permit No.VA0052451 violated the Virginia State Water Control Law, Virginia Code § 62.1-44.2 *et seq.*, the Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation, 9 VAC 25-31-10 *et seq.*, as well as relevant portions of the Clean Water Act, with which Virginia law requires compliance.

¹ The Court's reference to the "hot side" of Lake Anna is what Appellees have referred to as the "Waste Heat Treatment Facility," or "WHTF" for short.

Therefore, on this issue—the lack of regulation on the “hot side” of Lake Anna (or “WHTF,” as Appellees have called it)—the Board’s decision to apply the “waste treatment system” exemption to the “hot side” is SET ASIDE, and the Permit is REMANDED to the Board for further proceedings consistent with this Order, including the Court’s statements in the attached transcript, and Virginia law and regulations governing this Permit, as well as applicable Federal law, including the Clean Water Act, as required under Virginia law. The Court will not address the question of whether Dominion can meet Virginia’s water quality standards for thermal pollution for its discharges from Outfall 101 into the “hot side” or whether it is entitled to a variance and, if so, under what conditions; the case is remanded for further proceedings before the Board and the Board will make that determination.

Ruling No. 3: The Court finds that the Board’s issuance of a Section 316(a) variance at Outfall 001 (from the “hot side” to the “cool side” of Lake Anna) is supported by substantial evidence in the record. Therefore, on this issue of the 316(a) variance at Outfall 001, the Board’s findings and conclusions are AFFIRMED.

Ruling No. 4: The Court finds that there is substantial evidence in the record to support the Board’s decision with regard to Appellants’ argument that the Board erred by failing to consider alternative heat-reduction technologies and failing to require numeric limits on Dominion’s discharge at Outfall 001 (the discharge from the “hot side” into the “cool side” at Dike 3) and by instead approving the Permit’s “heat-rejected approach” for its discharge. Therefore, on this issue, the Board’s findings and conclusions are AFFIRMED.

Ruling No. 5: The Court further finds that there is substantial evidence in the record to support the Board’s decision that the reissuance of the Permit does not violate Virginia’s antidegradation policy as to the “cool side,” based on the determination concerning thermal discharge limitations made in conjunction with the Section 316(a) variance for Outfall 001 (the discharge from the “hot side” into the “cool side” at Dike 3). Therefore, on this issue, the Board’s findings and conclusions are AFFIRMED.

Ruling No. 6: On the issue of whether the Board was required to make specific findings, the Court looked at *Browning-Ferris Industries of South Atlantic, Inc. v. Residents Involved in Saving the Environment, Inc.*, 254 Va. 278, 492 S.E.2d 431 (1997), and concludes that case involved a different statutory directive, and a specific statutory directive that was not applicable to the issuance of this Permit. Therefore, on this issue, the Court AFFIRMS.

Appellees' Motion to Reconsider: Following this Court's February 20, 2009 bench ruling, Appellees moved for reconsideration, citing the Fourth Circuit's recent decision in *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). The parties fully briefed this issue, and, pursuant to Rule 4:15(d) of the Rules of the Supreme Court of Virginia, this Court decided that motion on the parties' filings. This Court denied that motion by its Order of June 8, 2009, which is incorporated herein by reference.

This concludes the matters presented to this Court, and the Permit is REMANDED to the State Water Control Board for further proceedings consistent with this Order, including the Court's oral ruling as memorialized in the attached transcript, and the applicable law and regulations governing this Permit.

The Clerk is directed to send attested copies of this order to counsel of record.

ENTER: 9, 14, 09



Margaret P. Spencer, Circuit Court Judge

Seen and:

- objected to on Ruling No. 1 regarding the standing of Gary Muller, for the reasons stated in Appellants' filings and at oral argument;
- agreed as to Ruling No. 1 as to the standing of the remaining Appellants;
- agreed as to Ruling No. 2;

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BY:  D.C.

- objected to as to Rulings Nos. 3 through 6, for the reasons stated in Appellants' filings and at oral argument; and
- agreed as to the Court's denial of Appellees' Motion for Reconsideration.

signature waived pursuant to Rule 1:13

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Counsel for Appellants

Seen and

- objected to on Ruling No. 1 regarding the standing of Appellants to raise claims related to the Waste Heat Treatment Facility for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference;
- objected to on Ruling No. 2 for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference;
- agreed to on Ruling Nos. 3, 4, 5, and 6;
- objected to regarding the Court's conclusion that it applied the appropriate standards of review for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference; and
- objected to on the Court's denial of Appellees' Motion for Reconsideration for the reasons stated in the motion and accompanying memorandum, which are incorporated herein by reference.

signature waived pursuant to Rule 1:13

Alfred Albiston (VSB No. 29851)
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Counsel for Appellees Virginia State Water Control Board and David K. Paylor

Seen and

- objected to on Ruling No. 1 regarding the standing of Appellants to raise claims related to the Waste Heat Treatment Facility for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference;
- objected to on Ruling No. 2 for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference;
- agreed to on Ruling Nos. 3, 4, 5, and 6;

- objected to regarding the Court's conclusion that it applied the appropriate standards of review for the reasons stated in Appellees' filings and at oral argument, which are incorporated herein by reference, and
- objected to on the Court's denial of Appellees' Motion for Reconsideration for the reasons stated in the motion and accompanying memorandum, which are incorporated herein by reference.

signature waived pursuant to Rule 1:13

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