IN THE

Court of Appeals of Virginia

RECORD NO. 2221-09-2

COMMONWEALTH OF VIRGINIA, *ex rel.*
VIRGINIA STATE WATER CONTROL BOARD, *et al.*,
Appellants,

v.

THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC.,
a Virginia Corporation, *et al.*,
Appellees.

RECORD NO. 2222-09-2

VIRGINIA ELECTRIC AND POWER COMPANY,
d/b/a DOMINION VIRGINIA POWER, *et al.*,
Appellants,

v.

THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC.,
a Virginia Corporation, *et al.*,
Appellees.

BRIEF OF APPELLEES

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OVERVIEW AND STATEMENT OF THE CASE

The vast bulk of the energy generated via uranium fission at every nuclear power plant is not converted into usable electricity. Rather, it is wasted and discharged directly to the environment. This waste heat can be discharged directly to the air via cooling towers, or it can be discharged to a body of water. Air discharges of heat are essentially benign and are therefore unregulated under federal or, to Appellees' knowledge, any other law. For these and other reasons many nuclear utilities have constructed cooling towers at their plants.

Those utilities that choose to save money at the expense of the environment forego cooling towers and discharge waste heat directly to bodies of water. Heat discharges to waterways pose a special environmental threat and have been subject to federal/state standard-setting, permitting and enforcement under a singular provision of the Clean Water Act ("CWA") since its enactment in 1972[1] – at least in theory. From the beginning, however, Virginia's State Water Control Board, ("Board") has declined to use its regulatory authority to limit thermal discharges from the North Anna nuclear power plant. (*See* J.A. 2695-96, describing the failure of the plant's first permits to limit thermal discharges to Lake Anna; *see also* Br. Appellants Commonwealth of Va. & Dominion Va. Power Co., ("Dominion") *et al*, ("Dominion") *et al*. (hereinafter collectively "Appellants") (hereinafter "Br.") at 11.)[2]

Local residents have decried Virginia's hands-off approach for decades. *See*, *e.g.*, (J.A. 600) (1992 correspondence between DEQ and local citizen's group concerned over thermal

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[1] Federal Water Pollution Control Act (renamed "Clean Water Act" in 1977), Pub. L. No. 92-500, § 316, 86 Stat. 876 (October 18, 1972), codified at 33 U.S.C. § 1316.

[2] As explained more fully in Appellants' brief and below, the Board has acknowledged its jurisdiction over discharges of heat from the "hot side" of Lake Anna to the "cold side," but it has never accepted jurisdiction over discharges of hot water from the plant to the "hot side."

discharges). In 2007 a group of non-profit organizations and individuals residing near Lake Anna (hereinafter "Blue Ridge") determined that they would challenge the Board's long-standing refusal to exercise regulatory authority over the plant's thermal discharges. They participated actively in the public comment process regarding the proposed reissuance of Dominion Power's permit, submitting live and written testimony. When the Board, per its custom, reissued the permit without any restrictions on thermal discharges from the plant, they sought judicial review in the Circuit Court.

The Circuit Court, after extensive briefing and argument, carefully considered the various challenges raised by Blue Ridge to the Board's issuance of the permit, and:

– **affirmed** the Board's decision to grant Dominion a full variance for all hot water discharges to the massive "cool side" of the lake;

– **affirmed** the Board's determination that reissuance of the permit did not violate the state's "antidegradation" policy;

– **affirmed** the Board's refusal to make detailed findings of fact, as urged by the citizen-appellants;

– similarly **affirmed** the Board's decision to use the "heat-rejected" methodology instead of the methodologies advanced by the citizen-appellants; and

– ruled that Plaintiff Muller lacked standing to sue.

On only a single, narrow question of law did the Court rule against the Board, concluding that the Board had wrongfully eschewed regulatory jurisdiction over the plant's thermal discharge to the "hot side" of the lake and remanding for further proceedings. This is the central issue presented in this appeal.

Notably, the Circuit Court's decision has had no effect on the North Anna plant's operational status, and it portends none. Blue Ridge has never sought injunctive relief seeking to halt the plant's operations, and Appellants have had no reason to seek a stay of the mandate of the Circuit Court. Indeed, the goal of this legal action is merely to bring the facility within the ambit of the environmental laws over time.

QUESTIONS PRESENTED

Appellees respectfully suggest that the first two questions raised by the Appellants in their STATEMENT OF QUESTIONS PRESENTED are, in effect, a single question:

Did the September 20, 2007 letter, (J.A. 1563), from a mid-level official in the Philadelphia office of the U.S. Environmental Protection Agency ("EPA") to DEQ's Woodbridge, Virginia office, in which the federal official declined to object to the reissuance of the CWA permit for the North Anna plant, represent a definitive and legally binding interpretation of federal law such that neither the Board nor the Circuit Court had the power to interpret the law differently?

Appellants accept the third question as presented by the Appellants.

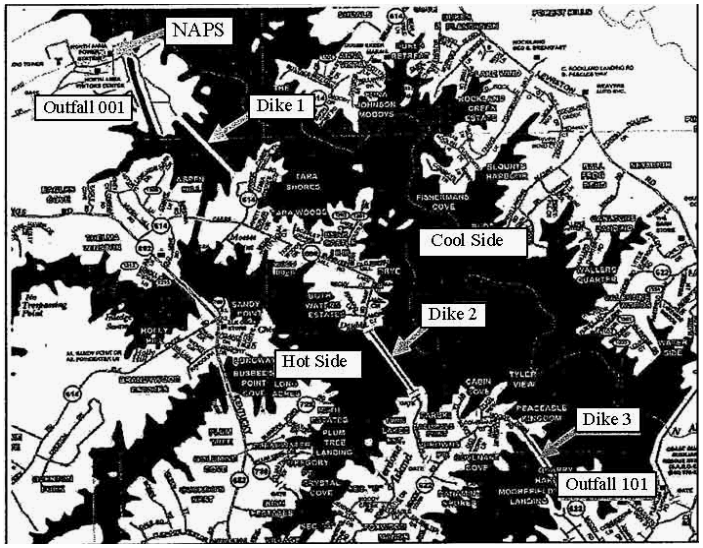
STATEMENT OF FACTS

Lake Anna was formed by the erection of a dam in 1971 to provide cooling water for the turbines of the then-proposed nuclear power plant, which went into operation in 1978. The resulting impoundment was then divided by dikes into two sections: a smaller "hot side" comprised of three connected lakes and a larger main reservoir, or "cool side."

As shown in the graphic, (J.A. 2601), heated water leaves the plant ("NAPS") at Outfall 001 and proceeds southeasterly through a chain of lakes on the "hot side" to Outfall 101, where it passes to the "cool side." From there it can migrate northwesterly to the plant's massive water intakes, and begin the heating/cooling cycle again.

Between 2 and 3 billion gallons of water circulate through the plant every day, raising its temperature by approximately 14 degrees during each cycle. (J.A. 2063-64.) According to evidence in the record, (J.A. 2140), this continual reheating can raise the temperature of the lake's waters to as high as 106° F.

Though Appellants claim that the "hot side" of the lake ". . . has limited private and no general public access," Br. at 10, this is incorrect. Indeed, some 13 popular fishing spots exist on the "hot side." (J.A. 1149.)



Both the "hot side" and the "cool side" of Lake Anna are enmeshed in interstate commerce, as they are home to thousands of permanent residents, weekend cabin owners and seasonal vacationers, and they are enjoyed by many additional thousands of anglers, paddlers,

water skiers, and visitors. Dominion Power's website states that "[t]he Lake Anna Reservoir and the Waste Heat Treatment Facility have become a popular outdoor recreational area, whose shoreline is dotted with homes, cabins. There are a number of marinas, campgrounds and a large state park on the Lake Anna reservoir." North Anna Power Station, *available at* http://www.dom.com/about/stations/nuclear/north-anna/index.jsp (last visited January 15, 2010). *(See also* J.A. 2601-02.) In addition, to the extent that the warmed waters of the North Anna River escape the impoundment and flow to the southeast, they serve businesses engaged in interstate commerce, including Kings' Dominion, Bear Island Paper Company and Doswell Limited Partnership. (J.A. 2123.)

Heat is a pollutant that can and does harm not only individual and commercial users of waterbodies, but also the ecosystems of which they are a part.[3] Warm water holds far less oxygen in solution than does cool water, and is thus less habitable for fish. *Id.* It leads to outbreaks of noxious aquatic vegetation like Hydrilla (*h. verticillata*) that interfere with navigation and recreation, and, upon decomposition, further reduce ambient levels of oxygen. (J.A. 2605.)

Warm water also breeds an amoeba ("N. fowleri") that attacks the human brain following passage through the nasal cavity. (J.A. 2138.) This organism is much more likely to lead to outbreaks of disease in waters warmer than 86° F, and was found in waters of both the "hot side" and the "cool side" of the Lake in 2007. (J.A. 2077-79.)

[3] *See* authorities cited at (J.A. 2604.)

ARGUMENT

I. Scope and Standard of Review

A. This Court Is Not Being Asked to Review Action Taken by EPA

This case is considerably less complicated than Appellants would make it. They mischaracterize or misunderstand the nature of this case when they suggest, Br. at 12, that this case involves state court review of "the non-party EPA's determination that the VPDES permit complies with federal law."

For one thing, EPA made no such determination. Rather, as discussed more fully below, it merely declined to block the issuance of the thermal discharge permit for the power plant. For another, state courts may not review EPA actions, *see Aminoil U. S. A., Inc. v. Cal. State Water Resources Control Bd.*, 674 F.2d 1227 (9th Cir. 1992), just as federal courts may not review decisions by state agencies. *Am. Paper Inst., Inc. v. U.S.E.P.A.*, 890 F.2d 869, 874 (7th Cir. 1989). The Circuit Court's opinion contains no hint that she believed she was reviewing federal agency action. Rather, she recognized that this is a classic case of judicial review of state agency action – the agency being the Board and the action being issuance of a water pollution discharge permit for Dominion's nuclear power plant.

As to Appellants' query (Br. at 3) as to ". . . who decides whether a permit complies with federal law?", they are mistaken when they imply that it is up to EPA to make such determinations. *Id.* It is not up to EPA any more than it is up to the Board. Ultimately, such decisions are made by the courts. Certainly the permitting agency must, in the first instance, address the legal questions that face it. But whether pertinent statutory requirements have been met is a matter for the courts at the end of the day. Indeed, it is the province of the judiciary to

say what the law is,[4] often based on an administrative record developed by an agency of the executive branch.

To the extent that a federal official has opined on a relevant question of law, that opinion may or may not be entitled to weight in the reviewing court's analysis, depending on a myriad of factors. *See* infra at 19. But the fact that the agency's file contains a "no-objection letter" from a federal bureaucrat does not overlay this matter with federal-state tensions, nor does it make this case remotely "unprecedented." (Br. at 4, 15.)

The central legal ruling on review is not EPA's but the Board's – specifically its determination that it lacked legal authority to regulate thermal discharges into the Lake's "hot side," because the "hot side" is a "waste treatment system" categorically exempted from regulatory jurisdiction under Virginia's "surface waters" definition. (J.A. 1624, 2072-73.) This determination was grounded explicitly on a legal opinion by then-Attorney General Robert McDonnell, who wrote: "[I]t is my opinion that the State Water Control Board does not have the legal authorization to impose limitations on thermal effluent discharges by [Dominion] from its reactors at the North Anna Power Station." (J.A. 1136.)

Indeed, as much as Appellants would cloak themselves in the allegedly unreviewable "no-objection letter" from EPA, there is no evidence in the record that the Board in fact paid any heed, at any point, to EPA's letter to the extent it interpreted the pertinent law. Rather, it was the Attorney General's legal opinion that influenced the thinking of the Water Control Board members and agency staff. *See, e.g.*, (J.A. 1624, 2072-73) (". . .again I stick to the original opinion [of] the Attorney General. . ."). The EPA no-objection letter is but a needle in the

[4] *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

haystack of the administrative record; Appellants' effort to exalt it to talismanic status does not withstand scrutiny.

B. The Traditional Standard of Judicial Review Applies - Substantial Deference is Due Agency Findings of Fact; Limited or No Deference is Owed to Interpretations of Law

In the courts of Virginia, agency findings of fact enjoy substantial judicial deference. *Shippers' Choice of Virginia, Inc. v. Smith*, 52 Va. App. 34, 37-38, 660 S.E.2d 695, 696-97 (2008), (citing *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243, 369 S.E.2d 1, 7 (1988)). But as the *Shippers' Choice* court went on to observe:

> . . . where the issue involves a legal determination or statutory interpretation, this Court does a *de novo* review, especially if the statutory language is clear. We are required to construe the law as it is written. "An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute." *Hurt v. Caldwell*, 222 Va. 91, 97, 279 S.E.2d 138, 142 (1981).

52 Va. App at 38, 660 S.E.2d at 696-97.

The Supreme Court of Virginia has further explained that agency interpretations of law do not enjoy a presumption of validity on judicial review:

> An appeal from the Director's decision to issue a permit is governed by the APA which allows the reviewing court to consider, among other things, the issue whether the decision was made in compliance with statutory authority. *See* Code § 9-6.14:17(ii). The reviewing court may set the agency action aside, even if it is supported by substantial evidence, if the court's review discloses that the agency failed to comply with a substantive statutory directive. *See Environmental Defense Fund, Inc. v. Virginia State Water Control Bd.*, 15 Va. App. 271, 278, 422 S.E.2d 608, 612 (1992). Since the issue before us is purely one of law, containing no underlying factual issues, we do not apply a presumption of official regularity or take account of the experience and specialized competence of the administrative agency. *See Virginia ABC Comm'n v. York Street Inn, Inc.*, 220 Va. 310, 313, 257 S.E.2d 851, 853 (1979).

Browning-Ferris Industries of South Atlantic, Inc. v. Residents Involved in Saving the Environment, Inc., et al., 254 Va. 278, 284; 492 S.E.2d 431 (1997). *Accord, Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 442, 621 S.E.2d 78, 88 (2005), *cert. denied*, 126 S. Ct. 2862 (2006), (citing *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996)).

Because the core of the Board's decision was a legal determination that Lake Anna is a "waste treatment system" and therefore exempt from regulation under state law, the proper standard of review is *de novo.*

II. The Circuit Court Correctly Interpreted State and Federal Law in Overturning the Board's Determination that the North Anna Plant's Thermal Discharge is Exempt from Regulation

A. Virginia Law Requires That Water Discharge Permits Comply Fully with Federal Laws and Regulations

Virginia's State Water Control Law, Va. Code Ann. §§ 62.1-44.2 to -44.34:28, prohibits the discharge of any pollutants into Virginia's waters unless in compliance with a Virginia Pollutant Discharge Elimination System ("VPDES") Permit. Va. Code Ann. § 62.1-44.5. This parallels the federal requirement that a NPDES permit be obtained in order to discharge pollutants into any navigable waters in the United States. 33 U.S.C. § 1342(a). The CWA and its implementing regulations allow a state agency to operate a discharge elimination system program in place of the federal program, provided that the state program is authorized under state law **and has standards that are at least as stringent as the federal ones**. 33 U.S.C. §§ 1342(b) & (c)(1); 40 C.F.R. § 122.1(a)(2).

Virginia's program was approved by EPA in 1975 and, pursuant to 33 U.S.C. § 1342, EPA then suspended its federal permitting program in the state. 40 Fed. Reg. 20,129 (May 8,

1975). From that date on, only DEQ and the Board have operated the pollutant discharge permitting program in Virginia, with federal oversight. Under this intermeshed statutory scheme, a permit issued by Virginia serves as both a VPDES and a NPDES permit. DEQ's rules provide that a VPDES permit "is equivalent to an NPDES permit," 9 Va. Admin. Code § 25-31-10, and that such permits are issued "pursuant to the Clean Water Act and the State Water Control Law," 9 Va. Admin. Code § 25-31-20. In administering this program, DEQ and the Board must adhere to the requirements of both state and **federal** law. *See* 9 Va. Admin. Code § 25-31-50(C) ("No permit may be issued: 1. When the conditions of the permit do not provide for compliance with the applicable requirements of the CWA or the law, or regulations promulgated under the CWA. . . .").

EPA plays an active role in Virginia's permitting program. CWA § 402(d)(1) requires the Board to provide EPA with copies of all NPDES permit applications. 33 U.S.C. § 1342(d)(1). By agreement and convention (J.A. at 2736, 2741), the Board also transmits to EPA's regional office all draft permits for which EPA has not waived its right of review. Under section 402(d)(2), EPA retains the power to object to the state's issuance of a permit as being outside the guidelines and requirements of the Clean Water Act. If EPA makes such an objection and the state fails to submit a revised permit which satisfies the Administrator's objections, EPA may issue its own permit containing its own conditions. 33 U.S.C. § 1342(d)(4).

B. Federal Law, with Which VPDES Permits Like This One Must Comply, Requires Regulation of Thermal Pollution

In 1972 Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a). In order to achieve its ambitious goal of eliminating, by 1985, the discharge of *all* pollutants into the Nation's navigable waters, 33 U.S.C. § 1251(a), the 1972 law called for stringent discharge limitations on new facilities, such that "the preferred standard for a new source is one 'permitting *no* discharge of pollutants,'" *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) (quoting 33 U.S.C. § 1316(a)(1)). To underscore the strictness of the prohibitions it was putting into place, Congress stated that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 414, 92nd Cong., 1st Sess. 7 (1971). No exception was made for discharges of heated water. In fact, Congress explicitly declared heat a pollutant and called for its regulation. *See* 33 U.S.C. §§ 1326 (standard-setting for thermal discharges), 1362(6) (defining "heat" as a pollutant).[5]

Given that the 92nd Congress called for new power plants to have **no** discharges of water pollutants, it would have been disappointed to learn that the North Anna nuclear plant, constructed six years after the law was enacted, would not employ readily-available control technology, *i.e.*, a cooling tower, to prevent hot water discharges. Undoubtedly that Congress

[5] *See also* Va. Code Ann. § 62-1-44.3 (defining "Pollution" to include "such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; . . .), 9 Va.Admin. Code § 25-260-50 and 60-90 (regulating thermal discharges).

would have been even more disappointed to learn that the plant's regulatory overseer would deny its own jurisdiction even to regulate such discharges, then and 30 years into the future.

C. The Board has the Jurisdiction as Well as the Duty to Regulate Discharges of Pollutants to the "Hot Side" of Lake Anna Because it is a "Water of the United States."

The CWA requires permitting authorities to protect all "navigable waters," which it defines as "waters of the United States." 33 U.S.C. § 1362(7). EPA has defined "waters of the United States" as:

> (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. . ..
> (3) All other waters, such as intrastate lakes, rivers, streams. . .
> [and]
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;. . ." 40 C.F.R. § 122.2 (2009).

DEQ has promulgated a generally similar definition of what it refers to as "surface waters," *see* Va. Code Ann. § 62.1-44.5(A)(1). This definition applies to all Virginia permitting programs, not only those that the Commonwealth administers under the federal NPDES program. Therefore, while Virginia may be free to decide what it will and will not regulate when administering its own state programs, when it comes to federally-delegated programs like the VPDES/NPDES program, Virginia's "surface waters" definition must be applied in a manner that is coextensive with the federal "waters of the United States" definition. *Westvaco Corp. v. U.S.E.P.A.*, 899 F. 2d 1383, 1384 (4th Cir. 1990) (state permitting programs must meet or exceed all elements of the federal program).

Given the extensive record evidence, discussed above in the Statement of Facts, as to the heavy public use of Lake Anna and the reliance by downstream businesses on the waters

of the North Anna River, there can be little question that both the "hot side" and "cool side" of Lake Anna fit within the federal definition of "waters of the United States." Indeed, EPA has stated that both sides of the lake fall within the ambit of the Commonwealth's regulatory program. In its 2007 "no-objection letter," EPA stated that "VaDEQ recognizes that the main reservoir of Lake Anna, as well as tributaries flowing into both the main reservoir and cooling lagoons/WHTF, are surface waters, subject to the state's water quality standards and VPDES permitting requirements." (J.A. 1564-65.)

D. Lake Anna is a "Cooling Lake" and Thus Comes Within the Board's Regulatory Jurisdiction

Lake Anna – both the "hot side" and the "cool side" – was created by impounding the North Anna River which, as shown above, was and remains a "navigable water" and therefore a "water of the United States." For this reason, Lake Anna falls within EPA's definition of a "cooling lake." The term "cooling lake" was defined in 1974 by EPA as "any manmade impoundment which impedes the flow of a navigable stream and which is used to remove waste from heated [power plant] condenser water prior to recirculating the water to the main condensor." 39 Fed. Reg. 36,186, 36,199 (Oct. 8, 1974). EPA has stated, unequivocally and without reconsideration, that "[a] 'cooling lake' is always a navigable water." 44 Fed. Reg. 32,854, 32,858 (June 7, 1979).

Significantly, Dominion has long acknowledged that Lake Anna – even its "hot side," standing in isolation, is a "cooling lake." An attachment to a study submitted by Dominion to DEQ states that:

> The North Anna Power Station is a two-unit power plant located on Lake Anna and operated by Virginia Electric and Power Company (VEPCO). A complex **cooling lake** system, involving a diked-off portion of Lake Anna – known as

> the Waste Heat Treatment Facility (WHTF) – as well as the main lake, was designed to dissipate the waste heat rejected by the plant.

(J.A. 597 (emphasis added).) Elsewhere in the same submission it is stated that:

> A **cooling lake system** was designed to dissipate the waste heat rejected by the nuclear power plant. Lake Anna was formed by impounding the North Anna River through construction of dam [sic] (see Figure 1.2).

(J.A. 598 (emphasis added).)

EPA has also promulgated a definition for the term "cooling pond." Such ponds "include any manmade water impoundment which does not impede the flow of a navigable stream and which is used to remove waste heat from the condenser water. . ." This term was codified at former 40 C.F.R. § 423.11, 39 Fed. Reg. 36,186, 36,199 (Oct. 8, 1974). In 1979 EPA explained that "[a] 'cooling pond' may under some circumstances be navigable waters, but usually is not." 44 Fed. Reg. 32,854, 32,858 (June 7, 1979). This means that cooling ponds always fall within the jurisdictional ambit of state and federal permit programs; only after a case-by-case review can a permitting agency decide whether any given cooling pond has sufficient indicia of navigability as to merit protection via regulation. And if "cooling ponds" fall within the jurisdictional ambit of the CWA's permitting program, then, *a fortiori*, so does the "cooling lake" that is Lake Anna. This highlights the error of law committed by the Board when it denied its jurisdiction to limit thermal discharges to the "hot side."

Notably, in recent years EPA has frequently, and with perfect consistency, published proposed regulations that have made it clear that "cooling ponds" always fall within the broadest purview of delegated NPDES permitting programs and that discharges of pollutants into them may or may not require a permit, depending on the circumstances of the ponds in

question. *See, e.g.*, 69 Fed. Reg. 68,444, 68,454 (Nov. 24, 2004), where EPA has explained cooling ponds should be considered in the context of permitting:

> D. Would My Facility Be Covered if It Withdraws From Waters of the United States?
>
> . . . .
> EPA recognizes that cooling ponds may, in certain circumstances, constitute part of a closed-cycled cooling system. *See, e.g.,* § 125.102. However, EPA does not intend that this proposed rule would change the regulatory status of cooling ponds. **Cooling ponds are neither categorically included nor categorically excluded from the definition of ''waters of the United States'' at 40 CFR 122.2.** EPA interprets 40 CFR 122.2 to give permit writers discretion to regulate cooling ponds as ''waters of the United States'' where cooling ponds meet the definition of ''waters of the United States.'' The determination of whether a particular cooling pond is a water of the United States is to be made by the permit writer on a case-by-case basis. . . .[6]

This belies the Board's claim, based on the Attorney General's opinion, that any body of water receiving discharges of waste heat can be categorically determined to be exempt from regulation, regardless of its characteristics or uses.

E. The "Hot Side" of Lake Anna Does Not Fall Outside of The Board's Permitting Jurisdiction By Virtue of the "Waste Treatment Systems Exemption"

EPA's expansive definition of the term "navigable waters," 40 C.F.R. § 122.2, contains an exemption for "waste treatment systems:"

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the] 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.].
> . . . .

[6] (emphasis added). Identical pronouncements by EPA can be found at 69 Fed. Reg. 41,576-80 (July 9, 2004), 67 Fed. Reg. 12,122-29 (April 9, 2002) and 66 Fed. Reg. 65,256-59 (Dec. 18, 2001).

> NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies … " in the definition of "Waters of the United States." This revision continues that suspension.

This exemption is inapplicable to Lake Anna. It was intended chiefly to relieve dischargers from the CWA's permitting requirements where they are disposing of waste in their own, closed-system, treatment lagoons. *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1032 (9th Cir. 2006). It was not intended to give a regulatory free pass to dischargers that had created waste disposal systems by impounding "waters of the United States." *California Sportfishing Protection Alliance v. Calamco*, 2007 U.S. Dist. LEXIS 8845 (E.D. Cal. 2007) *24 (citing 45 Fed. Reg. 48,620, (July 2, 1980). *Accord, West Virginia Coal Association v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D.W.Va. 1989) (the waste treatment systems exemption was not intended to apply to impoundments of navigable waters)).

F. The Board Committed Legal Error When it Declared Itself Without Jurisdiction to Limit Thermal Discharges into the "Hot Side" of Lake Anna

The Board declared itself to be without jurisdiction to regulate discharges to the "hot side" of Lake Anna based on an opinion letter prepared by the Attorney General. (J.A. 3249). On Nov. 30, 2006, in response to a written inquiry from DEQ dated October 6, 2006 (J.A. 1132), the Attorney General submitted a written opinion conveying his opinion that the Board was without legal authority "to impose limitations on thermal effluent discharges by [Dominion] from its reactors at the North Anna Power Station." (J.A. 1136.)

The Attorney General wrote that "[t]he key to answering the question you raise is found in 9 Va. Admin. Code § 25-31-10 of the VPDES program." That regulation contains Virginia's definition of the term "surface waters," which is identical to the federal definition

of "waters of the United States," 40 C.F.R. § 122.2, in every respect except one – the State's definition excludes all bodies of water used as waste treatment facilities, while the federal exemption for waste treatment systems excludes cooling ponds in certain circumstances. While the Attorney General's letter acknowledged this difference, Letter at 2 n. 6 (J.A. 1135), it paid it no heed. Thus, based on Dominion's and DEQ's assertions that the "hot side" of the lake was a "waste treatment system," the Attorney General concluded that it was exempt from regulation under the state program.

The Attorney General's opinion, on which the Board expressly relied, represents a clear error of law. The starting point for what the Board must include within the scope of its permitting program is defined by the CWA, not the VPDES regulations. *See* 40 C.F.R. § 123.1; 9 Va. Admin. Code § 25-31-50(C) (requiring every permit to comply with the CWA and with federal regulations). The Board may regulate with greater strictness that its federal counterpart but not with less. *State Water Control Board v. Smithfield Foods, Inc.*, 261 Va. 209, 212, 542 S.E.2d 766, 768 (2001). *Accord*, *West Virginia Coal Association v. Reilly*, 728 F. Supp. 1276, 1278 (S.D.W.Va. 1989).

G. The "No-Objection" Letter Submitted by EPA Does Not Amount to a Legal Determination That is Owed Deference by the Board or this Court

On Sept. 20, 2007, Jon Capasaca, a "Division Director" in EPA's Philadelphia office, transmitted to DEQ's Director EPA's comments on the proposed issuance of the permit to Dominion. (J.A. 1530.) This letter was like that which EPA customarily submits whenever the Board proposes to issue a permit, pursuant to the terms of the federal/state Memorandum of Agreement. The letter noted that because of the complex history of the federal waste treatment exemption, applying the exemption to particular cases "may present difficult, case-

specific issues" to permitting authorities. For these reason, the EPA official said, "EPA is not objecting" to DEQ's proposal to treat the "hot side" of Lake Anna as exempt.

There are a number of reasons why this letter does not represent a controlling legal authority here. First, the letter does not to purport to represent a legal interpretation. On its face it does nothing more than review the complex law governing the federal waste treatment exemption and decline to employ the onerous remedy of blocking issuance of the permit. While the CWA gives EPA authority to do this, 33 U.S.C. § 1342(d)(2), it also explicitly grants EPA discretion to go lightly on a state permitting authority. *See* 33 U.S.C. § 1342(d)(3). The EPA letter did not agree or disagree with the Board's or the Attorney General's position. All that can be inferred from it is that if EPA disagreed, the strength of its disagreement was not sufficient for it to throw a wrench in the gears of the Board's permitting process. *See District of Columbia v. Schramm,* 631 F.2d 854, 860 (D.C. Cir. 1980) (noting EPA's wide discretion in reviewing state permitting actions, citing CWA legislative history emphasizing that EPA is to use its review and veto authority "judiciously"). Appellants have cited to no court decision according deference to an EPA decision to object or not to object to a state-issued permit.

In *United States* v. *Mead Corp.,* 533 U.S. 218 (2001), the Supreme Court addressed the degree to which courts are to defer to agency interpretations of law. The criteria set forth by the Court demonstrate that the "no-objection letter" at issue in this case is not the kind of agency determination that should be given weight by any reviewing court.

First, the agency interpretations that deserve the most respect are those that undergo public notice and comment pursuant to the Administrative Procedure Act, 5 U.S.C. § 553. *Mead* at 230-31, (citing *Reno* v. *Koray,* 515 U.S. 50, 61 (1995)). Second, where an agency

has been given federal rulemaking authority by law, its rules enjoy judicial deference. But unless the agency has specifically been authorized to issue letter-opinions with precedential import, such letter-opinions are to be considered only advisory. *Id.* at 231-32. Further, opinion letters that issue from an agency's national headquarters have at least an imprimature that they represent a considered agency position that is intended to have national effect. A letter from a mid-level regional official, on the other hand, could be in conflict with letters issued by officials in other regions, leaving a court with little in the way of assurance that the letter represents the agency's true position. *Id.* at 233-34.

In other words, to earn deference the interpretation must reflect the agency's fair and considered judgment on the matter. *See Auer v. Robbins*, 519 U.S. 452 (1997). The letter at issue here meets none of these standards.

Finally, the no-objection letter is inconsistent with EPA's long standing position that "cooling lakes" fall within the purview of the federal/state regulatory program. Where an agency official departs from a consistently-held position, courts are under no obligation to follow. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (rejecting an agency interpretation that was "[f]ar from being a reasoned and consistent view"). *See generally Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 809 (9th Cir.1989) (courts should consider "the thoroughness of the agency's consideration, the validity of its reasoning, and the consistency of its position over time").

CONCLUSION

Two overarching principles must guide any agency or court that attempts to interpret the intricate contours of this ambitious and highly-evolved regulatory program. First, it is well established that courts, in order to give effect to Congress' remedial objectives in enacting the CWA, should apply a broad construction to the term "navigable water." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 964 (7th Cir. 1994).

Second, "claims of exemption, from the jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA." *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007) (citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)). This places the burden on the party that seeks to establish its entitlement to an exemption. *City of Healdsburg*, 496 F.3d at 1001 (citing *United States v. First City National Bank*, 386 U.S. 361, 366 (1967)).

Mindful of these principles, (J.A. 2998) the Circuit Court reached a narrow result in a thoughtful manner that merely remands the proceeding to the Board for further proceedings, consistent with applicable law. That decision deserves to be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rules 5A:19(f) and 5A:21(g) of the Rules of Supreme Court of Virginia, I hereby certify that seven (7) copies of the foregoing brief were filed with the Clerk of the Court of Appeals of Virginia and one (1) copy each of the foregoing brief was delivered via first-class mail, postage prepaid this 19th day of January, 2010 to:

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