

# Blue Ridge Environmental Defense League

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## *April 2010 Update*

### *Blue Ridge Environmental Defense League v. the Commonwealth of Virginia*

I write to update all our friends and supporters on this landmark water quality case. The Blue Ridge Environmental Defense League is mounting a vigorous defense of our win in circuit court on the North Anna power station water permit (NPDES).

As many of you know, with the October 7, 2009 Circuit Court Order, Dominion's permit was set aside and the Virginia State Water Control Board is required to bring the permit into compliance with the law. However, on December 22<sup>nd</sup>, both Dominion-Virginia Power and the Commonwealth of Virginia filed appeals in Virginia Court. As before, they argue that part of Lake Anna is exempt from the law. Nevertheless, since the judge's order is still in force, Dominion has requested permission from Virginia DEQ to seek a temperature variance. To get a variance under Section 316(a) of the Clean Water Act, Dominion must demonstrate that the standards are now more stringent than necessary to protect water quality. Such a demonstration could take two years to complete. This variance procedure has always been an option for Dominion, but the company has always maintained that they did not need to do it and the state has acquiesced. If granted, the variance would Dominion to continue to discharge hot water into the lake much as it has always done. Dominion's request to DEQ states:<sup>1</sup>

The Circuit Court's order allows the station to continue operating in accordance with the October 2007 VPDES permit. Because the Circuit Court's order remains in effect pending resolution of the appeal, Dominion believes it is appropriate and consistent with the court's order to initiate the process for seeking a site-specific temperature variance for discharges of cooling water to the WHTF, which would be our likely choice in the event that our appeal of the lower court's decision is not successful. Virginia's water quality standards regulations (9 VAC 25-260-90(C)) allow an applicant to demonstrate, in accordance with section 316(a) of the Clean Water Act, that applicable standards for controlling thermal discharges are more stringent than necessary to assure the protection and propagation of a balanced, indigenous population (BIP) of shellfish, fish, and wildlife in and on a receiving water. As discussed in a recent meeting with DEQ staff from the northern regional office, Dominion is developing a scope of work for conducting a study of the WHTF to support a potential future 316(a) demonstration (in the event that it becomes necessary) and will consult with other resource agencies during that process.

DEQ's response accepted Dominion's view that a variance request would be prudent, cited the relevant regulation for the variance (40 CFR 125 subpart H) and stipulated that members of the public must be given an opportunity to comment on the permit modification. The next step in the variance process is the expected submission of a work plan to DEQ by Dominion on or before June 1<sup>st</sup>.

Blue Ridge Environmental Defense League's activities during the last two months have

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<sup>1</sup> Pamela Faggert, Vice President Dominion Resources, letter to David Paylor, Director DEQ, January 19, 2010

included research, fundraising, obtaining additional legal counsel and filing our own brief with the Virginia Court of Appeals. We are fortunate to have working for us James B. Dougherty, an attorney with decades of experience in environmental law. We have retained Rob Wise, the lawyer who argued the case in circuit court, as legal consultant and local attorney.

Our reply brief in the Court of Appeals was filed on January 19, 2010.<sup>2</sup> We will appear before the judge on April 22<sup>nd</sup> at 9:30 AM in Richmond to defend our case. Our argument will rely on two overarching principles: 1) the court has the freedom to define the terms of the Clean Water Act, and 2) exemptions from jurisdiction or permitting requirements must be narrow. Last year, in the decision favoring Blue Ridge Environmental Defense League, the court merely returned Dominion's permit to the State Water Control Board for further proceedings to bring it into compliance with the law. The court said: "Virginia law requires regulation of Dominion's thermal pollution discharge because the exception for waste treatment simply doesn't apply here."<sup>3</sup> This is a minimum requirement to maintain water quality and achieve the purposes of the Clean Water Act.

Looking forward, the Court of Appeals decision may take from two to seven months after the April arguments. An appeal to the Virginia Supreme Court is then possible. That could take another year. Jim Dougherty says it is theoretically possible but highly unlikely this case will go to federal courts because the basic structure of the Clean Water Act delegates permitting decisions to the states. Therefore, judicial review is also a matter for state courts.

Although the gallery in the Richmond courthouse is small, I encourage all who are interested in this case to come and observe the proceedings. I will be there along with our attorneys. It would be good to see you there.

Also, I urge all residents, civic groups and other interested parties to remain vigilant. Do not miss any opportunity to get documents and provide comments to Virginia DEQ during the upcoming variance process. Dominion continues to view Lake Anna as its own private waste pond and will try to get by with the least amount of effort. The Commonwealth of Virginia and DEQ are also challenging our legal victory so they seem to be casting their lot with Dominion. We plan to continue our campaign to protect public health, to improve environmental quality and to end Virginia's breach of federal law.

*Louis A. Zeller, Science Director*

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<sup>2</sup> Filed January 19, 2010 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, a Virginia Corporation, et al., Appellees; and: Record No. 2222-09-2, Virginia Electric and Power Co., d/b/a Dominion Virginia Power, et al., Appellants, v. the Blue Ridge Environmental Defense League, Inc., a Virginia Corporation, et al., Appellees.

<sup>3</sup> In the Circuit Court for the City of Richmond, Case No. 07-6083, Transcript, February 20, 2009