

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

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

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

10 BARBARA J. CRAWFORD,

11 GARY MULLER, and

12 ARDEN "TERSH" NORTON, CASE NO.
13 CL070006083-00
14 APPELLANTS,

15 -vs-

16 COMMONWEALTH OF VIRGINIA, ex rel,
17 VIRGINIA STATE WATER CONTROL BOARD,
18 DAVID K. PAYLOR, and

19 VIRGINIA ELECTRIC AND POWER
20 COMPANY, d/b/a DOMINION VIRGINIA POWER,
21 APPELLEES.

22 *****

23 COURT RULING

24 *****

25 Richmond, Virginia

February 20, 2009

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28 P. O. Box 9349
29 Richmond, Virginia 23227
30 Reported by: Theresa S. Griffith, CCR

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

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7 APPEARANCES:

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

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

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

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1 NOTE: (Court Reporter sworn).

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

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

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

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

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

25 The first issue before the Court was the standing

1 issue and the representation of standing of the
2 organizational appellants. The Court will rule that
3 those appellants do have standing. The Court looked at
4 the 2007 Virginia Supreme Court case, Philip Morris
5 versus Chesapeake Bay Foundation. The individual
6 standing test for representational standing is not the
7 Virginia statutory review standing test that's at
8 62.1-44.29. The Court had ruled that Mr. Muller lacked
9 individual standing per this statute, 62.1-44.29.
10 However, the individual standing test for
11 representational standing, pursuant to the Philip Morris
12 case, is the test that's laid out in Lujan. I don't
13 have the correct spelling here in this note. And, the
14 Court looked at the three prongs in the Lujan test and
15 found that Mr. Muller does have that standing, but it's
16 clear here I'm making a distinction between the Virginia
17 statutory judicial review standing and the test for
18 standing for representational standing in which the
19 Court said in Philip Morris that its members would
20 otherwise have standing to sue in their own right. Upon
21 reconsideration of this Court's 2008 decision regarding
22 Mr. Muller, the Court was asked to look at new authority
23 not presented to the Court initially to support the
24 appellant's claim that the Court could review the
25 affidavits. The Court looked at the Chesapeake Bay

1 Foundation. That was the Stumpy case, 2005 Court of
2 Appeals. And, there was a footnote which said it is
3 within the trial Court's power to allow or to require
4 the plaintiff to supply by amendments to the complaint
5 or by affidavits further particularized allegations of
6 fact which would support Mr. Muller's individualized --
7 individual standing claim. Upon reconsideration the
8 Court has decided that it will not allow or require
9 supplementation by additional affidavits. The Court's
10 decision is based on the cases underlined, the
11 Chesapeake Bay Foundation, this is the Stumpy case from
12 2005, based on dicta in a Brunswick County case in which
13 that issue didn't really come up. The Court also could
14 find no authority that it had to allow it. And, I think
15 considering the factors that are relevant to this case,
16 considering the cases on which that footnote was based,
17 the Court declines to exercise that option in this case.

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

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

1 permit. And, the allegation was that reissuance of the
2 permit violated federal and state law. One of the
3 issues was whether the appellant was basing its claim on
4 federal law, on the Clean Water Act, because the
5 appellant had stated in an earlier hearing that it was
6 not basing its claim on the Clean Water Act, there was
7 no independent Clean Water Act. And, the Court's
8 decision is not based on federal law. The Virginia
9 State Water Control law must be consistent with federal
10 law. And, the Court will find that what happened here
11 was that state law was violated. The Board's reissuance
12 of the permit was inconsistent with the state program
13 and with state law, because, as I said, the state
14 program, which is the Virginia Pollutant Discharge
15 Elimination System, must comply with the federal Clean
16 Water Act. And, there is abundant authority for that.
17 The Code, 9 Virginia Administrative Code,
18 25-31-50(C)(1), which states that no permit may be
19 issued when the conditions of the permit do not provide
20 for compliance with the applicable requirements of the
21 Clean Water Act or the law and regulations promulgated
22 under the Clean Water Act or the law. There is also a
23 Virginia Supreme Court case, Smithfield, which states
24 that the state program must have standards as stringent
25 as the federal one. So, the Commonwealth's appellees

1 here in applying state law must also apply federal law.

2 Therefore, issuing the permits consistent with the

3 Virginia State Water Control law and the Virginia

4 Pollutant Discharge Elimination System, they must issue

5 permits that are consistent with the Clean Water Act.

6 I neglected to mention the standard that this

7 Court, the standard of review that this Court had to

8 consider in its ruling, and that is whether the agency

9 acted within the scope of its authority and whether that

10 decision is supported by substantial evidence. Because

11 if the agency did act within the scope of its authority

12 then there is no basis for a remand here. The error,

13 according to the appellants here, is that the

14 Commonwealth appellees issued a permit without limiting

15 Dominion -- Dominion owns and operates the facility --

16 without limiting their thermal pollution discharges into

17 the lake as to the hot side. And, the main issue is

18 whether the facility here is entitled to the waste

19 treatment system exception.

20 I am going to skip over a couple of things. Nine

21 Virginia Administrative Code Section 25-31-10, 2007, is

22 the state surface waters definition. It's identical to

23 the federal waters of the U.S. definition, which is in

24 CFR 122.2, with one exception, both have the exemption

25 for waste treatment systems that the appellee says is

1 applicable to this case. The federal definition
2 excludes cooling ponds from that exemption. The state
3 definition includes "treatment ponds or lagoons designed
4 to meet the requirements of the Clean Water Act and the
5 law in the exemption." So, the initial consideration
6 before the Court is how should it construe the waste
7 treatment systems exemption. And, from looking at a
8 number of cases, the Court had to conclude as the state
9 has and, this is, I think the Ohio Valley case is one
10 example, it has to construe this waste treatment system
11 exception narrowly. And, at the same time it has to
12 construe the term surface water or water of the United
13 States broadly. And the support for this construction
14 for the construing surface waters or waters of the
15 United States broadly, the Court will cite a U.S.
16 Supreme Court case, U.S. versus Riverside Bayview Homes.
17 I think that's a 1985 case. And, the Court will rule
18 that the exemption does not apply here because Lake
19 Anna's hot and cold side would be a cooling lake. The
20 Court also looked at the definitions of cooling ponds
21 and cooling lakes. I am not going to quote them; 40 CFR
22 423, the former is because it existed in 1979; 40 CFR
23 423.11(m), definition of cooling pond; definition of
24 cooling lake. Again, I have a long quote I will not
25 read. 40 CFR 423.11(n). The Court also looked at the

1 AG's opinion. I don't think the AG's opinion addressed
2 the situation where the Board was faced with a cooling
3 lake. But, given the mandate to treat the exemption
4 narrowly, and to treat the surface waters or waters of
5 the U.S. definition broadly, the classification of a
6 cooling lake controls. Cooling lakes are included in
7 the definition of waters of the United States. The
8 Court will note here it also looked at the Reilly case,
9 which I think is 1989 Southern District of West
10 Virginia. And, while the state can protect more than is
11 protected by the Clean Water Act, it cannot protect
12 less. And, the Court had Virginia authority for this.
13 It's in the AG's opinion. It's in the Smithfield Foods
14 case. It's in 9 Virginia Administrative Code,
15 25-350(C). I think that's the correct citing. So, to
16 the extent the state is protecting less than what is
17 protected by the CWA, the state is violating state law.
18 The waste treatment system exemption simply does not
19 include cooling ponds or lakes. And, the Virginia law
20 therefore requires regulation of the thermal pollution
21 discharges from the plant into the hot side.

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

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

9 All right. There are a number of other issues
10 that are raised by appellant, the variance issue as to
11 outfall 001. That's the hot side to the cool side, not
12 the plant to the hot side. And, the claim was that the
13 Board erred in reviewing this 316(a) variance because
14 the Board only looked at very old factual support. And,
15 the claimed error is that this decision was not
16 supported by substantial evidence. I mentioned the
17 standard of review earlier inconsistent with controlling
18 authority or not within the scope of the authority.
19 That's the legal one. Or the decision wasn't support by
20 substantial evidence. The annual reports here provide
21 that support. So, the Court rejects appellants' claims
22 as to this issue. There are annual reports from '94,
23 '97, 2000 to 2006. The Court also notes, and I won't go
24 into the long definition, that the standard is in 40 CFR
25 125.7(3)(a). Another claim the appellant made was that

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

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

25 And, I think the final issue is whether the Board

1 was required to make specific findings. And, the Court
2 looked at the Browning-Ferris case, which I think was a
3 '97 case. And, that case just involved a different
4 statutory directive, and a very specific statutory
5 directive that's not applicable here.

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

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

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

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

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

25 MR. EVANS: The objections are noted?

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

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

8 THE COURT: All right. Please.

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

14 THE COURT: Yes.

15 MR. WISE: Thank you, Your Honor.

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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.

Theresa S. Griffith, CCR