

Circuit Court
OF THE
City Of Richmond

MELVIN R. HUGHES, JR.
JUDGE

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219-1540

November 3, 2005

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Re: Case No. CH04-1390-1
*The Chesapeake Bay Foundation, Inc.,
George T. and Nell Minton and C. Pearce Cody*
v.
*Commonwealth of Virginia, ex rel., Virginia State Water
Control Board and Robert G. Burnley, Director, Department of
Environmental Quality, and Town of Onancock, Virginia*

Dear Counsel:

In this administrative appeal the State Water Control Board (the Board) approved the reissuance of a permit to the Town of Onancock for the operation of a waste water treatment facility. The appellants contend that

the Board and the Virginia Department of Environmental Quality (DEQ) failed to take account of a long standing problem of low dissolved oxygen in the tributaries of the Chesapeake Bay. Further, appellants allege that DEQ and the Board authorized the permit without numeric limits for nutrient pollution despite excessive amounts of nitrogen and phosphorous in the waterways and the fact that the Onancock plant is a significant discharger of these pollutants. The appellants ask that the permit be suspended and the case remanded to the Board and to DEQ with direction to (1) reissue the permit with numeric limits, (2) findings of fact confirming that the permit limits and loadings will not contribute to violation of water quality standards and (3) compliance with mandates of the Virginia Constitution, the Clean Water Act, the State Water Control Law and all other applicable regulations because the refusal to include numeric limits in the permit was arbitrary and capricious. Lastly, they contend the Board acted outside the scope of its authority in issuing the permit. The case is before the court on the appellants' Motion for Summary Judgment and Petition for Appeal and opposition thereto.¹

As with all agency appeals, it is useful to set out the standards of review applicable to such cases. Two other administrative cases involving the issuance of permits, *Crutchfield v. State Water Control Board*, 45 Va. App. 546, 612 S.E.2d 249 (2005) and *Browning-Ferris Indus. v. Residents Involved in Saving the Env. Inc.* 254 Va. 278, 492 S.E.2d 431 (1992), weigh these standards in permit awards involving pollutants relative to waste treatment facilities, as here.

Under Va. Code § 2.2-4027: The burden shall be on the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (1) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where

¹ The Town of Onancock is an appellee and has filed its opposition in writing. Also, the Virginia Association of Municipal Wastewater Authorities and the Association of Metropolitan Sewage Agencies have filed opposition in writing as amici curiae.

any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The court must first determine whether the agency acted within the scope of its authority, and second, whether the decision itself is supported by the evidence.

"With regard to an agency's decision on legal issues, the standard of review to be applied on appeal depends upon the nature of the legal issues involved [citations omitted]." *Volkswagen, Inc. v. Quillian*, 39 Va. App. 35, 50 (2002). "If the issue falls outside the area generally entrusted to the agency, and is one in which the courts have special competence, i.e., the common law or constitutional law' the court need not defer to the agency's interpretation." *Chippenham & Johnston-Willis Hospitals, Inc. v. Peterson*, 36 Va. App. 469, 475 (2001) (quoting *Johnson-Wills, Ltd. v. Kenley*, 6 Va. App. 231, 243-44 (1988) (quoting *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-15 (3rd Cir. 1981)). In *Browning-Ferris Industries v. Residents Involved in Saving the Environment, Inc.*, *supra*, the court ruled that on reviewing questions of law, the principles of presumption of official regularity and accounting for the experience and specialized competence of an administrative agency in reviewing agency appeals do not apply. *Id.* at 284. Where the question involves the specialized competence of the agency, the agency's determination may only be reversed upon a showing that the action was arbitrary or capricious.

Regarding whether the decision has support in evidence, the question for judicial review of an agency decision is one of substantial evidence. The term refers to such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Under this standard, the court may reject the agency's findings only if, considering the record as a whole; a reasonable mind would necessarily come to a different conclusion. *Kenley v. Waterway Estates, Ltd.*, 3 Va. App. 50 (1986).

As noted, the appellants rely on a constitutional, statutory and regulatory basis. The relevant portions of the provisions are summarized:

1. Virginia Constitution – Article XI, § 1: "it shall be the policy of the Commonwealth to protect its atmosphere, lands, and waters from pollution, impairment, or

destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."

2. Federal Clean Water Act (33 U.S.C. § 1251) – enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.
3. Virginia State Water Control Law –
 - Va. Code § 62.1-44.2 states that the law's purpose is to "safeguard the clean waters of the Commonwealth from pollution," "prevent any increase in pollution," and to "reduce existing pollution."
 - Va. Code § 62.2-44.15(3a) requires the Board "to take all appropriate steps to prevent water quality alteration contrary to the public interest or to the standards of policies established."
 - Va. Code § 62.1-44.3, waters shall not be "harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish, or aquatic life."
4. Regulations - the Board's own Virginia Pollutant Discharge Elimination System (VPDES)
 - "Each VPDES permit shall include . . . any requirements in addition to or more stringent than promulgated effluent limitation guidelines or standards . . . necessary to . . . achieve water quality standards established under the law and § 303 of the CWA, including state narrative water criteria for water quality." 9 VAC 25-31-220(D).
 - "Limitations must control all pollutants . . . which the board determines are or may be discharged at a level

that will cause, have the reasonable potential to cause, or contribute to an excursion above any Virginia water quality standard, including Virginia narrative criteria for water quality." Id.; 9 VAC 25-31-50(C))(1).

The waste water treatment facility in question is 30 years old and is located in the Town of Onancock on the North Branch of Onancock Creek. The facility provides wastewater treatment for the town and surrounding areas of Accomac County. It discharges from an outfall into the Onancock Creek, which is a tidal tributary to the Chesapeake Bay.

In February, 2003 Onancock applied to renew its permit for the facility's operations. DEQ gave notice for a period of public comment on Onancock's application from May 21, 2002 through June 23, 2003. It conducted a public hearing on September 8, 2003. Appellants provided written comment on the proposal during the comment period and at the public hearing. The parties dispute whether some documents are part of the agency record. Accordingly, DEQ disputes some of appellants' references to these documents on which they rely in support of the motion and the appeal.

However, by its terms the permit, which the Board issued on June 17, 2004, requires Onancock to limit total carbonaceous oxygen demanding pollutants - BOD5- contained in discharges and requires that the discharges contain a minimum dissolved oxygen concentration of 6.5 mg/l.

The primary issue in this appeal is whether DEQ and the Board have the authority and obligation to include a numeric limit for nutrient pollution of nitrogen and phosphorus in this permit. Appellants contend that, in the face of overwhelming scientific indication that the facility's discharge has lowered water quality standards, DEQ and the Board should not have approved the permit without numeric limits.

In *Browning-Ferris, supra*, the issue was whether Va. Code § 10.1-1408.1(D) required the Director of DEQ, before issuing a permit for a new solid waste management facility, to make an explicit finding that the facility would pose no present or potential damages to human health or the

environment. The court held that the statute, as part of the applicable Virginia Waste Management Act (Va. Code §§ 10.1-1400-1459) required such a finding and since the record contained no such finding, the agency determination was annulled. The court remanded the case to the trial court directing a remand to the DEQ for the Director to consider the record and make such finding before issuing a new solid waste facility permit. The court applied the rule that as an issue of law, the presumption of official regularity or the experience and specialized competence of the administrative agency did not come into play. *Id.* at 284. Here, appellants urge that the DEQ is under a similar mandate. The court does not agree.

The operative statutory provision in *Browning-Ferris*, Va. Code § 10.1-1408.1, is a part of the Virginia Waste Management Act. The statute is specifically applicable to the permit process for new solid waste management facilities. Here, none of the constitutional, statutory or regulatory schemes applicable to permitting renewals of waste water facilities carry a similar requirement on the appellees to make a specified determination. Accordingly, appellants contention that the Board should have made specific factual determinations that the Onancock discharge will not contribute to water quality violations has no merit. Similarly, although the array of legal requirements placed on the DEQ and the Board could be so interpreted, there is no direction to make a specific numerical limit on nitrogen and phosphorous in the reissuance of this permit.

In *Crutchfield v. State Water Control Board, supra*, the issues centered around whether the applicable regulations required the Board, in issuing a new waste water facility permit, to determine that the proposed discharge would not contribute to violations of water quality standards and impair river use and harm natural and human life. The court found that there was record support for the board's determination and that the Board issued the permit in compliance with applicable water quality law and regulations.

What the appellants have advocated, with credible basis, is a view that the existing law requires the development of Total Maximum Daily Loads (TMDL's) for nutrient pollutants. There is no dispute, however, that even though the Clean Water Act requires Virginia to establish numeric limits to reach applicable water quality standards, the case of *American Canoe Ass'n*

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v. United States EPA, 54 F.Supp.2d 621, 624 (E.D. Va. 1999) by a Consent Order, allows these not to be finalized until the year 2010. In the meantime, the question remains whether the appellees have in this case, discharged their responsibility in law and on evidence to cause the reissuance of a waste water facility permit consistent with that responsibility. The court finds that the requirements have been met.

The issues as framed bear out a distinction between limits on nutrient pollution as a product of nitrogen and phosphorous and limits of dissolved oxygen. As mentioned, the Board issued the permit with a limit of dissolved oxygen and concentration for efficient emission from the plant but none for nitrogen and phosphorous. Under 9 VAC 25-31-50(C)(9):

No [VPDES] permit may be issued . . .

9. To a new source or new discharge, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after application of the effluent limitation required by law and §§ 301(b)(1)(A) and 301(b)((B) of the CWA, and for which the [SWCB] has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

- a. There is sufficient remaining pollutant load allocations to allow for the discharge; and
- b. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards

Under the Clean Water Act states are required to identify waters where effluent limits fail to achieve water quality standards. The Act requires the states to rank such waters according to the severity of levels of pollutants. To comply with the CWA, with the approval by the federal Environmental Protection Agency, and according to established TMDLs from identified

pollutants, the state must engage in a "continuing planning process" for incorporation of the TMDLs. So, rather than an immediate implementation, the Act allows for scheduling, in this case until 2010, pursuant to the Consent Order and Memorandum of Understanding in *American Canoe*. While 9 VAC 25-31-50(C)(9) calls for numeric pollutant limits, these apply only after the scheduled TMDLs under the Act. The regulation expressly applies to new discharges. It sets out two conditions on a new discharger (1) that the receiving water does not meet or is expected to meet water quality standards and (2) the pollutant load allocation has already been performed on the subject water segment. Here, the Board could reasonably conclude, under the legal requirements, that the discharge allowed by this permit will not cause or contribute to lessening of water quality standards. And, the "continued planning process" currently underway will bring the water segment in compliance with water quality standards, including numeric pollutant limits on or by 2010. This is the only legal requirement for numeric pollutant limits. As noted, other cited law, the State Water Control Law, of Article XI of the Virginia Constitution does not require imposition of numeric limits as a specified means of controlling/reducing water pollution. The court finds that the Board could reasonably find from the evidence that the discharge will not cause or contribute to a violation of water quality standards.

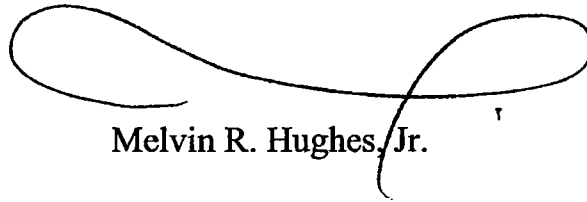
As noted, the permit does place limits on dissolved oxygen. It imposes a minimum requirement for dissolved oxygen concentration as well as monitoring requirements of the levels of nitrogen, phosphorous, and other substances contained in the discharge. It must also ensure that the discharge has a minimum dissolved oxygen level of 6.5 mg/l. Appellants argue that this not only meets, but exceeds water quality standards and there is record evidence to support this claim. This is in place pending monitoring of data and completion of water quality standards and TMDLs for nitrogen and phosphorous. These circumstances all satisfy the tests for court review of agency action as within the area and competence the law leaves to agency expertise in the field without implicating issues reserved to the court.

For the foregoing reasons, the motion for summary judgment and petition for appeal are denied. Mr. Bynum is directed to provide a suitable

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draft for order implementing this outcome for the reasons stated herein with exceptions noted.

Very truly yours,

A handwritten signature in black ink, consisting of a large, fluid, cursive loop that starts on the left, goes up and over, then down and under, ending with a small vertical stroke on the right side.

Melvin R. Hughes, Jr.

jsn