Circuit Court of the City of Richmond
John Marshall Courts Building

400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219

MARGARET POLES SPENCER
JUDGE

August 10, 2009

Calc Jaffe, Esquire
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, VA 22902-5065

John T. Suttles, Jr., Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516-2559

William C. Mims, Attorney General of Virginia
Roger L. Chaffe, Senior Assistant Attorney General
Carl Josephson, Senior Assistant Attorney General
900 East Main Street
Richmond, VA 23219

Timothy G. Hayes, Esquire
Kevin J. Finto, Esquire
Miranda R. Balister, Esquire
Andrea W. Wortzel, Esquire
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Re: Appalachian Voices, *et al.* v. State Air Pollution Control Board, *et al.*
Case No.: CL08-3530

Dear Counsel:

This matter is before the Court on an appeal from the State Air Pollution Control Board's (Board) decision to issue a Prevention of Significant Deterioration (PSD) permit, and a Maximum Achievable Control Technology (MACT) permit to Virginia Electric and Power Company (Dominion) on June 30, 2008, for the construction and operation of a coal-fired electric power generating facility (Virginia City Hybrid Energy Center – VCHEC) in Wise County, Virginia.

The Petitioners, a coalition of non-profit conservation organizations, challenge the two permits on seven grounds -- three addressing the MACT permit and four addressing the PSD permit. As to the MACT permit, Petitioners claim (1) it includes Condition 33, an "escape hatch" clause which negates the mercury limit requirement, (2) the Board did not complete the "floor" and "beyond-the-floor" analyses prior to issuing the permit, and (3) the Board used surrogates for categories of hazardous air pollutants (HAPs), rather than set specific emission limits for the HAPs. As to the PSD permit, Petitioners claim (4) the permit used a courser particulate matter (PM^{10}) as a "surrogate" for $PM^{2.5}$, by relying on an obsolete guidance memoranda from the Environmental Protection Agency (EPA), (5) the Board failed to establish that the coal plant will not contribute to pollution in excess of PSD "increment" levels and National Ambient Air Quality Standards (NAAQS), (6) the Board failed to consider "clean fuels" and "fuel cleaning" as pollution control strategies, because it failed to consider use of coals from outside the state, and (7) the permit contains no emission limitations for carbon dioxide, in violation of the Clean Air Act's (CAA) "best available control technology" mandate.

This Court finds that four of the arguments noted above raise questions of fact (##'s 3 – 6), and three raise questions of law (##'s 1,2, and 7). In reviewing issues of fact, the Board's decision must be affirmed if there is substantial evidence in the record to support the decision. State Board of Health of Commonwealth v. Godfrey, 223 Va. 423, 435, 290 S.E.2d 875, 881 (1982). Questions of law are subject to de novo review, and the Board's decision is not entitled to deference. See Commonwealth v. Barker, 275 Va. 529, 536, 659 S.E. 2d 502, 504 (2008). Upon review of the record, the Court finds the claims raising questions of fact (##'s 3 – 6 above) are supported by substantial evidence in the record, for the reasons stated in the briefs and oral arguments of the Respondents, the Board and Dominion.

For example, the Board considered "clean fuels" and "fuel cleaning." (Vol. 7 - 05085, 05150, 05154, Vol. 22 – 17161-17169). Appalachian Voices v. State Corp. Commission, 277Va. 509, 519, 675 S.E 2d 458 (2009). held Va. Code Ann. §56-585.1(A)(6) does not require a specific amount of Virginia coal in a coal-fired plant. To the extent Appalachian requires consideration of out-of-state coal, the permit does not preclude out-of-state coal. The Board considered and established SO2 emission limits at 603.6 tons a year, without regard to fuel source. (Vol. 22 – 17310-328, 17334-17359).

The issues of law are resolved below:

1. Emissions limits for carbon dioxide

There is no legal requirement that the Board conduct a best available control technology (BACT) analysis for carbon dioxide because carbon dioxide is not subject to regulation under the Clean Air Act.

A provision in the Code of Federal Regulations, cited by Petitioners at the hearing, states "the purpose of this part is to establish requirements for the monitoring, recordkeeping, and reporting of . . . carbon dioxide (CO2) emissions . . ." 40 C.F.R. 751. This provision and In re: Deseret Power Elec. Coop., 14 E.A.D. ___, PSD Appeal No. 07-03, Slip Op at 41 (Nov. 13, 2008), and Massachusetts v. EPA, 549 U.S. 497 (2007) were cited by Petitioners as authority for the claim that carbon dioxide is subject to regulation under the Clean Air Act. However, Petitioners concede there is no standard or emission limitation for carbon dioxide, and none is mentioned in the cited authorities. The term "subject to regulation" refers to pollutants subject to actual emission limitations. Deseret and Massachusetts simply state that carbon dioxide **can be** regulated under the Act, not that it **is** regulated under the Act. Massachusetts, 549 U.S. at 534-35. Deseret only requires the Board to determine whether carbon dioxide is subject to regulation. No federal or state regulatory controls have been established for carbon dioxide, and therefore it was not "subject to regulation" at the time the permit was issued. In sum, there is no authority, as a matter of fact or law, for the claim that a BACT analysis, to determine compliance with an unknown limitation, was required for carbon dioxide.

2. Escape hatch – Condition 33

The MACT permit sets a mercury limit of 8.8 x 10 7 lbs/MWhr for VCHEC. However, Condition 33 states that if Dominion "reasonably demonstrates using operational and other related information collected for a period not shorter than the first 12 months of operation of all the equipment used to control mercury . . . that the [set limits] are not achievable on a consistent basis under reasonably forseeable conditions, then testing and evaluation shall be conducted to determine an appropriate adjusted maximum achievable annual emission limit . . ." Petitioners claim this condition (1) authorizes emission limitations to be set after completion of construction, and (2) authorizes relaxation of emission limitations "beyond what has been achieved in practice by the best controlled similar source." The Court agrees.

The Clean Air Act requires the MACT determination prior to construction of VCHEC. 42 U.S.C. §7412(g)(2)(B), CAA §112(g)(2)(B). The law does not allow "an after-the-fact analysis" of the emission limitation. See United States v. Ohio Edison Co., 276 F. Supp.2d 829, 864-865 (S.D. Ohio 2003). The establishment of a flexible "limitation" with an ongoing analysis, in Condition 33, is not a limitation determination prior to construction of a facility, as required by law.

The Clean Air Act also requires that the mercury emission limit "not be less stringent than the emission control that is achieved in practice by the best controlled similar source." 42 U.S.C. §7412(d)(3), CAA §112(d)(3). This "best controlled similar source" mandate would be negated if Dominion demonstrates it could not achieve the mercury emission limit in the permit. This result, authorized by Condition 33, therefore violates the CAA. See Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 861-62 (D.C. Cir.

2001) and Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 955 (D.C. Cir. 2004). Moreover, Condition 33 states that determination of an "appropriate adjusted maximum achievable annual emission limit" will be based, at least in part, on what is "achievable on a consistent basis under reasonable forseeable conditions" by Dominion. The law requires the mercury emission limit "not be less stringent than the emission control that is achieved in practice by the best controlled similar source" regardless of the permittee's ability to achieve the set limit. Indeed, the limit must be set "irrespective of cost or achievability." Cement Kiln Recycling Coalition, 255 F.3d at 857-58; See Ne.Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 955 (D.C. Cir. 2004).

Respondents argued Condition 33 merely states a procedure, already available under state law, for requesting an amendment of the MACT permit. However, to the extent it states an existing post-construction procedure, it is at best, unnecessary, and at worst, violative of the laws addressing pre-construction mandates.

Finally, Condition 33 has "direct and appreciable legal consequences." Golden and Zimmerman, LLC v. Domenech, 599 F. Supp. 2d 702, 710 (E.D. Va. 2009). It negates the requirement of an absolute MACT limit prior to construction. As noted above, Condition 33 allows a flexible "limitation" during the first 12 months of operation in that the permittee (Dominion) is allowed to demonstrate it cannot achieve the set limit. See Sierra Club v. EPA, 479 F.3d 875, 880 (D.C. Cir. 2007).

3. "Floor" and "beyond-the-floor" analyses

Petitioners also allege the Board did not conduct the required "floor" and "beyond-the-floor" analyses, and that surrogates may not be used to regulate hazardous air pollutants. For the reasons stated in Respondents briefs and oral arguments, these allegations are rejected and are not grounds for reversing the Board's decision to grant the MACT permit.

This Court's decision as to Condition 33 above is sufficient to grant Petitioners' requested relief as to the MACT permit. Petitioners shall prepare an order consistent with this decision. Objections are noted in the record. Endorsements to the order are waived pursuant to Rule 1:13.

Sincerely,

Margaret P. Spencer