COMMONWEALTH of VIRGINIA

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Mr. David K. Paylor
Director, Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23219

Dear Mr. Paylor:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the State Water Control Board can by permit impose thermal effluent limitations on the discharge by Dominion Nuclear North Anna, LLC, from its reactors at its North Anna Power Station into a series of connected cooling lagoons.

Response

It is my opinion that the State Water Control Board does not have the legal authorization to impose limitations on thermal effluent involved in discharges by Dominion Nuclear North Anna, LLC, from its reactors at its North Anna Power Station.

Background

You state that Dominion Nuclear North Anna, LLC ("Dominion"), operates two nuclear reactors at its North Anna Power Station ("NAPS"). Further, NAPS disposes waste heat by running water from the North Anna Reservoir through condensers. The heated water is then discharged to a series of three connected cooling lagoons, separated from the main body of the lake by dikes. You relate that the lagoons are owned and operated by Dominion and collectively are referred to as the Waste Heat Treatment Facility ("WHTF"). WHTF discharges to the North Anna Reservoir through a dike owned and operated by Dominion. Together, the Reservoir and the lagoons make up Lake Anna. You state that WHTF was designed, built, and permitted by the State Water Control Board to be used as a treatment facility for waste heat. Dominion considers WHTF to be an integral part of the power station. Because WHTF specifically was designed as a waste treatment system, you indicate that the Board has not imposed restrictions on the discharge of heat from NAPS into WHTF.

Applicable Law and Discussion

The Virginia Pollutant Discharge Elimination System ("VPDES") program[1] is administered by the State Water Control Board[2] under the State Water Control Law[3] pursuant to approval by the federal Environmental Protection Agency ("EPA").[4] The VPDES program regulates the discharge of pollutants, including waste heat, into "surface waters" from point sources such as those about which you inquire. The Board has adopted regulations to implement this program.[5]

The key to answering the question you raise is found in 9 VAC 25-31-10 of the VPDES program. In defining "surface waters" for the purpose of establishing the jurisdiction of this program, the Board provides that:

> *"Surface waters"* means:
>
> ....
>
> 7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in subdivisions 1 through 6 of this definition.
>
> *Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the C*[lean] *W*[ater] *A*[ct] *and the law, are not surface waters.*[6]

Based on this clear regulatory language, you indicate that the Board historically has rejected jurisdiction over such matters and has declined to regulate WHTF under the VPDES program.[7] Additionally, the Board has not imposed conditions on the discharge of waste heat into WHTF from NAPS.[8]

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[1] *See* 9 Va. Admin. Code §§ 25-31-10 to 25-31-940 (2004 & Supp. 2006).

[2] *See* VA. CODE ANN. tit. 62.1, ch. 3.2, §§ 62.1-44.36 to 62.1-44.44 (2006) (setting forth statutory scheme governing conservation of water resources and State Water Control Board).

[3] *See* tit. 62.1, ch. 3, §§ 62.1-44.2 to 62.1-44.34:28 (2006) ("State Water Control Law").

[4] The federal Clean Water Act establishes a permit requirement for discharges of pollutants into waters of the United States. *See* 33 U.S.C.S. §§ 1342 to 1345 (LexisNexis 2001); 40 C.F.R. pt. 123 (2006). The EPA Administrator approved the State Water Control Board's program on March 31, 1975. *See* Environmental Protection Agency, NPDES Permit Program Results for Virginia, http://cfpub.epa.gov/npdes/stateinfo.cfm?&view=state&state_id=47&state=VA (last visited Nov. 1, 2006); *see also* 40 Fed. Reg. 20,129 (May 8, 1975).

[5] *See supra* note 1.

[6] 9 VA. ADMIN. CODE § 25-31-10 (Supp. 2006) (emphasis added). The State Water Control Board has the authority under state law to define "state waters" and "surface waters" and its VPDES regulations were lawfully adopted. 1999 Op. Va. Att'y Gen. 179, 180-81. The comparable federal regulation, 40 C.F.R. § 122.2, which defines "waters of the United States" in subpart g thereof, also contains an exemption for waste treatment systems. That regulation, however, specifically excludes "cooling ponds" from the definition of such systems. The regulations of the State Water Control Board were approved by EPA and contain no such exclusion. *See supra* note 4 and accompanying text.

[7] *See infra* note 8.

[8] You indicate that the State Water Control Board has imposed permit conditions on discharges of heated water into the North Anna Reservoir from WHTF. This is consistent with the Board's treatment of the Reservoir as a surface water under VPDES regulations.

While the language of 9 VAC 25-31-10 would not appear to require interpretation, an agency's interpretation and enforcement of its regulations is entitled to great deference.[9] Courts will not overturn an agency's interpretation of its regulations unless it is found to be arbitrary and capricious.[10] Conversely, an agency that ignores both the plain language and its prior consistent application of a regulation risks a successful challenge to any effort to change such application.[11]

Conclusion

Accordingly, it is my opinion that the State Water Control Board does not have the legal authorization to impose limitations on thermal effluent involved in discharges by Dominion Nuclear North Anna, LLC, from its reactors at its North Anna Power Station.

Thank you for letting me be of service to you.

Sincerely,

Robert F. McDonnell

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[9] Holtzman Oil Corp. v. Commonwealth, 32 Va. App. 532, 539, 529 S.E.2d 333, 337 (2000); Hilliards v. Jackson, 28 Va. App. 475, 479-80, 506 S.E.2d 547, 550 (1998); Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 160, 384 S.E.2d 622, 627 (1989).

[10] Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 246, 369 S.E.2d 1, 9 (1988), *quoted in* Fralin v. Kozlowski, 18 Va. App. 697, 701, 447 S.E.2d 238, 240 (1994).

[11] Any such challenge would, of course, be brought under Virginia's Administrative Process Act. *See* §§ 2.2-4000 to 2.2-4031 (2005 & Supp. 2006). Under § 2.2-4027 of the Act, a party challenging a decision of the State Water Control Board would need to show, *inter alia*, "compliance with ... jurisdiction limitations" and "the substantiality of the evidentiary support for findings of fact." Based on the facts you provide and 9 VAC 25-31-10, any effort by the Board to regulate the situation you describe may not withstand judicial scrutiny.