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HANOVER COUNTY
DEPARTMENT OF PUBLIC UTILITIES
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DIRECTOR OF PUBLIC UTILITIES

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*all one
comment*

January 7, 2004

Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mailstop T-6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

*11/24/03
68FR65961
(3)*

RECEIVED
JAN 14 - 9 PM 2:54
Rules and Directives
Branch
U.S. NRC

**Re: Dominion Nuclear North Anna, LLC
North Anna Early Site Permit, Additional Nuclear Reactor
Federal Register Publication Date November 24, 2003, page 65961**

Dear Chief, Rules and Directives Branch:

This letter and attachments represent the comments of the Hanover County Department of Public Utilities on the referenced permit application. Hanover County is immediately downstream from the Lake Anna Dam and relies on the North Anna River as the water source for its Doswell Water Treatment Plant and as the receiving water for its Doswell Wastewater Treatment Plant discharge. Further downstream, the County relies on the Pamunkey River, which receives a significant portion of its flow from the North Anna River, as the receiving water for its Courthouse and Totopotomoy Wastewater Treatment Plant discharges. The North Anna and Pamunkey Rivers are also important recreational amenities for County residents. Therefore, the County wishes to ensure that any environmental impact review evaluates the changes to Lake Anna releases and related impacts on County facilities, its citizens and other instream and offstream beneficial uses of the North Anna and Pamunkey Rivers that will result from the construction and operation of an additional reactor. Such a review should also determine the appropriate and necessary minimum Lake Anna release to protect these uses.

Template = ADM-013

Hanover: People, Tradition and Spirit

*E-RFDS = ADM-03
Call = A. Kuyler (ASK)*

Action by the Virginia General Assembly

The drought experienced in Central Virginia beginning in 1998 caused water levels in Lake Anna to drop one or two feet below normal. The lower levels caused by the drought, evaporation and maintaining minimum downstream releases, inconvenienced owners of lakefront property. These owners' had constructed fixed docks ignoring the regulatory required release and the natural weather pattern. The level variation is within the design parameters for the Lake. The lakefront property owners asked the Virginia General Assembly to address their concerns about lake levels and minimum releases. The General Assembly passed a bill that mandated the minimum releases be reduced during drought conditions even though the environmental work conducted during the original permitting process did not support such a change.

Minimum Release Rate

The original minimum release rate, 40 cubic feet per second (cfs), was approved by the State Water Control Board ("Board") and was incorporated in the State Corporation Commission's ("Commission") order approving the license for the Lake Anna Dam. Unfortunately both actions preceded a thorough review by the Board's staff in conjunction with the Virginia Institute of Marine Science and the Department of Conservation and Economic Development. These agencies proposed that the average annual instantaneous release be not less than 60 cfs during any calendar year, with a minimum instantaneous release for the period June through September not less than 100 cfs and not less than 40 cfs for the remaining period of any calendar year. Because the Board and Commission actions had already been taken, these proposed changes were not incorporated in the Commission's order approving the Lake Anna dam license.

Throughout these permitting and licensing proceedings, so far as one can determine, no agency, Commission or court ever suggested a lower instantaneous release than 40 cfs. To the contrary, higher releases were proposed. The State Corporation Commission approved a higher dam (elevation 250 feet vs. 240 feet), which holds back vastly more water and makes the inconvenience of drawdowns quite rare. The downstream users have had to live with far less water during low flow times than any agency would have proposed, had it had the right to reconsider the initial decision on this issue. Downstream users have designed their water intake and wastewater discharge systems around this 40 cfs low flow condition, and cannot get by with less water. And, increasingly more stringent regulations affect the ability to operate at the 40 cfs.

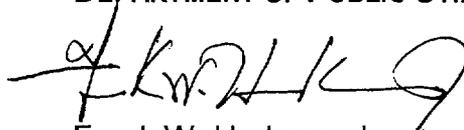
As a result of the action by the Virginia General Assembly and subsequent Board and Commission actions, the minimum release rate must now be reduced to 20 cfs during drought conditions.

Downstream Water Users

The downstream users who will be most directly affected by any change in the minimum releases from Lake Anna are Hanover County, the Doswell Limited Partnership Power Plant, Paramount's Kings Dominion and associated service facilities, and the Bear Island Paper Company. The downstream users have also had less water to use during low flow times than environmental review agencies would have proposed, had the initial decision on this issue been reconsidered.

Attached please find a complete summary of the history of the minimum release rate and comments submitted by Hanover County on the recently reissued North Anna VPDES discharge permit. Although this is a different permit and permitting process, many of the prior comments are applicable from an environmental perspective and should be included in the scope of an environmental impact statement. Thank you for this opportunity to provide comments.

Sincerely,
DEPARTMENT OF PUBLIC UTILITIES



Frank W. Harksen, Jr.
Director

Enclosures

cc: The Hanover County Board of Supervisors
Mr. Richard R. Johnson, County Administrator
Mr. John H. Hodges, Deputy County Administrator

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November 6, 2000

Mr. Janardan R. Pandey, P.E.
Environmental Engineer Senior
Dept. of Environmental Quality
Valley Regional Office
P.O. Box 3000
Harrisonburg, VA 22801-3000

Dear Mr. Pandey:

Pursuant to your October 11, 2000 request, this letter presents Hanover County's comments to the September 5, 2000 letter submitted by the Lake Anna Civic Association ("LACA") and their requested changes to the Lake Level Contingency Plan ("LLCP"). Before providing our comments, let us first state Hanover County supports the LLCP language as provided in the draft permit¹ and believes the proposed LLCP is consistent with the legislative requirement in Chapter 119, 2000 Acts of the General Assembly, codified at Virginia Code §62.1-44.15:1.2. Hanover County has worked hard with those who rely on Lake Anna to minimize any hardships during times of drought. This effort was demonstrated by Hanover County's willingness to work with Dominion Power on several occasions to reduce discharges during past drought conditions. Additionally, Hanover County willingly engaged in this ongoing attempt to reduce Lake discharge rates below 40 cfs when the Lake level drops below 248 feet above mean sea level (msl). However, Hanover County is committed to assuring that its residents continue to have a reliable source of water and the millions of dollars worth of investments made in public facilities are protected.

The following are Hanover County's comments to the LACA letter:

The letter states that the Lake level is typically stable and has only dropped significantly twice in twenty-five years. Arguably, two significant drops in lake level over a two and a half decade period would have occurred absent the required discharge

¹ The support is based upon the presumption the LLCP will not adversely impact the 7Q10 flow established for the North Anna and Pamunkey Rivers.

based upon the weather patterns during that time period and drops experienced in other lakes.

The LACA's primary argument in support of the suggested changes to the LLCPP is the impact on LACA recreational activities, specifically, some number of docks and boat houses were rendered unusable twice during the past twenty-five years. The County is sensitive to the impact on the property owners as our previously mentioned actions demonstrate. However, the LACA's argument is not relevant for three key reasons:

1. Virginia regulation prioritizes the beneficial uses of State waters and public water supply is the top priority². Accordingly, priority consideration must be given to protecting public water supply when making decisions impacting the Lake Anna releases.
2. The letter states there is the "perception" the reason the Virginia Law was passed was to protect the interests of the Lake Anna property owners. The specific language makes no mention of the property owners but does specifically protect the downstream users³.
3. The required 40 cfs Lake discharges have been mandated by regulation since the original SWCB Certificate was issued in 1968, and predate the improvements around the Lake. The original discharge permit was the subject of public hearings and that permit was authorized based upon a minimum 40 cfs discharge. The property owners assumed the risk to construct the fixed versus floating docks and boat houses. So, given the fact the discharge was a regulatory requirement, to now claim the very infrequent inconvenience they experience is justification to further reduce the discharge is not a reasonable argument. Hanover County and other downstream users have made decisions and spent in excess of \$800 million based, in part, on the knowledge of the mandated Lake discharge.

The LACA has taken the position that whenever the Lake cannot be maintained at its normal level of 250' msl a drought is approaching. The data provided by Dominion Power show that fluctuations below 250' msl are regular and normal occurrences. Therefore, using a drop below 250' msl as a pending drought indicator is not supported by the data and is inconsistent with LACA's earlier statement that there have only been two significant drops in Lake level in twenty-five years. The 248' level was recommended by Dominion Power as the point at which discharge rates should be reduced. We concur with this approach based on the fact that the Lake has dropped to this level only three times since 1975 and consequently, the 248' level is indicative of a true drought. To suggest an action level any higher than this would require a reduction in flow (i.e. <40cfs) on a regular basis and would be inconsistent with the legislative language that the reductions are required "due to drought conditions".

² See Va. Code §62.1-10, which states "Public water supply uses for human consumption shall be considered the highest priority."

³ See Va. Code §62.1-44.15:1.2, which states "... and such plans shall take into account and minimize any adverse effects of any release reduction on downstream users."

Hanover does not agree with LACA's suggestion that conservation measures be made a part of the LLCP. Hanover is sensitive to the environment and the County Code includes provisions that allow initiation of water conservation actions if warranted. Conservation measures were implemented as recently as 1999 and 1995. However, the LLCP is a provision in the Dominion Power VPDES permit and inclusion of a downstream conservation requirement for others is not appropriate⁴. Hanover County is committed to working collectively during times of drought but local jurisdictions should retain the right to initiate water rationing or similar efforts. The issue we are currently dealing with is not one of water use or conservation, but rather is the ability of our Doswell Water Treatment Plant to physically withdraw water from the North Anna River. During low flow conditions (42 cfs or 7Q10), the North Anna River looks more like a creek with only a few inches of water at our withdrawal structure (photos of Doswell intake structure and North Anna River at low flow are attached). At some point below the 7Q10 flow our pumps will begin to draw air which means they will not function properly (they are designed based upon the 7Q10 flow which includes the 40 cfs Lake Anna release). This concern is one reason the flow reductions are in 5 cfs increments with 72 hours allowed to determine any impacts. This is not a conservation issue but rather a physical constraint.

The LACA states "there is no meaningful yard stick of measure to determine degree of impact to the down stream users." Part F.2.h of Dominion Power's draft permit states that "adverse effect is defined as the inability to withdraw/discharge water for proper operation of facilities, or impairment of water quality." This statement very adequately defines the conditions under which reduced discharge levels can be attempted. The inability to withdraw is discussed in the preceding paragraph. The inability to discharge is related to our wastewater treatment plants. The amount of treated effluent we are allowed to discharge and the level of treatment required are tied directly to the 7Q10 flow – and our discharges must not contribute to a violation of water quality standards. All of our facilities are designed based upon the regulatory required release from Lake Anna of 40 cfs. As the release from Lake Anna is reduced, our discharges become a greater percentage of the river flow and the impacts must be quantified. The 5 cfs incremental decreases and 72 hour evaluation periods will allow Hanover and the Department of Environmental Quality to assess the water quality impacts. Hanover County supports this proposal as it provides protection to its water and wastewater facilities. Hanover also believes that the LACA letter over-emphasizes that significance of 20 cfs as related to Lake levels. It is our understanding that evaporation is the most significant factor impacting Lake levels as it can reach 90 cfs during the summer. This indicates that release reductions may not even significantly impact Lake levels.

⁴ Authority for local governments to initiate water conservation efforts is provided in Va. Code §15.2-924. Requirements for water conservation in a given locality should not be included in the permit of another entity, is not enforceable, and the VPDES permit is not the proper vehicle for this type of action.

Hanover County cooperated with efforts to attempt reduction in Lake Anna discharge rates with the understanding that it would be able to continue withdrawing water at permitted levels at the Doswell water treatment plant and there would be no water quality issues that would impact its Doswell, Courthouse or Totopotomoy Wastewater Plants permits. We now understand that the DEQ may reduce the in stream flow (7Q10) by 20 cfs when establishing permit limits for the Doswell Wastewater Plant. If this becomes DEQ's final position, Hanover County would oppose any effort to reduce discharge levels below 40 cfs at anytime. Such a reduction would constitute a major impact on Hanover County residents and businesses and could potentially require multi-million dollar plant up-grades.

In summary, Hanover County wishes to do what it can to be a good neighbor while at the same time honoring its fiduciary responsibility to safeguard the health, safety and welfare of Hanover County citizens. Human consumption, by definition in the Virginia State Code is the highest priority beneficial use, the draft permit LLCP is protective of such uses and the County supports the draft permit LLCP language.

Sincerely,
DEPARTMENT OF PUBLIC UTILITIES



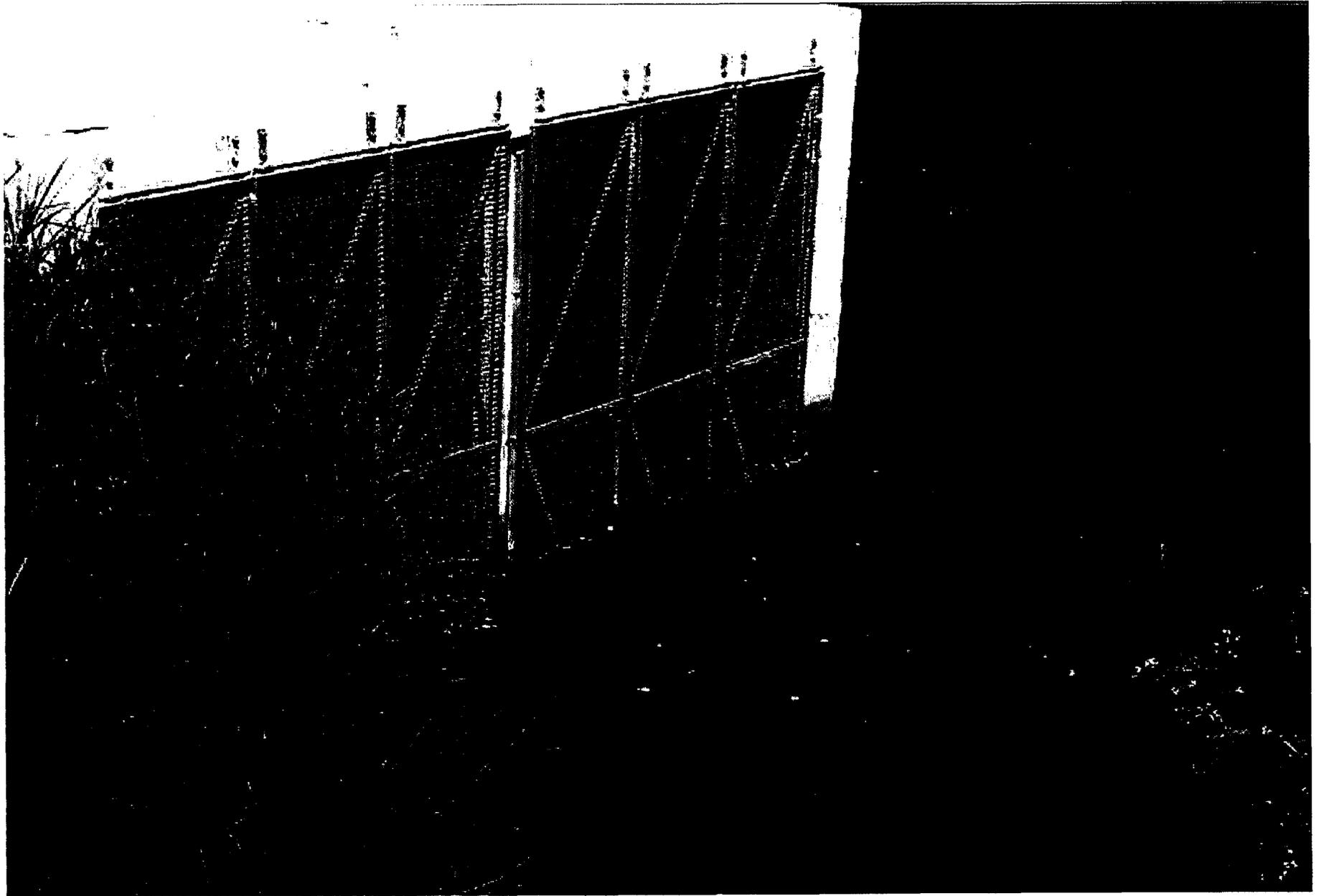
Frank W. Harksen, Jr.
Director

Attachment

Cc: Honorable William T. Bolling
Honorable Frank D. Hargrove, Sr.
Hanover County Board of Supervisors
Richard R. Johnson, Hanover County Administrator
Sterling E. Rives, III, Hanover County Attorney
John H. Hodges, Hanover County Deputy County Administrator
Marilyn Blake, Hanover County Assistant County Administrator
Robert A. Ellis, Bear Island Paper Company



Hanover Doswell Water Plant Intake on North Anna River - Flow = 42 cfs



Hanover County Doswell Water Plant Intake -- River Flow = 42 cfs

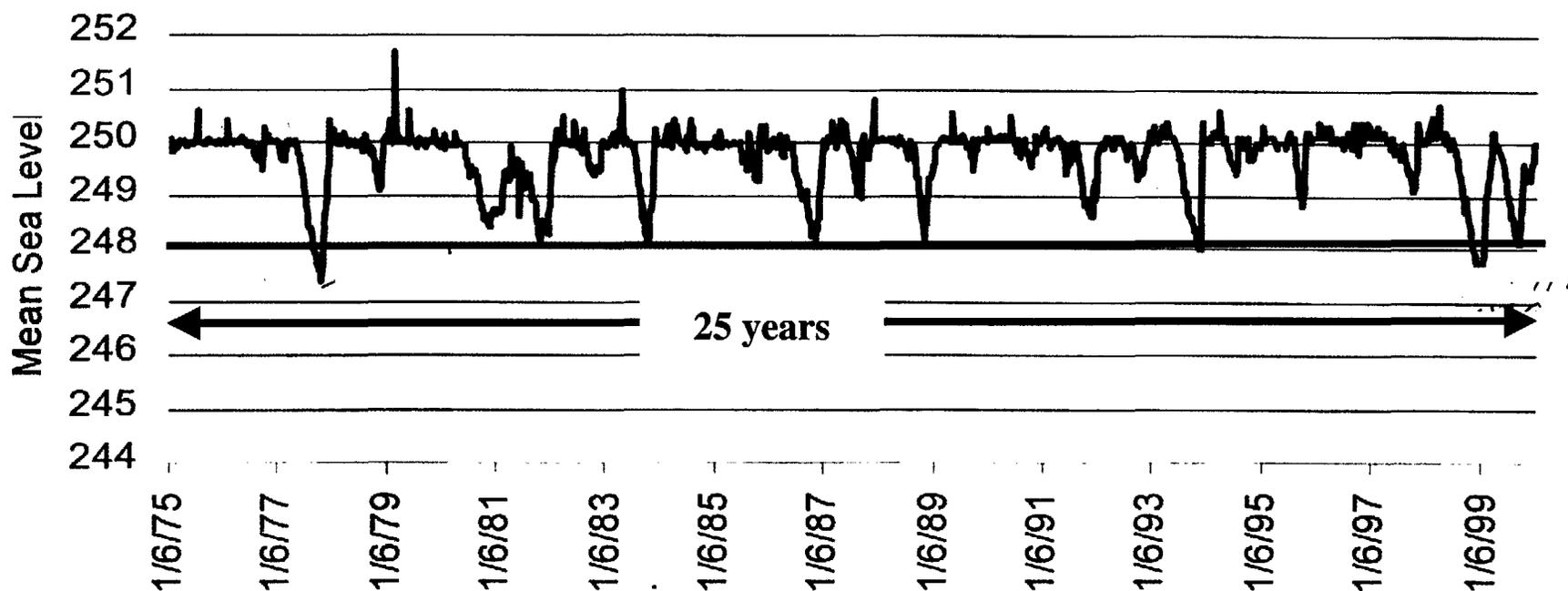


North Anna River in Hanover near Rt. 30 -- River Flow = 42 cfs



North Anna River Downstream of Hanover Water Plant -- 42 cfs Flow

Annual Lake Levels



NORTH ANNA POWER STATION
"Nuclear Safety First"

Lake Anna Levels -- Provided by Virginia Power

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November 21, 2000

Mr. Janardan R. Pandey, P.E.
Environmental Engineer Senior
Dept. of Environmental Quality
Valley Regional Office
P.O. Box 3000
Harrisonburg, VA 22801-3000

Dear Mr. Pandey:

I would like to express my appreciation for the opportunity to speak at the hearing held on November 6, 2000 regarding Dominion Power's draft VPDES permit. It was my observation during that hearing that there was no factual evidence presented to support any changes to the Lake Level Contingency Plan included in the draft permit. Also, the opinions voiced at the hearing from Lake Anna property owners appeared to be based on incorrect assumptions and information and gave Hanover County officials and myself reasons for great concern. One theme repeated several times by the lake property owners was their desire that downstream users "share the pain" during drought conditions. Let me emphasize that Hanover County has already made a major concession and demonstrated its willingness to cooperate by working with those who advocate dam discharge rates below 40cfs. Let me also emphasize that the downstream users and riparian owners have "felt the pain" for 30 years and experienced a net decrease in flow volume due primarily to the lake evaporation that occurs. Per testimony by Mr. White representing Dominion Power, the lake evaporation rate is between 60 and 120 cfs or approximately 40 to 80 mgd. This is water that would have been available for downstream users and riparian owners but for the dam. While there has been a net reduction in downstream flow as a result of the dam construction, Louisa and Spotsylvania residents have enjoyed the tremendous benefit of Lake Anna and the localities enjoy the tax benefits associated with the power plant and water front property. This latter statement is supported by Delegate Dickinson's testimony at the public hearing. He stated that the localities were initially opposed to the power plant (who wants a power plant is their backyard to paraphrase his statement) but they ultimately supported the plant recognizing the tremendous benefits provided by the Lake. Those of us downstream still must live with a nuclear power plant in the neighboring county while receiving none of the tax, property or recreational benefits provided by the Lake.

It is the County's view that low Lake levels primarily impact a minority of property owners that live in the far reaches of the Lake who built fixed docks ignoring the regulatory required release and the natural weather pattern. The level variation is within the design parameters for the Lake. Downstream users and riparian owners have also suffered due to the adverse impact on fisheries resource resulting from the loss of valuable habitat and a Lake discharge rate that is

lower than was recommended thirty years ago by the State agencies responsible for ensuring the health of the aquatic resources. In response to the comments made at the hearing and as a follow-up to my letter dated November 6, 2000, I would like to emphasize the following:

HISTORICAL FLOWS

During the hearing several individuals stated that historical flow rates, prior to the construction of the dam, were lower than present rates. This is a one dimensional argument which focuses on a single condition while ignoring the overall impact and is therefore incorrect. While 40 cfs may be higher than the original 7Q10 (a flow rate that only occurs once every 10 years by definition), river flow rates currently remain low for longer periods of time than they would have under natural (pre-dam) conditions. This is made evident by the fact that discharge rates are regularly dropped to 40 cfs in order to recharge the Lake – the water used to recharge the lake would have been available for downstream users and riparian owners. Dominion Power's documents show the average flow into the Lake and Waste-heat-treatment Facility (WHTF) is 300 cfs but the average release rate is 220 cfs for an average net loss of 80 cfs. Flows prior to construction of the Lake would have flowed unimpeded by the dam and water would not have been lost to evaporation to the extent it is in the Lake and Dominion Power's WHTF. Conversely, Lake Anna residents benefit from the Lake the vast majority of the time – by their own testimony there have only been two instances of a significant drop in the Lake level over the past 25 years. Please be reminded that downstream users' only benefit associated with the Lake is a *consistent* flow in the North Anna River and this benefit only occurs on a ten year statistical frequency.

LAKE ELEVATIONS

From the inception of Lake Anna the anticipated Lake level elevations were known as delineated in the attached chart. Empirical data suggests that actual levels are within the anticipated range predicted by Dominion Power. It is imperative that the action level at which discharge flow is reduced (i.e. <40 cfs) remain at 248' msl. Any level higher than this would put downstream users at risk greater than 13% of the time. This level of risk is contrary to the legislative language that flows be reduced due to "drought conditions", is not fair to downstream users and will be vigorously contested if changed.

DROUGHT CONDITIONS

The action level at which discharge rates are reduced must remain at 248' msl. This level historically occurs approximately twice every twenty years, is consistent with drought frequency experienced in central Virginia and therefore is consistent with the legislative language. Our region of the State has not experienced severe droughts 13% of the time which would be indicated if the action level was raised above 248' msl.

EVAPORATION RATES

I would like to reiterate the relative insignificance of 20 cfs as related to Lake elevations and volume. It appears that the underlying belief among Lake Anna property owners is that a reduction of 20 cfs will go a long way in maintaining Lake levels. The information supplied by Dominion Power indicates that this belief can not be substantiated. The attached chart lists cfs rates, corresponding flow rates in millions of gallons and Lake volume percentages. As outlined in the chart, 20 cfs equates to 13 million gallons per day or 1/100 of one percent of the total Lake volume. Clearly, this amount of water does not significantly impact Lake levels. To further

illustrate this point I will use the last drought period during the summer of 1999 as an example. The total loss of water from the Lake was 40 cfs from the dam discharge and approximately 120 cfs from evaporation. The resulting total is 160 cfs not including water use by Dominion Power, the WHTF, residents around the lake, irrigation and other water uses. The Lake experienced a two-foot drop during the drought period. Strictly from a percentage standpoint, 20 cfs is only 12.5% of 160 cfs; 12.5% of two feet is approximately three inches. Were the Lake to have been three inches higher during the last drought it is doubtful that the impact on property owners would have been minimized. Although the reduction in the Lake discharge from 40 to 20 cfs represents a 50% decrease in downstream flow, clearly inequitable.

LAKE PROPERTY OWNERS

Based upon testimony provided during the public hearing, it is our understanding that property owners at the far-reaches of the Lake are the individuals primarily affected by the decreased Lake level and initiated the effort to reduce discharge flows. Simply put, these individuals elected to purchase property adjacent to areas of the Lake that are shallow. Presumably the value of the property in the coves reflects the fact that there is only shallow water access and the downstream users and riparian owners should not be penalized in order to improve property values. Likewise, if our presumption is incorrect and the property values do not reflect the shallow water condition, the downstream users and riparian owners should not be penalized due to the failure of purchasers to exercise due diligence when making a purchasing decision – the Lake level variation and regulatory required releases are a matter of public record. Statistics related to anticipated Lake levels were available to all potential property owners when they purchased property along the Lakeshore. The estimated levels when the Lake was designed are included on the attached sheet.

ADVERSE IMPACTS DOWNSTREAM

Several Lake Anna property owners stated that they did not trust downstream users to define “adverse impacts” as defined in Dominion Power’s draft VPDES permit. We take strong issue with this statement as we engaged in this effort in good faith and will continue to act in the spirit of cooperation. To further demonstrate this commitment, Hanover County would be willing to contact DEQ personnel whenever we request a change in the Lake discharge rates. However, it is imperative that downstream users be the initiators of discharge rate adjustments when adverse impacts are evident. Response time will be critical when discharge rates are reduced. The decision to increase flows to avert adverse impacts may occur on a weekend or at night. Hanover personnel must have the ability to protect the County’s water treatment plant. It should be noted that Virginia environmental regulations are generally self monitoring with State oversight. That is, permit holders are responsible for adhering to permit conditions and applicable regulations, and also perform required testing and monitoring with the results submitted to the State for review. Permit holders must notify the State in the unlikely event a violation occurs. The authority granted the downstream users in the LLCPP is consistent with other environmental regulations.

7Q10 FLOW

Hanover’s wastewater treatment facilities are considered equally important when assessing the impact of reduced flows from Lake Anna. It is now our understanding that the DEQ will NOT use reduced flow conditions (i.e. <40cfs) as the North Anna River 7Q10 nor will it use reduced flows to establish permit limits. If this is not the case Hanover County adamantly

Mr. Janardan R. Pandey, P.E.
November 21, 2000
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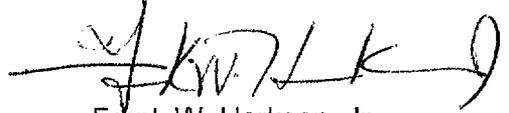
holds that the minimum discharge rate should remain at 40 cfs. Any change in the 7Q10 would potentially burden Hanover residents with major capital expenditures.

DOWN STREAM USERS

Again, we would like to emphatically state that domestic water use/consumption is defined in Virginia State Code as the highest priority beneficial use of water. The North Anna River is a critical supply of drinking water and fire protection to 40,000 Hanover residents. Hanover will do everything in its power to protect the health and wellbeing of its citizens.

In summary, Hanover County remains willing to do what it can to be a good neighbor while at the same time honoring its fiduciary responsibility to safeguard the health, safety and welfare of Hanover County citizens. Human consumption, by definition in the Virginia State Code is the highest priority beneficial use, the draft permit LLCP is protective of such uses and the County supports the draft permit LLCP language. There have been no facts provided that would justify any change to the LLCP.

Sincerely,
DEPARTMENT OF PUBLIC UTILITIES



Frank W. Harksen, Jr.
Director

Cc: Honorable William T. Bolling
Honorable Frank D. Hargrove, Sr.
Hanover County Board of Supervisors
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Sterling E. Rives, III, Hanover County Attorney
John H. Hodges, Hanover County Deputy County Administrator
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Robert A. Ellis, Bear Island Paper Company

**Lake Anna Surface Elevations and Drawdown
Design Basis - Forty Year Plant Life**

Extent of Drawdown	Ft. Below Design (MSL)	Duration Months	Percent of Life
Design	250 MSL	311	64.79%
Maximum	3.0-4.0	3	0.63%
Extreme	2.0-3.0	14.7	3.06%
Nominal	1.0-2.0	32.7	6.81%
Minimal	0.0-1.0	118.6	24.71%

Data Related to Lake Volume

Parameter	cubic feet / second	MGD	Acre-feet	MG	% of Lake Volume At 250' msl
Input	270	176	-	-	0.18%
Evaporation Avg.	59	38	-	-	0.04%
Evaporation Drought	120	78	-	-	0.08%
Discharge - (40 cfs)	40	26	-	-	0.03%
Discharge - (20 cfs)	20	13	-	-	0.01%
Lake Volume (250' msl)			305000	99125	-
Lake Volume (247' msl)			271000	88075	88.85%

Note: Information and the basis of calculations used in this chart were supplied by Dominion - Virginia Power

History of the Minimum Release Rate

A serious conflict between upstream and downstream interests arose when Virginia Power first proposed the North Anna Dam. In 1968, Virginia Power filed an application with the State Water Control Board, and proposed a minimum release rate of 40 cfs from the Lake Anna Dam. The principal focus of the Board's inquiry was the capacity of the Lake to cool the nuclear reactors without violating water quality temperature standards. The Board issued the permit. As more information became available, however, the Board had reason to reconsider its position on the release rate. After much deliberation, the Board's staff, in conjunction with the Virginia Institute of Marine Science and the Department of Conservation and Economic Development, proposed the following conditions to replace the 40 cfs minimum release:

1. Average annual instantaneous low flow release will be not less than 60 cfs during any calendar year.
2. Minimum instantaneous release for the period June through September of any calendar year will be not less than 100 cfs and the minimum instantaneous release for the remaining period of any calendar year will be not less than 40 cfs.
3. Although the low flow release schedule may from time to time be amended in no event should the amended schedule require minimum instantaneous low flow releases to exceed 150 cfs nor should such amended schedule require minimum instantaneous low flow releases to be less than 40 cfs and the amended release schedule should be so arranged that the average annual minimum instantaneous low flow release should not exceed 60 cfs.

See Memorandum for Agenda of November 17 and 18, 1970 State Water Control Board Meeting, from M. A. Bellanca to Board Members, dated November 13, 1970, copy attached.

This memorandum recited a number of reasons for increasing the minimum release schedule. In particular, the 40 cfs release schedule would "modify the salinity distribution in the upper Pamunkey estuary and produce environmental degradation by reducing valuable nursery and spawning areas of certain anadromous fish resulting in the reduction of the number of these fish."

Unfortunately, the agency staff had taken action too late. The State Corporation Commission had entered an order in June 1969 approving a license for the North Anna Dam, and this order incorporated the 40 cfs minimum release rate in which the State Water Control Board had acquiesced in 1968. The Commission's order provides:

"(1) The licensee shall at all times discharge a flow of water through the dam for low flow augmentation in the amount of at least forty cubic feet per second (40 cfs).

See Annual Report of State Corporation Commission (1969), p. 100, copy attached.

The memorandum filed with this order by Commissioner Hooker shows that the same issues were presented to the Commission:

“The statute requires the Commission to balance the conflicting interests of all persons that will or can be affected by the project. The interest of the people below the dam conflicts with the interest of those above the dam. Hence the downstream interest have to be weighed against the upstream interest. The downstream interveners want more than 40 cubic feet per second to be released and the upstream interveners want less than 40 cubic feet per second to be released. The release of more than 40 cubic feet will be more beneficial for fish and game and for possible future factories. The release of less than 40 cubic feet will make the resulting reservoir more valuable for recreation. There is a difference of opinion as to the optimum height of the dam. Two of the Commissioners are convinced that the company’s proposal of 250 feet is better than the 240 feet advocated by Judge Hooker. The higher dam will flood more land, but the lower dam will increase the maximum drawdown by more than a foot. The extra drawdown of one foot would expose considerably wider mud flats in places where the slope of the land is gentle. The suggestion of some of the interveners that the company be required to excavate the sides of the reservoir to make them vertical like the sides of a swimming-pool is not practicable.”

Id., at p. 102.

At the conclusion of the case, despite a number of reservations, the Commission chose to allow the 10-foot higher dam to be constructed. This resulted in a much larger lake. The 40 cfs minimum release rate, coupled with this much larger lake, minimized the effects of drawdowns on lakefront property. This decision was appealed to the Virginia Supreme Court by a number of adversely-affected land owners, but the Court affirmed the Commission’s decision. J.B. Vaughan, et al. v. The Virginia Electric and Power Company, 211Va. 500 (1971).

When the State Water Control Board reconsidered its position on the minimum release in late 1970, it asked the Virginia Attorney General whether it had the power to require the higher release rate. The Board pointed to its authority under § 21(b) of the Water Quality Improvement Act of 1969, which was the predecessor to § 401 of the Clean Water Act. As it still does, this statute authorized the Board to veto or place conditions on federal permits for activities affecting navigable waters. Virginia Power had sought the Board’s § 21(b) water quality certificate to present to the Nuclear Regulatory Commission, whose permit was required for the nuclear power station. In a rather extensive opinion, the Attorney General concluded that the Board had no authority unilaterally to amend its 1968 permit to require the higher release schedule. See Op. Va. Atty. Gen. (1970-71), p. 452, copy attached.

Throughout these proceedings, so far as one can determine, no agency, Commission or court ever suggested a lower instantaneous release than 40 cfs. The State Corporation Commission approved the higher dam (elevation 250 feet vs. 240 feet), which holds back vastly more water and makes the inconvenience of drawdowns quite rare. The downstream users have had to live with far less water during low flow times than any agency would have proposed, had it had the right to reconsider the initial decision on this issue. These downstream users have designed their water intake and wastewater discharge systems around this low flow condition, and cannot get by with less water.

STATE WATER CONTROL BOARD
Richmond, Virginia

Meeting of November 17-18, 1970

Meeting convened at 9:00 a.m. on both days in the Board Meeting Room,
4010 West Broad Street, Richmond, Virginia 23230.

Present for the Board:

- Noman M. Cole, Jr., Chairman
- Robert W. Spessard, Member
- Henry S. Holland, III, Member
- W. H. Singleton, Member
- Mrs. Neil Holmberg, Member
- Andrew McThenia Jr., Member
- Ray Edwards, Member
- R. A. Wright, Special Legal Counsel
- Gerald L. Baliles, Assistant Attorney General
- A. H. Paessler, Executive Secretary
- R. V. Davis, Assistant Executive Secretary
- Mrs. Borgny Durette, Confidential Secretary
- A. W. Hadder, Director, Enforcement Division
- M. H. Robbins, Director, Pollution Abatement Division
- R. R. Jennings, Director, Technical Services
- M. A. Bellanca, Assistant Director, Enforcement Division
- J. H. Roadcap, Jr., Assistant Director, PAD, Sewage Matters
- Jim Strong, Information Officer
- G. E. Moore, Assistant Director, Technical Services
- J. J. Cibulka, Assistant Director, PAD, Engineering Services Program
- R. S. McIvor, Chief, Stream Section, Technical Services
- E. R. Simmons, Area Representative, Richmond Region
- G. T. Yagel, Area Representative, Tidewater Region
- D. C. Prager, Area Representative, Central Region
- C. W. Maus, Chemical Engineer, Northern Region
- P. Mason, Chief, Laboratory Section
- Anne M. Field, Pollution Control Specialist, Enforcement Division
- L. A. Balderson, Pollution Control Specialist, Enforcement Division
- M. H. Thomas, Pollution Control Specialist, Enforcement Division
- H. P. Hoen, III, Pollution Control Specialist, Enforcement Division
- R. E. Bowles, Pollution Control Engineer, Enforcement Division
- C. M. Rush, Pollution Control Technician B, Enforcement Division
- L. G. Lawson, Sanitary Engineer, Pollution Abatement Division
- L. K. Owens, Sanitary Engineer, Southwestern Region
- D. Wheeler, Acting Assistant Director, Technical Services
- S. T. Underwood, Senior Chemist
- R. R. Rocchiccioli, Engineer, Pollution Abatement Division
- E. C. Meredith, Consultant, State Dept. of Health, Division of Engineering
- Norman Phillips, Jr., State Dept. of Health, Bureau of Sanitary Engineering

water control board
 board minutes, 00-0347-
 00-0408
 box 5
 1030851

Agenda Memorandum Available

Minute 72- Prince William County, Dale City--Section 1 - Sewage Treatment Facilities Additions and Modifications

In accordance with memorandum dated November 9, 1970, from James H. Roadcap, Jr., and C. W. Maus, and a letter dated September 28, 1970, from the State Department of Health, the Board approved final plans and specifications on this proposal with the condition that phosphorus removal be 94% or better.

Agenda Memorandum Available

Minute 73 - Virginia Electric & Power Company, North Anna Power Station--Amendment of State Water Control Board Certificate Number 1912 and Issuance of Certificate of Assurance Under Section 21(b) of Public Law 91-224

In accordance with the recommendation set forth in a memorandum dated November 13, 1970, from M. A. Bellanca, the Board directed the staff to amend Certificate No. 1912, issued to Virginia Electric and Power Company on June 19, 1968, to include the flow release schedule agreed upon after investigation and deliberation by the Division of Water Resources, Virginia Institute of Marine Science, and the State Water Control Board. The Board further directed the staff to issue a certificate of assurance in accordance with Section 21(b) of Public Law 91-224 and incorporate therein the aforementioned flow release schedule.

Mr. Noman M. Cole, Jr., Board Chairman, abstained from the proceedings and the vote.

Minute 74 - Ratification of Letter Ballots

The Board ruled that the following actions taken previously by letter ballot be ratified and made a part of these Minutes:

Letter Ballot Available

Eppinger and Russell Company, Chesapeake--Construction Schedule of Improvements to Waste Treatment Facilities--Consideration of granting an extension for preliminary plans. Letter ballot completed October 29, 1970.

No Letter Ballot Available

Fairfax County--Grant Funds--Consideration of grant money previously allocated for the "E" Branch Sanitary Sewer Trunk, the Flatlick Treatment Plant Expansion, and the Middle Cub Treatment Plant Expansion to be utilized as Fairfax County's share for the first 2 contracts for expansion of the Blue Plains Plant, also utilization of the Little Hunting Creek money previously allocated to the County's Interim Program be utilized to increase the scope of the County's Lower Potomac Project. Letter ballot completed November 18, 1970.

Letter Ballot Available

Holiday Inn Trav-L-Park, Virginia Beach--Consideration of preliminary proposal for sewage treatment facilities. Letter ballot completed November 18, 1970.

Letter Ballot Available

Jewell Ridge Coal Corporation, No. 11, Preparation Plant, Jewell Valley--Consideration of refuse dump area and preparing an amended certificate. Letter ballot completed October 21, 1970.

Letter Ballot Available

King George County--Cleve Farm Packing Company, Inc.--Consideration of owner's request for a certificate. Letter ballot completed October 29, 1970.

Letter Ballot Available

Kunzman Apartments, Virginia Beach--Consideration of preliminary proposal for sewage treatment facilities.

STATE WATER CONTROL BOARD

P. O. Box 11143

Richmond, Va. 23230

MEMORANDUM FOR AGENDA OF November 17 and 18, 1970

BOARD MEETING

R-7

SUBJECT: Virginia Electric and Power Company's North Anna Power Station -
Issuance of Certificate of Assurance

TO: Board Members

FROM: M. A. Bellanca

DATE: November 13, 1970

In April of 1968 Virginia Electric and Power Company announced the development of a nuclear power station which would be designed to produce 4 million kilowatts of electricity. Included in the project was the impoundment of 9,000 acres of water on the North Anna River in Louisa County, Spotsylvania County, and Orange County. Additionally 4,000 acres located in Louisa County would be impounded and these facilities would be used as cooling lagoons. Three cooling lagoons will empty their flow into the lower region of the main reservoir at the original water temperature. According to VEPCO all waters that would be discharged downstream would be approximately the same temperature as the water entering the reservoir and would thereby eliminate any thermal pollution.

The proposal included provisions for the release of 40 cubic feet per second for low flow augmentation which at that time was thought to be adequate, however, it was later learned from the Virginia Institute of Marine Science that additional flow release would be necessary in order to prevent degradation of the aquatic environment downstream. On June 19, 1968 the State Water Control Board issued VEPCO Certificate No. 1912.

In March and May of 1969, hearings were conducted before the State Corporation Commission to receive testimony regarding the VEPCO proposal. Following the May hearings, the Commission rendered their decision in favor of granting VEPCO a permit to construct the nuclear power station on the North Anna River.

The Department of Conservation and Economic Development has taken the position that the minimum release from the North Anna station should be increased to 60 cubic feet per second. The Virginia Institute of Marine Science recommended that minimum release from the facility be 100 cfs during the months of June through September and a minimum release of 40 cfs during the remainder of the year.

At the meeting of the State Water Control Board of September 16, 1969 the staff was directed to meet with the staffs of the Virginia Institute of Marine Science and the Division of Water Resources to arrive at a suitable recommendation for low flow releases from the North Anna project. This was done and the following release schedule was decided upon:

November 13, 1970

1. Average annual instantaneous low flow release will be not less than 60 cfs during any calendar year.
2. Minimum instantaneous release for the period June through September of any calendar year will be not less than 100 cfs and the minimum instantaneous release for the remaining period of any calendar year will be not less than 40 cfs.
3. Although the low flow release schedule may from time to time be amended in no event should the amended schedule require minimum instantaneous low flow releases to exceed 150 cfs, nor should such amended schedule require minimum instantaneous low flow releases to be less than 40 cfs and the amended release schedule should be so arranged that the average annual minimum instantaneous low flow release should not exceed 60 cfs.

By memorandum of February 27, 1970 from E. R. Sutherland to the Board, the staff recommended that a hearing be held on April 7, 1970 to consider amending Certificate No. 1912 by incorporating the above release schedule issued to the Virginia Electric and Power Company. The hearing was held and a summary of testimony is attached hereto.

STAFF COMMENTS

In May of 1969 the State Corporation Commission rendered their decision granting VEPCO a permit for construction of a nuclear power station and approving a release schedule of 40 cubic feet per second. Insofar as the upstream interests are concerned, the major objection is that a release of 60 cubic feet per second on an average throughout the year and in particular 100 cfs during the prime recreational season would create excessive drawdown and would thereby result in mudflats which would have an adverse effect on recreation. The staff and legal counsel believe that the matter of the drawdown creating mudflats is not within the jurisdiction of the Water Control Law, but that maintenance of water quality and the aquatic environment is.

In conjunction with this feeling we should reiterate the flow release schedule which had been agreed upon by the staffs of the State Water Control Board, the Division of Water Resources and the Virginia Institute of Marine Science, since it is felt that 40 cfs release schedule as proposed in the original VEPCO project would modify the salinity distribution in the upper Pamunkey estuary and produce environmental degradation by reducing valuable nursery and spawning areas of certain anadromous fish resulting in the reduction of the number of these fish. Changes in natural salinity would create an unsuitable environment for brackish water species of plants which are necessary in the food chain upon which the life of the estuary is dependent.

November 13, 1970

The proposed impoundment is in Section 3 of the York River Basin and carries IIIA standards classification. Under this classification it is required that the maximum temperature not exceed 90°F with a maximum of 5°F rise above the natural temperature. In the reservoir itself, the temperature of the hypolimnion shall not be raised more than 3°F above that which existed before the addition of heat of artificial origin. The increase is to be based on the average of the maximum daily temperature. Discharge of heated effluent into the hypolimnion shall not be approved unless the elimination of adverse effects is demonstrated. A recent study's calculations submitted by VEPCO's consulting engineers shows that a maximum water temperature of 87.9°F would have been reached in July, 1931, the low flow year of record. Calculations were made monthly for the years beginning January, 1931 through December, 1968.

The VEPCO North Anna project has been from its very conception a highly controversial matter particularly over the issue of minimum low flow releases from the reservoir. Because of this the staff wishes to advise the Board that any decision which the Board reaches in this matter will likely result in litigation.

A request has been made of the staff to supply VEPCO with a Certificate of Assurance, in accordance with Section 21 (b) of the Water Quality Improvement Act of 1970. This certificate would state that there is reasonable assurance that as a result of the project contravention of the stream standards will not result.

STAFF RECOMMENDATIONS:

The staff recommends that the Board direct the staff to issue the Certificate of Assurance and incorporate therein the flow release schedule agreed on by the Division of Water Resources, the Virginia Institute of Marine Science and the State Water Control Board.

The staff further recommends that the Board amend Certificate No. 1912 issued to VEPCO to include the flow release schedule shown above.

MAB/clm

State Water Control Board

4010 WEST BROAD STREET

P. O. Box 11143

RICHMOND, VA. 23230

SUBJECT: Summary of Hearing to Consider Amending Certificate Number 1912 Issued to Virginia Electric and Power Company on June 19, 1968

TO: Board Members

FROM: A. H. Paessler

DATE: November 2, 1970

COPIES:

The purpose of the hearing was to consider amending Certificate Number 1912 issued to the Virginia Electric and Power Company on June 19, 1968, to require a minimum flow release sequence from the Company's North Anna Reservoir of 100 cfs during the period from June through September and 40 cfs during the remainder of the year.

Testimony from representatives of the Virginia Institute of Marine Science indicated that the original release schedule of 40 cfs throughout the year would modify the salinity distribution in the upper Pamunkey estuary and produce environmental degradation. Dr. Jackson Davis, head of the Ichthyology Department, stated that valuable nursery and spawning areas of certain anadromous fish would be reduced, resulting in a reduction in the number of these fish. Dr. Marvin Bass indicated that modifications in the natural salinity regime would most likely result in the elimination of natural freshwater flora indigenous to the upper Couseaic Marsh, Cohoke Marsh, West Island, and Pamunkey Indian Reservation Marshes and that the water quality created would not be suitable for brackish water species of plants. The resulting decline of plants would cause a modification in the food chain on which animal life of the estuary is dependent. Both Dr. Davis and Dr. Bass indicated that they felt that the new release schedule would not result in degradation of natural conditions.

A letter dated March 30, 1970, from Milton T. Hickman, Commissioner, Marine Resources Commission, stated that the testimony of the Virginia Institute of Marine Science represents the position of the Marine Resources Commission.

Marvin Sutherland, Director, Department of Conservation and Economic Development, reaffirmed the Department's support of the October 28, 1969 agreement between the Virginia Institute of Marine Science, the State Water Control Board, and the Department of Conservation and Economic Development. He requested that the Board amend Certificate Number 1912 to include the proposed release schedule.

The position of the FWQA, as set forth in letter dated April 14, 1970, from David Dominick, Commissioner, concurs with the findings of the Virginia Institute of Marine Science. They feel that the release schedule of 40 cfs is inadequate to protect existing water uses in the upper Pamunkey estuary.

Upstream interests (including the Boards of Supervisors of Spotsylvania, Orange, and Louisa Counties; the Town of Mineral; Delegate D. French Slaughter, representing Orange, Madison and Culpeper Counties; Delegate Benjamin Woodbridge, Spotsylvania County; the Louisa County Planning Commission; and the Louisa County School Board and Mineral Industries), do not feel that there should be any amendment to the present release schedule. These upstream interests feel that requiring a higher minimum flow will result in more drawdown in the reservoir and will create mudflats.

They feel that a substantial fluctuation in the shoreline will be detrimental to the lake's recreational value and other possible benefits that would be derived from the impoundment.

Several of the representatives of upstream interests pointed out that flows during the summer can be as low as 1 cfs. They stated that they feel a guaranteed minimum flow of 40 cfs during the summer will result in a higher summer flow than might ordinarily be expected.

During the hearing Mr. Sutherland stated that, based on flow data recorded for 38 to 40 years, the minimum drawdown, once in 38 to 40 years, related to a 60 cfs release is 4.5 feet making a difference of a foot and a half once in 20 years or a difference of a foot once in 10 years. Mr. Sutherland also stated that in the judgment of the Board of Conservation and Economic Development, this is one of the most stable pools in the east, even with a 60 cfs release and that the Board feels it reached and recommended a reasonable balance between advantages to the upstream and downstream communities.

Mr. John Paul Causey, Commonwealth Attorney for King William County, appearing on behalf of the Boards of Supervisors of King William, New Kent, and Gloucester Counties, requested that the Board consider favorably the proposed amendment on the grounds of public interest involved. He also stated that the York County Board of Supervisors had adopted a resolution urging the Board to consider favorably the proposed amendment.

Correspondence from Mr. Causey following the hearing suggested amending the minimum flow requirements for the fill period and a reasonable time thereafter. He felt that this would allow time for assessing possible downstream damage from a lower flow and also enable upstream interests to document, from actual experience, the effects of the drawdown resulting from an increased minimum flow.

Correspondence from the King and Queen County, Board of Supervisors also urged that the rate of flow during the fill period be adequate for protection of downstream wetlands and protection of ecology.

AND THE COMMISSIONER having considered the application herein, the investigation made by the Commissioner of Banking and the evidence introduced at the hearing, a majority of the Commission, Commissioner Catterall dissenting, is of the opinion and finds, that public convenience and necessity will be served by permitting the applicant to establish a branch office at 621 West Center Street in the Town of Manassas, Prince William County, Virginia, and that the applicant should be authorized to establish said branch office upon the condition hereinafter stated.

IT IS, THEREFORE, ORDERED that Prince William Savings and Loan Association be, and it is hereby, authorized to establish a branch office at 621 West Center Street in the Town of Manassas, Prince William County, Virginia, provided the applicant establishes said branch office and opens it for business within nine months from this date and upon the opening of said office, it notify the Commissioner of Banking the date said branch office was opened for business.

CASE NO. 18669

Application of:

Virginia Electric and Power Company

For a license to construct a dam across the North Anna River in Louisa and Spotsylvania Counties and associated dikes under Chapter 7 of Title 62.1 of the Code of Virginia.

ORDER OF JANUARY 30, 1969, O. B. 58, p. 61

ON JANUARY 29, 1969 came Virginia Electric and Power Company and filed its application and exhibits therewith for a license to construct a dam across the North Anna River in Louisa and Spotsylvania Counties and associated dikes. The dam will create a reservoir to provide cooling water for the North Anna Power Station to be constructed by the applicant on the southern shore of the reservoir approximately 5.7 miles upstream from the dam.

UPON CONSIDERATION OF WHICH IT IS ORDERED:

(1) That this proceeding be instituted, assigned Case No. 18669, docketed and set for hearing in the Courtroom of the State Corporation Commission, Blanton Building, Richmond, Virginia, at 11:00 A.M. on March 4, 1969, at which time and place the applicant and any other interested person, firm, association or corporation shall be given an opportunity to present facts, evidence and argument for and against the granting of the application;

(2) That the application give notice to the public of its application by publication once in each week for four successive weeks prior to the date set for hearing in a newspaper or newspaper of general circulation published in the Counties of Orange, Louisa, Spotsylvania, Caroline, Hanover, King William, King and Queen, Gloucester, New Kent, James City, and York, and if there be no such newspaper, then by publishing in a newspaper of general circulation in said counties, the following:

NOTICE TO THE PUBLIC

Notice is hereby given that on January 29, 1969, the Virginia Electric and Power Company filed with the State Corporation Commission its application for a license to construct a dam across the North Anna River in Louisa and Spotsylvania Counties, Virginia, and associated dikes, approximately four miles north of the Town of Bumpass, Virginia, and approximately one-half mile upstream from the point at which Virginia Route 601 crosses the North Anna River. The dam will create a reservoir to provide cooling water for the North Anna Power Station to be constructed by the Company on the southern shore of the reservoir about 5.7 miles upstream from the dam. The reservoir will be located in Louisa, Spotsylvania and Orange Counties. It will extend approximately 19 miles upstream from the dam site and will have a surface area of approximately 9600 acres.

Notice is further given that the State Corporation Commission has set March 4, 1969 as the date for a public hearing on the application in its Courtroom, Blanton Building, Richmond, Virginia, at 11:00 A.M., and at such public hearing the applicant and any other interested person, firm, association or corporation shall be given an opportunity to present facts, evidence and argument for and against the granting of the application.

Descriptions, maps and plans of the proposed development are on file in the offices of the State Corporation Commission at Richmond, Virginia, and in the offices of the Director of the Department of Conservation and Economic Development at Richmond, Virginia, and also in the offices of the Virginia Electric and Power Company, 700 East Franklin Street, Richmond, Virginia, at any of which places they may be seen and examined by any interested person.

VIRGINIA ELECTRIC AND POWER COMPANY

and furnish proof of the giving of such notice at the time of the hearing;

(3) That the applicant file a copy of its application and exhibits therewith and a copy of this order with the Director of Conservation and Economic Development on or before February 8, 1969.

ORDER OF APRIL 2, 1969, O. B. 58, p. 192

THIS APPLICATION was heard on March 4th and 5th, 1969, pursuant to the order of the Commission of January 30, 1969. At the conclusion of the hearing on March 5th, the Commission took this matter under advisement. The Commission having considered the testimony and evidence presented at the hearing on March 4th and 5th is of the opinion that further investigation of this application should be made. To this end, the Commission has engaged the services of an independent consulting engineer. Therefore, another hearing on this application will be necessary to receive his report and consider any other relevant testimony in this matter.

THEREFORE, IT IS ORDERED that an additional hearing in this proceeding be set on May 1, 1969 in the Courtroom of the State Corporation Commission, Blanton Building, Richmond, Virginia at 10:00 A.M. at which time the Commission will receive the report of its consultant and such other relevant testimony as may be presented.

ORDER OF APRIL 15, 1969, O. B. 58, p. 230

BASED ON the estimated time requirements of the independent consulting engineer to complete his survey and report, the Commission finds that the May 1, 1969 hearing date set for receiving this report must be changed.

THEREFORE, IT IS ORDERED that the hearing set for receiving the report of the Commission's consultant and such other relevant testimony as may be presented, be changed from May 1, 1969 to May 21, 1969 at 10:00 A.M. in the Courtroom of the State Corporation Commission, Blanton Building, Richmond, Virginia.

ORDER OF JUNE 12, 1969, O. B. 58, p. 353

THE APPLICATION herein was heard on March 4 and 5, 1969, and taken under advisement, it appearing that the notice to the public required to be published by the Commission's order of January 30, 1969, had been given as required by that order, and that a copy of the application herein and the exhibits therewith and a copy of the Commission's order of January 30, 1969 had been filed with the Director of Conservation and Economic Development of the Commonwealth of Virginia within ten days after filing said application with the Commission. On April 2, 1969, the Commission entered an order setting an additional hearing in this proceeding for May 1, 1969. By order of April 15, 1969 the May 1, 1969 hearing date was changed to May 21, 1969. Further hearings were held on May 21, 22, and 23, 1969. At the hearings in March and May the applicant was repre-

sented by George D. Gibson, Evans B. Brasfield, Guy T. Tripp, III, and Turner T. Smith, Jr., its counsel; interveners were represented by S. Page Higginbotham, counsel for certain landowners, C. Pembroke Pettit for the Louisa County Board of Supervisors, W. W. Whitlock for the Town of Mineral, Mineral Industrial Development Corporation, and Louisa County Industrial Development Corporation; the Commission was represented by its counsel. At the hearings in May additional interveners were represented: C. Champion Bowles, Jr., counsel for the Town of Louisa, W. Kendall Lipscomb, Jr. for New Kent County, Malcolm E. Ritsch, Jr. for Louisa County Water Authority, and D. Nelson Sutton, Jr. for The Chesapeake Corporation of Virginia.

NOW ON THIS DAY the Commission having considered the application filed herein and the evidence introduced in this proceeding and having weighed all of the respective advantages and disadvantages from the standpoint of the State as a whole and the people thereof and having made appropriate investigation as to the effect of the proposed construction upon cities, towns and counties and upon the prospective development of other natural resources and the property of others, a majority of the Commission is of the opinion and finds from all the evidence in this proceeding, in pursuance of the policy of the State of Virginia as expressed in Chapter 7 of Title 62.1 of the Code of Virginia (1950):

(1) That the plans of the applicant provide for the greatest practicable extent of utilization of the waters of the State for which this application is made;

(2) That the applicant is financially able to construct and operate the proposed dam and associated works;

(3) The general public interest will be promoted by the consummation of the proposed project; and

(4) That the applicant should be licensed pursuant to Chapter 7 of Title 62.1 of the Code of Virginia (1950) for the term therein specified to construct a dam across the North Anna River in Louisa and Spotsylvania Counties, Virginia and associated dikes substantially in accordance with the general and preliminary maps, plans and specifications set forth in the application and the exhibits and evidence in this proceeding, but subject to the limitations, restrictions, requirements and rights reserved to and on behalf of the Commonwealth of Virginia in Chapter 7 of Title 62.1 of the Code of Virginia (1950) and to all of the conditions, restrictions, limitations and requirements set forth in this order.

IT IS THEREFORE ORDERED that Virginia Electric and Power Company be licensed and authorized to construct, operate and maintain a dam across the North Anna River between Louisa and Spotsylvania Counties and associated dikes substantially in accordance with the general and preliminary maps, plans and specifications set forth in the application and exhibits and the evidence in this proceeding for the term and subject to the restrictions imposed by Chapter 7 of Title 62.1 of the Code of Virginia (1950).

IT IS FURTHER ORDERED that the license and authority herein granted be subject, in addition to those imposed by law, to the following conditions, limitations and restrictions:

(1) The licensee shall at all times discharge a flow of water through the dam for low flow augmentation in the amount of at least forty cubic feet per second (40 cfs).

(2) During the period when the reservoir is being filled, the licensee shall at all times release a flow of water through the dam of not less than one hundred and fifty cubic feet per second (150 cfs) during the months of February through June in 1971 and 1972 unless otherwise ordered by the Commission.

(3) That the maps, plans and specifications, submitted with and as a part of the application for the license, be approved and made a part of the license, and no substantial change shall hereafter be made in said maps, plans and specifications until such change shall have been approved by the Commission.

(4) That the proposed construction shall be commenced before the expiration of two years from the date of this order, unless such time be extended; and that the project be completed before the expiration of five years from the date of this order, unless such time be extended.

(5) That this proceeding be continued generally on the docket of the Commission for such other and further action as the Commission may take herein.

(6) That an attested copy hereof be sent to the applicant as and for the license herein granted, and an attested copy be sent to counsel for each of the parties appearing herein, and to the Chief Engineer-Electric Utilities of the Commission.

HOOKEE, *Commissioner*, dissents for the reasons stated in the memorandum filed herewith.

APPLICATION OF VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. 18669

HOOKEE, *Commissioner*, Memorandum of Dissent:

As to the elevation of the reservoir and the lagoons, I am of the opinion that a reservoir elevation of 240 feet above mean sea level (10 feet lower than proposed) and a lagoon of approximately 245 feet (6½ feet lower than that proposed) will meet every requirement of the applicant.

Counsel for the applicant, in his closing argument, stated that while not forsaking his original position, as an alternative, that 241 feet for the dam and 251 feet for the lagoon would be acceptable. This would result in an increase in the maximum drawdown of slightly in excess of one foot and will not have any adverse effect on recreation.

It is obvious that a 10 foot reduction in the height of the dam (which is a mile wide) would reduce the cost of construction substantially. The Commission is obligated to require utilities to operate as economically as possible.

The Commission certainly should not approve a higher dam than is needed to meet the reasonable requirements of the applicant. The ultimate effect of this decision is to give to the applicant the right to exercise the power of eminent domain. The law of eminent domain is a drastic law and should never be permitted to be exercised unless it is an absolute necessity required to adequately meet the demands of the public.

Opinion, CATTERALL, *Chairman*.

The Commission's final order of June 12, 1969, authorized the Virginia Electric and Power Company to impound the waters of the North Anna River to the extent necessary for the operation of an atomic energy plant for the generation of electricity.

§62.1-83 of the Code of Virginia forbids the construction without a license of two kinds of dams: (1) "any dam across or in the waters of the State" or (2) "a dam . . . for the purpose of generating hydroelectric energy." Counsel for appellants takes the position that this section does not apply to this case because the dam is not to be for the purpose of generating hydroelectric energy. The water is to be used not as a source of energy but for the purpose of cooling the plant. Our conclusion of law is that the section does apply to this case under both (1) and (2):—(1) because the North Anna River comes within the definition of "waters of the State" and (2) because an atomic plant has the same impact on all the relevant statutory provisions as a hydroelectric plant.

The relevant statutory provisions are enumerated in §62.1-83:

"Before acting upon any application, the Commission shall weigh all the respective advantages and disadvantages from the standpoint of the State as a whole and the people thereof and shall make such investigation as may be appropriate as to the effect of the proposed construction upon any cities, towns and counties and upon the prospective development of other natural resources and the property of others."

The statute requires the Commission to balance the conflicting interests of all persons that will or can be affected by the project. The interest of people below the dam conflicts with the interest of those above the dam. Hence the downstream interests have to be weighed against the upstream interests. The downstream interveners want more than 40 cubic feet per second to be released and the upstream interveners want less than 40 cubic feet per second to be released. The release of more than 40 cubic feet will be more beneficial for fish and game and for possible

future factories. The release of less than 40 cubic feet will make the resulting reservoir more valuable for recreation. There is difference of opinion as to the optimum height of the dam. Two of the Commissioners are convinced that the company's proposal of 250 feet is better than the 240 feet advocated by Judge Hooker. The higher dam will flood more land, but the lower dam will increase the maximum drawdown by more than a foot. The extra drawdown of one foot would expose considerably wider mudflats in places where the slope of the land is gentle. The suggestion of some of the interveners that the company be required to excavate the sides of the reservoir to make them vertical like the sides of a swimming-pool is not practicable.

Finally, there is a conflict between the upstream landowners whose lands will be flooded and those whose lands will not be flooded. The value of the land fronting on the artificial lake will increase greatly. The land taken and damaged will have to be paid for by the power company, and we have to presume that fair compensation will be paid. Money compensation covers only economic loss, and we sympathize as deeply as Judge Hooker with the farmers who will lose their ancestral homes. They are the 68 interveners who have appealed our decision. Nearly every condemnation of land for a public purpose, whether for a power plant, a power line, an urban expressway or urban "renewal" leaves private tragedy in its wake. Against the devastating effect that this dam will have on the 68 interveners we have to weigh the needs of the consumers of electricity. Virginia Electric and Power Company supplies electricity directly to about 800,000 residential, 90,000 commercial and 750 industrial consumers, and indirectly to the customers of the electric cooperatives and the dwellers in public housing projects. All told, many more than a million Virginia consumers would suffer if there should be a shortage of electricity. The panic that swept through New York City last summer illustrates the potential threat. The Consolidated Edison Company is endlessly vilified by New Yorkers for not building more generating plants, and is prevented from building more generating plants by endless litigation instituted by New Yorkers. The consumers' demand for electricity is increasing so rapidly that Veeco must double its plant every eight or ten years. Simultaneously, the consumers (everybody is a consumer) demand that the necessary power plants and transmission lines be located anywhere except where the company plans to locate them. Last summer the most violent denunciations in New York's crisis were directed by New York's major and the "New York Times" against the New York Public Service Commission for not having forced the power company to build more power plants.

It takes years to build a large generating plant, and the companies must make their plans for new construction years before the increased demand for electricity can be estimated with complete accuracy. To us it is clear that the North Anna plant is essential to the welfare of the consumers in Virginia and that the work should go forward as speedily as possible. The decision of this Commission is not the last word on the subject. The United States Army Corps of Engineers has to be satisfied that the dam will not hurt the navigable waters of the United States, and the Atomic Energy Commission has to be satisfied that the plant complies with its strict requirements for the safety of the public.

We have given this application our most careful consideration in accordance with the statutory requirements. Some of the interveners urged upon us the desirability of postponing decision for a year or two in order to obtain more information about the dam's possible effect on the estuarine ecology. In the words of §62.1-88: ". . . from the standpoint of the State as a whole and the people thereof . . ." any delay could have disastrous consequences.

DILLON, *Commissioner*, concurs.

HOOKE, *Commissioner*, dissenting:

I concur with my fellow Commissioners in their finding that the project as proposed by the Company meets the requirements of the statute and that the Commission has the authority under the Water Power Act to license this project. I also am of the opinion that the applicant has shown the need for the electric power to be generated at this facility and agree that the North Anne Plant is essential to the welfare of consumers in Virginia and that the applicant should be granted a license to construct and operate a dam.

My dissent is predicated on my opinion that the project as proposed by the applicant will use more land than necessary to accomplish its goals. The Water Power Act in §62.1-90 states:

"If the Commission be of the opinion, from the evidence before it, that the prospective scheme of development is inadequate or wasteful . . . the Commission may require the applicant to modify the plans for the development in such manner as may be specified by the Commission. . . ."

A design that requires more land to be taken by condemnation than would be needed if another design were followed can only be described as wasteful. Land is a precious commodity and the law of eminent domain is a drastic law. I believe that it is incumbent upon this Commission to require the applicant to take as little land as may be required to meet the essential needs of the project. That the Commission has the authority to require a change in the design plans is abundantly clear in §62.1-90.

After the conclusion of the hearings on March 4th and 5th, I visited the site of the proposed dam and reservoir. This trip was made on March 19, 1969. At my suggestion the Commission agreed to engage the services of a qualified consultant. Dr. Frank L. Parker of Vanderbilt University was contacted and he met with the Commission on April 1, 1969. At that time the Commission agreed unanimously to engage Dr. Parker's services. The assignment given to Dr. Parker was to study the application in this case and to place "primary emphasis on examination of the area of reservoir, surface and corresponding elevation required . . ." (Tr. p. 54, 55).* The principal reason for hiring Dr. Parker was to make an independent study of the application to see if the amount of land required by the Vepco design could be reduced.

Dr. Parker's report concluded (Exhibit 17, p. 18) that it would be feasible to build the dam for a normal operating reservoir of 240 feet, 10 feet lower than that proposed by Vepco. This testimony was not refuted. Counsel for the applicant, in his closing argument, stated (Tr. p. 485) that their calculations showed that a reservoir level of 241 feet and a lagoon elevation of 251 feet would comply with the thermal limitations of the State Water Control Board. Vepco's objections to any re-design of the project were based on the increased operating costs occasioned by a two-level project and by additional construction cost. Further studies by Dr. Parker have shown that the project can be built to the full projected electrical capacity with the reservoir elevation at 240 feet and the lagoon elevation at 245 feet. This will reduce the extra operating expense caused by pumping by approximately 50%. Much of the additional capital expense which Vepco claimed would be caused by additional surveys and redesign of the project as originally proposed.

It is obvious that a project must be sufficiently planned and the design detailed enough prior to application for a license to give a clear and full understanding of the proposed development. The cost of this design is a normal cost of business. It is also obvious that the Commission has the authority in §62.1-90 to require the applicant to modify the plans. The cost of the change of design is also a normal part of doing business. If the Commission were to refuse to require a change in design solely because the utility had already incurred expense for the original plans, then the Commission would not be fulfilling its mandate as set forth in §62.1-90.

The Commission hired an expert engineer to advise it on this project generally and on the size and elevation of the reservoir specifically. Having received advice from our expert that the purposes for which the project is designed could be fulfilled and use less land, I am of the opinion that the advice should be followed unless there are compelling reasons otherwise. I do not believe that the applicant has shown these compelling reasons and therefore I do not concur with the majority opinion.

* This and all other references to the transcript in this dissenting opinion refer to the transcript taken on May 21-23, 1969.

Richmond

J. B. VAUGHAN, ET AL. v. VIRGINIA ELECTRIC AND POWER COMPANY.

January 18, 1971.

Record No. 7373.

Present, Snead, C.J., P'Anson, Carrico, Gordon and Harman, JJ.

(1) Waters of State—Dam—Authority of State Corporation Commission.

(2) Corporation Commission—Dam Project—Land Acquisition.

1. As to "waters of State" authority of State Corporation Commission extends to licensing of any dam proposed to be constructed in or across such waters regardless of purpose for which dam is to be used. Dam project to generate energy for interstate transmission affects the interests of interstate commerce which constitutes stream "waters of State".
2. Issue before State Corporation Commission was whether license to construct dam should be granted. Question of extent and nature of land to be acquired not proper for consideration by Commission. These matters were properly left for determination by appropriate court in eminent domain proceedings.

Appeal from an order of the State Corporation Commission.

*Affirmed.**S. Page Higginbotham (Higginbotham & Fry, on brief), for appellants.**George D. Gibson (Evans B. Brasfield; Guy T. Tripp, III; Hunton, Williams, Gay, Powell & Gibson, on brief), for appellee.*

CARRICO, J., delivered the opinion of the court.

The principal question involved in this appeal is whether the State Corporation Commission had authority to grant Virginia Electric and Power Company a license to construct a dam across the North Anna River in Louisa and Spotsylvania counties.

VEPCO filed an application praying for issuance of the license. J. B. Vaughan and various other landowners affected by the proposed construction intervened in protest against the project. After a hear-

ing, the Commission granted the license. The protesting intervenors are here on an appeal of right.

The evidence before the Commission showed, so far as is pertinent here, that VEPCO proposed to construct an electric generating station on the south shore of the reservoir to be created by the dam in question. The station would employ nuclear fuel to create steam and thereby supply the energy to rotate turbines for the production of electricity. Water from the reservoir would be used to cool the closed service system furnishing steam to the turbines. The water, which becomes heated in such a process, would then be diverted to lagoons to be cooled before being returned to the reservoir. Thus, the impounded water would be used not to rotate turbines for the production of electricity, as is true in a conventional hydroelectric plant, but for cooling purposes in the nuclear plant.

[1] VEPCO contends that the Commission had authority to grant it a license under the provisions of Code §§ 62.1-83 and 62.1-85. Those sections provide that a license is required from the Commission before any dam may be constructed "across or in the waters of the State" or "in any rivers or streams within the State when such dam is for the purpose of generating hydroelectric energy for use or sale in public service."

The protesting intervenors contend that under the foregoing statutory language, the Commission, in this type of case, has authority to license dams for hydroelectric purposes *only* and that since VEPCO's proposal is for a project employing nuclear energy, the Commission's action in issuing the license was void. This contention, however, disregards the distinction between the terms "waters of the State" and "waters within the State" in the statutory scheme fixing the authority of the Commission.

The term "waters of the State" is defined in Code § 62.1-81 to include navigable streams and "any stream or part thereof . . . in which the construction of any dam or works as authorized by this chapter would affect the interests of interstate or foreign commerce." While the term "waters within the State" is not defined, it is obviously meant to include all streams not described as "waters of the State."

Thus, with respect to the licensing of dam projects, the legislature in the above cited Code sections has recognized two classes of waters: those "within the State" and those "of the State." As to "waters within the State," the authority of the Commission is limited to the licens-

ing of a dam for hydroelectric purposes only.¹ But as to "waters of the State," the authority of the Commission extends to the licensing of *any* dam proposed to be constructed in or across such waters regardless of the purpose for which the dam is to be used.

Therefore, since the project proposed by VEPCO would not be for hydroelectric purposes, the crucial inquiry becomes: Is it a "water of the State" that VEPCO proposes to dam in the development of its project?

The evidence before the Commission showed that the electric energy to be generated at the proposed project would flow through VEPCO's interstate transmission network. The rule is that projects generating energy for the interstate transmission of electricity affect commerce among the states. *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 94 (1965). It follows that construction of the dam in and across the North Anna River would "affect the interests of interstate or foreign commerce" within the meaning of Code § 62.1-81 and constitute that stream a water "of the State" under Code § 62.1-83. These circumstances required licensing of the project pursuant to Code § 62.1-85, thus vesting authority in the Commission to grant the license in question to VEPCO.

[2] The protesting intervenors also contend that in granting the license, the Commission should have limited what land VEPCO may take in fee in eminent domain proceedings for use in the project. It is argued that the "area around the plant site and the dam site" is all that should be taken in fee and that only an easement should be acquired "for the reservoir and the flood area and the maintenance area."

When this point was raised below, the Commission ruled that the question of the extent and nature of the interests to be acquired for the proposed project was not a proper one for its consideration. We agree. The only issue before the Commission was whether VEPCO should be licensed to construct the dam. The Commission's action in granting the license did not determine how much land and what interest therein VEPCO might acquire. Those are matters properly left for determination by the appropriate court in eminent domain proceedings.

The final order of the Commission will be affirmed.

Affirmed.

¹ In the view we take of the case, we need not consider VEPCO's alternative contention that the Commission has permissive authority under Code § 62.1-99 to license dams in "waters within the State" for other than hydroelectric purposes.

now is codified as Chapter 3.1 of Title 62.1 of the Code of Virginia, as amended. In responding to your inquiry it is necessary to review three particular aspects of the Act: (A) State policy; (B) State control; (C) Board powers.

(A) In Section 62.1-44.2 of the Code of Virginia the General Assembly declared:

" . . . It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) *protect* existing high quality State waters and restore all other State waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them, (2) *safeguard* the clean waters of the State from pollution, (3) *prevent* any increase in pollution, and (4) *reduce* existing pollution, in order to provide for the health, safety, and welfare of the citizens of the Commonwealth." (Emphasis added.)

(B) Section 62.1-44.4 of the Code states clearly:

"(1) . . . The right and control of the State in and over all State waters is hereby expressly reserved and reaffirmed"

(C) The State Water Control Board was created by the General Assembly as the mechanism by which State policy would be executed. Section 62.1-44.15 of the Code outlines some of the *broad powers* of the Board. They include, among others, the authority to *exercise general supervision and control over the quality of all State waters*, to study and investigate all problems concerned with the quality of State waters, to *establish quality standards*, to conduct scientific experiments, to issue certificates for discharge of sewage, industrial and other wastes, to make investigations and inspections, to *insure compliance with Board orders and rules*, to adopt rules governing Board procedure, to *issue cease and desist orders* to owners who are permitting or causing water pollution, to adopt such regulations as it deems necessary to enforce general water quality management programs of the Board, to investigate any large-scale killing of fish, to establish policies and programs for effective area-wide or basin-wide water quality control and management, and to *establish requirements for the treatment of sewage, industrial wastes and other wastes* that are consistent with the general purposes of the State Water Control Law. In addition, the Board is authorized to *enforce its rules, regulations or orders by injunction, mandamus or other appropriate remedy*. See § 62.1-44.23 of the Code.

Based upon the foregoing, I am of the opinion that the State Water Control Board is empowered to adopt and enforce the water quality standards to which you refer in your letter.

**WATER CONTROL BOARD—Powers to Control Stream Flow Releases—
Defined.**

February 5, 1971

MR. A. H. PAESSLER, Executive Secretary
State Water Control Board

This will acknowledge receipt of your letter of January 29, 1971, in regard to the powers of the State Water Control Board. The letter states as follows:

"On June 12, 1969 the State Corporation Commission, following hearings, granted the Virginia Electric and Power Company a license to construct a nuclear power station on the North Anna River. The license contained provisions setting forth a minimum release schedule for flows from the impoundment.

"On April 7, 1970 the State Water Control Board convened a hearing in accordance with Section 62.1-27(5) of the State Water Control Law for the purpose of determining if Certificate #1912, issued to the Virginia Electric and Power Company on June 19, 1968, should be amended to incorporate a release schedule which provided for higher minimum releases than those established by the State Corporation Commission.

"By letter of June 25, 1970 Governor Holton designated the State Water Control Board to act as the State agency to certify to Federal licensing agencies, under Section 21(b) of Public Law 91-224, that activities conducted by licensees would be such that there is reasonable assurance that such activities will not cause a contravention of water quality standards.

"At its meeting on November 18, 1970, the State Water Control Board amended Certificate #1912, issued, under the State Water Control Law to the Virginia Electric and Power Company on June 19, 1968, and in addition, directed that the staff issue, in accordance with Section 21(b) of Public Law 91-224, a certificate of assurance certifying that the proposed construction and operation of the North Anna Power Station would not result in contravention of water quality standards. Both of the above certificates contain provisions for higher minimum flow releases than those set forth in the State Corporation Commission's license.

"The State Water Control Board is concerned about present and future jurisdictional disputes between State agencies in matters such as these. If the Board acted improperly, it may wish to reconsider its decision and the Board has requested that we obtain an opinion from you concerning the following:

"1. Did the State Water Control Board have the legal authority to act in amending Certificate #1912 issued to the Virginia Electric and Power Company on June 19, 1968 by requiring an average instantaneous flow release schedule greater than the minimum average instantaneous flow release schedule provided in the license to construct issued by the State Corporation Commission on the grounds that these greater releases were necessary to protect the water quality downstream from the North Anna Power Station?

"2. Regardless of your findings in 1, above, does the Board have legal authority to issue a certificate of assurance under Section 21(b) of Public Law 91-224 and to incorporate in that certificate a requirement of an average instantaneous flow release schedule greater than the schedule set forth in the license issued by the State Corporation Commission on the grounds that the greater releases are necessary to insure protection of water quality downstream?

"Your early response to our request will be appreciated."

Your questions require the consideration of an apparent discrepancy between the provisions of Chapter 3.1 of Title 62.1 of the Code of Virginia (1950), as amended (Water Control Law) and those of Chapter 7 of Title 62.1 (Water Power Act). The discrepancy takes on added significance in view of the problems associated with increasing total energy consumption by an expanding population and the intensified efforts to improve the quality and purity of the waters of the Commonwealth.

The policy of the State regarding water quality and the purpose of the recently amended State Water Control Law are stated in § 62.1-44.2 of the Code:

"It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality State waters and restore all other State waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish,

which might reasonably be expected to inhabit them, (2) safeguard the clean waters of the State from pollution, (3) prevent any increase in pollution, and (4) reduce existing pollution, in order to provide for the health, safety, and welfare of the citizens of the Commonwealth."

In addition, § 62.1-44.4 provides that no right exists to continue existing quality degradation of the waters of the State; that the right and control of the State over State waters is expressly reserved and reaffirmed; that those waters whose existing quality is better than established standards will be maintained at that high quality, and that where variances from such are allowed the necessary degree of waste treatment to maintain high water quality will be required wherever physically and economically feasible.

In order to implement the announced policy of the State and the objectives of the Water Control Law, the State Water Control Board is granted broad powers under § 62.1-44.15 of the Code. These powers include, among others, the authority: to exercise general supervision and control over the quality of all State waters, to study and investigate all problems concerned with the quality of State waters, to establish quality standards, to conduct scientific experiments, to issue certificates for discharge of sewage, industrial and other wastes, to make investigations and inspections; also, to insure compliance with Board orders and rules, to adopt rules governing Board procedure, to issue cease and desist orders to owners who are permitting or causing water pollution, to adopt such regulations as it deems necessary to enforce general water quality management programs with the Board, to investigate any large-scale killing of fish, to establish policies and programs for effective area-wide or basin-wide water quality control and management; and to establish requirements for the treatment of sewage and industrial wastes and other wastes that are consistent with the general purposes of the State Water Control Law.

The General Assembly has stated that the conservation and utilization of the otherwise wasted energy to be derived from water resources is also a concern of substantial magnitude. In this regard § 62.1-80 of the Water Power Act declares the policy of the State to be:

" . . . to encourage the utilization of the water resources in the State to the greatest practicable extent and to control the waters of the State, as herein defined, and also the construction and reconstruction of a dam in any rivers or streams within the State for the generation of hydroelectric energy for use or sale in public service, all as hereinafter provided."

The Water Power Act confers upon the State Corporation Commission jurisdiction over all dams across or in the waters of the State as defined in § 62.1-81 of the Code. See also *Vaughn v. VEPCO*, — Va. —, — S.E.2d — (1971). Section 62.1-82 provides that "[t]he control and regulation on the part of the State of the development of the waters of the State shall be paramount, and shall be exercised through the agency of the State Corporation Commission"

Correspondingly, § 62.1-83 of the Code provides, among other things, that no corporation proposing to construct or reconstruct any dam across or in the waters of the State shall undertake the same without first having complied with Chapter 7 of Title 62.1 of the Code. In addition, § 62.1-85 of the Code requires the obtaining of a license from the State Corporation Commission prior to construction, the application for which "shall be accompanied by such maps, plans and other information as may be necessary to give a clear and full understanding of the proposed scheme of development, and of dams, generating stations or other major structures, if any, involved therein."

In granting such licenses, the State Corporation Commission is authorized

by § 62.1-91 of the Code to impose “. . . such terms and conditions with respect to the character of construction, operation and maintenance of the proposed dam and works as may be reasonably necessary in the opinion of the Commission in the interest of public safety” More importantly, this same section authorizes the State Corporation Commission to “. . . determine what provision, if any, shall be made by the licensee to prevent the unreasonable obstruction of then existing navigation or *any unreasonable interference with stream flow.*” (Emphasis supplied.)

Any apparent discrepancy with respect to the authority of the State Water Control Board and that of the State Corporation Commission in this area is resolved by the language of the statutes themselves. Section 62.1-82 of the Code, as noted above, provides that “[t]he control and regulation on the part of the State of the development of the waters of the State shall be paramount, and shall be exercised through the agency of the State Corporation Commission” (Emphasis supplied.) “Paramount” is defined by *Black's Law Dictionary* as “of the highest rank or nature” and as “chief; pre-eminent; supreme” by *Webster's New Collegiate Dictionary*. See also *Commonwealth v. B&O R.R. Co.*, 12 Va. L. Reg. 302 (1906).

In this regard, it should be noted that a considerable amount of legislation has been enacted in recent years as a result of the increased demands placed upon the State's water resources. Consequently, authority to exercise control over defined—and limited—areas of water uses has been conferred upon a number of special agencies: the State Water Control Board, the Division of Water Resources of the Department of Conservation and Economic Development, the Marine Resources Commission, the State Corporation Commission, the State Department of Health, the Commission of Games and Inland Fisheries, the Virginia Ports Authority, the Potomac River Basin Commission and the Ohio River Valley Water Sanitation Commission.

In the area of State control and regulation of the development of water power projects, however, the authority of the State Corporation Commission is paramount. Indeed, the scope of authority of the State Corporation Commission is expressly made quite broad. In order to achieve the utilization of the waters of the State to the *greatest practicable extent*, § 62.1-88 of the Code requires that “[b]efore acting upon any application, the Commission shall weigh all the respective advantages and disadvantages from the standpoint of the State as a whole and the people thereof and shall make such investigation as may be appropriate as to the effect of the proposed construction upon any cities, towns and counties and upon the prospective development of other natural resources and the property of others.” (Emphasis supplied.)

In this regard, I direct your attention to § 62.1-44.6 of the Water Control Law which states as follows:

“This chapter is intended to supplement existing laws and no part thereof shall be construed to repeal any existing laws specifically enacted for the protection of fish, shellfish and game of the State, except that the administration of any such laws pertaining to the pollution of State waters, as herein defined, shall be in accord with the purpose of this chapter and general policies adopted by the Board.” (Emphasis supplied.)

In my opinion the General Assembly has declared its intention that the Water Control Law shall not override certain existing laws; rather the Water Control Law shall supplement and aid existing statutes dealing with the waters of the State.

Therefore, in response to your first question, I am of the opinion that in water power projects the final decision as to flow release schedules is that of the State Corporation Commission. However, the Legislature has directed that the administration of such existing laws affecting or touching upon

pollution of State waters as defined in § 62.1-44.3(6) of the Code shall be in accord with the purpose of the Water Control Law and the policies of the State Water Control Board adopted pursuant thereto. Thus, the State Corporation Commission in acting upon applications for licenses to construct dams in the waters of the State, and, particularly, in imposing restrictions on stream flow, must consider the advice and judgment of the State Water Control Board regarding the effect of the proposed project upon the quality of State waters. An appeal of right to the Virginia Supreme Court from an order of the State Corporation Commission is provided by law.

In the case to which you refer, it appears that the original judgment of the State Water Control Board in regard to stream flow was reflected in the State Corporation Commission's order and license to construct. See State Corporation Commission Order of June 12, 1969, *Application of Virginia Electric and Power Company*, Case No. 18,669, p. 3. It also appears from your letter that the State Water Control Board has reconsidered its previous determination and, in its judgment, decided that a greater average minimum release flow is necessary in order to protect the quality of State waters downstream from the North Anna Power Station. Therefore, it is my further opinion that while the State Water Control Board did not have the authority unilaterally to amend its Certificate #1912 after the State Corporation Commission license provisions relating to stream flow had been imposed, the revised findings of the State Water Control Board should be considered by the Commission. The proper procedure for accomplishing this is to petition the State Corporation Commission to reopen its proceedings pursuant to its own order that the matter be continued on the docket for such further action as may be taken by the Commission. See State Corporation Commission Order of June 12, 1969, *supra*.

I am aware that such a procedure, regrettably, could be cumbersome and time-consuming, particularly if appellate proceedings are involved; for that reason reference is made to § 62.1-102 of the Code which states that "[t]he provisions, terms, and conditions of any license may be altered or amended at any time by mutual consent of the licensee [VEPCO] and the Commission"

In response to your second question, it should be noted that by letter of January 23, 1970, the United States Army Corps of Engineers "determined that the North Anna River is not a navigable water of the United States for administration of navigation laws . . ." (See copy of letter attached.) Since the terms of § 21(b) of Public Law 91-224 applies only to those discharges into the navigable waters of the United States, the State Water Control Board, in my opinion did not have to act on the application by Virginia Electric and Power Company for a "21(b) Certificate of Assurance."

With reference to your concern about future jurisdictional disputes arising out of the regulation and control of water power projects, I am of the opinion that the State Water Control Board has the authority and is the proper agency, pursuant to the Water Control Law and the Governor's designation of April 7, 1970, to issue a certificate of assurance under § 21(b) of Public Law 91-224. However, this is not unqualified and requires a brief analysis of Public Law 91-224.

As you are aware, it is the purpose of this statute to insure that federally licensed activities and facilities which may result in, or cause to be made, any discharges into navigable waters comply with applicable water quality standards. Accordingly, the granting of the federal license or permit is contingent upon the appropriate agency, in this case, the State Water Control Board, issuing its certificate of assurance that the proposed activity or facility will not contravene applicable state water quality standards. In considering any request for a 21(b) certificate, Public Law 91-224 provides that the appropriate agency may either (1) issue the certificate, (2) fail or refuse to act on the same within a reasonable period of time,

in which case the requirement of a certificate is deemed to have been waived, or (3) deny the request, in which case no federal license or permit shall be granted the proposed activity or facility.

Although Public Law 91-224 provides for three possible alternatives to be taken by the State Water Control Board, the Board, in considering a 21(b) certificate, is subject to the scope and limitations imposed upon it by the state law that created it. In view of the reasons given in response to your first question, the action of the Board with respect to certificates issued regarding water power projects under § 21(b) cannot be in contravention of the conditions and terms imposed by the State Corporation Commission in its license to construct and operate such water power projects. Therefore, it is my opinion that the State Water Control Board does not have the authority to issue a certificate of assurance under § 21(b) of Public Law 91-224 incorporating therein a requirement of an average instantaneous flow release schedule greater than the schedule set forth in the license issued by the State Corporation Commission.

Two further observations should be noted: (1) on September 29, 1970, this Office issued an opinion in regard to the general powers of the State Water Control Board; the views expressed therein are not modified by this opinion, which is intended to clarify the procedure by which the powers of the State Water Control Board are exercised in the area of water power development projects; (2) your concern and questions have focused upon the delicate—but crucial—policy problems confronting both corporate and governmental entities: how best to balance and accommodate the growing need for electric power and the necessity for environmental protection and enhancement. These problems are heightened when governmental responsibilities are fragmented, conflicting or in need of clarification. In such cases, it would seem advisable to consider legislation to delineate clear lines of responsibility. In this case, especially, there is a definite need to consider the legislation that would redefine—and perhaps redetermine—more clearly the locus of responsibility for controlling stream flow releases from water power projects where water quality standards of the State are affected.

WELFARE—Lien Against Property—Proper only for hospitalization and treatment of indigents when not "assistance."

WELFARE—Lien Against Property—Not allowed for defined "assistance."

September 2, 1970

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

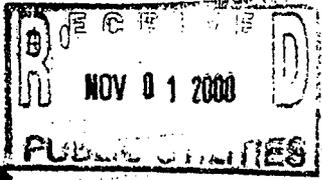
This is in response to your letter of July 22, 1970, in which you asked my opinion as to whether or not § 63.1-133 of the Code of Virginia, 1950, as amended, has the effect of repealing § 63.1-140 of the Code of Virginia, 1950, as amended.

You stated in part:

"Pursuant to § 63.1-140, our local Welfare Department follows the practice of having the aid recipient under Chapter 7 of Title 63.1 execute an assignment subrogating the Welfare Department to any right of recovery which the recipient may have against a third party. The local Welfare Department believes this practice may be contrary to the intent of § 63.1-133.1"

In my opinion, I feel that the Welfare Department could continue the practice, as outlined above, and not be in violation of § 63.1-133.1. Section 63.1-133.1 states:

"No lien or other interest in favor of the State or any of its political subdivisions shall be claimed against, levied, or attached to the



WLR

Commonwealth of Virginia

STATE WATER CONTROL BOARD

P. O. Box 11143, 4010 Westwood St., Richmond, Virginia 23220 (703) 773 2241



401 CERTIFICATE

ISSUED TO

VIRGINIA ELECTRIC AND POWER COMPANY
NORTH ANNA NUCLEAR POWER STATION
LOUISA COUNTY, VIRGINIA
ON AUGUST 29, 1973

BOARD MEMBERS

- Norman M. Clark, Jr. Chairman
Denis J. Brown
Ray W. Edwards
Henry S. Holland III
Mrs. Wayne Jackson
Andrew W. M. Thomas Jr
Robert W. Sussard

ok: 192
study re: 304

The State Water Control Board hereby certifies that the Applicant's proposed cooling water discharges from the North Anna Power Station, Units 1 and 2, proposed to be located on the North Anna River in Louisa County, Virginia, as specified in the application to the Board dated March 30, 1973, and supplemented by the letter from the Applicant dated May 25, 1973, and by the record of a hearing held on June 19, 1973, will comply with (1) the Virginia Water Quality Standards which became effective on July 20, 1970, and which are as amended, in full force and effect under Section 303 of Public Law 92-500, and (ii) a limitation on waste heat discharged to the treatment facility from the two units of 13.54 x 10^9 BTU/hr., which is an applicable limitation under Section 301 (b) (1) (C) of Public Law 92-500, and which is the basis of design of the facility. There is no other applicable effluent limitation or other limitation under Sections 301 (b) and 302 and there is not an applicable standard under Sections 306 and 307 of Public Law 92-500 presently in effect.

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The Board directs that the Applicant take the following step to assure that the Virginia Water Quality Standards are complied with:

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The Applicant, in cooperation with the staff, will by August 18, 1973, submit to the Board for its approval a comprehensive water quality monitoring program for Lake Anna, the waste heat treatment facility and the North Anna River downstream of the Lake Anna Dam, that will provide an adequate basis for determining, on the basis of results collected through the end of the first full year of operation of the second North Anna Unit to go into operation, whether the operation of the third and/or fourth units at the North Anna site will result in violation of (i) any applicable legal requirement, including water quality standards, and (ii) any effluent limitation on waste heat which must be imposed upon Units 3 and 4 by the Board in the above-mentioned Section 401 certification.

Pursuant to Sections 401 (d) and 510 of Public Law 92-500, this certificate is issued with the understanding that discharges from the above facilities must comply with applicable State Water Quality Standards, other limitations, standards, regulations, and requirements established in accordance with the State Water Control Law.

Further, the conditions of the certificate of assurance issued to the Applicant on February 11, 1972, pursuant to Section 21 (b) of Public Law 91-224, are incorporated herein by reference as limitations and shall continue in full force

401 Certificate
Virginia Electric & Power Company
North Anna Nuclear Power Station
Page 2

~~and effect until amended as a result of modification of water quality standards
and/or promulgation of applicable, more stringent effluent limitations pursuant
to Public Law 92-500. This certificate is subject to revocation or amendment
for good cause and after proper hearing.~~

By: Eugene J. Jensen
Eugene J. Jensen, Executive Secretary

Commonwealth of Virginia
STATE WATER CONTROL BOARD
 P. O. Box 11193, 4010 W. Broad St., Richmond, Virginia 23220 (703) 770-2741
 A. M. Parsler, Executive Secretary

WLR



CERTIFICATE

ISSUED TO

Virginia Electric and Power Company
 P.O. Box 1194
 Richmond, Virginia 23209

AMENDED ON

February 11, 1972

BOARD MEMBERS

- Norman M. Eric, Jr.
Chairman
- Ray W. Edwards
- Henry S. Hollings III
- Mrs. Wayne Jackson
- Andrew W. McThumie, Jr.
- W. H. Singleton
- Robert W. Spazzard

The State Water Control Board hereby certifies that the proposed North Anna Nuclear Power Station Project located on the North Anna River in Louisa County, Spotsylvania County and Orange County, Virginia, as specified in the application to the Board on September 28, 1970, provides reasonable assurance that applicable water quality standards will not be violated subject to the following provisions:

1. That the Virginia Electric and Power Company shall at all times provide a minimum instantaneous release from the impoundment of at least 40 cfs.
2. During the period when the reservoir is being filled, the Virginia Electric and Power Company shall at all times provide a minimum instantaneous release from the impoundment of not less than 150 cfs during the months of February through June. This provision is subject to additional action, if required, by the State Corporation Commission or this Board.
3. That the staff, in conjunction with the Virginia Institute of Marine Science and the Virginia Electric and Power Company, monitor the downstream water quality and effect of salinity on downstream environment to determine the effect of the 40 cfs minimum release schedule.
4. If at any time firm data from such monitoring indicates that further action on the part of the Board is necessary in order to protect water quality standards within the authority granted it under Title 62.1, Chapter 3.1, Articles 1-7, Code of Virginia, the staff is to immediately report the need for such action to the Board.

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In addition, this Certificate is issued with the understanding that, in accordance with the plans for the project, the Virginia Electric and Power Company and its project contractors will not violate the water quality standards as a result of a direct or indirect discharge of the spoil and construction materials to State waters. It is further understood that any direct or indirect discharge of spoil material or construction material to State waters will be subject to abatement and control under the State Water Control Law.

The Board reserves the right to amend this Certificate for good cause and after proper hearing.

By: A. H. Paessler
A. H. Paessler, Executive Secretary

Acceptance of the above stipulations and provisions is acknowledged by the undersigned:

By: J. D. Risdroph
J. D. Risdroph, Executive Director
Environmental Control

Date: 2-14-72

WLR

COMMONWEALTH OF VIRGINIA STATE WATER CONTROL BOARD

EXECUTIVE SECRETARY
A. H. PAESSLER

P. O. BOX 11143 - RICHMOND, VIRGINIA 23230 - (703) 770-2241

BOARD MEMBERS

CERTIFICATE

- Norman M. Cagle, Jr.
Chairman
- Ray Edwards
- Henry S. Holland III
- Mrs. Beverly Halmuerg
- Andrew M. McThenia, Jr.
- W. H. Singleton
- Robert W. Suassard

ISSUED TO

Virginia Electric and Power Company
P. O. Box 1194
Richmond, Virginia 23209

November 23, 1970

with 1, 2, 3, 4 for

The State Water Control Board hereby certifies that the proposed North Anna Nuclear Power Station Project located on the North Anna River in Louisa County, Spotsylvania County and Orange County, Virginia, as specified in the application to the Board on September 28, 1970, provides reasonable assurance that applicable water quality standards will not be violated.

This certificate is issued with the following provisions applicable to downstream flow release schedule from the impoundment:

1. Average annual instantaneous low flow release will be not less than 60 cfs during any calendar year.
2. Minimum instantaneous release for the period June through September of any calendar year will be not less than 100 cfs and the minimum instantaneous release for the remaining period of any calendar year will be not less than 40 cfs.
3. Although the low flow release schedule may from time to time be amended in no event should the amended schedule require minimum instantaneous low flow releases to exceed 150 cfs, nor should such amended schedule require minimum instantaneous low flow releases to be less than 40 cfs and the amended release schedule should be so arranged that the average annual minimum instantaneous low flow release should not exceed 60 cfs.

In addition this certificate is issued with the understanding that, in accordance with the plans for the project, the Virginia Electric and Power Company and its project contractors will not violate the water quality standards as a result of a direct or indirect discharge of the spoil and construction materials to State waters. It is further understood that any direct or indirect discharge of spoil material or construction material to State waters will be subject to abatement and control under the State Water Control Law.

By: A. H. Paessler
A. H. Paessler, Executive Secretary

CLEAN STREAMS PROVIDE HEALTH

Acceptance of the plan