

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

POTOMAC RIVERKEEPER, INC. d/b/a  
POTOMAC RIVERKEEPER NETWORK,

Appellant,

v.

STATE WATER CONTROL BOARD,

Appellee,

Case No.: \_\_\_\_\_

Serve: David K. Paylor, Executive Secretary  
State Water Control Board  
629 East Main Street  
Richmond, VA 23219

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Appellee,

Serve: David K. Paylor, Director  
Department of Environmental Quality  
629 East Main Street  
Richmond, VA 23219

with a copy to

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a  
DOMINION VIRGINIA POWER,

Permit applicant,

Serve: CT Corporation System, Registered Agent  
Virginia Electric and Power Company d/b/a Dominion  
Virginia Power  
4701 Cox Road, Suite 285  
Glen Allen, VA 23060

## **PETITION FOR APPEAL**

IN RE: VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION  
VIRGINIA POWER  
MODIFICATION OF VPDES PERMIT NO. VA0002071, POSSUM  
POINT POWER STATION

## **CASE DECISION APPEALED**

1. Under the Virginia State Water Control Law, Va. Code Ann. §§ 62.1-44.5, 62.1-44.15(5), 62.1-44.29, the Virginia Administrative Process Act, Va. Code Ann. §§ 2.2-4019, 2.2-4026, 2.2-4027, 2.2-4029, 2.2-4030, the federal Clean Water Act, 33 U.S.C. §§ 1311, 1314, 1317, 1318, 1326, 1341, 1342, 1370, and implementing regulations, Appellant POTOMAC RIVERKEEPER, INC. d/b/a POTOMAC RIVERKEEPER NETWORK (hereafter “Potomac Riverkeeper” or “Riverkeeper”) appeals the January 14, 2016, final decision of the Virginia State Water Control Board (hereafter the “Board”) to approve modifications to Virginia Pollutant Discharge Elimination System (“VPDES”) Permit No. VA0002071 to Virginia Electric and Power Company d/b/a Dominion Virginia Power (hereafter “Dominion Virginia Power” or “Dominion”) for the release of wastewater from coal ash ponds at the Possum Point Power Station in Dumfries, Virginia. Potomac Riverkeeper also appeals the decision of the Virginia Department of Environmental Quality (hereafter “DEQ”) to issue a final version of VPDES Permit No. VA0002071 with the modifications approved by the Board on January 19, 2016.

2. In compliance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, Potomac Riverkeeper filed a notice of appeal with David Paylor, Executive Secretary of the State Water Control Board and Director of the Department of Environmental Quality, on January 29, 2016, within 30 days of the Board's January 14, 2016, decision and mailed a copy to the Appellees, Dominion, and their respective counsel. A copy of the notice of appeal is attached with this petition as **Attachment A**.

3. In compliance with Rule 2A:4 of the Rules of the Supreme Court of Virginia, Potomac Riverkeeper submits this petition for appeal within 30 days of filing its notice of appeal on January 29, 2016.

### **PARTIES**

4. Appellant is Potomac Riverkeeper Inc., d/b/a Potomac Riverkeeper Network. Potomac Riverkeeper is a nonprofit organization dedicated to restoring clean water in the Potomac River and its tributaries. It utilizes the Clean Water Act and other environmental laws to stop pollution that damages water quality and river habitats and that negatively impacts the ability of Riverkeeper's members and the public to use and enjoy the Potomac River and its tributaries. Riverkeeper seeks to protect the health and safety of the nearly six million people who use the Potomac River for drinking water and recreation, to preserve and restore the health of aquatic life in the Potomac River and its tributaries, and to preserve and restore the scenic and recreational resources throughout the Potomac watershed.

5. Potomac Riverkeeper currently has approximately 1,000 members throughout Maryland, Virginia, West Virginia, and the District of Columbia. Members of the organization regularly use and enjoy the natural resources of the Potomac River and its tributaries like Quantico Creek for fishing, swimming, boating, hunting, wildlife viewing, and other purposes.

6. Potomac Riverkeeper and its members have a longstanding concern about the impact of pollutant discharges from the coal ash ponds at the Possum Point Power Plant. On January 4, 2013, the organization submitted comments on Dominion's application for renewal of VPDES Permit No. VA0002071. Among other things, Potomac Riverkeeper expressed particular concern about the toxicity of coal combustion wastewater and its potential to impact human health and the environment.

7. On December 14, 2015, Potomac Riverkeeper submitted comments on Dominion's application for modifications of VPDES Permit No. VA0002017 related to the draining of wastewater from coal ash pond D and the toe drain discharge from pond D at the Possum Point facility.

8. Appellants are the Virginia State Water Control Board and the Virginia Department of Environmental Quality. Under the State Water Control Law, Va. Code Ann. § 62.1-44.15(5), the Board has the authority to issue VPDES permits to discharge sewage, industrial wastes, and other wastes into state waters. The Board approved modifications to VPDES Permit No. VA0002071 on January 14, 2016, and DEQ issued



the final permit to Dominion on January 19, 2016, incorporating the modifications approved by the Board.

9. The Permit Applicant is Virginia Electric and Power Company d/b/a Dominion Virginia Power which owns and operates the Possum Point Power Station.

### **JURISDICTION AND VENUE**

10. Under Va. Code Ann. § 62.1-44.29, any person is entitled to judicial review of the final decision to issue a VPDES permit if such person has participated in the public comment process and if such person meets the requirements for judicial review under Article III of the United States Constitution.

11. Representatives of Potomac Riverkeeper spoke at a public hearing on December 8, 2015, and before the Board on January 14, 2016, and the organization submitted written comments on December 14, 2015, all of which concerned the proposed modification of VPDES Permit No. VA0002071.

12. Potomac Riverkeeper has standing to seek judicial review of the Board's approval and DEQ's issuance of the modified permit for Possum Point under Article III of the U.S. Constitution because: (i) the permitted discharges of wastewater from coal ash pond D, including the pond D toe drain, would harm the organization's interests in preventing pollution and restoring river habitat in the Potomac River; (ii) the injuries to the organization's interests are traceable to the Board's decision to approve the modified

permit and DEQ's issuance of the modified permit; and (iii) such injuries would be redressed by a favorable decision of this Court.

13. Potomac Riverkeeper also has standing to seek judicial review of the Board's approval and DEQ issuance of the modified VPDES permit for Possum Point under Article III of the U.S. Constitution because: (i) the permitted discharges of wastewater from coal ash pond D, including the pond D toe drain, would harm the recreational, aesthetic, and scientific interests of the organization's members in using Quantico Creek and the Potomac River for fishing, boating, swimming, birdwatching, and other activities; (ii) the injuries to the interests of the members are traceable to the Board's decision to approve the modified permit and DEQ's issuance of the modified permit; and (iii) such injuries would be redressed by a favorable decision of this Court.

14. In support of Potomac Riverkeeper's standing in this case, the affidavits of Phillip Musegaas, Legal Director of Potomac Riverkeeper, and Nicholas Kuttner, board member and member of Potomac Riverkeeper, are attached and incorporated into this petition as **Attachment B**.

15. Under Va. Code Ann. § 62.1-44.29, Potomac Riverkeeper is entitled to judicial review in accordance with the provisions of the Administrative Process Act, Va. Code Ann. § 2.2-4000 et seq. As authorized by § 2.2-4026 of the Administrative Process Act, any person affected by a case decision has the right to direct review of the decision by court action against the authorizing agency or its officers.

16. Venue is permissible in this Court under Va. Code Ann. § 2.2-403, § 2.2-4026, and § 8.01-261(1).

### **LEGAL BACKGROUND**

17. The federal Clean Water Act sets a national goal of “eliminating” the release of pollutants into waterways. 33 U.S.C. § 1251(a)(1).

18. Under the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain a National Pollutant Discharge Elimination System (“NPDES”) permit. *See* 33 U.S.C. § 1342(a).

19. The U.S. Environmental Protection Agency has delegated authority to administer the permitting program in Virginia to the state. *See* 33 U.S.C. § 1342(b). DEQ is charged with administering the program under the State Water Control Act, Va. Code Ann. § 62.1-44.15(5), and the Virginia Pollutant Discharge Elimination System Regulations, 9 Va. Admin. Code § 25-31-10 *et seq.*

20. VPDES permits must contain effluent limits sufficient to both “restore” and “maintain” the receiving waterbody. *See* 33 U.S.C. § 1251(a).

21. The Board must set technology-based effluent limits that reflect the ability of available technologies to reduce and ultimately eliminate pollution discharges. *See* 33 U.S.C. §§ 1311, 1342(a)(1); 9 Va. Admin. Code § 25-31-220.

22. To implement the Clean Water Act’s technology-based requirements, EPA is required to promulgate effluent limitations guidelines (“ELGs”) to control the

discharge of pollutants into the waters of the United States from industrial point sources. *See* 33 U.S.C. §§ 1311(b), 1314(b).

23. EPA promulgated an ELG for “legacy wastewater” at steam electric power generating plants on November 3, 2015. *See* U.S. EPA, Final Rule: Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,854–855 (Nov. 5, 2015).

24. Wastewater in coal ash pond D at Possum Point qualifies as legacy wastewater under the new ELG.

25. In the new ELG, EPA did not “establish BAT limitations for legacy wastewater based on a technology other than surface impoundments [ ] because it does not have the data to do so.” *Id.*

26. In support of its conclusion, EPA observed that “the characteristics of legacy wastewater contained in surface impoundments (flow rate and pollutant concentrations) vary at both any given plant, as well as across plants nationwide.” *Id.*

27. Thus, the new ELG only set a technology-based limitation for total suspended solids and oil and grease in legacy wastewater. *See id.*

28. EPA did not set technology-based limitations for arsenic, chromium, selenium, or other toxic metals contained in the wastewater in coal ash pond D at Possum Point in the new ELG.

29. The new ELG only contemplated the normal operation of coal ash surface impoundments, not complete draining and dewatering of all wastewater in the pond.

30. Where federal effluent limitations are inapplicable, the Board and DEQ are required to exercise best professional judgment to establish case-by-case technology-based effluent limitations for pollutants in the VPDES permit. *See* 33 U.S.C §§ 1311(b)(2)(A), 1342(a)(1); 40 C.F.R. §§ 125.3(a), 125.3(c)(2); 9 Va. Admin. Code § 25-31-220(A)(1).

31. Where federal effluent limitations “only apply to certain aspects of the discharger’s operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.” 40 C.F.R. § 125.3(c)(3).

32. For toxic pollutants, the Board and DEQ must establish technology-based limits based on the best available technology economically achievable. *See* 33 U.S.C. § 1311(b)(2)(A); 40 C.F.R. § 125.3(a)(2)(iii).

33. In setting best available technology-based limits, the Board and DEQ must apply the following factors: (1) the production process in use; (2) the engineering aspects of various control techniques; (3) the possibility of changing processes; (4) the cost of achieving such effluent reductions; and (5) the non-water-quality impacts of controlling pollution. *See* 33 U.S.C. § 1314(b)(2)(B); 40 C.F.R. § 125.3(d)(3).

34. Best available technology-based numeric effluent limits “shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him . . . that such elimination is technologically and economically achievable.” 33 U.S.C. § 1311(b)(2)(A).

35. Thus, the Board and DEQ must set effluent limits that eliminate pollution to the greatest extent possible using technology that is “available” and “economically achievable.” *Id.*

36. Following the application of technology-based limits, the Board and DEQ must evaluate whether a discharge causes, has the reasonable potential to cause, or contributes to a violation of state water quality standards and whether additional limits are necessary to ensure that state water quality standards are not exceeded. *See* 33 U.S.C. §§ 1311(b), 1312(a); 40 C.F.R. § 122.44(d).

37. Where best available technology-based effluent limitations alone will not achieve Virginia’s water quality standards, 9 Va. Admin. Code § 25-260-5 *et seq.*, the Board and DEQ must develop water-quality based effluent limitations prior to issuing the VPDES permit. *See* 33 U.S.C. § 1312, 40 C.F.R. § 125.3(a); Va. Code Ann. § 62.1-44.15(3a); 9 Va. Admin. Code § 25-31-220(D).

38. In approving and issuing a VPDES permit, the Board and DEQ must ensure that “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1); 9 Va. Admin. Code § 25-260-30(A)(1).

39. In approving and issuing a VPDES permit, the Board and DEQ must ensure “compliance with the applicable water quality requirements of all affected states.” 40 C.F.R. § 122.4(d); 9 Va. Admin. Code § 25-31-50(C)(4).

40. The Board and DEQ must ensure that VPDES permits comply with the Virginia State Water Control Law, the federal Clean Water Act, and their implementing regulations. *See* 9 Va. Admin. Code 25-31-50(c)(1).

### **FACTUAL BACKGROUND**

#### **Quantico Creek and the Potomac River**

41. The Possum Point Power Plant is located on a narrow peninsula between Quantico Creek and the Potomac River near Dumfries, Virginia.

42. Quantico Creek is a tributary of the Potomac River.

43. The waters of Quantico Creek are Virginia waters, and the waters of the Potomac River are Maryland waters.

44. The boundary between tidal fresh water and the transition zone in the Potomac River is located just south of Shipping Point at the mouth of Quantico Creek.

45. Both Quantico Creek and the Potomac River are popular recreational destinations.

46. Residents and visitors participate in annual cleanups on the water and enjoy using the water for swimming, fishing, boating, hunting, birding, and other recreational activities.

47. Quantico Creek and nearby creeks and tributaries of the Potomac are especially popular spots for bass fishing year-round.

48. Quantico Creek enters the Potomac in the middle of a significant spawning reach for striped bass, an important commercial and sport fishery in the Potomac River.

49. Federally endangered Atlantic sturgeon also use the Potomac River near the mouth of Quantico Creek.

50. Federally-protected bald eagles nest along Quantico Creek near Possum Point and feed in the Creek.

51. Metals released from coal ash pond D at Possum Point may impair spawning habitat, decrease spawning success, and have other harmful impacts on striped bass, Atlantic sturgeon, and other aquatic life in Quantico Creek and the Potomac River.

#### **Coal Ash at the Possum Point Power Station**

52. Dominion owns and operates the Possum Point Power Plant.

53. Dominion operated the Possum Point Power Plant as a coal-fired electricity generating station for forty-eight years from 1955 to 2003.

54. In 2003, Dominion converted two of the coal-fired generation units at the facility to natural gas and fuel oil and retired the other two coal-fired units.

55. Today, the Possum Point plant no longer burns coal for electricity.

56. During the forty-eight year period from 1955 to 2003, Dominion sluiced waste coal ash in a wet slurry from the plant's furnaces to at least one of the five different onsite ash ponds, known as ash ponds A, B, C, D, and E.

57. Although Dominion stopped burning coal at the Possum Point Power Plant in 2003, it continues to store a large volume of saturated waste coal ash and contaminated



wastewater in coal ash pond D located on the banks of Quantico Creek upstream from its confluence with the Potomac River.

58. Coal ash waste, derived from combusting coal to generate electricity, contains pollutants, like arsenic, antimony, barium, cadmium, chromium, copper, mercury, manganese, nickel, selenium, thallium, zinc, and other metals, that can cause harm to human health and to the environment.

59. Arsenic, cadmium, antimony, thallium, and chromium, for example, are known human carcinogens.

60. Arsenic, cadmium, and chromium, as well as copper, mercury, nickel, selenium, thallium, and zinc are also toxic pollutants, 40 C.F.R. § 401.15, and priority pollutants under the Clean Water Act, 40 C.F.R. Part 423 Appendix A.

61. Coal ash pollutants can have poisonous effects on benthic organisms, fish, and other wildlife that live in rivers near coal ash impoundments. Additionally, metals such as selenium can bioaccumulate in fish tissues as the metal moves through the aquatic food chain.

62. When waste coal ash is stored in ponds without effective liners, harmful pollutants from coal ash can leach or dissolve into the water and move into the groundwater and surface waterways.

63. For thirty years, Dominion's monitoring has shown that the waste coal ash impoundments at its Possum Point Power Plant have leaked harmful pollutants, like cadmium and zinc, into groundwater at the site.

64. Coal ash ponds at Possum Point have also leaked harmful pollutants, including arsenic, barium, nickel, selenium, cadmium, manganese, and zinc, directly into the surface waters of Quantico Creek through seeps and other unpermitted discharges.

65. A toe drain at the base of coal ash pond D has released contaminated wastewater for several decades.

66. In 2015, testing by Potomac Riverkeeper of the discharge from the pond D toe drain showed a suite of metals typically associated with coal ash pollution.

67. In 2001, DEQ identified a small portion of Quantico Creek around a single sampling site as impaired for aquatic life because, in part, of the presence of high levels of nickel in creek sediments.

68. Nickel is one of the metals present in the wastewater in coal ash pond D at Possum Point.

69. Metals released from coal ash pond D will be deposited in creek sediments.

70. DEQ has initiated a special study of Quantico Creek to increase the number of sampling sites in the creek and assess its level of impairment. The agency expects to conduct sampling during the summer of 2016.

71. The special study does not include a comprehensive analysis of benthic biota or creek sediments in the vicinity of the ash ponds.

**VPDES Permit No. VA0002071**

72. Under its delegated authority under the Clean Water Act, 33 U.S.C. § 1342(b), DEQ issued the prior version of permit VA0002071 in April 2013 authorizing

the discharge of wastewater from coal ash ponds D and E at Possum Point Power Plant through a designated outfall.

73. Dominion moved wastewater and waste ash from coal ash ponds A, B, C and E to coal ash pond D during 2015.

74. On information and belief, it was DEQ's understanding that Dominion moved all wastewater from coal ash pond E to coal ash pond D in 2015.

75. On information and belief, it was DEQ's understanding that the modified permit issued to authorize the release of coal ash wastewater from pond D would subject all of the wastewater from pond E to its terms.

76. In May 2015, Dominion dumped approximately 30 million gallons of wastewater from coal ash pond E into Quantico Creek or a tributary of Quantico Creek.

77. On information and belief, Dominion did not report the 2015 release of wastewater from pond E to Quantico Creek to DEQ.

78. On information and belief, DEQ did not discover that Dominion released approximately 30 million gallons of coal ash wastewater to Quantico Creek until after the release had occurred.

79. On August 20, 2015, Dominion applied for a permit modification from DEQ seeking authorization to drain wastewater stored in coal ash pond D into either a tributary of Quantico Creek or Quantico Creek directly.

80. Dominion's application materials report that the pond D wastewater contains arsenic and other toxic metals, including boron, cobalt, molybdenum, nickel, and selenium. The application reported arsenic concentrations as high as 960 parts per billion.

81. Dominion also sought permit coverage for the discharge from the toe drain at the base of coal ash pond D.

82. DEQ released a draft of a modified VPDES permit for Possum Point that would authorize the draining of wastewater from coal ash pond D and discharge from the toe drain on October 29, 2015, set a public hearing for December 8, 2015, and opened a public comment period that would close on December 14, 2015.

83. Three members of Potomac Riverkeeper Network, as well as the organization's outside counsel from the Southern Environmental Law Center, presented objections to the proposed draft permit at the December 8, 2015, public hearing.

84. Potomac Riverkeeper Network subsequently submitted written comments on the proposed draft permit by email to Susan Mackert on December 14, 2015, before the expiration of the public comment period.

85. The Board provided an opportunity for public input on January 14, 2016, at which two members of Potomac Riverkeeper Network and the organization's outside counsel again presented objections to the permit.

86. The Board approved the modifications to VPDES permit no. VA0002071 at the January 14, 2016, meeting.

87. On January 19, 2016, DEQ issued a final modified permit for the Possum Point Power Station authorizing the release of wastewater from coal ash pond D into Quantico Creek, a tributary of Quantico Creek, and into the Potomac River and authorizing the discharge from the toe drain.

88. Potomac Riverkeeper delivered a notice of appeal of the Board's decision by express overnight mail to David Paylor, Executive Secretary of the Board and Director of DEQ, on January 29, 2016.

### **CLAIMS OF ERROR**

#### **CLAIM I**

**The initial fact sheet for the modification of the VPDES permit for Possum Point was incomplete and inaccurate in violation of Virginia regulations.**

89. The draft fact sheet that DEQ issued in connection with the proposed modification of VPDES permit no. VA0002071 for the discharge of wastewater from coal ash pond D at Possum Point did not include information about the "type and quantity of waste, fluids, or pollutants" which would be discharged. 9 Va. Admin. Code § 25-31-280(B)(2).

90. DEQ did not know how much wastewater would be released from coal ash pond D, the maximum flow of the release, or the duration of the release at the time the draft permit was offered for public comment.

91. The draft fact sheet specified that all coal ash wastewater at the site had been transferred to pond D and would be subject to the proposed permit modifications.

92. In February 2016, after the Board approved and DEQ issued a modified VPDES permit for Possum Point, Dominion acknowledged that it had in fact drained approximately 30 million gallons of wastewater from coal ash pond E into Quantico Creek or its tributary in 2015.

93. The draft fact sheet also did not contain information about the “type and quantity of the wastes, fluids, or pollutants” that are discharged from the pond D to drain.

94. With incomplete and inaccurate information about the type and quantity of wastewater that would be discharged, the rate of discharge, and the time period over which the discharges would occur, the public was inadequately informed about the scope of the proposed activities.

95. Therefore, the Board violated 9 Va. Admin. Code § 25-31-280(B)(2) when it approved modifications to VPDES permit no. VA0002071 for Possum Point on the basis of an incomplete and inaccurate initial fact sheet.

96. Therefore, DEQ violated 9 Va. Admin. Code § 25-31-280(B)(2) when it issued a modified VPDES permit no. VA0002071 for Possum Point on the basis of an incomplete and inaccurate initial fact sheet.

## CLAIM II

### **The Board and DEQ failed to consider technology-based effluent limitations in violation of the federal Clean Water Act, federal regulations, and Virginia regulations.**

97. In considering the modified VPDES permit for Possum Point, the Board and DEQ failed to conduct an analysis of the best available technology economically achievable to control and limit the release of toxic metals from coal ash pond D.

98. The Board erroneously relied on DEQ's incorrect conclusion that the recent ELGs promulgated by the U.S. Environmental Protection Agency obviated the state's own obligation to develop technology-based limitations on a case-by-case basis for the discharge of coal ash wastewater from pond D.

99. The Board erroneously relied on DEQ's incorrect analysis that it does not have the authority to impose technology-based effluent limitations on a case-by-case basis for the discharge of coal ash wastewater from pond D.

100. Therefore, the Board violated the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A), 1342(a)(1); federal regulations, 40 C.F.R. §§ 125.3, 125.3(c)(2); and Virginia regulations, 9 Va. Admin. Code § 25-31-220(A)(1), when it approved the modified VPDES permit for Possum Point without an analysis of the best available technology economically achievable to control and limit the release of toxic metals from coal ash pond D.

101. Therefore, DEQ violated the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A), 1342(a)(1); federal regulations, 40 C.F.R. §§ 125.3, 125.3(c)(2); and Virginia regulations,

9 Va. Admin. Code § 25-31-220(A)(1), when it issued the modified VPDES permit for Possum Point without an analysis of the best available technology economically achievable to control and limit the release of toxic metals from coal ash pond D.

### **CLAIM III**

#### **The Board and DEQ failed to impose technology-based effluent limitations in violation of the federal Clean Water Act, federal regulations, and Virginia regulations.**

102. In considering the modified VPDES permit for Possum Point, the Board and DEQ failed to impose technology-based effluent limits reflecting the level of pollution control that available technologies can achieve to reduce the concentrations of toxic metals released from coal ash Pond D at Possum Point.

103. Coal ash pollutants can pose a serious risk to aquatic life. Coal ash pollutants can have poisonous effects on benthic organisms, fish, and other wildlife that live in rivers near coal ash impoundments. Additionally, metals like selenium can bioaccumulate in tissues as they move through the aquatic food chain.

104. At the concentration limits set in the modified VPDES permit for Possum Point, metals released from coal ash Pond D may impair spawning habitat, decrease spawning success, and have other harmful impacts on striped bass and other aquatic life in a tributary to Quantico Creek, Quantico Creek, and the Potomac River.

105. Cost-effective treatment technology is available that would significantly reduce the concentration of arsenic and other metals in the wastewater from coal ash pond D before it is discharged.



106. Therefore, the Board violated the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A), 1342(a)(1); federal regulations, 40 C.F.R. §§ 125.3, 125.3(c)(2); and Virginia regulations, 9 Va. Admin. Code § 25-31-220(A)(1), when it approved the modified VPDES permit for Possum Point without imposing technology-based limits.

107. Therefore, DEQ violated the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A), 1342(a)(1); federal regulations, 40 C.F.R. §§ 125.3, 125.3(c)(2); and Virginia regulations, 9 Va. Admin. Code § 25-31-220(A)(1), when it issued the modified VPDES permit for Possum Point without imposing technology-based limits.

#### **CLAIM IV**

**The Board authorized and DEQ issued a permit for the discharge of metals-laden wastewater into an impaired waterway in violation of the federal Clean Water Act, federal regulations, and Virginia regulations.**

108. In 2001, DEQ designated a portion of Quantico Creek as impaired for aquatic life because of high levels of nickel in creek sediments at a single sampling point.

109. DEQ has initiated a special study of Quantico Creek to assess its level of impairment, but that study is not complete or comprehensive.

110. The Board and DEQ do not know the extent of impairment for aquatic life in Quantico Creek because DEQ has not expanded and completed its special study of the creek.

111. The Board and DEQ have not established a total maximum daily load for Quantico Creek for arsenic, nickel, and other toxic metals associated with coal ash waste.

112. The wastewater that Dominion proposes to discharge from coal ash pond D at Possum Point under the modified VPDES permit contains arsenic, nickel, and other toxic metals.

113. Discharges from coal ash pond D will contribute to an existing impairment in Quantico Creek.

114. Therefore, the Board violated the requirements of 33 U.S.C. § 1311(b); 40 C.F.R. §§ 122.44(d), 131.12(a)(1); and 9 Va. Admin. Code §§ 25-31-220(D), 25-260-30(A)(1) when it approved a modified VPDES permit that will allow the discharge of nickel and other metals that will contribute to an existing impairment in Quantico Creek.

115. Therefore, DEQ violated the requirements of 33 U.S.C. § 1311(b); 40 C.F.R. §§ 122.44(d), 131.12(a)(1); and 9 Va. Admin. Code §§ 25-31-220(D), 25-260-30(A)(1) when it issued a modified VPDES permit that will allow the discharge of nickel and other metals that will contribute to an existing impairment in Quantico Creek.

### **CLAIM V**

**The Board authorized and DEQ issued a permit for the discharge of metals-laden wastewater concentrations that will exceed water quality criteria in violation of the federal Clean Water Act, federal regulations, and Virginia regulations.**

116. The modified permit for Possum Point authorizes Dominion to discharge coal ash wastewater at multiple locations including at the mouth of Quantico Creek.

117. Wastewater discharged at the mouth of Quantico Creek will reach the Potomac River immediately upstream of the identified boundary between tidal freshwater and the transition zone to saltwater.

118. The waters of the Potomac River are Maryland waters.

119. In calculating water quality-based limits for the modified VPDES Permit for Possum Point, the Board and DEQ failed to consider the impact of relying on more stringent saltwater criteria for arsenic and other metals.

120. The Board and DEQ failed to consider the degree of mixing for the discharge plume that could occur in the Potomac River.

121. The Board and DEQ cannot ensure that the discharge of metals-laden wastewater from Possum Point will not exceed saltwater criteria at the freshwater-transition zone boundary in Maryland waters.

122. Therefore, the Board violated 33 U.S.C. § 1311(b); 40 C.F.R. §§ 122.4(d), 122.44(d); and 9 Va. Admin. Code §§ 25-31-50(C)(4), 25-31-220(D) because it cannot ensure compliance with Maryland water quality requirements in approving the modified VPDES permit for coal ash wastewater discharges from Possum Point.

123. Therefore, DEQ violated 33 U.S.C. § 1311(b); 40 C.F.R. §§ 122.4(d), 122.44(d); and 9 Va. Admin. Code §§ 25-31-50(C)(4), 25-31-220(D) because it cannot ensure compliance with Maryland water quality requirements in issuing the modified VPDES permit for coal ash wastewater discharges from Possum Point.


### **RELIEF REQUESTED**

Potomac Riverkeeper respectfully requests that this Court grant the following relief:

1. That this Court invalidate, vacate, and declare null and void the modifications to VPDES permit no. VA0002071 that authorize the release of coal ash wastewater from pond D, including releases from the pond D toe drain, approved by the State Water Control Board on January 14, 2016, and issued by the Department of Environmental Quality to Dominion Virginia Power on January 19, 2016;
2. That this Court remand the matter to the Department of Environmental Quality to redress the errors assigned;
3. That this Court, under the authority of Va. Code Ann. § 2.2-4028, postpone the effective date of the modifications of VPDES permit no. VA0002071 that authorize the release of coal ash wastewater from pond D, including releases from the pond D toe drain;
4. That this Court, under the authority of Va. Code Ann. § 2.2-4030, award Appellant its reasonable costs and attorneys' fees; and
5. That this Court grant such other relief as may appear to be just and proper.

Respectfully submitted,

POTOMAC RIVERKEEPER, INC.

By:   
Gregory Buppert  
Bradford T. McLane

*Counsel for the Appellant  
Potomac Riverkeeper, Inc. d/b/a  
Potomac Riverkeeper Network*

**DATED: February 26, 2016**

Gregory Buppert, Va. Bar No. 86676  
Bradford T. McLane, Va. Bar No. 73203  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, VA 22902-5065  
Tel: 434.977.4090  
Fax: 434.977.4090  
[gbuppert@selcva.org](mailto:gbuppert@selcva.org)  
[bmclane@selcva.org](mailto:bmclane@selcva.org)

**ATTACHMENT A**

**Notice of Appeal filed by the Potomac Riverkeeper**

COMMONWEALTH OF VIRGINIA  
BEFORE THE STATE WATER CONTROL BOARD

IN RE: VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION  
VIRGINIA POWER  
MODIFICATION OF VPDES PERMIT NO. VA0002071, POSSUM  
POINT POWER STATION

**NOTICE OF APPEAL**

In accordance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, POTOMAC RIVERKEEPER, INC. d/b/a POTOMAC RIVERKEEPER NETWORK (“Appellant”) hereby files this notice of appeal with David Paylor, Executive Secretary of the Virginia State Water Control Board, for judicial review of the Board’s January 14, 2016, decision to modify VPDES Permit No. VA0002071 for the Virginia Electric and Power Company d/b/a Dominion Virginia Power. The modified permit authorizes Dominion to discharge industrial waste to state waters from its Possum Point Power Station under the Virginia Pollutant Discharge Elimination System, the Virginia State Water Control Law, and the federal Clean Water Act and its implementing regulations.

The appeal of this case decision will be taken to the Circuit Court for the City of Richmond, 13th Judicial Circuit of Virginia, located at 400 North Ninth Street, Richmond, Virginia 23219. Under Rule 2A:3 of the Rules of the Supreme Court of Virginia, the agency record should be forwarded to the Clerk of the Circuit Court for the City of Richmond as soon as possible.

As required by Rule 2A:2(b) of the Rules of the Supreme Court of Virginia, the Appellant provides the following information:

1. The Appellant is:

Potomac Riverkeeper, Inc. d/b/a Potomac Riverkeeper Network  
c/o Phillip Musegaas, Legal Director  
1615 M Street NW, 2nd Floor  
Washington, D.C. 20036

2. Counsel for the Appellant is:

Gregory Buppert (VSB #86676)  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, VA 22902  
gbuppert@selcva.org  
Tel: 434.977.4090  
Fax: 434.977.1483

3. The Appellees are:

Virginia State Water Control Board  
Virginia Department of Environmental Quality  
c/o David Paylor, Executive Secretary and Director  
629 East Main Street  
Richmond, VA 23219

4. Counsel for the Appellees are:

Mark R. Herring, Attorney General of Virginia  
David Grandis, Assistant Attorney General  
Office of the Attorney General of Virginia  
900 East Main Street  
Richmond, VA 23219



5. The permit applicant is:

Virginia Electric and Power Company d/b/a Dominion Virginia  
Power  
c/o Pam Faggert, Chief Environmental Officer & Vice-President  
5000 Dominion Boulevard  
Glen Allen, VA 23060

6. The permit applicant's registered agent is:

CT Corporation System, Registered Agent  
Virginia Electric and Power Company d/b/a Dominion Virginia  
Power  
4701 Cox Road, Suite 285  
Glen Allen, VA 23060

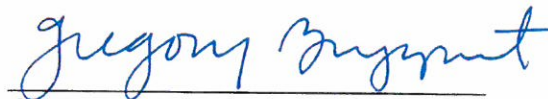
7. Counsel for the permit applicant is:

Brooks Smith  
Troutman Sanders, LLP  
15th Floor  
1001 Haxall Point  
Richmond, VA 23219

Dated: January 28, 2016

Respectfully submitted,

POTOMAC RIVERKEEPER, INC. d/b/a  
POTOMAC RIVERKEEPER NETWORK

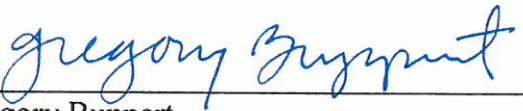


Gregory Buppert  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, VA 22902-5065  
gbuppert@selcva.org  
Tel: 434.977.4090  
Fax: 434.977.1483

*Counsel for the Potomac Riverkeeper, Inc. d/b/a  
Potomac Riverkeeper Network*

**CERTIFICATE OF SERVICE**

I hereby certify that, on January 28, 2016, I have mailed by certified U.S. Mail, returned receipt requested, a complete copy of the foregoing Notice of Appeal to each of the Appellees and their counsel and the permit applicant, its registered agent, and its counsel as identified above.

  
\_\_\_\_\_  
Gregory Buppert

*Counsel for the Potomac Riverkeeper, Inc. d/b/a  
Potomac Riverkeeper Network*

**ATTACHMENT B**

**Affidavit of Phillip Musegaas, Legal Director for the Potomac Riverkeeper**

**Affidavit of Nicholas Kuttner, Member of the Potomac Riverkeeper**

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

POTOMAC RIVERKEEPER, INC. d/b/a  
POTOMAC RIVERKEEPER NETWORK,

Petitioner,

v.

STATE WATER CONTROL BOARD,

Respondent,

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent,

VIRGINIA ELECTRIC AND POWER COMPANY,

Permit applicant

Case No.: \_\_\_\_\_

**AFFIDAVIT OF PHILLIP MUSEGAAS, ON BEHALF OF POTOMAC  
RIVERKEEPER, INC.**

DISTRICT OF COLUMBIA

This day personally appeared before me, a Notary Public in and for the District of Columbia at large, PHILLIP MUSEGAAS, who, first being duly sworn, stated that:

1. My name is Phillip Musegaas. I am over 18 years of age, and I am competent to give this declaration. The information in this declaration is based on my personal knowledge, information, and belief.

2. I reside at 120 Seaton Place NW, Washington, DC.
3. I have been the Legal Director of Potomac Riverkeeper, Inc., d/b/a Potomac Riverkeeper Network (PRK) since March 2, 2015. I am also an officer of PRK.
4. PRK has its offices at 1615 M Street NW, Washington, DC.
5. PRK is a member supported nonprofit organization, founded in 2000, with the mission of protecting the public's right to clean water in the Potomac River watershed. PRK engages in citizen enforcement of environmental laws to stop pollution, preserve river habitat and enhance public use and enjoyment of our shared waterways. Through advocacy and citizen enforcement actions, PRK seeks to prevent or remedy pollution that damages water quality and river habitats and negatively impacts the ability of PRK's members and the public to use and enjoy the Potomac River and its tributaries.
6. PRK works throughout the 14,000 mile Potomac River watershed, which includes the full length of the Potomac and Shenandoah Rivers, encompassing territory in Maryland, Virginia, West Virginia, Pennsylvania and the District of Columbia.
7. As part of its work, PRK regularly reviews and submits formal comments on Clean Water Act discharge permits that allow discharges of pollutants into the Potomac watershed. PRK's goal in engaging on these permits is to reduce and eventually eliminate these discharges, in order to improve water quality and the aquatic environment.
8. PRK currently has 1,000 members who live and work in the Potomac River watershed. Members of the organization regularly use and enjoy the natural

resources of the Potomac River and its tributaries like Quantico Creek for fishing, swimming, boating, hunting, wildlife viewing, and other purposes.

9. PRK's members are adversely affected by pollution that hinders or negatively affects their ability to use and enjoy these resources.
10. PRK members regularly use and enjoy the Potomac River and Quantico Creek in the vicinity of the Possum Point Power Plant (Possum Point).
11. PRK began investigating water pollution issues at Possum Point in 2013, in the context of filing comments on the facility's VPDES permit renewal.
12. Possum Point is located on the Potomac River and Quantico Creek, a tributary of the Potomac, in Prince William County, Virginia.
13. PRK has been actively engaged in efforts to reduce pollution from Possum Point since 2013. This engagement has included filing a Notice of Intent to Sue under the Clean Water Act, and commenting on proposed modifications to the facility's VPDES permit in 2015.
14. PRK is aware that until recently there were five coal ash ponds holding approximately a billion gallons of coal ash wastewater and coal ash at Possum Point.
15. PRK is aware that the coal ash from four of the ponds was combined into the fifth pond, called Pond D, at Possum Point. A "toe drain" from this pond discharges into Quantico Creek and contains pollutants from the coal ash.

16. PRK is aware that the coal ash ponds at Possum Point have leaked heavy metals and other pollutants into groundwater that flows into Quantico Creek, very near to the point where Quantico Creek empties into the Potomac River.
17. PRK is aware that the Virginia Department of Environmental Quality (DEQ) has authorized the “dewatering” discharge of more than 150 million gallons of coal ash wastewater from Pond D into an unnamed tributary of Quantico Creek, into Quantico Creek directly, and into the Potomac River.
18. PRK is aware that this coal ash wastewater contains arsenic, cadmium, lead, selenium and other toxic pollutants and heavy metals, and that the permit issued by DEQ allows the facility to discharge these pollutants at concentrations well above Virginia state standards for protecting human health and aquatic life.
19. PRK is aware that treatment technology is available that, if utilized, would significantly reduce the concentrations of pollutants in the dewatering discharge from Possum Point, but that the permit does not require its use.
20. If Possum Point is allowed to dewater Pond D and discharge coal ash pollutants at the levels specified in the current permit, this discharge will have a deleterious effect on aquatic life and water quality in Quantico Creek and the Potomac River because it will result in an increase, not decrease of metals pollution into the Potomac.
21. As a result, this discharge would negatively affect and hinder PRK’s ability to achieve its mission of stopping pollution and restoring river habitat in the Potomac watershed.

22. This permitted discharge of coal ash pollution from Possum Point would also directly hinder and degrade PRK's members' ability to use and enjoy the Potomac River and Quantico Creek for fishing, boating, wildlife viewing and other purposes.
23. Significant additional treatment of Possum Point's coal ash wastewater discharge utilizing available treatment technology would minimize or eliminate adverse impacts to Quantico Creek and the Potomac River.
24. The favorable resolution of this case resulting in the rejection of the current dewatering discharge permit for Possum Point would protect PRK's interests and benefit its organizational mission of protecting and preserving the Potomac River watershed, as well as redressing the likely injury resulting from discharges of coal ash wastewater from Possum Point.

Phillip Musegaas

PHILLIP MUSEGAAS

Subscribed and sworn to before me this 25<sup>th</sup> day of February, 2016.

Maria Saponara

NOTARY PUBLIC

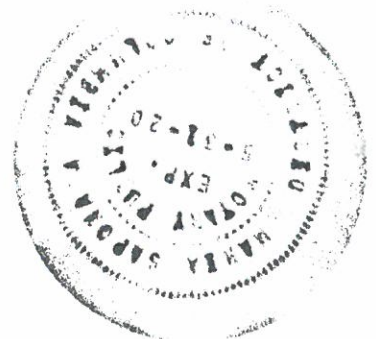
District of Columbia: SS

Subscribed and sworn to before me, in my presence,  
this 25 day of February, 2016

Maria Saponara

Maria Saponara, Notary Public, D.C.

My commission expires May 31, 2020.





VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

POTOMAC RIVERKEEPER, INC. d/b/a  
POTOMAC RIVERKEEPER NETWORK,

Petitioner,

v.

STATE WATER CONTROL BOARD,

Respondent,

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent,

VIRGINIA ELECTRIC AND POWER COMPANY,

Permit applicant

Case No.: \_\_\_\_\_

**AFFIDAVIT OF NICHOLAS KUTTNER**

DISTRICT OF COLUMBIA

This day personally appeared before me, a Notary Public in and for the District of Columbia at large, NICHOLAS KUTTNER, who, first being duly sworn, stated that:

1. My name is Nicholas Kuttner. I am over 18 years of age, and I am competent to give this declaration. The information in this declaration is based on my personal knowledge, information, and belief.

1. My name is Nicholas Kuttner. I am over 18 years of age, and I am competent to give this declaration. The information in this declaration is based on my personal knowledge, information, and belief.

2. I reside at 807 Arcturus on the Potomac in Alexandria, VA. My home is right beside the Potomac River.

3. I have been a member of the Board of Directors of Potomac Riverkeeper (PRK) for three years, and a member of PRK for approximately seven years.

4. The Potomac River is very important to me. Not only do I live along the river, but I am an avid fisherman and fish for bass or anything else that I can catch. I enjoy birdwatching on the river, as well as taking photographs of wildlife and the river.

5. I go out on the Potomac to fish multiple times every year. I frequently go fishing for largemouth bass, snakeheads, shad, and perch in the Potomac and its tributaries, south of my home.

6. In addition to the main stem of the Potomac, I enjoy fishing and boating in Quantico Creek, as well as Mattawoman Creek and Chicamuxen Creek, two tributaries that feed into the Potomac just across the river from the Possum Point Power Plant.

7. I go fishing and boating in Quantico Creek, Mattawoman Creek, Chicamuxen Creek, and the nearby section of the Potomac several times a year.

8. I often take friends and family out on the Potomac and tributaries, including Quantico Creek, Mattawoman Creek, and Chicamuxen Creek. Sometimes we go fishing; sometimes we just enjoy the experience of being out on the water. When my kids were

young, my wife and I used to take them out on the river to enjoy the water, to see the birds, and to listen to all the sounds of wildlife on the river.

9. During the spring and summer, I go out on the Potomac and its tributaries about once a week. Although I do not go out on the river as frequently during the winter months, I plan to go back out regularly once the weather warms up.

10. I have been boating and fishing in the Potomac River and Quantico Creek alongside of and downstream from the Possum Point Power Plant.

11. Although I enjoy fishing in the Potomac River, Quantico Creek, Mattawoman Creek and Chicamuxen Creek, I do not eat the fish I catch there because I am concerned about the toxins and heavy metals that have built up in the fishes' systems over the course of their lifetimes in that section of the River.

12. I became involved with the Potomac Riverkeeper because I am concerned about water quality in the Potomac River, and its effects on aquatic life and human health. I am frustrated by the many sources of pollution that have impacted the health of the River and its tributaries, and am actively engaged in efforts to improve water quality. The Potomac River provides livelihoods for and supports the personal passions of thousands of residents and visitors, and it enhances the quality of life of everyone in the entire region.

13. As a member of the Board of Directors, I am particularly interested in helping the organization to address pollution issues in the lower Potomac River, which includes the area near Possum Point Power Plant.

14. I understand that there were until recently five coal ash ponds holding many millions of gallons of waste coal ash located at the Possum Point Power Plant, between Quantico Creek and the Potomac River.

15. I understand that the coal ash from four of these ponds was combined into the fifth pond, known as pond D, at the Possum Point Power Plant. I also understand that a “toe drain” from this pond discharges into Quantico Creek and contains pollutants from the coal ash.

16. I understand that these ponds are leaking, and have leaked for decades, heavy metals and other pollutants into groundwater that flows into Quantico Creek very near to the point at which the Creek meets the Potomac River.

17. I understand that the Virginia Department of Environmental Quality has authorized the “dewatering” discharge of more than 150 million gallons of coal ash wastewater from this pond into a tributary of Quantico Creek, into Quantico Creek near its mouth, and into the Potomac River itself.

18. I understand that this coal ash wastewater contains arsenic and other toxic pollutants and heavy metals, and that the permit issued by the Virginia Department of Environmental Quality authorizes the discharge to contain these pollutants at concentrations well above Virginia’s water quality standards for human health and aquatic life.

19. I understand that treatment technology is available to greatly reduce the concentrations of these pollutants, but that the permit does not require its use.

20. The pollution at the Possum Point Power Plant affects my experience when I go boating, fishing, and birdwatching in the area. When I am on the Potomac, Quantico Creek, and other tributaries, pollution is always on my mind. Knowing about the contaminants leaking from the coal ash ponds impacts my ability to feel comfortable, confident, and good about using the river and harms my enjoyment and use. Knowing about the discharge of over 150 million gallons of coal ash wastewater further degrades my ability to use and enjoy the river.

21. I am concerned that the coal ash wastewater discharge could damage the fishery in Quantico Creek and in the nearby and downstream sections of the Potomac River and its tributaries, and could also harm the bald eagle and osprey populations that live in the area.

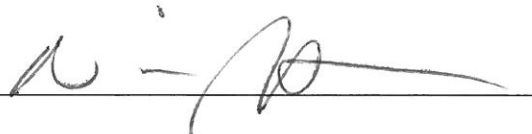
22. If the Possum Point Power Plant coal ash wastewater discharge was treated to the levels that routine wastewater treatment can achieve, which would ensure that concentrations of metals were below water quality standards at the point of discharge, I would enjoy the time I spend in the area much more. Knowing that this source of pollution is being addressed in a responsible manner that avoids degrading Quantico Creek and the Potomac River in any way would make me feel much better about the future of these waterways.

23. My knowledge of the coal ash ponds and the newly authorized coal ash wastewater discharge has caused me to want to avoid, rather than explore, Quantico Creek. If the Virginia Department of Environmental Quality instead set limits for metals

based on what treatment systems can achieve, I would be more likely to visit Quantico Creek more frequently as a place to fish and recreate.

24. The Potomac Riverkeeper represents my interests in seeking to protect Quantico Creek and the Potomac River and to bring the Possum Point Power Plant into compliance with state and federal law.

25. The resolution of this case in favor of the Potomac Riverkeeper will help protect my interests and redress my injuries.



NICHOLAS KUTTNER

Subscribed and sworn to before me this 29 day of February, 2016.

  
NOTARY PUBLIC

AZIZ BEKISHOV  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires September 30, 2020

