

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 434-977-4090

201 WEST MAIN STREET, SUITE 14
CHARLOTTESVILLE, VA 22902-5065

Facsimile 434-977-1483

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Via email to:

Heather Wood, Chair
State Water Control Board
Members of the State Water Control Board
citizenboards@deq.virginia.gov

David Paylor, Director
Virginia Department of Environmental Quality
PO Box 1105
Richmond, VA 23219
dpaylor@gov.state.va.us

Joseph Grist, Program Manager
Virginia Department of Environmental Quality, Office of Water Supply
PO Box 1105
Richmond, VA 23219
withdrawal.permitting@deq.virginia.gov

Re: Draft Groundwater Withdrawal Special Exception Permit for the Chickahominy Power Station (No. GW0078700)

Dear Chairwoman Wood, Members of the Board, Director Paylor, and Mr. Grist:

Southern Environmental Law Center (SELC), Concerned Citizens of Charles City County, Virginia Environmental Justice Collaborative, and Mothers Out Front offer the following comments on the draft groundwater withdrawal special exception permit for the Chickahominy Power Station (No. GW0078700). Specifically, we request that the State Water Control Board deny Chickahominy's application for the following reasons:

- Under the Virginia Energy Plan, the Virginia Department of Environmental Quality (DEQ) must conduct an environmental justice analysis for energy facilities to ensure that their development will not disproportionately impact economically disadvantaged or minority communities.
- DEQ should conduct this environmental justice analysis at the start of the permitting process and specifically apply it to each permit review for an energy facility to ensure that the overall development of the project will not result in a disproportionate adverse impact.

- But DEQ’s environmental justice analysis for the Chickahominy Power Station—conducted in 2019 during the review of the air permit—was critically flawed and now must be corrected during this next step in the permitting process.
- Finally, issuing a groundwater withdrawal permit for an industrial use from the taxed Potomac Aquifer sets poor groundwater management policy in the Commonwealth.

If built, the 1,650 MW Chickahominy Power Station would be the largest fossil fuel-fired power station in the Commonwealth.¹ Chickahominy Power, LLC proposes to withdraw 30 million gallons of groundwater annually for seven years from the taxed Potomac Aquifer to run its power station.² The facility would be located in Charles City County, a majority-minority county already burdened with a second proposed fossil fuel-fired power station, C4GT.³ Because the Chickahominy Power Station is an energy facility, it is subject to the Virginia Energy Plan’s environmental justice objective of ensuring development of energy facilities will not have a disproportionate adverse impact on economically disadvantaged and minority communities.⁴ An environmental justice analysis should be done at the start of a facility’s permitting process and should be considered throughout the multiple permitting processes required for development of energy facilities. This includes the groundwater withdrawal permit that would authorize significant withdrawals from a stressed aquifer that Charles City County residents rely on for drinking water. Accordingly, it is critical that DEQ’s environmental justice analysis for the facility is accurate.

As the United States Court of Appeals for the Fourth Circuit recognized in its recent decision in *Friends of Buckingham v. State Air Pollution Control Board*, “environmental justice is not merely a box to be checked[.]”⁵ But that is precisely what DEQ did for the Chickahominy Power Station. In *Friends of Buckingham*, the Fourth Circuit vacated and remanded the Virginia Air Pollution Control Board’s permit for construction of the Buckingham Compressor Station in the historic African-American community of Union Hill because of its flawed environmental justice analysis.⁶ Critically, DEQ’s unlawful analysis led some to doubt the existence of the Union Hill community during the permitting process.⁷ So, it is particularly concerning that

¹ Sarah Vogelsong, *Comment closes Wednesday on permit for giant new natural gas power plant in Charles City*, Virginia Mercury (Mar. 19, 2019), <https://www.virginiamercury.com/2019/03/19/comment-closes-wednesday-on-permit-for-new-natural-gas-power-plant-in-charles-city/>.

² Va. DEQ, Chickahominy Draft Special Exception Issuance Fact Sheet (GW0078700) 3, 5 (Nov. 22, 2019), <https://www.deq.virginia.gov/Portals/0/DEQ/Water/OWS-WWPandC/Draft%20Fact%20Sheet-Chickahominy%20Power-11-22-19.pdf?ver=2019-12-03-091443-603>.

³ Vogelsong, *supra* note 1.

⁴ See Va. Code §§ 67-101(12), 67-102(A)(11).

⁵ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

⁶ *Id.* at 71-72.

⁷ *Id.* at 88 (noting that “[t]hroughout the public comment period and public meetings, one of the main points of dispute was whether the Union Hill community could be deemed a ‘minority’ EJ community.”).

DEQ's environmental justice analysis for the Chickahominy Power Station suffered from many of the same inadequacies as its analysis for the Buckingham Compressor Station. DEQ must now take this permitting opportunity to correct its flawed environmental justice analysis for the facility. To ensure the same critical errors do not occur with the Chickahominy Power Station that did with the Buckingham Compressor Station, and to carry out the objectives of the Virginia Energy Plan, the State Water Control Board should deny Chickahominy's application for a groundwater withdrawal special exception permit until DEQ conducts a meaningful environmental justice review for the facility. At a minimum, the Water Board should suspend the permitting process until such an analysis is complete.

I. DEQ's environmental justice analysis for the Chickahominy Power Station was critically flawed.

A clear picture of the people who will be burdened by the numerous environmental impacts of an energy facility should be the first step of an environmental justice analysis and permitting process. DEQ conducted an environmental justice analysis for the Chickahominy Power Station at the start of the facility permitting process, with issuance of an air permit. Unfortunately, DEQ's analysis for the power station did not provide the public with a clear or accurate picture of the communities near the proposed facility.

A. DEQ misused EJSCREEN to conclude there were no environmental justice communities in the area surrounding the Chickahominy Power Station.

DEQ relied on EJSCREEN to determine the demographics of the area surrounding the Chickahominy Power Station, as it did for the Buckingham Compressor Station, and to conclude that no environmental justice communities existed.⁸ But as SELC and others have explained before, EJSCREEN is designed to give regulators and the public a preliminary, approximate understanding of who might be affected.⁹ It "is a pre-decisional screening tool" and is *not* "designed to be the basis for agency decisionmaking or determinations regarding the existence or absence of [environmental justice] concerns."¹⁰ EJSCREEN relies on census data and estimates, often involving substantial uncertainty and masking specific, localized impacts of a project.¹¹ Indeed, during its November 2018 presentation to the Air Board regarding Union Hill, one DEQ staff member told the Board, "I wouldn't really rely on" EJSCREEN.¹² Despite these limitations, DEQ did just that and relied on EJSCREEN as the basis for its determination

⁸ *Id.* at 87-88.

⁹ See e.g. Letter from Gregory Buppert, SELC, to Richard Langford, Chair, Va. Air Pollution Control Bd., and David Paylor, Dir., Va. DEQ 2-3 (Dec. 7, 2018), https://www.deq.virginia.gov/Portals/0/DEQ/Air/BuckinghamCompressorStation/PUBLIC_COMMENT_DOC_2018_12_07_SELCLetter_to_Air_Board_re_Union_Hill_Demographics_FINAL_WITH_ATTACH.pdf.

¹⁰ Environmental Protection Agency, EJSCREEN: Environmental Justice Screening and Mapping Tool, <https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen>.

¹¹ See Mary Finley-Brook, Environmental Injustices in Buckingham Compressor Station Siting and Permitting 8 (Jan. 4, 2019), https://www.deq.virginia.gov/Portals/0/DEQ/Air/BuckinghamCompressorStation/10DayCommentPeriod/BCS_emailled_public_comments_received_1-4-2019_File_7_of_8.pdf.

¹² *Friends of Buckingham*, 947 F.3d at 89.

regarding the absence of environmental justice communities near the Chickahominy Power Station.¹³ DEQ’s misuse of EJSCREEN warrants revisiting its analysis.

Moreover, after *Friends of Buckingham*, DEQ cannot reasonably claim to have any confidence in its EJSCREEN conclusions. DEQ’s substantially similar EJSCREEN analysis for the Buckingham Compressor Station concluded that the minority population varied between 37 to 39%, effectively denying the existence of the Union Hill community.¹⁴ In reality, as counsel for the Commonwealth conceded at oral argument, “84-85% of the people who live within 1.1 [mile] of the Compressor [Station] are people of color predominantly African Americans.”¹⁵ How can DEQ now claim with any degree of confidence that the EJSCREEN results for the Chickahominy Power Station—showing minority population varied between 34 to 45%—present an accurate picture of the communities in the area surrounding the power station? If DEQ is committed to ensuring environmental justice for all, it will revisit its flawed environmental justice analysis for the Chickahominy Power Station to ensure it has a clear picture of the people who would be burdened by this facility.

B. DEQ’s inconsistent comparison to countywide and statewide demographics was arbitrary and diluted the potential for disproportionate impacts to minority communities.

In responding to comments raising environmental justice concerns, DEQ noted that there were no economically disadvantaged environmental justice communities because income values within one, two, and five miles of the power station were above the average for the Commonwealth.¹⁶ But without explanation, DEQ chose a different approach for identifying minority environmental justice communities. Instead of comparing minority populations to the average for the Commonwealth, it compared them to the average for Charles City County, in turn masking the disproportionate impacts of this facility on minority communities.¹⁷ Had DEQ compared the minority population to the average for the *Commonwealth*, as it did for income levels, it would have concluded there was a minority environmental justice community. Based on the only data DEQ used, EJSCREEN, within one mile and two miles of the facility the

¹³ See Va. DEQ, Factors Considered Under Va. Code § 1307.E and Environmental Justice Presentation 23 (June 21, 2019), <https://www.deq.virginia.gov/Programs/Air/ChickahominyPowerStation.aspx> (concluding that “[t]he population of area surrounding proposed power plant is not majority-minority[,]” and “[r]esidents of area surrounding proposed plant have higher incomes on average than do residents of Virginia and the United States as a whole.”).

¹⁴ See Va. DEQ, Dec. 19, 2018 DEQ Presentation – Part 2, at 30, <https://www.deq.virginia.gov/Programs/Air/BuckinghamCompressorStationAirPermit/BuckinghamCompressorStationArchivedDocuments.aspx>.

¹⁵ *Friends of Buckingham*, 947 F.3d at 88 n.10.

¹⁶ Va. DEQ, Chickahominy Power Station Summary of and Response to Comments 6 (June 21, 2019), https://www.deq.virginia.gov/Portals/0/DEQ/Air/Chickahominy_Power_Plant/Documents/52610-001_summary_of_and_response_to_public_comments.pdf.

¹⁷ *Id.* (“all of the minority population values are below the average (52.8%) for Charles City County as a whole.”).

minority population was 42% and 45%, respectively, which is above the 37% average for the Commonwealth.¹⁸ It is unclear what led DEQ to use different comparisons for each factor and, notably, comparisons to statewide demographics better reveal the racial disparities that result from energy infrastructure development than comparisons to parent counties. Accordingly, DEQ should revisit its environmental justice determination and use a statewide comparison for both economically disadvantaged and minority communities. At a minimum, DEQ must explain its inconsistent approach that appears to favor finding no environmental justice communities.

DEQ must also revisit its summary dismissal of comments noting that Charles City County as a whole may be considered an environmental justice community because it is majority-minority.¹⁹ In its response to comments, DEQ recognized that Charles City County is a majority-minority county.²⁰ But DEQ dismissed the possibility that this created environmental justice issues.²¹ DEQ apparently reasoned that because the Charles City County Board of Supervisors represents the county, it must also represent environmental justice concerns.²² And because the Board of Supervisors must represent environmental justice concerns, its issuance of a special use permit was equivalent to concluding there were no environmental justice issues with the facility.²³ Not so. DEQ cannot avoid its independent duty to consider the potential for disproportionate harm from development of energy facilities by relying on a local government decision that did not consider information or factors bearing on environmental justice.

C. An independent study contradicts DEQ's conclusion that there are no environmental justice communities near the proposed Chickahominy Power Station.

In addition to the serious inadequacies underlying DEQ's analysis, there is also evidence in the record that conflicts with DEQ's EJSCREEN-based determinations. Stephen Metts, a Professor at The New School, conducted an independent spatial data analysis of the Chickahominy Power Station for environmental justice.²⁴ Professor Metts' analysis identified four environmental justice eligible tracts in close proximity to the power station warranting further environmental justice review.²⁵ Three were minority environmental justice eligible tracts, with between 65 and 79% minority populations, and one was an economically disadvantaged environmental justice tract.²⁶ In *Friends of Buckingham*, the Air Board was similarly "presented with conflicting evidence about whether and how Union Hill was a

¹⁸ *Id.*

¹⁹ *Id.* at 6-7.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Stephen Metts, Chickahominy Power Plant Proposal – Independent Spatial and Demographic Analyses Finding Statement (June 4, 2019), https://spatial-analysis-findings.s3.us-east-2.amazonaws.com/Independent+spatial+data+analyses+of+the+2019+Chickahominy+Power+Plant_6-4-19.pdf.

²⁵ *Id.* at 4.

²⁶ *Id.*

‘minority’ EJ population.”²⁷ The Fourth Circuit found the Air Board’s failure to resolve this conflict “improper under both federal law, and Virginia administrative law.”²⁸ Accordingly, if DEQ refuses to revisit its original environmental justice analysis for the facility, the Board must, at a minimum, resolve the conflicting evidence before it regarding the existence of environmental justice communities near the power station.

II. Issuing a groundwater withdrawal special exception permit to Chickahominy Power, LLC sets poor groundwater management policy.

In its decisionmaking process, DEQ appears to have considered only two options: (1) issuing a groundwater withdrawal permit for a term of 15 years or more or (2) issuing a special exception permit for a term of 7 years.²⁹ Importantly, DEQ did not consider a third option: not issuing a groundwater withdrawal permit for an industrial facility in an area with identified groundwater resource limitations.³⁰ DEQ’s decision to approve a special use permit, rather than simply require Chickahominy to select an alternative water supply, sets bad policy of deferring difficult groundwater management decisions. As DEQ recognized in the Draft Special Exception Issuance Fact Sheet, the requested withdrawal is within an aquifer area that has incurred an overall decline.³¹ Citizens of Charles City County rely on the stressed Potomac Aquifer for drinking water, and the Commonwealth’s Groundwater Management Act mandates the prioritization of human consumption where groundwater is not available for all who desire to use it.³²

Instead of prioritizing human consumption, though, DEQ has deferred a final decision on the issue for seven years. The upshot of DEQ’s deferral is that a billion dollar facility may be constructed and placed into operation on the mere assumption that a different, unrelated project will be completed and placed into operation within the next seven years – New Kent County’s proposed surface water intakes and water line.³³ DEQ places far too much weight on the assumption that New Kent County’s water intakes and water line will be constructed in seven years. Citizens burdened with the environmental impact of this facility should not have to rely on DEQ’s assumptions to protect their drinking water. What does DEQ propose if New Kent ultimately abandons its project or if construction is delayed? Would DEQ be willing to shut down the largest fossil fuel-fired power plant in the Commonwealth seven years from now if New Kent does not construct its intakes system and water line or falls behind schedule? Or would DEQ continue to issue new groundwater withdrawal permits for the power station based on the assumption that there may eventually be an alternative water source? And even if DEQ were willing to require Chickahominy to cease operation, DEQ will still have allowed this non-human consumption withdrawal for seven years. The Water Board should not condone DEQ’s decision to postpone serious consideration of these issues. The Water Board should instead deny

²⁷ *Friends of Buckingham*, 947 F.3d at 87-89.

²⁸ *Id.* at 88.

²⁹ Chickahominy Power Station Draft Special Exception Permit Issuance Fact Sheet 3.

³⁰ *Id.* at 3, 7.

³¹ *Id.* at 3.

³² Va. Code § 62.1-263.

³³ Chickahominy Power Station Draft Special Exception Permit Issuance Fact Sheet 4.

the groundwater withdrawal special exception permit and require Chickahominy to select an alternative water source for its power plant.

III. Request for Public Hearing

SELC, Concerned Citizens of Charles City County (C5), and Virginia Environmental Justice Collaborative (VEJC) request an additional public hearing for the proposed groundwater withdrawal special exception permit and subsequent environmental justice analysis for the facility, pursuant to 9 Va. Admin. Code §§ 25-230-40(B), 25-610-270(A) and Va. Code § 62.1-44.15.02. In support of such request, SELC, C5, and VEJC make the following statement:

1. The name, mailing address, and telephone number of the requester:

Emily Wyche
201 West Main St., Suite 14
Charlottesville, Virginia 22902
(434) 977-4090

On behalf of Southern Environmental Law Center

Benita Lewis
13431 Wilcox Neck Road
Charles City VA 23030
(804) 677-1595

On behalf of Concerned Citizens of Charles City County

Queen Zakia Shabazz
4809 Old Warwick Rd.
Richmond, Virginia 23224
(804) 370-1143

On behalf of Virginia Environmental Justice Collaborative

2. The proposed Chickahominy Power Station is a matter of significant public interest, as is the issuance of the proposed special exception permit. The Chickahominy Power Station would be the largest fossil fuel-fired power station in the Commonwealth and as a result has generated significant public controversy. Additionally, the proposed groundwater withdrawal would be from the stressed Potomac Aquifer, which has experienced an overall decline, and upon which Charles City County residents rely for drinking water. Based on the comments provided above, there is substantial dispute regarding whether the Board may issue the requested permit, including due to the inadequacy of DEQ's earlier environmental justice review and determination for the facility. Additionally, a public hearing would not be "inconsistent with, or in violation of, the State Water Control Law, federal law, or any regulation promulgated thereunder."³⁴ C5, representing citizens of Charles City County who would be burdened by this facility, notes that the power

³⁴ Va. Code § 62.1-44.15.02(C)(3).

station would dramatically and permanently reshape, and even endanger, their community. After careful study, C5 discovered that this power station would cause significant air pollution, exploit local water resources, permanently change the county's rural nature, affect roads and public safety, undermine property values, and likely result in a snowballing expansion of pipeline infrastructure in the community. Crucially, residents in Charles City were almost entirely kept out of the initial permitting for the facility; an omission that C5 believes was intentional and strategic. C5 also believes developers intentionally sited this proposed gas plant in a majority-minority community, and believes that this project raises significant environmental justice concerns. C5 first organized in response to this lack of transparency and environmental injustice. A public hearing is necessary to engage Charles City residents who would be most impacted by this plant, and to add a degree of participatory democracy to a process that has, thus far, been cloaked in bureaucratic and institutional silencing.

3. SELC is a non-profit public interest organization dedicated to using the power of the law to protect clean air, clean water, special places, and to ensure a healthy environment for all. C5 is a community grassroots organization that developed in the days immediately following the issuance of the air permit for the Chickahominy Power Station, with the goal of bringing transparency and citizen participation to the important decisions impacting Charles City County. C5 has a central, foundational interest in the groundwater withdrawal special exception permit and Chickahominy Power Station; indeed, the organization was largely developed to communicate local opposition to this fossil fuel project. VEJC is made up of community based non-profits, faith-based, conservation and green organizations, and academics and is dedicated to building a clean, healthy, and just environment for all Virginians and empowering communities to thrive without harmful government interference.

The Chickahominy Power Station would withdraw groundwater from the taxed Potomac Aquifer that Charles City County residents rely on for drinking water and poses significant environmental justice concerns for the citizens of Charles City County. Accordingly, SELC, C5, and VEJC have a demonstrated interest in ensuring the Water Board and DEQ conduct an adequate environmental justice analysis for this permit in order to identify the communities who will be burdened by the facility and consider the potential for disproportionate impacts to economically disadvantaged and minority communities. The public should be meaningfully involved through a public hearing on DEQ's environmental justice analysis for the facility and permit.

4. DEQ's review of this permit is inadequate because it failed to consider environmental justice impacts in accordance with the Virginia Energy Plan. Accordingly, an accurate environmental justice review of the facility and this permit is required to conform to the objectives of the Virginia Energy Plan.

IV. Conclusion

This permit presents the first opportunity since the Fourth Circuit's decision in *Friends of Buckingham* for DEQ and the Water Board to demonstrate that they are in fact dedicated to ensuring environmental justice in the permitting process for energy facilities. That DEQ's substantially similar analysis for the Buckingham Compressor Station effectively denied the

existence of the Union Hill community cannot be over emphasized. In order to ensure it does not allow such a significant error to reoccur, DEQ must conduct a new environmental justice review for the Chickahominy Power Station. And to ensure the citizens of Charles City County are meaningfully involved and their voices heard, DEQ should provide an additional opportunity for public comment and hearing *after* it conducts a new environmental justice analysis for the facility. This will ensure impacted residents and concerned citizens are able to provide meaningful comments on the potential for disproportionate adverse impacts from development of the facility.

The citizens of Charles City County deserve to be meaningfully involved in the permitting process for the Chickahominy Power Station and deserve the full and fair treatment and consideration envisioned by the Virginia Energy Plan. Because “environmental justice is not merely a box to be checked” we respectfully request that the Board: (1) deny the permit for the Chickahominy Power Station; (2) require additional, reliable information regarding the communities in close proximity to the power station; and (3) consider the potential for disproportionate impacts from issuing a groundwater withdrawal special exception permit. We appreciate your attention to this important matter.

Sincerely,



Emily Wyche
Gregory Buppert
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main St., Suite 14
Charlottesville, Virginia 22902
(434) 977-4090
ewyche@selcva.org

Benita Lewis
Pastor F. Wayne Henley
Bryant J. Wheeler
Cynthia Robinson
La'Veesha Allen Rollins
Wanda Roberts
Tara Johnson
Beth Kreydatus
Mary Finley-Brook
Barb Adams
CONCERNED CITIZENS OF CHARLES CITY COUNTY
13431 Wilcox Neck Road
Charles City, Virginia 23030

804-677-1595
c5groupinfom@gmail.com

Queen Zakia Shabazz
VIRGINIA ENVIRONMENTAL JUSTICE COLLABORATIVE
4809 Old Warwick Rd.
Richmond, Virginia 23224
(804) 370-1143
qshabazz@vaejc.org
www.vaejc.com

Haley Wilson
MOTHERS OUT FRONT
232 Eugene Drive NW
Roanoke, Virginia 24017
(434) 907-6116
haley.wilson@mothersoutfront.org