MINUTES FROM THE PROCEEDINGS
OF THE
STATE WATER CONTROL BOARD
AT ITS
MEETING ON JULY 30, 2007

House Room C
General Assembly Building
9th & Broad Streets
Richmond, Virginia

Board Members Present:

W. Shelton Miles, III, Chair
Michael McKenney
W. Jack Kiser
Robert H. Wayland, III
Komal K. Jain, Vice-Chair
Thomas D. C. Walker
John B. Thompson

Department of Environmental Quality Present:

David K. Paylor, Director
Julie F. Shelton
Cindy M. Berndt

Attorney General's Office:

Alfred B. Albiston, Assistant Attorney General

The meeting was convened at 10:05 a.m. on July 30, 2007, went into closed session at 10:25 a.m., reconvened in open session at 11:05 a.m., went into closed session at 11:45 a.m., reconvened in open session at 2:34 p.m. and adjourned at 2:35 p.m.

Minute No. 1 – Captain's Cove Utility Company, Inc.

Mr. Miles informed the Board that the purpose of the meeting was to render a final decision on the application by Captain's Cove Utility Company, Inc. (Captain's Cove) for a Virginia Pollutant Discharge Elimination System Permit for a proposed wastewater treatment facility to be located in Greenbackville, Virginia.

He explained that the application was denied by the Board at its meeting on September 6, 2006, and in response to a request from Captain's Cove, a formal hearing on the denial was held before a hearing officer assigned by the Executive Secretary of the Supreme Court of Virginia.

Mr. Miles advised the Board that both the applicant and the Department had requested an opportunity for oral arguments before the Board began deliberations and that those requests had been granted.

The Board then heard oral argument from Mark Baumgartner, representing Captain's Cove, and then from Ms. Julie Shelton, from the Department.

The Board then, on a unanimous vote, went into Closed Session pursuant to the provisions of Section 2.2-3711 (A)(7) of the Code of Virginia concerning Captain's Cove Utility Company, Inc. application for VPDES Permit No. 0091782.

Upon reconvening in open session the Board, pursuant to Section 2.2-3712 (D) of the Code of

Approved Minute No. 1
Sept. 25, 2007

Virginia, by roll call vote, unanimously certified that only those matters identified, which are lawfully exempted from the requirements of the Freedom of Information Act, were considered during Closed Session.

The Board then posed questions to both Mr. Baumgartner and Ms. Shelton. The Board then, on a unanimous vote went into Closed Session pursuant to the provisions of Section 2.2-3711 (A)(7) of the Code of Virginia concerning Captain's Cove Utility Company, Inc. application for VPDES Permit No. 0091782.

Upon reconvening in open session the Board, pursuant to Section 2.2-3712 (D) of the Code of Virginia, by roll call vote, unanimously certified that only those matters identified, which are lawfully exempted from the requirements of the Freedom of Information Act, were considered during Closed Session.

Decision: The Board unanimously adopted the following findings of fact:

(1) The SWCB has the authority to issue, revoke or amend water discharge permits for sewage and other waste into or adjacent to state waters and it is the regulatory function of the SWCB to issue and control water discharge permits pursuant to Va. Code Sec. 62.1-44.15.

(2) The SWCB and the DEQ oversee and monitor water quality standards within state waterways pursuant to Va. Code Sec. 62.1-44.2. The Chincoteague Bay and Swan's Gut Creek are within Virginia state waterways.

(3) Prior to the discharge of treated effluent within a state waterway, Virginia regulation set forth at Va. Code Sec. 62.1-44.19 states that the owner of a sewage treatment facility must obtain a Virginia Pollution Elimination System Permit.

(4) Before the SWCB may act upon a proposed project that would result in the condemnation of shellfish beds, the SWCB must convene a public hearing to determine the socio-economic effect of the proposed project pursuant to 9 VAC 25-260-270.

(5) The Board finds that issuance of the permit would authorize a discharge of a substance – the effluent from the wastewater treatment plant – which the Department of Health has said would require a condemnation of waters of the state, thereby causing interference, directly or indirectly with a designated use, that use being recreational or commercial shellfish harvesting. 9 VAC 25-260-270 and 9 VAC 25-260-20

(6) The general standard for the designation of uses of all state waters, including wetlands, is as follows pursuant to 9 VAC 25-260-10:

Recreational use is defined as swimming and growth of a balanced, indigenous population of aquatic life, including game fish which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources such as fish and shellfish.

(7) In the SWCB's evaluation of applications, it is the Board's policy, in giving adequate protection to viable shellfish resources, to include an evaluation of reasonable potential, as well as actual productivity for the affected areas pursuant to 9 VAC 25-370-20.

(8) Captain's Cove Development, a subdivision comprised of 4,800 lots in Greenbackville, Accomack County, Virginia, requests that the DEQ issue a surface water discharge permit in order to upgrade its existing non-discharge wastewater permit to a modern, biological nutrient removal ("BNR") sewage treatment facility. (St. Ex. 1)

(9) There are 710 homes in Captain's Cove Development. Of these homes, about 237 homes utilize the existing wastewater facility and about 300 to 400 of the homes use septic systems. (Tr./SWCB (B)4, Tr. 273, 18-22, Tr. 41, 20 & St. Ex. 10, Bates# 1768)

(10) Of the originally platted 4,800 Captain's Cove Development lots, 600 of the lots do not perk, therefore, it is not possible for these lot owners to create an adequate septic tank field within the square footage of each lot. Also, 2,958 of the lots were designed to have on-lot septic systems and 1,842 lots were to use the existing sewer system. (Tr. 270, 9-10 & Tr. 273, 7-17)

(11) The existing facility in Captain's Cove does not function at its full capacity. Currently, the CCUC operates this facility at a flow of 30,000 gallons, however, the maximum capacity for this facility is a flow of 100,000 gallons. (St. Ex. 10, Bates #1769)

(12) The proposed BNR facility would have the capacity to serve about 2,252 homes in Captain's Cove. (S.E. 1, Bates#4)

(13) CCUC has applied for a surface water discharge permit for 900,000 gallons of treated effluent flow per day into Swan's Gut Creek. The proposed discharge point into Swan's Gut Creek flows into the Chincoteague Bay which empties directly into the Atlantic Ocean. The Chincoteague Bay has very poor flushing capacity. (St. Ex. 1, Bates #5 & Tr./SWCB 4(B)8)

(14) The DEQ advised CCUC by certified letter that the proposed surface water outfall would have to be monitored by various state agencies and that it would be necessary for the public to participate in the issuance of the permit. (St. Ex. 2, Bates #121)

(15) Virginia regulation requires condemnation areas or "buffer zones" around the proposed outfall when shellfish will be affected by a sanitary waste discharge. Permits must be obtained from the Virginia Department of Health, ("VDH"), Division of Shellfish Sanitation, ("DSS"), and the VMRC in order to eat or sell the shellfish harvested from a restricted area. (St. Ex. 3(E), Bates #236, #237 & #238, St. Ex. 3(C)) Bates#216-#217 & Tr. 146, 23-25)

(16) If the CCUC water discharge outfall permit is approved, the DSS has advised the Board that it will close 142.2 acres of the Chincoteague Bay for shellfishing and the waters would be reclassified as "restricted" which means that shellfish must be cleansed by "relaying" or "depurating" before being eaten or sold. (St. Ex. 3(C)) Bates #216 -#217, St. Ex. 3(E), Bates#236-#237, Tr. 146, 23-25 & Tr. 147, 1-3)

(17) There is no depuration facility in Virginia. Depuration of shellfish is not possible in this state. (Tr. 147, 21-25).

(18) Pursuant to federal guidelines set by the National Shellfish Sanitation Program, ("NSSP"), the VDH/DSS studies shellfish harvests and establishes areas of condemnation based upon the proximity of the shellfish to potential pollutants. (Tr. 141, 10-14)

(19) Because shellfish are "filter feeders," eating unclean shellfish poses a major health risk. The shellfish must be allowed to purge by filtering out impurities contained in their gut before being eaten. Cleansing of the shellfish lessens the likelihood that dangerous viruses will be transmitted by shellfish. (Tr. 157, 15- 25, Tr. 158, 1-9)

(20) In Virginia, there have been no diseases from eating bad shellfish in over 35 years. Diseases caused by eating bad shellfish are quite serious and environmentally resistant: Typhoid fever, hepatitis, salmonella, shigella, bacterial problems, norovirus or, more commonly, diarrhea, nausea and vomiting are all illnesses caused by eating bad shellfish. (Tr. 167, 17-25, Tr. 157, 25, Tr. 158,1-9 & Tr. 159, 15-16)

(21) Virginia shellfish command a "premium price." A waterman or recreational clammer must undergo a tedious "relaying" process in order for the shellfish to be deemed "cleansed" by the VDH. Because the "catch" limit for a recreational clammer is only 250 clams, it is unlikely that recreational clammers will harvest shellfish that need to be relayed or "tagged." (Tr. 167, 17-25, Tr. 242, 22-25)

(22) There are "breed stock" clams in the area of proposed condemnation. Virginia regulation requires that the VMRC examine the waters for potential for shellfish growth, reproduction and replenishment of the existing numbers of shellfish. The clams in this area are healthy and capable of spawning. (Tr. 202, 10-25 & Tr. 203, 1-7)

(23) Potential for aquaculture clam reproduction and harvesting will be affected if the proposed outfall into Swan's Gut Creek is permitted. Clam farming activities will be limited or entirely cease in the Swan's Gut Creek condemnation area if the outfall is permitted. Virginia's aquaculture clam harvesting is a viable resource in this state. (Captain's Cove Ex. 19, at 3 & Tr. 347, 13-20)

(24) Existing quantities of shellfish and the shellfish resource potential would be affected by the proposed location of the surface water outfall pursuant to the best professional judgment of the VMRC in these matters. The VMRC has stated, "Small areas of commercial viability regarding clam numbers exist within the condemnation areas.... A waterman familiar with this area would find it suitable for periodic commercial harvest." (St. Ex. 10, Bates#1770)

(25) Public notice of the draft permit was published from February 15 to March 17, 2006. In 35 of the comments, there was concern for shellfish and the nutrients to be discharged by the outfall (St. Ex. 3(D) Bates #221, Bates #229 & St. Ex. 11)

(26) A public meeting occurred on the proposed CCUC wastewater treatment facility on March 22, 2006 which was attended by 45-50 persons. The topic for discussion was the volume of the discharge and its impact upon submerged aquatic vegetation and shellfish. (St. Ex. 10, Bates #1768-1769 & St. Ex. 11)

(27) By letter to Salm, project engineer for CCUC, dated April 24, 2006, CCUC was notified that the DEQ would require an increased level of environmental restrictions upon the treated effluent from the sewage treatment facility. Biological nutrient removal would have to be included in the draft permit. (St. Ex. 5, Bates #368-#369)

(28) A public meeting occurred on the proposed CCUC wastewater treatment facility on May 15, 2006 which was attended by 55 persons. The topics for discussion were alternatives to the surface water discharge, impact of the outfall on the shellfish and the nutrients to be discharged in the outfall. (St. Ex. 10, Bates #1768-#1769 & St. Ex. 11)

(29) A socio-economic public hearing occurred on the proposed CCUC wastewater treatment facility on June 21, 2006 (St Ex. 10, 001769). The public hearing was attended by over 500 persons. The topics for discussion were alternatives to surface water discharge, nutrients to be discharged and the impact of the discharge upon the shellfish. Most individuals who attended the public meeting were opposed to the BNR for the above reasons. Of the written comments received by the DEQ, about 300 comments favored the BNR plant proposal because of issues with septic tanks or inability to obtain sewer service. About 120 comments were opposed to the BNR plant because of the impact upon shellfish and objections to the nutrients to be discharged. (St. Ex. 10, Bates #1768-1769 & St. Ex. 11)

(30) The SWCB considered the Petitioner's application for a VPDES permit at its September 6,

2006 meeting. (See SWCB transcript, SWCB ex. B). Upon recommendation by the DEQ against issuance of this permit, the SWCB unanimously voted to deny issuance of the permit to the Petitioner. (Tr./SWCB (B)52-53)

(31) Waters above Swan's Gut Creek are already restricted, however, the Chincoteague Bay is classified as "open, approved and improved classification for shellfish harvest." Although it may be easier to define the source of pollutants in a point source, the excess amounts of fecal coliform present in the upper reaches of Swan's Gut Creek are not necessarily attributable to septic tank runoff. There are many other non-point sources of pollution. (Tr. 144, 1-22 & Tr. 161, 2-5)

(32) Because of the requirement to upgrade the proposed BNR system by the inclusion of a plan for ultraviolet disinfection, the Virginia Department of Health's proposed condemnation area was reduced from 300 + acres to 142.2 acres as reflected in the map shown on St. Ex. 3(C).

(33) The petitioner asserts that the proposed BNR plant will convert approximately 88% of the aqueous nitrogen waste load to nitrogen gas and approximately 5% of the original aqueous nitrogen will be removed as sludge. The leftover 7% is largely converted to nitrate. (St. Ex. 6, Bates#864)

(34) CCUC's project engineer stated that some of the 600 lots that do not perk in Captain's Cove might be able to connect up to the current wastewater treatment facility. (Tr. 287, 23-24 & Tr. 288, 1-2)

(35) Uses of the water could be affected by the condemnation of this area, by terminating shellfishing by watermen and by individuals who choose to harvest clams in this area. Relaying is not a practicable activity. (Tr. 242, 22-25)

(36) Swimming is another recreational use of the water in the proposed condemnation area. Even though swimming is not prohibited in a restricted area of condemnation, it is likely that swimmers would not desire to swim in an area marked with yellow signs stating, "Condemned. No shellfish to be removed." (Tr. 253, 1-5)

After adoption of the findings of fact, the Board unanimously, adopted the following motion: based upon the evidence presented to date and the findings of fact adopted today, the State Water Control Board affirms its decision that the denial of this permit should be upheld. Pursuant to 9 VAC 25-260-270, the State Water Control Board, based upon the State Health Department's determination that the proposed project would result in condemnation of shellfish beds, finds there would be a violation of the standards under 9 VAC 25-260-10 and 9 VAC 25-260-20.

Cindy M. Berndt

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