

MINUTES

Special Commission Meeting

March 12, 2007

The Special meeting of the Marine Resources Commission was set up as a teleconference and held at the Thomas Nelson Community College, Hampton, Virginia and SW Virginia Community College, Richland, Virginia with the following present:

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. T. Holland)	
John R. McConaugha)	Associate Members
F. Wayne McLeskey)	
Frederick Fisher	Sr. Assistant Attorney General
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst, Sr.
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Randy Owen	Environmental Engineer, Sr.

Others present:

Steve M. Faraci	Dr. James M. Roberts	Brian Buniva
Corey Simpson	Gerald F. Ramsey	Wade J. McNeely
Lowell Rothschild	Hon. Dan Bowling	Cathy St. Clair
Paul Smith	Jerry Ward	Anthony Justus
Jerry Jones	Franklin Stiltner	Carroll Branham
Lee Moise	Gerald L. Elkins	Michael G. McGlothlin
Michael Lewis	James Lowe	

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Commissioner Bowman called the meeting to order at approximately 2:30 p.m. Associate Members Fox, Schick, Robins, and Tankard were absent. Commissioner Bowman stated that he would hear from those speakers in support of the project first followed by those in opposition. He said the applicant or representative would be allowed time for rebuttal last.

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CONSOL VIRGINIA COAL COMPANY, #05-2233, requests authorization to construct a diffuser outfall to facilitate the discharge of mine water from its Buchanan Mine Number 1 into the Levisa Fork in Buchanan County. The project is protested by the Buchanan County Board of Supervisors, the Town of Grundy, and the Sierra Club and nearby residents.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides.

Mr. Owen explained that on September 15, 2006, DMME approved Consol's permit revision application to modify its existing coal-mining permit to include the proposed Levisa Fork outfall. Several parties had appealed the decision. An administrative formal hearing, which was originally scheduled to be heard during the week of March 12, 2007 would be conducted by a hearing officer later in the spring. DMMR's director will review any decision made by the hearing officer. His/her decision could be appealed to circuit court.

Mr. Owen stated that the Department of Environmental Quality issued their general permit (WP4-05-2233) for the project on September 26, 2006. The ACOE issued its Virginia State Programmatic General Permit on November 1, 2005. Consol lacks only their VMRC permit to construct and operate the outfall-diffuser.

Mr. Owen stated that the project was protested by the Buchanan County Board of Supervisors, the Town of Grundy, the Sierra Club, and nearby residents. The Commonwealth of Kentucky has reportedly expressed their concern to EPA Region IV because of the project's potential adverse impacts to that portion of their public drinking water supply obtained from the Levisa. Because of the requests by Delegate Daniel Bowling and Senator Phillip Puckett to hold our hearing in Southwest Virginia, VMRC agreed to facilitate a video-conference hearing for this project so that the full Commission may hear testimony provided at the Southwest Virginia Community College campus.

Mr. Owen explained that the project as proposed required Commission authorization pursuant to Title 28.2, Chapter 12 of the Code of Virginia. It was imperative to note, and that the public understand, that the Commission's jurisdiction over this project is limited

to the physical encroachment of the outfall over the State-owned submerged lands within the Levisa Fork and that the Commission was not empowered to regulate the effluent proper.

Mr. Owen said that the Buchanan County Board of Supervisors and the Town of Grundy, in December 2005, adopted resolutions in opposition to the project. The resolutions were forwarded to the Governor's office (Warner) as well as to a number of other elected officials and/or regulation representatives. In their resolution, they requested that the applicant be required to treat the effluent to remove the chlorides and other "dissolved solids" prior to discharge. They concluded that if untreated, the discharge would pose a threat to the health of the river, to the health, safety, and welfare of its citizens and impair further development in Buchanan County.

Mr. Owen explained that in light of the public health and aquatic life concerns raised by the protestants, staff requested clarification of DEQ's position on the project in a September 22, 2006, letter. In response, DEQ advised staff that they have reviewed the project and had no objections to the authorization of the discharge. In their October 6, 2006 response, DEQ added that they had reviewed the Consol proposal and provided written comments to DMLR that focused on the need to increase the permit controls to ensure that State water quality standards would not be violated. They additionally suggested that the permit require whole effluent toxicity (bioassays) and in-stream benthic surveys to ensure that the effluent was non-toxic to the receiving stream.

Mr. Owen stated that the Department of Game and Inland Fisheries recommended on October 28, 2005, that an instream work time-of-year restriction of March 15-July 31 be made a condition of permit approval to protect the State endangered variegate darter. They also recommended adherence to or standard instream work permit conditions. The Department of Conservation and Recreation comments of November 16, 2005, advised that the project as proposed was acceptable but recommended coordination with DGIF on the variegate darter. The Environmental Protection Agency (EPA) and the Office of Surface Mining (OSM) had also reviewed the project. EPA Regions 3 and 4 and OSM had provided written concurrence for the project in support of the issuance of the VPDES permit.

Commissioner Bowman opened the hearing to the public.

Brian Buniva, Attorney representing Consol Virginia Coal Company, was present and his comments are a part of the verbatim record. Mr. Buniva stated that they have a powerpoint presentation which they wish to make a part of the meeting record. He stated that they have been approved by seven other agencies. He said that VMRC was the last agency to review the project and consider whether to approve it or not.

Mr. Buniva stated that Dr. James Roberts, Founder, President and Chairman of Civil and Environmental Consultants, Inc., was at this hearing to address the Commission. He

explained that Dr. Roberts was a professional engineer in 25 states and he was in charge of this project.

Dr. James Roberts was sworn in and his comments are a part of the verbatim record. Dr. Roberts reviewed a powerpoint presentation and he stated that he had some of the same slides as those in the staff's presentation.

Dr. Roberts explained that the Buchanan mine water inflow rates were estimated to increase from 1,500 to 3,000 over the next 17 years. He said that the mine waters from the Number 1 mine must be removed or the mine will flood and have to be abandoned. The parameter of concern in the mine water was chloride. He said the Beatrice Mine and VP-1 mines were full. He said some of the water was natural and some was pumped from Buchanan mine. He continued to say that Consol plans to store water in VP-3 and has received permits for a controlled discharge into Levisa Fork using a complete mixing zone related to the chlorides. He said all of the mines were about 1,000 feet below stream level in Buchanan County. He explained that the discharge location, including the diffuser, was downstream of Grundy near the smaller town of Poetown. He said that modeling showed that diffuser usage was critical to controlling the location and width of the mixing zone.

Dr. Roberts explained that the significance of the project was that the Buchanan mine directly employed 443 individuals and its payroll for 2005 was \$29 M. He said over the lifetime of the mine, which was 17 years, the payroll amounted to \$508 M. He said the ratio of indirect jobs was 4 times the amount of direct jobs for a total of 2,200. He stated that the Buchanan mine revenues for those 17 years had been \$7.2 billion including State tax revenue.

Dr. Roberts stated that there were five different alternatives considered, but only reverse osmosis treatment or discharge to Levisa Fork with a mixing zone deemed feasible. He explained that reverse osmosis was found to be prohibitively expensive and the project would cost \$105 M over the 17-year period. He further explained that project personnel believed that the RO treatment was potentially not reliable due to the nature of the mine water and because the pump discharges were intermittent. He said the storage of the water in VP #1 and VP #3 using VP #3 as a temporary storage and a mixing zone discharge at Poetown was the selected method.

Dr. Roberts explained that DMME, DMLR was delegated the responsibility to issue the NPDES permits in the coalfields of Virginia by U. S. EPA and DEQ. He stated that DMLR had issued a NPDES permit for the project including establishing the requirements for the permit. He stated further that DEQ provided consultation to DMLR on water quality issues, water quality standards, CORMIX modeling, anti-degradation requirements, biologic monitoring, and mixing zone requirements.

Dr. Roberts said that the DEQ and US Corps of Engineers both reviewed project plans including the diffuser construction requirements and concluded DEQ should be the lead agency on the Joint Permit. DEQ issued a permit for the project, reviewed the CORMIX modeling results and concluded a mixing zone discharge with a multi-port diffuser met Virginia regulations.

Dr. Roberts explained that there was a high amount of chlorides and sodium in the water of the Buchanan mine and its high conductivity and TDS were due to the chlorides and sodium. He said that the mine water was about $\frac{1}{4}$ as salty as the ocean that there was a neutral pH and low levels of iron requiring simple treatment. He stated that the mine water was colorless and odorless based on lab tests. He further explained that the mine water was to be mixed with the Levisa Fork water at a ratio of approximately 35 parts river water and 1 part of mine water.

Dr. Roberts indicated that the selection of the Grundy Pool was the result of a CEC performed on micro-invertebrate sampling, habitat assessments, and fishery sampling at 4 locations, with winter and fall sampling in 2003. He said water quality and flow measurements were taken 16 times at these 4 locations. He said that 54 state endangered variegated darters were collected at all four sampling stations during the 2003 monitoring. One specimen was collected in the Grundy pool during the winter and none at this location in the fall. He said literature review indicated that the variegated darter prefers a riffle environment. He went on to say that the Grundy Pool was selected as the discharge location because of the lower potential impact on the variegated darter, sub-optimal habitat quality, lower number of fish and EPT taxa compared to the other locations, and more mixing capacity in the pool compared to other locations that were checked.

Dr. Roberts explained how the discharge worked. He said the mine water that was stored in the mines was pumped through an iron treatment system to a storage tank. He explained that the chloride monitors continually report to the computer system the concentrations in the tank and in Levisa Fork upstream and downstream of the diffuser. He said the Fork's flow rates are continually measured and the computers calculate the loading of additional chloride. He also said the allowable mine water discharge is computed and control valves are opened to release the water from the tank at a controlled rate. He said then the water flows through the diffuser to create a mixing zone of proper dimensions. He also said that chloride levels in the Fork are continuously monitored downstream of the mixing zone as required by the permit.

Dr. Roberts stated that there were safeguards planned for unplanned discharges and for the protection of the aquatic life. He explained any discharges can only occur when all control monitors are properly reporting. He said that all the pipeline valves remain closed until all monitors report and close automatically if monitors stop reporting. He explained that storage tank overflows are automatically piped to the VP #3 deep mine. He stated that the discharge pipe flow rates are measured continuously and computer matched with calculated discharge rates or the valves automatically close. He said the upstream and

downstream flow monitors in each pipe section must agree or the system automatically shuts down. He explained that the mine water is pumped through non-corroding, thick-walled HDPE pipe. He further explained that the HDPE pipe is encased in steel pipe at bridge crossings and in railroad fill areas. He said that during low flows in Levisa Fork no mine water discharge would occur, which provides additional protection to aquatic life. He said the NPDES permit requires extensive biological monitoring and reporting.

Dr. Roberts said that the diffuser consisted of a 24 foot by 24 inch diameter manifold to be placed in a concrete trench in the bottom of Levisa Fork such that the top of the concrete is flush with the bottom of Levisa Fork. He stated that the manifold is to be equipped with four evenly spaced 8 inch diameter discharge ports and each port is to extend approximately 1.4 feet above the manifold and consist of a 90 degree elbow positioned with the discharge pointed downstream. He said the center of the manifold was to be positioned approximately 29 feet from the near shore and 50 feet from the far shore. He explained that the by-pass distances, the distance between the shoreline and the closest port was to be approximately 18 and 39 feet, respectively and immediately upstream of each port a steel pipe bollard would be placed to protect it. He said that erosion and sedimentation control measures included the installation of Aqua-Barriers to facilitate the construction of the discharge structure.

Dr. Roberts said that requests to identify threatened or endangered species were sent to the Virginia Department of Game and Inland Fisheries, U. S. Fish and Wildlife Service, and the Virginia Department of Conservation and Recreation. He said that the U. S. Fish and Wildlife Service and the Virginia Department of Conservation and Recreation indicated that no species under their jurisdiction would be impacted. He went on to say that the Virginia Department of Game and Inland Fisheries proposed that no instream work should be performed from March 15 through July 31 to minimize impacts to aquatic life and this was a condition of the NPDES permit.

Dr. Roberts said the diffuser construction site contained no wetlands, silt fencing would be placed below all disturbed areas, aqua-barriers were specified so that excavation of the trench would be in the dry, all water pumped from inside the aqua-barriers would flow through silt bags, construction would occur outside the restricted period identified by VDGIF and in stream construction duration was estimated to be 6 days.

Associate Member McConaugha asked about the involvement of organic waste. Dr. Roberts stated there was little to none found by a study done in the past few years. He said the main concern was the levels of chloride and sodium.

Associate Member McLeskey asked whether they were anticipating any erosion of the river bottom. Dr. Roberts responded no, they did not as the location of the diffuser was elevated.

Commissioner Bowman asked if anyone in support wished to address the Commission. There were none. He then asked for those opposed who wished to speak.

Wade McNeely residing at Rt. 1, Box 228, Grundy, Virginia, was sworn in and his comments are a part of the verbatim record. Mr. McNeely expressed his concerns about the contaminants and the water being pumped without treatment. He said there was a study of Levisa Fork that showed an unhealthy rate of PCB's in it. He said that no TLD study was done it was only planned. He said there had been a "no fish" advisory since 2002. He said at the present time there were no bull frogs at all in the Levisa Fork area. He said he had spoke with DEQ staff about these contaminantes.

Mr. McNeely asked if his e-mail had been received by VMRC. Commissioner Bowman responded that it had and was a part of the record. He said that the water treatment was his greatest concern. He said that the coal company had received "black water" violations in the past. He said they were not concerned with the safety of the mines only in the profits they could make.

Jerry Ward residing at P. O. Box 473, King Mountain, VA 24624, was sworn in and his comments are a part of the verbatim record. Mr. Ward said he had worked for Consol Coal for many years and in many capacities, both above ground and below. He said the waters in VP #3 were not tested until they were released. He said there was hydraulic oil, hydrochloric acid, grease, diesel fuel, and PVB's as well as a concentration of sodium.

Jerry Jones residing at Rt. 2, Box 231, Grundy, Virginia, was sworn in and his comments are a part of the verbatim record. Mr. Jones said that he was not only represented himself, but others as well. He said as fishermen they have seen small mouth bass and other fish and all in the area where they say nothing was there and only 2 miles from where the output is to be located. He provided photographs of these fish. He said they felt that the fish were returning to the river. He said he had lived in Buchanan County all of his life and had worked hard. He explained that he was now retired and just fished, but he had seen evidence of wildlife, such as turkey and deer. He said besides the fish being there, the wildlife come to drink there. He said that they could only catch and release at the present time. He said that of the 443 people now employed by Consol Coal, 95% live outside of the county.

Franklin Stiltner residing at Rt. 2, Box 530, Grundy, Virginia, was sworn and his comments are a part of the verbatim record. Mr. Stiltner stated that everyone else had said what he wanted to say. He did say that he had worked in the mines for over 29 years and the company left what it did not want in the mines. He asked that the Commission keep them from destroying the resources and the area.

Carol Branham, Chairman of the Buchanan County Board of Supervisors, was sworn and his comments are a part of the verbatim record. Mr. Branham stated they were opposed to the proposed discharge, not to Consol mining. He said the discharge will turn the river

brown and that was not a good situation as it impacted the environment now and in the future. He stated that the reverse osmosis being used for treating the water was the best solution. He said finally that others have made comments that they agreed with this also.

Lee Moise, Assistant County Attorney for Buchanan County, residing at P. O. Box Drawer 950, Grundy, VA, was sworn in and his comments are a part of the verbatim record. Mr. Moise provided 3 documents for the record. He said the first was an affidavit by Jerry Ward, dated January 24, 2007, the second was the Resolution by Buchanan County, dated October 12, 2006, stating they were opposed to the discharge in Levisa Fork, and third, an additional Resolution by the county, dated January 8, 2007. He said the entire board agreed on it unanimously. He said the Commission can consider the water quality of a tidal area under its authority derived from Section 28.2-1205 of the Code of Virginia. He said when DMLR considered the permit they made an assumption that the water in mine VP#3 was the same as #1. He stated that Ward's testimony showed that this assumption was erroneous as there are very dangerous toxics present in these waters in this mine. He said because of the situation of this mine, VP #3, it was an important component of the permit. He said DMLR was abusive of its discretion when it did not require the testing of the water for chloride and it would be a violation of the Public Trust Doctrine if this is approved as it stands. He said there was no opposition to Consol Coal mining, only to the discharge of polluted waters. He said they were asking that this not be approved without requiring that the water be treated appropriately.

Gerald L. Elkins residing at Rt. 1, Box 50, Ravine, VA, was sworn in and his comments are a part of the verbatim record. Mr. Elkins stated that he was a resident of Buchanan County. He went on to say that he was appointed by Governor Gilmore to be on the Sandy Soil Conservation District Board on which he served for five years. He said he was not paid to be here and thanked Consol for trying to go through the proper channels. He said he was concerned with the safety and health issues for those individuals and groups who utilize the waterbody. He said he felt that the water should be treated before it was released upstream. He said this was an economically depressed area and he was opposed to the fact that only circumstantial evidence was being used, as there were 350,000 citizens who would be impacted.

Michael McGlothlin of P. O. Drawer 810, Grundy, VA and County Attorney for Buchanan County, was sworn in and his comments are a part of the verbatim record. Mr. McGlothlin stated that he had been a lifetime resident. He said the Levisa River was pristine. He explained that in 1931 commercial mining came to Buchanan County and it has been polluted since that time. He stated that this was the top coal producing county in Virginia, as well as the United States. He stated that over the years it had become more mechanized and there were less than a 1,000 employees at the present time. He said they were trying to clean up the county and work to improve tourism. He said that there had been a comeback of the large mouth bass and catfish. He explained that they held a raft race event in this area and there was frequent fishing done in the area of the proposed outfall. He said they wanted to diversify the area and bring more people back to the

county. He said he agreed that they needed this water to continue the mining. He stated that residences were asking for clean up of these waters. He said the costs projected by Consol for clean up has not been proven and the agencies just accepted what Consol Coal has said. He said Delegate Bowling had introduced a bill to address this issue, as well as Senator Puckett. He said but it failed the Senate committee. He stated that Dr. D. Orth could not be present so he read his statement into the record. He said they had written to VMRC, DEQ and DMLR to ask for a load study for the entire Levisa watershed. He said that if this discharge were allowed upstream it would preclude any other development. He said the County believed that the water should be treated by either reverse osmosis or by a distillation process. He said that the county has been looking for a new source of drinking water for the county. He stated that the coal company had already proceeded without permits from VMRC/DMLR. He provided photographs.

Commissioner Bowman stated that what this showed was not under the jurisdiction of VMRC.

Mr. McGlothlin stated that Consol would control the testing and hire contractors to do the testing. He said Consol should pay for testing, but VMRC should hire a contractor or the State Forensics should test for the amounts of pollutants in the water. He stated that there had been significant evidence that mine VP #3 had been used as a dumping ground for various pollutants. He said that the discharge of this water would kill fish, affect the health of the residents, and it was all about profits with the coal company. He said if this permit were granted Buchanan County as well as Kentucky would be impacted the most and that Consol would only profit.

Commissioner Bowman stated that the Commission was doing its best to obtain the best information before making a decision.

Mr. McGlothlin submitted for the record a May 23, 2006 letter to the Mine Commission, a News Article from a publication in Pikeville, Kentucky, and Dr. J. Orth's statement and credentials.

Commissioner Bowman announced that after Delegate Bowling's testimony the meeting would be adjourned for the dinner break and everyone would be asked to return at approximately 6:05 p.m.

Honorable Dan Bowling, Delegate in the General Assembly, was sworn in and his comments are a part of the verbatim record. Del. Bowling thanked the Commission for holding this special public hearing, thus saving the citizens the long drive to the coast. He said he represented the district within which Buchanan County was located. He said that there should be consideration given for the neighboring State of Kentucky. He said this should be considered in the same manner as a case that involved the James River and Bay area. He said there were concerns by fishermen as well as Buchanan County residents that the Levisa Fork would return to its former polluted condition, as it was presently

Special Commission Meeting

**14172
March 12, 2007**

showing improvement. He said there was concern about jobs as coal mining was a major industry in the County and State. He said that he was asking that the Commission do right by the people as well as the economy. He said he and Senator Puckett have seen a need for some kind of treatment of the water and they hoped that the Commonwealth would treat the Levisa Fork the same as they would areas along the Bay.

Commissioner Bowman adjourned for the dinner break at approximately 5:04 p.m. The meeting was reconvened at approximately 6:25 p.m. and the hearing was continued.

Paul A. Smith residing at Rt. 83, Lovers Gap Road, Ranchall, VA, was sworn in and his comments are a part of the verbatim record. Mr. Smith stated that he was a citizen and long-time resident of Buchanan County. He said in 1959 the Coal Company caused the black water, which killed all the fish until a few years ago. No swimming or fishing was allowed. He said he had been a coal miner for 32 years and he would do the same again, but the interest of the coal company was being taken over others. He said the other agencies had failed and that the VMRC was their last resort and they should consider his comments and do the right thing. He said that Consol Coal Company project should not be permitted.

Michael Lewis residing at P. O. Box 1723, Grundy, VA, was sworn in and his comments are a part of the verbatim record. Mr. Lewis explained that he was a citizen of Buchanan County and had personal property in the area. He provided hand outs of maps showing his property, the location of the diffuser and applicant's drawing showing the diffuser exceeded past the property lines of the company and onto other properties. He said that this would impact the fish and others, as well as other waterways. He asked if studies had been done to show how it would impact his property.

Commissioner Bowman explained that the Commission depended on other agencies to perform the studies and they considered, when making a decision, the Public Trust Doctrine, Section 28.2-1205 of the Code of Virginia, and water quality, which was under their jurisdiction

Mr. Owens stated that there were no other new speakers.

Commissioner Bowman stated that it was a job well done by staff and others and he thanked everyone who commented. He said that the matter would be continued at the Commission meeting on March 27, 2007, as the first item at approximately 9:45 a.m. He said that anyone else wishing to speak would be allowed at that time as well as the applicant or their representative, who will be allowed time for rebuttal comments.

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The meeting was adjourned at approximately 6:45 p.m.

Special Commission Meeting

**14173
March 12, 2007**

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Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary