

C. Disputed Conditions

While I find that the application shall be granted with the conditions noted by the State Agencies and water suppliers, several parties in this proceeding have proposed further conditions that they request be included in the Certificate if the application is granted. As noted above, Mr. James, Frederick County, and the Commission Staff (supported by OPC with a slight modification) have each proposed additional conditions that they desire be included in the grant of a CPCN. These further proposed conditions, many of which are contested, will now be discussed.

1. Donald L. James' Proposed Air Monitoring Condition

Mr. James, who has provided diligent participation throughout the entire proceeding, has proposed a condition¹⁶ that would require a minimum of three air quality testing monitors in residential areas near the plant, one of which would be placed at Carroll Manor Elementary School. Mr. James proposes that air quality testing be conducted by an independent third party, and funded by Catoclin, until the plant has been in full operation for two years, and longer if there is a measurable difference in the actual pollutant levels which contradict the modeling and expert assertions. In support of his proposed air quality testing condition, Mr. James has emphasized throughout the course of this proceeding that he believes there is insufficient evidence of actual testing of air quality in the residential areas that can specify the actual values of criteria pollutants in the vicinity. He further states that the residents in the Adamstown area have a great deal of uncertainty regarding the air quality which would not be alleviated by the modeling techniques used by the State, and that a valid sampling of the actual air quality in the area is necessary for assurance to the community of the safety of the actual air quality experienced by the residents. He acknowledges that while exemptions from ambient air monitoring requirements can be requested if air quality impacts are projected to be less than

¹⁶ During the course of the proceeding, Mr. James also proposed a condition with respect to use of effluent from Frederick County as the water source, but has withdrawn this proposed condition in his final position on brief.

de minimis levels, he requests the Commission not grant an exemption from ambient air monitoring requirements and require monitoring of the actual quality for the health and comfort level of the Adamstown residents.

In addition, on brief Mr. James asserts that the Eastalco plant has filed an application with MDE which will allow Eastalco to increase its production, which would also result in an increase in emissions. He contends that such increase provides further support for air monitoring as proposed in his condition.

Both Catoctin and PPRP oppose Mr. James' proposed condition for additional monitoring of local air quality. These parties do not consider such an air monitoring requirement to be necessary, noting that the Catoctin project's low emissions will result in air quality impacts that would not exceed significant impact thresholds so that such additional monitoring is not necessary for this project.

Catoctin also objects to the proffered information regarding an apparent recent application by Eastalco to increase production as such information was not offered during the evidentiary record in this case. However, Catoctin notes that to the extent Eastalco has filed a PSD application with the Maryland Department of the Environment, Eastalco will be required to satisfy all applicable regulatory requirements associated with the PSD permitting process, including a demonstration that any associated emissions do not cause any violation of applicable air quality standards in and around the community. Catoctin further reiterates

that its obligation to secure emissions offsets will in fact result in an overall decrease in pollutants that contribute to ozone problems in the region. Also, should MDE determine an air quality monitoring station in Adamstown is warranted, then MDE has the ability and authority to establish such a monitoring station.

The State Agencies have also been a vociferous critic of Mr. James' proposed monitoring condition. While acknowledging Mr. James' responsible participation in the hearing process, the State Agencies consider his testing proposal to be unnecessary and not supported by regulatory or technical rationale. They consider it to be an unnecessary expense subject to legal challenge. The State Agencies further dispute Mr. James' assertion that the actual air quality of Adamstown is unknown, stating it can be determined based upon modeling data collected from the rigorously designed and implemented nationwide monitoring network operated over a period of years. The closest monitoring station is located in Frederick, and using EPA-approved methodologies, MDE establishes background ambient pollutant concentrations for every locale in the State with a high degree of statistical confidence, according to PPRP. The monitoring network allows the State and U.S. Environmental Protection Agency to determine which areas of the country are attaining National Ambient Air Quality Standards ("NAAQS"), and which areas are not in compliance. Furthermore, the citizens of Adamstown are in no different situation than citizens in any other community located near industrial facilities or power plants, and Catoctin is already being required to install millions of dollars

of pollution control equipment at the facility as well as purchase offsets in order to meet the stringent PSD and Nonattainment New Source Review requirements. Therefore, to impose additional unnecessary expenses for further monitoring will not make the citizens of Adamstown more safe, according to PPRP.

In further explanation, the State Agencies contend that models are designed to establish the maximum impact that might occur from a new facility and estimate concentrations throughout the local area by using a detailed receptor grid, which can estimate the impact of source emissions at maximum allowable levels whereas air monitors may only reflect the actual emissions. Also, once the generating facility is in operation, it will be subjected to monitoring and inspections to assure that emissions limits are being satisfied, and the modeling performed by both the Applicant and State for this project indicate that the impacts are quite small and do not exceed the monitoring *de minimis* levels or significant impact levels for any pollutant modeled. The State Agencies contend that there is no regulatory or factual basis to recommend imposition of additional monitoring in Adamstown as a further condition, especially since MDE operates an ozone monitoring station at the Frederick Municipal Airport located approximately 7.5 miles from the Catoctin Power site as well as 100 pollutant monitoring stations for various criteria pollutants within 60 miles of the proposed project. Catoctin's emissions will be monitored at the stack source, which records will be submitted to MDE and EPA to ensure compliance with facility emission limits,

and PPRP concludes that the monitoring program meets the in-depth program requirements established by the EPA for pollutant monitoring networks. Therefore, as the project emissions will have no significant impacts, there is no need for further ambient air monitoring in the area, according to PPRP.

A review of the record on this issue indicates an apparent dichotomy between the residential neighbors of the project and the expert witnesses who testified on behalf of Catoctin and PPRP. While the Applicant and State Agencies do not believe actual air quality testing is necessary in the vicinity, Intervenor James, as well as comments from nearby residential neighbors of the project, express concerns regarding the emissions from the project and effect on air quality to the neighboring community, specifically Adamstown. A review of the evidence shows that the affected area is classified as a severe nonattainment area for ozone, and Frederick County has a monitor for ozone located approximately 7.5 miles away at the airport. Also, Mr. Paul, the State witness from MDE, stated that the Frederick County monitor has not registered a violation since 1999, which violation was for just one day, with regard to ozone. Also, the record reflects there is some question and recent dispute as to local air quality with respect to fine particulate matter, PM_{2.5} (fine particulate matter with a diameter smaller than 2.5 microns).

A review of the evidence further reveals that Catoctin will purchase offsets of at least 1.3 times the project's maximum NO_x and/or VOC emissions, so that, as noted above, the project will

actually provide some benefit to ozone air quality throughout the larger region by purchase of such emission offsets which will improve air quality throughout the region as a whole. In addition, the record reflects that the Applicant has agreed to conditions to endeavor to obtain such offsets from Frederick County sources, if reasonably commercially available, or from the geographically closest reasonably commercially available sources. However, as noted by the record in this case, procurement of local offsets may provide economic advantages to Frederick County, but from air quality perspectives, local offsets may not produce the same local air quality results as offsets from other areas.¹⁷

Mr. James has proposed his air monitoring condition for the stated purpose of measuring the actual air quality in the residential vicinity and to provide assurance to nearby residents of the actual air quality irrespective of what predictive models used by regulatory agencies may estimate. In this regard, there appears to be a clear fear of the air emissions from the project and distrust of how the modeling relied upon by State Agencies will translate into actual air quality of the nearby locale. In considering all of the evidence on the record and arguments of the parties with regard to this dispute, I find the record supports requiring one air monitoring station in the Adamstown area to determine actual air quality in the region that will result after

¹⁷ The air quality in any specific area may in fact be affected by emissions from far away sources, especially for ozone, so that local offsets may not necessarily have the intended benefit to nearby ozone air quality as more remote sources would have.

the project is placed in operation, but no support for three monitoring stations as proposed by Mr. James.

In reaching such decision, I agree with the Applicant and PPRP that the record indicates that the project does in fact satisfy all applicable standards for issuance of a CPCN as the emissions are within acceptable levels that will not constitute a significant impact to the area. Furthermore, the State Agencies particularly believe that the existing air monitoring system is sufficient without need of additional monitors, as they believe their modeling methodology can determine air quality throughout the State. While recognizing such record evidence, I find that there are certain unique aspects to this project so that an additional monitor for the Adamstown area is a reasonable condition for such project which is a new source of emissions in the area. Specifically, the evidence indicates that Frederick County, as well as all of Maryland, is in a federally designated severe nonattainment area for ozone, and while ozone is a pollutant formed by emissions of specific compounds (NO_x and VOC) that is formed over large areas, the fact remains that the location is part of a severe nonattainment area so that scrutiny should be given to requests for exemptions of air monitoring requests for these pollutants.¹⁸ In addition, there is apparently a pending proposal

¹⁸ According to PPRP witness Garrison, sources subject to PSD review must conduct ambient impact analyses using measured air quality data in the vicinity of the project, but can obtain an exemption if the source's impact is shown, through modeling, to be less than the *de minimis* concentration levels defined in PSD regulations. (PPRP Exh. No. 7, Garrison Direct Testimony at pp. 8-11, filed October 1, 2004, Docket Entry No. 48.)

to find Frederick County as a nonattainment area for particulate matter. The record further reflects that both ozone and particulate matter can impact local health, including affecting respiratory problems and asthma. In light of the record indicating potential health effects for these pollutants, and the clear concerns of the neighboring area which is in a designated nonattainment area, the request by an affected community for local air monitoring of these pollutants as a condition for a new power plant must be given serious consideration.

In addition, the record is also clear that the proposed power plant will be located in an industrial-zoned area near existing major emission sources. While I note earlier the site constitutes a reasonable site for placement of the power plant, these facts raise other factors that must be considered, specifically that a large industrial facility is already operating on the site. In this regard, while Catoclin is correct that future plans for the Eastalco facility potentially increasing emissions have not been adequately presented on the record and therefore cannot be considered,¹⁹ the fact remains that Eastalco is an existing industrial plant with emissions that affect the area, and operation of the proposed Catoclin power plant in the vicinity cannot be judged in total isolation. Furthermore, there are other power plants located several miles from the proposed Catoclin site,

¹⁹ As noted by the Applicant, State Agencies will review any such increased emissions in their review of any such Eastalco proposal.

specifically major power plant operations at Dickerson, located nearby in Montgomery County.

The air monitoring systems in place are largely based upon modeling which takes into account all aspects of emissions that may affect the residents of Maryland, and include monitors placed upon the emissions of each emitting source to ensure that such facilities are within their limits for each specific emission. While modeling methodology is intended to include cumulative effects and determine air quality in any locale, the confluence of the three major sources (Eastalco, Dickerson, and the Catoctin plant) within a fairly close geographic area further support the conclusion that it is reasonable to require an additional air monitoring station in the Adamstown vicinity to provide actual testing results of the air quality that will be experienced in that locale. Accordingly, the recommendation to require Catoctin to fund an air monitoring station in Adamstown for a two-year period as a condition of the CPCN will be accepted, as I find that such a condition is a reasonable request for one community air monitoring station (rather than three as proposed by Mr. James), which shall measure those pollutants for which the area is in nonattainment or potential nonattainment. Accordingly, Mr. James' condition will be accepted, but for one air monitor in Adamston, which shall measure air quality of ozone, NO_x, VOC and PM on a quarterly basis for a two-year period at the expense of the Applicant, Catoctin Power. Other pollutants requested to be monitored by Mr. James will not be required as the project emissions are below significant impact

levels and the location is not designated a nonattainment area for these other pollutants. The condition is also modified to require monitoring for a two-year period at which time it may cease, unless the State of Maryland Department of the Environment believes such monitoring should then be continued based upon the results of the testing.²⁰

2. Frederick County Proposed Conditions – Site Plan, Air Quality, Water Use, Land Preservation

As noted above, Frederick County has proposed various conditions in this matter in the event that the CPCN is granted. Specifically, Frederick County has proposed 15 enumerated conditions regarding issues of site plan, air quality, water use, and land preservation. Of these conditions, Catoctin has accepted many of the enumerated conditions, although with certain modifications or clarifications which do not appear to be contested and will therefore be accepted as no longer in dispute. Specifically, Catoctin appears to agree with Frederick site plan conditions Nos. 2, 3, 4, 5, and 6, which are hereby accepted, while indicating

²⁰ The record indicates the cost of air monitoring for a two-year period to be fairly modest. Mr. McCann, who testified for Catoctin in rebuttal to Mr. James' proposal, gave a rough cost estimate of up to \$100,000/year for an air monitor. (T. 1131-1137). The State Agencies also provided a cost estimate on brief indicating similar costs, but disavow the estimate in their reply brief.

While the cost estimates on this record are not very precise, it appears that the costs of a two-year monitor at a single location would be fairly modest and would benefit the community by providing actual air quality results to the Adamstown community to ensure the safety of the air.

it believes its agreement to PPRP-proposed condition No. 101²¹ satisfies the substance of Frederick County site plan condition No. 1 and is preferable to Frederick County's "vague and ambiguous" condition No. 1. Catoctin also accepts the ambient air quality proposed conditions of Frederick with certain clarifications which would require Catoctin to endeavor to obtain NO_x and/or VOC offsets from Frederick County sources if reasonably commercially available. Accordingly, conditions No. 7 and 8, as modified by Catoctin, are also accepted.

Frederick County conditions No. 9 through 14 concern water issues, with Catoctin accepting conditions No. 9 and 10, which are interpreted to clarify that the CPCN does not require Frederick County to supply treated waste water or potable water to Catoctin Power or require Frederick County to allow Catoctin Power to discharge waste water through the County's discharge system. Catoctin also agrees to condition No. 13, providing that Catoctin shall obtain a separate NPDES User Discharge Permit prior to discharging wastewater into or through the County's effluent outfall system. As agreed by the parties, these conditions will also be accepted.

Frederick County conditions No. 11, 12 and 14 concern matters regarding supply of effluent to Catoctin Power (or

²¹ PPRP Condition No. 101: "Catoctin Power shall design the facility in substantial conformance with the Site Plan drawings reviewed by the Frederick County Planning Commission ..."

discharge of Catoctin wastewater into the County's wastewater discharge system -- No. 12), which conditions are opposed by Catoctin as vague and ambiguous. Also, Catoctin opposes such conditions claiming they are commercial in nature and should more appropriately be accomplished through negotiation of any agreement between the County and Catoctin Power in their effluent negotiations.

With respect to these disputed water conditions, as noted earlier, the record reflects that Catoctin proposes two alternative options for obtaining the water supply for cooling purposes. The first option would use effluent from Frederick County that would require a contract with the County, while the second alternative would utilize the Potomac River as an alternative source with low flow augmentation provisions as noted earlier in this order. While Frederick County proposes certain specific terms with regard to possible effluent use for cooling purposes, Catoctin opposes the CPCN containing certain terms and conditions as the use of County effluent is contingent upon Catoctin and the County reaching agreement. Accordingly, Catoctin notes that terms regarding the County effluent option should be based upon negotiation between the parties rather than dictated by the Commission in the CPCN for such an option.

A review of the disputed conditions indicates that such provisions appear to be matters which the Board of County Commissioners have full power to negotiate with Catoctin Power in the event the parties reach agreement on use of County effluent as

the water cooling source, and therefore there is no need to address these conditions which appear to be matters subject to the parties' negotiation. No such agreement to use County effluent has occurred as of this date, but any such agreement should incorporate the provisions mutually agreeable to both parties if agreement is reached.

Frederick County's final proposed condition provides for a land preservation condition that Catoctin Power shall work with Eastalco Aluminum to place approximately 250 acres of land located in the general vicinity of the plant into permanent agricultural preservation. The County states the purpose of such land preservation is to offset negative impacts of the plant on the quality of life of the citizens of the area, and to serve as a further buffer between the plant and community including, but not limited to, St. Matthew's Lutheran Church. Furthermore, if such land preservation does not occur for this specific site, an alternative similar site would be acceptable, or Catoctin Power shall work with the Carrollton Manor Land Trust to identify and locate land to achieve the same result, with certain parcels of land identified in the proposed Frederick County condition.

The County's proposed land preservation condition is opposed by Catoctin, and also by Eastalco as noted above. Eastalco, which did not sponsor any witnesses but opposed the proposed condition on brief, contends the proposal is unsupported by evidence, outside the scope of the Commission's jurisdiction, and would be unconstitutional. Eastalco notes the proposed gener-

ating site is on property currently zoned for industry and adjacent to an existing industrial facility, and the location is consistent with Frederick County's comprehensive plan. Furthermore, Eastalco contends the record does not support any claims of significant adverse impacts from the project, noting the evidence of the expert witnesses does not indicate any significant impacts on traffic, noise levels, or property values. Only minor effects on demand for fire and rescue services have been demonstrated, for which Catoctin has agreed in a condition to conduct an assessment and provide adequate services or reimbursement if necessary, and truck traffic transporting aqueous ammonia will use designated truck routes that would not pass by schools or housing developments. Also, Eastalco contends that the evidence shows project air emissions will not adversely impact air quality and will comply with all applicable air standards, regulations, and requirements under federal and state law. Therefore, Eastalco claims the record, including the numerous conditions regarding air quality and testing by the Applicant and DNR, refute any allegations of increased pollutants requiring a large buffer area for offsetting alleged negative impacts of the plant on the quality of life of Frederick County citizens.

In addition to the lack of record support for such a land preservation condition, Eastalco contends the proposed condition seeking to place Eastalco property into agricultural preservation is beyond the jurisdiction of the Commission and is in effect an attempt to accomplish rezoning of Eastalco property. Eastalco

contends the Commission does not have jurisdiction over zoning such that it can require placement of unrelated property into permanent agricultural preservation, nor does it have jurisdiction over Eastalco that can require Eastalco to do so. Finally, Eastalco contends the request is unconstitutional as it would impose a constructive taking of portions of Eastalco's property as a condition in the CPCN, the grant of which would be arbitrary and capricious and offend due process.

Catoctin also opposes the proposed land use condition disputing the County's rationale that the agricultural set-aside would provide needed additional buffering benefits. Catoctin notes that the record reflects over 97 percent of the two proposed parcels provide no buffer at all between the church and the Catoctin facility, and the project was in fact purposely sited in the center of an industrial-zoned parcel with significant amounts of adjacent industrial property to provide physical buffer to the community. The project incorporates additional buffering and screening recommendations of the County and the public, including tree plantings which would buffer and screen the facility from the church property. Furthermore, the proposed parcels which the County proposes be placed by Catoctin in permanent agricultural preservation are not owned by Catoctin, but are Eastalco property that are currently zoned for agricultural use. Therefore, it is within the County's control to allow or not allow industrial use on such property in the future.

As to a possible purpose of placing further land into agricultural preservation as an offset to the project, Catoctin opposes such request in this instance as the project is proposed for an industrial-zoned site rather than "green field" property. Catoctin contends the CPCN process should not be used to circumvent land use planning regulations or dictate a land use concession from Catoctin simply because the project will be located on property owned by a landowner with whom the County has previously engaged in land use discussions. Catoctin further disputes the rationale of needing the property for preservation of "quality of life" conditions in the County noting it has agreed to many such quality of life conditions, and the site was selected to avoid such issues.

A review of the record with respect to the proposed land use condition of Frederick County shows that Frederick County desires the Applicant arrange the placement of a very large parcel of land in the vicinity of the plant into agricultural preservation. The land is not currently owned by the Applicant and has little relation to the project other than being in a nearby vicinity. The County seeks such a condition for the purpose of addressing impacts of the proposed plant on the quality of life of Frederick County citizens and to serve as a buffer between the plant and the community, with its evidentiary presentation indicating desire for an additional buffer for the St. Matthew's Lutheran Church located north of the project site.

In reviewing the record on this issue, of the 250 acres sought by the County to be placed in agricultural preservation, the

evidence reveals that approximately only eight acres may serve as additional buffer between the church site and the Catoctin project site, while the remainder of the proposed agricultural property is basically to the east and west of the St. Matthew's Church and would in fact provide no buffer between the church and Catoctin's facility. The record further reveals that the Catoctin plant will be located in the zoned Eastalco industrial site in close proximity to the existing Eastalco plant, and Catoctin has included tree planting buffering along the industrial site borders with the road in the area to buffer neighboring communities. Furthermore, Catoctin would be willing to engage in additional tree planting buffering of the area along the same path, and I find that the tree planting buffer area along the area of the industrial site near the roadway should provide adequate buffering for neighboring communities from the Catoctin facility.

The County further argues that the agricultural preservation condition is requested for quality of life purposes, but the record in this instance further indicates that the proposed plant will have minimal effects on the quality of life in the area. The record indicates the project will satisfy all regulatory requirements with the conditions designed to mitigate the environmental and other effects, and there will also be little effect on the character of the area, which is currently a zoned industrial area with an existing large industrial plant.

The County request is essentially a proposal to seek permanent placement of large parcels of land in permanent agricul-

tural preservation, which land is currently used for agricultural purposes but may not continue so in the future. There is no requirement that power plants seek to "offset" power plant sites with protection of comparable properties, but if any such offsets would be considered as an appropriate "trade off" for power plant construction, the request for 250 acres or more in agricultural preservation would totally dwarf the less than 20 acres utilized by the Catoctin plant in this instance. This would be an arbitrary and capricious demand imposed upon generating projects absent some type of legislative direction requiring such a proposal.

Therefore, based upon the record, I find that the County's proposed condition to require a large parcel of neighboring property be placed in agricultural preservation is not reasonable in this instance as a condition to be placed upon the Applicant, and it will therefore not be accepted as a condition of the Certificate. Such decision, however, does not speak in any respect to any attempts the County may wish to engage in with the owner of the property in question, Eastalco, as to maintaining such property in agricultural preservation if the County believes that is the proper designation for the parcels in question. However, the record in this case does not support the reasonableness of requiring such a condition in the Catoctin CPCN, especially for this project which will constitute less than 20 acres on an already zoned industrial parcel.

3. Staff Proposed Conditions – Electric System Stability and Reliability

During the course of this proceeding, Staff has proposed three conditions regarding the effect of the proposed plant on stability and reliability of the electric system. Specifically, Staff recommends that prior to putting any portion of the project in service, the Applicant shall file with the Commission a listing of transmission system improvements required by PJM and certification that the improvements have been completed. Also, the Applicant shall file with the Commission a listing of interconnection requirements and certification that the requirements have been met, and within 30 days after putting the project into service, Catoclin shall file a copy of its interconnection service agreement with the Commission.

The Applicant has indicated agreement with such conditions, although issues have arisen regarding the timing of such certifications and the parties' implementation language with respect to such conditions. In this regard, OPC has also indicated in its final comments supplied in letter form in this proceeding that such reporting by the Company of transmission system improvements and interconnection requirements should be done at least 30 days prior to operation of the proposed facility (except for the interconnection service agreement which may be filed after the project is put into service). OPC claims a sufficient time is needed for review by the Commission of filings related to transmission and interconnection.

Catoctin reiterates an objection to the consideration of the OPC proposed modification, which Catoctin considers to be untimely as it was raised in OPC's final letter submitted subsequent to the hearings. However, Catoctin also indicates if the OPC's request is not rejected as out of time, Catoctin would accept such conditions with the modification that certifications of improvements may not always be available 30 days prior to operation with regard to minor modifications required by PJM or the transmission provider. Catoctin therefore proposes that it will file with the Commission a list of transmission improvements and interconnection requirements not less than 30 days prior to putting any portion of the project in service, but certifications that the improvements and interconnection requirements have been met will be filed prior to putting the project in service.

In considering this dispute, while it may have been preferable for all parties to have advanced their positions at an earlier stage in the proceeding, I find that the proposed modification by Catoctin in its final brief appears to be a reasonable resolution of this issue that apparently satisfies concerns of all parties with respect to this subject. Accordingly, the modified Staff conditions No. 1 and 2 of the Catoctin reply brief²² will be accepted, as will the original Staff condition No. 3, which does not appear to be contested.

²² February 18, 2005, Catoctin Reply Brief, p. 11.(Docket Entry No. 84)