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January 28, 2014

HAND DELIVERED

Lynchburg News & Advance
Attention: Ms. Caroline Glickman, Managing Editor
and Mr. Thomas Frasier, City Editor
101 Wyndale Drive
Lynchburg, Virginia

Re: *Bedford Weaving, Inc. v. Bedford Regional Water Authority, Case No. CL14000008-00*

Ladies and Gentlemen:

Thank you so much for meeting with representatives of the Bedford Regional Water Authority (the "Authority") to give background on the litigation now pending in the Circuit Court of Bedford County, Virginia styled *Bedford Weaving, Inc. v. Bedford Regional Water Authority*.

SUMMARY

Bedford Weaving's stated goal is to continue to receive water exclusively from the former Bedford City Reservoir because of its being "soft;" and it has asserted that "[u]ntil Bedford Weaving's future water supply need is satisfactorily resolved .., Bedford Weaving will seek to utilize any and all practicable means allowed by law for challenging, delaying and defeating actions to interconnect the [Bedford City and Bedford County] water systems." Bedford Weaving unfairly insists that its concerns be elevated above those of all other individual and commercial customers of the Authority's water system.

THE AUTHORITY'S POSITION

The Authority's obligation is to provide water a dependable source of potable water to current and future users so they will not be affected by droughts and other conditions. It provides quality, quantity, redundancy and flexibility by partnering with the Town of Bedford, Bedford County, the Western Virginia Water Authority and the City of Lynchburg. It is responsible not only to Bedford Weaving but to all residential, commercial and governmental users in Bedford County.

DISCUSSION

In the suit Bedford Weaving, Inc. (Bedford Weaving") asks for a finding by the Court that the Authority does not have the legal authority to design, construct and operate a raw water intake, water treatment plant and related water transmission and distribution lines at the former Moneta Adult Detention Center on Radford Church Road, Moneta ("Camp 24") in Bedford County, described more particularly in Special Review Project Applications Numbered SRP 140001 and 140002, scheduled for public hearing before the Bedford County Planning Commission February 4, 2014 (the "Project").

This litigation is part of a year-long attempt by Bedford Weaving, through its attorneys, to stop the Project. Bedford Weaving has an ally in the so-called Bedford Above Board group which is also interested in stopping the Project. The Authority views Bedford Weaving's activities as an attempt to use its substantial resources to have its concerns elevated above those of all other individual and commercial customers of the Authority's water system.

The stated goal of Bedford Weaving is to continue to receive water from the same raw water source, i.e. the former Bedford City or Stoney Creek Reservoir. The Authority has agreed to use its best effort to accommodate the needs of Bedford Weaving. The Authority is not able to commit to one, sole resolution without full analysis of all of the engineering issues involved. The first step in an orderly process should be the delineation by Bedford Weaving of the technical specifications and ranges of the quality of water that it needs to properly, safely and efficiently conduct its manufacturing facilities. While the Authority has requested many times, formally and informally, that the analysis of these technical ranges be made, none has been forthcoming. On June 19, 2013 the Authority donated 300 gallons of water from the existing High Point Water Treatment Plant at Smith Mountain Lake to Bedford Weaving for its use in testing the water for compatibility with its manufacturing process. To date, despite request from the Authority, the results from that testing have not been made available. Bedford Weaving has focused solely, some might say maniacally, on its one solution: to continue to receive water exclusively from the former Bedford City Reservoir.

The Authority has learned that in the long period of time in which water was provided by the City of Bedford, another source was also periodically used, i.e. the Big Otter River. The Big Otter River source has a very high hardness, and yet there were never any complaints from Bedford Weaving when this alternative source was used. This alternative source was apparently not known to Bedford Weaving and indicates to the Authority that there is a broader range of water quality that can be efficiently and economically used by Bedford Weaving. Again, there has been no progress in determining exactly what its allowable specifications for process water are.

The Authority is looking for a long-term "redundant" water source for the whole of Bedford County and on September 19, 2013, was granted by the Virginia Department of Environmental Quality ("DEQ") Major Modification #1 to VWP Individual Permit #96-0707 (the "Modification"), providing for increased, tiered withdrawals based on certain construction

milestones. We have provided DEQ's transmittal letter (Tab A). The full Modification can be downloaded from the Authority's website http://www.brwa.com/SitePages/Home.aspx.

Mr. P.J. Garbarini, President of Bedford Weaving, had several informal conversations with the Chairman and the Executive Director of the Authority, beginning soon after the Authority was formed December 18, 2012. He strongly expressed his concerns that water of the appropriate quality might not in the future be available to his business, and insisted that the Authority commit to a legally binding commitment to provide him exclusively water from the Bedford City Reservoir. The Authority responded in a March 13, 2013 letter by assuring him that "the Board and staff will do all that we can do to help Bedford Weaving continue to operate properly."

In a letter dated March 21, 2013 (Tab B), Bedford Weaving's attorney took the position that Bedford Weaving has pursued throughout. Hinting that the reversion agreement between Bedford County and the City of Bedford is "constitutionally infirm," he demanded "... a separate water line from the City's reservoir to Bedford Weaving ..." and then stated, "[u]ntil Bedford Weaving's future water supply need is satisfactorily resolved ..., Bedford Weaving will seek to utilize any and all practicable means allowed by law for challenging, delaying and defeating actions to interconnect the [Bedford City and Bedford County] water systems."

The Authority responded with a letter dated April 24, 2013, acknowledging that Bedford Weaving was asking for a binding, legal obligation on the part of the Authority prior to assessing the overall needs of the County, and explaining that there may be many engineering solutions to develop a satisfactory response to Bedford Weaving's needs.

Bedford Weaving then, in May, forwarded to the Authority letters addressed to a judge and to the citizens of Bedford City (Tab D).

In August, Bedford Weaving filed a twenty-nine (29) page Comment with the Virginia Department of Environmental Quality trying to stop the issuance of Modification, and developing the argument that the Reversion Agreement was "constitutionally infirm" (Tab E). Bedford Weaving also argued that the proposed Modification would be illegal under applicable law and requested a formal, public hearing on the Modification.

The Virginia Department of Environmental Quality responded in detail to Bedford Weaving's various assertions, but did not alter its determination.[1] The Modification was issued September 19, 2013.

At the end of September, Bedford Weaving prevailed upon Delegate Lacey E. Putney to ask Attorney General Ken Cuccinelli for an Attorney General's Opinion enclosing a "memorandum of law explaining how Bedford County has impermissibly created debt contrary to the Virginia Constitution," a copy of which was not provided to us by Delegate Putney (Tab F).

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[1] See Attachment B to the Modification, *DEQ Responses to Public Comment*, pp.32-41.

Once the Modification was granted, Bedford Weaving filed a Petition for Formal Hearing with the Department of Environmental Quality alleging, generally, that the Bedford Regional Water Authority was not properly formed and therefore did not exist (Tab G).

On October 18, 2013, Bedford Weaving initiated litigation against DEQ, the Authority and Bedford County, Virginia, by filing a Notice of Appeal under the Virginia Administrative Process Act (Tab H), asserting that the Modification was "unlawful."

On November 8, 2013, Bedford Weaving withdrew its request for a formal hearing (Tab I) and on November 19, 2013, abandoned its appeal under the Virginia Administrative Process Act by failing to timely serve appropriate process.

On December 16, 2013, Bedford Weaving filed comments to the Federal Energy Regulatory Commission ("FERC") about the withdrawal permit application that was submitted by the Authority to FERC (Tab J). They are requesting "(1) to find the subject Applicant-prepared environmental assessment to be deficient and (2) to defer a decision on the subject Application until an environmental assessment of all of the BRWA's planned, interdependent actions has been prepared and reviewed."

Having not prevailed at (1) the public comment level for the Modification, (2) the request for formal hearing before DEQ, (3) the litigation initiated under the Administrative Process Act, and (4) the attempt to obtain and Attorney General's Opinion, Bedford Weaving then served suit against the Authority on January 9, 2014 claiming that the Authority lacks the legal authority to undertake the project and developing its interpretation of the Authority's Articles of Incorporation read in the context of Va. Code § 15.1-5111.

The Virginia Code provides for localities such as Bedford City and County to limit the scope of activities of a water and wastewater authority by "specifying" "projects" in the Articles of Incorporation. The Authority's Articles provide that it "... exercise all the powers granted ... pursuant to the Virginia Water and Wastewater Authorities Act ... and ha[s] all the rights, powers and duties of an authority under the Act." The Articles go on to say that, "It is not practicable to set forth ... proposals for specific projects." The Articles also refer to the two overriding goals imposed upon it in the Consolidation Agreement dated as of October 31, 2012 between Bedford City and Bedford County, namely the time by which the Authority was to "... establish a water line of sufficient size to connect the existing [county] water system to the existing [city] water system;" and the time by which the Authority was to "... substantially equalize rates and establish volume rates for large customers." Bedford Weaving argues that the mention of these two scheduling deadlines was the "specification" of two "projects," which, under the Virginia Code, would limit the activities of the Authority to those two "projects" alone.

The Complaint asserts that if the systems were combined and water from Smith Mountain Lake were blended into water provided Bedford Weaving, it would suffer "irreparable and harmful impact on [its] processes." It further asserts that the Project "... will result in an increase in rates for Bedford Weaving and other similarly situated rate paying customers..."

The Authority will be filing on or before January 30 a pleading asserting a correct reading of its Articles and asserting that (1) the Authority's sole responsibility as to water quality is to provide potable water in accordance with the Clean Water Act and the Virginia Department of Health's Waterworks Regulations and (2) rates have not been increased nor has any increase been proposed as a result of the Project, and asking that the case be dismissed. Bedford Weaving has no legal claim to "soft" water because hardness or softness is not regulated by any applicable law or regulation. Bedford Weaving has a legal remedy as to rates because the Virginia Code requires that they be "fair and reasonable." We are providing, as background and not to be published until filed with the Court, a draft of the Demurrer that the Authority will be filing in the case (Tab K) and a legal Memorandum in Support to be filed once the Court has entered a briefing schedule (Tab L).

But it doesn't end there. On January 23, Bedford Weaving filed Comments (Tab M) with the Bedford County Planning Commission asserting that (1) since the case was pending it needn't make its determination that the Project comports with the County's Comprehensive Plan and (2) the Authority's application is defective for want of an "environmental impact report." The Authority will file a response this week asserting that (1) the pending litigation is not relevant to the Planning Commission's responsibility and (2) (a) environmental impact reports are only required of state agencies and (b) the environmental issues were dealt with in the Modification process.

There are two aspects of this matter that we would like to bring to your attention. The first is the patently false assertions by Bedford Weaving in its filings and by the Bedford Above Board group in its publicity that the Project will cost between $42,000,000 and $51,000,000 to complete. . The engineering studies have shown the Project to have an estimated cost of approximately $34,000,000. The Authority commissioned Morgan-Keegan to perform a financial study to review the financial capability of the Authority to pay the debt service on such a project. Based on the results of that study, the Authority has been focusing on finding cost savings to bring the total project costs down closer to $30,000,000. While the Authority is focused on reducing the cost of the project, Bedford Weaving and Bedford Above Board are focused on portraying the project as rising in costs.

The second is the partnering in the Project by the Western Virginia Water Authority (the "WVWA"), which on March 21, 2013, adopted a resolution (Tab N) affirming the regional approach to augment the water resources for Bedford and Franklin Counties, and joined in the process that resulted in the issuance of the Modification. The WVWA has also approved in principal participating jointly with the Authority in the development and operation of the

water intake and treatment plant portions of the Project, and has approved in concept a contribution of up to $7,000,000 (Tab O).

Thanks very much for your courtesies in letting us present this material and your attention to our perspective on the suit and the overall situation.

Very truly yours,

Harwell M. Darby, Jr.

HMDJR:wmj:0600118

c: Mr. Justin Falconer (w/o encl.)
Mr. Alex Rorer (w/o encl.)

List of Exhibits

Tab A.	Transmittal letter from DEQ of Modification
Tab B.	Letter from Bedford Weaving attorney March 21, 2013
Tab. C.	Letter to Bedford Weaving attorney April 24, 2013
Tab D.	Draft letters to Judge and Citizens
Tab E.	Bedford Weaving Comment filed with DEQ
Tab F.	Delegate Lacy Putney correspondence (2 letters)
Tab G.	Petition for Formal Hearing
Tab H.	Notice of Appeal under Administrative Process Act
Tab I.	Letter withdrawing Petition for Formal Hearing
Tab. J.	Comments filed with Federal Energy Regulatory Commission
Tab K.	Draft Demurrer
Tab L.	Draft Memorandum of Law in Support of Demurrer
Tab M.	Comments filed with Bedford County Planning Commission
Tab. N.	Resolution No. 269 of the Western Virginia Water Authority
Tab. O.	Resolution No. 285 of the Western Virginia Water Authority

Tab A. Transmittal letter from DEQ of Modification

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 1105, Richmond, Virginia 23218
TDD (804) 698-4021
www.deq.virginia.gov

Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4020
1-800-592-5482

September 19, 2013

Mr. Brian M. Key, P.E.
Executive Director
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, VA 24523

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Virginia Water Protection Individual Permit No. 96-0707
Smith Mountain Lake Water Treatment Plant Withdrawal Project, Bedford County, Virginia
Final Major Modification of VWP Individual Permit

Dear Mr. Key:

Pursuant to the Virginia Water Protection (VWP) Permit Program Regulation 9 VAC 25-210-10 et seq., § 401 of the Clean Water Act Amendments of 1977, and Public Law 95-217, the Department of Environmental Quality (DEQ) has enclosed the final Major Modification No. 1 of the Virginia Water Protection individual permit for the project referenced above.

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have **30 calendar days** from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a notice of appeal in accordance with the Rules of the Supreme Court of Virginia with the Director, Department of Environmental Quality. In the event that this decision is served on you by mail, three days are added to that period. Refer to Part 2A of the Rules of the Supreme Court of Virginia for additional requirements governing appeals from administrative agencies.

Alternatively, any owner under §§62.1-44.16, 62.1-44.17, and 62.1-44.19 of the State Water Control Law aggrieved by any action the board has taken without a formal hearing, or by inaction of the board, may demand in writing a formal hearing of such owner's grievance, provided a petition requesting such hearing is filed with the board. Said petition must meet the requirements set forth in the board's Procedural Rule Number 1 (9 VAC 25-230-130.B). In cases involving actions of the board, such petition must be filed within 30 calendar days after notice of such action is sent to such owner by certified mail.

Should you have any questions, please contact Brian McGurk by phone at (804)-698-4180, or by email at Brian.McGurk@deq.virginia.gov, or at the above address.

Respectfully,

Scott W. Kudlas
Director, Office of Water Supply

Enclosures: Final Modification Cover Page; Final Modification Part I – Special Conditions and Attachment A; Part II – General Conditions

cc: Mr. David Inman, Anderson & Associates, Inc. – VIA EMAIL
Ms. Jeanne Richardson, U.S. Army Corps of Engineers, Field Office – VIA EMAIL
Ms. Juliette Giordano, Virginia Marine Resources Commission – VIA EMAIL
Mr. Mitchell R. Childrey, Virginia Department of Health – VIA EMAIL

Tab B. Letter from Bedford Weaving attorney March 21, 2013

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

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Richmond, Virginia 23227

John R. Cline
Virginia Bar #41346

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Office and Fax: 804-746-4501
Cell: 804-347-4017

March 21, 2013

Mr. Elmer Hodge, Chair
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, Virginia 24523

Dear Mr. Hodge:

On behalf of Bedford Weaving, Inc. ("Company"), I write to re-emphasize and amplify several of the serious concerns expressed to date by Mr. Garbarini regarding the planned consolidation or merger of the City's and County's water supply systems.

Major Water Quality Issues

As you know, the Voluntary Settlement established several key "principals" (sic) to guide the subject merger, including the following:

> The City presently has large industrial and commercial users which provide significant employment for citizens of both jurisdictions. Most of these large water users have water quality requirements as a result of chemical tolerances required for manufacturing or production processes. The study [to review the necessary details associated with such a merger] must address those concerns . . .[1]

To that end, the City and County authorized the conduct of the *Bedford Utilities Consolidation Report.*[2] Among other things, that Consolidation Report found that the hardness and alkalinity levels of the City's existing "soft" finished water were significantly lower than the levels of those parameters in the "moderately hard" finished water under consideration as a backup source of water for the City.[3] Moreover, that same report acknowledged "several notable" adverse effects of increased levels of hardness in a water source, including deterioration and discoloration of fabrics and increased fouling in atomizing spray devices which necessitate

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[1] *Voluntary Settlement of Transition to Town Status and Other Related Issues between the City of Bedford and the County of Bedford,* Exhibit 7 (Sept. 14, 2011) (hereinafter "Voluntary Settlement")..

[2] Wiley & Wilson, *Bedford Utilities Consolidation Report,* (Sept. 27, 2012) (hereinafter "Consolidation Report").

[3] *Id.* at 4-3 to 4-6, 4-9 to 4-12.

shutdowns of manufacturing operations dependent on those sprays.[4] Indeed, you are well aware of Bedford Weaving's paramount need for such sprays to maintain humidity within a narrow range for its looms to operate properly while avoiding damage to its fabrics due to poor quality of the water used in those sprays.[5]

The Consolidation Report also made the following recommendation:

> It is recommended that the new Joint Authority conduct a more in-depth study to assess the specific effects of blending the City of Bedford WTP's soft finished water with a backup source providing moderately hard finished water. It is recommended that the study (1) identify potential blending scenarios, (2) coordinate with industrial customers to determine thresholds at which increased hardness/TDS will affect their processes, and (3) evaluate different treatment techniques which may be required to reduce hardness. This may include point-of-use techniques to meet specific industrial customer requirements.[6]

To date, the Company is unaware of any substantive actions taken by the BRWA to implement the above recommendations. The BRWA is undoubtedly aware of the high level of water quality required by Bedford Weaving and appears to be doing little, if anything to address that need – despite the Voluntary Settlement's general directive to address the concerns of its large industrial and commercial users.

Meanwhile, the BRWA continues its aggressive planning for the design and construction of a new water treatment plant ("WTP") at Smith Mountain Lake ("SML") to provide a backup source of water for the City. Yet, the final draft of the Preliminary Engineering Report ("PER") for that project barely mentions any consideration of the finished water quality from that new plant. The PER states succinctly that "[t]he finished water quality *goals* for the proposed SML WTP are *generally less* than the Maximum Contaminant Levels (MCLs) listed for primary and secondary contaminants in the Safe Drinking Water Act."[7]

Of course, any water quality "goal" is just that, i.e., an aspiration, and it may fall far short of what the eventual design standard is, as well as what the finished project actually achieves. Furthermore, the fact that the PER states that such goals are "generally less" than the MCLs suggests, at least, that some of those goal are greater than the corresponding MCLs. That vague

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[4] *Id.* at 4-4.

[5] Letter from Elmer Hodge, BRWA Chair, to Philip Garbarini, Sr., Bedford Weaving, of Mar. 13, 2013.

[6] Consolidation Report at 4-12.

[7] Anderson& Associates, Inc., *Preliminary Engineering Report; Smith Mountain Lake Water Treatment Plant; Bedford County, Virginia (Final Draft)*, 9 (Feb. 15, 2013) (emphases added).

language begs the question of what are the specific "goals" for hardness, alkalinity and total dissolved solids in the finished water from the planned SML WTP?

The PER's absence of any substantive consideration of the water quality concerns of the City's large industrial and commercial water users strongly suggests again that such concerns are not an integral part of BRWA's plans for merging the City's and County's water systems. The BRWA has recently stated that "[o]ur first priority is to provide the best water and wastewater services that we can, *now* and for future generations. . . . One of the first things economic development prospects look for is a strong, dependable water and wastewater system that is well run and affordable."[8] However, Bedford Weaving believes that BRWA actions to date demonstrate too much emphasis on economic "development," i.e., new water users, and not enough emphasis on economic "maintenance," i.e., those existing industrial and commercial users that have supported a major part of the Bedford area's economy for many years. Indeed, the Company is mindful of the caution from the Virginia Commission on Local Government that "[w]hile the consolidation of utility systems will result in greater efficiencies, the City should be cognizant that, as a result, it will lose some influence in managing growth in the area, as water and sewer utilities often encourage and direct where growth occurs."[9]

In sum, absent BRWA's performance of the previously cited follow-up actions on this issue in the Consolidation Report, Bedford Weaving will strongly oppose any merger plans by the BRWA which would deprive the Company of a long-term supply of soft finished water from the City's existing water supply system.

Partial Interconnection with Segregated City Water for City's Existing Industrials

The Voluntary Settlement plainly states that "[b]oth the City and the County agree that the top priority of the new authority shall be the interconnectivity between the existing PSA system and the existing City system."[10] Importantly, however, that Agreement does not prescribe that total or complete interconnectivity between the two systems is *required*, or even desirable.

In the past, the possibility of a separate water line from the City's reservoir to Bedford Weaving has been *mentioned.*[11] The Company wants the BRWA to pursue further study of that possible option as the two overall water systems are merged. "Recent usage data indicates that the [City's] water system on average consumes about 900,000 GPD, or only 30% of its capacity."[12] Clearly then, large volumes of water from the City's water system could be made

[8] BRWA, "Presentation to the Bedford City Council," (Mar. 12, 2013) (emphasis added).

[9] Virginia Commission on Local Government, *Report on the City of Bedford – County of Bedford Voluntary Settlement Agreement*, 19 (July 2012) (hereinafter "Commission Report").

[10] Voluntary Settlement, Exhibit 7.

[11] Letter from Elmer Hodge, BRWA Chair, to Philip Garbarini, Sr., Bedford Weaving, of Mar. 13, 2013.

[12] Commission Report at 27.

available for blending with the County's water without the need for that blending to include the current amounts being used by the City's large industrial and commercial users.

In short, it appears that the BRWA needs to sharpen its view as to how much interconnectivity between the two systems is actually *necessary*. The two water systems could be merged without all elements of the two systems being completed interconnected. Consequently, Bedford Weaving will continue to challenge any interconnection plans that do not provide for segregation of City water for continuing consumption by the City's existing industrial and commercial users.

Unaddressed Environmental Impacts

Furthermore, the Company's review of recent BRWA documentation raises questions in our minds concerning the overall scope of environmental permitting for the construction and operation of the SML WTP. Bedford Weaving understands that the Virginia Department of Environmental Quality must issue a water withdrawal permit and that permit issuance is contingent upon the Army Corps of Engineers' examination of potential wetlands impacts.[13] However, to date we have been unable to identify other environmental permitting requirements and related regulations which the new WTP may need to satisfy.

For example, what will be the nature of any solid wastes generated by the proposed WTP and how will they be disposed of? Will the WTP be using any hazardous chemicals, especially ones which may require a risk management plan under the Clean Air Act ("CAA"). Will the WTP need to have any standby emergency generator or engine for a fire pump that will require permitting under the CAA? Will the WTP constitute a hazardous waste generator, and, if so, what will be the nature of that particular waste?

The PER indicates that the SML WTP is proposed to be located at the site of the former Camp 24 Moneta Adult Detention Facility.[14] The Company assumes that an Environmental Site Assessment of that location will be performed before finalizing any siting decision. More generally, will any potential environmental or archaeological impacts, e.g., to aquatic or terrestrial resources, to ambient noise levels, etc., be scrutinized as part of the WTP's planning and permitting?

Overall, Bedford Weaving believes there is a need for increased transparency for any environmental planning and permitting related to proposed actions associated with interconnection of the two water and wastewater systems, in general, and for constructing and operating the SML WTP, in particular.

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[13] BRWA, "Smith Mountain Lake – Water Treatment Plant; Summary of Project," 9 (Feb. 14, 2013).

[14] PER at 3.

Constitutional Limitations on Revenue-Sharing

Finally, Bedford Weaving believes that it may not be too late to examine whether the Voluntary Settlement is constitutionally infirm. If a revenue-sharing agreement established through Virginia's statute for voluntary settlement between localities obligates a county to make payments that constitute debt under Article VII, Section 10(b) of the Virginia Constitution, then Va. Code § 15.2-3401 appears to require that such an arrangement be approved by qualified voters of the county at a special referendum election before the county enters into that agreement.

Apparently, this constitutional issue was not one that required review by either the Virginia Commission on Local Government or by the Special Court convened to affirm the proposed Voluntary Settlement. Therefore, the Company will need to re-visit the history of the Voluntary Settlement development and, of course, examine the nature of any payments by the County that are required by that agreement. At this time, we are unable to conclude that any of the County's obligations to transfer revenue constitute long-term debt subject to the aforementioned constitutional limitation. In that regard, the Company would welcome receipt of any opinion of that matter which the BRWA may already have.

Conclusion

In closing, Bedford Weaving wishes to express its profound disappointment with the manner in which the "consolidation" of the City's and the County's water systems has been handled to date. Bedford Weaving has been a good corporate citizen in the Bedford community for many years, and yet the Company's fundamental need for a supply of high-quality water to continue its operations has been all but ignored. In that regard, there are other existing industrial and commercial water users in the City that have similar needs that also have not received the scope and extent of BRWA's attention which they deserve.

Until Bedford Weaving's future water supply need is satisfactorily resolved, the Company will maintain vigilant oversight of all activities related to the water systems' consolidation. If the BRWA's present lack of attention and support continues, Bedford Weaving will seek to utilize any and all practicable means allowed by law for challenging, delaying and defeating actions to interconnect the two water systems.

If you have any questions, and especially if you can provide the Company with much-needed assistance on this matter, please do not hesitate to call Mr. Garbarini or me.

Sincerely,

John R. Cline

cc: P. J. Garbarini
Charles Kolakowski
Robert Wandrei

Tab. C. Letter to Bedford Weaving attorney April 24, 2013

GFD&G
GLENN FELDMANN DARBY GOODLATTE

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E-mail hdarby@gfdg.com

April 24, 2013

John R. Cline, Esq.
P. O. Box 15476
Richmond, Virginia 23227

Re: Letter dated March 21, 2013 addressed to Mr. Elmer Hodge, Chair

Dear Mr. Cline:

Mr. Hodge, Chairman of the Bedford Regional Water Authority ("the Authority"), has asked me, as counsel to the Authority, to respond to your letter.

As I understand your letter, your client, Bedford Weaving, Inc., is requesting a binding legal obligation on the part of the Authority to provide it with the same quality and quantity of water as has been provided in the past to Bedford Weaving, Inc. by the City of Bedford, for an indefinite term.

You seem to be suggesting one particular engineering solution: the segregation of water from the Bedford City reservoir for use by your client at its manufacturing facility in the City of Bedford. While this may very well be one solution to the problem, it must be determined if this can feasibly be done. I understand that the water used in the past by your client has been satisfactory and has not been a cause for concern in your client's manufacturing processes. It apparently has not, however, been sourced exclusively from the Bedford City Reservoir, but has also been drawn regularly from the Big Otter River. Insisting that the water come exclusively from the Bedford City Reservoir appears, at this juncture, not to be thoroughly evaluated.

As I read the letter, you are stating, on behalf of Bedford Weaving, Inc., to "utilize any and all practicable means allowed by law for challenging, delaying and defeating actions to interconnect the [Bedford County Public Service Authority and the City of Bedford] water systems;" specifically being challenged is the augmentation currently under consideration to provide additional water from Smith Mountain Lake and an additional water treatment plant to be constructed in the Smith Mountain Lake area. You go on to state on page 4 of your letter that " ... Bedford Weaving will continue to challenge any interconnection plans that do not provide

for segregation of City water for continued consumption by the City's existing industrial and commercial users." Finally, you suggest a constitutional challenge under Article VII of the Virginia Constitution for failure of the County to have sought a voter referendum approving of the revenue sharing portions of the Voluntary Settlement.

The position you set forth is in sharp contrast to comments made on March 26, 2013 by Mr. P. J. Garbarini, president of Bedford Weaving, Inc., acknowledging that the Authority was doing all that he could expect to investigate the most efficient and most economical way to provide his company with the quality and quantity of water necessary for his industrial operations.

While you have reviewed quite a bit of material that was made available to you primarily from the postings on the Bedford County Public Service Authority website, you complain of lack of transparency for any environmental planning and permitting related to proposed actions associated with interconnection of the two water and wastewater systems, in general, and for constructing and operating the Smith Mountain Lake water treatment plant in particular. The Authority prides itself on transparency, and permitting liberal access to information; and it is pleased that you have been able to utilize this information to learn about the Authority and its processes. Please recognize that policy decisions are made by the Board of Directors; the Board hires the Executive Director, sets rates, authorizes capital investments and provides guidance on broad policy issues such as the best methods for prioritizing and attaining the goals set for the Authority by the two localities. Together, the Authority Board and staff, with guidance from retained professionals, will search out and determine the best solution to your client's problem.

Mr. Hodge did clearly state to Mr. Garbarini, when he attended the Authority's regularly scheduled Board meeting on March 26, 2013, that the engineering solution of how to accommodate your client's reasonable need would be included in an ongoing engineering study; to do otherwise would take a lot of time and money to procure a separate engineering study. Mr. Hodge assured Mr. Garbarini that the Authority would do whatever it could to provide suitable water for your client's plant in the best possible way, including but not limited to providing a sound engineering and financially feasible solution. Mr. Hodge cautioned that it is not known at this time if there exists a practical engineering solution to the problem, but that the Authority is going to find out and let your client know as soon as possible. When asked by Mr. Hodge if that were agreeable to Mr. Garbarini, the response was "It has to be. We have no choice."

We assure you that your client's concerns have been listened to by various representatives of the Authority, including Mr. Hodge, its chairman, and others who have made themselves accessible to him.

We understand that your preference will be to segregate water from the Bedford Reservoir for use in Bedford Weaving's manufacturing process. Certainly the Authority is willing to develop the engineering analysis to determine whether this would be feasible and practicable. The Authority is willing to keep Mr. Garbarini reasonably informed as to the results of the engineering analysis.

As you note on page 3 of your letter, the Voluntary Settlement of Transition to town status and other related issues between the City of Bedford and the County of Bedford dated September 14, 2011 (the "Reversion Agreement"), and all of the actions taken to date have shown that "the top priority of the new Authority shall be the interconnectivity between the existing PSA system and the existing city system." It is clear, then, that the primary goal must be to establish an abundant and efficient water supply for all of the customers of the Authority. It has been shown that the best long-term source of water supply is a withdrawal of raw water from Smith Mountain Lake and treatment at a new, state-of-the-art water treatment plant to be located near the withdrawal point. This is not inconsistent with continuing to provide Bedford Weaving, Inc. with the quality and quantity of water it is reasonable needs in its manufacturing processes.

I assure you, on behalf of the Authority, that the various engineering solutions to the problem will be investigated. As noted in the Reversion Agreement, "The size and location or locations of the waterline interconnection will be decided by the new Authority taking into consideration the long term interconnectivity needs of the entire county."[1] This investigation is proceeding apace and should result in a choice of solutions. As soon as more information is available from the engineering evaluation, representatives from the Authority will be in contact with your client.

Very truly yours,

Harwell M. Darby, Jr.

HMDJR:wmj:0600112

c: Mr. Elmer C. Hodge, Jr., Chairman
Directors of Bedford Regional Water Authority
Mr. Brian Key, Executive Director

[1] Reversion Agreement, § 11(a)

Tab D. Draft letters to Judge and Citizens

Bedford Weaving, Inc.

Phone (540) 586-8235 P.O. Box 449 • Bedford, Virginia 24523 FAX (540) 586-6653

May 31, 2013

CITIZENS OF BEDFORD CITY

The City of Bedford in becoming a town has transferred the water plant at Falling Creek Dam to the County; and, they are, also, transferring the water treatment facility on Orange Street to the County.

One month ago we asked Chariman Hodge for some statement indicating that the new Water Authority would be able to supply the same quality water to Bedford Weaving as we were receiving. Chariman Hodge indicated that the water from the Smith Mountain Lake and/or James River by Lynchburg would not meet the qualtiy of the water we now have.

We are pleased to announce that we have been given an 18 Million yard order from a very large customer to run over a period of two years. The water we will need will not be available through the proposed pipe line to Smith Mountain Lake Water Authority and/or to the James River Lynchburg Water Authority. It can be made available, but the way the equipment stands now it will not be available for three to four years. The head of the water authority is not in favor of this commitment.

Therefore, Bedford Weaving opposes the merger of the water authority.

I hope you will support us.

P. J. Garbarini, President
BEDFORD WEAVING, INC .

Bedford Weaving, Inc.

Phone (540) 586-8235 P.O. Box 449 • Bedford, Virginia 24523 FAX (540) 586-6653

May 31, 2013

Honorable Judge

Dear Sir:

You have given us a quandry in that the proposal to make Bedford City revert to a town was neve publicly presented to the public. Now, the former County of Bedford is being given the Bedford City water system and this is causing us a problem.

We are a medium sized, profitable textile mill, weaving specialty fabrics with sales of approximately $30 Million a year. We have recently received an 18 Million yard over for a fabric used for surgical tape to run for a two year period from a large well known U.S. company. While it will take two years to weave this product we expect continuing orders for this same product., which we would not be able to take due to the change in water supply.

The former County of Bedford, is taking over the the water works and they propose to send water from Smith Mountain Lake area and receive water from the James River through Lynchburg. These merged waters will not have the same properties and will not be treated to make them have the same properties as the water from the City water supply.

The Chairman of this committee, Elmer Hodge, recognizes the fact that Bedford Weaving requires the water we are now supplied. He is, also, in agreement that the merged water from the James River and Smith Mountain Lake would not be treated to the water we now have.

This fact came to light only a few weeks ago and we object to the County of Bedford taking over the water supply. We, also, belive there was a master plan to get this for the County of Bedford has been after this water supply for years for property development (at least 40 years).

We have hired an attorney, John Cline, and we want to oppose the City of Bedford giving the current water supply to the County as I am sure this fact was never presented to you before a decision was given. We would propose that you order the current water supply and water system be left with the former City of Bedford and not given or transferred to the County of Bedford

Sincerely

BEDFORD WEAVING, INC.

P.J. Garbarini, President

Tab E. Bedford Weaving Comment filed with DEQ

COMMONWEALTH OF VIRGINIA
BEFORE THE VIRGINIA STATE WATER CONTROL BOARD AND
THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF BEDFORD REGIONAL WATER AUTHORITY; PROPOSED MODIFICATION OF VIRGINIA WATER PROTECTION PERMIT	))))	VWP Permit No. 96-0707

COMMENTS OF
BEDFORD WEAVING, INC.

The Virginia Department of Environmental Quality ("DEQ" or "Department"), acting on behalf of the State Water Control Board ("Board"), has prepared a draft modification to the Virginia Water Protection ("VWP") permit held by the Bedford Regional Water Authority ("BRWA"), and formerly held by the Bedford County Public Service Authority ("BCPSA").[1] The modified permit would authorize the Authority to expand its existing intake structure on Smith Mountain Lake in order to increase its maximum permitted daily withdrawal rate of raw water from 2.99 million gallons to 12 million gallons. The modified permit would limit the allowable withdrawal rates depending upon whether specific waterline extensions to service areas within Bedford County are completed by a date certain. The modified permit would also limit the allowable withdrawal rate for water to be allocated to Franklin County depending upon whether a waterline extension in Franklin County is completed by a date certain or whether an amendment to an existing water purchase agreement between the applicant and the Western Virginia Water Authority is completed.

The draft permit was noticed for public comment on July 17, 2013 in the *Bedford Bulletin*. *XXXXXXXXXothers* The following comments on that draft permit and its associated application by the Water Authority are provided by Bedford Weaving, Inc. of Bedford, Virginia.

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[1] Application for the subject permit was originally made by the Bedford County Public Service Authority ("BCPSA") in March 2011. Thereafter, Bedford County and the City of Bedford executed a Voluntary Settlement which authorized, among other things, consolidation of the County's and the City's water systems and a joint authority to implement that consolidation. Pursuant to the Voluntary Settlement Agreement, the Bedford Regional Water Authority ("BRWA") was created and has become the applicant for the subject permit. The term "Water Authority" is used throughout this document to refer either to the BCPSA or to the BRWA as applicable.

I. INTRODUCTION

Bedford Weaving is a privately held company which manufactures high-quality, broad loom fabrics. The Company weaves a variety of fiberglass, nylon and polyester fabrics used in a range of industrial applications. Other fiberglass fabrics and acetate fabrics are produced for commercial applications. The Company also manufacturers different polyester and acetate fabrics for the apparel industry and particular nylon fabrics for aerospace applications.

Bedford Weaving is truly an anachronism . . . an operating textile mill in the United States. Whereas textile manufacturing was once a staple of the economy throughout parts of Virginia and the Carolinas, the industry has essentially abandoned the U.S. for a variety of reasons, not the least of which were lower labor costs and less oppressive environmental regulation.

However, unlike a number of industries which have left Virginia, in general, and the City of Bedford, in particular, Bedford Weaving has remained at its current location within the Town (formerly City) of Bedford for almost forty years. The Company employs a skilled labor force of over 100 people that reside in Bedford and surrounding areas. As such, Bedford Weaving has been a good corporate citizen and an integral part of the City's and County's economies for decades.

A major reason that Bedford Weaving has remained at its location is the consistently high quality of water which has been provided to its mill over the years. Water quality is important to the Company's operations. For example, the weaving process must be performed in a constant-humidity environment. Therefore, an arrangement of spray nozzles is located overhead in the weaving room to inject the requisite amounts of mist to maintain the room air's desired level of humidity. Water with high levels of solids results in persistently plugging of the nozzles which in turn shuts down the continuous weaving operation. Levels of certain metals and other contaminants in that water can result in discoloration of the fabrics.

Furthermore, high-quality water is essential to the size solutions which are used to form a coating that protects the yarn against snagging or abrasion during the weaving process. In general, as the hardness of the water used for the size solution increases, the harder the film on that yarn becomes, and the resultant fabric may no longer meet its product specifications. In addition, some of the Company's woven fabrics have applications in the surgical/medical field where not only the tolerances for physical properties of the woven fabrics are narrow but the presence of contaminants in the fabrics is unacceptable. In short, the acceptability of many of Bedford Weaving's fabrics, indeed the sustainability of the Company itself, is very dependent on the Company's operations continuing to receive the high quality of water that it has received for the past forty years.

The recent consolidation of the City's and County's water systems now threatens to deprive Bedford Weaving of its manufacturing "life-line," i.e., the consistently high-quality

water from the Stoney Creek Reservoir. The Water Authority's application simply does not address how the City's (now Town's) water supply and treatment system will be incorporated within the new Water Authority's overall system. Moreover, to date, the Authority has not been able to provide Bedford Weaving with any specifics of that interconnection.

A number of water quality parameters from the Authority's High Point Water Treatment Plant near Smith Mountain Lake are significantly different from their counterparts in finished water from the Town's water treatment plant. Wiley & Wilson, *Bedford Utilities Consolidation Report,* 4-1 to 4-12, Sept. 27, 2012. Thus, for example, assuming that finished water from the Authority's planned new treatment plant processing water from the Lake is similar to that from the current High Point WTP, the hardness of future water from the Authority's new treatment plan is projected to be almost 4 times greater than that of the soft water from the Town's treatment plant. *Id.* at 4-5.

Bedford Weaving is very concerned that the Authority's water from its new treatment plant will not be compatible with the Company's manufacturing operations and its specialty products. Indeed, the Authority's consultant has recommended that an in-depth study should be performed "to assess the specific effects of blending the City of Bedford's soft finished water with a backup source providing moderately hard finished water." *Id.* at 1-8. To date, Bedford Weaving is unaware of any such "in-depth study" by the Authority.

Therefore, until the Water Authority discloses the specifics of (1) how the Town's water system is to be integrated within the Authority's overall system and (2) what the quality of any resultant blended water may be and how it will affect the Company, Bedford Weaving is compelled to strongly oppose DEQ's authorization of the Authority's proposed action.

Notwithstanding the Company's major concern with whether its future water will be compatible with its long-time operations, Bedford Weaving finds numerous other, unrelated reasons for why DEQ must deny the subject VWP permit for the Authority. As detailed herein, the Authority's application, and unfortunately the Department's draft permit, are not consistent with the VWP Permit Program regulations, accompanying DEQ guidance and sound public policy. Among other concerns, the Company believes strongly that the Water Authority and the Western Virginia Water Authority are obligated by law to seek a VWP permit for all of their planned, interdependent activities that collectively constitute a single and complete project. In sum, Bedford Weaving believes there are several additional fatal flaws in the Authority's application that must be cured before DEQ can consider issuance of a VWP permit for the entire project.

II. DISCUSSION

Acting under a delegation of authority from the State Water Control Board ("Board"), DEQ has recently released a draft modification of Permit #96-0707 in response to the Water Authority's application. In keeping with State Water Control Law, "[t]he Board shall . . . issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with provisions of the Clean Water Act and the State Water Control Law . . . [.]" Va. Code § 62.1-44.15:20B.

For many substantive reasons, as explained herein, the Water Authority's proposed activity is not "consistent with provisions of the Clean Water Act and the State Water Control Law . . . [.]" Because that proposed activity cannot satisfy that statutory threshold requirement, the Department must deny the requested VWP permit.

A. The "Proposed Activity" Is Not the Full "Project" That Must Be Permitted.

1. *An Activity's "Independent Utility" Is Key to Determining the "Project".*

The VWP Permit Program Regulations require a permit application to provide the "purpose and need for the project," "a complete narrative description of the project," including "the type of activity to be conducted" and "all impacts . . . associated with the project." 9 VAC 25-210-80B(1)(f). Although those "Chapter 210" regulations do not specifically define the term "project," those regulations and related guidance nevertheless make clear that a project consists of all interdependent activities. *See, e.g.*, 9 VAC 25-210-60B ("Activities, other than the surface water withdrawal, which are contained in 9 VAC 25-210-50 and are associated with the construction and operation of the surface water withdrawal, are subject to VWP permit requirements unless excluded by subsection A of this section.") (Emphasis added.); DEQ Guidance Memorandum No. 11-2004, 14 Mar. 17, 2011) ("[9 VAC 25-210-80] distinguishes the informational requirements for projects exclusively involving a surface water withdrawal from those projects that may involve other impacts to streams and/or wetlands.").

Indeed, the Board's regulations for VWP General Permits for different types of activities firmly establish the concept of what constitutes a "project" for VWP-permitting purposes. Those general regulations provide that

> [t]he words and terms used in this chapter shall have the *meanings defined in the State Water Control Law . . . and the Virginia Water Protection (VWP) Permit Regulation (9VAC25-210)* unless the context clearly indicates otherwise or unless otherwise indicated below.
>
> * * *
>
> "Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have

> independent utility if it would be constructed absent the construction of other projects in the project area. *Portions of a multi-phase project that depend upon other phases of the project do not have independent utility.* Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

9 VAC 25-660-10; 9 VAC 25-670-10, 9 VAC 25-680-10 and 9 VAC 25-690-10 (emphases added).

2. *Why Applications for Part of a Project Are Submitted*

Environmental permitting regulations generally prohibit an application for a portion of a multi-phase project that does not have "independent utility," i.e., that depends upon other phases of the project. An applicant's inappropriate disaggregation of a single large project into several smaller "projects" for permitting purposes may be motivated by several interests. For example, a separate preconstruction permitting sequence for several small projects may allow construction of one or more of those portions of the overall project to begin sooner, i.e., since application for a preconstruction permit for a small "project" frequently can be processed quicker than an application for a more complex, multi-phase project. In addition, during subsequent applications for other portions of the single large project, the applicant may assert the potential for substantial financial losses from construction of the earlier activities unless permits are issued for the remaining portions of the single large project.

In many instances, smaller "projects" below a certain discharge/impact threshold are subject to less stringent environmental requirements (control, testing, monitoring, recordkeeping and reporting) than comparable requirements for a larger project with a greater cumulative discharge/impact. Moreover, expedited permitting of only one portion of an entire project may allow allocation of a particular resource to be "locked-up" without substantial pre-construction permitting scrutiny before other similarly situated applicants can obtain allocations for a share of that resource.[2]

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[2] In that regard, it is noteworthy that BCPSA's requested maximum daily withdrawal of 12 mgd happens to be almost equal to the remaining amount of raw water in SML that Appalachian Power Company (APCO) previously estimated could still be withdrawn without requiring a comprehensive evaluation of environmental and other effects by the Federal Energy Regulatory Commission in keeping with the National Environmental Policy Act (NEPA). In its re-licensing application to FERC, APCO requested FERC's authorization to allow future domestic water withdrawals from SML without FERC's typical NEPA scrutiny until the total withdrawals reached the predetermined value established by the Company's Water Withdrawal Study. *See* APCO, *Application for New License for Major Project – Existing Dam*, Volume VII, Attachment 1 ("Draft Water Management Plan"), Section 2.E (Water Withdrawals) (incorporating Water Withdrawal Study, Aug. 2007), Mar. 2008. Importantly, however, when it issued the new license to APCO, FERC directed APCO to file a Final Water Management Plan that expressly excluded section 2.E pertaining to water withdrawals from the Draft Water Management Plan. *See* FERC, *Order Issuing New License,* Appalachian Power Co. (Project No. 2210-169), Article 404, Dec. 15, 2009. In other words, once APCO applies to FERC for approval to allow BCPSA's expanded withdrawal from SML, FERC's

3. *The Authority's Application Is Deficient*

Against that background, Bedford Weaving notes that the Water Authority has applied "to expand the existing intake permit and structure from its current permitted capacity of 2.999 mgd up to 12 mgd." JPA Insert Sheet 8a. That intake supplies the nearby High Point Water Treatment Plant ("WTP"), which is currently permitted by the Virginia Department of Health for a treatment capacity of up to 0.770 mgd. DEQ, "Fact Sheet," Modification of Virginia Water Protection Permit No. 96-0707, 3, July 11, 2013. The disparity between those facilities' capacities is apparent. How can the Water Authority treat up to 12 mgd of raw water when its treatment plant's capacity is only 0.77 mgd?

The answer to that question is straightforward, i.e., the Water Authority's "proposed activity" is not the same as the single, joint "project" that has been planned by the Water Authority and the Western Virginia Water Authority ("WVWA"). In addition to increasing its raw water withdrawal, the Water Authority also plans to decommission the existing High Point WTP and construct a 6.0 mgd regional WTP with ultimate expansion capacity to 12 mgd. *Id.* at 4. The Water Authority also plans to construct a new water transmission line from the new treatment plant to the Town of Bedford and then to extend construction of that water transmission line all the way to Forest. *Id.* at 3 and 8.[3] The Water Authority also plans to treat and sell roughly 40% of its future total withdrawal to the WVWA, and the WVWA plans in turn to construct new water transmission lines to provide that water to Franklin County's Route 220 North and Boones Mill service areas. *Id.* at 8. Given their projected water consumption, both the Water Authority and the WVWA will need to "extend service to a significant number of previously self-supplied users within their projected services areas by the end of the 15-year permit term, especially within Franklin County." *Id.* at 5. In addition, the WVWA plans "to install one or more under lake crossings that will allow water [from the Water Authority's new treatment plant] to move from the Scruggs Peninsula to the southern part of [Smith Mountain Lake]." Electronic mail from Gary Robertson, WVWA, to Scott Kudlas, DEQ, of June 7, 2013.

In other words, the Water Authority along with the WVWA has planned a large "public surface water supply withdrawal," i.e., (1) the "withdrawal of surface water in Virginia," (2) "for the production of drinking water," where (3) that drinking water is "distributed to the general

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review of that non-project use of SML water will require FERC's standard NEPA review prior to authorizing that increased withdrawal. proper FERC cite??

[3] "These proposed facilities, hereafter referred to as the Smith Mountain Lake Water Treatment Plant (SML WTP), would immediately serve the Lakes Central and Moneta areas of Bedford County [currently served by existing High Point intake and WTP] as well as provide water to the Western Virginia Water Authority for their customers in Franklin County. It is ultimately proposed to serve the Forest area of Bedford County and connect to the City of Bedford's water system[.]" Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant, Bedford County, Virginia*, Executive Summary at i, Feb. 15, 2013.

public for the purpose of, but not limited to, domestic use." 9 VAC 25-210-10. That regulatory definition from the VWP Permit Program is accompanied by another Program definition for the term "surface water supply project" which means "a project that withdraws or diverts water from a surface water body for consumptive or nonconsumptive purposes[.]" *Id.* That latter term "usually applies to municipal projects where water is withdrawn for treatment to create a potable water supply. DEQ, Guidance Memorandum No. 11-2004, Mar. 17, 2011. And yet, while the Water Authority and the WVWA have plans for such a surface water supply project, i.e., withdrawal, treatment, transmission and distribution, the Water Authority has sought a VWP permit solely "to expand the existing intake permit and structure."

Applying the "independent utility" test of the VWP permit regulations, an expanded intake structure in Smith Mountain Lake would not be constructed if the Water Authority's planned new water treatment plant were not built. Similarly, that planned new water treatment plant would not be constructed if the Water Authority's planned new water transmission lines would not be built. And the Water Authority's planned new distribution lines to connect new users in Bedford City and Forest and users in between those service areas would not be built if the new water transmission lines for those service areas were not constructed.

Similarly, WVWA's planned new distribution lines to connect new users in Franklin County's Route 220 North and Boone's Mill service areas would not be built if the new water transmission lines through Franklin County were not constructed. And new water transmission lines through Franklin County would not be constructed if the Water Authority's new treatment plant were not built.

In sum, the Water Authority's planned expansion of its water intake in Smith Mountain Lake does not have independent utility. Consequently, in keeping with the VWP permit regulations and DEQ guidance, the planned expansion of that water intake, i.e., the Water Authority's "proposed activity," does not constitute a single and complete "project" that may be authorized under State Water Control Law.

Moreover, the Water Authority's planned new water treatment plant at the Lake does not have independent utility. Nor do the Authority's planned new water transmission and distribution lines have independent utility. Likewise, WVWA's planned new water transmission and distribution lines do not have independent utility. In the vernacular of the VWP permit regulations, each of those planned activities only constitutes a "portion of a multi-phase project." As such, none of those portions of a project may be permitted as a separate project.

Bedford Weaving finds it particularly troubling that DEQ has chosen to ignore the fact that the Water Authority and the WVWA have planned a much larger project. In May 2011 DEQ asked the applicant to provide a map that would include "1) all service areas to which water supply is anticipated by the applicant and partnering entities, and 2) all proposed and

existing water lines in all service areas." Letter from Brenda Winn, DEQ, to Anderson & Associates, agent for BCPSA, of May 10, 2011. BCPSA's agent responded to DEQ's request with the following statement:

> [F]uture waterlines are indicated which show the "big picture" for the regional water distribution plans in Bedford County and Franklin County and surrounding areas. No waterlines are proposed to be constructed with this application; however, the interconnectivity provided by these future waterlines is needed to serve the anticipated demand. These waterlines will be proposed at such time that BCPSA requires them. *The requested withdrawal rate will be necessary to serve the areas connected by the future waterlines.*

Letter from Anderson & Associates, agent for BCPSA, to Brenda Winn, DEQ, of June 24, 2011 (emphasis added).

Clearly, BCPSA recognized that the "requested withdrawal rate," i.e., the proposed activity, had no independent utility. The BCPSA confirmed what DEQ knew, i.e., that the proposed expansion of the Water Authority's intake was only a portion of a much larger multi-phase project. "Capital improvements in the form of 1) a new regional WTP and 2) new waterline extensions are required in order to provide the demand for the requested withdrawals." DEQ, Draft Fact Sheet at 14.

And yet, counter to its own regulations and guidance and counter to sound public policy, DEQ's proposed action indicates its willingness not to require a VWP permit for the Water Authority's and WVWA's single combined project. Rather, DEQ simply acknowledges that "[a]ny potential impacts related to future waterline extensions and/or water treatment plant expansion or construction are not part of this modification and would be permitted separately." DEQ, Fact Sheet at 4.

The Water Authority cannot simply define its "proposed activity" to accommodate its preference for what it seeks to permit when that preference is something less than a single and complete project. Nor can DEQ issue a VWP permit for an activity that has no independent utility, i.e., that would not be built absent the construction of other inter-related activities.

4. *Clean Water Act § 404 Looks at All Reasonably Related Activities*

The federal permitting scheme for construction impacts to wetlands and for construction of structures in navigable waters also prescribes that all planned inter-related activities must be addressed by a single permit. Under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, the U.S. Army Corps of Engineers ("COE" or "Corps") issues permits for discharges of dredged or fill material into waters of the U.S., including wetlands. 33 C.F.R. Part 323. Under

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, the Corps issues permit for structures or work in or affecting navigable waters of the United States. 33 C.F.R. Part 322. As the Corps' regulations for processing of those Department of the Army ("DA") permits explains:

> *All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same application.* District engineers should reject as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as will as any fill associated with construction of the marina.

33 C.F.R. § 325.1(d)(2) (emphasis added).

To that end, in March 2011 shortly after the Water Authority had filed its Joint Permit Application ("JPA"), the Corps requested the Authority to provide details of all of the planned waterline construction in Bedford and Franklin Counties, noting that constructions impacts to wetlands and streams greater than specific threshold levels would be subject to detailed application requirements under CWA §404. Electronic mail from Jeanne Richardson, Corps of Engineers, to Anderson & Associates, agent for BCPSA, of March 31, 2011.

However, one year and nine months after the Corps' request, BCPSA's agent responded by stating that

> The intent of this JPA is for the water intake only. After potential environmental impacts resulting from the waterline extensions, if and when they happen, will be permitted separately from the water intake once final alignments are determined.

Letter from Anderson & Associates, agent for BCPSA, to Jeanne Richardson, Corps of Engineers, of December 31, 2012.

BCPSA's disingenuous misrepresentation of the interdependence between the expanded water intake and future construction of new water transmission and distribution lines ("if and when they happen") and its failure to disclose the interdependence between the expanded water intake structure and a planned new water treatment plant were apparently contrived to convince the Corps that the scope of the project requiring a DA permit was nothing more than the expanded water intake. In keeping with that erroneous understanding of the Water Authority's planned activities, the Corps found the proposed water intake to be subject to its Nationwide Permit 7 ("NWP7").[4] Letter from Peter Kube, Corps of Engineers, to BCPSA of Feb. 22, 2013.

[4] Bedford Weaving also questions the validity of this DA permit for the Water Authority's intake structure. Not only did the Water Authority fail to apply for "[a]ll activities which the [Water Authority] plans to undertake which

In short, both DEQ's VWP permitting regulations and the Corps' DA permitting regulation require an application that includes all reasonably related or interdependent activities which the applicant has planned. Nevertheless, the Water Authority has somehow convinced DEQ and the Corps that the Authority's only planned activity is the proposed expanded water intake. In this case, however, the proposed expanded water intake has no independent utility, so that activity by itself cannot constitute a project for purposes of permitting under DEQ's VWP permit regulations or under the referenced Corps regulations.

5. *Water Authority's Previous VWP Permits*

The fact that the Water Authority's previous two VWP permits were issued solely for the water intake structure and related withdrawal rate does not establish any precedent for the applicable scope of VWP permitting in the instant case. The Water Authority's first VWP permit was issued in 1997 and authorized the construction and operation of the Authority's original water supply intake on Smith Mountain Lake. DEQ, VWP Permit No. 96-0707, Sept. 8, 1997. The expiration date for that permit was September 9, 2007.

In 1996 the Water Authority had been issued a federal Abbreviated Standard Permit ASP-18 from the U.S. Army Corps of Engineers, authorizing installation of the original water supply intake on Smith Mountain Lake. Corps of Engineers, ASP-18, Project No. 96-0707, July 31, 1996. The Water Authority's first VWP permit served as the requisite State certification of that federal permit under Section 401 of the Clean Water Act. At the time of that DEQ action, the regulatory scope of Virginia's VWP Permit Program did not include protection of Virginia's wetland resources. DEQ, *A Guide to the Virginia Water Protection Permit Process,* 1-1, June 2003.

In other words, the only activity of the Water Authority which was regulated in 1997 by Virginia VWP Permit Program was construction and operation of a new water intake structure. Consequently, the Water Authority's 1997 VWP permit only addressed that water intake structure.

In 2007 the Water Authority's VWP permit for its existing water intake structure was renewed. DEQ, VWP Permit No. 96-0707, Nov. 30, 2007. However, earlier in July 2000, the Virginia General Assembly had amended the scope of the VWP Permit Program to include not only a Section 401 certification program for federal Section 404 permits issued under the CWA

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are reasonably related to the same project and for which a DA permit would be required," 33 CFR § 325.1(d)(2), but NWP7 states plainly on its face that "[t]he construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure." Corps of Engineers, NWP7 Permit No. NAO-2011-0593, Feb. 22, 2013. The Water Authority's intake structure clearly is not directly associated with an authorized outfall structure.

but also a Virginia nontidal wetlands program independent of Section 401 certifications. *Id.* For that reason, the Water Authority's 2007 VWP permit not only addressed the withdrawal of water from Smith Mountain Lake but it also contained various "Standard Project Conditions" for the protection of wetlands. DEQ, VWP Individual Permit No. 96-0707, Nov. 30, 2007. Notably, because the Authority's intake structure had already been constructed and because construction of any related structures had not been planned (e.g., new water treatment plant, new water transmission lines, etc.), the scope of the Authority's second VWP permit once again was solely the existing water intake.

In the instant case, the Water Authority has once again attempted to portray its VWP-permitting needs only as the construction and operation of additional water intakes. But in attempting to justify its projected water demands in its application, the Authority has necessarily disclosed that a large new water treatment plant will also have to be constructed, that large water transmission lines to the Town of Bedford and Forest Service Areas and through Franklin County will also have to be constructed, and that the Water Authority and the Western Virginia Water Authority will need to install numerous new distribution lines to a large number of new users. In other words, unlike the Water Authority's prior plans in 1997 and 2007 that only involved a water intake structure, the Water Authority's current plans call for construction of a major public water supply withdrawal project.

As explained earlier, the Water Authority planned activities are all inter-related; none has independent utility. Consequently, Virginia's regulations mandate that all of those planned activities be examined by DEQ as a single, complete project in need of a single VWP permit. "The regulation concerning water withdrawals *and associated activities* permitted under the VWP Permit Program is 9 VAC 25-210 *et seq.* [sic]" DEQ, *Status of Virginia's Water Resources: A Report on Virginia's Water Resources Management Activities,* 18, Oct. 2011. In contrast to its earlier plans and related VWP-permitting, the Water Authority's "proposed activity" in this proceeding constitutes only a portion of an overall project and as such cannot be lawfully issued a VWP permit unless that permit also authorizes all of the other inter-related portions of the Authority's single project.

B. The Authority's Water Supply Planning Is Flawed.

The Water Authority initially based its projections of future water demand on the needs of the Lakes and the Forest Service Areas in Bedford County and the Smith Mountain Lake, Boones Mill and Route 220 North Service Areas in Franklin County Service. The application's total projected peak water usage during the 15-year permit period was 10.59 mgd. Letter from Anderson & Associates, agent of the Water Authority, to Brenda Winn, DEQ, of June 24, 2011.

However, based on the City's plans to revert to Town status as part of Bedford County, DEQ requested the Water Authority to amend its projected water demand to include appropriate usage rates for

the City/Town of Bedford. Electronic mail from Brian McGurk, DEQ, to Anderson & Associates, agent for BCPSA, of Aug. 28, 2012. In response, the Water Authority adjusted its total projected peak water usage during the permit period to 13.21 mgd. Electronic mail from Anderson & Associates, agent for BCPSA, to Brian McGurk, DEQ, of Sept. 13, 2012.

The Voluntary Settlement between the City and County mandated the interconnection of the City's and County's respective water systems. The agent for the Water Authority observed that it was "our understanding that this interconnection is intended to serve as an emergency water supply for the City and that it may become the permanent supply in the future if their existing treatment infrastructure ever requires significant upgrades or repairs." *Id.* Curiously, however, the Water Authority's projections of future water supply needs were never adjusted to account for the existing supply available from the City's/Town's water system.

The Water Authority's water supply plan appears to assume that water from the Towns' water system will not be used on a continuous basis. DEQ asked the Water Authority to describe its plan for using the Town's existing "water sources (Stoney Creek Reservoir, Big Otter River intake, and 5 wells)" conjunctively with the Smith Mountain Lake source during the permit period. Electronic mail from Brian McGurk, DEQ, to Anderson & Associates, agent of the Water Authority, of Oct. 19, 2012. In response, the Water Authority stated:

> That will be determined by the new Bedford Regional Water Authority board, and it may take years to decide what the most efficient method of balancing the sources will be. The only definite answer that we can provide you at this point is that during times of drought 100% of the water for the City will need to be able to come from Smith Mountain Lake.

Electronic mail from Brian Key, Water Authority, to Brian McGurk, DEQ, of Oct. 19, 2012.

Bedford Weaving believes that the Water Authority's basis for excluding the Town's water system from the Authority's plans is simply unfounded. The Company understands that some form of backup supply clearly would enhance the reliability of the Town's system. But that backup situation stops short of justifying the Authority's decisions to exclude the Town's water system from the Authority's determination of its net water need from Smith Mountain Lake and to plan on no availability of Town water during "times of drought."

Indeed, the regional water supply plan that included the City of Bedford as a participant concluded that

> [t]he City of Bedford is projected to have sufficient PWS [public water supply] capacity to satisfy demand through 2060, based on their current 2 mgd capacity (safe yield of sources). . . . By 2060, the City is expected to have a surplus of approximately 0.32 mgd.

Draper Aden Associates *et al.*, *Region 2000 Local Government Council: Regional Water Supply Plan,* 293, Mar. 18, 2009, rev. Mar. 16, 2011. That water supply plan did not include any caveat or exception to the availability of the City's water.

Moreover, a water supply study performed solely for the Water Authority contemporaneously with the Region 2000 regional planning came to a similar conclusion that the City of Bedford's water system would be viable resource in the future. In particular, that study recommended that the BCPSA should

> [n]egotiate with the City of Bedford regarding participation in expansion of the Lakes Region Water Treatment Plant and of a transmission main from the Lakes area to supplement the needs of the City of Bedford.

Draper Aden Associates for BCPSA, *Water and Sewer Master Plan*, 67, Feb. 12, 2009. The Water Authority's own water supply plan found that an interconnection between a large new water treatment plant in the Lakes Region and the City of Bedford's water system would "increase[e] system reliability for the both the City and BCPSA's systems." *Id.* at 17. Nothing within that report for the Water Authority supports a conclusion that the City's existing water system would be wholly unavailable during "times of drought."

In determining a local water supply need, the applicant must provide information not only on current demands but also on existing supply sources and yields. 9 VAC 25-210-115B. The Water Authority's exclusion of available water from the Town's existing system as part of the water supply to meet the Authority's projected needs is a material omission from the Authority's application. The lack of any definitive plans for using the Town's existing water is particularly troublesome for Bedford Weaving because its continuing operations depend on a supply of that high-quality water. Moreover, the fact that the Water Authority's latest plan contemplates decommissioning the existing High Point WTP so that the Authority "has a single treatment plant to operate and maintain instead of two" only heightens Bedford Weaving's fear that the Company will no longer receive water from the Town's existing water system.

Bedford Weaving strongly encourages DEQ to deny any VWP permit to the Water Authority unless and until the Authority's demonstrated water need accounts for available water from the Town's existing water system and the Authority's plan for its integrated operations appropriately describes how the Town's existing water system will be used.

C. WVWA Must Be a Co-applicant.

During its review of the application, DEQ expressed serious reservations about the fact that "future service area expansions and connections that would provide approximately 2.63 mgd (44%) of the

requested 6.0 mgd AADF are required by an entity that is not part to the permit application." DEQ, Draft Fact Sheet, Modification of Virginia Water Protection Individual permit No, 96-0707, 6, Jan 6, 2013. As the Department observed:

> DEQ has had a number of recent 'regional' permit applications involving demand from multiple parties that were not firmed up prior to issuance of the permit. In these instances the parties failed to reach agreement and the permit ultimately allocated more water than justified during the permit term.

Id. As a result of those prior negative experiences, DEQ concluded that

> allocation of additional water from Smith Mountain Lake will only be made to those who are parties to the permit. Bedford County PSA however, in response to a request for additional information in June 2012, opted to remain the sole applicant. Therefore, only the applicant's direct needs will be considered

Id. Bedford Weaving believes that the Department decision to allocate future water from SML only to applicants that had lawfully applied under the VWP Permit Program for such allocations not only reflected sound public policy but also was in full accord with Virginia Water Control Law and its implementing regulations for the VEP Permit Program.

Nevertheless, in the final draft permit only for the Water Authority, DEQ has agreed to allocate water conditionally to the WVWA. That is, part of the water allocated to WVWA is predicated on WVWA's timely completion of the necessary water transmission lines from the Water Authority's planned new treatment plant to specified service areas in Franklin County. Alternatively, that water allocation will remain valid if the WVWA completes an agreement to purchase a specified interest in the new WTP by a date certain. On the other hand, if neither condition is satisfied timely, the draft permit would nevertheless still allocate a significant amount of water to the WVWA for use in Franklin County.

Bedford Weaving opposes DEQ's "flip-flop" on its original position that allocations of water from SML must only go to VWP permit holders. Not only does the Department's current position represent poor public policy with an inevitable "slippery slope" when dealing with future non-applicants' allocations, the allocation of surface water to a non-applicant under the VWP Permit Program is simply not consistent with that Program's regulations and the underlying statute.

Bedford Weaving understands that counsel to the Water Authority has opined that WVWA cannot lawfully be a co-applicant with the Water Authority. Letter from Harwell M. Darby, Jr., counsel to the Water Authority, to Brian Key, Executive Director of the Water Authority, of Mar. 4, 2013. However, Bedford Weaving notes that the subject legal opinion was based in large part on the erroneous understandings that (1) "the Board ha[s] established Smith Mountain Lake as a surface water management area" and (2) the subject draft permit is "issued under 9VAC25-220-110[.]" *Id.* Because those understandings of the Water Authority's counsel are each erroneous as a matter of fact, counsel's conclusion that the WVWA cannot be a co-applicant with the Water Authority is erroneous as a matter of law.

Instead, when applicability of the VWP Permit Program is determined in accordance with the Program's regulations and its underlying statute, it becomes apparent that the WVWA not only could, but must, be a co-applicant with the Water Authority. As explained in substantial detail previously, a VWP permit cannot be issued solely for a proposed activity that has no independent utility. On the other hand, when a VWP permit is issued for a single and complete project as required by law, the scope of that permit in the instant case will include certain proposed activities by the Water Authority and other proposed activities by the WVWA. Thus, the single VWP permit for the overall project contemplated by both parties would include appropriate and necessary permit conditions relative to the proposed activities of the Water Authority (water intake, new water treatment plant, and new water transmission and distribution lines). Likewise, the single VWP permit for the single and complete project would also include appropriate and necessary permit conditions relative to the proposed activities of the WVWA (new water transmission and distribution lines). Such a single VWP permit involving co-permittees for implementation of a single, multiple-activity project is fully consistent with the VWP Permit Program regulations and with State Water Control Law.

Any suggestion that liability for non-compliance with such a single VWP permit for two permittees would be complex to sort out and difficult to administer fairly, *id.*, is little more than a speculative, make-weight argument that lacks any support. As noted above, one permittee would be responsible for compliance with those permit conditions addressing that permittee's activities, and the other permittee would similarly be responsible for compliance with those permit conditions addressing that permittee's activities. Given the clear division between the Water Authority's planned activities and WVWA's planned activities, it is difficult to envision the single VWP permit containing several, if any, provisions subject to joint liability.

In sum, for purposes of VWP-permitting, the respective activities planned by each party must be viewed in the aggregate as a single and complete project. The Water Authority can and must lawfully apply only for those proposed activities for which it has the legal authority to implement. By the same token, the WVWA can and must lawfully apply only for those other proposed activities for which it has the legal authority to implement. The decision whether the WVWA must be a co-applicant in this instance cannot be subject to the discretion of the Department, the Water Authority or the WVWA. Instead, that decision must be made as a matter of law, i.e., WVWA must be an applicant for any activities that it proposes to conduct as part of the overall project.

D. The Proposed "Tiered" Allocations for Water Withdrawals Have Numerous Flaws.

1. *A More Logical/Understandable Tiered Approach*

The tiered allocations in Condition I.D of the draft permit are structured in descending order, i.e., the allocations begin with the maximum amounts that could possibly be authorized over the period of the permit and then are reduced according to what particular activity within the project is not completed. The draft permit's presentation of the tiered allocations is also confusing because some of the allocations mix usages of the Water Authority and the WVWA,

and because some of the incremental changes in allocations are not consistent with DEQ's projected demands at page 8 of its July 11, 2013 Fact Sheet.

A far more logical (and understandable) method for presenting tiered allocations would be to begin with the base case (current conditions) and then add an allocation when its particular corresponding activity has been completed. Two separate tiers should be established – one tier of allocations for the Water Authority and a separate tier of allocations for the WVWA.

2. ***Proposed Trigger Events for Increasing Allocations Are Unenforceable.***

Under the draft permit's withdrawal allocation scheme in Condition I.D, the permittee's allocation is reduced by a specified amount if construction of the Route 122 South Waterline Extension is not completed by a date certain. The permittee's allocation is further reduced by another amount if construction of the Route 460 East Waterline Extension is not completed by a date certain. Furthermore, the authorized allocation is reduced even further if construction of the waterline extension to the Route 220 North Service Area in Franklin County is not completed by a date certain.

As drafted, those "triggers" for reducing the authorized allocation by a specified amount are unenforceable for several reasons. First, the draft permit does not specifically identify what constitutes the Route 122 South Waterline Extension, or the Route 460 East Waterline Extension, or the waterline extension to the Route 220 North Service Area in Franklin County. Although DEQ's draft Fact Sheet, the Water Authority's application and miscellaneous correspondence may discuss the general parameters of those waterline extensions, given the importance of those construction activities to the authorized allocations of water from Smith Mountain Lake, the specific details of what constitutes each of those waterline extensions must be defined and contained in the permit.[5]

For those construction-related triggers to be enforceable, the permit must establish a common understanding of the specific components of each waterline extension. Once the components of each waterline extension are specified in the permit, then the trigger for allocation of a specified amount of water, as currently drafted, would require all of those components to have been permanently installed as part of the Water Authority's (or WVWA's) water system.

Moreover, the specific meaning of the term "completion of construction" in the context of each of the subject waterline extensions is extremely vague. Whether a particular water allocation was triggered by a date certain would be left to the subjective opinions of DEQ, the

[5] This issue, of course, speaks directly to Bedford Weaving's earlier comment that a single VWP Permit should be issued for all of the Water Authority's and WVWA's planned activities that collectively make up the single and complete project. As currently structured, the draft permit adopts a highly questionable approach which allocates water based on non-existent, non-permitted activities.

Water Authority, the WVWA and the public. In short, the meaning of the term in the permit is so vague as to be unenforceable.

3. *The Trigger Events for Increased Allocations Are Inappropriate.*

The amount of surface water withdrawal authorized by a VWP permit is intended to correspond to the approximate amount of water actually used by the end of the permit period. In effect, the VWP Permit Program is implemented on a *quid pro quo* basis. That is, a specific amount of surface water withdrawal is authorized for the permittee in exchange for the permittee's construction and operation of water treatment, transmission and distribution facilities that allow use of the resultant drinking water. In short, the VWP Permit Program eschews the "banking" of water allocations for unknown, speculative purposes in the future.

However, adherence to the fundamental "use-it-or-lose-it" policy for VWP permitted water allocations is not assured with the triggers identified in the draft permit. Completion of construction of a waterline extension, i.e., a water transmission line from the planned new treatment plant, stops short of ensuring the allotted water will be used.

As DEQ has aptly noted, "[a] major assumption supporting the projected future demand is that both BRWA and the Western Virginia Water Authority (WVWA) will extend service to a significant number of previously self-supplied users within their projected service areas by the end of the 15-year permit term, especially within Franklin County." DEQ, Draft Fact Sheet, 5, July 11, 2013. Consequently, the mere completion of a water transmission line is not an appropriate indicator that the water allocated for future users is actually used. Instead, the permit should be structured so that an authorized incremental increase in water withdrawal associated with a particular service area is justified by the demonstrated increase in water usage in that service area.

In sum, water allocation is tied directly to future water usage. The draft permit's current triggers for increased water allocation, i.e., completions of water transmission lines, are not directly tied to increased water usage. While those transmission lines may be essential to increased water usage, they do not ensure that increased amounts of water are actually used. The permit's tiered structure of water allocations must be revised such that retention of a specific allocation for a particular service area is based upon a corresponding increase in water usage in that service area by a specified date. Retention of allocated water should depend upon demonstrated future usage and not on the mere completion of a water transmission line.

4. ***The Trigger Events for Allocations to WVWA Are Particularly Confusing.***

As currently drafted, the allocation of water projected for usage in the Route 220 North Service Area of Franklin County is represented by the difference in water volumes in Tier 2 and Tier 3 in Condition I.D.1. However, it appears that there is no specified allocation of water projected for usage in the Boones Mill Service Area of Franklin County. *See* DEQ Draft Fact Sheet, 5, July 11, 2013.

Although the projected water usage in the Boones Mill Service Area may be small relatively to the other service areas addressed by the draft permit, any allocation of water for Boones Mill should not be automatic. In order to avoid "banking" of water allocations by either the Water Authority or the WVWA, retention of the allocation of water to Boones Mill (as well as the allocations to the other service areas) should be conditioned on demonstrated future usage in that service area consistent with that allocation.

Bedford Weaving echoes its previous comment that the authorized allocations should be structured beginning with the current baseline usage for each service area and then presenting the individual allocations (AADF mgd, mgd max daily, mgd max monthly and mgd max annual) for each service area along with the specific future usage milestone for that area which must be demonstrated in order to retain that area's allocations.

E. Modification of the Existing VWP Permit May Be Inappropriate; A New Application Is Required.

The Water Authority's current VWP Permit No. 96-0707 authorizes the use of an existing water supply intake to withdraw a maximum of up to 2.99 mgd from Smith Mountain Lake. DEQ, VWP Individual Permit No. 96-0707, Nov. 30, 2007. The VWP Permit Program regulations at 9 VAC 25-210-180D provide that a VWP permit may be modified "[w]hen additions or alterations to the affected facility or activity that require the application of VWP permit conditions that differ from those of the existing VWP permit or are absent from it."[6]

The Water Authority's application states that the primary purpose of its proposed activity is to "expand the existing intake permit and structure." JPA at Insert Sheet 8a. Figure 2 of the JPA shows how new intake structures and piping would be added in the same location as the

[6] Bedford Weaving notes that VWP Permit Program regulations state that "VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance." 9 VAC 25-210-180C. Also, "[u]nder no circumstances will the original and extended permit terms together exceed a total of 15 years." 9 VAC 25-210-185B. The Authority's current VWP permit was issued on November 30, 2007. Condition I.B.1 of the draft permit states that "[t]his permit is valid for fifteen (15) years from the date of issuance." Bedford Weaving suggests the date of issuance of the original permit (11/30/07) be included therein in order to eliminate any doubt that the modified permit, if an when issued, does not have a term of 15 years.

existing, permitted intake structure and its associated piping. In its response to DEQ's first request for additional information, the Water Authority stated in 2011 that "[i]t is intended that the [Water Authority] will continue to operate the existing intake structure." Letter from Anderson & Associates, agent for the Water Authority, to Brenda Win, DEQ, of June 24, 2011.

More recently, however, the Water Authority has indicated a preference for keeping its raw water treatment centralized at a single facility. Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant; Bedford County, Virginia (Final Draft)*, 3, Feb. 15, 2013. DEQ has noted that PER recommends decommissioning the High Point WTP and construction of a 6.0 mgd regional WTP with ultimate expansion of capacity to 12 mgd. DEQ, Draft Fact Sheet, July 11, 2013.

If the Water Authority now plans to decommission the High Point WTP, then the Authority must amend its application accordingly to reflect that new plan. However, an application for modification of its current VWP permit will no longer be feasible. Decommissioning the High Point WTP would include discontinuing any withdrawals from the existing, permitted water intake. That is, the Water Authority's proposed project would no longer be adding to or altering a permitted facility or activity. Thus, an application to modify the Water Authority's existing VWP permit would no longer be appropriate.

As explained previously, the proposed activity, i.e., a large new intake structure and associated water withdrawal rate, has no independent utility. The proposed activity would not be built unless several other planned activities were constructed as well. Consequently, the current application is unacceptable because it seeks a VWP permit only for a single activity that is an inter-related part of a much larger project.

Furthermore, the current application is unacceptable because the planned shutdown of the existing, permitted water intake means that modification of the Water Authority's existing VWP, as requested, is inappropriate. Given the significant revisions that are necessary for the Water Authority's existing application, a revised application will need to be prepared after which its submittal must be treated as a new application for purposes of agencies' and the public's reviews. *See* 9 VAC 25-210-80F.[7]

Finally, Bedford Weaving notes that DEQ determined the Water Authority's application for a modified VWP permit to be complete on September 13, 2012. DEQ, Draft Fact Sheet at 2, July 11, 2013. The State Water Control Law states explicitly that "[w]ithin 120 days of receipt

[7] Bedford Weaving notes that DEQ determined the Water Authority's application for a modified VWP permit to be complete on September 13, 2012. DEQ, Draft Fact Sheet at 2, July 11, 2013. The State Water Control Law states explicitly that "[w]ithin 120 days of receipt of a complete application, the Board shall issue the permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or hearing." Va. Code § 62.1-44.14:21E.

of a complete application, the Board shall issue the permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or hearing." Va. Code § 62.1-44.14:21E. That 120-day period passed with no action by the Board and no record of the 120-day period having been tolled. Arguably, therefore, the Water Authority's application has become void as a matter of law, further justifying a new VWP application for the entire planned project.

F. **Water Conservation Requirements Are Deficient.**

Condition I.D.14 in the draft permit requires conservation measures to protect minimum instream flows during drought emergencies. Similarly, Condition I.D.17 requires specific conservation measures to be taken during Trigger 3 drought conditions that affect the operation of APCO's Smith Mountain Project. Those two permit conditions, implemented only during drought emergencies, constitute the full extent of water conservation measures required for the Water Authority. As such, water conservation requirements in the draft permit fall far short of what the VWP Permit Program contemplates and what the Board should mandate.

When an applicant's proposal involves a public surface water supply project or a major surface water withdrawal, the applicant must provide projected demands both without conservation measures and "*with long-term conservation measures.*" 9 VAC 25-210-115B(2). Bedford Weaving is not aware of anything in the Water Authority's application that identifies specific long-term conservation measures and the expected effects of such measures on either the Authority's or WVWA's projected demands.

Water conservation has become an integral component of modern-day water supply planning. Water conservation, of course, extends existing water supplies. Bedford Weaving believes that properly planned and implemented water conservation measures could cause the projected water demands by the Water Authority and the WVWA to be reduced by a significant increment.

When water systems need to build facilities, the benefits of water conservation are greatly enhanced. Those same properly planned and implemented water conservation programs can defer, reduce or eliminate the need not only for water supply facilities but also for wastewater facilities as well. Significant capital cost savings can result, which in turn translates to smaller loan requirements. EPA, *Water Conservation Plan Guidelines, 3*, Aug. 6, 1998; see also *Id.*, Appendix A ("Water Conservation Measures" – Basic, Intermediate and Advanced).

Article XI, Section 1 of the Virginia Constitution proclaims that "[i]t shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources, its public lands and its historic sites and buildings." Similarly, Va. Code § 62.1-44.36 states as follows:

> Being cognizant of the critical importance of the Commonwealth's water resources to the health and welfare of the people of Virginia, and of the need of a water supply to assure further industrial growth and economic prosperity for the Commonwealth, and recognizing the necessity for continuous cooperative planning and effective state-level guidance in the use of water resources, the State Water Control Board is assigned the responsibility for planning the development, conservation and utilization of Virginia's water resources.

As noted above, the Board's regulations seek to plan for the conservation of water resources by, among other actions, requiring an applicant for a public surface water supply project or a major surface water withdrawal to provide projected demands that incorporate *long-term conservation measures.* To that end, Bedford Weaving strongly encourages DEQ to continue to deny a requested VWP permit for the joint project of the Water Authority and the WVWA until both entities commit to the implementation of long-term water conservation measures that are capable of reducing each parties' 30-year projected demand by no less than 15% of that projected demand without conservation measures. When identifying acceptable conservation measures to reach that goal, Bedford Weaving urges DEQ to include (1) water demand management practices for the reduction of system water losses as well as (2) water reuse and reclamation activities.

G. Several Monitoring Requirements Are Unlawful.

1. *Monitoring Plan Must Be Part of Permit*

Condition I.D.13 of the draft permit requires the permittee to submit "a plan for monitoring . . . water withdrawals and transfers to the Central, Forest, and Franklin County service areas. This plan . . . should describe the methodology or methodologies to be used to monitor . . . monthly flows from Smith Mountain Lake to each service area." That requirement for a post-permitting submittal stands in direct conflict with specific VWP Permit Program regulations.

In particular, those regulations mandate that "[m]onitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods *as specified in the VWP permit.*" 9 VAC 25-210-90F(1) (emphasis added). Moreover, those same regulations prescribe that "[m]onitoring requirements *as conditions of VWP permits* may include but are not limited to . . . [r]equirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods . . . when *required as a condition of the VWP permit.*" 9 VAC 25-210-110D(1) (emphases added).

In short, the VWP Permit Program regulations intend not only for the applicant but also for the general public to have the opportunity to review and comment on requirements for

specific monitoring methodologies in the draft permit, including the monitoring for flows of water withdrawals and water transfers. Condition I.D.13, however, extinguishes that public comment opportunity, requiring instead that proposed monitoring methodologies be included in a monitoring plan submitted to the Department after issuance of a VWP permit for the Authority. Condition I.D.13's requirement for a monitoring plan submittal to DEQ after DEQ's issuance of the final VWP permit conflicts with established Virginia regulations and sound public policy. Thus, that requirement must be deleted from the subject permit.

2. *Calculating or Estimating Water Flows Is Not Monitoring*

Conditions I.D.9, I.D.10 and I.D.11 require monthly monitoring[8] of water flows from Smith Mountain Lake to the Central, Forest and Franklin County service areas, respectively. Thereafter, Condition I.D.13 requires the aforementioned monitoring plan to describe the methodology or methodologies to be used to monitor those monthly flowing, including the "[m]ethod(s) to calculate and/or estimate monthly flows sent to each area from Smith Mountain Lake." Likewise, Condition I.D.13 requires the same monitoring plan to include "[m]ethods proposed to calculate and/or estimate monthly flow of water from the City of Lynchburg to each of [the Water Authority's] service areas."

The term "monitoring," at least with respect to volumetric flows, implies some form of direct measurement of that flow. Therefore, the suggestion in Condition I.D.13 that the permittee could "calculate" or even "estimate" the monthly volumes of water transferred from SML to the different service areas is neither appropriate nor necessary.

Bedford Weaving is aware that the Authority opposes the monthly monitoring of flows to the individual service areas, claiming monitoring would necessitate "enormous master meters" and related problems of "cost, reading them, inability to reverse flow, maintenance of the vaults, etc." Electronic mail from Brian Key, Water Authority, to Brian McGurk, DEQ, of June 21, 2013 (1:01 p.m. EDT). Instead, the Water Authority has proposed to provide the summary records of its water sales to its customers, based on every-other-month meter readings, and then divide by 60-62 days to calculate an AADF. *Id.* With respect to the Authority's customers supplied by water from Lynchburg, the Authority has proposed "provid[ing] the monthly reads, which are used by Lynchburg for billing the Authority, and then calculate the AADF by dividing the monthly readings by the number of days in the month." Electronic mail from Brian Key, Water Authority, to Brian McGurk, DEQ, of June 21, 2013 (12:22 p.m. EDT).

[8] These conditions initially require bi-monthly monitoring of flows to each service area. However, once the reported annual flow to a given service area equals or exceeds 50% of that area's projected end-of-permit annual demand, monitoring of flows to that area must be performed on a monthly basis thereafter.

Bedford Weaving respectfully requests the DEQ to examine this matter in more detail before finalizing that monitoring requirement. This monitoring issue appears to have been evaluated by the Water Authority very late in the process leading-up to the draft permit being published for public review and comment. As a consequence of that time limitation on both the Authority and DEQ, the Authority's objection to the installation of monitors or meters is completely characterized only by several conclusory statements. No technical or cost details were provided by the Authority in support of its statements, so neither DEQ nor the public has any means to independently evaluate the basis for the Authority's assertions. Moreover, it is not clear to the Company why metering of withdrawals from Smith Mountain Lake using flow totalizer technology apparently poses no overwhelming technical or economic obstacles, *see* Draft Permit, Condition I.D.8, but that metering smaller volumetric flows to the individual service areas is, according to the Authority, fraught with problems.

The Company can appreciate the Authority's overall concerns about the costs and other possible challenges posed by actually monitoring the flows in question. By the same token, the subject of this monitoring issue is a project which will likely withdraw and transfer in excess of 2 billion gallons of water per year for many years. Given the Board's statutory mandate to manage the development, use and conservation of the water resources of the Commonwealth, Bedford Weaving believes that the investment required for measuring the substantial, long-term water usage by the Authority and the WVWA and the commensurate utility/benefit of those measurements would be justified. At a minimum, this issue needs more of a "hard look" by the Department before finalizing the preferred method for quantifying the subject volumetric flows.

3. *Lynchburg Water for Use within the Water Authority's Service Areas*

Bedford Weaving was absolutely perplexed by the requirement in Condition I.D.12 of the draft permit to "monitor the monthly flow of water purchased from the City of Lynchburg for use . . . within the Bedford City service area." Condition I.D.13 of the draft permit is equally confusing because it requires a monitoring plan to include "[m]ethods proposed to calculate and/or estimate monthly flow of water from the City of Lynchburg to each of [the Water Authority's] service areas."

DEQ has correctly noted that the "purchase of water from City of Lynchburg and deliver along Rte 460" was one of the Water Authority's alternatives for providing future water to Bedford City. DEQ, Draft Fact Sheet at 8. However, as DEQ has also noted, that particular alternative was ultimately not selected to be implemented by the Authority. *Id.*; *see also* Anderson & Associates, *Preliminary Engineering Report; Lakes-Bedford-Forest Water Supply Evaluation; Bedford County, Virginia,* v, Aug. 15, 2010 (rev. June 10, 2011). Similarly, the option for providing water from Lynchburg to any of the Water Authority's service areas was not selected for implementation by the Authority.

Based upon the application submittals by the applicant and based upon DEQ's summary of the Water Authority's plans for delivering water to the Bedford and Forest service areas, any requirement related to water from Lynchburg being delivered to those service areas is not applicable. Consequently, Bedford Weaving believes that any such requirement is not applicable to the project planned by the Water Authority and WVWA and, therefore, any such requirement should be deleted.

This particular draft requirement (as well as those requirements in Conditions I.D.9, I.D.10 and I.D.11) once again illustrates the futility, and indeed the unlawfulness, of attempting to issue a VWP permit for a proposed activity (1) when that activity is actually a component of a much larger project, and (2) when a VWP permit application for that full project consisting of numerous interdependent activities has not been submitted. A permit requirement related to Lynchburg water being provided in the future to the Water Authority's service areas is but one of many within the draft permit that inappropriately links a regulatory requirement to a future, specific facility or activity that not only does not or will not exist but also has actually not even been proposed as a facility or activity to be permitted. These types of open-ended permit conditions confirm the inappropriateness of DEQ's current attempt to permit a single facility or activity that has no independent utility.

4. *Specification of Monitoring Accuracy*

To be sure, DEQ's requirements for measurements of water flows must include a specification that establishes the upper limit on acceptable uncertainty in those measurements. Condition I.D.8 of the draft permit, therefore, prescribes that "[s]uch meters shall produce volume determinations within plus or minus 10% of actual flows." Bedford Weaving suggests different language for that requirement in order to implement the Department's intent.

The Company suggests that the condition should require that "the accuracy of any meter used to measure water flow rates or total volumetric flows must be demonstrated to be ± 10% over the range of flow conditions experienced by that meter." Initially, prior to meter installation, the vendor of the particular meter would be expected to document the meter's accuracy over the appropriate range of flows. A quality assurance plan for such meters should require such re-testing on a periodic basis.

H. Bedford Regional Water Authority Is Not a "Legal Entity".

For the reasons explained below, Bedford Weaving believes that the Voluntary Settlement between the City of Bedford and the County of Bedford was likely void *ab initio*, i.e., it was invalid from the time of its execution. Accordingly, and notwithstanding a special court's validation of that Voluntary Settlement, any actions taken thereafter under legal authority

ostensibly created by that Voluntary Settlement would also be invalid and have no force of law. This means, among other things, that the Bedford Regional Water Authority is likely not a legal entity which can be issued a VWP permit and therefore the recent consolidation of the City's and County's respective water systems would be unlawful.

1. *Voluntary Settlement Statute and Constitutional Limit on County Debt*

A Virginia statute, Va. Code § 15.2-3400, authorizes two or more localities in the Commonwealth to enter into an agreement to settle certain matters. The statute gives localities virtually unlimited authority regarding the types of provisions the localities may include in such a settlement, subject to any constitutional limitations, and subject to the court's determination that the agreement is in the best interests of the parties.

Perhaps, the most troublesome hurdle to arrangements established pursuant to the voluntary settlement statute involves the constitutional debt limitations imposed on counties. Article VII, Section 10(b) of the Virginia Constitution provides in relevant part as follows:

> No debt shall be contracted by or on behalf of any county . . . except by authority conferred by the General Assembly by general law. . . . , unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county . . . for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

In other words, if a county is considering an agreement that requires the county to contract long-term debt, then that the planned contracting of that debt must first be approved by a majority of the county's voters in a special referendum election before the county enters into that agreement.

2. *The Nature of Bedford County's Debt*

Article IV, Section 4.1 of the Voluntary Settlement requires the County to pay the Town an annual amount of $500,000 to $750,000. A portion of that annual payment consists of the Town's share of the Virginia General Assembly's financial incentives for the consolidation of localities. However, another portion of that annual payment from the County to the Town is for the City's transfer of its property interests in the Bedford Library, Bedford Elementary School and Bedford Welcome Center to the County. *See* Article IV, Section 4.1 and Article III, Sections 3.2, 3.3 and 3.4. In short, the County of Bedford contracted for long-term debt as part of the Settlement Agreement with the City of Bedford.

Despite the Settlement Agreement providing for Bedford County to contract long-term debt, the voters of Bedford County were not provided an opportunity to approve that debt prior

to the City and County's execution of the Settlement Agreement. Bedford County's contracting for debt, therefore, conflicts with the plain language of Article VII, Section 10(b) of the Virginia Constitution. On that basis, the Voluntary Settlement was void *ab initio*.

3. *Related Legal Considerations*

To be sure, supporters of the Voluntary Settlement will dispute this assessment of the Settlement's legal status for a variety of reasons. For example, the Settlement's "payment plan" for purchasing real estate from the City is commonly referred to as "subject-to-appropriations financing." According to that financing theory, because those payments are subject to appropriations by the County's Board of Supervisors on an annual basis, the County has no legal obligation for any debt beyond one year, i.e., "long-term" debt. Indeed, supporters of the Settlement Agreement will cite the Supreme Court of Virginia's decision in *Dykes v. Northern Virginia Transportation District Commission,* 242 Va. 370 (1991), where the Court found the particular subject-to-appropriations financing scheme of Fairfax County did not create constitutionally cognizable debt.

One must quickly realize, however, that the Court's particular opinion in *Dykes* was a 4 to 3 majority decision upon rehearing which overturned the Court's initial decision that the County's particular subject-to-appropriations financing scheme did create long-term debt for the County that was subject to pre-approval by the County's voters in accordance with Article VII, Section 10(b) of the constitution of Virginia. *Dykes v. Northern Virginia Transportation District Commission,* 242 Va. 357 (1991). In other words, the constitutional status of "subject-to-appropriations financing" is anything but well-settled in the Commonwealth of Virginia.

No two subject-to-appropriations financing schemes have the same sets of facts and circumstances, so the legitimacy of different subject-to-appropriations schemes should be evaluated on a case-by-case basis. Many observers still regard this financing mechanism to be little more than a legal fiction. In that financing scheme a county makes a transaction requiring it to pay a substantial amount of money, but also includes explicit provisions in the contract that the county is not legally obligated to pay that full amount of money; or that the county has not made a binding commitment that is enforceable; or that the county has not pledged its full faith and credit. Those types of contractual provisions that so one-sidedly favor the county are clearly not characteristic of an arms-length transaction. How many entities are willing to execute a contract that essentially tells them the other party to the agreement does not have to pay the full amount of the transaction? Subject-to-appropriations financing schemes appear to be little more than "sweetheart deals" for the county involved, where the other party to the contract is willing to accept abnormal amounts of risk with the unwritten assurance that the apparent risk is not real.

The fact that a special court has affirmed and validated the Voluntary Settlement between Bedford City and Bedford County does not necessarily make that Settlement immune from legal

challenge. A statutory provision at Va. Code § 15.2-3400 requires the court to affirm such an agreement "unless the court finds either that the agreement is contrary to the best interests of the Commonwealth or that it is not in the best interests of each of the parties thereto." Importantly, nowhere does the statute require the court to find that the Settlement is in full accord with the Constitution of Virginia.

Nevertheless, in affirming a previous Voluntary Settlement between the City and County in 1998, the special court for that proceeding explicitly found that "[t]he provisions of the agreement do not conflict with the constitution of Virginia."[9] Interestingly, however, in the special court's affirmation of the recent Voluntary Settlement between the City and County, that court found only that "[t]he provisions of the Agreement waiving certain statutory rights of the City and its successor, the Town of Bedford, do not conflict with the Constitution of Virginia."[10] In other words, unlike the 1998 special court, the court affirming the recent Voluntary Settlement between the City and County made no finding regarding whether all provisions of that agreement complied with the constitution of Virginia.

In short, the special court which affirmed the recent Voluntary Settlement was not required by statute to find that the provisions of that agreement do not conflict with the Constitution of Virginia, and, accordingly, that court made no such finding. Consequently, the fact that Bedford Weaving would now assert that the Voluntary Settlement may be constitutionally infirm does not implicate the principle of collateral estoppel because that issue was never litigated in the judicial proceeding to affirm that agreement. Similarly, the principle of res judicata is not implicated in instance because, among other things, the issue of the agreement's constitutionality was not at issue in the court's prior proceeding. Moreover, citizens of the County had no right to participate in the special court's proceeding under Va. Code § 15.2-3400, and the County could hardly be seen as acting on behalf of its citizens when it deliberately denied those citizens the constitutional right to authorize or deny the County's actions.

In sum, Bedford Weaving believes the Voluntary Settlement between the City and the County is invalid because the debt incurred by the County to pay for the City's transfer of its property should have been approved by the County's voters before the County executed that agreement. Consequently, any subsequent actions that were authorized by that Settlement would be invalid as well. That is, the legal basis for existence of the Bedford Regional Water Authority would not exist, the Authority would not be a legal entity, and therefore, in accordance with 9 VAC 25-210-10, the Authority could not be a "person" that could apply for a VWP permit. Similarly, the consolidation of the City's and County's water systems, authorized by the Voluntary Settlement, would have no force of law, meaning the Town of Bedford's water system

[9] Cite
[10] Cite

could not be a component of the public water supply project currently before the Department seeking water from Smith Mountain Lake.

III. CONCLUSION

State Water Control Law requires the Board to issue a Virginia Water Protection Permit "if it has determined that the proposed activity is consistent with provisions of the Clean Water Act and the State Water Control Law . . . [.]" Va. Code § 62.1-44.15:20B. As explained herein, there is a multitude of reasons why the proposed activity in this instance does not satisfy that threshold for issuance of a VWP permit.

Examination of the legal instrument that gave rise to the new Bedford Regional Water Authority and its mandate to merge the City's and County's water systems indicates the long-term contracted by the County should have been pre-approved by the County's voters. Because no such voter approval was obtained, the Voluntary Settlement and subsequent actions based on that agreement's authorization would be invalid as a matter of law. Because this constitutional infirmity could not be readily cured by the applicant, the application would be rendered invalid, thereby terminating any further DEQ consideration of a VWP permit at this time.

Aside from the basic issue of whether the Water Authority and its merged water system is lawful, the Authority's application and the DEQ's puzzling draft permit contain numerous other legal impediments that prevent issuance of a VWP permit for the proposed activity at this time. Looking first at the limited scope of the proposed activity and then looking at the plans for the numerous other activities directly related to the proposal begs the obvious question: What is wrong with this picture?

A fundamental concept of both the VWP Permit Program and the Corps of Engineers' Section 404 Permit Program is that the application (and subsequent permit) must address a single and complete project. The facts of this particular case plainly demonstrate that Bedford Regional Water Authority and Western Virginia Water Authority have jointly planned a public surface water supply project where (1) a new water intake will be constructed in Smith Mountain Lake, (2) a new water treatment plant will be constructed, (3) new major water transmission lines will be built from the new treatment plant to the County's Bedford and Forest service areas and to service areas in Franklin County. New water distribution lines will need to be installed to allow the numerous new service connections contemplated by those localities. The WVWA even envisions construction of several water pipelines across the Lake. Those inter-related activities involve, at a minimum, a surface water withdrawal and impacts to both surface water, wetlands and streams.

And yet, the BRWA is the sole applicant for a VWP permit for the new water intake and associated raw water withdrawal from the Lake. Adding insult to injury, the Department has

proposed to issue a VWP permit for that single activity, knowing fully well that limited activity is directly related to numerous other planned construction and operation activities having impacts that require a VWP permit. It has to be obvious that the proposed activity is not "consistent with provisions of the Clean Water Act and the State Water Control Law." For that reason alone, DEQ must deny the requested permit in this proceeding.

Even if the subject application were for a single and complete project as required by law, that application and the resultant draft VWP permit proposed by DEQ have several other fatal flaws. For example, the applicant's water supply planning in support of the application is plainly deficient because it fails to describe how the water sources of the former City of Bedford will be conjunctively managed with the massive new water system planned by the applicant. In addition, Bedford Regional Water Authority cannot lawfully be the permittee for activities of the overall project that will be the legal responsibility of either WVWA and/or Franklin County.

Furthermore, the tiered allocation of water withdrawals in the draft permit has numerous legal flaws. The basic structure of the allocations is inappropriate and confusing. Completion of a water transmission line without more is wholly inappropriate, for triggering retention of a water allocation. Allocations should be retained on the basis of timely increases in water usage that confirms delivery of the allocated water to the public.

Because the final design of even the proposed activity is uncertain, a modification of the existing VWP permit may be unlawful. If use of the Authority's existing water intake will be discontinued, nothing would remain to be "modified." Instead, an application for a new permit for a new water intake (and all of its interconnected planned activities) may be necessary.

In these times, the absence of any requirements for long-term water conservation measures in a permit for a public water supply project of the magnitude planned by the Authority and the WVWA is simply inconceivable. The Authority has paid lip-service to that fundamental water supply component by committing to implement measures only during periods of designated drought. Finally, several of the water-monitoring requirements in the draft permit are too vague or outside the bounds of acceptable monitoring and permitting requirements. The overall planned project is a major public water supply project that will operate for decades. Appropriate monitoring of water withdrawals and water transfers to different service areas is a "must" for such projects.

In conclusion, the Water Authority's application for a VWP permit is legally infirm in many respects. Unless and until those deficiencies are cured, the State Water Control Board cannot lawfully issue a VWP permit for the planned activities.

Tab F. Delegate Lacy Putney correspondence (2 letters)

FILE COPY

COMMONWEALTH OF VIRGINIA

HOUSE OF DELEGATES

RICHMOND

LACEY E. PUTNEY
POST OFFICE BOX 127
BEDFORD, VIRGINIA 24523

NINETEENTH DISTRICT

September 30, 2013

COMMITTEE ASSIGNMENTS:
APPROPRIATIONS (CHAIRMAN)
PRIVILEGES AND ELECTIONS
RULES

The Honorable Ken Cuccinelli
Attorney General, Commonwealth of Virginia
900 East Main Street - Sixth Floor
Richmond, VA 23219

Dear Attorney General Cuccinelli:

I am writing this letter for an official Advisory Opinion on an issue of great importance for a friend and constituent, Mr. P. J. Garbarini, owner of Bedford Weaving Mills, Inc. here in the Town of Bedford.

Following a telephone call from Mr. Garbarini, I received a letter dated September 25, 2013, from his Richmond Attorney, Mr. John R. Cline, a copy of which is enclosed. Also enclosed is a copy of a "Memorandum of Law explaining how Bedford County has impermissibly created debt contrary to the Virginia Constitution," which Mr. Cline included as a part of his letter, and I am hoping that the information set forth in the Memorandum will be of some assistance to your office.

Based on the information contained in his Memorandum, I am respectfully requesting an official Advisory Opinion on the following question: "Has Bedford County impermissibly created debt contrary to limitations of the Virginia Constitution?"

If any additional information is needed in order for you to render the opinion requested in this letter, please let me know. I am aware of the demands on your time currently; however, I would greatly appreciate the Advisory Opinion as soon as it is convenient for you to do so.

Thanking you for your assistance in this matter and with kind regards, I am

Yours very truly,

Lacey E. Putney

LACEY E. PUTNEY

LEP:bll
CC: John R. Cline, Esquire
Mr. P. J. Garbarini

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

LACEY E. PUTNEY
POST OFFICE BOX 127
BEDFORD, VIRGINIA 24523

NINETEENTH DISTRICT

October 22, 2013

COMMITTEE ASSIGNMENTS:
APPROPRIATIONS (CHAIRMAN)
PRIVILEGES AND ELECTIONS
RULES

Harwell M. Darby, Jr., Esquire
37 Campbell Avenue, S. W.
P. O. Box 2887
Roanoke, VA 24001

Dear Mr. Darby:

I wish to acknowledge receipt of your email dated October 22, 2013, requesting "... a copy of your recent request to the Attorney General for an opinion on or related to the Reversion of the City of Bedford to Town Status and the formation of the Bedford Regional Water Authority."

I should point out that my connection with this matter is limited solely to the request of Mr. P. J. Garbarini, owner of Bedford Weaving Mills, Inc., for me to obtain an official Advisory Opinion from the Attorney General on the following question: "Has Bedford County impermissibly created debt contrary to limitations of the Virginia Constitution. In his request, there was nothing mentioned about the Bedford Regional Water Authority.

Since I have no further interest in this other than the advisory opinion, I would suggest that all future correspondence related to this matter be addressed to the attorneys representing the parties in interest in this matter.

I have not enclosed a copy of Mr. Cline's "Memorandum of Law explaining how Bedford County has impermissibly created debt contrary to the Virginia Constitution" referred to in my letter of request to the Attorney General.

Yours very truly,

LACEY E. PUTNEY

LEP:bll

CC: John R. Cline, Esquire
P. J. Garbarini

Tab G. Petition for Formal Hearing

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

8261 Ellerson Green Close
Mechanicsville, Virginia 23116

John R. Cline
Virginia Bar #41346

john@johnclinelaw.com

Office and Fax: 804-746-4501
Cell: 804-347-4017

October 18, 2013

Via Hand-Delivery

David K. Paylor, Director
Virginia Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23218

Re: Major Modification No. 1 to VWP Individual Permit No. 96-0707;
Bedford Regional Water Authority

Dear Director Paylor:

Today I have hand-delivered the enclosed Petition for Formal Hearing with respect to the above-referenced permit modification issued by the State Water Control Board. Please acknowledge timely receipt of the subject Petition by date-stamping the duplicate copy of this letter and then mailing that letter to me in the enclosed envelope.

Should you or your staff have any questions regarding the contents of this Petition, please contact me at your convenience. Thank you.

Sincerely,

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

Enclosure

BEFORE THE STATE WATER CONTROL BOARD
COMMONWEALTH OF VIRGINIA

In the Matter of:	)
Major Modification No. 1 to VWP Individual Permit No. 96-0707; Bedford Regional Water Authority	)

PETITION FOR FORMAL HEARING

Pursuant to Va. Code § 2.2-4020 and 9 VAC § 25-230-130, Bedford Weaving, Inc. petitions the Executive Secretary of the State Water Control Board ("Board") for the convening of a formal hearing as described in 9 VAC §§ 25-230-100 *et seq*. In support of this Petition, Bedford Weaving provides the following information in keeping with 9 VAC § 25-230-130(B):

1. The name and address of the Petitioner are Bedford Weaving, Inc.; 1211 Monroe Street; P. O. Box 449; Bedford, Virginia 24523.

2. Petitioner is acting as a representative for Mr. Philip J. Garbarini, President of Bedford Weaving.

3. The name and address of Petitioner's counsel are John R. Cline; 8261 Ellerson Green Close; Mechanicsville, Virginia 23116.

4. The action appealed from by this Petition is the Board's issuance of Major Modification No. 1 to VWP Individual Permit No. 96-0707, dated September 19, 2013 but not signed until September 20, 2013, to the Bedford Regional Water Authority ("BRWA").

5. Petitioner is a privately held company with both its headquarters and principal place of business located in Bedford, Virginia. Petitioner has operated at that location for more than thirty years and employs a skilled labor force of over 115 people that reside in Bedford and surrounding areas. Petitioner manufactures high-quality, broad loom fabrics that are used in a variety of industrial, commercial, and aerospace applications as well as in the apparel industry. Some of the Petitioner's woven fabrics also have applications in the surgical/medical field where not only the tolerances for physical properties of the fabrics are narrow but also the presence of contaminants in the fabrics is unacceptable. For that reason, one of Petitioner's major contracts for production of a specialty fabric prohibits Bedford Weaving from changing any raw materials in the manufacturing operation (including process water) without the prior consent of the customer.

Petitioner's production process depends upon the use of high-quality water in several stages of the process. To date, the high-quality, "soft" water provided by the former City of Bedford's reservoir and water treatment plant has allowed successful production of a range of different fabrics, including certain specialty fabrics that cannot tolerate contaminants.

The former City of Bedford and Bedford County entered into a Voluntary Settlement of Transition to Town Status and Other Related Issues Between the City of Bedford and the County of Bedford dated August 2012 (the "Reversion Agreement") in which they agreed, among other things, to merge the existing water systems of the two localities. (Exhibit A). The Bedford Regional Water Authority was created to effect that merger and thereafter to manage the consolidated water system. *Id.*

The BRWA plans to construct and operate a major public surface water supply withdrawal project consisting of, among other new activities, an expanded raw water withdrawal

intake at Smith Mountain Lake ("SML"), a new major raw water treatment plant near the Lake, and a water transmission pipeline to transport treated water from that new plant to the portion of the City-County consolidated water system serving customers of the former City of Bedford's water system, including Bedford Weaving. *See* Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant, Bedford County, Virginia* (Feb. 15, 2013) (contained within the administrative record for the challenged permit modification); *see also* Anderson & Associates, *Preliminary Engineering Report: Lakes-Bedford-Forest Water Supply Evaluation; Bedford County, Virginia* (rev. June 10, 2011) (contained within the administrative record for the challenged permit modification).

An engineering consultant was engaged by the BRWA to examine whether differences between the quality of finished water from the BRWA's new public water supply project and the quality of treated water from the former City's water system could have an adverse impact on some of the former City's commercial and industrial customers, including Bedford Weaving. Wiley & Wilson, *Bedford Utilities Consolidation Report,* Ch. 4 – "Water Characteristics" (Sept. 27, 2012) (Exhibit B). That consultant concluded that under certain conditions the BRWA's new public water supply project "will produce water with significantly greater hardness than currently produced by the [former City's water system]." *Id.* at 4-12. That consultant's report also addressed how increased hardness in water could lead to (1) deposits of minerals that cause fabric deterioration and discoloration, (2) elevated levels of dissolved solids and (3) increased fouling of atomizing spray nozzles - - results that almost certainly would directly affect Bedford Weaving's water-dependent manufacturing operations in highly adverse ways. *Id.* at 4-4.

One of the most important features of that consultant's report is what it did not contain. The consultant explained that the scope of its evaluation was limited solely to water-quality data that were readily available. That is, the consultant's evaluation did not examine the full range of

expected differences between the quality of water from the BRWA's new public water supply project and the quality of water from the former City's water system. Consequently, the consultant identified a number of "additional water parameters that could be sampled in the future to provide more in-depth analysis." *Id.* at 4-3.

Most importantly, based on its evaluation, that consultant recommended that the BRWA

> conduct a more in-depth study to assess the specific effects of blending the City of Bedford WTP's soft finished water with a backup source [planned new plant treating raw water from SML] providing moderately hard finished water. It is recommended that the study (1) identify potential blending scenarios, (2) coordinate with industrial customers to determine concentration thresholds at which increased hardness/TDS will affect their processes, and (3) evaluate different treatment techniques which may be required to reduce hardness. This may include point-of-use techniques to meet specific industrial customer requirements.

Id. at 4-12.

In other words, that consultant's analysis put both the BRWA and industrial customers of the BRWA, including Bedford Weaving, on notice that lower-quality finished water from the planned new treatment plant at SML (supplied by the raw water intake authorized by the Board's permit modification in question) could adversely affect those industries' processes. Moreover, that consultant advised the BRWA to evaluate and appropriately address those industry-specific process problems that could occur as a result of those industries being supplied with lower-quality water originating from the water intake authorized by the Board's challenged permit modification. Nevertheless, the BRWA to date has failed to evaluate and appropriately address industry-specific problems that are likely occur in the absence of proactive measures by the BRWA.

Given the consultant's assessment that significant processing problems could occur at those industries, including Bedford Weaving, if they receive finished water from the BRWA's

planned public surface water supply withdrawal project, and given the BRWA's failure to address the potential scope and effects of those processing problems, Bedford Weaving seeks to prevent its manufacturing operations from being supplied with water from the BRWA's new project. However, because the Board has not reviewed and approved any portion of the BRWA's planned project other than its raw water intake with increased withdrawal, Bedford Weaving's effort to protect its manufacturing operations is limited at this time solely to a challenge of the Board's authorization of that single piece of the multiple, inter-related activities planned by the BRWA.

6. The Board has modified a VWP individual permit held by the Bedford Regional Water Authority, thereby authorizing the BRWA to expand an existing water intake structure to withdraw up to 12 mgd of surface water from Smith Mountain Lake. In doing so, the Board has committed the following errors:

(a) The permit was not issued to a legal entity.

A person who holds a VWP individual permit must be a legal entity. 9 VAC § 25-210-10 (definitions of "permittee" and "person"). In commenting on the Board's proposed issuance of the subject modified permit, Bedford Weaving explained how the City-County Reversion Agreement was void *ab initio* because the County had contracted for debt as part of that Agreement without first receiving voter approval as required by the Constitution of Virginia. "Comments of Bedford Weaving, Inc." at 25-28 (contained within the administrative record for the challenged permit modification). Consequently, any action authorized or taken in accordance with that invalid Agreement, such as authorization and creation of the BRWA, must also be invalid as a matter of law.

On behalf of the Board, the Virginia Department of Environmental Quality ("DEQ") responded to Bedford Weaving's comment by recognizing (1) that a Special Court had validated the Reversion Agreement and (2) that the State Corporation Commission ("SCC") had issued a certificate of organization to the BRWA, authorizing the BRWA to transact its business subject to all applicable Virginia laws. DEQ, "Summary of Public Comments and Staff Responses," Proposed Modification of Virginia Water Protection Individual Permit No. 96-0707 (undated) (hereinafter "Response to Comments" or "RTC"). However, in taking such actions, neither the Special Court nor the SCC was charged with any legal responsibility to confirm that Bedford County's financing scheme, provided for in the Reversion Agreement, did not conflict with the Virginia Constitution's limitations on debt contracted by a county. Consequently, the Board's reliances on those Special Court and SCC actions as proof that the BRWA was a legal entity were erroneous as a matter of law.

(b) The scope of the permit is unlawful.

As indicated above, the BRWA is planning the construction and operation of a major public surface water supply withdrawal project.[1] Nevertheless, the BRWA only applied for, and the Board only issued, a permit modification for a single activity within that overall project. In commenting on the scope of that Board-issued permit, Bedford Weaving explained why a VWP permit for only a single activity that belongs to a project consisting of multiple, inter-related activities was inconsistent with the federal Clean Water Act, State Water Control Law, and regulations and guidance of the VWP Permit Program. Comments of Bedford Weaving, Inc. at

[1] *See, e.g.,* Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant, Bedford County, Virginia* (Feb. 15, 2013); Anderson & Associates, *Preliminary Engineering Report: Lakes-Bedford-Forest Water Supply Evaluation; Bedford County, Virginia* (rev. June 10, 2011); Joint Permit Application of the BRWA's predecessor and responses to DEQ's requests for additional information; and memorandum from Brian McGurk, DEQ, to Jeffery Steers, DEQ, of Sept. 19, 2013, containing Fact Sheet for Modification of Virginia Water Protection Individual Permit Number 96-0707 (all contained within the administrative record for the challenged permit modification).

4-12 (contained within the administrative record for the challenged permit modification). Bedford Weaving also explained why such a permitting approach, i.e., permitting a single activity that is part of a group of inter-related activities, is generally inappropriate from a public policy perspective. *Id.*

In response to the Company's comments, DEQ, on behalf of the Board, explained first that Bedford Weaving's reliance on the term "independent utility," as contained in the VWP Permit Program regulations, was misplaced because that specific term appeared only within the Board's regulations for VWP General Permits for certain activities – activities that do not include surface water withdrawal activities. RTC at 3. DEQ's understanding of the reach of the Board's concept of "independent utility" is incorrect in this instance.

DEQ correctly acknowledged that the regulation governing issuance of VWP Individual Permits, 9 VAC § 25-210 *et seq.*, did not contain an express definition for the term "independent utility." *Id.* DEQ, however, has overlooked the fact that an existing provision within that specific regulation negates any need for the explicit definition of "independent utility" to be contained in that regulation. In particular, 9 VAC § 25-210-60(B) expressly provides that *"[a]ctivities, other than the surface water withdrawal*, which are contained in 9 VAC 25-210-50 and *are associated with the construction and operation of the surface water withdrawal* are subject to VWP requirements unless excluded by subsection A if this section." (Emphasis added). In other words, the plain language of 9 VAC § 25-210-60(B) adopts the same concept as the "independent utility" test that is actually codified in regulations for VWP General Permits, i.e., that construction and operation of planned activities that are associated with the construction and operation of another planned activity are collectively subject to VWP requirements.

The obvious implication of 9 VAC § 25-210-60(B) is that VWP requirements for those "activities other than surface water withdrawal" must be addressed during a VWP-permitting process that also addresses the surface water withdrawal activity. Indeed, Bedford Weaving strongly believes that the purpose of 9 VAC § 25-210-60(B) is to prevent the Board from unwittingly doing what it has actually done in this instance, i.e., to issue a VWP permit for a single activity that belongs to a group of associated, or inter-related, activities. Any alternative interpretation of 9 VAC § 25-210-60(B) would not be reasonable.

In sum, Bedford Weaving has never asserted, as DEQ has suggested, that the regulations for issuing VWP Individual Permits must contain an express statement that the "independent utility" test applies. The plain language of 9 VAC § 25-210-60(B) confirms that particular test applies in the context of VWP-permitting for a surface water withdrawal without the need for that regulation's explicit use of that term.

Moreover, DEQ's Response to Comments failed to address Bedford Weaving's demonstration that the scope of the Board-issued permit conflicts with the Clean Water Act ("CWA"). Comments of Bedford Weaving, Inc. at 9-10. A Board-issued VWP permit constitutes the State's "Section 401 Certification," required by CWA § 401 when the U. S. Army Corps of Engineers issues a permit under CWA § 404. Va. Code § 62.1-44.15-20(D). The Corps' regulations for processing such a Department of the Army ("DA") permit prescribe that "[a]ll activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same application." 33 C.F.R. § 325.1(d)(2). Clearly, the language of that Corps requirement under the CWA is nothing more than a generic restatement of that same requirement under 9 VAC § 25-210-60(B) as applied to surface water withdrawals.

In short, implementation of the Board-permitted rates of BRWA's water withdrawal directly depends on the construction and operation not only of a new water treatment plant but also the construction and operation of water transmission pipelines from that treatment plant to Bedford, to Forest and to Franklin County. Yet, DEQ has failed to explain how its Board-issued permit for a raw water intake and increased water withdrawal is consistent with a CWA-permitting regulation and the VWP Individual Permit regulation which require the Board to review and, as appropriate, approve with a single VWP permit all planned activities associated with a planned surface water withdrawal.

One needs only to examine the "triggers" for increased water withdrawals in the Board-issued permit to gain a sense that something is amiss with that permit. Those triggers are based upon completing installation of specific water transmission pipelines – non-existent facilities whose surface water impacts have yet to be reviewed and authorized by the Board. Those triggers are also implicitly based upon completing construction of a new water treatment plant – more non-existent facilities whose surface water impacts have yet to be reviewed and authorized by the Board. Nevertheless, those "other activities," although outside the written scope of the Board-issued permit, are constructively and effectively already approved by the Board due to that permit's reliance on their existence.

The quality of water ultimately to be supplied to Bedford Weaving is heavily dependent upon the design and operation of BRWA's new water treatment plant and BRWA's new water transmission pipeline to Bedford. And yet those planned facilities of substantial importance to Bedford Weaving and other customers of the BRWA are, according to DEQ, beyond the Board's and the public's review at this time because they are not part of the Board's permitting process. That result simply defies common sense.

In essence, the BRWA has effectively gamed the VWP-permitting system by inappropriately applying for a permit only for its planned water intake modification and increased water withdrawals. Disturbingly, DEQ, on behalf of the Board, has been complicit in that circumvention of federal and State law as well as Virginia regulations which prescribe the requisite scope for the Board-issued VWP Individual Permit.

7. Through its counsel, Petitioner confirms that, should this Petition be granted and a hearing held pursuant thereto, Petitioner and all persons represented by Petitioner in connection with the appeal will be available, without cost to any other party, to appear at such hearing.

8. Petitioner requests the Board to grant the following relief:

To reverse the Board's original permit decision, i.e., to deny the VWP permit modification requested by the BRWA, unless and until the following conditions are satisfied:

(a) The constitutional conflicts which currently prevent the BRWA from being a legal entity are appropriately resolved, and the BRWA thereafter demonstrates that it constitutes a legal entity which can hold a VWP permit;

(b) The BRWA files with the Board a single application under the VWP Permit Program requesting authorization to construct and operate the entire public surface water supply withdrawal project planned by the BRWA, i.e., not only the water intake structure with increased surface water withdrawals but also all other downstream activities that would only be constructed in the event the new water intake is constructed and its raw water withdrawal rate is increased; and

(c) The BRWA files a single application, as specified in (b) above, that also includes the results of the in-depth study previously recommended by its consultant, as discussed in

paragraph 5 above, that identifies actions required of the BRWA to address peculiar water-quality needs of certain industrial and commercial water users now in the Town of Bedford.

This Petition raises genuine and substantial issues of law and fact which, if resolved adversely to Petitioner, will almost certainly result in damage to the Petitioner's longstanding process for manufacturing a variety of woven fabrics, thereby causing economic loss to Petitioner.

Respectfully submitted,

/s/ John R. Cline
John R. Cline
John R. Cline, PLLC
8261 Ellerson Green Close
Mechanicsville, Virginia 23116
(804) 746-4501
john@johnclinelaw.com
Counsel for Bedford Weaving, Inc.

Date: 10/18/2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Formal Hearing was hand-delivered on this 18th day of October, 2013, to David K. Paylor, Director, at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23218.

I further certify that a copy of this Petition for Formal Hearing, without Exhibits, was mailed via U.S. mail, first class and postage prepaid, on this 18th day of October, 2013, to the following:

Elmer C. Hodge, Chairman
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, Virginia 24523

Brian M. Key, Executive Director
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, Virginia 24523

Harwell M. Darby, Jr.
Counsel for Bedford Regional Water Authority
P. O. Box 2887
Roanoke, Virginia 24001

Mark K. Reeter
County Administrator
Bedford County
122 East Main Street, Suite 202
Bedford, Virginia 24523

G. Carl Boggess
County Attorney
Bedford County
122 East Main Street, Suite 201
Bedford, Virginia 24523

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

Date: 10/18/2013

Tab H. Notice of Appeal under Administrative Process Act

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

8261 Ellerson Green Close
Mechanicsville, Virginia 23116

John R. Cline
Virginia Bar #41346

john@johnclinelaw.com

Office and Fax: 804-746-4501
Cell: 804-347-4017

October 18, 2013

Via Hand-Delivery

David K. Paylor, Director
Virginia Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23218

Re: Major Modification No. 1 to VWP Individual Permit No. 96-0707;
Bedford Regional Water Authority

Dear Director Paylor:

Today I have hand-delivered the enclosed Notice of Appeal with respect to the above-referenced permit modification issued by the State Water Control Board. Please acknowledge timely receipt of the subject Notice by date-stamping the duplicate copy of this letter and then mailing that letter to me in the enclosed envelope. Thank you.

Sincerely,

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

Enclosure

BEFORE THE STATE WATER CONTROL BOARD
COMMONWEALTH OF VIRGINIA

In the Matter of:	)
Major Modification No. 1 to VWP Individual Permit No. 96-0707; Bedford Regional Water Authority	)

NOTICE OF APPEAL

Pursuant to Rule 2A:2 of the Rules of Supreme Court of Virginia, Bedford Weaving, Inc., as Appellant, hereby files this Notice of Appeal with the Director, Virginia Department of Environmental Quality, to advise the State Water Control Board ("Board") of Appellant's pending submittal of a Petition for Appeal to the Clerk of the Circuit Court of Bedford County. In support of this Notice of Appeal, Appellant, by counsel, states the following:

1. The name and address of the Appellant are Bedford Weaving, Inc.; 1211 Monroe Street; P. O. Box 449; Bedford, Virginia 24523.

2. The name and address of Appellant's counsel are John R. Cline; 8261 Ellerson Green Close; Mechanicsville, Virginia 23116.

3. The case decision appealed from is the Board's issuance of Major Modification No. 1 to VWP Individual Permit No. 96-0707, dated September 19, 2013 but not signed until September 20, 2013, to the Bedford Regional Water Authority ("BRWA"). Appellant asserts that the subject case decision is unlawful.

4. Appellant participated in the public comment process related to the subject case decision by submitting written comments on the Board's tentative decision to issue the referenced permit modification.

5. In accordance with Rule 2A:1(c) of the Rules of Supreme Court of Virginia, the BRWA is a necessary party to the pending judicial proceeding.

6. The name and address of the BRWA's counsel are Harwell M. Darby, Jr.; P. O. Box 2887; Roanoke, Virginia 24001.

7. The basis for one of Appellant's claims will be that Bedford County ("County") has impermissibly contracted debt contrary to the Constitution of Virginia. Appellant expects that the County will seek to become a party to the pending judicial proceeding.

8. The name and address of the County's counsel are G. Carl Boggess; 122 East Main Street, Suite 201; Bedford, Virginia 24523.

Respectfully submitted,

/s/ John R. Cline
John R. Cline
John R. Cline, PLLC
8261 Ellerson Green Close
Mechanicsville, Virginia 23116
(804) 746-4501
john@johnclinelaw.com
Counsel for Bedford Weaving, Inc.

Date: 10/18/2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was hand-delivered on this 18th day of October, 2013, to David K. Paylor, Director, at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23218.

I further certify that a copy of this Notice of Appeal was mailed via U.S. mail, first class and postage prepaid, on this 18th day of October, 2013, to the following:

Elmer C. Hodge, Chairman
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, Virginia 24523

Brian M. Key, Executive Director
Bedford Regional Water Authority
1723 Falling Creek Road
Bedford, Virginia 24523

Harwell M. Darby, Jr.
Counsel for Bedford Regional Water Authority
P. O. Box 2887
Roanoke, Virginia 24001

Mark K. Reeter
County Administrator
Bedford County
122 East Main Street, Suite 202
Bedford, Virginia 24523

G. Carl Boggess
County Attorney
Bedford County
122 East Main Street, Suite 201
Bedford, Virginia 24523

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

Date: 10/18/2013

Tab I. Letter withdrawing Petition for Formal Hearing

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

8261 Ellerson Green Close
Mechanicsville, Virginia 23116

John R. Cline
Virginia Bar #41346

john@johnclinelaw.com

Office and Fax: 804-746-4501
Cell: 804-347-4017

November 8, 2013

Via U. S. Mail

David K. Paylor, Director
Virginia Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23218

Re: Major Modification No. 1 to VWP Individual Permit No. 96-0707;
Bedford Regional Water Authority

Dear Director Paylor:

By letter dated October 18, 2013, I provided you with Bedford Weaving's Petition for Formal Hearing with respect to the above-referenced permit modification issued by the State Water Control Board. However, I write today respectfully on behalf of Bedford Weaving to withdraw that Petition.

Should you or your staff have any questions, please contact me at your convenience.

Sincerely,

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

cc: P. J. Garbarini – Bedford Weaving
Harwell M. Darby, Jr. – Counsel for Bedford Regional Water Authority

Tab. J. Comments filed with Federal Energy Regulatory Commission

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

P. O. Box 15476
Richmond, Virginia 23227

John R. Cline
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December 16, 2013

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: Project No. 2210-238
Appalachian Power Company
COMMENTS on Environmental Assessment

Dear Ms. Bose:

Appalachian Power Company (Appalachian) has filed an Application for Amendment of Order Approving Non-Project Use of Project Lands and Waters. The subject Order was issued by the Commission on October 10, 2008. 125 FERC ¶ 62,047 (2008). Appalachian's Application includes an Applicant-prepared Environmental Assessment (EA).

On behalf of Bedford Weaving, Inc. (Company) of Bedford, Virginia, I am enclosing comments on that EA. The Commission must understand that the overall scope of construction and operation directly related to the non-project use addressed by Appalachian's current Application is far more extensive than the limited activities authorized by the Commission's 2008 Order. As explained in the Company's enclosed comments, the non-project use addressed by Appalachian's current Application is only one of several, interdependent "connected actions" for construction and operation of a new major public water supply project. Consequently, the EA submitted with Appalachian's current Application is wholly unacceptable because it fails to address all of those "connected actions" in a single environmental analysis as required by law.

Therefore, Bedford Weaving respectfully requests the Commission to reject the Applicant-prepared EA originally submitted by Appalachian and to ORDER the preparation and submittal of a single EA which examines the full scope of environmental impacts expected to result from all of the planned public-water-supply actions directly related to the limited action addressed by Appalachian's current Application.

Sincerely,

/s/ John R. Cline
John R. Cline
Counsel for Bedford Weaving, Inc.

Document Content(s)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Appalachian Power Company	)	**Project No. 2210-238**

COMMENTS OF BEDFORD WEAVING
ON THE APPLICATION FOR NON-PROJECT USE OF PROJECT LANDS AND WATERS TO INCREASE WATER WITHDRAWAL AND CONSTRUCT FACILITIES

Pursuant to FERC's notice, issued November 20, 2013, of its acceptance for filing of an application by the Smith Mountain Pumped Storage Project, FERC Project No. 2210, for non-project use of project lands and waters to increase water withdrawal and construct facilities, Bedford Weaving, Inc. hereby submits its comments on the subject application. Consistent with regulations which implement the National Environmental Policy Act (NEPA), that application includes an Applicant-prepared environmental assessment (EA). Bedford Weaving's comments herein address a major shortcoming of that EA.

The proposed action addressed by the subject EA consists of the Bedford Regional Water Authority's (BRWA's) installation of a new water intake structure and an increase in water withdrawals from Smith Mountain Lake. However, the BRWA also has plans for the contemporaneous construction of a new water treatment plant and the installation of several new water transmission lines, one of which will connect to the existing distribution system serving Bedford Weaving. In other words, the BRWA has plans to construct a number of "connected actions," as that term is defined by applicable NEPA regulations.[1]

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[1] 40 C.F.R. § 1508.25(a)(1).

Those regulations require that "connected actions" be addressed in a single environmental analysis.[2] Because the Applicant-prepared EA in this proceeding fails to satisfy that fundamental requirement, Bedford Weaving respectfully requests the Commission to defer any further action on the proposed non-project use until a thorough EA has been prepared that addresses the relevant impacts of all of the BRWA's planned construction activities.

I. Background

Bedford Weaving (the Company) is a privately held company with both its headquarters and principal place of business located in Bedford, Virginia. Bedford Weaving has operated at that location for more than thirty years and employs a skilled labor force of over 115 people that reside in Bedford and surrounding areas. The Company manufactures high-quality, broad loom fabrics that are used in a variety of industrial, commercial, and aerospace applications as well as in the apparel industry. Some of the Petitioner's woven fabrics also have applications in the surgical/medical field where not only the tolerances for physical properties of the fabrics are narrow but also the presence of contaminants in the fabrics is unacceptable.

Bedford Weaving's production process depends upon the use of high-quality water in several stages of the process. The high-quality, "soft" water historically provided to the Company has allowed it to manufacture a wide range of woven fabrics without repeated equipment malfunctions or damaged fabrics that could otherwise occur when using lower-quality process water.

As part of the City of Bedford's reversion to town status in 2013, the City and Bedford County agreed not only to merge their respective existing water systems but also to form a joint authority to own and operate that consolidated water system, i.e., the Bedford Regional Water

[2] *Id. See, e.g., Dominion Transmission, Inc.*, 141 FERC¶ 61, 240 at P 80 (2012).

Authority.[3] In addition to operating the resultant merger of those two existing water systems, the BRWA now plans to construct and operate a new major public water supply project. That new public water supply project will include not only the proposed raw water intake at Smith Mountain Lake (SML), but also a large new raw water treatment plant near SML,[4] and several new 24" water transmission pipelines, one of which will transport treated water to an interconnection with the existing water system formerly operated by the City of Bedford.[5]

The BRWA's engineering consultant has concluded that under certain conditions the BRWA's new public water supply project "will produce water with significantly greater hardness than currently produced by the [former City's water system]."[6] That consultant's report explained how increased hardness in water could lead to (1) deposits of minerals that cause fabric deterioration and discoloration, (2) elevated levels of dissolved solids and (3) increased fouling of atomizing spray nozzles - - results that almost certainly would directly affect Bedford Weaving's water-dependent manufacturing operation in highly adverse ways.[7]

Significantly, that consultant's evaluation did not even examine the full range of expected differences between the quality of water from the BRWA's new public water supply project and the quality of water from the former City's water system. Consequently, the consultant

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[3] *Voluntary Settlement of Transition to Town Status and Other Related Issues Between the City of Bedford and the County of Bedford*, § 6.2 (Aug. 2012) (the "Reversion Agreement").

[4] Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant, Bedford County, Virginia* (Feb. 15, 2013).

[5] Anderson & Associates, *Preliminary Engineering Report: Lakes-Bedford-Forest Water Supply Evaluation; Bedford County, Virginia* (rev. June 10, 2011).

[6] Wiley & Wilson, *Bedford Utilities Consolidation Report,* 4-12 (Sept. 27, 2012).

[7] *Id.* at 4-3.

identified a number of "additional water parameters that could be sampled in the future to provide more in-depth analysis."[8]

Importantly, that consultant also recommended that the BRWA

> conduct a more in-depth study to assess the specific effects of blending the City of Bedford WTP's soft finished water with a backup source [planned new plant treating raw water from SML] providing moderately hard finished water. It is recommended that the study (1) identify potential blending scenarios, (2) coordinate with industrial customers to determine concentration thresholds at which increased hardness/TDS will affect their processes, and (3) evaluate different treatment techniques which may be required to reduce hardness. This may include point-of-use techniques to meet specific industrial customer requirements.[9]

The BRWA, as well as Bedford Weaving and other industrial and commercial customers historically served by the former City's existing water system, have now been put on notice that lower-quality finished water from BRWA's planned new treatment plant will likely cause adverse effects to those industries' operations. Nevertheless, the potentially substantive environmental and socioeconomic impacts associated with the BRWA's planned public water supply project are not addressed by the subject EA due to the impermissible manner in which only a single segment of the BRWA's extensive construction plans has been presented to the Commission.

II. Segmentation

CEQ regulations prescribe that actions are "connected," thus requiring consideration in the same environmental analysis, if they . . . are interdependent parts of a larger action and

[8] *Id.*

[9] *Id.* at 4-12.

depend on the larger action for their justification.[10] Those CEQ regulations are binding on federal administrative agencies.[11]

The requirement to consider "connected actions" in the same environmental analysis "is intended to prevent agencies from engaging in segmentation, which involves 'an attempt to circumvent [the] NEPA by breaking up one project into smaller projects and not studying the overall project.'"[12] In determining whether actions are connected so as to require consideration in the same environmental analysis under NEPA, courts generally employ an "independent utility" test, which asks whether each project would have taken place in the other's absence."[13]

For example, the Forest Service was required to consider in a single NEPA review process the environmental impacts of (1) building a road in a forest to facilitate logging and (2) the timber sales that would result from that logging. The court found that the road construction and contemplated timber sales were "connected actions" because "the timber sales [could not] proceed without the road, and the road would not be built but for the contemplated timber sales."[14]

Similarly, in the instant proceeding, the planned water treatment plant could not proceed without the planned raw water intake with its increased withdrawals, and that raw water intake would not be built but for the planned water treatment plant. Moreover, the planned water transmission line to Bedford could not proceed without the planned water treatment plant, and that water treatment plant would not be built but for the planned water transmission line.

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[10] *Dominion Transmission, Inc.*, 141 FERC ¶ 61, 240 at P 80 (2012) (citing 40 C.F.R. § 1508.25(a)(1)(iii)).

[11] *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir., 1985) (citing Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 25, 1977)).

[12] *Webster v. U.S. Dep't of Agriculture*, 685 F.3d 411, 426 (4th Cir., 2012) (internal citations omitted).

[13] *Id.* (internal citations omitted).

[14] 753 F.2d at 759.

In short, the BRWA's plans for a new public water supply project include construction of (1) a new raw water intake, (2) a new water treatment plant and (3) a new water transmission line from the new plant to Bedford. Those three planned actions are "interdependent parts of a larger action [public water supply project] and depend on the larger action for their justification." None of those three planned actions has independent utility, i.e., there is no need or use for just one of those actions without the existence of the other two.

A. The BRWA's Multiple Actions Are Planned, Not Speculative.

In *Webster*, the appellants asserted that planned construction of a new water supply source, i.e., a dam, would necessarily require construction of a new water treatment facility and a new water distribution system to service the new water supply source. Therefore, appellants argued that the environmental assessment for the planned dam should also include evaluation of possible environmental impacts from a treatment facility and distribution system that might also be built.[15]

The court, however, recognized that appellants had failed to demonstrate that a water treatment facility and a water distribution system had been planned in connection with construction plans for the proposed dam. The court concluded that "[i]n the absence of any impending plans to construct such a [water distribution] system or [water treatment] facility, segmentation is not a concern."[16] Courts generally do not require agencies' NEPA analyses to consider speculative actions or their speculative impacts.[17]

Unlike the situation in *Webster*, plans for construction of a new raw water intake at the existing Smith Mountain Lake in this proceeding are directly related to impending plans for

[15] *Webster*, 685 F.3d at 425.

[16] *Id.* at 427 (internal citation omitted).

[17] *Id.* (internal citation omitted).

construction of a new water treatment plant and a new water transmission line. The BRWA's construction of its public water supply project, i.e., new raw water intake, new water treatment plant and new water transmission lines, is scheduled for completion in 2016.[18] To that end, the BRWA has recently determined to authorize the issuance of a revenue bond in the aggregate, principal amount of up to $34 million to finance the design, installation and construction of all of those interdependent components of a new public water supply.[19]

The Commission has also stated that "[u]nlawful segmentation occurs in the context of contemporaneously proposed projects."[20] As evidenced by the state of the BRWA's planning to date, the several new facilities planned by the BRWA constitute contemporaneously proposed projects. There can be little doubt that the BRWA intends to begin construction of each of those new facilities, even though the Applicant-prepared EA in this proceeding only addresses construction of the new raw water intake with the associated increase in water withdrawals.

In sum, the BRWA's planned construction of a new raw water intake, just like its planned construction of a water treatment plant and a water transmission line to Bedford, are not speculative actions. All of the BRWA's contemporaneously proposed projects must be considered within the same NEPA analysis. The current Applicant-prepared environmental assessment of only the proposed raw water intake construction is deficient.

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[18] Bedford Regional Water Authority, *Request for Proposals: Smith Mountain Lake Water Treatment Plant and Lake to Forest Waterline Extension Project,* 4, Nov. 4, 2013; *see also* http://www.brwa.com/developmentandcapitalprojects/SitePages/Smith%20Mtn%20Lake%20Water%20Treatment%20Plant.aspx, last visited Dec. 6, 2013.

[19] Bedford Regional Water Authority, *Bond Resolution Providing for the Issuance, Sale and Award of a Water and Sewer System Revenue Bond (Smith Mountain Lake Project), Series 2014, of the Bedford Regional Water Authority, in the Principal Amount of up to $34,000,000 and Providing for the Form, Details and Payment Thereof,* Nov. 19, 2013.

[20] *Sabine Pass Liquefaction, LLC, and Sabine Pass LNG, L.P.,* 144 FERC ¶ 61,099, at P 33 (2013).

B. The BRWA's Proposed Intake Construction Is Pretext for a Much Larger Project.

In March 2011, the BRWA submitted its Joint Permit Application (JPA) to construct a new water intake to the Virginia Department of Environmental Quality (DEQ) and to the U.S. Army Corps of Engineers (COE). After reviewing the JPA which included plans for construction of new waterline corridors in both Bedford and Franklin Counties, the COE requested the BRWA to provide a USGS topographic map with the entire waterline corridor clearly identified. The COE also noted that, depending upon the type of construction used to install those waterlines and upon the extent of waterways, wetlands and streams that may be impacted, the BRWA might also need to provide "a delineation of all wetlands and streams within the corridor, an alternatives analysis that takes into consideration alignment selection, avoidance and minimization of impacts to wetlands and streams, directional drilling as an alternative construction practice, etc."[21] In December 2012, more than one-and-a-half years after the COE's request, the BRWA responded that "[t]he intent of this JPA is for the water intake only. Any potential environmental impacts resulting from the waterline extensions, <u>if and when they happen</u>, will be permitted separately from the water intake once final alignments are determined."[22]

The BRWA's response misrepresented the broad scope of its actual construction plans. At the time of its response to the COE, the BRWA's construction plans for a public water supply project were much more advanced than what that response suggested. For example, as early as May 2012, the BRWA provided information to the Virginia DEQ indicating that the BRWA

[21] Electronic mail from Jeanne Richardson, COE, to Paula Moore, Anderson & Associates (BCPSA's engineering contractor), of Mar. 31, 2011.

[22] Letter from David Inman, Anderson & Associates, to Jeanne Richardson, COE, of Dec. 31, 2012 (emphasis added).

planned to complete construction of a new water treatment plant and a new water transmission line from that plant to Bedford by 2016.[23] Moreover, two weeks after that BRWA's response to the COE, DEQ provided the BRWA with a draft permit for construction of the proposed raw water intake, authorizing future raw water withdrawals that were predicated on completing construction of BRWA's new water treatment plant, its new water transmission line from that plant to Bedford, and its new water transmission line from Bedford to the Forest area. [24]

The Commission has explained that impermissible segmentation under the CEQ regulations occurs when an applicant or an agency attempts "to pretextually circumvent NEPA to avoid studying in the same environmental document the connected impacts of a single overall project."[25] The record of DEQ's permitting process clearly shows that the BRWA's characterization of its planned construction of new water transmission lines as "if and when they happen" was little more than pretext. The BRWA's proposal to construct only a raw water intake was intended to cloak the actual state of its construction plans for a new water treatment plant and new water transmission line to Bedford. In that manner, the BRWA sought to prevent the COE from studying the connected impacts of the BRWA's overall construction plans in the same NEPA analysis.

In sum, the BRWA's pretextual characterization of its overall construction plans constitutes impermissible segmentation under the CEQ regulations. Those regulations require an environmental assessment of all of the "connected actions" planned by the BRWA.

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[23] Letter from David Inman, Anderson & Associates, to Scott Kudlas, Virginia DEQ, of May 24, 2012.

[24] Virginia DEQ, VWP Individual Permit No. 96-0707 (Draft), 16-17, Jan. 16, 2013.

[25] *Sabine Pass Liquefaction, LLC, and Sabine Pass LNG, L.P.*, 144 FERC ¶ 61,099, at P 30 (2013).

C. FERC Has Not Only the Authority But Also the Obligation to Ensure That Environmental Impacts of the BRWA's Entire Project Are Examined.

The extent of FERC's environmental assessment under NEPA is not limited solely to the portion of an overall project under its direct jurisdiction. As FERC has explained,

> When [FERC] considers the environmental impact of a project subject to its jurisdiction, it also considers the environmental impact of nonjurisdictional facilities which are to be constructed with, or are an integral part of, the project involving jurisdictional facilities. [FERC] does this because [FERC] precedent, case law, and the CEQ regulations require [FERC] to consider the environmental impact of an entire project when considering whether to approve the portion of the project under the jurisdiction of [FERC]. . . . [FERC] does not intend to exercise jurisdiction over nonjurisdictional facilities and is not using this process to exercise such jurisdiction. However, to ignore the environmental impact of these facilities when they are an integral part of an entire project that includes jurisdictional facilities would be to take too narrow a view of [FERC's] NEPA responsibilities.[26]

While the majority of the BRWA's planned public water supply project would be outside the area in which FERC exercises jurisdiction (the FERC project area), clearly that larger portion of the BRWA's overall project is "to be constructed with" or is "an integral part of" the project over which FERC would exercise jurisdiction, i.e., the intake facility at Smith Mountain Lake. Therefore, review of the entire public water supply project planned by the BRWA should be part of FERC's responsibility under NEPA.

Inasmuch as environmental impacts from the BRWA's entire water supply project almost certainly include effects upon wetlands and waterways caused by construction of nonjurisdictional facilities over a large area, the COE arguably should be responsible for assessment of environmental impacts outside of FERC's jurisdiction. However, the COE did not evaluate environmental impacts outside of the FERC project's area, presumably as a result of the BRWA's pretextual statement that its planned construction consisted only of a raw water intake.

[26] 52 Fed. Reg. 47897, 47904 (Dec. 17, 1987).

At this stage of the instant proceeding, therefore, FERC has the *de facto* federal responsibility for performing an assessment of environmental impacts resulting from the BRWA's entire public water supply project. Alternatively, FERC could suspend further action on the Application in this proceeding until the COE performs an environmental assessment of the impacts from all of the planned facilities not under FERC's direct jurisdiction.

In either case, however, FERC should be mindful that environmental impacts other than those to wetlands and waterways are likely at issue. For example, pumping stations are often powered by multiple reciprocating internal combustion engines whose emissions of criteria and hazardous air pollutants can adversely affect air quality in the area; infiltration basins are likely to be used to dispose of filter backwashes; the use of chlorine for disinfection would require large amounts of liquid chlorine to be transported to and stored at the treatment plant; and construction activities for the treatment plant and water transmission lines will be accompanied by significant emissions of fugitive particulate matter as well as emissions from numerous nonroad engines.

D. The Scope of an EA for a Prior, Similar Action Is Not Precedent.

In 2008, FERC approved Appalachian Power Company's application under FERC Project No. 2210 to allow the Bedford County Public Service Authority (BCPSA) to install a water intake facility and to increase its permitted water withdrawal rate from Smith Mountain Lake.[27] The scope of the 2008 environmental assessment for the BCPSA's planned water intake parallels the scope of the Applicant-prepared environmental assessment in this instant proceeding. That is, the 2008 environmental assessment only examined relatively minimal environmental impacts associated with the planned installation of a new water intake facility with an increase in maximum allowable water withdrawals.

[27] *Appalachian Power Company*, 125 FERC ¶ 62,047 (2008).

However, unlike the instant proceeding, in 2008 the BCPSA planned no other construction. Although a new water intake facility would be installed, the BCPSA's existing water treatment facility and its existing water transmission line would suffice to handle the BCPSA's planned increase in water withdrawal. Therefore, the scope of that earlier environmental assessment for BCPSA's planned new water intake and increased withdrawals cannot establish any precedent for the scope of the environmental assessment in this proceeding due to the substantial, additional construction (new water treatment plant, new water transmission lines) that is also now planned by the BRWA.

III. Conclusion

The Applicant in this proceeding has prepared an environmental assessment which examines the environmental impact of only one of several planned "connected actions." As such, the Applicant's environmental assessment conflicts with the plain language of CEQ's regulations that require "connected actions" to be considered in the same environmental analysis. For that reason, Bedford Weaving respectfully requests the Commission (1) to find the subject Applicant-prepared environmental assessment to be deficient and (2) to defer a decision on the subject Application until an environmental assessment of all of the BRWA's planned, interdependent actions has been prepared and reviewed.

Respectfully submitted.

/s/ John R. Cline
John R. Cline
John R. Cline, PLLC
P. O. Box 15476
Richmond, Virginia 23227
(804) 746-4501
john@johnclinelaw.com
Counsel for Bedford Weaving, Inc.

Tab K. Draft Demurrer

Draft 1/21/14
MEF

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

BEDFORD WEAVING, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL14000008-00
	)	
BEDFORD REGIONAL WATER AUTHORITY,	)	
	)	
	)	
Defendant.	)	

DEMURRER

COMES NOW Defendant Bedford Regional Water Authority ("Authority"), by counsel, and respectfully demurs to the Complaint as it fails to state facts upon which the relief demanded in either Count I or Count II can be granted against the Authority. As grounds for this Demurrer, the Authority states as follows:

1. The Complaint fails to state a claim that the Authority's participation in the Smith Mountain Lake Project was not properly authorized in accordance with the Virginia Water and Waste Authorities Act, Va. Code §§ 15.2-5100, et seq. (the "Act") and is ultra vires and unlawful. The initial paragraph of Article IV of the Authority's Articles of Incorporation ("Article IV") states its purpose in the broadest terms and expressly grants the Authority all rights, powers and duties of an authority under the Act. The second and third paragraphs Plaintiff cites merely encourage or direct the Authority to prioritize actions in

accordance with the Principles adopted by the City of Bedford and County of Bedford which created the Authority and which are referenced in their Reversion Agreement dated August 14, 2012, and a Consolidation Agreement dated October 31, 2012. Those two paragraphs do not employ either of the words "specified" or "project" so as to constitute a "specified project or projects" within the meaning of Va. Code § 15.2-5111 or limit the purposes of the Authority to any particular project or projects. This is clear from the localities express statement in the final paragraph of Article IV that "it is not practicable to set forth herein information regarding . . . proposals for specific projects to be undertaken . . . ." The construction of Article IV urged by Plaintiff renders the initial and final paragraphs meaningless. When properly construed in its entirety, and giving effect to each provision of Article IV, the Articles have not specified any project so as to limit the projects to be undertaken by the Authority. Rather, they give the Authority all of the powers granted to an authority under the Act to undertake any and all projects allowed under the Act.

2. The Complaint fails to allege facts showing that Plaintiff will suffer irreparable harm or lacks an adequate remedy at law due to any alleged future increase in rates charged by the Authority. The Complaint fails to allege, and Plaintiff is wholly unable to allege, that any rates, fees or charges that the Authority may adopt in the future are not "just and equitable" or adopted after notice and public hearing as required by the Act, Va. Code § 15.2-5136. The Complaint also fails to allege, and Plaintiff is wholly unable to allege, that the Authority has increased or is presently proposing to increase any rates.

3. The Complaint fails to allege facts showing that Plaintiff will suffer irreparable harm or lacks an adequate remedy at law due to any alleged increase in hardness of the water the Authority furnishes following completion of the Project. The Complaint fails to allege, and Plaintiff is wholly unable to allege, that any increase in the hardness of the water would violate any regulations or standards which govern the quality of water the Authority furnishes to Plaintiff or others. The Complaint fails to allege that water quality standards govern hardness or facts showing that Plaintiff has any legal right to any particular quality of water other than as required by the relevant standards. Finally, the Complaint fails to allege facts showing that any alleged "operational and product problems" that may result from increased hardness of the water could not be adequately remedied by monetary damages.

4. The Complaint fails to allege facts to establish that the injunction Plaintiff requested is in the public interest.

WHEREFORE, Bedford Regional Water Authority respectfully prays that the Court enter an order sustaining its Demurrer, dismissing the Complaint filed against it in its entirety, and award it costs and such other relief as the Court may deem just and proper.

Draft 1/21/14
MEF

BEDFORD REGIONAL WATER AUTHORITY

By:_____
Of Counsel

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Counsel for Bedford Regional Water Authority

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer was mailed, by first class mail, postage prepaid, to Kevin W. Mottley, Esq., the Mottley Law Firm PLC, 1700 Bayberry Court, Suite 203, Richmond, Virginia 23226; and to John R. Cline, Esq., John R. Cline, PLLC, 8261 Ellerson Green Close, Mechanicsville, Virginia 23116, counsel for Bedford Weaving, Inc., on this the ____ day of January, 2014.

_____
Mark E. Feldmann

Tab L. Draft Memorandum of Law in Support of Demurrer

DRAFT

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

BEDFORD WEAVING, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL14000008-00
	)	
BEDFORD REGIONAL WATER AUTHORITY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEMURRER

Defendant Bedford Regional Water Authority ("Authority"), by counsel, respectfully submits this Memorandum in Support of its Demurrer to the Complaint. For the reasons stated below, the Complaint fails to state facts upon which relief can be granted against the Authority.

STATEMENT OF FACTS

I. Background

Plaintiff, Bedford Weaving, Inc. has brought suit against the Authority seeking an injunction to prevent the Authority from undertaking a public water supply project referred to as the Smith Mountain Lake Project (hereafter sometimes the "Project"). Plaintiff alleges that the Authority lacks the power to undertake the Project under the Virginia Water and Waste Authorities Act, Va. Code §§ 15.2-5100 *et seq.* (the "Act"). Compl. ¶¶ 1-2. Plaintiff seeks an injunction alleging that the Project may result in an increase in rates for Plaintiff and other

customers, Compl. ¶ 32, and that the Project may result in greater water hardness under certain conditions, Compl. ¶ 24.

II. The Authority's Articles of Incorporation

The Authority is governed by Articles of Incorporation, which Plaintiff attached as Exhibit A to the Complaint. Article IV grants the Authority broad powers. It states:

> The purposes for which the Authority is being organized are to exercise all the powers granted to the Authority to acquire, finance, construct, operate, manage and maintain water, waste water, sewage disposal and other facilities pursuant to the Virginia Water and Waste Authorities Act, Chapter 51, Title 15.2 of the 1950 Code of Virginia, as amended ("Act"). The Authority shall have all of the rights, powers, and duties of an authority under the Act.

See Ex. A to Compl. at 2-3.

After establishing that the Authority has broad powers under the Act, the Articles state:

> On or before December 31, 2016 the Authority shall make every reasonable effort to construct a water line of sufficient size to connect the existing City of Bedford and the Bedford County Public Service Authority water systems in accordance with the terms of Principles Governing the Creation of the Bedford Regional Utilities Authority attached as Exhibit 7 to that Voluntary Settlement of Transition to Town Status and Other Related Issues Between the City of Bedford and the County of Bedford, dated August 2012.

See Ex. A to Compl. at 3. Nowhere is this goal of connecting the water systems referred to as a specific project. The Articles do not require that the Authority complete this task; rather, it must make reasonable efforts to do so before December 31, 2016.

The following paragraph of the Articles describes another goal for the Authority, stating:

> The Authority will substantially equalize rates and establish volume rates for large customers in accordance with that Consolidation Agreement dated as of October 31, 2012 (the

> "Consolidation Agreement") by and among the City of Bedford, Virginia, Bedford County, Virginia and the Bedford County Public Service Authority.

See Ex. A to Compl. at 3. This paragraph also does not specify a project that the Authority must undertake to the exclusion of all other projects; rather, like the previous paragraph, it merely encourages or directs the Authority to prioritize certain actions in accordance with a prior agreement.

In fact, the Articles make clear that they do **not** specify projects that the Authority must undertake. The last paragraph of Article IV states, "It is not practicable to set forth herein information regarding preliminary estimates of capital costs, **proposals for specific projects to be undertaken** or initial rates for the proposed projects." *See* Ex. A to Compl. at 3 (emphasis added). Thus, the Articles state that it is not practicable to list specific projects to be undertaken, and therefore the preceding paragraphs cannot be logically interpreted as listing specific projects to be undertaken to the exclusion of any other project.

STANDARD

"[T]he contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer." Va. Code Ann. § 8.01-273. A demurrer "tests the legal sufficiency of a pleading and can be sustained if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action." *Kitchen v. City of Newport News*, 275 Va. 378, 385 (2008) (citation omitted). To survive a demurrer, a pleading must allege "sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." *Id.*

To be entitled to an injunction, Plaintiff must show "irreparable harm and lack of an adequate remedy at law." *Hotjobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 39 (2000) (citing *Wright v. Castles*, 232 Va. 218 (1986)). "A complaint for an injunction must distinctly allege the two noted elements of injunctive relief – irreparable injury and inadequacy of legal remedies." *Root v. County of Fairfax*, 81 Va. Cir. 407, 410 (2010). "Unquestionably, 'an injunction is an extraordinary remedy.'" *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 341 (2005) (citing *Unit Owners Ass'n of BuildAmerica v. Gillman*, 223 Va. 752, 770 (1982)). "The granting or refusing of an injunction is a matter which rests in the sound discretion of [the court]." *Akers v. Mathieson Alkali Works*, 151 Va. 1, 8 (1928).

ARGUMENT

I. The Articles of Incorporation Grant the Authority Broad Powers and do not Specify Projects the Authority must undertake

The Complaint alleges that the Authority's participation in the Smith Mountain Lake Project was not properly authorized in accordance with the Act. Compl. ¶ 2. In particular, Plaintiff points to Virginia Code § 15.2-5111, which provides that if an authority's articles of incorporation have "specified" a "project" to be undertaken by the authority, "[n]o other projects shall be undertaken by the authority than those so specified." Compl. ¶ 29. The Complaint alleges that the Authority's Articles of Incorporation specified projects to be undertaken by the Authority, Compl. ¶ 25, and that as a result the Authority cannot undertake any other projects, including the Smith Mountain Lake Project, Compl. ¶ 28. Plaintiff is mistaken.

The plain language of the Articles does not support Plaintiff's argument. When interpreting a contract, courts "must give effect to all of the language of a contract if its parts can

be read together without conflict." *Berry v. Klinger*, 225 Va. 201, 208 (Va. 1983).[1] "Where possible, meaning must be given to every clause." *Id.* The meaning of the contract "is to be gathered from all its associated parts assembled as the unitary expression of the agreement of the parties." *Id.* Plaintiff's interpretation of the Articles improperly ignores two paragraphs of the document. First, Plaintiff's interpretation disregards the opening paragraph of Article IV, which grants the Authority "all of the rights, powers, and duties of an authority under the Act." And second, Plaintiff ignores the last paragraph of Article IV, which states that "[i]t is not practicable to set forth herein . . . proposals for specific projects to be undertaken . . . ." Because Plaintiff's interpretation of the Articles violates well-established rules of contract construction, it must be rejected.

But even if Plaintiff is correct that the Articles list two projects, the Authority is not prohibited from exercising the broad powers it was granted. The Virginia Attorney General interpreted a water authority's articles of incorporation in a similar case and found that the authority had broad powers to undertake projects beyond those specified in the articles. There, the authority adopted articles of incorporation that provided as follows: "The purposes for which the Authority is to be created are to carry out such projects . . . as authorized by said [Virginia Water and Sewer Authorities] Act, but in addition thereto the original principal purpose is [two projects, not relevant here, specified]." 1986 Va. AG LEXIS 148, at *2 (all modifications in original). The Attorney General found that the "above-quoted language clearly does not restrict

[1] The Articles of Incorporation are a corporate charter, and "a corporate charter is a contract between the state on the one hand and the organizers of the corporation on the other." *St. John's Protestant Episcopal Church Endowment Fund, Inc. v. Vestry of St. John's Protestant Episcopal Church*, 237 Va. 236, 240 (1989).

the Authority to the two projects originally specified in the articles of incorporation." *Id.* Similarly, here, the Articles grant the Authority broad powers under the Act. Even if the two paragraphs Plaintiffs reference were to specify projects, the Articles do not limit the Authority's powers to those two tasks.

II. Plaintiff is not entitled to an Injunction because Plaintiff has not Alleged Irreparable Harm

The Complaint alleges that Plaintiff will suffer irreparable harm from 1) projected increases in the Authority's rates to cover the cost of the Project, ¶ 33, and 2) potentially increased water hardness, ¶ 35. Neither of these facts demonstrates irreparable harm for at least three reasons.

First, Plaintiff's allegations of irreparable harm are based on hypotheticals and projections that, even if true, cannot show that Plaintiff will suffer irreparable harm. The Complaint alleges that the Project will result in increased rates for Plaintiff and others that "would likely have a substantial, adverse, harmful and irreparable impact on Bedford Weaving and on other similarly situated rate-paying customers of the BRWA." Compl. ¶¶ 32-33. The Authority has not changed the rates and Plaintiff does not allege that any new rates have even been proposed. Thus, Plaintiff's complaint is premature. But even if the Authority wishes to change the rates in the future, it is bound by statute to select rates that are "just and equitable" and it is required to provide notice and the opportunity for public hearing before changing the rates. Va. Code § 15.2-5136. Plaintiff cannot contend that future hypothetical rate increases that would be subject to public hearing and approval currently cause Plaintiff irreparable harm.

Similarly, Plaintiff's allegation that "under certain conditions" water treated from Smith Mountain Lake will have greater hardness than current water produced by the Authority does not show that Plaintiff will suffer irreparable harm. Plaintiff does not articulate what conditions would have to occur to produce harder water and does not even state whether those conditions are likely. But even if Plaintiff had established that the water will become harder, Plaintiff fails to allege and cannot allege that harder water constitutes irreparable injury. Plaintiff points to no regulation, and the Authority is aware of no regulation, state or federal, requiring that water have a particular level of hardness or softness. In the only relevant case the Authority could locate, *Mahoning Valley Sanitary Dist. v. David*, No. 78 CA 38, 1979 WL 207475, at *11 (Ohio Ct. App. Oct. 15, 1979), in which the plaintiff alleged that hard water constituted a nuisance or pollutant, the court noted that soft water is a "convenience" and a matter of "personal preference," and stated that the Plaintiff's own witness was not aware of any federal clean water standards relating to water hardness. Thus, Plaintiff has not shown that potential future water hardness, even if it occurs, will cause irreparable injury.

Second, both allegations of irreparable harm fail because Plaintiff does not show that its alleged injuries could not be compensated by damages. "When the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable." *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994). Plaintiff alleges that it may face increased rates as a result of the Project and that it might suffer damages to its operations from increased water hardness. Plaintiff does not explain why these injuries, if proven, could not be compensated with money damages.

Third, even if Plaintiff had shown an irreparable injury, it has not shown that it will suffer a particular injury different from any injury to the general public. "A private person who wishes to restrain an official must allege and prove damage to himself different in character from that sustained by the public generally." *Riverton Inv. Corp. v. Economic Dev. Auth.*, 50 Va. Cir. 404, 411-12 (1999). In other words, "[s]ome prospect of damage different from that of the public at large must be present in order to have standing to maintain a suit for injunction against public officials." *Id.*; *see also Danville Historic Neighborhood Ass'n v. City of Danville*, 64 Va. Cir. 83, 84 (2004). If Plaintiff is correct that rates will increase and the water will become harder, these alleged injuries would impact all customers equally. Plaintiff has not shown any irreparable injury specific to Plaintiff.

Because "proof of irreparable harm is absolutely essential to the award of injunctive relief," *D'Ambrosio*, 45 Va. App. at 342, the Court should deny Plaintiff's request for an injunction.

III. Plaintiff also has not shown that it has no Adequate Remedy at Law

The Complaint fails to allege facts showing that Plaintiff lacks an adequate remedy at law. If an action for damages would provide an adequate remedy to Plaintiff, injunctive relief is inappropriate. *Root*, 81 Va. Cir. at 410. The two types of harm Plaintiff alleges it may suffer, potential increased future rates and "operational and product problems" that may result from increased hardness of the water, could be adequately remedied by monetary damages.

As to the future rates, the Authority has not yet changed the rates and if it does, the rates must be approved after a notice and public hearing. This hearing provides Plaintiff a forum in which to challenge any future proposed rate changes. Further, if the Authority did increase rates

in the future, and Plaintiff could establish that the rates are unlawful and that Plaintiff suffered damages as a result, Plaintiff could seek money damages and would therefore have an adequate remedy at law. *See Root*, 81 Va. Cir. at 410; *see also Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 402 (2012). As to water hardness, even if Plaintiff could show that the water will become harder and harder water will cause damage to Plaintiff's operations, Plaintiff has not shown why that injury could not be remedied by money damages. *Root*, 81 Va. Cir. at 410; *Preferred Sys. Solutions, Inc.*, 284 Va. at 402.

IV. Plaintiff also has not shown that an Injunction is in the Public Interest

Finally, Plaintiff has not alleged that an injunction is in the public interest. Plaintiff admits that the Authority has been anticipating completion of the Project for some time. *See* Compl. ¶¶ 31, 36. Plaintiff also recognizes that the Authority and its predecessor have incurred costs in advancing this project. Compl. ¶ 36. Plaintiff does not discuss the benefits of the project to the public, including the benefit of an additional water supply. In short, Plaintiff does not allege that it would be in the public interest to stop this project now after it has already been set in motion.

CONCLUSION

Bedford Regional Water Authority respectfully requests that the Court enter an order sustaining its Demurrer, dismissing the Complaint filed against it in its entirety, and award it costs and such other relief as the Court may deem just and proper.

DRAFT

BEDFORD REGIONAL WATER AUTHORITY

By:_____
Of Counsel

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Counsel for Bedford Regional Water Authority

DRAFT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Defendant's Demurrer was mailed, by first class mail, postage prepaid, to Kevin W. Mottley, Esq., the Mottley Law Firm PLC, 1700 Bayberry Court, Suite 203, Richmond, Virginia 23226; and to John R. Cline, Esq., John R. Cline, PLLC, 8261 Ellerson Green Close, Mechanicsville, Virginia 23116, counsel for Bedford Weaving, Inc., on this the ____ day of January, 2014.

_____

Mark E. Feldmann

Tab M. Comments filed with Bedford County Planning Commission

JOHN R. CLINE, PLLC
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January 23, 2014

Via Electronic Mail

Jeff Burdett
Bedford County Planning Commission
2302 Lake Retreat Road
Huddleston, Virginia 24104

Dear Commissioner Burdett:

I am writing to the Bedford County Planning Commission on behalf of Bedford Weaving (the "Company") regarding the Commission's pending evaluation of two special review project applications by the Bedford Regional Water Authority ("BRWA"). The aggregate of the various planned public utility facilities addressed by those applications consists of what the BRWA has designated as its Smith Mountain Lake Project (the "Project"). The Project constitutes a new major public water supply project that relies upon Smith Mountain Lake for the source of raw water. Among other facilities, the Project would include construction of a new water intake structure in the Lake, a new water treatment plant near the Lake, and several new water transmission pipelines to deliver treated water to the Town of Bedford and then to the Forest area. The Project would also provide another new water transmission line to deliver treated water from the new treatment plant to the Western Virginia Water Authority in order to serve several areas in Franklin County.

Construction of any of the public utility facilities in the BRWA's applications is prohibited unless and until the Commission determines that the general or approximate location, character, and extent of that facility is "substantially in accord" with the County's adopted Comprehensive Plan ("Plan"). Va. Code § 15.2-2232(A). The Department of Planning has provided its analyses of the BRWA's facilities to the Commission in order to inform the Commission's substantial-accordance determinations. However, the inexplicably limited scope and content of those analyses fall far short of the level of detailed information that the Commission should have when making those determinations. For example, the Department's analyses do evaluate the subject facilities with respect to Chapter VII ("Utilities") and Chapter IX ("Land Use") of the County's Plan. Yet, the scope of those evaluations consists only of a few of the qualitative objectives of the chapters; no quantitative evaluations have been performed. Moreover, the characteristics of the facilities in the two applications combined clearly intersect with Plan Chapters III ("Community Character, Design and Aesthetics"), IV ("Housing"), V ("Natural Environment"), VIII ("Economic Development") and XI ("Public Safety and Community Services"). In spite of the relevance of those chapters, the Department's analyses fail to address them. In light of the substantial magnitude and scope of the BRWA's Project and the contrasting paucity of information and analyses for the Commission to examine, Bedford Weaving has to question how the Commission can reasonably expect to make informed determinations about the substantial accordance of BRWA's facilities immediately after conclusion of the Commission's re-scheduled public hearing for those facilities on February 4.

However, before the Commission expends significant time and resources in evaluating the BRWA's planned facilities for "substantial accordance," Bedford Weaving believes that the Commission must first decide whether such evaluations are even appropriate or necessary at this time. First, given that the Company has recently asked the Bedford County Circuit Court to decide whether the BRWA is legally authorized to undertake the Smith Mountain Lake Project, the Commission should examine whether its responses to the BRWA's applications are even appropriate at this time. As Bedford Weaving explains in its enclosed comments to the Commission in response to those applications, the Company urges the Commission to suspend further action on those applications until the question of the Project's legal status has been decided by the judiciary.

Second, the Commission must understand that it has no obligation to respond to the BRWA's applications at this time. By law, the Smith Mountain Lake Project constitutes a "major state project" for which the BRWA must prepare an environmental impact report (EIR) and submit it to the Virginia Department of Environmental Quality ("DEQ"). Va. Code § 10.1-1188(A). In turn, the DEQ must provide the County with a copy of that report "to enable the [County] to evaluate the proposed project for environmental impact, *consistency with the [County's] comprehensive plan*, local ordinances adopted pursuant to this chapter and other applicable law and to provide the [County] with an opportunity to comment." Va. Code § 15.2-2202(A) (emphasis added).

As also addressed in the Company's enclosed comments, apparently the BRWA has chosen (1) to by-pass that entire statutory process, (2) to propose *and select* the specific facilities for its major project, and now (3) to attempt to prevail upon the Commission to make substantive determinations without its members having the benefit of being fully informed by the required environmental impact report that has never been prepared. As a consequence, Bedford Weaving respectfully submits that it is not legally necessary at this time for the Commission to respond to the BRWA's premature applications. Arguably, in light of the significant deficiencies in the information provided to the Commission, it might not be lawful for the Commission to act on the subject applications.

Bedford Weaving thanks the Planning Commission for this opportunity to comment on what the Company considers to be two untimely and incomplete applications for a Project which is not authorized under the law. Given the circumstances surrounding the BRWA's apparent non-compliance with applicable law on several fronts, the Company urges the Commission to request the Board of Supervisors to extend the Commission's statutory deadline for responding to the subject applications for a period of no less than six (6) months, with the expectation that the legal issues addressed herein will be resolved by that time.

Respectfully,

/s/ John R. Cline
John R. Cline
Counsel to Bedford Weaving

Enclosure

BEFORE THE
BEDFORD COUNTY PLANNING COMMISSION

Bedford Regional Water Authority	)	SRP Nos. 140001 & 140002

COMMENTS OF BEDFORD WEAVING ON APPLICATIONS FOR DETERMINATIONS OF SUBSTANTIAL ACCORDANCE FOR (1) PLANNED WATER TREATMENT PLANT AND RELATED WORK AND (2) PLANNED WATERLINES AND RELATED WORK

I. BACKGROUND

In accordance with Va. Code § 15.2-2232 and the Bedford County Zoning Ordinance § 30-25, the Bedford Regional Water Authority (BRWA or the Water Authority) has applied to the Bedford County Planning Commission (Commission) for determinations of whether the general or approximate locations, characters, and extents of certain planned public utility facilities are substantially in accord with the County's adopted Comprehensive Plan (Plan). In particular, the Commission's Special Review Project (SRP) 140001 consists of four interrelated projects planned by the BRWA, and SRP 140002 consists of five different waterline projects. All nine of the projects are components of the BRWA's overall new public water supply project referred to as the Smith Mountain Lake Project.

For the reasons explained herein, Bedford Weaving, Inc. (Company) strongly encourages the Commission to stay or suspend all further actions with respect to both SRP 140001 and SRP 140002 until existing litigation resolves whether the BRWA actually has the legal authority to construct any of the planned nine (9) projects.

Moreover, Bedford Weaving believes, as explained herein, that the BRWA's requests for determinations of substantial accordance are fatally flawed. Unless and until the Commission receives a BRWA-prepared environmental impact report for the Smith Mountain Lake Project, the Commission will not have all of the requisite environmental information to make the requested determinations in accordance with Virginia law.

II. BEDFORD WEAVING'S INTEREST IN THIS PROCEEDING

Bedford Weaving is a privately held company with both its headquarters and principal place of business located in Bedford, Virginia. Bedford Weaving has operated at that location for more than thirty years and employs a skilled labor force of over 115 people that reside in Bedford and surrounding areas. The Company manufactures high-quality, broad loom fabrics that are used in a variety of industrial, commercial, and aerospace applications as well as in the apparel industry. Some of the Petitioner's woven fabrics also have applications in the surgical/medical field where not only the tolerances for physical properties of the fabrics are narrow but also the presence of contaminants in the fabrics is unacceptable.

Bedford Weaving's production process depends upon the use of high-quality water in several stages of the process. The high-quality, "soft" water historically provided to the Company has allowed it to manufacture a wide range of woven fabrics without repeated equipment malfunctions or damaged fabrics that could otherwise occur when using lower-quality process water.

As part of the City of Bedford's reversion to town status in 2013, the City and Bedford County agreed not only to merge and interconnect their respective existing water systems but also to form a joint authority to own and operate that consolidated water system, i.e., the Bedford

Regional Water Authority.[1] However, shortly after formation of the BRWA and the consolidation of those two existing water systems, the BRWA announced plans to begin the design, engineering and financing of a major new public water supply project called the Smith Mountain Lake (SML) Project. As noted previously, the various BRWA-planned projects under SRPs 140001 and 140002 comprise that SML Project.

BRWA's planned new public water supply project will include a new raw water intake at SML, a large new raw water treatment plant near SML,[2] and several large new water transmission pipelines, one of which will transport treated water to the City of Bedford.[3] In spite of the scope and magnitude of the new Water Authority's planned undertaking, there curiously was no mention of the SML Project either in the City-County Reversion Agreement or in the subsequent Consolidation Agreement[4] between the City, County and Bedford County Public Service Authority (BCPSA) that provided for merging the two existing water systems of the City and BCPSA.

The BRWA's engineering consultant has concluded that under certain conditions the BRWA's new public water supply project "will produce water with significantly greater hardness than currently produced by the [former City's water system]."[5] That consultant's report explained how increased hardness in water could lead to (1) deposits of minerals that cause

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[1] *Voluntary Settlement of Transition to Town Status and Other Related Issues Between the City of Bedford and the County of Bedford*, § 6.2 (Aug. 2012) (the "Reversion Agreement").

[2] Anderson & Associates, *Preliminary Engineering Report: Smith Mountain Lake Water Treatment Plant, Bedford County, Virginia* (Feb. 15, 2013).

[3] Anderson & Associates, *Preliminary Engineering Report: Lakes-Bedford-Forest Water Supply Evaluation; Bedford County, Virginia* (rev. June 10, 2011).

[4] *Consolidation Agreement Among City of Bedford, Virginia, Bedford County, Virginia and Bedford County Public Service Authority,* (Oct. 31, 2012) (the "Consolidation Agreement").

[5] Wiley & Wilson, *Bedford Utilities Consolidation Report,* 4-12 (Sept. 27, 2012).

fabric deterioration and discoloration, (2) elevated levels of dissolved solids and (3) increased fouling of atomizing spray nozzles[6] - - results that almost certainly would directly affect Bedford Weaving's water-dependent manufacturing operation in highly adverse ways.

The Authority has recently authorized issuance of a revenue bond in the aggregate principal amount of $34,000,000 to finance the design, installation and construction of the proposed public utility facilities which are the subject of the Commission's instant proceeding.[7] An independent assessment estimates that construction of the Smith Mountain Lake Project will cost between $42,000,000 and $51,000,000. Moreover, that same assessment finds that the BRWA is able to continue quoting a Project cost of $34,000,000 only by postponing construction of necessary elements of the Project for numerous years, and not by reducing the scope of the Project. That same independent study finds that, in addition to the $2,000,000 subsidy the Authority already receives, the Authority is projected to operate with an annual revenue deficit of $2,400,000 beginning in 2016. Over the next 14 years, that study claims, the BRWA projects a revenue gap of $17,700,000, but the Water Authority has provided no explanation for how it expects to fill that gap.[8]

In addition to the substantial cost for BRWA's new Smith Mountain Lake Project, the BRWA has also agreed to pay the remaining debts of the two merged water systems. When the City, the County and the BCPSA agreed to merge the existing water system of the City with the existing BCPSA water system, the BRWA agreed to assume all of BCPSA's existing revenue-

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[6] *Id.* at 4-3.

[7] BRWA, "Bond Resolution Providing for the Issuance, Sale and Award of a Water and Sewer System Revenue Bond (Smith Mountain Lake Project), Series 2014, of the Bedford Regional Water Authority, in the Principal Amount of up to $34,000,000 and Providing for the Form, Details and Payment Thereof," Nov. 19, 2013.

[8] Private communication to John Cline, "An Unbiased Analysis of BRWA's Own Reports," Aug. 28, 2013.

pledged liabilities and obligations.[9] In addition, the BRWA agreed to make "locality compensation payments" to the Town in order to retire the remaining debt service associated with several of the City's general obligation bonds that the City had used to finance improvements to the its water system.[10]

The Consolidation Agreement directs the BRWA to "substantially equalize the rates charged to the citizens of the Localities within a 10 year period from July 1, 2013."[11] Based on the Water Authority's rates as of July 1, 2013, the water rates for BRWA customers in the Town, e.g., Bedford Weaving, will need to be increased substantially before they rise to a future level comparable to the rates that will be charged to BRWA customers in the County. Adding insult to injury, besides those substantial rate increases that Bedford Weaving and other City customers can already expect to realize as a result of the merger of the existing water systems, the BRWA will need to levy major additional rate increases to cover the new debt service of the Smith Mountain Lake Project.

A BRWA representative recently stated that "[a]t this point we do not know exactly how rates will be influenced [by the SML Project] but will [sic] have more information on that in the next couple of months. However, we do know that the *rates will be changing each year through 2023* as we merge the former PSA and City rates."[12]

In sum, upon completion of the BRWA's planned Smith Mountain Project, i.e., the numerous individual projects now before the Commission, Bedford Weaving will be supplied with water almost certainly to have significant differences in its quality as compared to the high-

[9] *Consolidation Agreement* at § 2.2.

[10] *Id.* at § 2.3.

[11] *Id.* at § 3.11.

[12] *The News & Advance*, newsadvance.com, Jan. 11, 2014 ("Bedford business files lawsuit over water line project") (emphasis added).

quality, "soft" water that the Company has received for decades from the former City's water system. Even the BRWA's own consultant has warned that commercial and industrial businesses in Bedford, such as Bedford Weaving, could experience adverse impacts to their water-dependent operations.

Moreover, the BRWA will be increasing Bedford Weaving's and other City customers' water rates for the next 10 years solely due to the merger of two existing water systems. On top of those increases, the BRWA will be further increasing Bedford Weaving's and all other customers' water rates, for some prolonged but yet indefinite period, to pay for the enormous costs of the SML Project.

Regulated businesses like Bedford Weaving, as well as other enterprises and, yes, even families and individuals throughout the Town and the County, seek as much certainty as possible when planning for the future. With respect to the new Water Authority, the only certainties for Bedford Weaving to date are (1) that the quality of its future process water will be inferior to that of the water it has received for over 30 years and (2) that the cost of that future water for the Company's operations will be substantially higher that prior water costs.

Consequently, in attempting to preserve its economic viability, Bedford Weaving has concluded that it must strongly oppose the financing, construction and operation of those BRWA-planned facilities now before the Commission.

III. THE BRWA LACKS THE LEGAL AUTHORITY TO UNDERTAKE THE SML PROJECT.

The Commission should give due consideration to whether it should proceed further with this instant proceeding in light of a challenge to the BRWA's legal authority to undertake construction of the public utility facilities now before the Commission. Bedford Weaving has recently asked the Circuit Court of Bedford County to determine whether the BRWA actually

has the legal authority to undertake the SML Project. The plain statutory language provides that, if an authority's articles of incorporation specify certain projects for the new authority to undertake, then that authority cannot thereafter undertake any further project without that additional project first being approved in keeping with the procedure detailed in the statute.

The BRWA's Articles of Incorporation specify several projects to be undertaken by the Water Authority. The SML Project, however, was not one of those specified projects. The Company, therefore, believes that application of the law is clear in this case, i.e., that Bedford County's Board of Supervisors and the Bedford Town Council must first approve the SML Project before it can be undertaken by the BRWA in accordance with the law.

Therefore, the Planning Commission's decision to move forward at this time with SRPs 140001 and 140002 in the face of active litigation which challenges the lawfulness of those projects contained in the two SRPs could well prove to be an unnecessary burden on and waste of the County's limited administrative resources. In addition, although a Commission determination of substantial accordance is necessarily made on a case-by-case basis, the Commission likely prefers to avoid the situation where a court decision would subsequently transform its determination into nothing more than an advisory opinion, while future applicants nevertheless seek to rely on factors within that nullified Commission determination as precedents for favorable Commission findings on those future applications.

In light of the real possibility that the SML Project may not currently be a lawful undertaking by the BRWA, Bedford Weaving strongly encourages the Commission to stay its proceedings on the subject two applications until the lawfulness of the projects addressed by those applications is decided. As further explained below, a stay in the instant proceedings is also warranted in view of the subject applications being extremely deficient.

IV. THE COMMISSION SHOULD TAKE NO ACTION ON THE SUBJECT APPLICATIONS UNTIL IT RECEIVES AN ENVIRONMENTAL IMPACT REPORT.

The Commission's role in the instant proceeding has been appropriately summarized as follows: "[T]he charge of the Commission in this matter is solely limited to determining if the *general* location, character, and extent of the proposed public facility is in *substantial* accordance [with] the provisions of the County's adopted *comprehensive plan.*"[13] With respect to impacts on the natural environment as addressed in Chapter 5 of the County's adopted Plan, the Commission is simply unable to make a determination of substantial accordance because the BRWA's applications contain no substantive information about the likely environmental impacts from the proposed public utility facilities.

"All state agencies, boards, *authorities* and commissions or any branch of the state government shall prepare and submit an environmental impact report to the Department [of Environmental Quality (DEQ)] on each major state project."[14] A "major state project" is defined as "the acquisition of an interest in land for any state facility construction, or the construction of any facility or expansion of an existing facility which is hereafter undertaken by any state agency, board, commission, *authority* . . . which costs $500,000 or more."[15]

The BRWA is a "public body politic and corporate and a political subdivision of the Commonwealth."[16] The BRWA's Smith Mountain Lake Project. i.e., the projects now before the

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[13] Memorandum from Mary A. Zirkle, Chief of Planning, to Planning Commission of Jan. 9, 2014 ("Special Project Review # 140001 – Bedford Regional Water Authority – Proposed High Point Water Treatment Plant and related work") (emphases in original). The same statement appears in a similar memorandum regarding Special Project Review # 140002.

[14] Va. Code § 10.1-1188(A) (emphasis added).

[15] *Id.*

[16] Va. Code § 15.2-5102(A).

Commission, will clearly cost in excess of $500,000. By law, the BRWA is therefore required to prepare an environmental impact report.

At a minimum, an environmental impact report must address the following:

- The environmental impact of the major state project;
- Any adverse environmental effects that cannot be avoided by the project;
- Measures proposed to minimize the project's environmental impact;
- Any alternatives to the proposed construction;
- Any irreversible environmental changes resulting from the project.[17]

In short, it seems clear that information which must be contained in the State-required EIR for BRWA's overall Project now before the Commission is precisely the kind of information that the Commission needs in order to make informed determinations of substantial accordance for those individual components of the Project.

Indeed, the statute confirms the purpose of the required environmental impact report. Once the EIR is submitted to DEQ, the Department is then required to submit a copy of that EIR to the chief administrative officer of every locality in which the major state project is proposed to be located.[18] As the statute explains,

> [t]he purpose of the distribution is to enable the locality to evaluate the proposed project for environmental impact, consistency with the locality's comprehensive plan, local ordinances adopted pursuant to this chapter, and other applicable law and to provide the locality with the opportunity to comment.[19]

In other words, when the Bedford County Planning Commission needs to determine whether the general or approximate location, the character, and the extent of the Smith Mountain Lake

[17] Va. Code § 10.1-1188(A).

[18] Va. Code § 15.2-2202(A).

[19] *Id.* (emphasis added).

Project is substantially in accord with the County's adopted Comprehensive Plan, State law contemplates the Commission's determination concerning environmental features of the Plan to be informed by the detailed information contained within the BRWA's required environmental impact report.

The BRWA has simply ignored its statutory responsibility to prepare an environmental impact report, and consequently the Commission has not been provided with a copy of the EIR for the Smith Mountain Lake Project. Therefore, the Commission is ill-equipped to take the actions which the BRWA is now requesting because the Commission lacks fundamental environmental information about the Project which it needs to fulfill its statutory responsibility.

In the absence of an appropriate EIR for the Smith Mountain Project, the instant proceeding before the Commission is fatally flawed. Accordingly, Bedford Weaving believes the Commission has no alternative but to reject further consideration of the BRWA's applications unless and until, at a minimum, the Commission is provided with the appropriate EIR for the Project.

V. CONCLUSION

The Bedford Regional Water Authority has asked the Bedford County Planning Commission to make determinations whether individual components of the Smith Mountain Lake Project are in substantial accordance with the County's Comprehensive Plan. The Commission should decline to respond to the BRWA's applications at this time, pending resolution of a claim currently before the Circuit Court of Bedford County that the BRWA lacks the statutory authority to undertake that Project.

Furthermore, Virginia law contemplates the Commission's requested determinations being fully informed by the BRWA's environmental impact report for the Smith Mountain

Project. No such EIR has been prepared. Therefore, the Commission lacks basic information about the project's environmental impacts that is needed for the Commission to make the requested determinations in accordance with the law.

For the foregoing reasons, Commission action on the BRWA's requested determinations of substantial accordance should be DEFERRED in accordance with an extension of the time period for that action as authorized by the County Board of Supervisors.

Respectfully submitted,

/s/ John R. Cline
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Date: January 21, 2014

Tab. N. Resolution No. 269 of the Western Virginia Water Authority

RESOLUTION #269 (03-13)
OF THE
WESTERN VIRGINIA WATER AUTHORITY

Endorsing a Regional Approach to a Water Withdrawal Permit Application

WHEREAS, the Western Virginia Water Authority (the "Authority"), a public service authority formed and existing in accordance with the provisions of Chapter 51 of Title 15.2 of the Code of Virginia (1950), as amended, the Virginia Water and Waste Authorities Act §§ 15.2-5100-15.2-5158 (the "Act"), has determined to support the Bedford County Service Authority in a regional approach to an application for the modification of an existing water withdrawal permit; and

WHEREAS, the Bedford County Public Service Authority (the "BCPSA") is in the process of applying to the Virginia Department of Environmental Quality ("DEQ") for the modification of its Virginia Water Protection Individual Permit Number 96-0707 for the withdrawal of raw water from Smith Mountain Lake to increase the maximum daily rate of withdrawal from 2.99 million gallons to a maximum daily rate of 12 million gallons, with a proposed average annual daily flow of 6 million gallons per day; and

WHEREAS, as part of its application, the BCPSA included an average annual daily flow of approximately 2.63 million gallons per day and 5.21 million gallons per day peak intended to be sold by the BCPSA to the WVWA for distribution in Franklin County; and

WHEREAS, DEQ has issued a draft permit in which it has and tentatively approved withdrawal of up to 4.38 million gallons per day and 8.67 million gallons per day peak and eliminated from consideration the "indirect" needs for water allocable to projected use by the Western Virginia Water Authority in Franklin County, apparently because the WVWA is not currently a party to the permit application, stating in the draft permit that it doesn't want to allocate water to a "regional configuration," and "risk the regional participants' "fail[ing] to reach agreement," resulting in an over-allocation of water to the applicant for the permit; and

WHEREAS, the Executive Director, Water Operations, has informed the Board that it is in the best long term interest of the WVWA that the full withdrawal volume be approved by DEQ in the pending application, recommended that the Board go on record as being in support of a regional approach for the full withdrawal amount and that, if necessary, and if acceptable to the BCPSA, the WVWA would join in the permit application as a party so as to avoid the delay and expense of being required to file its own, separate application for withdrawal; and

WHEREAS, the Executive Director, Water Operations, expects to recommend to the Board a substantial capital investment in a new water treatment plant to be constructed by the BCPSA in the High Point area of Bedford County, with a view toward supplying the long term needs for treated water in Franklin County.

NOW, THEREFORE, be it resolved by the Board of Directors of the Western Virginia Water Authority that it support the effort of the BCPSA to operate on a regional basis and to receive a modification of its withdrawal permit up to the requested maximum daily rate of 12 million gallons, with a proposed average annual daily flow of 6 million gallons per day and that the Board authorizes the Executive Director, Water Operations, to communicate its position to DEQ, and be it further resolved that in the event it becomes necessary to obtain the full withdrawal volume in the pending application, the WVWA's join in the pending permit application as a party.

This resolution shall take effect immediately.

Directors absent	0
Votes in Favor	7
Votes Against	0
Abstentions	0

CERTIFICATION

The undersigned secretary of the Western Virginia Water Authority does hereby certify that the foregoing is a true, complete and correct Resolution adopted by a vote of a majority of the Directors of the Western Virginia Water Authority, present at a regular meeting of the Board of Directors of the Western Virginia Water Authority duly called and held March 21, 2013, at which a quorum was present and acting throughout, and that the same has not been amended or rescinded and is in full force and effect as of the date of this certification, March 21, 2013.

Jean Thurman

Jean Thurman, Secretary,
Western Virginia Water Authority

(SEAL)

Tab. O. Resolution No. 285 of the Western Virginia Water Authority

RESOLUTION #285 (01/14)
OF THE
WESTERN VIRGINIA WATER AUTHORITY

Approving the Concept of a Joint Water Facility with Bedford Regional Water Authority

WHEREAS, the Western Virginia Water Authority (the "Authority"), a public service authority formed and existing in accordance with the provisions of Chapter 51 of Title 15.2 of the Code of Virginia, 1950, as amended, the Virginia Water and Waste Authorities Act §§ 15.2-5100-15.2-5158 (the "Act"), has the opportunity to develop and operate jointly with the Bedford Regional Water Authority (the "BRWA") a raw water intake and water treatment plant on Smith Mountain Lake in Bedford County, Virginia (the "Water Facility"); and,

WHEREAS, the joint undertaking would be structured pursuant to the provisions of Chapter 13 of Title 15.2 of the Code of Virginia, as amended (the "Joint Exercise of Powers Act"), permitting political subdivisions such as the Authority and the BRWA to jointly exercise the powers granted them under the Act; and

WHEREAS, the Executive Director, Water Operations has explained the ranges of costs and benefits of the Water Facility to the Board.

NOWTHEREFORE, be it resolved by the Western Virginia Water Authority that after consideration of the concept of the joint development and operation of the Water Facility, including the contribution by the Authority of up to $7,000,000 in a combination of loans and equity contribution to the Water Facility, the Board of Directors of the Western Virginia Water Authority does hereby approve in principle developing and operating the Water Facility Concept jointly with the BRWA.

AND BE IT FURTHER RESOLVED, that the Executive Director, Water Operations, is hereby authorized and directed to negotiate the terms and conditions of the Water Facility Agreement and to present the completed agreement to this Board for final approval.

This resolution shall take effect immediately.

Directors absent 1

Votes For 6

Votes Against 0

Abstentions 0

CERTIFICATION

The undersigned secretary of the Western Virginia Water Authority does hereby certify that the foregoing is a true, complete and correct Resolution adopted by a vote of a majority of the Directors of the Western Virginia Water Authority, present at a regular meeting of the Board of Directors of the Western Virginia Water Authority duly called and held January 16, 2014 at which a quorum was present and acting throughout, and that the same has not been amended or rescinded and is in full force and effect as of the date of this certification, January 16, 2014.

THE WESTERN VIRGINIA WATER AUTHORITY SEAL

Mary Sweeney

Mary Sweeney, Assistant Secretary,
Western Virginia Water Authority