

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF FLUVANNA**

JAMES RIVER WATER AUTHORITY )  
County Administration Office, 3<sup>rd</sup> Floor )  
132 Main Street )  
Palmyra, Virginia 22963 )

Appellant, )

v. )

Case No. \_\_\_\_\_

VIRGINIA DEPARTMENT OF )  
HISTORICAL RESOURCES )  
(Serve: Julie V. Langan, Director) )  
2801 Kensington Avenue )  
Richmond, Virginia 23221, )

JULIE V. LANGAN, in her official )  
capacity as Director of the )  
Virginia Department of Historic Resources, )

Appellees. )  
\_\_\_\_\_ )

**PETITION FOR APPEAL**

Pursuant to Virginia Code § 2.2-4026 and Rule 2A:4 of the Rules of the Supreme Court of Virginia, Appellant James River Water Authority (JRWA) hereby appeals case decisions made by the Virginia Department of Historic Resources and its Director, Ms. Julie V. Langan (referred to collectively as “DHR” unless otherwise noted). JRWA is proposing to build a water intake, pump station, and one-mile-long water main that will serve as a long-term supply of fresh drinking water to the citizens of Fluvanna and Louisa Counties (the “Water Supply Project”). To comply

with applicable laws and regulations and out of sensitivity to historical resources in the vicinity of the Water Supply Project, JRWA engaged a team of expert consultants that included a professional archeologist who had been involved with dozens of similar projects throughout the Commonwealth—including a preliminary archeological study performed for JRWA with DHR’s approval in 2017. JRWA applied for an anticipatory permit for the Archaeological Excavation of Human Remains from DHR in 2019. Despite JRWA’s best efforts to comply with the laws and regulations necessary to obtain this permit, DHR has taken improper steps and made unlawful decisions that have impeded JRWA’s efforts to bring a new water supply to its citizens, thereby necessitating this appeal. In support of this appeal, JRWA alleges the following:

**CASE DECISIONS APPEALED FROM**

1. JRWA appeals the September 6, 2019, denial by DHR of JRWA’s application for an anticipatory Archaeological Excavation of Human Remains at the Point of Fork in Fluvanna County (DHR File No. 2015-0984) (hereinafter, “Permit Application,” attached hereto as Exhibit A).

2. JRWA further appeals DHR’s decision that the archaeological consultant associated with JRWA’s Permit Application does not meet the requirements established by the Secretary of the Interior and promulgated through 36 C.F.R. § 61 as the Professional Qualifications Standards for Archaeology, which are incorporated into the Department of Historic Resources’ regulations at 17 VAC § 5-20-40(C).

3. JRWA further appeals DHR's decision that a research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet standards of the DHR.

4. JRWA further appeals DHR's decision that a research design and data recovery plan must be revised to meet the approval of the Monacan Indian Nation.

5. JRWA further appeals DHR's decision that 17 VAC § 5-20-40(A)(3) requires JRWA to obtain permission for access from third-party "owners" of properties to which JRWA holds a utility easement.

## **PARTIES**

### Appellant

6. The James River Water Authority was formed in 2009 by Fluvanna County and Louisa County for the purpose of coordinating the Counties' effort to develop long-term water supply for their respective residents. JRWA is aggrieved by the decisions of DHR resulting in the denial of JRWA's application for an anticipatory burial permit.

7. JRWA is an authority created pursuant to the Virginia Water and Waste Authorities Act, Va. Code § 15.2-5100 *et seq.*, and, as such, is a public body politic and corporate and a political subdivision of the Commonwealth of Virginia. JRWA maintains its principal office in Fluvanna County, Virginia.

### Appellees

8. The Virginia Department of Historical Resources is an executive department of the Commonwealth of Virginia established by Virginia Code § 10.1-2201. DHR is required by statute to encourage, stimulate, and support the

identification, evaluation, protection, preservation, and rehabilitation of the Commonwealth's significant historic, architectural, archaeological, and cultural resources. Va. Code § 10.1-2202.

9. Ms. Julie V. Langan is the Director of DHR and State Historic Preservation Officer, having been appointed to the position pursuant to Va. Code § 10.1-2202. Director Langan is being sued in her official capacity.

### **JURISDICTION AND VENUE**

10. On October 4, 2019, JRWA timely submitted a Notice of Appeal to DHR in accordance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, a copy of which is appended hereto as Exhibit B.

11. This Court has jurisdiction to hear this appeal pursuant to the Virginia Administrative Process Act, Virginia Code § 2.2-4000 *et seq.*, including without limitation Virginia Code § 2.2-4026.

12. This Court is a Category A preferred venue pursuant to Virginia Code §§ 2.2-4003, 2.2-4026, and 8.01-261.

### **BACKGROUND**

#### **JRWA's Water Supply Project**

13. The existing groundwater and surface water sources in Fluvanna County and Louisa County are insufficient to supply a sustainable long-term source of public drinking water for the Counties' residents and businesses.

14. When completed, the JRWA Water Supply Project will provide a sustainable source of drinking water that will meet both Counties' projected water supply needs for decades.

15. The Water Supply Project is located near the confluence of the James River and Rivanna River in Fluvanna County, Virginia.

16. The Water Supply Project consists of three main components: (1) a water intake in the James River; (2) a small building housing water pumps located a short distance from the river; and (3) a nearly one-mile-long 24-inch diameter water main that crosses the Rivanna River and connects to an existing Louisa County Water Authority water main.

17. JRWA acquired all necessary property interests to construct and operate the Water Supply Project, including (1) fee simple ownership and a temporary construction easement for the land to be occupied by the water intake and pump station and (2) temporary construction and permanent utility easements for the water main. The easements grant JRWA broad authority to make any use of the property “reasonably necessary” for the construction and operation of the water main.\*

18. JRWA applied for the primary Federal and State permits needed to construct the Water Supply Project in March 2014. The Virginia Department of Environmental Quality issued a permit to withdraw water from the James River in November 2015. The Virginia Marine Resources Commission issued a permit to allow impacts to state-owned bottom lands in James and Rivanna Rivers in March 2017. An application to the U.S. Army Corps of Engineers (USACE) for a permit under 44

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\* The easements are included as Attachment C to the Permit Application, which is appended to this Petition as Exhibit A.

U.S.C. § 1344 to authorize impacts to streams and wetlands under Federal jurisdiction remains pending.

First Anticipatory Burial Permit Issued in 2017

19. Under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, the USACE is required to consult with the State Historic Preservation Officer (i.e., Director Langan) prior to issuing a permit for a project that may affect historic resources.

20. The USACE has been engaged in consultation with DHR, JRWA, and other interested parties.

21. As part of the consultation process, JRWA conducted a preliminary “Phase II” archeological field study for area of the Water Supply Project, that included deep test trenching between October 2017 and January 2018.

22. The archeological field study was performed by a cultural resources firm, Circa~ Cultural Resource Management (“Circa”). Circa’s president, Ms. Carol Tyrer, served as the Principal Archaeologist. Circa is not engaged directly by JRWA, but is a subconsultant to JRWA’s engineering consultant, the Timmons Group.

23. The Phase II study was conducted in accordance with a plan approved by DHR and involved, among other things, the excavation of deep trenches to map and evaluate any buried historical resources within the Water Supply Project’s footprint.

24. Under the Virginia Antiquities Act, it is unlawful to disturb buried human remains or associated funerary objects as part of an archeological study

without a permit from DHR. Va. Code § 10.1-2305(A). If there is a possibility that an archeological study may encounter previously unknown burials, DHR's regulations allow the study proponent to apply for an *anticipatory* burial permit. 17 VAC § 50-20-30(2).

25. Although no human burials are known to exist within the footprint of the Water Supply Project, DHR recommended that JRWA apply for an anticipatory burial permit for its Phase II study.

26. JRWA submitted an anticipatory burial permit application on April 14, 2016. The application identified Ms. Tyrer as the Principal Archeologist.

27. DHR issued an anticipatory burial permit to JRWA on that application for the Phase II study on October 4, 2017 (Exhibit C). DHR explained its decision to issue the permit as follows:

The Department has concluded that issuance of this anticipatory burial permit is necessary in order to ensure that any and all buried remains and associated funerary items inadvertently disturbed during archaeological investigation of the James River Water Supply project area will be properly treated, and that important information about Fluvanna County's history will be properly recorded.

28. The permit notes that DHR consulted with federally- and state-recognized tribes, including the Monacan Indian Nation regarding the application. It also states that DHR found Tyrer "qualified to complete the work" as the Principal Archaeologist.

29. The field work for the Phase II study was completed in January 2018. No human remains or funerary objects were found.

30. The anticipatory burial permit was issued for a term of six months. It expired on April 2, 2018.

Second Anticipatory Burial Permit Denied in 2019

31. JRWA expects to perform a second archeological field study (“Phase III study”) following issuance of the USACE permit.

32. As it did in preparation for the Phase II study, JRWA filed an application with DHR for a second *anticipatory* burial permit on March 22, 2019, (Exhibit A) in preparation for the Phase III study.

33. The application covers the same areas of the Water Supply Project as the Phase II study completed under the 2017 anticipatory burial permit.

34. The application names the same Principal Archaeologist (Ms. Tyrer).

35. The application included a landowner certification form executed by former Fluvanna County Administrator and JRWA Board member, Mr. Steven M. Nichols, on behalf of JRWA. The application also included copies of the relevant easements demonstrating that JRWA possesses all property rights necessary to undertake the Phase III study and any related actions that may be required by anticipatory burial permit.

36. The application requested that DHR exercise its discretion under 17 VAC § 5-20-40(D) to waive the normal requirements that any burials, if discovered, be subject to excavation and examination by a qualified archaeologist. As first explained to DHR in an October 12, 2018 letter and reiterated in the application, this request was made following consultation between JRWA and representatives of the



Monacan Indian Nation. In support of the waiver request, the application stated that tribal representatives expressed to JRWA that if any previously unknown burials are discovered, the tribe would prefer that the matter “be handled in accordance with the tribe’s spiritual beliefs and traditions and that no archeological excavation or examination be conducted on Native American remains.”

37. Notwithstanding that the tribe did not oppose the 2017 anticipatory burial permit application, an attorney representing the Monacan Indian Nation submitted a letter to Director Langan on July 23, 2019, urging DHR to deny JRWA’s pending application.

38. On August 15, 2019, the Monacans’ attorney emailed Director Langan alleging that Ms. Tyrer is unqualified and again urging DHR to deny JRWA’s application.

39. The next day (August 16, 2019), Director Langan sent an email to Ms. Tyrer with the subject, “JRWA” (Exhibit D). The email stated:

I would like to meet with you as soon as practicable to discuss this project. Could you please suggest a time early next week that you would be available? The purpose of the meeting is to discuss questions that relate to the burial permit application. I would appreciate you bringing to the meeting copies of your University of Denver transcript illustrating which courses you took when pursuing your MA in Hiistory [sic], Anthropology and Cultural Studies.

40. Notwithstanding that Ms. Tyrer is a subconsultant with no direct contractual relationship with JRWA, Director Langan’s email was not copied to any JRWA Board members or its counsel. Nor were any JRWA Board members, counsel,

or consultants working directly for JRWA otherwise notified of the meeting request concerning JRWA's pending permit application.

41. Ms. Tyrer met with Director Langan at DHR's office in Richmond on August 19, 2019. JRWA was not aware of the meeting.

42. On September 6, 2019, Director Langan sent a letter to Fluvanna County Administrator and JRWA Board member Mr. Eric Dahl denying JRWA's anticipatory burial permit application (the "Denial Letter") (Exhibit E). The letter stated that DHR "will not be able to issue a permit under the existing application that is in process" and outlined several purported reasons for the denial and instructions for future requirements:

- JRWA's archeological subconsultant, Ms. Tyrer, does not meet the professional qualifications standard in 17 VAC § 5-20-40;
- JRWA's "existing research design and data recovery plan must be reviewed and revised by a qualified archeological consultant";
- Any revised research design and study plan must "meet . . . the approval of the Monacan Indian Nation"; and
- JRWA "has not obtained landowner permission for access to those portions of the project area not with the legal ownership of JWRA."

43. The Denial Letter states that the only way JRWA may be able to obtain a permit is if it "resubmit[s] a revised permit application."

44. On the same date (September 6, 2019), Director Langan sent a letter to the USACE regarding JRWA (Exhibit F). The letter stated that DHR "will not be

approving any permit application that identifies Ms. Tyrer as the principal archaeologist.”

45. Director Langan also sent a letter to Ms. Tyrer on September 6, 2019 (Exhibit G). The letter expressed Director Langan’s determination that Ms. Tyrer does not meet the minimum requirements to be a professional archaeologist. It stated: “This decision has consequences, and not just for the James River Water Authority Project.”

46. JRWA was given no notice of any deficiencies in its permit application or of DHR’s decision to deny it prior to September 6, 2019.

47. On information and belief, DHR and Director Langan made the decision to deny JRWA’s permit application for improper and unlawful reasons prior to the August 19, 2019, meeting.

48. On information and belief, the August 19, 2019, meeting with Ms. Tyrer and reasons outlined in the Denial Letter were pretexts to support the previously made final decision to deny JRWA’s application.

### **ERRORS ASSIGNED**

49. JRWA incorporates by reference the preceding paragraphs as though set forth fully herein.

#### **I. First Assignment of Error: Denial of Permit for JRWA’s Anticipatory Application for Archaeological Excavation of Human Remains**

50. Error is assigned on the basis that the DHR unlawfully denied JRWA’s application for the anticipatory burial permit.

51. JRWA submitted its second application for the anticipatory burial permit on March 22, 2019 (the “Permit Application” (Exhibit A)).

52. DHR made the decision to deny the Permit Application on or before September 6, 2019.

53. DHR’s regulations and the Virginia Administrative Process Act mandate that DHR must provide an applicant notice of a tentative decision to deny a permit application and an opportunity to participate in an informal fact-finding conference. 17 VAC § 5-20-60(D) (referencing Va. Code § 2.2-4019).

54. Informal fact-finding conferences provide a permit applicant important protections, including the (1) right to reasonable notice of the proposed decision; (2) the right to appear before the agency in person and with the assistance of counsel; (3) the right to present information and argument in support its application; and (4) the right to be apprised of any adverse facts or information that the agency may rely on to deny the application. Va. Code § 2.2-4019(A).

55. JRWA was denied the process required by law. DHR failed to provide JRWA with notice that it intended to deny the Permit Application and denied JRWA the right to attend an informal fact-finding conference to address the purported reasons for the decision, in violation of 17 VAC § 5-20-60(D) and Va. Code § 2.2-4019.

56. JRWA also was not given advance notice of the public data, documents, or information upon which Director Langan intended to base her decision to deny the Permit Application, in violation of Va. Code § 2.2.4019(B).

57. DHR's regulations specify six factors that its Director must consider before making a decision on an anticipatory burial permit application. 17 VAC § 5-20-60(C). No indication was provided demonstrating that DHR considered any of the six factors with regard to the Permit Application. Instead, the reasons stated in the Denial Letter were pretextual, arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

58. DHR's decision to deny the Permit Application based on the archeological consultant's purported failure to meet the minimum standards of a professional archaeologist was pretextual, arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

59. DHR's decision to deny the Permit Application based on the assertion that the research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant was pretextual, arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

60. DHR's decision to deny the Permit Application based on the assertion that a research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet the approval of the Monacan Indian Nation was pretextual, arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

61. DHR's decision to deny the Permit Application based on the assertion that JRWA failed to obtain permission for access from third-party "owners" of

properties to which JRWA holds a utility easement was pretextual, arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

62. The Denial Letter provides no justification for DHR's irreconcilable decisions to (1) grant JRWA's first anticipatory burial permit in 2017 and (2) deny the second anticipatory burial permit application in 2019. The applications pertained to archeological studies of the same parcels (i.e., footprint of the Water Supply Project), named the same Principal Archaeologist, and involved notices to the same interested tribes. This patent inconsistency epitomizes arbitrary and capricious action.

63. In the alternative, on information and belief, DHR's decision to deny the Permit Application was made prior to, and for reasons that were not expressed in, the Denial Letter.

## **II. Second Assignment of Error: Decision That JRWA's Archaeological Consultant Does Not Meet Certain Educational and Work Experience Requirements**

64. Error is assigned on the basis that the DHR unlawfully decided that JRWA's archaeological consultant does not meet the requirements established by the Secretary of the Interior and promulgated through 36 C.F.R. § 61 as the Professional Qualifications Standards for Archaeology, which are incorporated into the Department of Historic Resources' regulations at 17 VAC § 5-20-40(C).

65. To the extent DHR's decision to disqualify JRWA's archeological consultant may be construed as an independent case decision from DHR's decision on JRWA's Permit Application, that decision had a direct and distinct adverse impact on JRWA. The disqualification decision (1) was cited as a basis to deny JRWA's

Permit Application and (2) was referenced by DHR in a letter to the USACE as grounds for that agency to question submissions from JRWA in relation to its pending USACE permit application. JRWA is therefore a “party aggrieved” by the disqualification decision within the meaning of Va. Code § 2.2-4026(A).

66. The person(s) planning and supervising the field investigation and subsequent analysis of human burials must meet certain minimum qualifications. 17 VAC § 5-20-40(C). Specifically, the Virginia regulations require:

The qualifications of the archaeologist performing or supervising the work shall include a graduate degree in archaeology, anthropology, or closely related field plus:

- a. At least one year of full-time professional experience or equivalent specialized training in archaeological research, administration, or management;
- b. At least four months of supervised field and analytic experience in general North American archaeology; and
- c. Demonstrated ability to carry research to completion.

17 VAC § 5-20-40(C)(1).

67. To the extent the August 19, 2019 meeting between Director Langan and Ms. Tyrer may be characterized as an informal fact-finding conference, it fell woefully short of the requirements of the Administrative Process Act. Va. Code § 2.2-4019; *see also* 17 VAC § 5-20-60(E). JRWA was provided no notice of the meeting. Nor was Ms. Tyrer apprised that the true purpose of the meeting was to gather information to disqualify her from practicing as a professional archaeologist in Virginia, which in turn would be cited by DHR as grounds for denying JRWA’s Permit Application.

68. The Denial Letter provides no reasoned basis for DHR's decision that Ms. Tyrer does not meet the minimum qualifications. It was therefore arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

69. On information and belief, Ms. Tyrer meets the minimum qualifications of a professional archaeologist in 17 VAC § 5-20-40(C). The Denial Letter was therefore arbitrary and capricious, not supported by substantial evidence, and otherwise contrary to law.

### **III. Third Assignment of Error: Decision That a Research Design and Data Recovery Plan Must Be Reviewed and Revised by a Qualified Archaeological Consultant to Meet DHR's Standards**

70. Error is assigned on the basis that the DHR decided that a research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet standards of DHR.

71. Except as noted below, DHR's burial permit regulations outline requirements for the archeological research study of any human remains or associated funerary objects that will be removed from a site. 17 VAC § 5-20-30(4)–(8), -40(B) & (E), -60(C)(2). This study must be overseen by a qualified professional archeologist. 17 VAC § 5-20-30(4)–(5).

72. DHR's regulations provide, however, that the director of DHR has the authority to “waive the requirements of research design and professional qualifications” required to obtain an anticipatory burial permit. 17 VAC § 5-20-40(D).

73. As requested by the Monacan Indian Nation, JRWA's Permit Application requested that Director Langan waive the research study and professional qualification requirements.



74. DHR acknowledged in the Denial Letter that the research study was “omitted from the original application in deference to the Monacan.” However, it also states that the “*existing* research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet both the Department’s standards and the approval of the Monacan Indian Nation” (emphasis added) before DHR will process a new anticipatory burial permit application.

75. The only “*existing* research design and data recovery plan” prepared by JRWA is a documented titled, “Treatment Plan for Architectural Resources 032-0036 and 032-5124, and Archaeological Sites 44FV0022, 44FV0024, and 44FV0268 James River Water Supply Pump Station and Pipeline Alignment” (the “Treatment Plan”). The Treatment Plan was submitted to the USACE for review in March 2019 in connection with JRWA’s application for a permit from the USACE. That plan does *not* contain a research study plan for previously unknown human burials and funerary objects that may be discovered.

76. The USACE, not DHR nor the Monacan Indian Nation, is authorized by federal law to determine if the research design and data recovery plan submitted to the USACE has been developed by an archaeologist that meets the applicable professional qualification standards. 36 C.F.R. § 800.2(a)(1) & (a)(3).

77. Nothing in DHR’s regulations or enabling statute empowers it or its Director to deny a pending anticipatory burial permit application, or to announce prospectively that it will not consider any new applications, unless and until the

applicant hires a new consultant that meets DHR's approval to revise a plan submitted to a Federal agency.

78. DHR acted unlawfully and in excess of its statutory authority by conditioning its decision on JRWA's 2019 anticipatory burial permit application, and on any future applications, on a revision a of Treatment Plan submitted to the USACE under Federal law.

**IV. Fourth Assignment of Error: Decision That a Research Design and Data Recovery Plan Must Be Reviewed and Revised by a Qualified Archaeological Consultant to Meet the Approval of the Monacan Indian Nation**

79. Error is assigned on the basis that the DHR decided that a research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet the approval of the Monacan Indian Nation.

80. To the extent the Denial Letter requires JRWA to submit a revised Treatment Plan that is approved by the Monacan Indian Nation, DHR committed an error of law for the reasons outlined in the Third Assignment of Error.

81. Alternatively, to the extent the Denial Letter purports to require JRWA to submit an archeological research study of human remains or associated funerary that meets the approval of the Monacan Indian Nation, it is internally contradictory and, therefore, arbitrary and capricious.

82. The Denial Letter acknowledges that JRWA's application omitted an archeological research study for any human remains or associated funerary objects that may be discovered in deference to the Monacan Indian Nation's refusal to agree to any such study. The Denial Letter nevertheless states that the Permit Application

was denied, and a new application will not be processed, unless and until JRWA submits a research study plan that meets the approval of the Monacan Indian Nation. Thus, DHR has manufactured an arbitrary and unfounded requirement that it knows JRWA cannot meet.

83. DHR's decision to deny JRWA's Permit Application and to require prospectively that no application will be processed without an archeological research study approved by the Monacan Indian Nation is arbitrary and capricious and otherwise contrary to law.

**V. Fifth Assignment of Error: Decision That 17 VAC § 5-20-40(A)(3) Requires JRWA to Obtain Permission for Access from Third-Party "Owners" of Properties to Which JRWA Owns a Utility Easement**

84. Error is assigned on the basis that the DHR unlawfully decided that JRWA must obtain permission for access from third-party "owners" of properties to which JRWA already holds a utility easement.

85. The Denial Letter states, in relevant part:

JWRA [*sic*] has not obtained landowner permission for access to those portions of the project area not with the legal ownership of JWRA [*sic*]. Although we appreciate and acknowledge the presence of utility easements in favor of JRWA across these properties, the Virginia Administrative Code (see 17VAC5-20-40(A)(3) [*sic*]) specifically requires the permission of the owners.

86. DHR's position is contrary to 17 VAC § 5-20-40(A), which lists the "basic information" that must be included an application:

Application for a permit shall be in such form as required by the director, but shall include the following basic information:

1. Name, address, email address, phone number, and institutional affiliation of the applicant.

2. Location and description of the archaeological site for which field investigation is proposed, including site number if assigned.
3. Proof of ownership of the archaeological site or the property on which the field investigation is to be conducted.
4. A written statement of the landowner's permission both to conduct such research and to remove human remains on the landowner's property, and allowing the director or the director's designee access to the field investigation site at any reasonable time for the duration of the permit. The landowner's signature to the written statement shall be notarized.

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87. The Permit Application contained a landowner form executed by Mr. Nichols on behalf of JRWA. The application explained that JRWA owns a sufficient legal property interest in all areas of the Water Supply Project to undertake any action required by an anticipatory burial permit:

JRWA is the fee owner of the land on which the pump station will be constructed, which includes the majority of Site 44FV0022 within the area of potential effect. For the remainder of the Project area, JRWA holds utility line easements that grant "all rights and privileges reasonably necessary for the enjoyment and exercise" of the easement. Conducting archaeological excavations within the Project's right-of-way—including archeological excavation of any human remains that may be discovered—is "reasonably necessary" to construct the Project's raw water transmission main. JRWA therefore holds the necessary legal property rights . . . to grant permission to conduct all activities proposed in this permit application in accordance with 17 VAC § 25-20-40(A)(3). Copies of the relevant easements are attached to this application.

88. DHR's decision that JRWA is not a landowner within the meaning of 17 VAC § 5-20-40(A), and the decision to deny the Permit Application on those grounds, was error of law.

89. As DHR is aware, JRWA was compelled to file Certificates of Take to obtain two of the easements from parties who are vocal opponents of the Water

Supply Project. Those parties are consulting parties in the consultation process overseen by the USACE and in which DHR is an active participant. DHR is well-acquainted with these parties' positions on the project. On information and belief, DHR's assertion that JRWA cannot obtain the anticipatory burial permit without those parties' signatures grants them a de facto veto. This action was pretextual, arbitrary and capricious, and otherwise not in accordance with law.

90. The errors assigned above are not harmless.

**STATEMENT OF RELIEF REQUESTED**

WHEREFORE, Appellant requests this Court to:

91. Find and declare that the DHR's denial of JRWA's Permit Application was arbitrary and capricious, unsupported by sufficient evidence, and otherwise contrary to law.

92. Find and declare that the DHR's decision that the archaeological consultant associated with JRWA's Permit Application did not meet the requirements set forth in DHR's regulations at 17 VAC § 5-20-40(C) was arbitrary and capricious, unsupported by substantial evidence, and otherwise contrary to law.

93. Find and declare that the DHR's decision that a research design and data recovery plan must be reviewed and revised by a qualified archaeological consultant to meet DHR's standards was arbitrary and capricious and otherwise contrary to law.

94. Find and declare that the DHR's decision that a research design and data recovery plan must be reviewed and revised by a qualified archaeological

consultant to meet standards of the Monacan Indian Nation was arbitrary and capricious and otherwise contrary to law.

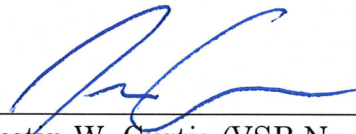
95. Find and declare that the DHR's decision that 17 VAC § 5-20-40(A)(3) requires JRWA to obtain permission for access from third-party "owners" of properties to which JRWA holds a utility easement was arbitrary and capricious and otherwise contrary to law.

96. Enter a final decree, pursuant to Va. Code § 2.2-4029, vacating DHR's action denying JRWA's Permit Application and remanding the matter to DHR for further proceedings in accordance with instructions from the Court.

97. Find and declare that DHR's actions were (1) not substantially justified, (2) in violation of law, and/or (3) made for an improper purpose, and award JRWA its reasonable costs for this appeal, including attorneys' fees, to the extent provided under Va. Code § 2.2-4030(A) or other applicable law.

98. Grant JRWA such additional relief as the Court deems just and proper.

Respectfully submitted,



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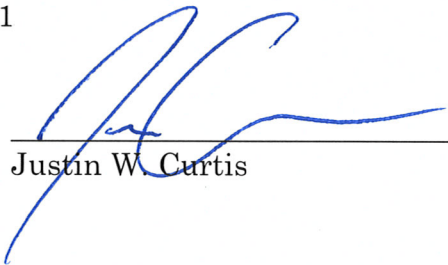
pnnyffeler@aqualaw.com

November 4, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of November, 2019, the filing of this petition for appeal included the payment of all fees and the taking of all steps provided in Supreme Court of Virginia Rules 3:2, 3:3 and 3:4 to cause a copy of the petition for appeal to be served (as in a civil action) on the following:

Julie V. Langan, Director  
Virginia Department of Historic Resources  
2801 Kensington Avenue  
Richmond, Virginia 23221



Justin W. Curtis