



CITY OF RICHMOND

DEPARTMENT OF PUBLIC UTILITIES
Office of the Director

June 5, 2020

VIA EMAIL steven.a.vanderploeg@usace.army.mil

Steven VanderPloeg
Norfolk District, Corps of Engineers
9100 Arboretum Parkway, Suite 235
Richmond, VA 23236

RE: James River Water Authority Proposed Water Supply Project (NAO-2014-00708)

Dear Mr. VanderPloeg:

The City of Richmond (the "City") appreciates this opportunity to comment on the James River Water Authority's (JRWA) proposed water supply project to serve Fluvanna and Louisa Counties (NAO-2014-00708) (the "Proposed Project").¹ The City is concerned about the Proposed Project's likely significant impacts and encourages the U.S. Army Corps of Engineers to prepare an Environmental Impact Statement to address the City's concerns.

The City is roughly 50 miles downstream the James River from the Proposed Project's intake near the mouth of the Rivanna River at Columbia, Virginia.² The City straddles the Falls of the James where the tidal and non-tidal stretches meet. The City's water utility relies on the James River as the sole water source for the Richmond Water Treatment Plant. The Richmond Water Treatment Plant treats an average of 55 Million Gallons per Day (MGD) from November thru May and 75 MGD from June thru October to serve the City's 62,000 water customer connections and to provide water directly through wholesale contracts to Henrico, Chesterfield, and Hanover Counties and indirectly to Goochland and Powhatan Counties. In total the City's water utility serves over 500,000 individual water users regionally. Additionally, the City uses the James River to maintain the flows of the Kanawha West, Haxall, East, City Docks and Manchester Canals. The City's water rights can be traced back over 200 years ago, and the City began asserting those rights, and other concerns, in relation to the Proposed Project as early as 2015.³

¹ The Proposed Project is described in JRWA's "James River Water Supply Project Supplemental Information Package NAO-2014-0070" with appendices which was submitted to you March 18, 2020 and is available at <https://www.nao.usace.army.mil/Missions/Regulatory/JRWAPermit/> in PDF format (collectively, "SIP").

² The City is sensitive to the fact that other commenting parties take issue with the Proposed Project's intake location because it is culturally and historically significant. The City at this time takes no position on the cultural and historical concerns related to the intake location. The proposed intake location is used in these comments only for discussion purposes.

³ See, Letters from Robert C. Steidel, City of Richmond, to Sarah Marsala, DEQ, dated September 21, 2015 and November 17, 2015, both attached hereto and incorporated herein.

While preserving and maintaining its firm water rights, the City voluntarily and actively participates with the Virginia Department of Environmental Quality (DEQ) and neighboring localities in regional water supply planning. The City is committed to ensuring reliable water supply to its customers, as well as stewarding minimum instream flows. DEQ determined minimum instream flows above the Falls of the James by evaluating levels necessary to preserve existing instream beneficial uses, namely aquatic habitat and recreation.

In addition to supplying drinking water, the City is responsible for the water quality of the James River. Therefore, the City is opposed to upstream activities that would cause water quality to backslide and burden the City's water, wastewater, and stormwater utility ratepayers.

The Proposed Project would allow the diversion of between 5.73 MGD and 8.39 MGD.⁴ JRWA's stated purpose for the Proposed Project "is to provide a new and reliable raw water supply of sufficient quantity to meet the short and long-term needs of Fluvanna and Louisa Counties for delivery to an agreed-upon T interconnection point planned for use by Fluvanna and Louisa Counties."⁵ The Proposed Project's intake would be on a 2.1-acre parcel owned by JRWA where water would be diverted and pumped less than three miles to a T interconnection point. From the T interconnection point, Fluvanna and Louisa Counties would pump and treat the diverted water for use throughout those jurisdictions (the "JRWA service area"). A substantial portion of the JRWA service area, i.e., most all of Louisa County, lies within the York River Basin, HUC 02080106. An Environmental Impact Statement is necessary to fully review the Proposed Project.

I. Water Rights

Water rights are property rights. Under Virginia's common law riparian doctrine, riparian owners, owners of property adjoining a water body, have the right to the reasonable use of that water body on their riparian land so long as that reasonable use does not interfere with other riparian owners' reasonable use. In *Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508 (1921), the Supreme Court of Virginia limited "riparian land" to a riparian owner's land adjoining their diversion point and within the watershed of the diversion point. Water rights "affected with a public interest or dedicated to public use" cannot be acquired by prescription.⁶

The City is a riparian owner with vested riparian rights to the reasonable use of the James River. Buttressing and supplementing the City's riparian rights, the City holds the rights to 337 MGD (521 cubic feet per second) that were originally granted by the Virginia General Assembly in the 18th Century. The Supreme Court of Virginia recognized rights by acquisition, among those now held by the City, in *Old Dominion Iron & Nail Co. v. Chesapeake & Ohio Ry. Co.*, 116 Va. 166, 81 S.E. 108 (1914). The City held James River water rights to 417 MGD before it conveyed Henrico County the rights to 80 MGD in 1994 as part of arrangements for Henrico County's water treatment plant. The City's water rights to 337 MGD are objectively quantifiable in addition to its riparian rights measured by the common law reasonable-use standard. The City values its water rights for consumptive use and for instream use to maintain the flows of the James River and the City's canals.

Other than the 2.1-acre parcel the Proposed Project's intake structure would sit on, the JRWA service area would be non-riparian land, much of which is outside the James River Basin. JRWA should not plan to acquire rights by prescription to any of the 337 MGD held by the City for public use.

Without expressly reducing preexisting common law riparian rights or water rights by acquisition, the Virginia General Assembly enacted the Virginia Water Protection (VWP) permitting program in 1989.⁷ VWP permits are

⁴ VWP Permit No. 14-0343, Part I, p. 7, October 30, 2017 (also SIP, Appendix D - Project Authorizations Agency Decisions, PDF p. 125) includes a table of three phased water usage tiers: 5.73 MGD, 7.45 MGD, and 8.39 MGD.

⁵ SIP, p. i (also JRWA - IP Submittal Information & Alt Analysis MAR2020, PDF p. 3).

⁶ *Lynchburg v. Chesapeake & O. R. Co.*, 170 Va. 108, 195 S.E. 510 (1938).

⁷ See, Va. Code § 62.1-44.15:20 et seq.

required for certain new water withdrawals.

“Conditions contained in a Virginia Water Protection Permit may include but are not limited to the volume of water which may be withdrawn as a part of the permitted activity and conditions necessary to protect beneficial uses. Domestic and other existing beneficial uses shall be considered the highest priority uses.”⁸

DEQ issued VWP Permit No. 14-0343 for the Proposed Project on November 20, 2015 and last modified that permit on October 30, 2017. Explicitly by its own terms, VWP Permit No. 14-0343 neither grants new water rights nor affects existing water rights.⁹

II. Water Quality

The City progressively improves water quality by partnering with stakeholders in the City’s award-winning RVAH2O clean water program.¹⁰ Under the umbrella of RVAH2O, the City’s Department of Public Utilities operates the City’s wastewater treatment plant, maintains and improves the City’s combined sewer system, and administers the City’s municipal separate storm sewer system. The City obtained Virginia’s first integrated Virginia Pollution Discharge Elimination System and Virginia State Water Control Law Permit, Permit No. VA0063177 (the “Integrated Permit”), to manage its water quality efforts more efficiently and effectively. Through the Integrated Permit, the City is responsible for meeting promulgated water quality standards and total maximum daily loads. The City addresses water quality parameters affected by low flows including dissolved oxygen (DO), algae blooms, and chlorophyll a. Algae growth contributes to chlorophyll a production, which, in turn, can indicate the presence of harmful cyanotoxins. Low flows increase treatment costs at the Richmond Water Treatment Plant to remove suspended solids, namely algae. Improved water quality and DO levels are credited as drivers for the recent resurgence of endangered anadromous Atlantic sturgeon up to the Falls of the James. The City promotes conservation through its James River Park System and other programs to make the James River more fishable and swimmable. The City also is a principle steward of the Historic Falls of the James State Scenic River, which is a component of the Virginia Scenic Rivers System.¹¹ Recreation on and around the James River is very much a part of Richmond life.

III. Proposed Project Review

The National Environmental Policy Act (NEPA) requires preparation of an Environmental Impact Statement for “major federal actions significantly affecting the quality of the human environment”¹²
The Corps

“should establish the scope of the NEPA document (e.g., the EA [Environmental Assessment] or EIS [Environmental Impact Statement]) to address the impacts of the specific activity requiring a DA [Department of Army] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.”¹³

⁸ Va. Code § 62.1-44.15:22(A).

⁹ See, VWP Permit No. 14-0343, October 30, 2017, Pt. II, p. 3 (Also SIP, App. D - Project Authorizations Agency Decisions, PDF p. 134) (“The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize injury to private property or any invasion of personal rights or any infringement of federal, state or local law or regulation.”).

¹⁰ See, <https://rvah2o.org/awards/>.

¹¹ See, Va. Code § 10.1-412.

¹² 42 U.S. Code § 4332(C).

¹³ 33 CFR PART 325 App. B § 7.b.1.

“*Significantly* as used in NEPA requires considerations of both context and intensity.”¹⁴ “Context” is case specific and incorporates analysis of the “affected region.”¹⁵ Significance “intensity” factors that are pertinent to the City’s Proposed Project concerns and listed in 40 CFR 1508.27(b) include:

- [. . .]
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- [. . .]
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- [. . .]
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Environmental Impact Statements must include, among other components, “the environmental impact of the proposed action” and “alternatives to the proposed action.”¹⁶ NEPA further requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”¹⁷

The Corps must balance public interest factors when evaluating Department of Army permit applications.¹⁸ Public interest factors pertinent to the City’s concerns with the Proposed Project include “general environmental concerns,” “fish and wildlife values,” “recreation,” “water supply and conservation,” and “considerations of property ownership.”¹⁹ The Corps must consult with the appropriate state and federal agencies in accordance with the Fish and Wildlife Coordination Act for wildlife conservation.²⁰ The Corps will impose permit conditions, if granting a permit, “necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement.”²¹

The City questions whether the Proposed Project could serve JRWA’s stated purpose of providing reliable water supply for the JRWA service area, particularly during low flows when diversions from the Proposed Project’s intake would be most likely to be challenged. As a threshold matter, the Corps should determine whether the Proposed Project could legally provide reliable water supply to the JRWA service area. The Corps should not approve the Proposed Project’s diversion to the diminution of the City’s water rights. Nor should JRWA make large Proposed Project capital investments, regardless of Corps approval, without clearly established rights to use the intended water supply.

¹⁴ 40 CFR 1508.27.

¹⁵ 40 CFR 1508.27(a).

¹⁶ See, 42 U.S. Code § 4332(C); 40 CFR 1508.11.

¹⁷ 42 U.S. Code § 4332(E).

¹⁸ 33 CFR 320.4(a) (“The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.”).

¹⁹ 33 CFR 320.4(a)(1).

²⁰ 33 CFR 320.4(c).

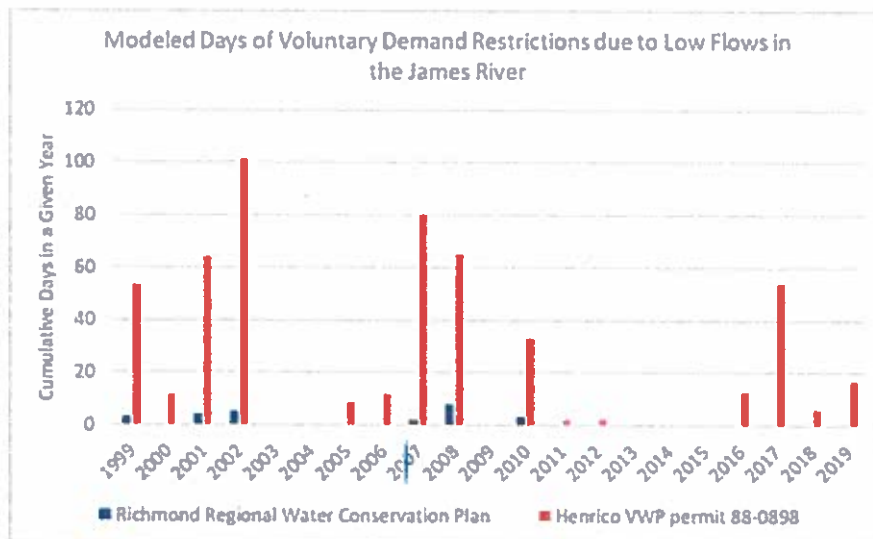
²¹ See, 33 CFR 325.4(a).

The Corps should carefully establish the scope of the Environmental Impact Statement review to adequately evaluate the Proposed Project intended to provide reliable water supply to the JRWA service area. The scope of the Corps' review should include an evaluation of the Proposed Project's potential effects downstream to the City and the cumulative impacts from extending water distribution beyond the T interconnection point throughout the JRWA service area. The Corps' review also should develop and communicate details about the proposed interbasin transfer, e.g., projected water demands and uses, and drought planning in the York River Basin portion of the JRWA service area.

The Proposed Project would significantly and adversely affect the quality of the human and natural environments by causing water to be diverted from the James River before it reaches the City. During low flows, the Proposed Project could significantly damage the City's existing instream and offstream beneficial uses. Even more troubling hydrologically and legally, a large portion of the Proposed Project's diversion would be pumped out of the James River Basin.

DEQ performed a modeling analysis in 2015 capping the City's water use at 95 MGD and making other assumptions to determine the expected downstream effects of VWP Permit No. 14-0343.²² Among its outputs, DEQ's modeling analysis showed that the Proposed Project would decrease flows during the drought of record (2002) at the Proposed Project intake by 3.1 percent and by 2.0 percent at the City.²³ Based on its modeling analysis, DEQ determined in its 2015 review that the Proposed Project ". . . will not materially diminish the quantity of water in the River."²⁴

DEQ's assertion that the Proposed Project's "[s]urface water impacts have been avoided and minimized to the maximum extent practicable,"²⁵ would be of little comfort to the City and its regional water supply partners during low flow water use restrictions.²⁶



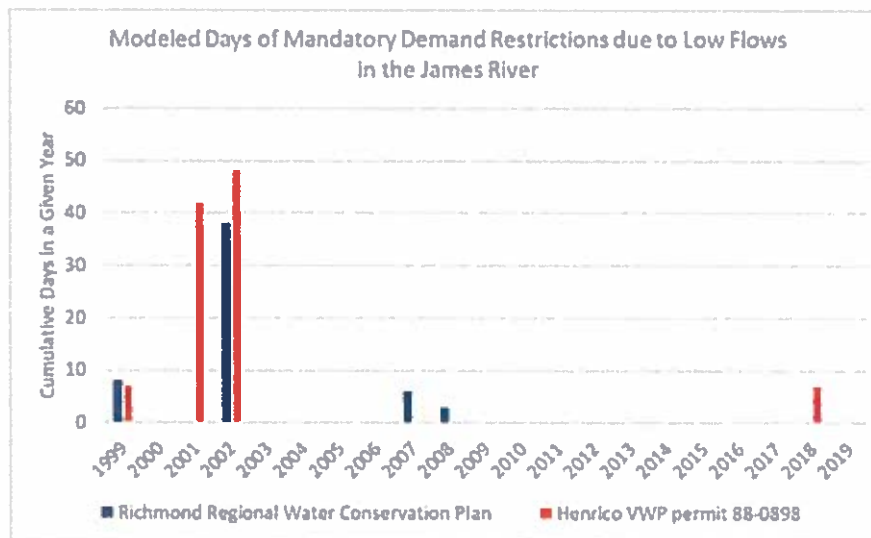
²² VWP Permit No. 14-0343 Fact Sheet, November 20, 2015, pp. 28 – 35 ("Attachment A – DEQ Modeling Summary") (also SIP, App. D - Project Authorizations Agency Decisions, PDF pp. 60 – 67). VWP Permit No. 14-0343 has been modified twice since DEQ's 2015 modeling analysis.

²³ *Id.* at p. 31 (also SIP, App. D - Project Authorizations Agency Decisions, PDF p. 63).

²⁴ *See id.* at p. 36 ("Attachment B – Summary of Public Comments and Staff Responses") (also SIP, App. D - Project Authorizations Agency Decisions, PDF p. 68).

²⁵ *Id.* at 1 (also SIP, App. D - Project Authorizations Agency Decisions, PDF p. 33).

²⁶ *See*, Graphs depicting modeled voluntary and mandatory demand restrictions at the City, prepared by Whitman, Reardon & Associates, LLP.



Irrespective of modeling and impact materiality, diverting up to 8.39 MGD at the Proposed Project's intake would infringe on the City's water rights, particularly the rights by acquisition to 337 MGD.

In response to the water rights concerns raised by the City in 2015, DEQ noted:

"DEQ may not adjudicate property rights as it's not within the Agency's purview or authority to do so. Moreover, the issuance of a VWP permit does not, and by law, cannot affect private property rights. DEQ does have responsibility for reviewing activities within the jurisdiction of VWP Permit Program to determine potential impacts that may result to existing beneficial uses. Such review was conducted for the proposed withdrawal project and based upon our analysis; staff determined the proposed project, as limited in the draft permit, will protect existing beneficial uses while meeting the permittee's purpose and need."²⁷

It is true that DEQ does not adjudicate water rights, and neither does the Corps. But that acknowledgment is not enough. Permitting the Proposed Project while dismissing as immaterial the Proposed Project's impact on the City's water rights to just the first 95 MGD and ignoring the City's remaining rights to 242 MGD (337 MGD less 95 MGD) would be poor governance. The Corps should figure into its Proposed Project review 337 MGD as the unencumbered flow that must reach the City. The Proposed Project's effect on the human environment, namely the level of the James River at the Falls of the James, is likely to be highly controversial and to cause a violation of Virginia water law.

The Proposed Project inherently represents a decision about a future consideration and involves cumulatively significant impacts because the water usage tiers in VWP Permit No. 14-0343 anticipate gradual water use increases and because water distribution improvements beyond the T interconnection point would be necessary. The Corps should assume the Proposed Project's diversion as the highest usage tier approved in VWP Permit No. 14-0343, 8.39 MGD, for significance and Environmental Impact Statement purposes.

Because the Proposed Project invokes several of the significance factors in 40 CFR 1508.27, the Proposed Project deserves Environmental Impact Statement review. In addition to the environmental impacts at and around the Proposed Project's intake, the Environmental Impact Statement should address the Proposed Project's low flow impacts as far downstream as the City. The Corps should consult with the appropriate state and federal agencies to

²⁷ VWP Permit No. 14-0343 Fact Sheet, p. 46 ("Attachment B – Summary of Public Comments and Staff Responses") (also SIP, App. D - Project Authorizations Agency Decisions, PDF p. 78).

determine what impacts to the City the Proposed Project would have on DO, algae blooms, chlorophyll a, endangered species, and water quality generally.

NEPA requires the Corps to evaluate Proposed Project alternatives including results of the permit not being issued.

JRWA identified Proposed Project source alternatives to the James River, including the Cobbs Creek Reservoir, but determined that the identified alternative sources would be inadequate to fulfill the Proposed Project's needs, or otherwise are infeasible.²⁸ The City appreciates JRWA's preference to achieve economies of scale and avoid lumpy capital costs. Although the City understands that the Corps will not evaluate endless or infeasible iterations of alternative combinations, alternative sources and the Proposed Project are not mutually exclusive. Rather, Proposed Project alternatives should include feasible alternative partial sources to supplement and, thereby, reduce withdrawals from the Proposed Project's intake. In addition to source diversification, alternatives should include feasible storage opportunities and innovative conservation approaches. By conditioning permit approvals on JRWA internalizing the cost of maintaining requisite flows to the City, the Corps would also incentivize water conservation.

Fluvanna and Louisa Counties currently rely on a network of water distribution systems and sources for their water supply needs.²⁹ Thus, it may not be overly burdensome to identify feasible alternative partial sources. Alternative partial sources with water distribution systems in place could present economic efficiencies to serve areas that are closer to an alternative partial source than the Proposed Project's intake. The City acknowledges that some potential alternative partial sources are James River tributaries. Special efforts should be made to identify alternative partial sources in the York River Basin to serve the JRWA service area in that watershed and minimize hydrologic disconnection. Along with alternative partial sources, the Corps should determine whether there are feasible storage opportunities within the JRWA service area. Alternative partial sources and storage could be managed to decrease withdrawals from the Proposed Project's intake during low flows.

Cobbs Creek Reservoir is a James River storage and flow augmentation project being constructed by Henrico County in Cumberland County. The mere fact that Henrico County committed to constructing Cobbs Creek Reservoir rather than simply increasing its withdrawal from the James River suggests that the Corps' Proposed Project review under NEPA, at a minimum, should consider storage options and related alternatives. JRWA considered Cobbs Creek Reservoir as an alternative source but determined that storage capacity and pumping costs were prohibitive.³⁰ Cobb Creek Reservoir should not only be evaluated as a stand-alone Proposed Project water source alternative. Rather, the Corps should also determine whether JRWA could purchase storage in Cobb Creek Reservoir, without incurring costs of pumping from Cobb Creek Reservoir to the JRWA service area. Any Cobb Creek Reservoir storage purchased by JRWA could be released during low flows to offset the Proposed Project's diversion.

To be sure, the City's water rights and water supply concerns weigh against the Proposed Project being in the public interest. As part of its public interest review, the Corps should independently determine JRWA's water needs. Additionally, the Corps should consider all potential environmental impacts and weigh such potential impacts against the Proposed Project's perceived benefits.

IV. Conclusion

An Environmental Impact Statement should be prepared to examine the significant water quantity and water quality impacts. The Corps should evaluate alternatives and permit conditions that would address the City's concerns discussed in these comments to ensure the Proposed Project is only approved if it is in the public interest.

²⁸ See, SIP, pp. 36 – 44 (also JRWA - IP Submittal Information & Alt Analysis MAR2020, PDF pp. 59 – 69).

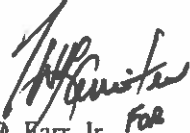
²⁹ See, SIP, pp. 27 – 32 (also JRWA - IP Submittal Information & Alt Analysis MAR2020, PDF pp. 50 – 55).

³⁰ See, SIP, p. 42 (also JRWA - IP Submittal Information & Alt Analysis MAR2020, PDF p. 67).

Steven VanderPloeg
June 5, 2020
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We thank you for your consideration and will be happy to provide any further information related to these comments that you may need.

Sincerely,



Calvin D. Farr, Jr.
Director



A. Ross Phillips
Assistant City Attorney



CITY OF RICHMOND

DEPARTMENT OF PUBLIC UTILITIES
OFFICE OF THE DIRECTOR

September 21, 2015

Ms. Sarah Marsala
Virginia Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218

Via email: sarah.marsala@deq.virginia.gov

Re: Virginia Water Protection Permit action revoke/reissuance of James River Water Authority
Permit No. 04-0805.

Dear Ms. Marsala:

Thank you for the opportunity to review and provide comment on the proposed action by the Virginia Department of Environmental Quality (DEQ) to revoke/reissue the James River Water Authority (JRWA) permit No. 04-0805. We previously provided informal comments concerning this permit action and many of those comments are reiterated below.

As previously noted in earlier correspondence by the City of Richmond (City) with DEQ, in response to several recent DEQ actions regarding water supply, Richmond has had to restate our water supply premise under which we operate and base assessment of all DEQ legislative and administrative proposals: in addition to its common law riparian rights, the City has obtained by conveyance the right to withdraw at least 645 cubic feet per second (cfs), or 417 million gallons per day (mgd) of water from the James River. This right is a property right obtained through private conveyances, originating in a grant from the Commonwealth of Virginia over two centuries ago. These rights are reinforced and supplemented by the City's riparian rights and rights derived from the contracts with the James River and Kanawha Company in 1880 and 1890. The rights now owned by the City were affirmed in 1914 by the Supreme Court of Virginia in a case involving a predecessor in title. The City of Richmond will view any increase in the proposed water withdraw from the currently permitted amounts in the James River basin in context of the City's water rights and will vigorously defend against actions which we believe will infringe on those rights.

The City still believes the proposed permit should: 1) not increase the previously permitted water withdrawal from the James River on either a daily or instantaneous basis above the 5.7 mgd contained in the current permit; 2) require stringent water conservation measures as exist for the Henrico WTP VWP permit; and 3) if necessary allow for a more detailed review of the impacts of the proposed water withdrawals proposed in the application from the owner. Perhaps for a more effective process DEQ could reconsider its decision to process this action as a reissuance/renewal of the existing permit held by Fluvanna County. Due to the magnitude of the proposed changes in withdrawal amounts and location, we think that it could be treated as an entirely new permit which if approved would supersede the existing VWP permit originally issued to Fluvanna County and subsequently transferred to the JRWA.

The following are specific comments related to the proposed permit VWP Individual Permit No. 14-0343 for James River Water Authority:

Sarah Marsala

September 21, 2015

Re: Virginia Water Protection Permit action revoke/reissuance of JRWA Permit No. 04-0805

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1. Part 1, Section A – As drafted this section authorizes only the construction and operation of intake structures, and does not specifically authorize a withdrawal of water from the James River. Therefore the permit as drafted does not authorize a withdrawal of water. If the intent is to authorize a water withdrawal as described in Part 1, Section F, that would be viewed as a significant change to the proposed permit and require the proposed permit to be re-drafted and sent out for Public Notice.
2. Part 1, Para C.3 – “Flows downstream of the project area shall be maintained to protect all uses”. The proposed water withdrawals will negatively impact downstream uses in the Richmond area including existing public water supply uses. The permit does not provide adequate requirements or information related to what the permittee will do to protect downstream uses. The permit does not provide adequate requirements or information related to what the permittee will do to augment flows in the James River to offset the water withdrawal.
3. Part 1, Sections C & D – Instream construction of the James River intake has the potential to adversely affect the water quality of downstream public water supply intakes for Henrico County and the City of Richmond.
4. Part 1, Para F.2 – The permit states the safe yield of the surface water withdrawal project is 4.12 mgd, but provides no basis for this determination. What was the basis for the 4.12 mgd annual average safe yield determination for this project? What is the safe yield during recurring periods of low river levels during summer/fall seasons?
5. Part 1, Para F.3 – The increases in authorized withdrawal limits compared with the existing JRWA permit appear unjustified at this time. The City of Richmond views these increases as infringing upon our recognized legal rights to the first 645 cfs of flow in the James River.
6. Part 1, Para F.3 – The tiered water withdrawal limits table contains limits for maximum daily, monthly and annual withdrawals but does not contain any limits for maximum hourly or instantaneous withdrawal. We would like to see the table expanded to include a maximum instantaneous limit not higher than the maximum daily limit to protect downstream uses during periods of low flow in the James River.
7. Part 1, Para F.4 – The implication here that the permittee does not yet have a capital plan for improvements to transport or treat the proposed water withdrawals clearly indicates there is no actual need for increasing the withdrawal limits beyond those authorized in the existing JRWA permit.
8. Part 1, Para F.5.d and e – These two paragraphs appear to render meaningless the schedule imposed in paragraphs 5.a, b and c for completing necessary capital improvement to transport and treat water for public water supply purposes. Again this lack of a defined need coupled with the failure of the Authority to act on its existing VWP permit calls into question the Authority’s need to increase its water withdrawal limits.
9. Part 1, Para F.7 – What exactly does it mean that “the permittee shall make reasonable effort to coordinate with the operators of the Cobb Creek Reservoir ...”? This provision is too vague and needs to be clarified prior to the permit being re-proposed for public notice and comment.

Sarah Marsala

September 21, 2015

Re: Virginia Water Protection Permit action revoke/reissuance of JRWA Permit No. 04-0805

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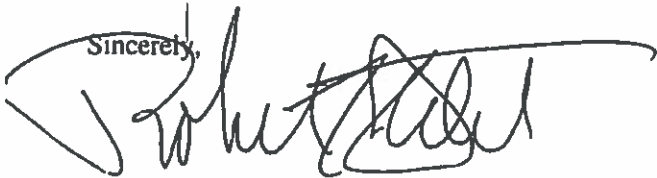
10. Part I, Para F.8 – This section appears weak to the point of being useless or meaningless with respect to providing for augmentation of the flow in the James River being withdrawn by the JRWA. This section provides no protection of existing downstream uses. The protocol needs to be established in advance of the permit being issued and incorporated as an enforceable provision of the permit and subject to public review and comment.
11. Part I, Para F.9.a – Table for Drought Stage thresholds is blank. Subparagraph b of this section also seems to be incomplete and therefore cannot be fully evaluated. This information needs to be provided as part of the proposed permit and the permit re-proposed and sent out for public notice and review.
12. Part I, Para F.12 – The proposed 10% accuracy for metering withdrawal flows is not adequate for pumped and piped raw water transmission system. Recommend an accuracy tolerance of plus or minus 2%.
13. Part II, Section H – We request that the provision for “automatic transfer” be stricken from this permit.
14. Part II, Section I – The proposed increased water withdrawal limits contained in this permit will infringe on property rights held by the City of Richmond to water in the James River.
15. Attachment A – Water Conservation – This section only covers mandatory water use restrictions that are effective only when the State declares a Drought Emergency. We would like to see the JRWA apply water restrictions in a manner consistent with and coordinated with other downstream public water supply systems supplied by the James River (City of Richmond, Henrico County, Chesterfield County and Hanover County). Additionally, the provisions for water use restrictions contained in Attachment A are not as detailed or restrictive as those used in the metro Richmond area. For instance it is not clear what restrictions are placed on the watering of established lawns.

The following provision found in Henrico's permit should also be applied to this permit:

“The permittee shall enact a water conservation plan during low flow conditions. Specifically, the permittee shall take steps to call for voluntary conservation whenever the 14 day rolling average of natural streamflow falls below 1700 cubic feet per second (cfs) from November 1st through June 30th or below 1200 cfs from July 1st to October 31st. The permittee shall also take steps to enact a mandatory conservation plan whenever the 14 day rolling average of natural streamflow falls below 1250 cfs from November 1st to June 30th or below 700 cfs from July 1st to October 31st.”

The City of Richmond appreciates the opportunity to review and provide comment on the proposed VWP permit action for the James River Water Authority. Should you have any questions regarding the comments we have provided please feel free to contact me.

Sincerely,



Robert C. Steidel
Director



CITY OF RICHMOND

DEPARTMENT OF PUBLIC UTILITIES
OFFICE OF THE DIRECTOR

November 17, 2015

Sarah Marsala
Virginia Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218

Via email: sarah.marsala@deq.virginia.gov

Re: Additional Comments related to Virginia Water Protection Permit action revoke/reissuance of James River Water Authority Permit No. 04-0805

Dear Ms. Marsala:

Thank you and the other members of the Virginia Department of Environmental Quality for taking the time to meet with us on November 6 to discuss DEQ's proposed action to revoke and reissue the James River Water Authority (JRWA) permit No. 04-0805, and comments earlier provided by the City of Richmond concerning the proposed permit action. We also appreciate DEQ providing a fact sheet for the proposed permit during the meeting.

As noted during the meeting, in our written comments, and as previously noted in earlier correspondence with DEQ, we feel it is necessary to restate our water supply premise under which the City operates and assesses legislative and DEQ proposals: in addition to its common law riparian rights, the City has obtained by conveyance the right to withdraw at least 337 million gallons per day (mgd) of water from the James River. This right is a property right obtained through private conveyances, originating in a grant from the Commonwealth of Virginia over two centuries ago. The rights are reinforced and supplemented by the City's riparian and prescriptive use rights. The rights now owned by the City were affirmed in 1914 by the Supreme Court of Virginia in a case involving a predecessor in title. The City views any increase in proposed withdrawals from the James River that could adversely reduce flows in the Richmond area within the context of the City's water rights and will vigorously defend against actions which we believe will infringe on those rights. The City views the rights as important both from a water withdrawal standpoint for the City's water utility, and from an instream standpoint for minimum flows in the James River and in the and Kanawha Canal.

After our discussion on November 6 and review of the fact sheet provided at the meeting, we still believe the available record does not support issuance of the proposed JRWA permit for an increased water withdrawal. Our concerns fall into two general categories – procedural and technical.

Our procedural concerns center on the need for adequate notice and opportunity for comment. DEQ released the proposed permit for Public Notice in late August, with a 30-day comment period. However, as our previous comments demonstrate, the record is inadequate to provide reasonable support for issuance of the proposed permit. We recently learned that the fact sheet generated in connection with the proposed permit may have existed during the public comment period, but the public availability of the fact sheet does not appear to have been clearly made known, and, in fact, the City was unaware of its availability until the November 6 meeting. The lack of an openly available fact sheet made it impossible for the City or any other interested party to adequately review and provide comments concerning the proposed permit during the comment period. Many of our earlier comments noted the vagueness of the proposed permit requirements and this is directly related to the lack of an adequate record.

For instance, we commented on the proposed requirement that the permittee "coordinate" with the Cobb Creek Reservoir operator. The proposed permit contains no specific actions for accomplishing the proposed coordination requirement. The fact sheet provided at the November 6 meeting includes a short response to comment which indicates that the proposed coordination would be tied to a requirement in the permit for JRWA to provide a plan for DEQ approval. Vague permit conditions and requirements to develop plans instead of including specific permit requirements make objective review of the proposed permit very difficult. Among other things, the City is concerned that DEQ has proposed to impose as a permit condition the management plan proposed by the applicant, but the information available concerning the proposed plan includes very few specifics. The public, therefore, has not been provided an adequate opportunity to comment.

Given that the proposed permit was released for public notice without clear supporting documentation providing an adequate basis for review, we believe the process in this instance does not meet the minimum statutory requirements for an adequate opportunity for notice and comment.

With regard to technical issues, we believe many of our earlier stated comments are still valid; however, our main concern is the lack of data in the fact sheet to support DEQ's numerous statements that the proposed increased water withdrawal will not adversely affect downstream water quality standards. The proposed permit and fact sheet both indicate that downstream flows will be maintained to protect downstream uses. However, despite the fact that water quality standards are designed to protect aquatic life and that one of the primary measures to assess protection of aquatic life is dissolved oxygen, the fact sheet fails to include data to show that an assessment has been undertaken of the impact of the proposed withdrawals on dissolved oxygen in the River or that DEQ has otherwise considered dissolved oxygen. Yet, the James River is currently listed in the State's most recent integrated report as being impaired, due to low dissolved oxygen levels. Given that the River currently is impaired, it is hard to understand how a proposed permit designed to reduce the flow in the River could possibly not contribute to further degradation of the aquatic habitat specific to dissolved oxygen. At a minimum, an assessment of the impact on dissolved oxygen levels should be conducted prior to moving forward with the proposed permit.

We also believe the assessment of potential for adverse impact due to reducing the flow in the River should include impacts related to algae, especially harmful algal blooms (HABs). The potential for HABs in the area below the Falls of the James is well documented in connection with low flow periods of the River.

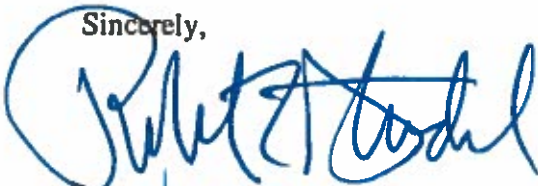
The fact sheet also includes data that do not seem accurate based upon what is known about current water withdrawals. For instance, as noted earlier, the City has obtained the right to withdraw at least 337 mgd from the James River. Further, the City's plant is rated for a 132 mgd send-out, which in turn requires a raw water intake of about 140 mgd. The fact sheet indicates the City has a permit max of 95 mgd. The City does not have a VWP permit for its plant and so it is not at all clear where the number comes from. The fact sheet also indicates the City is providing 35 mgd of Henrico's 75.2 mgd permitted amount. Henrico's plant capacity was initially 55 mgd when built and is now expanded, or very close to completing expansion, to 80 mgd. (The City conveyed Henrico County James River water rights to 80 mgd in 1994 as part of arrangements for the County's water treatment plant).

Although the City appreciates that the issuance of a VWP permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does such a permit authorize injury to private property or any invasion of personal rights, the City believes it's proper and prudent that DEQ recognize such rights. The City also believes it appropriate for DEQ to consider possible adverse impacts on the River's beneficial uses protected by the City's water rights, and to ensure that the proposed withdrawals not cause or contribute to downstream violations of water quality standards.

As stated previously, the City believes the proposed permit should: 1) not increase the previously permitted water withdrawal from the James River on either a daily or instantaneous basis above the 5.7 mgd contained in the current permit; 2) require stringent water conservation measures as exist for the Henrico WTP VWP permit, preferably developed through proactive discussions with other James River interests; and 3) provide the applicant's analysis of the impacts upon water quality standards (at a minimum dissolved oxygen and algae) of the proposed water withdrawals. The City urges DEQ to reopen the public record and allow additional public comment in connection with these concerns. DEQ-facilitated discussions among the interested parties might prove beneficial.

The City of Richmond appreciates the opportunity to review and provide comment on the proposed VWP permit action for the James River Water Authority. Should you have any questions concerning our comments, please feel free to contact me.

Sincerely,



Robert C. Steidel
Director

John J. Buturla, Deputy Chief Administrative Officer
Patrick Bradley, Water Quality Manager
Rosemary Green, Deputy Director II
David Kearney, Assistance City Attorney