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May 18, 2009

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY / CLIENT COMMUNICATION**

Mr. Thomas L. Frederick, Jr., P.E.  
Executive Director  
Rivanna Water & Sewer Authority  
695 Moores Creek Lane  
Charlottesville, Virginia 22903-9016

Dear Mr. Frederick:

This letter responds to your recent request for advice concerning the existing Corps of Engineers and Virginia Water Protection ("VWP") permits for activities associated with construction of the Expanded Ragged Mountain Reservoir and South Fork Rivanna River Pipeline project. As I understand it, you wish to know if these existing permits might be placed at risk if the water demand projections on which they were based were to be lowered, or if the Authority were to seek to lower the height of the Expanded Ragged Mountain Reservoir, or if it were to perform an engineering feasibility study of dredging the South Fork Reservoir that would result in a more detailed and updated estimate of potential costs.

You have asked that I not undertake an exhaustive and detailed legal opinion on these questions, but rather that I provide a short summary of practical conclusions based on my existing knowledge and experience in the field of municipal water supply, which has been continuous since the early 1980's and encompasses work on five major projects in several states, several of which have involved substantial federal and state litigation.

Before turning to your question I wish to make two observations. First, I am not aware of any credible information suggesting that the long-term water demand projections properly could, or should, be lowered; nor that reducing the height of the Expanded Ragged Mountain Reservoir is consistent with achieving project purposes and environmental mitigation goals; nor that dredging South Fork Rivanna Reservoir for water supply purposes is anything but impracticable and more environmentally damaging than the permitted project. My advice relates to the purely hypothetical question, "What if these things were done, nevertheless?"

Second, I wish to point out that, in the absence of efforts by the Authority to modify its permits or

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restudy their bases, and so long as the Authority diligently pursues completion of the project as permitted, the existing regulatory approvals are reasonably secure and may be relied upon with substantial assurance. You are undoubtedly aware of the recent court decision regarding the King William Reservoir. Judge Henry H. Kennedy, Jr. of the United States District Court for the District of Columbia in *Alliance to Save the Mattaponi v. U. S. Army Corps of Engineers*, No. 06-02168 (D. D.C. March 31, 2009), invalidated issuance of the Corps of Engineers permit for that project. At present, neither the Authority's Corps permit, nor its VWP permit, is vulnerable to that kind of judicial attack by individuals or citizen groups who may be dissatisfied with them. Among other things, no Notice of Appeal was filed within the prescribed time with respect to the VWP permit (Rule 2A:2, Virginia Supreme Court Rules). As to the Corps permit, no one participated in the Corps' administrative process by filing comment when the Corps issued its public notice of the permit application as is required to challenge federal agency action.

This situation could change if the Authority were not to pursue the permitted project diligently, and in the interim were to lower demand projections, or to alter the analysis of alternatives by lowering the pool elevation (and yield) of the Expanded Ragged Mountain Reservoir project or by performing additional, more detailed evaluation of dredging South Fork Rivanna Reservoir.

Both the Corps, and the Virginia State Water Control Board, through the Department of Environmental Quality, have discretion to suspend, modify, revoke, reopen or reissue permits based on changed circumstances or new information. In my experience, these agencies are more likely to invoke that authority when the permit applicant has not expended substantial resources in reliance upon an existing permit or has not otherwise diligently pursued completion of the permitted project, and considerable time has passed. Once reopened, it would likely be beyond the ability of the Authority to confine agency proceedings narrowly to particular issues or potential specific modifications. On the contrary, demand projections, project size and yield, and available alternatives are fundamental to and usually do affect the overall selection of "the least environmentally damaging, practicable alternative." In short, the extent, duration, expense, and outcome of further regulatory actions would be entirely unpredictable. The Authority should assume that any participant displeased by the result of such further regulatory proceedings would also have the opportunity to seek judicial review of both agencies' final actions.

To summarize, restudying and altering demand projections, seeking to lower the height of the Expanded Ragged Mountain Reservoir, or re-evaluating the practicability of dredging South Fork Rivanna Reservoir for water supply purposes could place the Authority's existing permits at risk and result in new and unpredictable regulatory processes that are entirely unpredictable in terms of scope, duration, expense and outcome.

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Please let me know if you have questions or desire further explanation of any of these points.

Sincerely,

A handwritten signature in black ink, appearing to read "William B. Ellis". The signature is written in a cursive style with a prominent flourish at the end.

William B. Ellis