

VIRGINIA:

BEFORE THE STATE WATER CONTROL BOARD

IN RE:

VIRGINIA WATER PROTECTION PERMIT NO. 93-0902

CITY OF NEWPORT NEWS, VIRGINIA
APPLICATION BY CITY OF NEWPORT NEWS FOR PERMIT
EXTENSION

PETITION FOR FORMAL ADMINISTRATIVE HEARING

This Petition for Formal Administrative Hearing is filed in accordance with Virginia Code §§ 2.2-4020, 62.1-44.25 and Procedural Rule No. 1 (9 VAC 25-230-100, *et seq.*).

1. **Petitioner.** The Petitioner is the City of Newport News (“City”), a Virginia municipal corporation. Counsel for the City is identified below the signature to this Petition.

2. **Matter Requiring Formal Hearing.** The matter giving rise to this petition is the September 6, 2006, decision of the State Water Control Board (“Board”) to deny the City’s request to extend the term of Virginia Water Protection (“VWP”) Permit No. 93-0902 (“Permit”) by five years, from December 22, 1997, to December 22, 2012. *See* letter dated September 12, 2006, from Ellen Gilinsky, Ph. D., Director, Department of Environmental Quality, Division of Water Quality, to Randy W. Hildebrandt, City Manager, City of Newport News, Virginia (“Decision Letter”).

3. **Interest of the Petitioner.** The Permit authorizes the City to construct

and operate the King William Reservoir Project (“Project”). The City requested the proposed Permit term extension to allow sufficient time to undertake and complete, and to give the Board, the Department of Environmental Quality (“DEQ”) and the public time to review, the several important reports and plans required by the Permit. Since 1997, when the Permit was issued, the subject matter of these reports and plans – wetlands mitigation, possible salinity changes and possible effects on fisheries and aquatic plant life – has been under direct and essentially continuous review by the Virginia Marine Resources Commission, the United States Army Corps of Engineers (“Corps”) and the Virginia courts. In November 2004, the Virginia Marine Resources Commission granted its permit for the Project. In November 2005, the Corps issued its Section 404 permit for the Project and the Virginia Supreme Court rejected all third-party challenges to the validity of the Permit.

Because of the overlapping and duplicative requirements of these several permits, it was not possible to specify the scope and detail of these reports and plans and start these studies, or to begin construction of the Project, before these other agency and court determinations were made. The City must spend several years of effort and millions of dollars to complete these plans and reports. Therefore, it is impossible to complete these plans and reports before December 22, 2007, which is the end of the ten-year Permit term. It was and is contemplated by the City and DEQ staff, as well as by the terms of the Permit, that these studies and plans would be completed prior to June 22, 2007, when the City must file an application for renewal of the Permit. For all these reasons, the City requested, and the Board should have

granted, the extension of the Permit term until December 22, 2012, which would allow the City to complete these studies and reports and give the DEQ and Board the information needed to process the City's application for renewal under the requirements of the Virginia Code and applicable VWP permit regulations.

4. **Reasons the Proposed Action Would be Contrary to Law.** The Board's regulation, 9 VAC 25-210-185, authorizes an extension of the term of a Virginia Water Protection ("VWP") permit so long as the permitted activity has not changed. The Project has not changed, and statements to the contrary by those commenting on the extension request are not correct. The Virginia Administrative Process Act (Va. Code §§ 2.2-4000, *et seq.*) requires that an agency follow its established procedures. Board regulation 9 VAC 25-230-90 requires that the Board's decisions be reduced to writing and contain a statement of the basis for its decision. The Board's Decision Letter fails to state the basis for denial of the proposed extension. The Decision Letter and proceedings at the September 6 meeting fail to show that, in reaching its decision, the Board applied the standard set forth in 9 VAC 25-210-185. The Board's decision, therefore, is unlawful for failure to follow required procedures and, to the extent that that decision is based on any fact except possible change in the Project, the decision is erroneous as a matter of law and lacks substantial evidential support. The City requests a formal hearing to fully develop the administrative record and demonstrate to the Board that the requested Permit extension should be granted.

5. **Statement of Availability.** The City and all persons representing the

City will be available without cost to any other party to appear at and participate in the requested hearing.

6. **Relief Requested.** The City requests that the Board conduct a formal administrative hearing on the requested extension of the Permit pursuant to Virginia Code §§ 2.2-4020, 62.1-44.26 and the Board's Procedural Rule No. 1 (9 VAC 25-230-100, *et seq.*).

Respectfully submitted,

THE CITY OF NEWPORT NEWS, VIRGINIA

BY: _____
Randy W. Hildebrandt, City Manager

DATED: October _____, 2006

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