



JAMES RIVER WATER AUTHORITY

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September 16, 2019

By Email (julie.langan@dhr.virginia.gov)

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

Re: James River Water Authority Project
Revised Treatment Plan
USACE Action ID Number: NAO-2014-00708
DHR File No. 2015-0984

Dear Director Langan:

On behalf of the James River Water Authority (JRWA) and the 60,000 residents of Louisa and Fluvanna Counties we represent, I am writing you to convey our great disappointment in your September 6, 2019 letter to Eric Dahl denying the JRWA's anticipatory burial permit application. It was surprising to receive that denial without any advance notice. There are several assertions in the letter that are not accurate and others that are unclear. If JRWA had been given notice and an opportunity to sit down with you and your staff before the denial letter was issued—which is required by your regulations (17VAC5-20-60.E)—we could have resolved some or all of these issues. Because we were not afforded due process, we must respond to the assertions in your letter after-the-fact and urge you to immediately reconsider this improvidently issued decision.

Project Archaeologist's Qualifications

JRWA unequivocally disagrees with the statement in your letter that the "archaeological consultant associated with this project does not meet the requirements established by the Secretary of the Interior and promulgated through 36 CFR 61 as the Professional Qualifications Standards for Archaeology." Before outlining the reasons for this disagreement, we must first express our strong objection to the manner in which you came to this decision.

JRWA did not become aware until *after* your denial letter that you independently contacted the archeological consultant, Ms. Carol Tyrer, by email on August 16, 2019, for the stated purpose of scheduling an in-person meeting to “discuss questions that relate to [JRWA’s] burial permit application.” Although your email said you would “appreciate” if Ms. Tyrer would bring copies of her academic transcript, there was no clear indication that the purpose of the meeting was to disqualify her standing as a professional archaeologist or to determine whether there were grounds to deny JRWA’s permit.

Your actions were not in line with the fair and transparent manner Virginia’s citizens expect state agencies to serve persons, businesses, and fellow arms of Virginia’s government who come before them seeking permits and approvals. As you are aware, Ms. Tyrer is a sub-consultant to JRWA’s engineering consultant and has no direct contractual relationship with the Authority. It was inappropriate for DHR to schedule a meeting with this sub-consultant, and to use that meeting as the basis to deny JRWA’s permit application, without notifying the Authority or its counsel. If appropriate notice had been provided, JRWA would have evaluated the accusation and prepared to defend the consultant’s work on the project and our pending permit application. We were denied that opportunity.

Your action was also grossly unfair to the consultant, who has been a valued member of the project team for several years. Your August 16 email gave the consultant no warning that she should have been prepared to defend her standing as a professional archaeologist, which is her livelihood. Had she been informed of the true purpose of the meeting and the fact that her continued livelihood was in the balance, no doubt she would have secured personal legal representation and prepared a robust defense.

We next turn to the archeological consultant’s qualifications. DHR is well-aware that she has been a principal archaeologist on hundreds of cultural resource studies, data recoveries, and burial permits throughout Virginia and surrounding states. It is our understanding that her work has been accepted by DHR in each of these cases. Indeed, we must remind you that in the previous anticipatory burial permit you issued for this project on October 4, 2017, you stated about this same consultant: “The Department has reviewed the vita of the professionally-qualified archaeologist responsible for the proposed work and *has found her qualified to complete the work.*” We must also remind that your staff, Joanna Wilson Green, stated in an email to JRWA dated November 22, 2017 that: “The consulting parties agree that [*the consultant*] will be on site at all times during deep testing, and that all earthmoving conducted pursuant to this deep testing will be performed under their direct supervision.”

Your letter provides no justification for the assertion that the consultant’s qualifications do not meet the standards in 36 C.F.R. Part 61 or 17VAC5-20-40.C for archeology. Since your denial letter was issued, we have undertaken our own evaluation of her qualifications. The Secretary of Interior standards incorporate three basic components: “academic degrees or comparable training;

professional experience; and products and activities that demonstrate proficiency in the field of historic preservation.” 62 Fed. Reg. 33708, 33709 (Jun. 20, 1997). Given that Ms. Tyrer has been a practicing archaeologist full time for over 35 years, has authored over 700 publications and technical reports, and managed hundreds of field studies and research projects with DHR’s involvement, we presume the professional experience and demonstrated proficiency components are not in question. The academic component requires a graduate degree in “archaeology, anthropology, or closely related field.” Anthropology is defined as the “study of human beings and their ancestors through time and space and in relation to physical character, environmental and social relations, and culture.” Merriam-Webster’s Dictionary. Ms. Tyrer holds a graduate degree in “Global Affairs” with a “World History and Culture Specialty.” Her graduate coursework included relevant studies of Native American literature, natural science, cultural positioning, graduate research and writing, religious studies, and cultural competition and conflict. Furthermore, we note that the Secretary of Interior’s guidance permit consideration of an archaeologist’s undergraduate degree in determining whether the “closely related field” academic component of the standards have been satisfied. 62 Fed. Reg. at 33711. Ms. Tyrer obtained an undergraduate degree in Sociology and Anthropology with an “Anthropology Specialty” in 1984. Her course of study included freshman through senior level archaeological classes including theory, field methods, laboratory methods, artifact identification, and an archaeological field school. We fail to see how DHR could justifiably conclude how the consultant is not qualified as a professional archeologist.

Existing Research Design and Data Recovery Plan

Your letter states that the “failure of the archaeological consultant to meet the above requirements renders the information previously provided regarding the scope of the permit application and associated plans unreliable.” It further states the “existing research design and data recovery plan”—which we assume is a reference to the Treatment Plan—“must be reviewed and revised by a qualified archaeological consultant to meet . . . the Department’s standards.” There is no reasonable basis for this assertion.

As we believe you are aware, Ms. Tyrer was not the only archaeologist who participated in the project’s Phase I and II fieldwork and the development of the research design or data recovery plan. As the email from Ms. Green referenced above noted, other archeologists who participated in the previous fieldwork, including the onsite supervisor, met the professional qualification standard. The existing research design and data recovery plan includes multiple authors, at least two of whom (not including Ms. Tyrer) meet the professional qualification standards. The statement that those plans are “unreliable” due to Ms. Tyrer’s purported lack of qualifications ignores the participation and review by other archeologists on the team. We must reiterate that this is a topic we could have resolved in advance had JRWA been provided proper notice of the Department’s concerns and tentative decision to deny the burial permit application.

Notwithstanding our firm belief that Ms. Tyrer is eminently qualified, and in response to requests from consulting parties for a peer review of those documents, JRWA has issued a Request for Proposals for additional archeological consulting services to review the project's research design and data recovery plan. Proposals remain under review, and no contract has yet been awarded. We note this, however, because even if DHR's concerns about Ms. Tyrer could not have been resolved satisfactorily, JRWA could have offered to substitute a different archeologist for Ms. Tyrer for purposes of the anticipatory burial permit application. This is further reason why DHR's failure to follow its own regulations before denying the permit application is counterproductive and has harmed JRWA.

Approval of the Monacan Indian Nation

JRWA objects in the strongest possible terms to the assertion that the research design and data recovery plan "must . . . meet the approval of the Monacan Indian Nation, who are directly affected by this project." The assertion that the project "directly affects" the Monacans is factually wrong. The project is wholly situated on private—not tribal—property. In fact, Chief Dean Branham stated publicly on September 9, 2018 that the tribe was not aware of this site until JRWA brought it to their attention. The tribe's only access to the project site has been at JRWA's invitation. Neither construction nor operation of this water supply project will directly affect the Monacans.

Your assertion also is legally incorrect. Because this project does not touch tribal land, the Monacans' status under the National Historic Preservation Act is that of a consulting party—nothing more or less. The tribe's federally recognized status does not affect their lawful role in the Section 106 process. It is wholly inappropriate, and we believe unlawful, for DHR to purport to cede its decision-making authority to a consulting party.

In short, the Monacans have stated publicly that they will not agree to any research design or data recovery plan for the site, and your letter appears to state that the research design and data recovery plan must be approved by the Monacans. In light of the Monacans' recent well-publicized statements about the project, we read your letter as effectively granting the Monacans a veto power over the project. If our reading of the letter is correct, it appears that consultation is at an impasse.

Omission of Information Relating to Archeological Study of Potential Burials

JRWA consulted with the Monacans prior to filing the anticipatory burial permit. As we have relayed to DHR on several occasions, the message conveyed to JRWA was clear that the Monacans would object to any archeological study of burials in the unlikely event any unknown burials were discovered during further excavations. The Monacans also specifically requested that no public notice be issued for the burial permit application. JRWA proceeded in good faith to honor those requests. However, your letter cites comments from the Monacans' legal counsel to the contrary as a basis for permit denial.

JRWA has no objection to providing an archeological study proposal for burials—should any be found—and in proceeding with public notice of the application. We object to the unclear and constantly shifting expectations being placed on this project. The comment letter referenced in your letter were not submitted in good faith; it was an obvious attempt to obstruct the project and make issuance of a permit with reasonable conditions impossible. With each new comment letter that is submitted by that party, the expectations and demands change. DHR should not take those comments at face value and allow that party to make a mockery of the consultation process.

Landowner Permission

JRWA disagrees with your statement that the application must be denied because JRWA had “not obtained landowner permission for access to those portions of the project area not with the legal ownership of JWRA” The order from the Circuit Court of Fluvanna county which was attached to the application established the JRWA’s absolute right to use the property in accordance the easements described therein. As owner of the water line easement, the JRWA has the right “to erect, construct, install and lay and thereafter use, operate, inspect, repair, maintain, replace, and remove utility lines for the purposes of provision and conveyance of water and appurtenances thereto.” Additionally, “JRWA its agents, employees and successors and assigns, shall have full and free use of the said easement and rights for the purposes named herein and all rights and privileges reasonably necessary to the enjoyment and exercise of the Water Line Easement.” The JRWA, as the owner of the easement, has all the legal and necessary property rights to excavate within the easement, including the potential to discover and remove any human remains, and therefore, is the real party in interest with respect to the ownership of the property at issue.

The intent of the easement is to give JRWA the right to take any reasonably necessary action to construct and install the utility lines, including the excavation and removal any human remains contained within the easement. As a matter of law, the underlying property holder that granted the easement to the JRWA cannot unreasonably interfere with the easements granted to the JRWA. See the Virginia Supreme Court’s decision in *Walton v. Capital Land*, 252 Va. 324 (1996). Consequently, the JRWA as the owner with the control over the property rights at issue is the “landowner” that is required to sign the application for the burial permit under 17VAC5-20-40. The underlying landowner does not have the legal authority to deny the JRWA’s rights contained in the easement and therefore, is not the appropriate person to sign the burial application.

Also, the Virginia Supreme Court has defined the owner of an easement as a “landowner.” “An easement is a privilege held by one landowner to use and enjoy certain property of another in a particular manner and for a particular purpose. This privilege encompasses an affirmative right to use and enjoy the encumbered property free from interference by the grantor of the easement or by other persons.” *Anderson v. Delore*, 278 Va. 251. Additionally, although 17VAC5-20-10 does not specifically define the term “landowner,” the Virginia Code has elsewhere. For example, Section 29.1-509 defines “landowner” to mean the legal title holder or any easement holder.”

Lastly, as DHR is aware, at least one of the underlying property owners is an outspoken opponent of the project. The position stated in your letter effectively hands that person a de facto veto over the burial permit and, as a consequence, over the Memorandum of Agreement, which requires that JRWA obtain an anticipatory burial permit prior to construction. DHR's overly restrictive construction of "landowner" is unprecedented and incorrect. We urge DHR to reconsider.

* * *

JRWA does not agree that an anticipatory burial permit should be necessary for this project. As we have outlined for DHR on several occasions, the likelihood of uncovering any unknown burial sites is minimal. In response to a specific comment from DHR, the most recent version of the Memorandum of Agreement (MOA) included a requirement (Section X.B) that an anticipatory burial permit be obtained prior to construction. We did not object to that requirement because we assumed a burial permit application would be processed in the normal course. The reasons outlined in your letter for denial of the permit demonstrate that the application has not been processed in the normal course and is instead being held to arbitrary and capricious—and likely unattainable—standards. If DHR insists on requiring an anticipatory burial permit as an MOA condition and prevents JRWA from reasonably obtaining such permit, then we are at an impasse and further consultation would be fruitless.

JRWA has no option but to push forward with the Corps permit application process to construct a new water supply for its citizens. We have a duty to our citizens to provide them with clean and affordable public water supply. As we have discussed, this project was conceived in response to the 50-year water supply plans prepared by Louisa and Fluvanna Counties in response to an executive order from then-Governor Warner. DHR is aware that this application process has dragged on for over five years and that there is now an urgent need for an expanded water supply in the Zion Crossroads area. Progress toward completion of this project has been continually frustrated by changing requirements and unclear and uncommunicated expectations. Your September 6 letter is emblematic of how this process has been conducted to date.

Furthermore, the improvident issuance of your September 6 letters has had a compounding effect that has caused irreversible damage to both the JRWA and the archeological sub-consultant. Within two business days after you issued the letter, the Monacans' legal counsel forwarded all three letters (letter to JRWA, the Corps, and the consultant) to the consulting parties by email on September 10, 2019 and then the Corps of Engineers quoted your letter in the letter they issued on September 10, 2019. In addition, the JRWA is dismayed a consulting party, who was not copied on the letters, would receive copies of a JRWA permit denial so quickly and outside the normal process of distributing information to consulting parties. Obviously, this will create a significant and completely unjustifiable public relations issue among the 60,000 citizens of Fluvanna and

Louisa Counties, as well as surrounding media, that will cause the JRWA and both Counties to spend significant time, energy, and resources attempting to explain how DHR was errant in the issuance of the September 6 letters. Again, we strongly believe all of these issues could have been easily addressed and resolved had DHR followed the administrative code as required by law.

DHR's stated values are "Integrity," "Transparency," and "Customer Service." The letter we received on September 6 is not consistent with those values. JRWA requests that you promptly withdraw and reconsider the permit denial based on better information. We would be happy to meet with you to make sure you have the best available information. If your decision is not changed by this information, however, we must insist that you provide JRWA with advance notice of that determination and an opportunity to meet with you as required by 17VAC5-20-60.E.

Sincerely,

A handwritten signature in black ink, appearing to read "D.D. Watson", with a large, stylized flourish at the top.

D.D. Watson
Chairman
James River Water Authority

Copy:

Col. Patrick Kinsman, USACE
Mr. Tom Walker, USACE
Ms. Jennifer Frye, USACE
Mr. John Eddins, ACHP
Mr. Roger Kirchen, VDHR
Ms. Joanna Wilson Green, VDHR
Ms. Gray O'Dwyer, OAG