VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FRANKLIN

RICHARD A. PRESSL and THERESA M. PRESSL, Plaintiffs, v. APPALACHIAN POWER COMPANY, Defendant.	)	Case No. CL 15-631

DEMURRER

Defendant Appalachian Power Company ("APCO") demurs to Plaintiffs Richard A. Pressl and Theresa M. Pressl's (together, the "Pressls") Complaint for Declaratory Judgment. In support of its demurrer, APCO states as follows:

BACKGROUND

In this case, the Pressls attempt to unsettle that which has long been settled—APCO's right to restrict a property owner's construction of a dock below the 800-foot elevation contour on Smith Mountain Lake. They make various requests for relief challenging APCO's right to limit their use of their property, all in the pursuit of building a dock on shoreline that is environmentally sensitive and thus protected. But as explained below, and as other courts have held, APCO has just such a right, pursuant to a Flowage Easement, which the Pressls attach as Exhibit F to the Complaint and concede governs their property. (For the Court's convenience, the Flowage Easement is also attached hereto as **Exhibit 1**.) As relevant here, the Flowage Easement provides in unequivocal language that APCO has the "right to enter upon [the Pressls'

property] at any time . . . at [its] discretion[] to cut, burn, and/or remove therefrom any and all buildings, structures, [and] improvements . . . which are or may hereafter be located on the portion of [the property] below the elevation of which is 800 feet." (Ex. 1, at 2.)

After this case was filed, APCO removed it to the U.S. District Court for the Western District of Virginia and moved to dismiss for failure to state a claim upon which relief could be granted. Judge Norman K. Moon presided over the case and granted APCO's motion, concluding that the Pressls failed to state a claim because, under the plain language of the Flowage Easement, APCO had the right to prohibit them from building a dock below the 800-foot elevation contour.

The Pressls appealed Judge Moon's decision, contending that he lacked subject-matter jurisdiction. Though the U.S. Court of Appeals for the Fourth Circuit agreed and reversed, its opinion did not identify any fault in Judge Moon's reasoning or holding that the Complaint failed to state a claim upon which relief could be granted.

For the reasons stated in Judge Moon's decision, and for the other reasons stated below, the Complaint fails to state a cause of action upon which relief may be granted. Thus, APCO's demurrer should be sustained and the Complaint should be dismissed with prejudice.

STANDARD OF REVIEW

"The purpose of a demurrer," the Supreme Court of Virginia has often said, "is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Kurpiel v. Hicks*, 284 Va. 347, 353 (2012) (citation omitted). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Id.* (citation omitted). While a court must accept as true all of the plaintiff's properly pleaded facts and all inferences fairly drawn from those facts in reviewing a demurrer, it does not have to accept the

correctness of his legal conclusions. *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 405 (2012). Further, when, as here, outside documents are made a part of the plaintiff's complaint, a court "considering a demurrer may ignore a party's factual allegations contradicted by the terms of [those] documents." *Schaecher v. Bouffault*, 290 Va. 83, 107 (2015) (citation omitted).

POINTS OF DEMURRER

In the Complaint, the Pressls assert 11 requests for relief. As explained below, each request fails to state a cause of action upon which relief may be granted and should therefore be dismissed with prejudice.

Demurrer to Requests for Relief A, B, J, and K

Request A does not state a cause of action but merely repeats the Complaint's demand for a trial by jury if any issues of fact are to be determined. Request B asks the Court to find that a justiciable case or controversy exists, which is only a jurisdictional prerequisite to issue a declaratory judgment and not a cause of action in and of itself. And Requests J and K simply ask the Court to award the Pressls costs and such other relief as it may deem necessary, which are also not causes of action in and of themselves. Accordingly, Requests A, B, J, and K should be dismissed with prejudice.

Demurrer to Requests for Relief C and D

Request C asks the Court to find that APCO lacks authority to demand that the Pressls relinquish property rights without compensation. This Request relates to APCO's proposed Occupancy and Use Permit (the "Permit"). (*See* Compl. ¶¶ 28–29.) Similar to Request C, Request D asks the Court to find that APCO lacks the authority to require the Pressls to enter into a revocable license agreement (i.e., the Permit) as a condition for accessing the waters of

Smith Mountain Lake for recreational purposes. But the Complaint alleges only that APCO "would" require the Pressls to apply for the Permit; it does not allege that APCO ever actually made such a demand on them. (*See id.* ¶ 28.) Indeed, the Permit attached to the Complaint as Exhibit G is not alleged to be one that APCO actually offered to the Pressls; rather, it is simply characterized as a sample of the "proposed" Permit. Thus, the controversy asserted here, to the extent that there is one, is too speculative to give rise to a justiciable controversy.

Under Virginia's declaratory-judgment statute, courts can make "binding adjudications of right" in cases of "actual controversy." Va. Code § 8.01-184. The statute was not, however, "intended to vest [courts] with the authority, to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative." *Fairfax v. Shanklin*, 205 Va. 227, 229 (1964) (citation omitted). "An actual controversy is a prerequisite to the court having authority. If there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render." *Charlottesville Area Fitness Club Operators Ass'n v. Albermarle Cty. Bd. of Supervisors*, 285 Va. 87, 98 (2013). "Declaratory judgment does not lie just because the parties disagree. To vest the court with jurisdiction, the controversy must be justiciable." *Erie Ins. Grp. v. Hughes*, 240 Va. 165, 170 (1990) (citations omitted). "In order to have a 'justiciable interest' in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant, such that his rights will be affected by the outcome of the case." *W.S. Carnes, Inc. v. Bd. of Supervisors*, 252 Va. 377, 383 (1996).

One court has already ruled that Requests C and D fail to state a justiciable controversy. As noted above, when APCO removed this case to the Western District, it moved to dismiss the

Complaint for failure to state a claim upon which relief could be granted. In granting the motion, Judge Moon stated in relevant part:

> Because the Court finds this ground to be proper for dismissal,[1] it is unnecessary to reach APCO's other grounds for dismissal. However, the other grounds are also viable grounds for dismissal. For example, APCO claims that the Pressls' request for Declaratory Relief in Paragraph C. and D. (listed above) should be dismissed for failure to state a justiciable controversy. More specifically, APCO suggests that C. and D. are based on a "proposed" permit rather than one that had been formally entered by the parties. Until this permit is formally agreed upon, the parties are not in any justiciable controversy.

Pressl v. Appalachian Power Co., 137 F. Supp. 3d 900, 911 n.11 (W.D. Va. 2015), *rev'd on other grounds*, 842 F.3d 299 (4th Cir. 2016).[2] (Judge Moon's opinion in *Pressl* is attached hereto as **Exhibit 2**.)

Accordingly, Requests C and D fail to state a cause of action upon which relief may be granted and should be dismissed with prejudice.

Demurrer to Requests for Relief E, F, and I

Requests E and F ask the Court to declare that the Pressls have the right to build structures, including a dock, on the part of their property that is subject to the Flowage Easement without interference from APCO. Basically, it is the Pressls' position that, based on the property interests created by the Flowage Easement, they can build any structure they want on land that is subject to the easement so long as that structure is meant to provide access to Smith Mountain Lake for recreational purposes.

However, as Judge Moon held, the Pressls' position runs contrary to the plain language of the Flowage Easement. *Pressl*, 137 F. Supp. 3d at 910. He reasoned:

[1] Judge Moon was referring to APCO's arguments regarding its ability to regulate the construction of docks, which are set forth below.

[2] Again, the Fourth Circuit did not identify any fault in Judge Moon's reasoning or holding that the Complaint failed to state a cause of action upon which relief could be granted. *See Pressl*, 842 F.3d at 301–06.

The rules controlling the interpretation of an easement granted by deed are the same as those that govern the construction of other written documents. *Pyramid Development, L.L.C. v. D & J Associates,* 553 S.E.2d 725, 728 (Va. 2001). The terms of the easement "are to be construed by giving the words their natural and ordinary meaning," and "[t]he language in the deed is taken most strongly against the grantor and most favorably to the grantee." *Bailey v. Town of Saltville,* 691 S.E.2d 491, 494 (Va. 2010). Determining the nature of an interest in land conveyed by deed is a question of law. *Id.*

With this background, the Pressls' position is at odds with the plain language of the Flowage Easement. The instrument grants APCO:

> [T]he right to enter upon said premises at any time and from time to time and, at [APCO's] discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour elevation [sic] of which is 800 feet.

Compl. ¶ 16. This language vests APCO with the ability to remove structures located below 800 [feet above mean see level ("FMSL")] at any time for any reason.

Id. at 909–10 (first, second, and third alterations in original).

And on the issue of the Permit, Judge Moon went on to conclude:

> While this broad grant allows the removal of structures, such as a dock, at APCO's discretion, it logically would hold that it also provides APCO with the ability to determine the necessary steps that a party must take to build a dock to begin with. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 US. 328, 345–46 (1986) (accepting the principle that the greater power includes the lesser power); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (same). For example, without the Permit, APCO legally has the right to come onto the Pressls' land and tear down their dock at the exact moment the first structure has been erected. This could continuously occur over and over again until either . . . APCO seeks an injunction or the Pressls give up on the endeavor. In order to prevent this long and expensive standoff, APCO has provided a mechanism, the Permit, to allow the Pressls to ensure that it builds the dock in accordance with APCO's [Federal Energy Regulatory Commission ("FERC")] obligations. This Permit ultimately saves both sides' time and money to ensure a dock is correctly built with the necessary conditions and no structure has to be removed at a later date.

> Therefore, APCO's right to require the Pressls to obtain a Permit before the commencement of their dock is logically tied to [its] ability to remove at the moment that the first structure has been erected.

Id. at 910.

Judge Moon reached a similar conclusion in *Appalachian Power Co. v. Nissen*, 2015 U.S. Dist. LEXIS 53878, at *10–11 (W.D. Va. Apr. 24, 2015). There, the Nissens started building a dock on Smith Mountain Lake without first obtaining a permit from APCO. *Id.* at *7. Because the dock was oversized, and thus noncompliant with Smith Mountain Lake's Shoreline Management Plan ("SMP"), APCO sued to stop the dock's construction, pursuant to a flowage easement with identical operative language as the Flowage Easement at issue here. *Id.* (The SMP is attached hereto as **Exhibit 3**.) In response, the Nissens filed a series of counterclaims seeking declaratory relief. *Id.* at *1–2. One of those counterclaims alleged that APCO lacked a property interest sufficient to compel the Nissens to take certain actions on their land. *Id.* at *2. APCO moved to dismiss all of the counterclaims for failure to state a claim upon which relief could be granted. *Id.* at *1–2, *7–8.

Judge Moon granted APCO's motion and dismissed the Nissens' counterclaims. *Id.* at *14. He explained:

> I turn first to Defendants' argument that APCO does not have a property interest such that it can compel the Nissens to cease construction of the dock. Defendants' position is at odds with the plain language of the Flowage Easement. That instrument grants APCO the right to
>
> > . . . enter upon said premises at any time and from time to time and, *at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements,* trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

(emphasis added). The Flowage Easement vests APCO with the power to remove structures located below 800 FMSL at any time and for any reason. *There is no language in the instrument limiting APCO's ability to exercise this right to situations where the structures to be removed are interfering with the impounding of waters or the operation of the Smith Mountain Hydroelectric Dam.* Thus I reject Defendants' contention that APCO may only exercise the rights granted to it by the Flowage Easement when necessary to ensure that waters may be impounded or that the operation of the dam is not interfered with. . . .

Moreover, the provision of the Flowage Easement retaining to the grantors "the right to cross said land to reach the impounded waters for recreational purposes" does not affect APCO's right to remove structures located below 800 FMSL. *Giving these words their natural and ordinary meaning, the right to cross the land to access the lake for recreational purposes does not carry with it a right to build structures on that land, even if those structures are in furtherance of recreational use of the waters.* Furthermore, if the Flowage Easement had reserved to the grantors a right to construct certain structures to facilitate recreational use of the waters, such a reservation would be expressly included in the language of the instrument, as was the case with the reservation of grantors' right to construct livestock fences below 800 FMSL. *Therefore, Defendants' [sic] have failed to state a plausible basis on which I could declare that APCO lacks sufficient property rights to compel them to remove the dock.*

Id. at *9–12 (second, third, and fourth emphases added).

APCO later moved for summary judgment against the Nissens, which Judge Moon also granted. *Appalachian Power Co. v. Nissen*, 151 F. Supp. 3d 683, 699 (W.D. Va. 2015), *rev'd on other grounds*, 2016 U.S. App. LEXIS 22469 (4th Cir. 2016).[3] A year earlier, APCO prevailed in another case involving a similar flowage easement and unpermitted dock. *Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790, 797 (W.D. Va. 2014).

These outcomes were not aberrations. For years now, APCO has prevailed against landowners claiming that it could not prevent them from building structures below the elevation contours referenced in the subject flowage easements. *See, e.g., VA Timberline, LLC v. Appalachian Power Co.*, 2008 U.S. Dist. LEXIS 6394, at *12 (W.D. Va. Jan. 29, 2008) (granting summary judgment to APCO on property owner's request for a declaratory judgment that APCO

[3] Relying on its decision in *Pressl*, the Fourth Circuit reversed Judge Moon's summary-judgment decision, concluding that he lacked subject-matter jurisdiction. *Nissen*, 2016 U.S. App. LEXIS 22469, at *1–2.

could not limit the property owner's ability to build docks at the Smith Mountain Project), *aff'd*, 343 F. App'x 915 (4th Cir. 2009); *Appalachian Power Co. v. Longenecker*, 2001 U.S. Dist. LEXIS 27185, at *1–4 (W.D. Va. July 11, 2001) (granting summary judgment to APCO on its request for a declaratory judgment and injunction requiring property owners to remove structures from their property on Smith Mountain Lake that were below the 800-foot elevation contour, concluding that, "[c]onsistent with its license, as amended by an order dated February 17, 1998, [APCO] maintains control over the use and occupancies of property within the project").

The express language of the Flowage Easement at issue in this case giving APCO the right to enter onto the Pressls' property at any time and from time to time, at APCO's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, and improvements that are located below the 800-foot elevation contour clearly contradicts the Pressls' allegation in the Complaint that "[t]he flowage easement does not allow Appalachian to regulate the size and type of dock the plaintiffs may construct on their property." (Compl. ¶ 23) Hence, the Court does not have to accept this allegation as true in considering whether the Pressls have sufficiently pleaded a cause of action upon which relief may be granted. *See Schaecher*, 290 Va. at 107.

Because Requests E and F would limit APCO's right to regulate dock building on the Pressls' property under the Flowage Easement, they fail to state a cause action upon which relief may be granted and should be dismissed with prejudice, just as Judge Moon held in *Pressl* and *Nissen*.

Request I should likewise be dismissed. It asks Court to "find that the Pressls be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydroelectric power generation plant operated by APCO." (Compl. p. 18.) Like Requests E and F, this Request is legally insufficient because it is clearly contradicted by the plain language in

the Flowage Easement. As Judge Moon concluded in *Nissen,* "[t]here is no language in the instrument limiting APCO's ability to exercise [its right to remove structures] to situations where the structures to be removed are interfering with the impounding of waters or the operation of the Smith Mountain Hydroelectric Dam." 2015 U.S. Dist. LEXIS 53878, at *10.

Thus, Request I fails to state a cause of action upon which relief may be granted and should be dismissed with prejudice.

Demurrer to Request for Relief G

Request G asks the Court to find that APCO cannot regulate how the Pressls stabilize the shoreline of their property by requiring them to plant vegetation below the 800-foot elevation contour. This Request pertains to the Pressls' allegation that APCO "would require [them] to plant vegetation below the 800 foot contour as opposed to placing rip-rap along the shoreline as many other waterfront property owners have done." (Compl. ¶ 20(e).)

While the Pressls allege that APCO has demanded that they plant vegetation below the 800-foot elevation contour, they also allege that they have attempted to comply with APCO's demands. (*See id* ¶¶ 20–21.) Accordingly, there is no actual controversy, or, to the extent that there was a justiciable issue, it is now moot. The Complaint does not assert any further antagonistic denial of the Pressls' rights on the part of APCO with respect to the placement of vegetation.

But even if this were a justiciable claim, the allegations would be subject to demurrer because, again, they are contrary to the plain language of the Flowage Easement, which gives APCO the right to enter upon the Pressls' property at any time and from time to time, at APCO's discretion, to remove any "improvements" that are located below the 800-foot elevation contour. Rip-rap shoreline stabilization would be an improvement to the property below that contour.

When assessing whether a gravel road was an improvement in *Nissen*, Judge Moon stated:

> In its fourth request for declaratory judgment, APCO asks the Court to decide that the Nissens have constructed a road in violation of the Flowage Easement. Under the Flowage Easement, APCO has the right to enter upon Defendants' Property at any time to "remove therefrom any and all . . . *improvement[s]* . . . and other objects and debris of any and every kind or description which are or may be located on the portion of said premises below the contour the elevation of which is 800 feet." Black's Law Dictionary defines "improvement" as "an addition to property, usually real estate, whether permanent or not; especially, one that increases its value or utility or that enhances its appearance." Black's Law Dictionary (10th ed. 2014). An earlier version of Black's Law Dictionary defined "improvement" as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purpose." Black's Law Dictionary (6th ed. Abridged 1991); *see also Sellers v. Bles*, 198 Va. 49, 55, 92 S.E.2d 486 (1956) (defining "improvement" as "a valuable addition, or betterment, as a building, clearing, drain, fence, etc., on land."); 9B Michie's Jurisprudence, *Improvements* §1 (2013) ("A valuable addition made to property—usually real estate—or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for a new or further purpose."). Therefore, each definition accepts the fact that "improvement" is a "comprehensive term, which includes in its meaning any development whereunder work is done and money is expended with reference to the future benefit or enrichment of the premises." *Eppes v. Eppes*, 181 Va. 970, 988, 27 S.E.2d 164 (1943). Furthermore, the Flowage Easement's use of the term "improvement" is preceded by two other very broad and comprehensive terms: buildings and structures. *Sellers*, 198 Va. at 54 ("Improvement is not a word of art having a fixed and definite meaning. It takes color and significance from its surrounding and must be interpreted and given the meaning indicated by its setting. It will be judged by the company it keeps.")[.]
>
> In this case, the Nissens' road fits the definition of the term "improvement." Construction of a road, even a gravel one, requires changes in a property to allow the road to be utilized. The Nissens admit to grading the land and adding gravel as a base to construct the road. Defs. And Countercl. Pls. answer to interrog. No. 10. Therefore, the road construction was an improvement in violation of APCO's Flowage Easement, thus triggering APCO's power to enter the Nissens' property and remove the road.

151 F. Supp. 3d at 694–95.

Rip-rap shoreline stabilization would be an improvement to the Pressls' property, and would be similar to clearing the property or adding a drain or fence. And it would be similar to the gravel road in *Nissen*, and, therefore, Request G fails to state a cause of action upon which relief may be granted and should be dismissed.

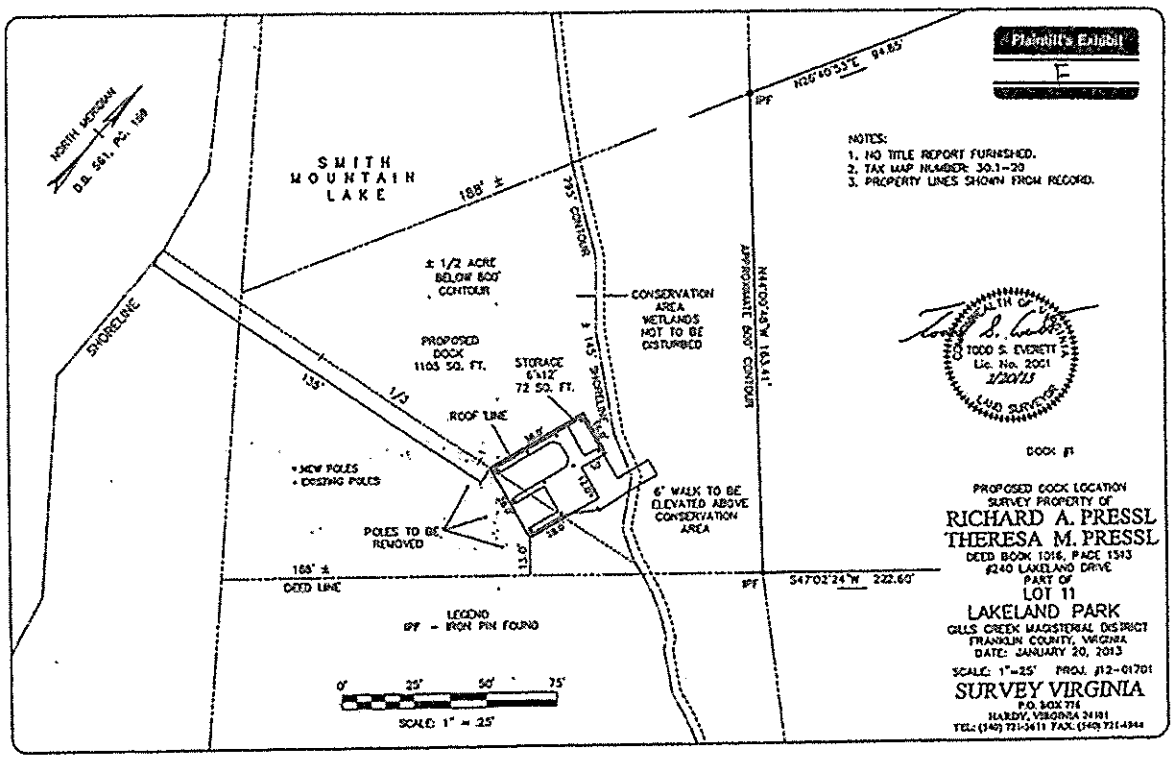
Demurrer to Request for Relief H

Request H also fails to state a cause of action. This Request asks the Court to find that APCO cannot regulate whether the Pressls may dredge in front of their property to improve any dock. They admit, however, that their property is subject to the Flowage Easement (Compl. ¶ 8), and that Easement imposes on them an obligation to "not cause, permit or suffer any . . . contaminating matter to be cast, drained or discharged onto the portion of [their property] below the contour the elevation of which is 800 feet . . . or directly or indirectly into such impounded waters" (Ex. 1, at 2). The Flowage Easement also clearly gives APCO the right to remove "objects and debris of any and every kind or description" that may be located on the property subject to the Easement. (*Id.*) The Pressls' dredging of the property would be inconsistent with these rights. Indeed, APCO has a duty and a right to regulate the activities proposed by the Pressls under the provisions of the SMP.

The Flowage Easement also grants APCO the right to "affect so much of the [Pressls' property] as may be overflowed and/or affected . . . as the result of the construction, existence, operation and/or maintenance of the . . . dam and/or power station, [and] the impounding of the waters." (*Id.* at 1.) APCO is required to limit dredging within the project in order to operate and maintain the dam and power station and reservoir (the "Project"). The requirements placed upon APCO to operate and maintain the Project are set forth in APCO's license, which was issued by an order of FERC. *Appalachian Power Co.* 129 FERC ¶ 62,210 (FERC 2009). Article 415 of

the FERC License Order contains FERC's standard land use article. (*Id.* at 60). Under that article, APCO has the responsibility to allow only those uses and occupancies of Project property that protect and enhance the scenic, recreational, and other environmental values of the Project. (*Id.*) To this end, FERC delegated to APCO the authority to grant permission for certain types of uses and occupancies of Project lands and waters without prior FERC approval. (*Id.*) Those types of uses and occupancies are generally set forth in the SMP, which was approved and made a part of the license.

The SMP, which APCO must follow to operate and maintain the Project, limits the types of dredging that APCO may allow. (*See* Ex. 3, at 71–73.) "Dredging and/or excavation of all wetland areas is prohibited." (*Id.* at 72.) The Pressls' drawing of their proposed dock (attached as Exhibit F to the Complaint) reveals that there is a linear conservation area wetlands located all along the shoreline of the property.



Therefore, to operate and maintain the project, APCO must affect the property at issue by limiting dredging. Because the Pressls granted APCO the right to affect their property as is necessary for APCO to operate and maintain the Project in the Flowage Easement, they have agreed to be bound by the dredging requirements that are part of the SMP.

Request H thus fails to state a cause of action upon which relief may be granted and should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint fails to state a cause of action upon which relief may be granted. Accordingly, APCO's demurrer should be sustained and the Complaint should be dismissed with prejudice.

Appalachian reserves the right to file a memorandum of law in support of its demurrer.

Respectfully submitted,

APPALACHIAN POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2017, the foregoing was sent by regular mail to Steven C. Wandrei, RADFORD & WANDREI, P.C., P.O. Box 1008, Bedford, Virginia 24523, counsel for Plaintiffs.