IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

RICHARD A. PRESSL and THERESA M. PRESSL,	)	
Plaintiffs,	)	
	)	**Case No..: 7:15-cv-00343**
vs.	)	
APPALACHIAN POWER COMPANY,	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Appalachian Power Company ("APCO"), by counsel, submits this brief in reply to the Memorandum of Law in Opposition to Appalachian Power Company's Motion to Dismiss (Dkt. No. 14) (the "Response Brief") filed by the plaintiffs, Richard A. Pressl and Theresa M. Pressl (the "Pressls"). The Response Brief is unpersuasive in its attempt to convince the Court that this case should not be dismissed in its entirety. Despite the arguments to the contrary, the claims asserted in the Pressls' Complaint are an impermissible collateral attack on final orders issued by the Federal Energy Regulatory Commission ("FERC"). Similarly, the issues in this case are strikingly similar to issues considered in previous and ongoing administrative proceedings, thus requiring the Pressls to exhaust their administrative remedies before seeking judicial review of such issues. Lastly, the Pressls' specific requests for declaratory relief should be dismissed pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure because, among other reasons, this Court has already dismissed similar arguments in its Memorandum Opinion in *Appalachian Power Co. v. Nissen,* 2015 WL 1883647 (April 24, 2015).

ARGUMENT & AUTHORITIES

I. The Claims Asserted In The Pressls' Complaint Amount To An Impermissible Collateral Attack On Determinations Made In FERC Proceedings.

The Pressls are incorrect when they argue in the Response Brief that the "Complaint is not a collateral attack on an order issued by FERC." Although the Pressls dedicate the majority of the Response Brief to arguing that their claims do not constitute an impermissible collateral attack on an order issued by FERC, the Pressls fail to even mention the strict judicial review provision found in 16 U.S.C. § 825*l*(b). For its part, 16 U.S.C. § 825*l*(b) provides that the exclusive mode for judicial review of FERC orders is to seek review of such orders in the appropriate United States Court of Appeals. Thus, any attempt to seek review of a FERC Order outside the confines of 16 U.S.C. § 825*l*(b) constitutes an impermissible collateral attack. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 336, 78 S. Ct. 1209, 1219 (1958) (explaining that § 825*l*(b) requires all objections to FERC orders to "be made in the Court of Appeals or not at all").[1]

Here the Pressls' claims are inescapably intertwined with a review of decisions previously made by FERC. Contrary to the assertion in the Response Brief that the Pressls "are not asking the court to make any findings with respect to the orders regarding the Defendant's license issued by FERC," (Resp. Br., p. 7), the declaratory relief sought by the Pressls would directly

[1] The Pressls state in the Response Brief that APCO "misconstrues the holding in *City of Tacoma* to completely prohibit the application of state law." (Resp. Br., p. 10). However, this is an inaccurate assessment of APCO's position. That is, APCO is not making an argument anywhere near as extreme as saying that *City of Tacoma* "completely prohibits the application of state law." To the contrary, APCO merely relies on the guidance given by the Supreme Court in *City of Tacoma* that, in enacting 16 U.S.C. § 825*l*(b), Congress "prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *Id.* 357 U.S. at 336, 78 S. Ct. at 1218. Thus, § 825*l*(b) "necessarily preclude[s] de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review," and requires that "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all." *Id.* at 336, 78 S. Ct. at 1219. As for how APCO "construes" the holding in *City of Tacoma*, APCO is guided by, *inter alia,* the Fourth and Eleventh Circuits' application of the *Tacoma* opinion in *Halifax County v. Lever*, 718 F.2d 649 (4th Cir.1983), and *Otwell v. Alabama Power Co.*, 747 F.3d 1275, 1282 (11th Cir. 2014), respectively.

undermine two specific FERC determinations. Specifically, as discussed below, the issues raised by the Pressls in their Complaint were previously considered and adjudicated in: (i) FERC's Order Denying Non-Project Use of Project Lands and Waters and Denying Variance Under Shoreline Management Plan, 133 FERC ¶ 62,135 at p. 5 (November 10, 2010) (the "2010 FERC Order"); and (ii) FERC's Order Denying Request for Rehearing and Motion for Late Intervention , 134 FERC ¶ 61,113, at ¶ ¶ 24-27 (Feb. 17, 2011) (the "2011 FERC Order," and collectively, the "Previous FERC Orders").

The issues ruled upon in the Previous FERC Orders involved whether or not the Pressls' predecessor in title, Richard W. Frie ("Mr. Frie"), could conduct certain activities on the very same property at issue in this case. The activities which Mr. Frie wanted to conduct on his property are the same activities in which, according to their Complaint, the Pressls seek to pursue. For instance, like Mr. Frie sought to do, the Pressls wish to construct a dock on their property.[2] By comparing the Pressls' proposed dock location survey (which was attached to their Complaint as Exhibit F)[3] to the dock location survey submitted on behalf of Mr. Frie in the previous proceedings before FERC,[4] it is apparent that the Pressls seek to construct essentially the exact same dock considered and rejected in the FERC Orders. As can be seen below, the docks proposed by Mr. Frie and the Pressls are located on the same shoreline, remove some of the same existing dock pilings, use some of the same existing dock pilings, and have the same layout. The only real difference seems to be that the Pressls' proposed dock is even larger than the dock contemplated by Mr. Frie:

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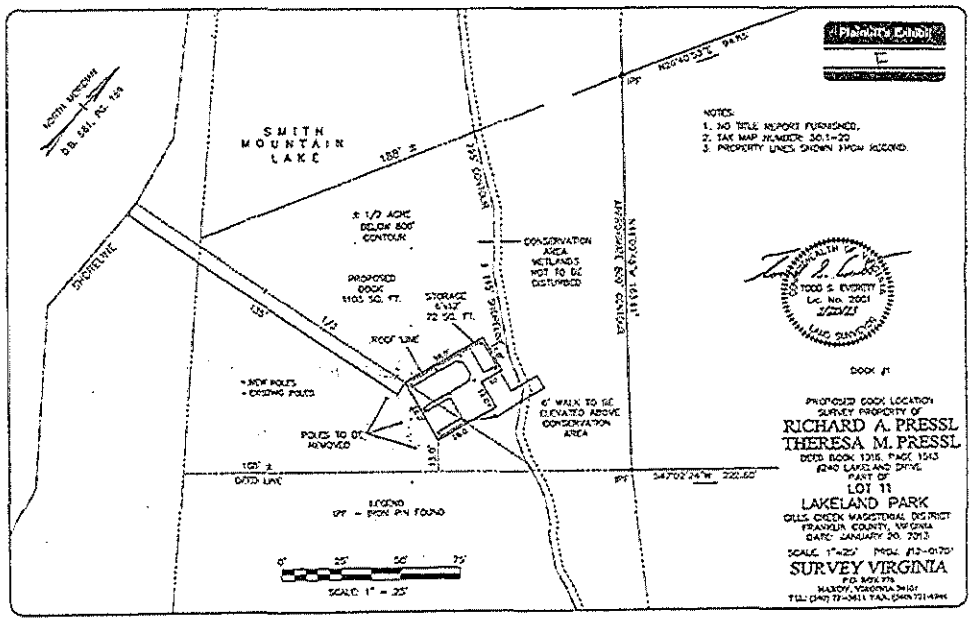
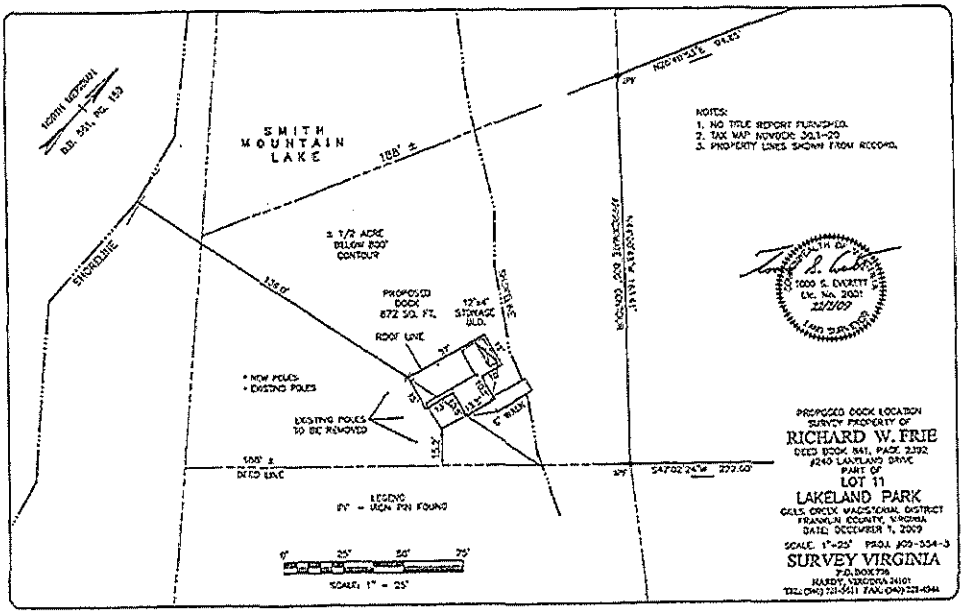
[2] Compl., ¶ 14 ("The Pressls desire to exercise their right to construct a dock to access the impounded waters of Smith Mountain Lake."); ¶ 19 ("[P]laintiffs have attempted unsuccessfully for almost three years to use their property for beneficial purposes to include the right to construct a dock to access the impounded waters for recreational purposes.")

[3] Compl., ¶ 19. A copy of the Pressls' proposed dock location survey prepared by Todd S. Everett, land surveyor, dated January 20, 2013, is attached hereto as **Exhibit A.**

[4] A copy of Mr. Frie's proposed dock location survey prepared by Todd S. Everett, land surveyor, dated December 1, 2009, was part of exhibit B to the Pressls' Response Brief, and another copy is attached hereto as **Exhibit B.**



(exhibit A)



(exhibit B)

The purpose of the proceedings underlying the Previous FERC Orders was to ensure that certain activities Mr. Frie wished to engage in were consistent with APCO's license with FERC to operate its hydroelectric project (the "Project"). Specifically, Mr. Frie sought to conduct activities within the Project boundary that were prohibited by the Shoreline Management Plan

("SMP"), which APCO was required implement under Article 413 of its FERC license. (2010 FERC Order, ¶ 1, fn 1). Thus, in order to determine whether a variance was appropriate for Mr. Frie's proposed activities, FERC had to determine whether such activities would be consistent with APCO's license and applicable federal law. Similarly, in the present case, the Pressls ask "[t]hat the Court find that the Pressls be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydro electric power generation plant operated by APCO at Smith Mountain."[5] However, pursuant to the Previous FERC Orders, FERC has already determined that the activities the Pressls have in mind are "inconsistent" with APCO's license with FERC.[6]

To help illustrate the point that the issues in this case have already been determined by FERC, the table provided below compares the Pressls' proposed activities at issue in this case with the issues already adjudicated in the Previous FERC Orders:

Request for Relief From Complaint	**Issue Addressed by Previous FERC Orders**
"F. That the Court find that APCO cannot regulate the size and type of dock that the plaintiffs may construct on their property;"	In the 2010 FERC Order, permission was sought for Mr. Frie "to construct a single slip dock," but this application was denied. In denying Mr. Frie's later request for rehearing, the 2011 FERC Order noted how its previous decision to not allow construction of a dock was based on "doubt that wetlands would not be affected by the dock construction" and "that the proposed dock location was poor for logistical reasons[.]" ¶ ¶ 11-12.
"G. That the Court find that APCO cannot regulate how the plaintiffs stabilize the shoreline of their property by requiring them to plant vegetation below the 800 foot contour;"	In the 2010 FERC Order, FERC noted that: Mr. Frie's property was "on shoreline classified as Conservation/Environmental (C/E)," and "the SMP prohibits shoreline stabilization along shoreline classified as C/E[.]" ¶¶ 4, 6.

[5] Compl. at 18-19. Because APCO requires a FERC license to operate the "dam and hydro electric power generation plant... at Smith Mountain," it is certainly fair to say that land uses within the Project boundary that would be in violation of APCO's FERC license would be "inconsistent" with APCO's maintenance of the Project, and with the terms of the Flowage Easement.

[6] Thus, such activities would also be inconsistent with operation of the Project.

	The FERC further noted that Mr. Frie had cleared shoreline vegetation on the property and failed to mitigate such removal by properly following a landscape re-vegetation plan as required by APCO. *Id.* ¶ ¶ 8-10. These issues informed FERC's decision to deny a request for variance from the SMP to conduct certain activities not generally allowed on shoreline classified as C/E. Mr. Frie's clearing of "shoreline vegetation on company-owned lands within the project boundary, without authorization from [APCO]" and his failure to properly re-vegetate the site was also part of the analysis by FERC in the 2011 FERC Order. ¶ 11.
"H. That the Court find that APCO cannot regulate whether the plaintiffs may dredge in front of their property to improve any dock which they may construct[.]"	In connection with the construction of the dock at issue in the 2010 FERC Order, permission was requested for Mr. Frie to be able to dredge in front of the property due to the shallow water in the vicinity of the dock. ¶ 3. With regard to dredging, FERC noted in the 2010 Order that "[t]he SMP states that dredging is prohibited in wetland areas, and if allowed near any wetland areas, would require sufficient buffers to ensure no adverse impact to the wetlands." ¶ 10. FERC found that there was insufficient buffers to the wetlands on the property, and denied a variance. ¶ 12.[7]

From the discussion above, it is clear that the Pressls' are seeking the same results in the present action that Mr. Frie hoped to achieve in earlier proceedings before FERC. Thus, the Pressls' claims are inescapably intertwined with a review of the Previous FERC Orders. Given this, the Pressls cannot escape 16 U.S.C. 825*l*(b)'s strict judicial review provision by arguing that they are relying on state law claims and are not expressly challenging the Previous FERC Orders. *See Otwell v. Alabama Power Co.*, 747 F.3d 1275, 1281 (11th Cir. 2014) (Litigants "cannot

[7] As shown in the Pressls' dock location survey, exh. A, there is a narrow strip of wetlands that is located all along the shoreline of the Pressl property. The survey refers to this area of wetlands as "Conservation Area Wetlands".

escape § 825*l*(b)'s strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC.").

Similar to the Pressls' position in this case, the plaintiffs in *Otwell* argued that their claims were not an impermissible collateral attack on a FERC order because, "rather than challenging the agency's decision, [plaintiffs] simply sought to enforce their riparian rights." *Id.* at 1281. Despite the fact that the plaintiffs in *Otwell* attempted to fashion their claims as having to do with property rights only, the Eleventh Circuit looked behind this and observed that the plaintiffs were "attempting to obtain the same results and to place the same constraints on Alabama Power rejected by [FERC] in the exercise of its institutional expertise, and their claims are inescapably intertwined with a review of the FERC's final decision." *Id.* at 1282. Here, like in *Otwell*, the Pressls are attempting to achieve the same results their predecessor wished to achieve in previous FERC proceedings, and like in *Otwell,* the Pressls claims constitute an impermissible collateral attack.

In the Response Brief, the Pressls attempt to distinguish *Otwell* by claiming that in *Otwell* the district court found that the power company had the requisite property rights to enforce its FERC license, whereas, so the argument goes, "[T]he issue central to the Pressls claims is that APCO lacks sufficient property rights to regulate the uses which the Pressls may make of their property below the 800' contour." (Resp. Br., p. 13). However, although the district court in *Otwell* did note that Alabama Power "acquired the property necessary to own and operate" its hydroelectric project, this was mentioned only as background information to explain how the power company came to have property interests affecting the plaintiffs' property. *Otwell*, 944 F. Supp. 2d. at 1137. Even if this background information had been a material finding in the district court's decision, the fact remains that the *Otwell* plaintiffs, like the Pressls, certainly

disputed and sought a ruling on the extent of the power company's property rights within the project boundary.

Moving beyond general background information in *Otwell* to the substance of the claims in the case, the plaintiffs in *Otwell* alleged "generally that they have riparian rights in the waters of Smith Lake" and those rights were violated by the power company's operation of its hydroelectric power dam. *Id.* 1143-44. Here, by comparison, the Pressls allege that they have property rights that are violated when APCO attempts to "regulate" use of their property in a manner "inconsistent with the maintenance of a dam and hydro electric power generation plant operated by APCO at Smith Mountain."[8] Thus, the "central issue" in both cases are strikingly similar in that the plaintiffs in each case allege that a power company was encroaching on their property rights in connection with the operation of a hydroelectric dam—and thus the Response Brief's attempt to distinguish *Otwell* is unavailing.

Another case the Pressls try to distinguish in the Response Brief is *Halifax County v. Lever*, 718 F.2d 649 (4th Cir. 1983). In *Halifax*, the Fourth Circuit held that the plaintiff's claims against a FERC license holder should have been dismissed because 16 U.S.C. § 825*l*(b) mandated that the "exclusive remedy in this matter was by petition for review with the appropriate Court of Appeals and not by an independent action in the District Court." *Id.* at 654. The Pressls attempt to distinguish *Halifax* from the present case by claiming that "Halifax County did not assert any claims arising under state law as the Pressels [sic] raise in their complaint." (Resp. Br., p. 11). This assertion is plainly wrong. The whole reason the *Halifax* case was before the appellate court was because the trial court incorrectly denied the defendant's motion to dismiss on the grounds that "plaintiffs' action was one in tort for fraud and deceit and as such did not arise under the Federal Power Act." *Id.* at 650. The Fourth Circuit reversed,

[8] Compl., Prayer for Relief.

holding that the District Court should have refused to entertain the action "despite the claim of fraud and deceit." *Id.* at 654.

The Response Brief also makes much of the fact that the Previous FERC Orders "do not make any mention of the flowage easement upon which the Plaintiffs' claims for declaratory relief are based[,]" and argues that property rights cannot be affected by "the fact that they are located within the boundaries of a project licensed by FERC pursuant to the FPA." (Resp. Br., p.14). While it is true that the Previous FERC Orders do not mention the applicable flowage easement (hereinafter, the "Flowage Easement"), this does not change the fact that the Pressls' claims, as discussed above, are inescapably intertwined with a review of those orders. In any event, the parties' property rights under the Flowage Easement cannot be determined while turning a blind eye to APCO's FERC license for the Project because the Flowage Easement itself requires a determination of what APCO must do to operate the Project. This is because the Flowage Easement provides, in pertinent part, that APCO has the right to "affect so much of said premises... continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of [the Project]." Since APCO necessarily operates the Project pursuant to and in accordance with its FERC license, and the Flowage Easement defines the extent of APCO's rights by reference to what must be done as a result of operation of the Project, therefore delineation of the Pressls' property rights are indeed informed in part by the terms of APCO's FERC license and determinations by FERC regarding such license.

In the Response Brief's final argument on the issue of the collateral attack on the Previous FERC Orders, the Pressls note that Mr. Frie submitted an Application for Permit

("Application")[9] to APCO while they themselves have not completed an such an application. The Pressls' seem to think this distinction is significant because they apparently believe that signing the Application was tantamount to having "voluntarily submitted to the jurisdiction of FERC." (Resp. Br., p. 13). However, the Application does not create jurisdiction where it did not exist before, but merely had Mr. Frie acknowledge circumstances that would exist whether or not he signed the instrument. For instance, whether or not Mr. Frie or the Pressls sign any application or agreement, "APCO has the authority and responsibility under its [FERC license] and its land rights to review and authorize certain activities within the [Project] Boundary."[10] In any event, the jurisdiction under which the Previous FERC Orders were issued was not dependent on Mr. Frie's signing of the Application, and the Pressls cannot avoid § 825*l*(b)'s judicial review requirements simply because they refuse to acknowledge the relationship between their property rights and APCO's license with FERC. If anything, any relevance the Application may have to the Previous FERC Orders only further intertwines the Pressls' claims with those orders because the Pressls specifically seek a declaration that they should not have to enter into a license agreement with many of the same provisions as the Application.

In any event, the Pressls admit that, like Mr. Frie, they have been in communications with APCO requesting permission to build. In paragraphs 19 and 20 of the Complaint, they alleged that they have attempted for three years to construct a dock and that APCO has made numerous demands related thereto. In fact, they have been working with APCO to attempt to address the very issues that have been raised by FERC in the Previous FERC Orders in order to prepare a proper variance for FERC.[11]

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[9] A copy of the Application was attached to the Pressls' Response Brief as exhibit B.
[10] Application at 1.
[11] See copies of some of the email correspondence between Mr. Pressl and APCO regarding re-vegetation of the property and what steps are necessary to prepare a variance request that would meet FERC's concerns regarding

II. The Pressls' Claims Also Involve Issues Submitted To Administrative Proceedings And Should Be Dismissed For Failure To Exhaust Administrative Remedies.

This Court already has dismissed the claim of a property owner who was "seeking a declaration as to its rights to construct boat docks on the shoreline of Smith Mountain Lake." *J.W. Holdings, Inc., v. Appalachian Power Co.,* case no. 6:04-cv-00033, Memorandum Opinion, Jan. 28, 2005.[12] The *J.W. Holdings* plaintiff's claim was dismissed for lack of subject matter jurisdiction because this Court found that the plaintiff had "failed to exhaust its administrative remedies as required by the FPA[.]" *Id.* at 8.

The Pressls attempt in the Response Brief to distinguish *J.W. Holdings* by arguing that the present case involves different issues. The Response Brief asserts that "the present claims raised by the Pressls center around whether the property rights granted to APCO are sufficient to allow the regulation of uses to which the Pressls may make of that portion of their property lying below the 800' contour." (Resp. Br., p. 17). Despite the Pressls' contention to the contrary, this issue is very similar to "the exact issue" of *J.W. Holdings*, to wit, "the right of [plaintiff] to build boat docks on the land falling below the 800 fmsl contour on [plaintiff's land]." *J.W. Holdings,* at 7. Also, like in the present action, the complaint in *J.W. Holdings* "argued that APCO had no right to interfere with [plaintiff's] construction of boat docks on [plaintiff's land]." *Id.* at 4.

The Response Brief also asserts that, at the time the suit was filed, the plaintiff in *J.W. Holdings* had applications pending before APCO subject to the review and approval of FERC and had intervened as a party" in APCO's FERC license renewal proceedings. (Resp. Br., p. 17). In considering this, the Pressls conclude that the *J.W. Holdings* plaintiff "voluntarily submitted to the jurisdiction of FERC." *Id.* While it may be true that the Pressls themselves may not have

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dock construction, dredging, and shoreline stabilization on the property. These emails are attached, collectively, as **Exhibit C.**

[12] A copy of this opinion was attached as Exhibit I to APCO's brief in support of its motion to dismiss, Dkt. No. 4.

knowingly submitted to the jurisdiction of FERC, the fact is, the issues raised by the Pressls' Complaint regarding the ability to develop the exact shoreline in question have been raised in previous and ongoing proceedings before the FERC. This is important because, in *J.W. Holdings*' exhaustion analysis, this Court was more concerned that FERC proceedings involved the same *issues* as those before the court—not the same *parties*. *See id.* at 8 ("The Plaintiff currently has several proceedings pending before FERC which might resolve this *issue*. Under the FPA, Plaintiff must exhaust all of its administrative remedies for these proceedings before bringing a case to court.") (emphasis added).[13]

As discussed above, the Previous FERC Orders addressed issues identical to those arising in the Pressls' claims in administrative proceedings involving the Pressls' predecessor in title. Also, as admitted in the Response Brief,[14] the pending complaint filed with FERC by the entity known as "Cut Unnecessary Regulatory Burden, Inc." ("CURB") is raising similar issues as those asserted by the Pressls in this action. In its pending Complaint to the FERC, CURB is asserting: (1) APCO has not obtained sufficient property rights in its flowage easement to implement the Shoreline Management Plan; and (2) APCO, in effect, attempts to take property rights without compensation by requiring landowners to enter into revocable license agreements.[15] The CURB Complaint even refers to the shoreline of the Pressls property when it refers to the Frie proceedings as an example where FERC "exceeded its powers and ordered its licensee [i.e., APCO] to control the private property of others, knowing the licensee did not hold

[13] The Court's focus on the issues of a FERC proceeding rather than the parties is consistent with the Eleventh Circuit's decision in *Otwell* where it was noted that "non-parties to the proceedings before the FERC may not contest the agency's final decision in an alternative forum by bringing challenges that are inescapably intertwined with a review of the agency's final determination." 747 F.3d at 1282 (citing *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009)).

[14] "While the Pressls raise claims similar to those raised by CURB, they do not touch and concern the defendant's FERC issued license." Resp. Br., p. 15.

[15] See CURB Complaint, exh. F to APCO's brief in support of its motion to dismiss, Dkt . No. 4.

necessary property rights."[16] CURB's complaint is still pending before FERC on CURB's request for rehearing, which was filed earlier this month.

The Pressls cannot avoid the fact that the issues in this case are inescapably intertwined with those involved in Mr. Frie's and CURB's FERC proceedings by falling back on the argument that the Complaint here is simply seeking interpretation of the Flowage Easement. The Flowage Easement states that APCO may affect the Pressls property in connection with operation of the Project. For its part, the Project must be operated pursuant to a FERC license. It is for FERC to decide whether certain land uses are permitted under APCO's license. Thus, interpretation of the Flowage Easement requires reference to APCO's FERC license and related FERC orders—including orders stemming from administrative proceedings relating to the license.

Even if parties' rights under the Flowage Easement were not defined by what was required for APCO to operate the Project, the Pressls could still not maintain that this case is just about interpretation of an ordinary deed. If this case were only about deed interpretation, there would be no controversy, and thus there would be no jurisdiction to grant declaratory relief. Given this, the dispute (*i.e.*, APCO's alleged denial of the Pressls' rights) is an element of the Pressls claim for declaratory relief and cannot be ignored. When looking at the Complaint to determine what the dispute is, Paragraph 36 states that "there exists a dispute between the parties regarding the interpretation of the flowage easement granted to the defendant and the rights which the defendant has to regulate the plaintiffs' use of their property." When explaining how APCO has attempted to "regulate" the Pressls' land, the Complaint states that APCO has sought to regulate vegetation placement,[17] construction of a dock,[18] and the ability to dredge.[19] Thus, to

[16] *Id.*
[17] Compl., ¶ 20(a).

grant declaratory relief in this case, a court could not consider the language of the Flowage Easement in a vacuum, but must also consider what the actual dispute is between the parties. Here, the dispute alleged in the Complaint raises issues addressed in previous and ongoing proceedings before FERC. Therefore, as was the case in *J.W. Holdings,* under the FPA, the Pressls "must exhaust all of [their] administrative remedies for these proceedings before bringing a case to court."

III. The Pressls' Specific Requests For Declaratory Relief Should Be Dismissed For Failure To State A Justiciable Controversy And Failure To State A Claim.

In the Response Brief, the Pressls argue that, with respect to requests for relief "C" and "D" in the Complaint, a justiciable controversy is asserted. In those requests for relief, the Pressls ask the court to find that APCO lacks the authority "to demand" and "to require" the Pressls to execute the revocable license agreement. Usually, absent coercion, an attempt to "demand" or "require" someone to enter any agreement is considered an *offer*—a necessary step to the negotiation of any agreement. Surely, there can be no dispute that APCO has the authority to at least offer the Pressls the opportunity to enter into a license agreement. The Response Brief attempts to put some substance in this alleged controversy by arguing that if the Pressls "were to independently begin construction of a dock, shoreline stabilization or plant vegetation without first submitting an application they would expose themselves to enforcement litigation." p. 20. (citing *Appalachian Power Co. v. Arthur, Appalachian Power Co. v. Nissen*). This may be true, but the central issue in such a case would be removal of the dock, not whether APCO could "demand or "require" the Pressls to execute a revocable license agreement. Thus, the controversy would be whether APCO could prevent the activity, not whether APCO could offer permission to conduct such activity as consideration for a license agreement. Thus, the issue

[18] *Id.*, at 23.
[19] *Id.*, at 26.

regarding the license agreement raised in requests for relief "C" and "D" is too far removed from an actual controversy and is too speculative to be justiciable.

The Pressls' requests for declaratory relief "E," "F" and "H," basically all seek a declaration that APCO has no authority to keep the Pressls from building, constructing, or improving a dock or other structures on their property. However, under this Court's recent ruling in *Appalachian Power Co. v. Nissen*, 2015 WL 1883647 (April 24, 2015), these claims lack merit and should be dismissed. In *Nissen*, this Court interpreted a flowage easement with practically the same provisions as the one in this case. Like in this case, APCO moved to dismiss in *Nissen* upon the grounds that the landowner's allegations failed to state a claim because they admitted that their land was subject to a flowage easement, which clearly gives APCO the right to prohibit such activities, citing *Massey v. Ojanit*, 759 F.3d 343, 347 (4th Cir. 2014) (observing that a court "need not accept allegations that contradict matters properly subject to judicial notice or [ ] exhibit") (internal citations omitted). Upon review of the same language in the flowage easement in *Nissen*, this Court held that the instrument "vests APCO with the power to remove structures located below 800 FMSL at any time and for any reason." *Nissen.* 2015 WL 1883647 at *4.

To attempt to distinguish this case from *Nissen*, the Response Brief points out how the Complaint makes allegations regarding history and development of the lake, and the Pressls "and other landowners... reasonable belief that they had the absolute right to construct a dock to access the waters of Smith Mountain Lake." (Resp. Br., p. 25). However, the language of the Flowage Easement makes no reference to what the Pressls and other landowners reasonable beliefs might be. This fact, along with the fact that the language of the Flowage Easement is not

unclear or ambiguous (nor is it alleged to be), external factors like "the history and development" of the lake is completely irrelevant to the claims in the Complaint.

Moreover, the claim that they have a reasonable belief in "an absolute right" to build a dock flies in the face of the fact that Pressls are charged with knowledge of what is contained in their land records and have the additional duty to inquire as to issues appearing in their chain of title. "[W]here a party purchases an estate which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination." *Chavis v. Gibbs*, 198 Va. 379, 382, 94 S.E.2d 195, 197 (1956). A purchaser "must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to this inlet of information, and then say he is a bona fide purchaser without notice." *Shaheen v. County of Matthews*, 265 Va. 462, 477, 579 S.E.2d 162, 172 (2003).

Here, had the Pressls merely looked, they would have found the Flowage Easement in their chain of title. Certainly, at the time the Pressls made their purchase in 2012,[20] on the shoreline was Mr. Frie's unfinished dock, which had sat deteriorating for a number of years following the dispute with FERC. APCO's Shoreline Management Plan had been the subject of public hearings and much discussion. The Pressls may not avoid their obligation to check the land records, or to investigate well-publicized discussions regarding shoreline development, and then ask this Court to invalidate the rules governing development on project lands. This Court should reject their invitation to ignore well settled law regarding constructive notice of properly recorded documents and endorse chaotic and unregulated development at Smith Mountain Lake.

[20] Ex. A to Compl.

Finally, the Pressls argue in the Response Brief that the Commonwealth of Virginia has codified the rights of private landowners to erect piers, wharves or landings upon watercourses. (Resp. Br., p. 25). Although the Response Brief cites Va. Code § 64.2-164 in support of this position, presumably they meant to cite to Va. Code § 62.1-164 since there is no Va. Code Section 64.2-164. In any event, Va. Code § 62.1-164 does not apply. *Ramaker v. SML Yacht Club*, 261 Va. 240, 542 S.E.2d 392 (2001)(holding such a dock cannot be constructed if the private rights of another be injured thereby). Here, APCO's rights would be injured by the Pressls' proposed dock. In addition, the General Assembly of Virginia has recognized that at Smith Mountain Lake, state or local regulation of docks is subservient to APCO's federal license. Va. Code Ann. § 15.2-1226 (establishing that certain counties may by ordinance regulate the land below the Project boundary on Smith Mountain Lake concerning the location, size and length of docks, provided those ordinances do not conflict with the rights and responsibilities of Appalachian under its federal license for the Project).[21]

CONCLUSION

For the reasons stated above, Appalachian Power Company respectfully requests that the Court grant its Motion to Dismiss the Complaint filed by plaintiffs, Richard A. Pressl and Theresa M. Pressl.

[21] Virginia Code Section 15.2 - 1226 is in effect, but not set out in the bound volumes of the Code of Virginia. A copy is attached as **Exhibit D.**

Respectfully submitted,

APPALACHIAN POWER COMPANY

By /s Matthew P. Pritts
Of Counsel

Matthew P. Pritts, Esq. (VSB #34628)
C. Carter Lee, Esq. (VSB # 78731)
WOODS ROGERS PLC
Wells Fargo Tower, Suite 1400
10 South Jefferson Street
P. O. Box 14125
Roanoke, VA 24038-4125
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Facsimile: (540) 983-7711
E-mail: pritts@woodsrogers.com
E-mail: clee@woodsrogers.com

Counsel for Appalachian Power Company

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, a true copy of the foregoing was filed with the court's CM/ECF system, which will send electronic notice to all attorneys of record.

/s Matthew P. Pritts

EXHIBIT A

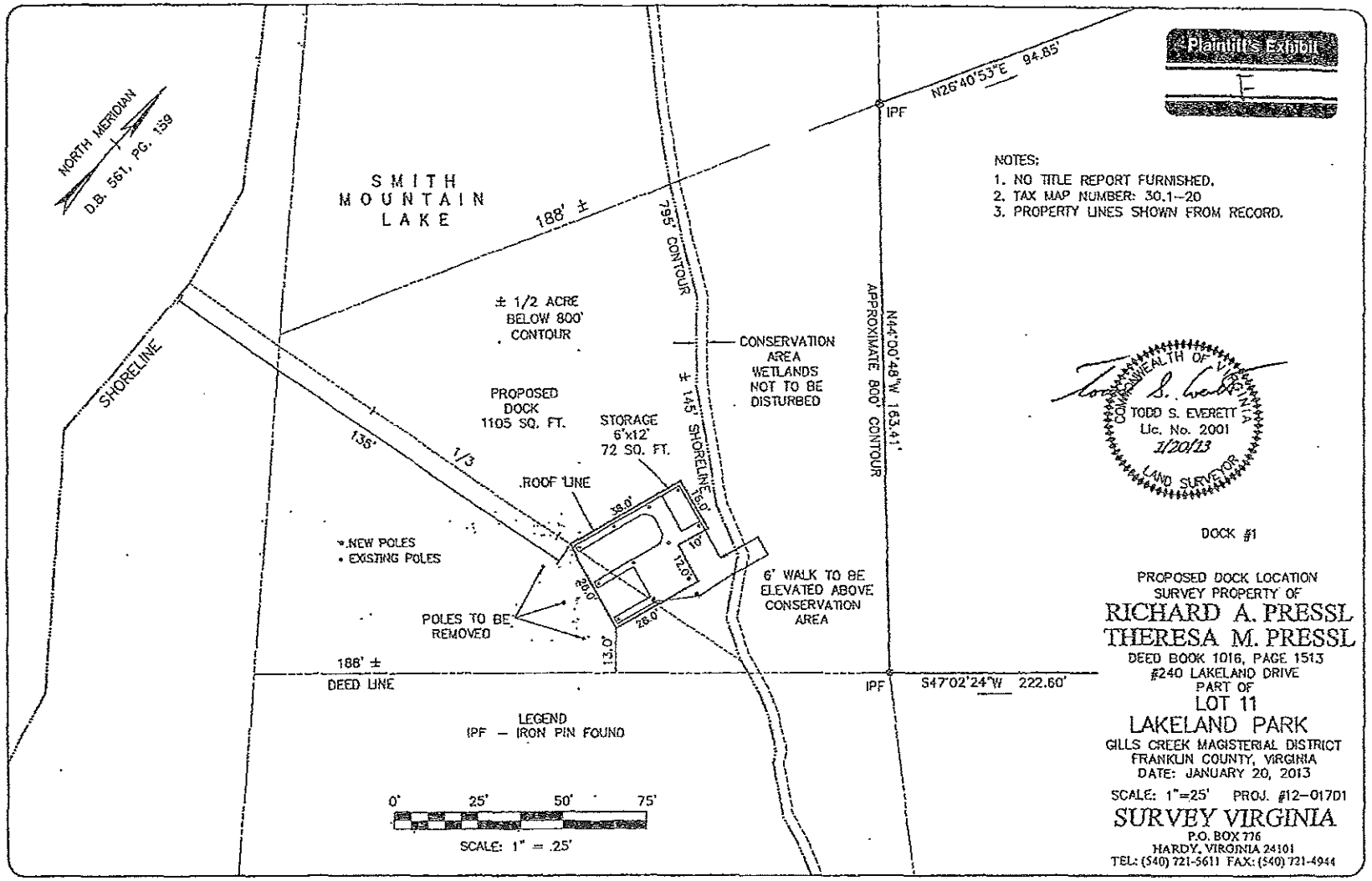
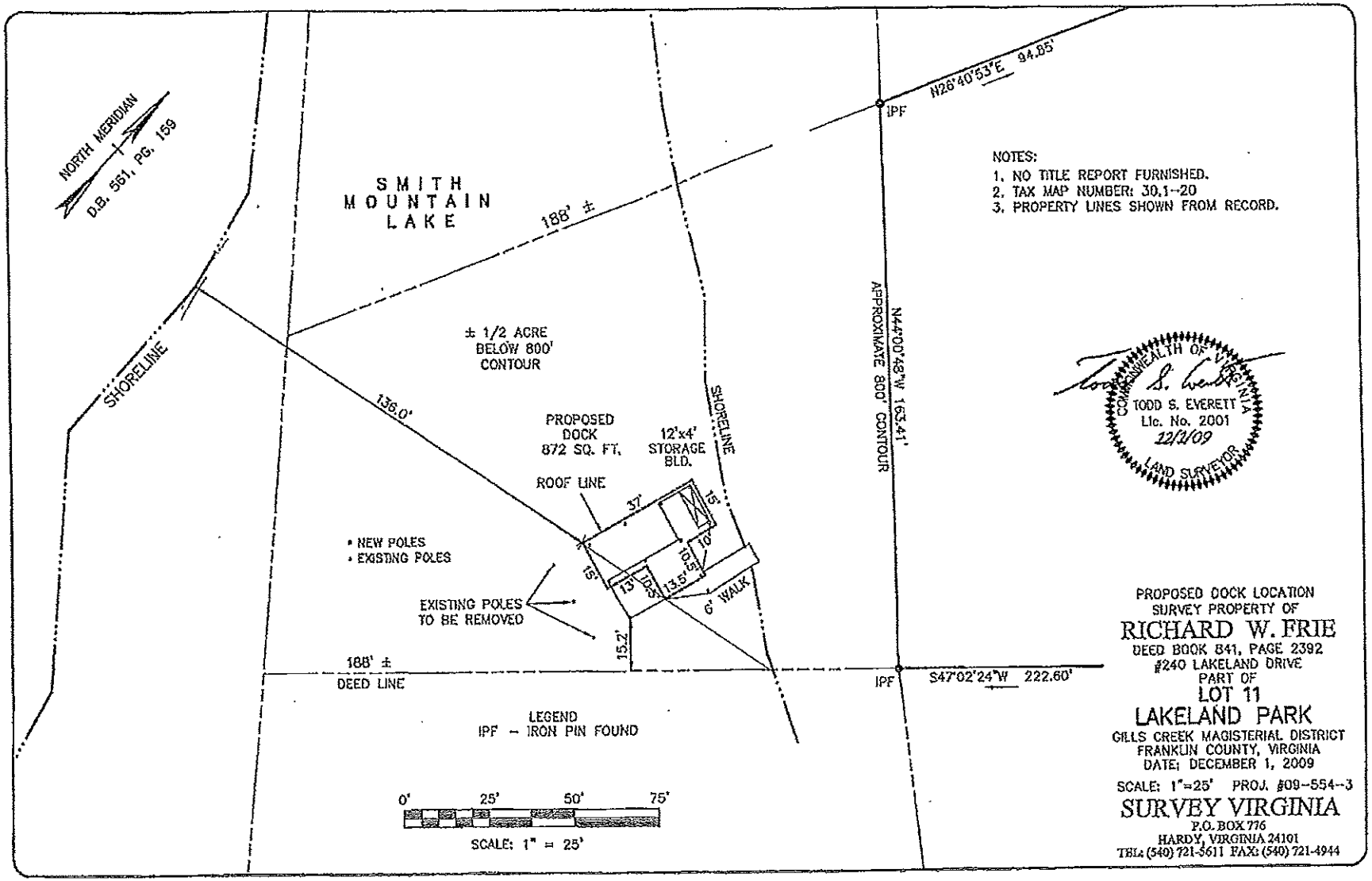

Plaintiff's Exhibit
NORTH MERIDIAN
D.B. 561, PG. 139
SMITH MOUNTAIN LAKE
188' ±
795' CONTOUR
IPF
N26°40'53"E 94.85'
NOTES:
1. NO TITLE REPORT FURNISHED.
2. TAX MAP NUMBER: 30.1-20
3. PROPERTY LINES SHOWN FROM RECORD.
± 1/2 ACRE BELOW 800' CONTOUR
CONSERVATION AREA WETLANDS NOT TO BE DISTURBED
PROPOSED DOCK 1105 SQ. FT.
STORAGE 6'x12' 72 SQ. FT.
± 145' SHORELINE
APPROXIMATE 800' CONTOUR
N44°00'48"W 153.41'
SHORELINE
135'
1/3
ROOF LINE
38.0'
15.0'
10'
12.0'
8.0'
26.0'
113.0'
* NEW POLES
• EXISTING POLES
POLES TO BE REMOVED
6' WALK TO BE ELEVATED ABOVE CONSERVATION AREA
186' ±
DEED LINE
IPF
S47°02'24"W 222.60'
LEGEND
IPF - IRON PIN FOUND
0' 25' 50' 75'
SCALE: 1" = 25'
COMMONWEALTH OF VIRGINIA
TODD S. EVERETT
Lic. No. 2001
1/20/13
LAND SURVEYOR
DOCK #1
PROPOSED DOCK LOCATION
SURVEY PROPERTY OF
RICHARD A. PRESSL
THERESA M. PRESSL
DEED BOOK 1016, PAGE 1513
#240 LAKELAND DRIVE
PART OF
LOT 11
LAKELAND PARK
GILLS CREEK MAGISTERIAL DISTRICT
FRANKLIN COUNTY, VIRGINIA
DATE: JANUARY 20, 2013
SCALE: 1"=25' PROJ. #12-017D1
SURVEY VIRGINIA
P.O. BOX 776
HARDY, VIRGINIA 24101
TEL: (540) 721-5611 FAX: (540) 721-4944

EXHIBIT B



20100416-0050 FERC PDF (Unofficial) 04/16/2010

EXHIBIT C

Rick Pressl
<relicrick@yahoo.com>
10/19/2012 10:19 AM
Please respond to
Rick Pressl
<relicrick@yahoo.com>

To "ebparcell@aep.com" <ebparcell@aep.com>
cc "rsd@netzero.com" <rsd@netzero.com>,
"pgdade@aep.com" <pgdade@aep.com>
bcc
Subject Re: 240 Lakeland Drive, Moneta, VA

Good Morning Liz,

I apologize for the delay with my reply...I was in Delaware all week visiting my Dad with no access to my e-mail.

Thank you for sending the restoration formula and the FERC information as promised. I assume the landscape architect can/ will determine if the existing vegetation meets or exceeds the restoration formula. Obviously Reba Dillon will be guiding me through this process so we comply with all requirements.

I have forwarded the four dock plans to Carl Bumgarner for his review and his latest reply stated he is having his real estate attorney and appraiser determine the impact a dock will have on the value of his property. Additionally, his mother Paula is in the process of "gifting" her portion of the property to Carl's sister which may delay his signing of a waiver.

I will be in touch with any additional information I receive. Thank you for everything.

Have a great day,

Rick Pressl

From: "ebparcell@aep.com" <ebparcell@aep.com>
To: Rick Pressl <relicrick@yahoo.com>
Cc: "rsd@netzero.com" <rsd@netzero.com>; pgdade@aep.com
Sent: Monday, October 15, 2012 1:57 PM
Subject: 240 Lakeland Drive, Moneta, VA

Mr. Pressl,

Thank you for meeting with me on Monday, October 1 at the Rocky Mount office to discuss the restoration of the project boundary and the possibility of a dock at property identified as 240 Lakeland Drive. At the meeting, I indicated that I would send you the restoration formula that we are currently using for comparison of what has been installed and what is coming up naturally. For every 400 square feet, there should be at a minimum -

- One canopy tree @ 1 ½" - 2" caliper or large evergreen @ 6'; and
- Two understory trees @ 3/4"- 1 1/2" or evergreen @ 4' OR one understory tree

and two large shrubs @ 3'-4'; and

- Three small shrubs or woody groundcover @ 15"- 18"

As I mentioned at our meeting, all vegetation must be native and be identified in Native Plans for Wildlife Habitat, compiled by the US Fish and Wildlife and contained in Appendix E of the Shoreline Management

Plan for the Smith Mountain Project.

I also indicated that I would convey to you a copy of the filing made with the Federal Energy Regulatory Commission for the variance. I know that you have a copy of their final order but I thought a copy of the filing would be helpful as it contained a dock proposal that met the 1/3 of the cove requirement. FERC later asked for additional information so I am also attaching a copy of their request and my response.

Reba sent me an email with additional proposals but I have not yet had a chance to review them.

Please let me know if you have any questions.

Liz

Elizabeth B. Parcell
Plant Coordinator I
Hydro Generation
Rocky Mount Service Center
540-489-2540
Fax 540-489-2567

P.S. I am going to have to send multiple emails because the size of the email is greater than I can send externally. Additional email(s) forthcoming.

Elizabeth B Parcell

From: Rick Pressl <relicrick@yahoo.com>
Sent: Sunday, August 25, 2013 7:03 PM
To: Elizabeth B Parcell
Cc: Reba Dillon (rsd@netzero.net); Patricia G Dade
Subject: Re: 240 Lakeland Drive

Dear Liz,

It was my pleasure having you, Patricia and Oscar visit our property to discuss the status of our application. I wish we were able to get a better look at what trees and shrubs are thriving there. The removal of the vines and invasive sticker bushes, combined with this year's rainfall amounts have really helped the trees that are there. Unfortunately, that same rain has also made the invasive plants thrive as well, hence the difficulty sizing up the status.

Thank you for the information about the shoreline stabilization material...I will do some more research about this technique, but I have to say it does look like an interesting alternative.

I look forward to continued work with Patricia and Reba to establish a plan that meets everyone's needs, especially the wildlife. Can you or Patricia offer any suggestions or absolutes I can share with a Landscape Architect to avoid a "running back and forth" with changes to the overall plan? I would like to keep this project as cost effective as possible.

Again, many thanks for all you have done.

Regards,

Rick Pressl

From: Elizabeth B Parcell <ebparcell@aep.com>
To: "relicrick@yahoo.com" <relicrick@yahoo.com>
Cc: "Reba Dillon (rsd@netzero.net)" <rsd@netzero.net>; Patricia G Dade <pgdade@aep.com>
Sent: Friday, August 23, 2013 11:04 AM
Subject: 240 Lakeland Drive

Dear Rick,

Thank you again for inviting Patricia and me to your property to inspect the progress of the vegetative growth within the Project Boundary (800 foot contour elevation at Smith Mountain). Truly, this year's rain has benefitted the property.

We discussed shoreline stabilization yesterday and I indicated that I would send to you some information that may be of benefit. Hence please find attached the information should you be interested in pursuing a more natural shoreline stabilization technique.

Also, we discussed our memories of the status of the application. Patricia will review the file and any related correspondence and get back with you regarding the details. She does an excellent job and I know that you will enjoy working with her.

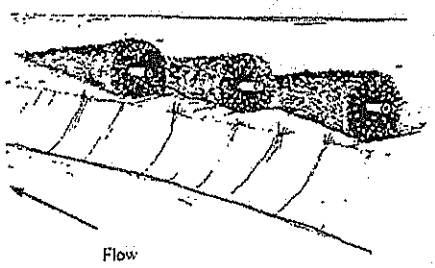
Please let me know if I can be of any further assistance.

Liz
540-985-2441

Figure. 2

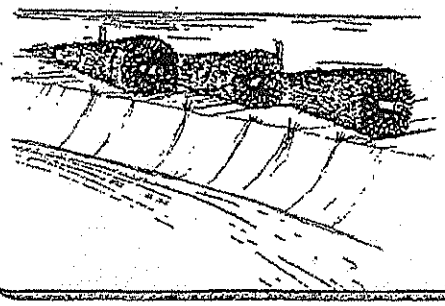
Procedure for Brush or Tree Revetment-Option A

Overlap the trunk of one tree into the main branches of the next tree.



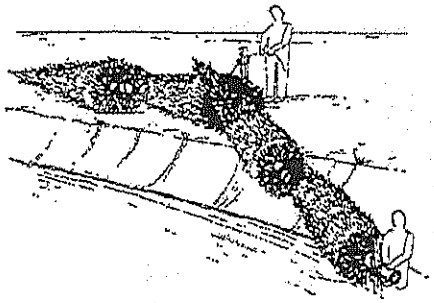
Step One: Harvest & Stage Material

Secure the trees together at the main trunks using wire. Place t-posts along the revetment and secure rope from the posts to the revetment



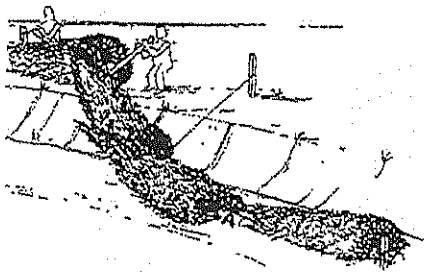
Step Two: Fastening Revetment

Lower revetment into stream and fasten end of revetment to a t-post placed at toe of bank.



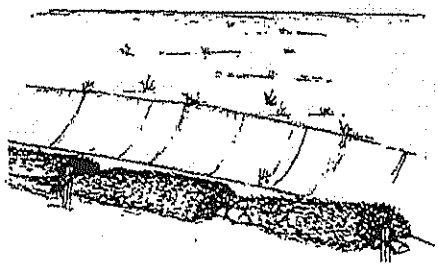
Step Three: Begin Placement

Lever the rest of the revetment into the stream, temporarily securing the revetment to the t-posts.



Step Four: Final Placement

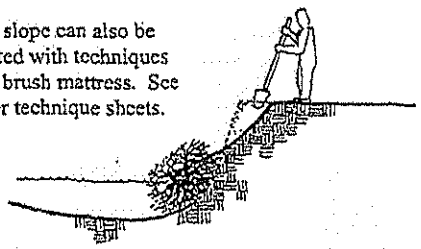
Pound t-posts next to the revetment and secure revetment to posts with wire.



Step Five: Final T-post Placement

Streambank can be knocked down on to the revetment. Slope should be seeded with grass and planted with willows.

The slope can also be treated with techniques like brush mattress. See other technique sheets.

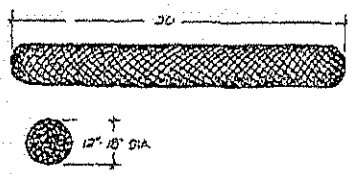


Step Six: Optional Bank Shaping

Figure. 3

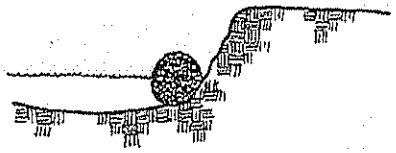
Procedure for Fiberschines

Acquire the amount of fiberschines needed for the project.



Step One: Acquisition of fiberschines

Place fiberschine at the toe of streambank at the low water line. Key in the ends of the fiberschine. See "How to Install".

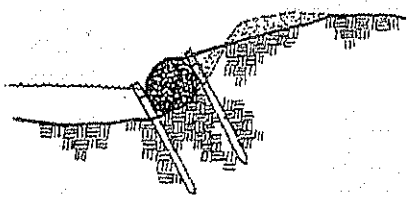


Step Two: Excavate Trench

Drive notched wooden stakes at 5' intervals on each side of the fiberschine. Tie twine between each pair of notched stakes. Drive stakes in until twine is tight across the top of the fiberschine.

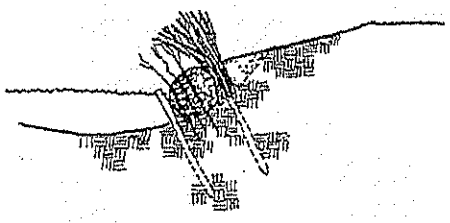
Step Three: Secure fiberschines

Backfill behind the fiberschine.



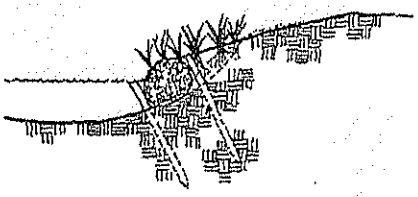
Step Four: Backfill

Willow cuttings should be planted into and behind the fiberschine before backfilling.



Step 5: Willow Plantings

Herbaceous wetland plants should be planted into the roll and the soil after backfilling Make sure the root systems are in saturated soil.



Step 5: Herbaceous Wetland Plantings

INTERAGENCY RIPARIAN/WETLAND PROJECT USDA-NRCS Plant Materials Center Aberdeen, ID 83210

(Sheet 3 of 3)

Patricia G Dade

From:	Patricia G Dade
Sent:	Thursday, July 31, 2014 2:16 PM
To:	'relicrick@yahoo.com'
Cc:	rsd@netzero.com
Subject:	Lakeland park, Lot 11

Mr. Pressl,

It was a pleasure meeting with you and Reba Dillon on July 8th, 2014 in our Rocky Mount office and at the site on July 10th, 2014 with Ken Stump. We continue to be pleased with the growth of vegetation including what was planted and the volunteers that have emerged within the majority of the project boundary (800 foot contour elevation) adjacent to your property.

During your visit to our office we discussed the new variance process as it relates to your proposal to dredge and to construct a dock. Since the variance request filed with the Federal Energy Regulatory Commission (Commission) by Appalachian Power Company (Appalachian) on behalf of the previous owner of the property was denied by the Commission, the importance of having all aspects in order before proceeding with an additional variance request was emphasized. We discussed the extent to which the vegetation had matured or recovered and a site visit was arranged to document the current condition of the vegetation. Additionally, the dredging proposal was discussed and you or Reba were going to follow up with the U.S. Army Corps of Engineers to determine what was previously submitted and the status of your application.

I asked Ken Stump to accompany me to the site since Ken was involved at a much earlier stage and has considerable experience relating to vegetation and dredging. There is no doubt that the vegetation planted has matured with each successive year but additional areas needing attention were identified. For ease of reference, I have identified three distinct areas; Area 1 (to the left of the pilings when facing the lake); Area 2 (the open grassy area); Area 3 (to the right of the pilings when facing the lake). In order to provide you with guidance to allow for further improvements, I would like to address some of the issues raised during our visit as follows:

- **Dock proposal**
  During our office meeting there was some discussion with Reba about redesigning the dock to maximize water depths. We also discussed that in order to determine the one third of the cove the 795 foot contour elevation is required. For your information, a request for the 795 foot contour elevation to be added to the survey was sent to Reba and copied to you on 10/18/2012. Please note that the waiver granted by the neighbor references a specific drawing. Any changes to the design would necessitate a new waiver from the neighbor.

- **Acceptability of Vegetation Planted**
  Reba noted that some of the vegetation on the landscape plan prepared by Dan Chitwood (sent to Reba and copied to you) was not available at the time. In an email dated 10/15/2012, Liz Parcell sent you a restoration plan based on the minimum requirements for every 400 square feet. In response, you stated in an email dated 10/19/2012 that "the landscape architect can/will determine if the existing vegetation meets or exceeds the restoration formula". We are also in receipt of a hand drawn plan of the current vegetation and a list comparing the current vegetation to the landscape plan.

Based on this information, it appears that the current vegetation is not consistent with the landscape plan nor does it meet the density of the restoration plan. It appears that missing from Areas 1 and 3 are the understory trees (such as Dogwood and Redbud) and the current open grassed area (Area 2) was to be planted with wildflower mix with Itea, Buttonbush and Witchhazel along the shoreline.

The Shoreline Management Plan states the following:
"In order for the buffer to function as intended, it should contain the full compliment of vegetation that includes all trophic layers; shade or canopy trees, understory trees, shrubs and ground cover. Vegetative buffers and replacement plans should reflect all trophic layers to the greatest extent possible, given what was originally located on the shoreline and what is to be replaced".

Site prior to vegetation removal illustrating what we are trying to accomplish.

My suggestion to you would be to devise a revised landscape plan based on the current vegetation that includes all tropic layers and your proposal for Area 2. As discussed at the site, if you would prefer to propose more shrubs than wildflowers that would afford more rapid coverage of the exposed area then this could be included in the revised landscape plan. We would then forward the landscape plan to state agencies for comments. Please note that more detail than shown on the hand drawn plan received would be beneficial since the current plan shows considerable areas void of vegetation (in Areas 1 and 3) when you and I know that this is not the case. You may consider a professionally drawn landscape plan in order to provide an accurate evaluation of the current vegetation. It would be advantageous to submit a revised landscape for state agencies for comment in advance of preparing the Environmental Assessment so that any suggestions made could be incorporated into the Environmental Assessment and as a such, could possibly put forth a stronger argument for the re-vegetation achieved thus far.

Additionally, you questioned what could be done to prevent erosion once the plastic matting is removed from Area 2. Ken and I informed you that a reasonable amount of mulch could be used to stabilize the exposed soil until the vegetative cover had matured sufficiently.

- **Plastic matting**

As explained to you at the site, we have requested on several occasions that the plastic matting be removed. In an email dated 9/13/2012 (sent to Reba and copied to you) Liz requested the removal of the

black plastic as well as earlier requests to the previous owners. The plastic is most evident in Area 2 which currently has two trees with the remaining area covered in grass growing on top of the plastic. You explained that the plastic had been used extensively and that it would be difficult to remove the plastic from within the area that is now thickly vegetated. Ken advised you that in his opinion, even though plastic was visible in places around the periphery of the vegetated area, the plastic in the open area was of most concern. Please be advised that we are requesting that the plastic be completely removed in Area 2 and that the plastic be removed to the greatest extent possible in all others areas within the project boundary.

- **Access path**
  You requested that the access path to the shoreline be extended from four feet to five feet to allow the path to be mowed with a riding lawn mower. You stated that you intended to maintain a grass path after the additional vegetation had been planted. A width of four feet had previously been requested in order to minimize the impact on the shoreline. My advice to you would be to include and justify a proposal for a five foot wide access path in your Environmental Assessment with an alternative action-plan to include a four foot wide access path. You may want to emphasize that you will be maintaining the path as grass as opposed to other (permeable) materials.

- **Weeding/trimming around the vegetation planted**
  You inquired if you could trim/weed-eat around the vegetation planted in order to prevent some trees/shrubs from being choked by regenerating vegetation in Area 3. You also inquired if some of the trees Area 1 could be thinned-out. I would advise you to not proceed with such activities until comments are received from state agencies.

- **Shoreline Stabilization**
  In an email dated 8/23/2013, following a site visit to the property, Liz Parcell attached information concerning natural shoreline stabilization techniques. Should you desire to pursue such techniques, any proposal should be included in your Environmental Assessment.

As previously discussed, I will be happy to review your dock and dredging proposals with you or the professional of your choice to assist in preparing your Environmental Assessment. In the meantime, please forward the revised landscape plan at your earliest convenience so that we can set this in motion while you are preparing other aspects of your Environmental Assessment.

If you have additional concerns that I have not addressed or if you have any questions on the items discussed above please contact me.

Sincerely,

Patricia Dade
Plant Environmental Coordinator II
Hydro Generation
540 489 2564

EXHIBIT D

Text in effect from and after July 1, 1997

Title 15.2 Counties, Cities and Towns
Chap. 12 General Powers and Procedures of Counties, §§ 15.2-1200 — 15.2-1249
Art. 1 Miscellaneous Powers, §§ 15.2-1200 — 15.2-1232.1

§ 15.2-1226. Authority of certain counties over Smith Mountain Lake. —

A. The governing bodies of Bedford, Franklin and Pittsylvania Counties may by ordinance regulate the land of their respective counties in and around Smith Mountain Lake below the 800 foot contour concerning the location, size and length of wharves, piers, boathouses, docks, bulkheads, and similar structures to provide for safe navigation of the lake.

Such ordinance shall not conflict with the provisions of the Uniform Statewide Building Code or with the rights and responsibilities accorded Appalachian Power Company under its federal license to operate the Smith Mountain Project. The ordinance may include:

1. Procedures for approval of construction of such by the governing body or its designated agent; and

2. Penalties for violation of the ordinance.

B. Such governing bodies may act jointly in the enactment, administration and enforcement of such an ordinance pursuant to § 15.2-1300. (1988, c. 876, § 15.1-12.1; 1997, c. 587.)