



## **CUT UNNECESSARY REGULATORY BURDEN, Inc.**

RECOVER OUR PROPERTY RIGHTS FROM UNWARRANTED CORPORATE CONTROL

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29 July 2011

The Honorable Cliff Stearns  
Chairman, House Energy and Commerce Committee's Subcommittee on Oversight and Investigations  
U.S. House of Representatives  
2306 Rayburn House Office Building  
Washington, D.C. 20515

Re: Federal Energy Regulatory Commission Fails to Meet the Intent of Executive Order 13563

Attachments: A. Virginia Secretary of Natural Resources letter to Secretary Federal Energy Regulatory Commission, dated 15 April 2011  
B. FERC Office of Energy Products letter to The Honorable Robert Hurt, dated July 15, 2011  
C. West Piedmont Planning District Commission Resolution, Concerns and Request for Changes Smith Mountain Lake Appalachian Power Company Shoreline Management Plan, February 24, 2011.

Dear Congressman Stearns:

President Obama's Executive Order 13563, issued January 21, requires Federal agencies to maximize the benefits of regulations, minimize their impact, and review existing regulations to ensure they are not unnecessarily burdensome. Executive Order 13563 is replete with commonsense principles. Its purpose clear—ensure regulation is balanced by considering both the cost and the benefit of the regulatory policy.

At the House oversight subcommittee hearings on Energy and Commerce held July 7th, FERC Chairman Wellinghoff testified that FERC regularly reviews its rules and has launched a new review. *"I have directed the commission's staff to conduct a review of the commission's regulations with the goals of the executive order in mind."* In response to your question about why he did not submit a rule review plan to OMB, Chairman Wellinghoff said *"I believed that we were not subject to the executive order."* When pressed further about why he did not submit a notice about the review for public comment, Wellinghoff said that his general counsel said such notice was not necessary for a staff review. With all due respect Chairman Stearns, just who is in charge here?

As a direct result of your Committee's July 7<sup>th</sup> hearing I was pleased to see that President Obama issued a new executive order: *"Within 120 days of the date of this order, each independent regulatory*

*agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations ...”*

FERC is an independent agency; but it would be more accurate to refer to it as an absolute regulator. It does what it wants, when it wants, regardless of the impact to its licensees or the general public, and apparently is accountable only to itself. FERC is conflicted as it grants licenses and collects revenue from those licensees that it then regulates. Congress recently changed this conflicted and failed regulatory model with the Mines and Minerals Service, after it was alleged MMS failed to properly regulate BP. Recall FERC also failed to regulate ENRON. The FERC regulatory model needs to change to become more accountable to the public and to Congressional oversight.

We very familiar with the Commission’s rules and procedures having participated in the recent relicensing of the Smith Mountain Hydro-Project P-2210, including the re-write of its ineffectual Shoreline Management Plan, and have drafted numerous comments and various motions of prodigious formality, attention to detail, and technical analysis. Having participated for the past seven years, organizing meetings, speaking with citizens, business owners, contractors, developers, government representatives and Appalachian Power, we can assure you and Chairman Wellinghoff that FERC’s rules limit, rather than encourage public and local government participation.

More importantly, we are certain a regulation review and rewrite will be insufficient to fix the FERC. A reasoned reading of FERC policies and regulations imparts the perception they welcome and are responsive to public input and they are transparent and impartial regulators – none of which is absolute. The failure of the FERC is in its implementation of regulations, which in our experience has been counter to the published regulation. FERC seeks public input only to ‘check that box’ and then ignores it; FERC is unresponsive to constructive criticism from informed stakeholders; FERC favors private discussion over public discussion; and FERC uses its regulations as a shield to avoid constructive confrontation and resolution of issues.

FERC sets no deadlines for its staff, there are no guaranteed FERC responses, and the FERC appeals process is designed to obfuscate, obstruct and cover its proverbial ‘butt.’ FERC, as an independent agency, exercises the powers to legislate, to enforce and to judge -- legislator, sheriff, judge, jury and appeals—all authority in one independent regulatory agency, free from political influence. In our representative democracy, these powers are always distributed among three separate but equal branches of government to ensure fairness and due process.

Regarding due process, the FERC’s administrative procedures deny the right to a timely and fair trial before an impartial judge. Before litigation can commence, one must first exhaust all avenues of appeal with FERC, which can take years, as FERC sets its own deadlines to wear-down its critics. The right to a speedy trial in Federal District Court is skipped and instead, one must proceed to a US

Circuit Court of Appeals. This is unconstitutional; as I believe it violates both the 5<sup>th</sup> and 14<sup>th</sup> amendments, and must be corrected.

FERC's absolute authority is pervasive in its Use and Occupancy and Shoreline Management Plan standard license articles, both of which trample State's rights and individual property rights. Using the Smith Mountain Project P-2210 as an illustrative example, regardless of how well reasoned or researched a position, the Commission too often turned a deaf ear, or cherry picked a study finding, or cited an irrelevant legal precedent or Commission order, or hid behind yet another confounding administrative rule designed to preserve FERC's unrestrained authority. The Commission has shown bias favoring its licensee over the public. The Commission is guilty of neglecting science as a basis for regulation, of ignoring and marginalizing public input critical of its policies, of writing confusing and inconsistent orders it fails to enforce, and of developing duplicate regulations that openly conflict with existing federal, state and local ordinances.

In support of our position, Attachment A. is a letter from Virginia's Secretary of Natural Resources explaining that Virginia's regulations are sufficient to protect Virginia's natural resources and that Appalachian Power's proposed rewrite of its Shoreline Management Plan fails to strike the appropriate balance between environmental protection and economic development.

Attachment B. is a letter from the FERC Office of Energy Products to Congressman Robert Hurt, Representative Virginia 5th Congressional District, denying the Congressman's request to support a technical conference to resolve issues with the rewritten Shoreline Management Plan. Instead FERC prefers to hide behind a flawed implementation of its rules than to resolve issues with the Smith Mountain Project Shoreline Management Plan. In its SMP guidelines FERC states: *"The SMP should be monitored and reviewed on a regular basis to determine how effective it is in accomplishing the licensee's goals, and to respond to new or evolving situations or conditions. ... A well-crafted SMP does result in a stakeholder and licensee partnership."* [See Guidance for Shoreline Management Planning at Hydropower Projects, April 2001]. The SMP currently under review by Commission staff has unanimous disagreement with the stakeholders that participated in its rewrite, rather than agreement. How is it then that the Director, Office of Energy Products can openly violate Commission guidelines in his response to the Congressman: *"Finally, please note that the Commission's review of this application will not involve revisiting the entire shoreline management plan."*

Attachment C. is a resolution from the West Piedmont Planning Commission critical of the proposed Shoreline Management Plan and its unsupported and unnecessary regulations which are negatively impacting the greater area.

I and the greater community of Southwestern Virginia would welcome an opportunity to address your subcommittee and present factual evidence demonstrating that Chairman Wellinghoff's agency employs a failed regulatory model, lacks incentive to modify its regulations, and is incapable of

conducting a comprehensive top down regulatory review without public input and more extensive Congressional oversight.

Sincerely,

A handwritten signature in black ink that reads "William C. Brush". The signature is written in a cursive, flowing style.

William C. Brush  
President, Cut Unnecessary Regulatory Burdens, Inc.

Cc:

The Honorable Robert McDonald, Governor of Virginia

The Honorable Fred Upton, Chairman of the House Committee on Energy and Commerce

The Honorable Henry Waxman, Ranking Minority Member, House Committee on Energy and Commerce

The Honorable Ed Whitfield, Chairman House Subcommittee on Energy and Power

The Honorable Bobby L. Rush, Ranking Minority Member, House Subcommittee on Energy and Power

The Honorable Diana DeGette, Ranking Minority Member, Subcommittee on Oversight and Investigations for Energy and Commerce

The Honorable Doc Hastings, Chairman of the House Natural Resources Committee

The Honorable Edward Markey, Ranking Minority Member, House Natural Resources Committee

The Honorable Robert Hurt, Virginia 5<sup>th</sup> District Representative

The Honorable Morgan Griffith, Virginia 9<sup>th</sup> District Representative

The Honorable Kenneth Cuccinelli, Attorney General of Virginia

The Honorable Doug Domenech, Virginia Secretary of Natural Resources



# COMMONWEALTH of VIRGINIA

Office of the Governor

Doug Domenech  
Secretary of Natural Resources

April 15, 2011

Kimberly C. Bose, Secretary  
Federal Energy Regulatory Commission  
888 first Street N.E. Room 1A  
Washington, DC 20426

Re: Appalachian Power Company  
Smith Mountain Project No. 2210-090  
Shoreline Management Plan

Dear Ms. Bose:

On December 31, 2010, Appalachian Power Company (APCo) submitted its proposed Shoreline Management Plan for Smith Mountain Lake as a part of its application for relicensing of its Smith Mountain Pumped Storage Project. I write to share concerns that have been raised around the proposed plan, and to urge serious consideration of those concerns in FERC's process to approve the proposed plan. Indeed, the Tri-County Relicensing Committee – created and authorized by four local governing bodies to represent their interests in this matter and a participant in the Plan development process – have shared with us significant issues that they believe has not been appropriately resolved in the development of the Plan.

We understand that the Federal Energy Regulatory Commission must approve APCo's plans for allowing development of the Smith Mountain shoreline. In that context, I am sure you recognize that Smith Mountain Lake, similar to many impoundment structures that support power generation, has become an important residential, recreational and economic development asset to its surrounding communities and to the Commonwealth. As a consequence, the rules and regulations adopted by APCo for management of shoreline development are of urgent interest to the property and business owners, to outdoorsman who visit the Lake for recreation, and to Virginia's natural resource agencies. These groups have worked together and with APCo to develop this revised plan and, while that process has been open and transparent, it is not entirely clear that the plan – as submitted by APCo - strikes the appropriate and necessary balance between environmental protection and economic development. I expect you will receive comments in addition to this letter that will set out specific issues in detail. I write to underscore the importance of getting the balance right.

As we struggle to bring Virginia's economy out of the worst recession in decades, it is more important than ever to avoid adoption of regulatory schemes that create unintended obstacles to sensible and responsible business and real estate development. We are confident that Virginia's environmental protection laws and regulations, together with local zoning provisions, secure the protection of our valuable natural resources, and strike a fair balance between economic development and the environment. To the extent that the requirements of APCo's proposed plan are more stringent than state and local law, without justification in the operation of the power generation function, I would ask that you suggest that APCo revise the plan in order to conform it to requirements already in place on property adjacent to the shoreline, and which govern Virginia shorelines generally.

In addition, I expect you will agree that local respect for, and cooperation in, the implementation of the final plan will be important to its success. An open and transparent process, at every stage, makes a valuable contribution to the relationships necessary for successful implementation. In this regard, I urge FERC to hold a public hearing on the proposed Plan at a location close to Smith Mountain Lake, so that interested local governments, NGOs, businesses and property owners have the opportunity to share their views with you directly.

Thank you for your attention in this matter, and for your consideration of our requests. It is our hope that Virginia, Virginians, and APCo will continue to work together for a vibrant and valuable Smith Mountain Lake community that supports not only our power generation assets, but our economic and environmental goals.

Sincerely yours

A handwritten signature in black ink, appearing to read "Doug Domenech". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Doug Domenech  
Secretary of Natural Resources  
Commonwealth of Virginia

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D. C. 20426

July 15, 2011

ASSIGNED  
PUMPS FILE

The Honorable Robert Hurt  
U.S. House of Representatives  
1516 Longworth House Office Building  
Washington, D.C. 20515

Dear Congressman Hurt:

Thank you for your June 24, 2011 letter requesting a technical conference between your constituents and Commission staff to discuss their concerns regarding Appalachian Power Company's shoreline management plan for the Smith Mountain Pumped Storage Project (Federal Energy Regulatory Commission's Project No. 2210), located on the headwaters of the Roanoke River in Bedford, Campbell, Franklin and Pittsylvania counties, Virginia.

The current shoreline management plan was approved by the Commission on July 5, 2005, and amended on April 14, 2006, and February 23, 2007, after taking into consideration hundreds of comments. Article 413 of the project license, issued December 15, 2009, required Appalachian Power Company to continue to implement the shoreline management plan and file an update of the plan that included, at a minimum, the specific provisions in the habitat management plan approved in the license, which include the replacement of habitat along the shoreline that is removed during shoreline construction activities (e.g., shallow-water habitat that is affected by the installation of riprap or docks), and mitigation for habitat lost due to the removal of overhanging vegetation along the shoreline, as well as setbacks (or buffers) between commercial/residential and resource protection areas.

Appalachian Power Company filed its updated shoreline management plan on January 3, 2011, and supplemented it on February 18, 2011. On March 17, 2011, the Commission issued a public notice of the application soliciting comments, motions to intervene, and protests with an April 15, 2011 deadline for filing comments. In response to the notice, over 90 letters were filed in the proceeding, expressing a wide range of comments on the shoreline management plan. These comments will assist the Commission in making an informed decision on the application.

2011-00103

Because we will consider all of the extensive comments filed in this proceeding, at this time we do not see a need to hold a technical conference. Please note that your letter and this reply have also been placed in the public files for these proceedings, which serves to alert the Commission to the concerns of interested individuals and groups.

Finally, please note that the Commission's review of this application will not involve revisiting the entire shoreline management plan. Rather it will focus on the updates required by Article 413 of the license described above.

If I can be of further assistance in this or any other Commission matter, please let me know.

Sincerely,



Jeff Wright  
Director  
Office of Energy Project

West Piedmont Planning District Commission

**Resolution  
Concerns and Request for Changes  
Smith Mountain Lake  
Appalachian Power Company  
Shoreline Management Plan**

**WHEREAS**, the West Piedmont Planning District Commission has had interest in Smith Mountain Lake since the agency's inception and wishes to support measures in aid of agencies such as the Tri-County Relicensing Committee (TCRC) and it has received information from a Franklin County Commissioner concerning TCRC's positions and wish to lend support to TCRC by submitting the following resolution positions believed to be shared with TCRC; and

**WHEREAS**, In October 2009 Appalachian Power Company (Appalachian) invited 14 state agencies, counties, business organizations, and homeowner groups to join and form a Steering Committee to review and update its Shoreline Management Plan (SMP) for Smith Mountain and Leesville Lakes. Subsequently, ten Committee meetings were held to revise the current SMP.

**WHEREAS**, on December 2<sup>nd</sup>, 2010 the Tri-County Relicensing Committee (TCRC) submitted comments to Appalachian, which were shortly thereafter endorsed by all Steering Committee members and the Virginia Secretary of Natural Resources, representing the State Resource Agencies (DGIF, DEQ, and DCR).

**WHEREAS**, on December 31, 2010 Appalachian Power submitted a revised SMP to the Federal Energy Regulatory Commission (FERC) seeking approval of their plan. Of the 70 TCRC detailed comments and recommendations, Appalachian incorporated 7 and rejected 63.

**WHEREAS**, One of the stated Goals of the SMP is: *Striving for a balance that supports local economic interests yet protects environmental and recreational resources and that allows the public to enjoy these interests and resources.* The SMP that Appalachian is seeking FERC approval for fails this goal.

**WHEREAS**, Smith Mountain Lake has great **Economic Importance** and it is recognized that the area surrounding Smith Mountain and Leesville Lakes has been an economic engine for the region for the last forty five years. Residents of the surrounding counties of Bedford, Franklin, Pittsylvania, and Campbell Counties have benefitted from recreational access, tourism, development, business activity, property values and associated revenues; the magnitude of this benefit is demonstrated in the following table:

Lake	Visitation at Public Areas <sup>1</sup>	Visitation from Shoreline Homeowners <sup>1</sup>	Visitation to Commercial Areas <sup>1</sup>
Smith Mountain	578,091	2,777,000	1,744,721
Leesville	79,057	157,860	98,465
Total Visitor Use	657,148	2,934,860	1,843,187

<sup>1</sup> Estimated Recreation Visitation April 1, 2006 to March 31, 2007

**WHEREAS**, according to the Recreation Site Survey, a survey of visitors, an average of 25 percent of visitors does not reside within the four-county area (The Louis Berger Group, 2006b). Total spending by out-of region visitors is \$15.4 million. Based on the Recreation Site Survey results, it can be estimated that local visitors (i.e., visitors who reside within the four-county region) spent a total of \$64.3 million when they visited the Smith Mountain Project; and

**WHEREAS**, in regard to **Conformance with Federal, State, and Local Regulations**, the proposed SMP violates state and regulations and imposes more limiting regulations. Local governments in the Commonwealth of Virginia are constitutionally responsible for regulation of development and land use, however, this SMP continues to permit Appalachian Power Company to classify the Smith Mountain Lake Shoreline in a manner that limits residents and businesses access to and use of project waters; and

**WHEREAS**, there appears to be **Unsupported and Unnecessary Regulation** and that many SMP regulations seek to prevent some unsupported harm or solve an undocumented problem; so that TCRC has requested that each regulation be tied to an SMP goal and detail the problem or threat the regulation is designed to resolve, but Appalachian Power Company refused to pursue this; and

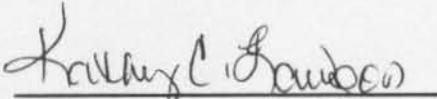
**WHEREAS**, TCRC sees a problem with **Permitting, Inspection & Enforcement** in that Appalachian's permitting and enforcement processes are lacking, as there are no office hours, permit processing timelines, and both phone and written correspondence, including electronic delivery, is frequently ignored and responses inordinately delayed. Permitting is cumbersome and unnecessarily complicated, resulting in unnecessary delays that the impact resident's property improvement timelines and contractor payment schedules.

**WHEREAS**, regarding **Dock Ownership and Transfer**, Appalachian insists on a non-standard practice of individual assignment of dock permits; for example, before re-assignment of a dock permit, Appalachian Power Company often forces the seller to modify the dock to meet the most current regulations; for this instance, TCRC recommended that dock assignments should transfer with the property deeds.

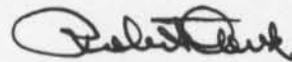
**WHEREAS**, regarding **Restrictions on Shoreline Business**, Appalachian's SMP imposes restrictions on food preparation, sale of food and beverages, boating supplies, other items, and restaurant seating within the project area, none of which are reasonable or justified. These unnecessary regulations limit the ability of marine businesses to innovate, to serve their customer's needs and expectations; and threaten their future existence.

**THEREFORE BE IT RESOLVED** that the West Piedmont Planning District Commission, representing the interests of 249,000 citizens, four counties, seven towns and two cities endorses and supports the Tri-County Relicensing Committee's December, 2<sup>nd</sup>, 2010 comments and recommendation to improve the Appalachian Power Company's Shoreline Management Plan.

This Resolution was adopted by the West Piedmont Planning District Board of Commissioners at its meeting of February 24, 2011 as attested to below.



Kathy C. Lawson  
Chairman



Robert W. Dowd  
Executive Director