

RESOLUTION NO. 11917-09

A RESOLUTION OF THE NEWPORT NEWS CITY COUNCIL TERMINATING THE KING WILLIAM RESERVOIR PROJECT.

WHEREAS, in the 1980s the City of Newport News ("the City") began assessing the region's future water needs, and for that purpose the Regional Raw Water Study Group ("the RRWSG") was formed; and

WHEREAS, as a result of studies and consultation with the RRWSG, the City identified the King William Reservoir Project ("the Project") as a principal element of the region's long-term water supply plan, in part due to the assessment that the Project was the best alternative for meeting the region's need for more water through the middle of the 21st Century; and

WHEREAS, in furtherance of the Project, the City Council ("the Council") appropriated funds for various professional services agreements including giving its specific approval of two professional services agreements with Malcolm Pirnie, Inc., dated September 13, 1988, as amended, for engineering services, and September 27, 2005, for ecological monitoring ("the Malcolm Pirnie Agreements"); and

WHEREAS, in furtherance of the Project, beginning in 1989, the City executed multiple agreements and amendments thereto with King William County, including the Memorandum of Understanding dated May 23, 1989; the King William Reservoir Project Development Agreement dated November 13, 1990, as amended; the King William Reservoir Project Lease dated January 1, 1999; the King William Reservoir Project Implementation Agreement dated June 22, 1999; and the King William Reservoir Interim Project Financing Agreement dated March 25, 2008 ("the KWC Agreements"); and

WHEREAS, in furtherance of the Project, the City and New Kent County executed the New Kent-Newport News Water Agreement dated July 13, 1993, which also sought to regulate the use and protection of the City-owned Diascund Creek Reservoir, which is primarily located in New Kent County; and

WHEREAS, in furtherance of the Project, the Norfolk District of the United States Army Corps of Engineers issued a Final Environmental Impact Statement in January, 1997, which identified additional conservation, freshwater or groundwater desalination or both, and the King William Reservoir as the least environmentally damaging combination of alternatives capable of meeting water needs; and

WHEREAS, the Virginia State Water Control Board ("the SWCB") issued a Virginia water protection permit for the Project on December 22, 1997 ("the VWPP"); and

WHEREAS, the Virginia Marine Resources Commission issued a permit allowing construction and operation of an intake structure for the Project in the Mattaponi River on August 12, 2004; and

WHEREAS, in connection with its application to the United States Army Corps of Engineers (“the Corps”) for a Section 404 permit for the Project under the federal Clean Water Act, the City executed a Final Memorandum of Agreement Among the United States Army Corps of Engineers, the Virginia Department of Historic Resources, and the Advisory Council on Historic Preservation For Treatment of Adverse Effects to Historic Properties Affected by the Construction and Development of the King William Reservoir, King William County, Virginia, dated June 21, 2005, pertaining to identification and treatment of both historic properties and traditional cultural properties affected by the Project (“the TCP Agreement”); and

WHEREAS, the North Atlantic Division of the Corps issued a record of decision in July, 2005, in which Brigadier General Merdith W.B. Temple found that the Project, along with conservation measures and groundwater, to be the least environmentally damaging and practicable alternative to meeting the public need and subsequently issued a Section 404 permit for the Project in November, 2005 (“the Section 404 permit”); and

WHEREAS, the action of the SWCB in issuing the VWPP was approved by the Virginia Supreme Court in November, 2005; and

WHEREAS, the SWCB extended the term of the VWPP in December, 2006; and

WHEREAS, the Chesapeake Bay Foundation filed suit against the SWCB in the Circuit Court for the City of Richmond in connection with its action extending the term of the VWPP, and

WHEREAS, following a decision by the Circuit Court adverse to the Chesapeake Bay Foundation, it appealed to the Virginia Court of Appeals; and

WHEREAS, following a decision by the Virginia Court of Appeals adverse to the City, it appealed to the Virginia Supreme Court, which awarded an appeal in the case styled Commonwealth of Virginia, et al. v. Chesapeake Bay Foundation, No. 082384, which appeal is at present pending before the Court; and

WHEREAS, in conjunction with the KWC Agreements, between 1999 and 2009, the City and King William County purchased various properties in furtherance of the Project; and

WHEREAS, in furtherance of the VWPP and the Section 404 permit, in 2008 and 2009, the City purchased various wetlands and stream mitigation credits; and

WHEREAS, in furtherance of the TCP Agreement and the Section 404 permit, the City negotiated proposed mitigation programs with the Pamunkey Tribal Government in December, 2008, and with the Upper Mattaponi Tribal Government in April, 2009, and began negotiations with the Mattaponi Tribal Government; and

WHEREAS, on March 31, 2009, the United States District Court for the District of Columbia ruled that the Corps and the United States Environmental Protection Agency had been "arbitrary and capricious" in some of their actions related to the issuance of the Section 404 permit, which decision was not appealed; and

WHEREAS, in response to this ruling, the Corps suspended the Section 404 permit; and

WHEREAS, by Resolution No. 11820-09 adopted on May 12, 2009, the Council directed that further work on the Project be stopped to enable the City Manager to engage in further discussions with the various permitting authorities, to analyze the consequences to the Project and its impact on the Project's other permits and the City's contractual obligations in regard to the Project; to perform the analysis necessary to identify the City's options and opportunities in regard to the Project, including alternate water supply projects; and to perform the analysis necessary to determine the financial implications of the suspension and of the selection of a possible alternative water supply project; and

WHEREAS, in response to the Council's direction, Newport News Waterworks prepared a report dated September 9, 2009, titled, "King William Reservoir Water Supply Program - Implementation Assessment" ("the Report"); and

WHEREAS, having received the necessary state and federal permits in furtherance of the Project, the City has spent more than \$50 million since 1987; and

WHEREAS, the Report concludes that, in light of the March 31, 2009, ruling by the United States District Court and the response of the Corps and the United States Environmental Protection Agency thereto, a high probability exists that the Project will not successfully obtain or retain all regulatory permits required for the Project, and that an effort to obtain and retain all such permits will likely require millions of dollars in additional costs and years of further delay; and

WHEREAS, at a work session of the Council on September 22, 2009, the Acting City Manager recommended that the Project be terminated; and

WHEREAS, after consideration of the Report and the recommendation of the Acting City Manager, his staff, and others, the Council now finds that it is in the best interests of the City to terminate the Project.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Newport News, Virginia, that:

1. Work on the Project is terminated, and the Acting City Manager is directed to close out the Project and take all actions necessary or appropriate to accomplish such termination.
2. The Acting City Manager is directed to withdraw all outstanding permit applications and to surrender all previously obtained permits issued by federal and state authorities in connection with the Project, including the Section 404 permit, the VWPP, and the water intake placement permit issued by the Virginia Marine Resources Commission, and to take all actions as shall be necessary or appropriate in connection therewith.
3. The Acting City Manager is directed to cease all activities, unless otherwise required by law, concerning the TCP Agreement, and to take all actions as shall be necessary or appropriate pertaining to such Agreement.
4. The Acting City Manager is directed to cease all activities pertaining to the mitigation programs involving the Pamunkey and Upper Mattaponi Tribal Governments and to take all actions as shall be necessary or appropriate related to such programs.
5. The Acting City Manager is directed to terminate all agreements related to the Project with King William County, including the KWC Agreements, and to take all actions necessary or appropriate related to such agreements.
6. The Acting City Manager is directed to terminate all professional services agreements, and other agreements for services relating to the Project, including but not limited to the Malcolm Pirnie Agreements.
7. Subject to applicable legal requirements, the Acting City Manager is authorized to analyze and recommend appropriate action with respect to properties and mitigation credits acquired for the Project.
8. The City Attorney is authorized to withdraw the City's appeal currently pending in the Virginia Supreme Court in the case styled Commonwealth of Virginia, et al. v. Chesapeake Bay Foundation, No. 082384, and to institute, prosecute, and defend all other legal proceedings he shall deem necessary or proper to protect the interests of the City in connection with the Project or with the termination of the Project.
9. The Acting City Manager is directed to review the New Kent-Newport News Water Agreement dated July 13, 1993, and report back to City Council within 120 days with recommendations for its further consideration.
10. The Acting City Manager is authorized to expend from existing unexpended appropriations for the Project such sums as may be necessary or required to close out the Project, including payments for which legal obligations already exist, as well as to make payments for additional materials, services, and property which in the discretion of the Acting City Manager are necessary or appropriate.

11. That this resolution shall be in effect on and after the date of its adoption, October 13, 2009.

PASSED BY THE COUNCIL OF THE CITY OF NEWPORT NEWS ON OCTOBER 13, 2009

Mabel Washington Jenkins, CMC
City Clerk

Joe S. Frank
Mayor

A true copy, teste:

City Clerk