

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL PARKS CONSERVATION)
ASSOCIATION,)

Plaintiff,)

and)

COALITION TO PROTECT AMERICA’S)
NATIONAL PARKS, INC.)
5625 North Wilmot Road)
Tucson, Arizona 85750-1216,)

JONATHAN B. JARVIS)
2575 Samuel Street,)
Pinole, California 94547,)

and)

AMERICAN RIVERS, INC.)
1101 14th Street NW, Suite 1400)
Washington, D.C. 20005,)

Amici Curiae,)

v.)

Civ. Action No. 1:17-CV-1361-RCL

TODD T. SEMONITE, Lieutenant General,)
U.S. Army Corps of Engineers, et al.,)

Federal Defendants,)

and)

VIRGINIA ELECTRIC AND POWER CO.,)

Intervenor-Defendant.)

**[PROPOSED] BRIEF OF AMICI CURIAE THE COALITION TO PROTECT
AMERICA’S NATIONAL PARKS, INC., FORMER 18TH DIRECTOR OF THE
NATIONAL PARK SERVICE JONATHAN B. JARVIS, AND AMERICAN RIVERS,
INC. IN SUPPORT OF PLAINTIFF NATIONAL PARKS CONSERVATION
ASSOCIATION’S MOTION FOR PRELIMINARY INJUNCTION**

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STATEMENT PURSUANT TO LOCAL RULE 7(O)(5)

Pursuant to Local Rule 7(o)(5), undersigned certifies that no counsel for any party authored this proposed brief, in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this proposed brief, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this proposed brief.

Dated: **August 16, 2017**

/s/ Tyler J. Sniff

Tyler J. Sniff

D.C. Bar No. 1022155

STACK & ASSOCIATES, P.C.

260 Peachtree Street, Suite 1200

Atlanta, Georgia 30303

Telephone: (404) 525-9205

Facsimile: (404) 522-0275

E-mail: tsniff@stackenv.com

IDENTITIES AND INTERESTS OF AMICI CURIAE

I. THE COALITION TO PROTECT AMERICA’S NATIONAL PARKS, INC. AND 18TH NATIONAL PARK SERVICE DIRECTOR JONATHAN B. JARVIS.

Pursuant to Local Rule 7(o)(1), The Coalition to Protect America’s National Parks, Inc. and Former 18th Director of the National Park Service Jonathan B. Jarvis join this case as amici curiae because of the importance of the issues to the National Park System on a nationwide basis.

With more than 1,400 members, the Coalition consists entirely of retired NPS officials, including former: directors; associate and regional directors; superintendents (including a superintendent at Colonial National Historic Park); rangers, and specialists with expertise in subject matter areas such as the National Park Service NPS Organic Act, National Environmental Policy Act (“NEPA”) compliance, historic and cultural resource preservation and management, and American history and prehistory. This exceptional group of NPS experts, all of whom serve on a volunteer basis, formed the Coalition in 2003 to advance the “preservation and protection of America’s national park areas” and “the central mission of the National Park Service,” i.e., the conservation mandate of the NPS Organic Act. Art. of Inc., Coalition, arts. II & III (2006), *available at* www.protectnps.org. The Coalition “collectively represents nearly 35,000 years of professional stewardship experience in protecting America’s most precious and important natural and historic places.” Ex. C. The Coalition is a “partner” of NPS on several programs, and it collaborates with NPS on a continuing basis. Since its establishment, the Coalition has found it necessary to fulfill its mission through litigation on only four occasions.¹ In each case, the issues that necessitated Coalition involvement threatened the integrity of the National Park System.

¹ *Garfield Cnty. v. U.S.*, No. 20150335, 2017 WL 3187505 (Utah July 26, 2017); *Nat’l Parks Conservation Ass’n v. U.S. Dep’t of the Interior*, 835 F.3d 1377 (11th Cir. 2016); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2013); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009).

A native of Shenandoah Valley, Virginia, Jonathan B. Jarvis served as the 18th Director of the National Park Service from September 2009 to January 2017. Prior to serving as Director, Former NPS Director Jarvis served as a Regional Director and superintendent of several NPS units. Former NPS Director Jarvis has tremendous knowledge of the national treasures managed by NPS including Historic Jamestowne; vast experience in NEPA and National Historic Preservation Act compliance, the non-impairment mandate of the NPS Organic Act, the NPS Nationwide Rivers Inventory Program, and historic and cultural resource preservation and management; and a deep understanding of special expertise of NPS in evaluating adverse impacts to and impairment of park resources and values and potential wild and scenic river segments. Former Director Jarvis earned a B.S. in Biology from the College of William & Mary.

As NPS Director during the Corps' review of the proposed Surry-Skiffes Creek-Wheaton Transmission Line Project ("Project") at issue, Mr. Jarvis is intimately familiar with the repeated failure of the Corps to pay attention to and use NPS's analyses and findings regarding the Project. Director Jarvis told the Corps that the Project is "one of the most serious threats to our nationally significant historic resources" and will cause "severe and unacceptable damage" to the "historic setting" of Colonial NHP and the Captain John Smith Chesapeake National Historic Trail ("NHT"), which "has survived intact for over 400 years" and "is integral to being able to understand each and their connection to each other." ECF No. 5-22 at 3. He also stated that "no amount of mitigation could possibly counteract the severity of the effects that would be caused by this proposal" to these units and "urge[d] the [Corps] to further examine the many other solutions available through an Environmental Impact Statement ["EIS"]." *Id.*

In the view of the Coalition and Former NPS Director Jarvis, this case challenging the Corps' approval of the construction of dozens of transmission towers as tall as the Statue of

Liberty and covered with red blinking lights across the James River near Jamestown Island—one of America’s most precious historic sites—also presents issues of System-wide importance.

These issues include: (1) the significance of adverse impacts to the resources and values of national historic parks, trails, and landmarks from modern visual intrusions; (2) violations of the NPS Organic Act by the Corps and other federal agencies through authorizing activities that are exercised in derogation of the values and purposes for which NPS units have been established; and (3) deference to NPS’s special expertise in evaluating adverse impacts to and impairment of park and river resources and values under the NPS Organic Act and Wild and Scenic Rivers Act.

II. AMERICAN RIVERS, INC.

American Rivers, Inc. joins this case as an amicus curiae because the Project threatens the tremendous historic, cultural, scenic, and natural resources and values of the James River. American Rivers was founded in 1974 for the express purpose of advocating for vigorous implementation of the Wild and Scenic Rivers Act. Since then, it has been involved in virtually every wild and scenic river designation, protecting more than 10,000 river miles and over 3 million acres of riverside habitat. With more than 275,000 members, supporters, and volunteers, it works to protect wild rivers and restore damaged rivers. As the nation’s leading proponent of the Wild and Scenic Rivers Act, American Rivers has a particular interest in ensuring that the Project does not impair the values that led to the James River’s inclusion on the NRI.

Members, supporters, and volunteers of American Rivers have been active for many years in local efforts, and have worked for years, to restore and protect the James River, which is “America’s Founding River” and the hub of a collection of protected areas, including the nation’s only congressionally-designated historic water trail. For example, for years American Rivers has contributed to the James River Regional Cleanup. In addition, for years, it has

worked with federal and state agencies, dam owners, and others to remove dams from and re-open tributaries of the James River to migratory fish such as the endangered Atlantic Sturgeon—the food source that saved the first permanent English colony in America at Jamestown.

American Rivers joins this case because the Project threatens its longstanding goal of securing the protection of this segment of the James River near Historic Jamestowne under the Wild and Scenic Rivers Act, for which it is eligible by its inclusion in the Nationwide Rivers Inventory (“NRI”). Construction of 17 transmission towers in the James River in critical habitat for the endangered Atlantic sturgeon will also be a setback to American Rivers’ efforts to re-open the James River to and conserve this prehistoric species. American Rivers’ distinct focus in this brief is the Corps’ failure to prepare an EIS despite severe adverse impacts that the Project will have on the outstandingly remarkable historic, cultural, and scenic values of this segment of the James River on which designation under the Wild and Scenic Rivers Act would be based.

SUMMARY OF THE ARGUMENT

Under NEPA and its implementing regulations the Corps, in evaluating whether the Project will “significantly affect the quality of the human environment” and require preparation of an EIS, is required to pay “special attention . . . to the views of those agencies with special expertise or jurisdiction by law in a particular field of inquiry,” 51 Fed. Reg. 15,618, 15,623 (Apr. 25, 1986), and “use[d] the environmental analysis . . . of cooperating agencies with . . . special expertise, to the maximum extent possible.” 40 C.F.R. § 1501.6; *see also* 42 U.S.C. § 4332. The National Park Service, under the NPS Organic Act and Wild and Scenic Rivers Act, has special expertise in evaluating, and statutory mandates to avoid, impacts to “national park system resources and values” and “resources associated with NPS programs, such as National Historic Landmarks [and the Nationwide Rivers Inventory].” NPS NEPA Handbook at 82.

From 2013 into 2017, **in at least 20 letters**, NPS repeatedly told the Corps that the construction of 44 transmission towers as tall as the Statue of Liberty and covered with red blinking lights across the James River near Historic Jamestowne will cause significant adverse impacts to the resources and values for which Colonial NHP, the Captain John Smith Chesapeake NHT and other NPS units were established. ECF No. 5-3. In fact, NPS found that the impacts are so significant that they will unacceptably impair the enjoyment of these units by future generations under the NPS Organic Act. NPS also repeatedly told the Corps that the Project would have “a significant adverse effect on the outstandingly remarkable historic values for which [this] segment of the James River is listed on the [NRI].” ECF No. 5-13 at 13.

NPS supported its findings with a science-based analysis of visual impacts to historic properties that found that 22 of the 44 towers would be visible from Colonial NHP, 29 from the Captain John Smith Chesapeake NHT, and 25 from Carter’s Grove Plantation National Historic Landmark (“NHL”). ECF No. 5-14 at 16. Further, NPS told the Corps that, because the mere presence of the towers in this historic segment of the James River would constitute impairment under the NPS Organic Act the only onsite mitigation measure—“examine available and feasible tower coatings and finishing materials and methods [to minimize] the visual intensity of the [Project],” ECF 5-39 at 119—cannot reduce the adverse impacts to park resources and values to the minimum such that preparation of an EIS is unnecessary. ECF No. 5-22 at 3.

These more than 20 letters from NPS demonstrate that the Corps’ authorization of the Project violates the NPS Organic Act because it was exercised in derogation of the values and purposes for which multiple NPS units were established. The Finding of No Significant Impact (“FONSI”) does not pay attention to, let alone use to the maximum extent possible, the analyses and findings of NPS, contrary to NEPA and its implementing regulations. It also erroneously

characterizes the impacts as subjective aesthetic impacts rather than objective impacts to protected park resources and values that NPS spends enormous time and resources studying. Further, it fails to consider whether the Project could prevent the segment of the James River on the NRI from qualifying for inclusion in the wild and scenic rivers system. For these reasons, the FONSI does not accurately identify the relevant environmental concerns, take a “hard look” at the problem, make a convincing case for its finding, and show that even if there is an impact of true significance, the mitigation measure sufficiently reduces the impact to a minimum. Thus, issuance of the permit and the FONSI are arbitrary and capricious and contrary to NEPA.

BACKGROUND

I. RELEVANT STATUTORY BACKGROUND.

The central issue in this case is whether the Corps violated NEPA, the statutory framework of which Plaintiff’s brief discusses. However, also of relevance to compliance with NEPA (and whether it requires preparation of an EIS here) is whether the FONSI is in tension with and/or violates other environmental protection statutes. This brief focuses on two such statutes, the NPS Organic Act and Wild and Scenic Rivers Act, and related NEPA regulations.

The National Park System includes any area of land and water administered by NPS “for park, monument, historic, parkway, recreational, or other purposes.” 54 U.S.C. § 100501. This includes national historic parks, trails, and landmarks. Under three laws—the NPS Organic Act of 1916, the NPS General Authorities Act of 1970, and the 1978 “Redwood Amendment,” NPS must manage every unit of the National Park System under the same conservation and non-impairment mandates. Specifically, in 1916 Congress mandated that NPS:

shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural and historic

objects, and wild life in such manner and **by such means as will leave them unimpaired for the enjoyment of future generations.**

54 U.S.C. § 100101(a); NPS Management Policies § 1.4.3 (2006) (“The fundamental purpose of the [NPS] . . . begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources or values.”). In 1978, Congress reaffirmed these mandates and stated:

The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as . . . specifically provided by Congress.

54 U.S.C. § 100101(b)(2). Notably, Section 100101(b)(2) **does not** limit the prohibition on the authorization of activities that are exercised in derogation of the values and purposes for which units have been established to only authorizations by NPS or only activities within parks.

The Wild and Scenic Rivers Act of 1968 states that selected rivers:

which, within their immediate environments, possess outstandingly remarkable scenic . . . historic, cultural or other similar values, shall be preserved in free-flowing condition, and . . . they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

16 U.S.C. § 1271. Segments of rivers designated by Congress or NPS as wild, scenic, or recreational rivers² are administered by a federal or state agency “in such manner as to protect and enhance the values which caused [them] to be included in [the] system.” *Id.* at § 1281(a).

The Act also requires all agencies “having jurisdiction over any lands which include . . . or are adjacent to, any river [designated] or under consideration for such inclusion” to “take such

² Wild rivers are “those . . . sections of rivers that are . . . generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted [which] represent vestiges of primitive America.” *Id.* at § 1273(b)(1). Scenic rivers are “those . . . sections of rivers . . . with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by road.” *Id.* at § 1273(b)(2).

action respecting management policies [or] plans, affecting such lands . . . as may be necessary to protect such rivers in accordance with the purposes of the [Act].” *Id.* at § 1283(a). The Act requires **all agencies** to give “particular attention [to] timber harvesting, road construction, and similar activities [i.e., transmission line construction] which might be contrary to the [Act’s] purposes.” *Id.* The Act prohibits **any agency** from issuing a permit for any water resources project, such as transmission line construction in a river, “that would have a direct and adverse effect on the values for which [a designated] river was established.” 16 U.S.C. § 1278(a).

Pursuant to Section 1276(d) of the Act NPS administers the Nationwide Rivers Inventory (“NRI”), a list of river segments that are eligible for protection under the Act. NPS may list a segment on the NRI if it is free flowing and has one or more “outstandingly remarkable values.”

II. RELEVANT FACTUAL BACKGROUND.

A. The James River Segment Listed on the Nationwide Rivers Inventory And Units Of The National Park System Near Historic Jamestowne.

To understand the significance of the Project’s impacts to the segment of the James River listed on the Nationwide Rivers Inventory and the adjacent NPS units it is critical to understand the purposes, resources, and values for which they have been established and protected.

Colonial NHP was “established in 1930 to commemorate the Colonial and Revolutionary periods in American History and includes Jamestown Island and the Colonial Parkway.” *See* 16 U.S.C. § 81 (stating that the park “shall be established . . . for the preservation of the historical structures and remains thereon and for the benefit and enjoyment of the people”). Jamestown Island, approximately 1,500-acres in size, “is the site of the first permanent English settlement in North America as well as the site of the first legislative assembly from which sprung our representative government.” ECF No. 5-5 at 4. Colonial Parkway is “a 23-mile scenic roadway

stretching from the York River at Yorktown to the James River at Jamestown [that] connects Virginia's historic triangle: Jamestown, Williamsburg, and Yorktown." ECF No. 5-5 at 3.

The General Management Plan ("GMP") for Colonial NHP states that "scenic vistas are . . . an important resource in the national park system. At Colonial, visibility is vital to interpretation of the historic events commemorated by the park. Significant vistas [include] the James River." Ex. F at 46. Accordingly, the NPS management objectives for the park are to "maximize the visual and historical integrity of the visitor experience" and "actively promote conservation of the landscapes adjacent to [the Park] to enhance historic and scenic views and to protect park resources and values." ECF No. 5-5 at 7. As such, "to avoid adding to the negative visual impact of existing utility lines, all new utility lines *will* be installed underground." Ex. F at 34. Regarding Colonial Parkway, "the road was to maintain a 'country road' flavor and to preserve the rural nature of the landscape between [Yorktown and Jamestown]." *Id.* at 39.

The Captain John Smith Chesapeake NHT is the only water trail designated by Congress under the National Trails System Act. *See* 16 U.S.C. § 1241. The trail route "is found throughout the portions of the tidal Chesapeake explored by [John] Smith, including the James and Chickahominy Rivers." ECF No. 5-5 at 3. The purpose of the trail is to "commemorate the exploratory voyages of John Smith on the Chesapeake Bay and its tributaries in 1607–1609." Ex. G at i; *see also* 16 U.S.C. § 1244. Under the Comprehensive Management Plan ("CMP") for the trail, NPS manages the trail to "emphasize interpreting and protecting the world of the Chesapeake that Smith encountered during his voyages." Ex. G at vi. Under the CMP, NPS is to provide "technical assistance" to other agencies including the Corps to protect "high potential route segments," including Smith "voyage stops [and] evocative landscapes." *Id.* at viii. Under the James River Segment Plan, the resources of the trail near Jamestown include "landscapes and

viewsheds evocative of the 17th century,” and “the views out over the James that provide a feeling for the river and the magnitude of Smith’s explorations.” Ex. H at 10, 20. The desired trail experiences include “boating . . . in an evocative 17th century landscape.” *Id.* at 21.

Washington-Rochambeau Revolutionary Route NHT is “a corridor of approximately 600 miles following the route taken by the armies of General George Washington and Count Rochambeau between Newport [and] Yorktown . . . in 1781 and 1782.” 16 U.S.C. § 1255(a)(29). The trail connects and shares resources with Colonial NHP the Captain John Smith Chesapeake NHT. The resource study states that “the route passes through or near a number of associated national parks . . . and other preserved sites that continue to convey an 18th-century landscape.” Ex. I. at 77. Carter’s Grove Plantation includes “one of colonial America’s most impressive examples of Georgian architecture” and in 1970 was designated a National Historic Landmark. This “remarkable property is intrinsically tied to the James River, with over one mile of frontage, and its river view is among its most important aspects.” ECF No. 5-5 at 4.

Finally, the 62-mile segment of the James River from Mogarts Beach to Hopewell which flows past Historic Jamestowne was listed by NPS on the NRI in 1982 for having outstandingly remarkable historic values. NPS found that this river segment is “**one of the most significant historic, relatively undeveloped rivers in the entire northeast region.** Within or adjacent to the corridor are 4 National Historic Register Sites and [Colonial] National Historic Park.” NPS, Virginia Segments, *available at* <https://www.nps.gov/ncrc/programs/rtca/nri/states/va.html>.

B. Comments Of NPS And The Amici Curiae That The Project Will Impair These NPS Units And NRI River Segment And The Corps’ FONSI.

From 2013 into 2017, the Coalition, American Rivers, and NPS sent dozens of letters to the Corps identifying adverse impacts of the Project to the above-described resources and values of the aforementioned NPS units and NRI river segment, and urged the Corps to prepare an EIS.

For example, American Rivers stated that “the project will be implemented within the viewsheds of Historic Jamestown, Colonial [NHP], Carter’s Grove Plantation [NHL], and many other nationally significant historic properties” and the segment of the James River listed on the NRI. Ex. D. at 2. The Coalition stated that visitors to the NPS units experience “exceptional scenic views of the James River that look little changed since Captain John Smith sailed up the river more than 400 years ago.” Ex. C. at 3. It urged the Corps not to “approve a proposal that would mar that scene with 44 transmission towers covered with red blinking lights—some towers as tall as the Statue of Liberty” without preparing an EIS. *Id.*; Ex. B (Jan. 2016 letter from Coalition).

NPS alone wrote **at least 20 letters to the Corps** in which it identified significant adverse impacts to these NPS units and NRI river segment and told the Corps that NEPA required preparation of an EIS. In late 2015, NPS prepared and sent the Corps a science-based analysis of visual impacts to historic properties from the Project. The NPS analysis found that given existing vegetation, 22 of the 44 towers would be visible from Colonial NHP, 29 of them would be visible from the Captain John Smith Chesapeake NHT, and 25 of them would be visible from Carter’s Grove Plantation NHL. ECF No. 5-14 at 16. The NPS analysis also found that the aggregate visual impact in acres of all historic properties (adjusted for intensity) would be **nearly 10,000 acres of historic properties**. *Id.* at 18. NPS stated that its analysis did “not account for varying degrees of significance of different viewing or vantage points within historic properties” or “additional visual impacts stemming from cumulative effects of the [Project]” and that such effects could “only be evaluated in the context of an EIS.” *Id.* at 19.

Regarding the listed river segment, NPS found that these “impacts noted above for the various historic properties from [the Project] would represent a significant adverse effect on the outstandingly remarkable historic values for which this segment of the James River is listed on

the NRI.” ECF No. 5-13 at 13. Additionally, NPS in partnership with Argonne National Laboratory reviewed Intervenor’s visual analysis and in a letter to the Corps identified “a number of critical shortcoming of [Intervenor’s] visual analysis” and that it lacked any “clear rational, consistent method for measuring visual impacts.” *See* Ex. E at 6 (detailing the shortcomings).

Based on analyses, NPS stated that “no objective reasoning could possibly conclude that the visibility of this many towers with the naked eye would not create a noticeable adverse effect, compromising the integrity of the[se] resource[s] setting, feeling, and association.” ECF No. 5-21 at 10, 12, 13. NPS told the Corps that “we believe the impacts to Jamestown Island and the Colonial National Parkway and thereby to Colonial National Park are clearly significant **and may constitute impairment under the [NPS] Organic Act. Therefore, the NPS reiterates its position that an EIS needs to be completed.**” ECF No. 5-24 at 9. NPS also stated that “NPS feels strongly that the proposal to construct an overhead power line across the James River in this location would result in an **unacceptable level of damage** to this historically important area,” i.e., would constitute impairment under the NPS Organic Act. ECF No. 5-21 at 10; ECF No. 5-15 at 2. NPS Director Jarvis told the Corps that the Project “would forever degrade, damage, and destroy the historic setting of these iconic resources. This is not acceptable for resources designated by Congress to ensure their permanent protection.” ECF No. 5-22 at 2.

On December 9, 2016, NPS pleaded with the Corps: “to date, we have not received written responses [from the Corps] to [NPS’s] communications. We find this extraordinary, given the extent to which nationally significant resources administered by or associated with the NPS will be impacted. **Please advise the NPS of how the [Corps] plans to respond to these concerns.**” ECF No. 5-33 at 2. On January 12, 2017, in a final letter to the Corps, NPS submitted comments on a draft memorandum of agreement (“MOA”) for the Project that

purports to mitigate the adverse impacts of the Project so that that they are no longer significant. NPS stated that “NPS again **unequivocally** asserts that the impacts to the nationally significant and iconic historic resources affected by this project cannot be mitigated.” ECF No. 5-34 at 2. NPS stated that “**there has been no good faith consultation [with NPS] in response to [its] concerns expressed previously.**” ECF No. 5-34 at 4. NPS reiterated the shortcomings with Intervenor’s visual analysis and offered to assist the Corps in “completion of an accurate visual impact analysis” and an EIS that “accurately assesses the impacts to the historic properties” as well as “properly analyzes scenic and visitor experience impacts.” ECF No. 5-34 at 5.

On March 30, 2017, after the change in administration, the Secretary of the Interior sent the Corps a one-page letter in which he stated, without addressing the foregoing findings and concerns of NPS, that the “Corps has taken into account the concerns of various parties” and that “the Department stands ready to sign a final [MOA].” ECF No. 5-37 at 2. On May 3, 2017, the Acting Assistant Secretary for Fish and Wildlife and Parks of DOI signed the MOA “on behalf of [NPS].” ECF No. 5-39 at 52. To date, no NPS official has signed the MOA.

On July 3, 2017, the Corps issued the permit with a Finding of No Significant Impact (“FONSI”), i.e., a finding that in the eyes of the Corps NEPA does not require preparation of an EIS. Without addressing the foregoing analyses and concerns of NPS, the FONSI curtly states that “with the DOI letter of March 30, 2017 and DOI’s May 3, 2017 concurrence on behalf of the NPS with the [MOA] we conclude that NPS’s concerns have been adequately addressed.” ECF No. 5-41 at 22. Ignoring the special expertise of NPS, the FONSI states that “while the Corps agrees that certain historic resources potentially impacted are nationally important, the Corps concludes that the intensity of the, mostly secondary effects do not reach a level of significance to the human environment, especially in light of the proposed mitigation.” ECF No. 5-41 at 29.

The FONSI characterizes the adverse impacts to park resources and values as “subjective” and states that the “Corps believes that with the execution of the mitigation . . . in the required MOA . . . these visual impacts will be mitigated.” *Id.* at 70. Rejecting NPS’s science-based analysis of visual impacts, the FONSI states that “aesthetic impacts are inherently subjective and do not lend themselves to quantitative or statistical analysis.” *Id.* at 103. The FONSI does not analyze the “critical shortcomings” of Intervenor-Defendant’s visual analysis identified by NPS. The FONSI states that “from . . . areas of Colonial Parkway, Grounds at Carter’s Grove, Jamestown Island—Captain John Smith Trail Historic District) the project will be a modern intrusion on the view” yet concludes that such impacts are not significant simply because “it is not a blockage to viewing the river or the surroundings.” *Id.* at 104. Regarding the NRI, the FONSI states that “this Project will intrude upon . . . a unique and highly scenic section of the James River” yet concludes that such impacts are not significant. *Id.* at 103.

The FONSI relies on mitigation measures in the MOA to avoid significant adverse environmental. However, the only onsite mitigation measure is a vague commitment to “examine available and feasible tower coatings and finishing materials and methods in order to further minimize and/or maintain the visual intensity of the transmission line infrastructure crossing the James River.” *Id.* at 7. The FONSI includes some offsite mitigation measures to offset “the diminished integrity of setting and feeling” caused by the Project. *Id.* at 82. However, these are limited to creating “interpretive signage,” conducting a “visitor experience study,” and providing money for “preserving and/or enhancing the landscape and setting.” *Id.*

The FONSI does not address NPS’s comments that “the impacts to the nationally significant and iconic historic resources affected by this project cannot be mitigated.” ECF No. 5-34 at 2. This includes the following statement in NPS’s final January 12, 2017 letter to the

Corps: “how can one possibly define mitigation for Jamestown? How can the installation of huge steel towers in the middle of the river be made less harsh or hostile to views that John Smith saw on his explorations? **It cannot be done.**” ECF No. 5-34 at 8 (emphasis added).

ARGUMENT

I. THE FONSI IS UNLAWFUL BECAUSE NPS FOUND THAT THE PROJECT WILL HAVE SIGNIFICANT ADVERSE IMPACTS TO PARK RESOURCES AND VALUES THAT CONSTITUTE IMPAIRMENT UNDER THE NPS ORGANIC ACT AND CANNOT BE MITIGATED.

A FONSI is unlawful if it does not: (1) “accurately identif[y] the relevant environmental concern”; (2) “t[ake] a hard look at the problem in making its decision”; (3) “ma[ke] a convincing case for its finding of no significant impact”; **and** (4) “show[] that even if there is an impact of true significance, an EIS is unnecessary because changes and safeguards in the project sufficiently reduce the impact to a minimum.” *Am. Wild Horse Preservation Campaign v. Perdue*, No. 15-5332, 2017 WL 3318750 (D.C. Cir. Aug. 4, 2017). As discussed below, the Corps’ FONSI does not make a convincing case for its finding of no significant impact and the other *Perdue* criteria because it does not pay attention to and/or use the findings of NPS—the agency with special expertise—that: (1) the Project’s adverse impacts to the resources and values for which Colonial NHP, the Captain John Smith Chesapeake NHT, and other NPS units were established rise to the level of impairment under the NPS Organic Act, and (2) such significant adverse impacts cannot be reduced to a minimum through mitigation measures because the mere presence of the towers in this historic segment of the James River constitutes impairment.

Under NPS Management Policies, park resources and values that are subject to the non-impairment mandate include: (1) “natural landscapes [and] cultural landscapes”; (2) “appropriate opportunities to experience enjoyment of [such] resources”; and (3) “any additional attributes encompassed by the specific values and purposes for which the park was established.” NPS

Management Policies § 1.4.6. Impacts that result in “impairment,” i.e. “unacceptable impacts,” to park resources and values contrary to the NPS Organic Act include “impacts that, individually or cumulatively” would: (1) “be inconsistent with a park’s purposes or values”; (2) “impede the attainment of a park’s desired future conditions for natural and cultural resources as identified through the park’s planning process”; or (3) “diminish opportunities for current or future generations to enjoy, learn about, or be inspired by park resources or values.” *Id.* at § 1.4.7.

Courts have held that NEPA requires preparation of an EIS where a proposed action adjacent to a NPS unit would impair park resources and values. *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006) (Bates, J.). In *Mainella*, the court found that a FONSI by NPS for directional oil and gas drilling on land adjacent to Big Thicket National Preserve was arbitrary and capricious where NPS “failed to take a ‘hard look’ at impacts on the Preserve from adjacent surface activities” that might result in impairment to resources and values of the preserve from in part disruption of the lightscape from artificial lighting. *Id.* at 108.

Accordingly, the NPS Management Policies recognize that construction of transmission lines through and/or near units of the NPS have the potential to result in significant adverse impacts to and impairment of park resources and values and thus require preparation of an EIS:

Where feasible, NPS utility lines will be placed underground. . . . When placed aboveground, utility lines and appurtenant structures will be located and designed to minimize their impact on park resources and values. Whenever possible and visually acceptable, all utilities will share a common corridor and be combined with transportation corridors. Cost-effectiveness, reliability of service, and visual impact will be considered.

NPS Management Policies § 9.1.5.3. For example, in *NPCA v. Jewell*, 965 F. Supp. 2d 67 (D.D.C. 2013), NPS prepared an EIS for proposal to enlarge existing transmission line in an existing right of way through three national parks.

Accordingly, the NPS NEPA Handbook states that NPS must prepare an EIS where a “proposal is expected to **or has the potential to** result in significant adverse environmental impacts.” NPS NEPA Handbook, at 18 (2015). The Handbook indicates that impacts to park resources and values, including natural and cultural landscapes and opportunities to experience enjoyment of them, are environmental impacts. *Id.* at 3; *see also Md. Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973) (“NEPA contemplates that aesthetic considerations are part of the quality of the human environment.”).

NEPA and CEQ NEPA regulations provide that “special attention should be paid to the views of those agencies with special expertise or jurisdiction by law in a particular field of inquiry.” 51 Fed. Reg. 15,618, 15,623 (Apr. 25, 1986); 42 U.S.C. § 4332 (“The Congress . . . directs that, **to the fullest extent possible . . . all agencies** of the federal government **shall . . .** consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”); 40 C.F.R. § 1501.6 (“The lead agency shall . . . use the environmental analysis . . . of cooperating agencies with . . . special expertise, to the **maximum extent possible**”). The NPS NEPA Handbook states that NPS has special expertise in “national park system resources and values” and “resources associated with NPS programs, such as National Historic Landmarks [and the NRI].” Handbook at 82.

In the present case, the Corps fails to make a convincing case for its FONSI in numerous respects. First, the at least 20 letters from NPS to the Corps demonstrate that, even with the “mitigation measures,” the Corps’ authorization of the Project violates the NPS Organic Act because it was exercised in derogation of the values and purposes for which Colonial National Historical Park, the Captain John Smith Chesapeake National Historic Trail, the Washington-Rochambeau Revolutionary Route National Historic Trail, and Carter’s Grove Plantation NHL

were established. 54 U.S.C. § 100101(b)(2). Indeed, NPS Director Jarvis stated that the Project is “one of the most serious threats to our nationally significant historic resources” and will cause “severe and unacceptable damage” to the “historic setting” of Colonial NHP and the Captain John Smith Chesapeake NHT, which setting “has survived intact for over 400 years” and “is integral to being able to understand each and their connection to each other.” ECF No. 5-22 at 3. Using its science-based analysis, NPS stated in another letter that “no objective reasoning could possibly conclude that the visibility of this many towers with the naked eye [22 from Colonial NHP, 29 from the Captain John Smith Chesapeake NHT, and 25 from Carter’s Grove Plantation NHL] would not create a noticeable adverse effect, compromising the integrity of the resource’s setting, feeling, and association.” ECF No. 5-21 at 10, 12, 13.

Second, the FONSI fails to pay attention to, and/or use to the maximum extent possible, these analyses and findings of NPS that the Project will cause significant adverse impacts to the resources and values for which these NPS units were established. The Corps’ finding that the intensity of the Project’s adverse environmental impacts is not significant is directly contrary to NPS’s repeated findings that the Project *not only has the potential* to result in significant adverse impacts—which such potential is sufficient to require preparation of an EIS—but as stated above by NPS Director Jarvis “*would* forever degrade, damage, and destroy the historic setting of these iconic resources . . . designated by Congress to ensure their permanent protection.” ECF No. 5-22 at 2. Indeed, because the Project involves construction of a new transmission line through NPS units that the Corps in the FONSI describes as a “national treasure,” ECF No. 5-41 at 103, the need to prepare an EIS is *even more compelling* than in *NPCA v. Jewell*, where NPS prepared an EIS for a less damaging proposal to enlarge an existing transmission line in an existing right of way through multiple NPS units. 965 F. Supp. 2d at 72.

The Corps' FONSI is based on an erroneous characterization of the adverse impacts as merely "aesthetic impacts," "inherently subjective," and "not lend[ing] themselves to quantitative or statistical analysis." ECF No. 5-41 at 103. Yet, as discussed above, in promulgating management plans for these units, NPS spends enormous time and resources cataloging and analyzing the evocative 17th-century and 18th-century landscapes and viewsheds of these units. *See* 54 U.S.C. § 100502 (requiring NPS to regularly prepare GMPs for each NPS unit). This is because, consistent with the NPS Organic Act and the establishment acts for these units, NPS **must** manage these units to, *inter alia*, "actively promote conservation of the landscapes adjacent to [the Park] to enhance historic and scenic views and to protect park resources and values" (Colonial National Historic Park), ECF No. 5-5 at 7, and protect "high potential route segments, including Smith voyage stops [and] evocative landscapes" (Captain John Smith Chesapeake National Historic Trail). Ex. G at viii As such, the adverse impacts are **not** "aesthetic impacts alone," *River Rd. Alliance v. Army Corps of Engr's*, 764 F.2d 445, 451 (7th Cir. 1985), but rather **tangible impacts to objective park resources and values**, i.e., historic, cultural, and natural landscapes and opportunities to experience them as Captain John Smith and the first residents of Jamestown experienced them. Thus, the FONSI fails to identify the relevant environmental concerns. *Perdue*, 2017 WL 3318750, at *12.

The FONSI's characterization is also erroneous because NPS conducted a *science-based* analysis of adverse impacts from the Project to the NPS units which concluded that "no objective reasoning could possibly conclude that the visibility of this many towers with the naked eye [22 from Colonial NHP, 29 from the Captain John Smith Chesapeake NHT, and 25 from Carter's Grove Plantation NHL] would not create a noticeable adverse effect, compromising the integrity of the resource's setting, feeling, and association." ECF No. 5-21 at 10, 12, 13. Likewise, NPS

in partnership with Argonne National Laboratory analyzed Intervenor's visual analysis and determined that it lacked any "clear rational, consistent method for measuring visual impacts." Ex. E at 6 (listing shortcomings). In the FONSI, the Corps fails to pay attention to, let alone use to the maximum extent possible, these analyses by NPS, contrary to NEPA. As such, words, the FONSI does not take a "hard look" at the problem. *Perdue*, 2017 WL 3318750, at *12.

Even if the Court views the Project's adverse impacts as simply "aesthetic impacts," *River Rd. Alliance*, 764 F.2d at 451, the intensity of such adverse aesthetic impacts is severe enough to compel the preparation of an EIS given that NPS found that "the impacts to . . . Colonial National Park . . . may constitute impairment under the Organic Act." ECF No. 5-24 at 9. Similar to *Mainella* where the court found that a FONSI was arbitrary and capricious where NPS "failed to take a 'hard look' at impacts on the Preserve from adjacent surface activities," i.e., activities on property adjacent to the Preserve, that ***might result*** in impairment to resources and values of the Preserve, 459 F. Supp. 2d at 108, the FONSI here is arbitrary and capricious given that the Corps ignored the finding of NPS, the agency with special expertise, that the impacts to Colonial NHP from adjacent construction of the transmission line ***will result*** in impairment to the resources and values of the park.

Critically, because NPS found that the mere presence of the transmission towers/line in this historic segment of the James River cause such impairment the Corps cannot rationally show that the "mitigation measures" sufficiently reduce the adverse impacts to park resources and values to a minimum such that preparation of an EIS is unnecessary. *Perdue*, 2017 WL 3318750, at *12. The FONSI ignored NPS's comments that "the impacts to the nationally significant and iconic historic resources affected by this project cannot be mitigated." ECF No. 5-34 at 2. As stated above, the primary onsite mitigation measure is a vague commitment to

“examine available and feasible tower coatings and finishing materials and methods in order to . . . minimize . . . the visual intensity of the [Project].” ECF No. 5-41 at 7. This mitigation measure is plainly insufficient to reduce the adverse impacts to park resources and values to the requisite minimum where NPS Director Jarvis found that the mere presence of the towers in this historic segment of the James River “would forever degrade, damage, and destroy the historic setting of these iconic resources.” ECF No. 5-22 at 2; *see Perdue*, 2017 WL 3318750, at *12.

Finally, the FONSI’s statement that “with the DOI letter of March 30, 2017 and DOI’s May 3, 2017 concurrence on behalf of the NPS with the [MOA] NPS’s concerns have been adequately addressed” is flawed. “Cooperating agency” means an agency that “request[s] the lead agency to designate it a cooperating agency” and “which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal.” 40 C.F.R. § 1508.5. “Special expertise” means “statutory responsibility, agency mission, or related program experience.” *Id.* § 1508.26. The NPS Organic Act charges NPS the responsibility and mission to ensure that park resources and values are not impaired. Indeed, the NPS NEPA Handbook states that NPS has special expertise in “national park system resources and values” and “resources associated with NPS programs, such as National Historic Landmarks.” Handbook at 82. As such, the Secretary’s letter and the signature of the Acting Assistant of DOI on the MOA do not magically erase the analyses, findings, or concerns of NPS. After NPS sent its final letter on January 12, 2017 to the Corps, NPS never sent a follow-up letter explaining that its prior analyses and findings are invalid. **The analyses and findings stand including NPS’s position in its last letter: “how can one possibly define mitigation for Jamestown? How can the installation of huge steel towers in the middle of the river be made less harsh or hostile to views that John Smith saw on his explorations? It cannot be done.” ECF No. 5-34 at 8.**

II. THE FONSI IS UNLAWFUL BECAUSE NPS FOUND THAT THE PROJECT WILL HAVE SIGNIFICANT ADVERSE IMPACTS TO THE HISTORIC VALUES OF THE SEGMENT OF THE JAMES RIVER ON THE NATIONWIDE RIVERS INVENTORY THAT CANNOT BE MITIGATED.

The FONSI also does not make a convincing case for its finding and satisfy the other *Perdue* criteria because it does not pay attention to, let alone use, the analyses and consistent findings of NPS that the Project will have significant adverse effects on the historic values of the segment of the James River on the Nationwide Rivers Inventory which cannot be mitigated.

As discussed above, Section 1276(d) of the Wild and Scenic Rivers Act gives NPS the authority and responsibility to administer the NRI and mandates that “in all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic, and recreational river areas.” 16 U.S.C. §1276(d)(1). Pursuant to this provision, a 1979 Presidential Directive required **all agencies** to “as part of its . . . environmental review process, take care to avoid or mitigate adverse effects on rivers identified in the Nationwide Inventory.” 45 Fed. Reg. 59,189, 59,191 (Sept. 8, 1980).

CEQ published procedures for agencies to use in complying with the above-mentioned provisions of the Act, NEPA, the Presidential Directive, and CEQ NEPA regulations. *Id.* These procedures indicate that agencies must consult with NPS and prepare an EIS where a proposal “could have” significant adverse effects on a river in the Inventory because such effects could downgrade portions of the Inventory or foreclose wild and scenic river status. *Id.* The procedures define “adverse effects” to include “introduction of visual . . . intrusions which are out of character with the river or alter its setting.” *Id.* The procedures also indicate that “actions which diminish . . . the outstandingly remarkable values of a river segment could prevent the segment from qualifying for inclusion in the national system.” *Id.* at 59,192. **The procedures**

explicitly identify construction of “transmission lines” as having “the potential for adverse effects on the values of a potential wild, scenic, or recreational river.” *Id.* at 59,192.

As stated above, the NPS NEPA Handbook states that NPS has “special expertise in “resources associated with NPS programs” including the Nationwide Rivers Inventory. Handbook at 82. Indeed, in *NPCA v. Jewell*, 965 F. Supp. 2d 67 (2010), the Court held that assessments by NPS, not the Corps, “about whether an action substantially interferes with public use and enjoyment of [a wild and scenic] river’s values [are] entitled to deference.” *Id.* at 89.

In the present case, NPS placed the 62-mile segment of the James River from Mogarts Beach to Hopewell which flows past Jamestown on the NRI for having “outstandingly remarkable” historic values. Specifically, more than three decades ago, NPS found that this river segment is **“one of the most significant historic, relatively undeveloped rivers in the entire northeast region.** Within or adjacent to the corridor are 4 National Historic Register Sites and one National Historic Park.” NPS, NRI Virginia Segments. In addition, as American Rivers noted in its letter to the Corps, this river segment is “the only river segment in the state [of Virginia] recognized by the Virginia National Assembly as a ‘Historic River.’” Ex. D at 1.

In a letter to the Corps, NPS found that all the “impacts noted . . . for the various historic properties from [the Project] would represent a significant adverse effect on the outstandingly remarkable historic values for which this segment of the James River is listed on the NRI.” ECF No. 5-13 at 13. As the court held in *NPCA v. Jewell*, NPS findings on whether adverse impacts to rivers classified and/or inventoried under the Wild and Scenic Rivers Act are substantial are entitled to deference. 965 F. Supp. at 89. However, in its FONSI, the Corps does not mention let alone use to the “maximum extent possible” this expert finding by NPS, contrary to NEPA and the CEQ NEPA regulations. As such, the FONSI fails to take a “hard look” at the problem.

In *NPCA v. Jewell*, the Court upheld as rational NPS's finding in an EIS that a proposal to construct a transmission line across a segment of a river protected as scenic would not substantially interfere with its visual quality because the project would "cross the river at the same place as [an] existing [transmission line and would] use . . . neutral colored paints to reduce reflection [and] monopoles rather than lattice towers." *Id.* Unlike the project in *NPCA v. Jewell*, the Project here crosses "a unique and highly scenic section of the James River," ECF No. 5-41 at 103, where no transmission line exists and the towers in the river are not monopoles but rather towers as tall as the Statue of Liberty with red blinking lights. As such, the primary mitigation measure in the MOA of "examin[ing] available and feasible tower coatings and finishing materials and methods," ECF No. 5-41 at 7, clearly does not sufficiently reduce the impacts to a minimum such that preparation of an EIS is not required. *Perdue*, 2017 WL 3318750, at *12.

Furthermore, the FONSI states that "this Project will intrude upon . . . a unique and highly scenic section of the James River" but fails to consider whether such an intrusion is significant necessitating preparation of an EIS. ECF No. 5-41 at 103. Instead, the FONSI contains an empty statement that "the Corps believes its consideration pursuant to history for this segment of the James River have [sic] been adequately addressed and therefore determined that it has fulfilled its responsibilities under the Wild and Scenic Rivers Act." ECF No. 5-41 at 107. As such the FONSI fails to take a hard look at the problem. *Perdue*, 2017 WL 3318750, at *12.

Moreover, nowhere does the FONSI discuss whether an intrusion upon a unique and highly scenic section of the segment of the James River on the NRI could prevent the segment from qualifying for inclusion in the national wild and scenic rivers system. This failure alone is a sufficient ground to find the FONSI arbitrary and capricious as the Corps failed to "identif[y] the relevant environmental concern" and take a "hard look at the problem." *Perdue*, 2017 WL

3318750, at *12. In sum, the FONSI fails to make a convincing case that the modern visual intrusions of dozens of transmission line towers covered with red blinking lights, some as tall as the Statue of Liberty in “a unique and highly scenic section” of “one of the most significant historic, relatively undeveloped rivers in the entire northeast region” are not significant or can be reduced to a minimum such that preparation of an EIS is unnecessary. *See id.* at *12.

CONCLUSION

For the foregoing reasons, the FONSI is unlawful and NEPA requires preparation of an EIS. No party has benefited from merely preparing an Environmental Assessment (“EA”) given the time, resources, and controversy that the EA process has involved, which has only resulted in the lack of a full understanding of the impacts of and alternatives to the Project. Indeed, these time and resources could have easily been invested in an EIS process which would have resulted in a full understanding of the impacts and alternatives and during which a clear consensus-based alternative could have emerged. *See, e.g.,* DOI NEPA Regulations, 43 C.F.R. § 46.110 (requiring NPS to “whenever practicable, use a consensus-based management approach to the NEPA process” in which it “must . . . show that [a] reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision.”).

Respectfully submitted,

Dated: **August 16, 2017**

/s/ Tyler J. Sniff

Tyler J. Sniff
D.C. Bar No. 1022155
STACK & ASSOCIATES, P.C.
260 Peachtree Street, Suite 1200
Atlanta, Georgia 30303
Telephone: (404) 525-9205
Facsimile: (404) 522-0275
E-mail: tsniff@stack-envirolaw.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on **August 16, 2017**, I electronically filed the foregoing using the Court's CM/ECF system and thus also served the foregoing on all counsel of record.

Dated: **August 16, 2017**

/s/ Tyler J. Sniff

Tyler J. Sniff

D.C. Bar No. 1022155

STACK & ASSOCIATES, P.C.

260 Peachtree Street, Suite 1200

Atlanta, Georgia 30303

Telephone: (404) 525-9205

Facsimile: (404) 522-0275

E-mail: tsniff@stack-envirolaw.com