



August 13, 2021

Colonel Col. Brian P. Hallberg
District Commander
U. S. Army Corps of Engineers, Norfolk District
803 Front St.
Norfolk, VA 23510

*Ref: DEIS and Consideration of Sections 106 and 110(f) of the NHPA
Surry-Skiffes Creek-Wheaton Transmission Project
James City County, Virginia
ACHP Case Number: 12021*

Dear Colonel Hallberg:

The Advisory Council on Historic Preservation (ACHP) has received inquiries from a number of stakeholders regarding the obligation of the Corps of Engineers, Norfolk District (Corps) to reconsider or supplement its consideration of effects to historic properties as it develops an Environmental Impact Statement (EIS) for compliance with the National Environmental Policy Act (NEPA) for the referenced undertaking. The Corps is developing the EIS pursuant to a court order from the United States District Court for the District of Columbia, following a decision issued on March 1, 2019 by the United States Court of Appeals for the District of Columbia Circuit. The Appeals Court determined that the Corps should have developed an EIS during its original permit review because of the significant impact on the human environment that would result specifically from the effects of the undertaking on a collection of historic properties of national importance concentrated at the project location. In the following, the ACHP addresses consideration of effects to historic properties in the context of the purpose and need for the project, the consideration of alternatives, and the obligation of a federal agency to comply with Section 110(f) (54 U.S.C. § 306107) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.). Our comments are informed by the conclusions presented by the Corps in its draft EIS (DEIS) and the comments of stakeholders on that draft. The ACHP is providing these comments due to its involvement in the original Section 106 review of this undertaking and its continued interest in seeking ways to avoid, minimize, or mitigate the adverse effects to nationally significant historic properties.

Background

The Surry-Skiffes Creek-Wheaton Transmission Project (project, undertaking) was proposed by Virginia Electric and Power Company (Dominion) to address anticipated challenges to the reliability of the regional electric power grid as a result of projections about growth in demand for electric power in the North Hampton Roads Load Area (NHRLA) and in the context of its need to close or modify several existing power generation facilities to comply with the Mercury and Air Toxics Standards (MATS) rule of 2012. Activities associated with the undertaking required a Corps permit pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Dominion proposed to construct the project at a location in the viewshed of a complex of extremely important historic properties, including Jamestown Island, Colonial National Parkway, Carter's Grove Plantation National Historic Landmark

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(NHL), and the Captain John Smith Chesapeake National Historic Trail (NHT). As ACHP noted in a letter to the Corps in May 2017 regarding the Corps' Section 106 review for the undertaking, the project threatened to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for historic properties that have foundational national significance, in an area centrally linked to extensive Native American habitation, European exploration and settlement, the founding of the nation, the establishment of an economy based on African slavery, the Revolutionary War, and the Civil War.

The Corps ultimately found that the undertaking would have an adverse effect on historic properties, and in May 2017, executed a Memorandum of Agreement (MOA) for the resolution of those effects. As noted in the Appeals Court decision, the resolution of adverse effects under the MOA did not reduce or in any way minimize or avoid the adverse effect of the undertaking. Other than requiring consideration of paint colors to reduce the visibility of the transmission line towers and data recovery at an affected archaeological site, the MOA focuses on providing funding for a variety of historic preservation and landscape protection projects intended to compensate for the adverse effect, which remains unabated. Many consulting parties, including the National Park Service (NPS), the National Trust for Historic Preservation (NTHP), and the National Parks Conservation Association (NPCA), did not concur with the MOA. These consulting parties remain deeply concerned about the lasting harm this undertaking will cause to significant historic places, through the intrusion of an industrial presence and its potential to facilitate future development in the setting of historic properties that have been valued, preserved, and honored by generations of Americans.

The Corps' permit for the project was issued on July 3, 2017. The project was constructed, and ultimately energized, in February 2019. In 2018, the issuance of the permit was challenged in the District Court, which upheld the permit decision. That decision was appealed, and the Appeals Court remanded the action to the District Court with instructions to direct the Corps to prepare an EIS. In its order, the Appeals Court also directed the Corps to reconsider alternatives under NEPA, noting that would require the Corps to reevaluate its Clean Water Act and NHPA analyses. The Court also specifically directed the Corps to comply appropriately with Section 110(f) of the NHPA in light of the Court's clarification of the meaning of the term "direct adverse effect" as used in the statute and its implementing regulations.

Purpose and Need and Consideration of Alternatives

Comments on the current draft EIS from several stakeholders, and updated supporting information they have supplied, provide continued criticism of the purpose and need for the constructed project and the consideration of alternatives. During the original review and Section 106 consultation, consulting parties challenged the accuracy of the data and assumptions used by Dominion in its computer modeling to justify the purpose and need for the project and the selection of the preferred alternative to meet the requirements of the regional planning process. In light of the Appeals Court order directing the Corps to develop an EIS, the NTHP and NPCA followed up by sponsoring additional technical analyses that further challenge the purpose and need for the project and again recommend alternative measures to address revised projections about the growth in demand and the need to ensure reliability.

In the draft EIS, the Corps notes that it carefully reviewed the comments provided by NTHP, NPCA, and their consultants, in the context of the responses provided by Dominion and PJM Interconnection LLC, the regional grid manager. The comments and responses indicate that there is still disagreement regarding energy needs and the availability of viable alternatives. The ACHP acknowledges that it has no expertise to evaluate the technical issues in question. However, it remains unclear to the ACHP whether the Corps has adequately addressed the challenges provided by NTHP and NPCA, in a way that includes serious consideration of effects to Carter's Grove NHL and other historic properties.

The ACHP also remains concerned about the Corps' stated ability to realistically consider effects to historic properties using the regulations and protocols the Corps follows in its public interest review and permitting process. During the original Section 106 consultation for the project as well as in the current DEIS, the Corps indicates numerous times that it is subject to limitations on its authority to consider alternatives when issuing permits to comply with the Clean Water Act. While the ACHP understands other laws and regulations may impact the types of alternatives identified, this limitation does not modify the requirement to consider the effects of those identified alternatives on historic properties. Further, in focusing the consideration of alternatives ultimately on impacts to aquatic resources, the Corps mistakenly fosters the assumption that adverse effects to historic properties can be minimized by offset measures. Offset mitigation measures may compensate for, and under Section 106 be used to resolve, adverse effects to historic properties, but such measures generally do not avoid or minimize the adverse effects.

We also remain concerned about whether the Corps meaningfully considered other impacts that relate to the overall human environment, including effects on historic properties, with the same weight as effects to aquatic resources in its analysis of alternatives in the DEIS. Further, the compensatory mindset which defaults to mitigation as a way to offset adverse effects to historic properties limits serious consideration of alternatives that avoid and/or minimize such effects, and is especially problematic when attempting to meet the higher standards of Section 110(f), referenced further below.

Section 110(f) (54 USC § 306107)

The Corps' focus on mitigating or offsetting effects to resources makes it difficult for the Corps to comply appropriately with Section 110(f) of the NHPA. Section 110(f) requires that federal agencies must, to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to NHLs, prior to carrying out, licensing, permitting or assisting undertakings that may directly and adversely affect such NHLs. As the Appeals Court noted, and as advised by the ACHP and NPS, the use of the term "directly" in Section 110(f) and in 36 C.F.R. § 800.10(a) refers to causation and not physicality. Thus, visual effects can be a direct consequence of an undertaking and trigger federal agency responsibility to comply with Section 110(f).

During the original Section 106 consultation, the Corps determined that the project would have a visual adverse effect on the Carter's Grove NHL by impacting the viewshed of the resource and introducing elements that would diminish the NHL's integrity of setting, feeling, and association, which are integral to the resource's significance and qualifications for listing in the NRHP and as an NHL. However, the Corps believed that Section 110(f) was not applicable because the Corps did not consider the project's visual impacts to be "direct," as referenced in the statute, interpreting "direct" to require a physical effect. As a result, the Corps did not comply with Section 110(f). Now, in Section 5.3.3.1. of the current DEIS, the Corps posits that the studies carried out in the original Section 106 review to identify historic properties and assess effects, and the mitigation required in the MOA demonstrate that it has met the Section 110(f) requirement to undertake, to the maximum extent possible, such planning and actions as may be necessary to minimize harm to the NHL. The Corps concludes that the Section 106 actions taken to date have fulfilled the Corps responsibilities under Section 110(f).

The ACHP disagrees with that assessment. While, Section 106 imposes procedural requirements for the agency to consider the effects of the undertaking on historic properties, Section 110(f) goes beyond that to require more substantive action on the part of the agency: to deliberately take such planning and actions as may be necessary to minimize harm to an NHL to the maximum extent possible. We remind the Corps that the consideration of mitigation does not in any way minimize, or remove, the adverse effect. As the Appeals Court observed, beyond examining alternative coatings and finishing materials for the transmission towers, the mitigation measures that resulted from the Section 106 review do not

substantially reduce the severity of the project's visual impacts on historic resources. The resolution of adverse effects under the MOA focuses on more 'general historic preservation efforts' throughout the general project area, including landscape and viewshed enhancement, shoreline protection, and archaeological research and summative studies (that is, mitigation rather than minimization).

In determining how to comply with Section 110(f), federal agencies should consider the revised guidance set forth in The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Projects pursuant to the National Historic Preservation Act. Standard 4 of the guidance applies to federal agency project planning and provides a useful summary of factors that should be considered when planning undertakings that involve NHLs. That guidance clarifies the requirement for federal agencies to exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs, such as the undertaking at issue here, by considering all prudent and feasible avoidance alternatives. The guidance also notes that in situations where such alternatives appear to require undue cost or to compromise the undertaking's goals and objectives, the agency must balance those goals and objectives with the intent of Section 110(f), considering: (1) the magnitude of the undertaking's harm to the historical, archaeological and cultural qualities of the NHL; (2) the public interest in the NHL and in the undertaking as proposed, and, (3) the effect a mitigation action would have on meeting the goals and objectives of the undertaking.

Thus, in order to show how it has complied with Section 110(f), the Corps should demonstrate how it planned, including evaluating the applicant's planning, and considered, to the maximum extent possible, ways to minimize the adverse visual effects to the Carter's Grove NHL in evaluating alternatives for this undertaking. This analysis would need to be completed prior to the Corps' making a final decision regarding approval of the undertaking. To the extent that the purpose and need for the undertaking may be modified based on updated knowledge and projections about growth in demand for electric power and the possibility of other viable alternatives, the Corps' compliance with Section 110(f) should be modified accordingly. Further, the requirements of the public interest review do not relieve the Corps of its responsibility to fully comply with Section 110(f).

Conclusions

As noted, the undertaking's executed MOA focused on mitigation that includes a range of projects for archaeological study, shoreline protection, landscape preservation, and enhancement of public experience of the historic properties in their setting and context. The ACHP reluctantly chose to execute the MOA because these studies and projects have the potential to contribute to the stewardship of the important historic properties in this area. Our goal was to ensure that the commitments in the MOA would be included as conditions of the Corps' permit and part of the legal obligations for Dominion as it implemented the undertaking. In signing the MOA, we offered comments on four areas: (1) the planning process and the sequencing of state and federal reviews; (2) the alternatives analysis; (3) the coordination of NEPA and Section 106 reviews; and (4) the focus on mitigation in project design and review. These issues remain a concern, and most have been referenced in our comments above, and by stakeholders commenting on the DEIS.

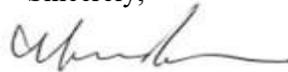
The Appeals Court found that the Corps had not properly complied with NEPA because of its failure to acknowledge the obvious significant effect to the human environment resulting from the effects on a collection of historic properties of national importance. It is important to remember that a federal agency's compliance with Section 106 and NEPA should work in tandem, the reviews under each statute informing the other. It is not clear to the ACHP that the Corps has adequately addressed the challenges posed by NTHP and NPCA to the purpose and need for the undertaking, the consideration of alternatives, and consideration of ways to avoid or minimize adverse effects to historic properties including the NHL. Further, we would suggest that to the extent that the purpose and need for the original preferred

alternative can be reasonably questioned, the resolution of adverse effects in the Section 106 review may also be questioned.

As the Corps continues its NEPA analysis, the ACHP would like to suggest that the Corps convene a meeting of the Section 106 consulting parties to discuss the issues raised here, to consider what additional information may be needed to meet the statutory requirements of Section 110(f), and to determine whether amendments to the MOA may be necessary and appropriate. As noted above, a reliance on mitigation alone for the resolution of adverse effects in the Section 106 review without more fully exploring avoidance and minimization, may challenge a federal agency's ability to adequately comply with Section 110(f). We note that the MOA could be amended to include development of something akin to a Special Area Management Plans (SAMP), as developed under the Coastal Zone Management Act, for the APE associated with this undertaking. Such a plan could provide for coordination among federal and state agencies and local governments, stakeholders, and the public, to consider and limit effects to the nationally significant historic properties that are affected by the project and will be subjected to effects from ongoing development in the future. Such a plan could also address appropriate timing for development and implementation of an alternative that would reasonably address future power needs and grid reliability issues and allow for removal of the transmission line that directly adversely affects the Carter's Grove NHL and the other historic properties that have foundational national significance in the APE for the undertaking.

We appreciate the opportunity to provide our comments on this matter. Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely,



Reid J. Nelson
Director
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