January 19, 2022

Charles F. Sams III  
Director  
National Park Service  
1849 C Street, NW  
Washington, DC 20240

RE: NAO-2012-00080 Surry-Skiffes Creek-Whealton Proposal  
Request for Pre-Decisional Referral to CEQ

Dear Director Sams:

Congratulations on your appointment as the Director of the National Park Service. We look forward to working with you.

We, the undersigned, urge the National Park Service (NPS) to submit a pre-decisional referral to the Council on Environmental Quality (CEQ), pursuant to 40 C.F.R. Part 1504, to resolve Federal interagency disagreements concerning the major federal action at Dominion Energy’s Surry-Skiffes Creek-Whealton 500kV transmission line across the James River at Jamestown, Virginia. A CEQ referral appears to be necessary to protect the region’s nationally significant historic properties, including the Carter’s Grove National Historic Landmark (NHL), indigenous cultural landscapes, and unique aquatic resources, while resolving the fundamental disagreements over the project raised by multiple federal agencies, including the National Park Service, over many years.

The Draft EIS released by the U.S. Army Corps of Engineers’ Norfolk District (Corps) in November 2020 repeated the serious flaws from the initial Environmental Assessment that the U.S. Court of Appeals for the D.C. Circuit found to violate NEPA in myriad ways. The Draft EIS also defied the mandate of the U.S. Court of Appeals for the D.C. Circuit to conduct a more thorough review of the project’s impacts and revisit its analysis under the Clean Water Act and the National Historic Preservation Act, including impacts to the Carter’s Grove NHL. According to the project dashboard, the Corps intends to issue the Final EIS (FEIS) in early spring of 2022, quickly followed by a Record of Decision. NPS would have only 25 days to submit a CEQ referral once the FEIS has been issued, so time is of the essence in preparing to request a referral.

Background

During the Obama Administration, the National Park Service played a leadership role in pushing the Corps to consider alternatives. Dozens of NPS and Department of Interior (DOI) professionals, including Secretary of the Interior Sally Jewell and NPS Director Jonathan Jarvis, engaged in the permit application review process and raised grave concerns about the impacts of Dominion’s preferred project on nationally significant natural and cultural resources. In January 2017, Secretary Jewell sent to the Corps a letter stating, “Unfortunately, no mitigation measures can effectively offset the impact to the (Jamestown) landscape that the presence of the transmission line would cause.” The Corps never addressed NPS/DOI concerns and in March 2017, DOI Secretary Ryan Zinke reversed the Department’s position without explanation.
The Corps issued a permit in 2017 and the National Parks Conservation Association, the National Trust for Historic Preservation, and Preservation Virginia immediately sued in federal district court alleging violations of NEPA, the Clean Water Act, and the National Historic Preservation Act (NHPA). These organizations also sought a preliminary injunction to prevent the company from moving forward with the project pending a ruling from the courts.

Unfortunately, the courts denied these motions and Dominion proceeded to begin construction. Although we ultimately prevailed on appeal, Dominion completed the project and placed it into operation just three days before the U.S. Court of Appeals for the D.C. Circuit ruled that the Corps’ permit decision violated the law and ordered the agency to prepare an Environmental Impact Statement (EIS) and, in the process, reconsider its analysis under the Clean Water Act and the NHPA. Regrettably, the Corps ignored the Court’s mandate and issued a Draft EIS in November 2020 that recycled its earlier analyses and decision.

The Corps now plans to issue a final EIS in March 2022. Based on the DEIS and our conversations with the Corps and agency officials, we expect the FEIS will not address the many concerns brought forth by the NPS and other federal and state agencies, including the Advisory Council on Historic Preservation and the EPA. The Corps also failed to consider new information on alternatives to the in-river line that were made available during the draft EIS process, and the Corps has not consulted meaningfully with relevant federally recognized tribes.

Despite years of hearing serious concerns about the project from sister agencies, stakeholders, and indigenous communities, it is readily apparent that the Norfolk District will not effectively resolve these issues. The Norfolk District seems comfortable repackaging the same analysis and ultimate decision represented in the legally deficient 2017 Environmental Assessment. To correct the many defects in the analysis and resolve interagency disputes, the appropriate and necessary next step under NEPA is a pre-decisional referral to CEQ.

Need for Referral to CEQ

This project presents a number of unique circumstances that raise nationally important issues of policy and precedent that warrant the direct involvement of CEQ. For example, the fact that the project is already built raises significant challenges regarding the Corps’ ability to objectively evaluate alternatives, as required by NEPA. Moreover, the federal recognition of a number of Indian tribes in Virginia subsequent to the Corps’ earlier decision raises an unusual situation that has special importance for DOI. Government-to-government consultation is required, and has not occurred.

In a February 10, 2021, letter to the Norfolk District, the EPA expressed concerns about the shortcomings of the Corps’ review process, stating, “(g)iven that six tribes in Virginia were federally recognized after the MOA was signed, we encourage the USACE to re-engage the tribes in effective tribal consultation and coordination.” Although both the Rappahannock and the Upper Mattaponi tribes have formally requested consultation with the Norfolk District on this project, the Corps has failed to honor these requests.
In an August 13, 2021, letter (attached) to the Corps Norfolk District, the Advisory Council on Historic Preservation (ACHP) disputed both the Corps’ process and its findings. The ACHP stated, “(t)he 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 [which requires special protection for National Historic Landmarks]... 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.”

Given the significant and substantive disputes among agencies and the deficiencies in the process and analysis to date, a Section 106 consultation must be reinitiated, tribes must be brought into a meaningful consultation process, and the current Memorandum of Agreement must be reopened. Additionally, the Corps must give serious consideration to available alternatives and, relatedly, revisit its analysis under the Clean Water Act to comply with the statute’s mandate to select the least environmentally damaging practicable alternative. This is precisely what the U.S. Court of Appeals for the D.C. Circuit mandated.

If the disagreement among federal agencies regarding the project’s unsatisfactory environmental and cultural effects remains unresolved when the Corps issues the FEIS, we urge NPS to refer the matter to CEQ as described in 40 CFR Part 1504 and in CEQ’s description of the referral process. The window for submitting a CEQ referral is a mere 25 days after the FEIS has been issued. In this case, a CEQ referral may be the only manner short of additional litigation that would enable the federal agencies involved to reach a mutually acceptable solution to protect aquatic resources and critical sites in this historic and indigenous cultural landscape, among other iconic resources affected by this project. We urge the NPS to facilitate resolution of the long-standing concerns regarding America’s irreplaceable cultural and natural heritage by requesting a pre-decisional referral to CEQ. At this point in the planning process, this referral appears necessary so that all relevant agencies can air (and hopefully resolve) their differences using the specific tool provided by NEPA’s implementing regulations for situations precisely like this one.

We invite you to join us for a tour of Jamestown and its historic landscape to share what is at risk should the Corps finalize its decision without resolution of the critical concerns brought by the NPS.

Sincerely,

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