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Preserving America's Heritage

**US Army Corps of Engineers
Norfolk District Regulatory
Office
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May 2, 2017

Mr. Douglas Lamont
Senior Official Performing the Duties of the
Assistant Secretary of the Army for Civil Works
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Dear Acting Assistant Secretary Lamont:

On May 2, 2017, the Advisory Council on Historic Preservation (ACHP) executed the Memorandum of Agreement (MOA) developed by the Corps of Engineers, Norfolk District (Corps) in compliance with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800) for the proposed Surry – Skiffes Creek – Whealton 500 kV Project. The Corps is considering issuance of a permit pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act to the project proponent, Virginia Electric and Power Company (Dominion), for the undertaking.

While execution of the MOA formally concludes the Section 106 process for this project, I am also providing you comments on behalf of the ACHP pursuant to 36 C.F.R. § 800.7(b) in order to address concerns about the conduct of the Section 106 review for this project. Our comments are intended to highlight issues encountered in this case related to the planning and review of large infrastructure projects that can impede the ability of project proponents, federal agencies, and consulting parties to effectively consider alternatives that would avoid and minimize adverse effects to historic properties.

The project has been highly controversial, and the Section 106 review has been challenging from its initiation. It was widely recognized prior to the initiation of the Section 106 process that the construction of an overhead transmission line crossing the James River was in the viewshed of Jamestown Island, Colonial National Parkway, Carter's Grove plantation National Historic Landmark, the Captain John Smith Chesapeake National Historic Trail, and other historic properties within the Historic Triangle. The project threatened to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for the historic properties encompassed within. The historic properties affected by this undertaking have foundational national significance, located, as they are, 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 area contains a number of National Park Service (NPS) and Virginia State Park units as well as privately owned historic sites linked to those aspects of the nation's history.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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The active involvement of many consulting parties in the Section 106 review for this project, including the NPS and prominent regional and national preservation entities, has underscored the importance of this section of the James River to the context and setting of the historic properties clustered around the proposed transmission line crossing. The majority of the consulting parties are deeply concerned that this undertaking will cause permanent harm to these historic places that have been valued, preserved, and honored by generations of Americans. Since they continue to believe that the adverse effects resulting from this undertaking cannot be mitigated, they have declined to sign the MOA as concurring parties.

While acknowledging these impacts, the ACHP concluded that the Corps would likely issue the requested permit even if the Section 106 consultation were terminated and formal ACHP comments provided to the Corps. Thus, the ACHP reluctantly chose to execute the MOA because it does include commitments to carry out extensive mitigation to address direct, indirect, long term, and cumulative effects to historic properties from the construction of the power line. The studies and projects required by the MOA have the potential to deter long-term effects of the undertaking that could reverse more than a century of conservation efforts to preserve and celebrate this location. Our goal in executing this MOA, therefore, is to ensure that the commitments in the MOA become conditions of the Corps permit and part of the legal obligations for Dominion as it implements this undertaking.

In providing its comments pursuant to 36 C.F.R. § 800.7(b), the ACHP believes that the planning and public review process for this undertaking reveals sequencing issues related to the state and federal level reviews that hindered early and serious consideration of effects to historic properties. These are important issues that often affect the reviews of a broad range of infrastructure undertakings subject to Corps-issued permits. Therefore, the ACHP provides the following comments to encourage collaboration among the Corps, other federal agencies, and infrastructure project proponents to improve the project planning and review process so that early and informed consideration of effects to significant historic properties occurs while alternatives are still available. The comments fall under the following four headings:

- 1) Planning process and the sequencing of state and federal reviews;
- 2) The analysis of alternatives;
- 3) The coordination of NEPA and Section 106 reviews; and
- 4) A standard focus on mitigation instead of avoidance and minimization.

Planning Process and the Sequencing of State and Federal Reviews

At the outset, it is important to stress that the ACHP does not dispute the importance of Dominion's need to ensure a reliable and clean power supply to the North Hampton Roads Load Area (NHRLA) or its other service areas. The undertaking was developed to meet current and future electricity demands in NHRLA consistent with the North American Electric Reliability Corporation reliability standards and is intended to compensate for the closure of coal burning power units at the Yorktown Power Station. Throughout the process, Dominion has asserted that the proposed undertaking is both necessary and preferable in terms of cost considerations, technological feasibility, and siting/land use restrictions.

From the ACHP's perspective, the planning process followed by Dominion and the attendant sequencing of state and federal reviews led to what appears to have been an unyielding commitment to a preferred alternative well before the federal Section 106 review was started. This planning process does not appear to have included early and informed consideration of effects to a collection of nationally significant historic properties and to the importance of the historic context and setting of those properties.

Likewise, the State Corporation Commission's review was carried out before major federal reviews were fully underway, and, while it addressed effects to historic resources, the consideration was not at the level required by the federal Section 106 review. Though the state review process entertained comments

regarding effects to historic properties from stakeholders, including preservation proponents, it did not benefit from the consultative engagement required by Section 106 with local, regional, and national stakeholders with preservation expertise, including the NPS, the nation's expert on issues of the significance of historic properties. As a result, the approval of the preferred alternative in the state review was done without adequate awareness of potential impacts to these properties, and its selection reduced the flexibility for consideration of alternatives under the ensuing federal Section 106 review. By the time the Corps launched the Section 106 review, the previous planning and review process presented the federal agency's decision as an either/or choice, as frequently characterized by Dominion, between the preferred alternative or rolling black-outs.

The Analysis of Alternatives

The ACHP acknowledges that it does not have the requisite expertise in electrical engineering and power supply planning and modeling to undertake a rigorous technical analysis of alternatives for a project such as this. However, from the ACHP's experienced perspective on how agencies and applicants consider effects of projects on a collection of nationally significant historic properties located in a relatively unspoiled and evocative setting, the alternatives analysis was extremely problematic.

During the Corps Section 106 review, the alternatives analysis and the preferred alternative were challenged by consulting parties and other stakeholders. The National Parks Conservation Association funded a study by Princeton Energy Resources International that challenged the accuracy of the data and assumptions used by Dominion in its computer modeling to justify selection of the preferred alternative to meet the requirements of the PJM Interconnection LLC (PJM) planning process. In a study funded by the National Trust for Historic Preservation, the engineering firm of Tabors Caramanis Rudkevich (TCR) developed four alternative projects that it believed would avoid the need to construct an overhead 500kV transmission line across the James River. TCR found that the alternatives it proposed would cost less to construct, be built more quickly, and meet all relevant reliability standards and energy needs in the region, while protecting the historic landscape and resources along the James River. Though Dominion challenged the results of these studies, the majority of the consulting parties in the Section 106 review believed that the Dominion response to these studies, along with any consideration of additional alternatives, was superficial and inadequate. Ultimately, at the request of the Corps, PJM reaffirmed its assessment that Dominion's preferred alternative was the most practical and cost effective, but in a conclusory manner with limited explanation or detail.

The ACHP and the consulting parties also raised questions about the technical feasibility of using a buried underwater cable in place of the overhead transmission line supported by towers across the James. Dominion consistently held to the position that buried underwater cable would be on the cutting edge of technology, and therefore too difficult and costly to construct and maintain at the present time. However, Dominion's position appears to be contradicted by the increasing use of such technology on larger projects in more challenging environments worldwide. Examples include the Chino Hills 500kV underground line in California; the Hayes-Yorktown 230kV Transmission line that runs under the York River in Virginia; the high-voltage direct current (HVDC) Cross-Channel line running under the English Channel between England and France; and the Atlantic Link Transmission submarine HVDC line which is proposed to run 350 miles from New Brunswick, Canada, to Massachusetts. Placing the line under water via a shorter route would solve the major visual adverse effects, enable greater initial reliability from storm activity and other causes of outages, and provide for better marine transportation safety.

Throughout the Section 106 review, the Corps was tentative about communicating a definitive position on the adequacy of the analysis of alternatives and the justification for the preferred alternative. While the Corps indicated in a November 2015 Preliminary White Paper that it saw no reason to challenge the preferred alternative, the ensuing consultation process revolved largely around debate over the existence

of viable alternatives and the adequacy of the analysis of such alternatives. In the end, the Corps issued a follow-up White Paper in April 2017, stating that, based on the final PJM assessment, it did not believe there was justification to further consider alternatives.

During the consultation, the Corps also indicated numerous times that it was subject to limitations on its authority to consider alternatives when issuing permits based on established Corps protocols to comply with the Clean Water Act, Section 404(b)(1) Guidelines, and the Public Interest Review (PIR). According to those protocols, the Corps consideration of alternatives is centered on selection of the least environmentally damaging practicable alternative (LEDPA). As such, the Corps focuses on consideration of effects to aquatic resources as the basis for considering alternatives to a project proponent's preferred alternative. In conducting the PIR, the Corps only focuses on a proponent's alternative that satisfies the Corps LEDPA analysis. Accordingly, it appears that the Corps, when issuing permits, does not meaningfully consider other impacts that relate to the overall public interest, including effects on historic properties, in its analysis of alternatives.

The ACHP acknowledges that federal agencies providing permits or other authorizations for projects carried out by private entities or local governments have less control over development of alternatives for an undertaking than federal agencies that provide substantial funding assistance or conduct projects on land they manage. However, even in a permitting situation, federal agencies have a responsibility to fully evaluate the feasibility of alternatives that may avoid or minimize adverse effects on historic properties and thereby might better serve the broader public interest. This is especially true when the magnitude of those effects and the significance of the affected historic properties reach the level found in the current undertaking.

The Coordination of NEPA and Section 106 Reviews

Many of the consulting parties expressed concerns about the Corps' coordination of Section 106 and its compliance with the National Environmental Policy Act (NEPA) in assessing the effects of the undertaking and the analysis of alternatives. There was ongoing uncertainty among consulting parties about the Corps' intention to develop an Environmental Assessment or Environmental Impact Statement (EIS) that complicated the Section 106 review, resulting in the Section 106 consultation focusing on the adequacy of the alternatives analysis. Consulting parties continually asserted that the Corps NEPA review process did not provide the level of public or stakeholder input appropriate for a controversial infrastructure project of this type that would affect this cluster of nationally significant historic properties. Secretary of the Interior Sally Jewell, in a letter dated January 1, 2016, and the Managing Director of the Council on Environmental Quality (CEQ), Christy Goldfuss, in a letter dated January 19, 2017, expressed similar opinions.

It appears that the position taken by the Corps in this case was guided by agency-wide policy. That is unfortunate. As suggested in the guidance on coordination of Section 106 and NEPA reviews jointly issued by CEQ and the ACHP in 2013, federal agencies should coordinate compliance with NEPA and Section 106 so they can more fully engage with consulting parties, stakeholders, and the general public, and allow them to share concerns and ideas about projects under review. Such coordination is especially important for infrastructure projects such as the Surry – Skiffes Creek – Whealton 500 kV Project, which are highly controversial and deserving of more focused scrutiny. Had the Corps carried out the higher level of analysis of an EIS, it likely would have received and substantially benefitted from better and more timely input from the public on the impacts, including long term and cumulative, of the various alternatives on the affected historic properties.

Standard Focus on Mitigation Instead of Avoidance and Minimization

Due to the early commitment of Dominion to the preferred alternative, the Corps and Dominion focused primarily on mitigation rather than avoidance or minimization of adverse effects during the Section 106 review. This led to a protracted federal review as the consulting parties challenged the preferred alternative and urged consideration of additional alternatives that would avoid or substantially reduce harm to historic properties. In this case, given the substantial adverse effects that will occur to properties of national significance, it is disappointing that throughout the consultation Dominion focused on mitigation, at the expense of more fully considering alternatives that would avoid or minimize harm. It was clear from early in the consultation that the significance of the affected historic properties and the integrity of the historic setting warranted extraordinary efforts to preserve and protect this area from the type of industrial development represented by the proposed undertaking. Despite statements such as those made by the Director of the NPS in a letter dated December 11, 2015 that "... no amount of mitigation could possibly counteract the severity of the effects that would be caused by this proposal," Dominion and the Corps focused the Section 106 consultations primarily on mitigation. This complicated the necessary consideration of alternatives, resulting in a protracted Section 106 review process.

Recommendations

In view of the above findings, the ACHP offers the following recommendations with regard to the implementation of the MOA:

- 1) Dominion should use the extensive mitigation package in the MOA and the collaborative efforts it supports as the basis to build relationships with the preservation community that will inform the remaining planning and design process, help avoid future conflicts, enhance preservation efforts along the river corridor, and serve as an example for the development of other infrastructure projects.
- 2) The Corps and Dominion should seek the assistance of the NPS, despite its opposition to the preferred alternative, in the implementation of the mitigation package and the development of cooperative preservation efforts so the national interest in the historic resources is known and advanced.
- 3) The overhead transmission line crossing must be removed at the earliest opportunity to restore the historic setting of the river corridor.
- 4) The Corps and Dominion should work to acknowledge the special sensitivity of this area to the intrusion of any additional water crossings and ensure that steps set forth in Stipulations II.h.1. and IV of the MOA are carried out to the fullest extent possible.

The ACHP further recommends that the Corps take the following steps to improve its processes for managing Section 106 reviews for future infrastructure projects requiring Corps permits:

- 1) Since NPS is the primary steward of nationally significant resources, its position that the impacts of the undertaking could not be mitigated should have led both the Corps and the NPS to elevate the issues that emerged from the Section 106 consultation to the senior policymakers. If similar interagency conflicts emerge in future Section 106 reviews, the Corps should take the initiative to ensure issues are brought to the policy level of the affected agencies for resolution in order to provide clear guidance for the completion of the Section 106 process.

- 2) The Corps should work with the ACHP to improve pre-application planning and coordination for infrastructure projects that will likely require Corps permits. Special attention should be given to the sequencing and impact of non-federal reviews and early engagement of stakeholders to better facilitate the overall planning and approval process.
- 3) The Corps should consult with ACHP to identify and resolve procedural issues that may cause delays in Section 106 reviews for major infrastructure projects. In particular, the Corps should examine its overall policy regarding the level of NEPA review that is appropriate for major infrastructure projects, with the goal of having NEPA analyses support the requirements for the assessment of alternatives to avoid or minimize harm to historic properties found in Section 106 and its implementing regulations.
- 4) The Corps should consult with the ACHP to develop guidance for permit applicants that stresses the importance of identifying and considering effects to historic properties in the early stages of project planning when adverse effects may be avoided.

I look forward to your response to the ACHP's recommendations and welcome the opportunity for the ACHP to work with the Corps to promote early and informed consideration of effects to historic properties in the planning and review process. It is important that we move forward with common goals to advance those efforts.

Should you have any questions or wish to discuss this matter further, please contact John Fowler, Executive Director of the ACHP at 202-517-0191, or by e-mail at jfowler@achp.gov.

Sincerely,

A handwritten signature in blue ink that reads "Milford Wayne Donaldson". The signature is stylized and written in a cursive-like font.

Milford Wayne Donaldson, FAIA
Chairman