UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES and ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES Plaintiffs, v. TODD T. SEMONITE, Lieutenant General Chief of Engineers and Commanding General, U.S. Army Corps of Engineers and ROBERT M. SPEER Acting Secretary of the Army Defendants.	Civ. No. 17-cv-01574-RCL

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I. INTRODUCTION

The James River flows through a collection of some of our Nation's most significant historic and cultural resources. Jamestown Island is the site of the first permanent English colony in America. Today it is a part of Colonial National Historical Park. Carter's Grove Plantation, on the banks of the James, has been recognized for its exceptional historic significance by the National Park Service ("NPS") and is a National Historic Landmark. The Colonial Parkway, built by the Park Service and designated as an All-American Road under the National Scenic Byways Program, runs along the north bank of the James and is eligible in its own right for listing in the National Register of Historic Places. The Parkway also connects Jamestown to Colonial Williamsburg, a National Historic Landmark District located a few miles inland, and to Yorktown, where General Cornwallis' surrender effectively concluded the Revolutionary War and established the United States as an independent Nation. Indeed, the James River itself has been recognized by Congress as a unique and valuable historic landscape through the establishment of the Captain John Smith Chesapeake National Historic Trail ("Captain John Smith Trail"), the first water trail designated under the National Trails System Act.

For more than a century, the United States, the Commonwealth of Virginia, and numerous local governments have worked to preserve and maintain this stretch of the James River so that future generations could understand and appreciate its historic importance and scenic beauty. Until now, that effort has been successful: the James and its landscape have retained their historic and scenic attributes, and millions of visitors each year are able to experience this remarkably intact historic setting.

On July 3, 2017, however, the Army Corps of Engineers ("Corps") authorized Virginia Electric & Power Company ("Dominion") to build massive overhead electric transmission infrastructure known as the "Surry-Skiffes Creek-Whealton Project" ("Project"), a portion of which will cut straight through the heart of this historic landscape. Among other things, the Project calls for the construction of seventeen steel towers fitted with flashing lights and transmission lines, up to 295 feet tall, in the James River, across the Captain John Smith Trail, through the Jamestown-Hog Island-Captain John Smith Trail Historic District, and within the historic viewsheds of Jamestown Island, the Colonial Parkway, Colonial National Historical Park, and Carter's Grove National Historic Landmark. The Project would indelibly mar one of the most historically significant and best-preserved landscapes along the James — a stretch of approximately 51 miles currently without overhead crossings of any kind, a portion of which has been designated by Virginia's state legislature as a historic river and is listed on the Nationwide Rivers Inventory under the federal Wild and Scenic Rivers Act.

The Administrative Record ("AR") in this matter demonstrates that the Corps failed to comply with the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), the Clean Water Act ("CWA"), the Rivers and Harbors Act ("RHA") before approving the Project. Accordingly, Plaintiffs the National Trust for Historic Preservation ("National Trust") and the Association for the Preservation of Virginia Antiquities ("Preservation Virginia") now move for summary judgment and request that the Corps' permits and authorizations for the Project be vacated.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. The James River And Its Historic Surrounds

This case concerns the James River and its surrounds, one of the most historically significant and culturally sensitive landscapes in the country. It is the place where the earliest seeds of the United States were planted. It is the place where people from North America, Europe and Africa first interacted. And, most of all, it is the place where Americans come to learn and experience their founding history firsthand. For purposes of Plaintiffs' Motion for Summary Judgment, six historic resources bear particular attention.

Jamestown Island. Jamestown Island is the site of the first permanent English settlement in America. (AR118221, 143501-17.) It was the original capital of the Virginia Colony, the founding site of a global empire that would eventually carry English language, laws, and institutions across the North American continent. The Project would be visible from the island, marring the site's historic setting. AR143507, 761.

Colonial National Historical Park. Jamestown Island is a part of Colonial National Historical Park, which is co-managed by NPS and Plaintiff Preservation Virginia. AR118221. The Park's walking trails lead visitors to Blackpoint, from which views extend across an expanse of the James River that is largely devoid of visible modern development. AR151845, 151923-24.

Colonial Parkway. Colonial National Historical Park ties together the earliest history of the founding of the United States. AR143493. In addition to Historic Jamestowne, the Park includes Yorktown Battlefield, the site of the final major battle of the American Revolutionary War. *Id.*; AR118226. Jamestown and Yorktown are connected by the Colonial Parkway, a 22-mile scenic roadway that also takes visitors to Williamsburg, Virginia. AR118221. The Parkway

was carefully designed and constructed by the National Park Service to allow visitors to travel between these sites via a roadway that conserves the area's scenery and natural and historic resources. AR143493. It is a three-lane road, with a 45 mile-per-hour speed limit, intended to promote scenic enjoyment. Visitors have enjoyed expansive views of the James River along the Parkway's designed lookout points. Visitors emerge from forested areas to view wide open expanses of the James River, emulating the experience of the first settlers and native Powhatan Indians. The most dramatic views occur as visitors leave Jamestown heading toward Williamsburg — precisely the lookout area through which the Project will pass. AR143510. The Colonial Parkway is part of a historic district that is listed on the National Register in its own right. AR118221.

Carter's Grove. Carter's Grove National Historic Landmark is a large plantation located along the north shore of the James River. Built between 1749 and 1756, it is considered one of the best-preserved and most important examples of eighteenth-century Georgian architecture in North America. AR118221. The structure and its surrounding landscape were designed to face the river, which served as the primary transportation route at the time of construction. AR143492. In fact, the front door of Carter's Grove looks directly out to the James River. (*Id.*) The Project would introduce major new industrial infrastructure into the well-preserved historic setting of Carter's Grove. *Id.*

Captain John Smith Trail. In 2007, Congress established the Captain John Smith Trail along the James River to commemorate the exploratory voyages of Captain John Smith, celebrate the long history of indigenous stewardship of the Chesapeake region prior to European contact, and provide opportunities for all Americans to enjoy recreational activities surrounded by this history. AR143493. Visitors access the Trail by land and by water. *Id.* From both

perspectives, they can see, experience, and learn what the explorers and native inhabitants of the region experienced more than 400 years ago. NPS has identified landscapes along the Trail that are "unspoiled" and express the aesthetic or historic sense of the seventeenth century. The vast majority of the shoreline near the Project has been so identified. *Id.*

Jamestown-Hog Island-Captain John Smith Trail Historic District. The Captain John Smith Trail is also a contributing resource to a larger historic area known as the Jamestown-Hog Island-Captain John Smith Trail Historic District, which includes the James River and its shoreline within the Project area. AR118229. The Keeper of the National Register of Historic Places has determined that this entire historic landscape is eligible for listing in the Register. *Id*.

B. The Project

The Project consists of three components: (i) a 500kV overhead transmission line across the James River from Surry to Skiffes Creek; (ii) a 500kV-230kV-115kV Switching Station at Skiffes Creek; and (iii) a 230kV overhead transmission line from Skiffes Creek to Whealton. (AR661-65.) Plaintiffs' interest lies in the first component (the "River Crossing"), which involves approximately 7.92 miles of new 500kV overhead electric transmission lines. (AR662-63.) Approximately 4.11 miles of this segment will cross the James River directly through the Jamestown-Hog Island-Captain John Smith Trail Historic District, across the Captain John Smith Trail, and in close proximity to Historic Jamestowne, the Colonial Parkway, Colonial National Historical Park, and Carter's Grove National Historic Landmark. (*Id*.) The River Crossing includes 17 massive steel towers up to 295 feet tall, which will be fitted with flashing lights and transmission lines. (Id.)

C. The Administrative Process

On August 28, 2013, the Corps issued a notice formally initiating the federal administrative process. AR149952-50043. The notice stated that (i) Dominion had applied for authorization to construct the Project; and (ii) a preliminary review had indicated that no EIS would be required. AR149954. The notice did not provide any other information about the preliminary review. Nor did the Corps make the preliminary review available to the public. *Id*. In response to the August 28, 2013 public notice, a wide variety of stakeholders expressed concern about the Project's impacts. NPS, among others, informed the Corps that the Project would have significant impacts on historic resources, aesthetics, recreation, health and safety, and socioeconomics, suggesting that the preparation of an EIS was required. AR143495.

Between 2014 and 2017, the Corps held consultation meetings about the Project pursuant to Section 106 of the NHPA. Plaintiffs each participated in the consultation process, and during that process they repeatedly expressed significant concerns about the Project's impacts on historic resources, the Corps' failure to consider less-damaging alternatives, the Corps' failure to conduct necessary analyses and investigations, the Corps' refusal to provide or discuss its draft NEPA analysis, the Corps' failure to comply with Section 110(f) of the NHPA, and the Corps' failure to involve the public in the agency decision-making process. AR143248-50, 24412-518, 3330-43, 3001-03, 143501-17. Plaintiffs also noted that the Project poses a grave threat to the economy of the region, which is largely based on heritage tourism. AR6016.

Plaintiffs were not alone in these concerns. Although the Corps refused to make any draft NEPA documents available for public review, interested parties nonetheless submitted comments disputing the agency's analysis and approach. *See, e.g.*, AR143248-50, 24412-518, 3330-43, 3001-03, 143501-17, 143489-95, 6012-74, 3253-61, 114266-68, 29026-32, 7257-59,

24561-64, 5827-28, 143576-79, 24369-411. State and federal agencies with jurisdiction over affected resources — including, most notably, NPS, the Council on Environmental Quality, the Advisory Council on Historic Preservation, the Virginia Department of Historic Resources, and the Keeper of the National Register of Historic Places — disputed various portions of the Corps' assessment of the Project's effects, the Corps' failure to prepare an EIS, and the Corps' refusal to meaningfully pursue alternatives. AR143489-95, 6012-74, 3253-61, 114266-68, 29026-32, 7257-59, 24561-64, 5827-28, 143576-79, 24369-411. Although some commenters ultimately decided that their concerns had been addressed, the vast majority continued to object to the Project and to dispute the Corps' analysis of the Project's effects. Notably, NPS and the ACHP — both of which have been charged by Congress with overseeing the nation's historic resources — were among the many stakeholders to maintain their objections throughout the administrative process. (AR6012-74, 3253-61.)

Faced with the Corps' refusal to meaningfully consider alternatives to the Project, Plaintiffs commissioned an independent engineering firm (Tabor Caramanis Rudkevich or "Tabors") to investigate whether other, less-harmful options might be available. (AR22700-02, 22282-83.) Tabors found that there were at least four technically and financially feasible alternatives capable of avoiding harm to historic resources. Tabors also found that each of these alternatives would feasibly address all transmission needs more quickly and less expensively than the Project. (*Id*.) Notably, those conclusions were based on data submitted by Dominion to the Federal Energy Regulatory Commission. (AR21982-2004, AR22700-02, 22504-06, 22282-83.)

In May 2017, the Corps, Dominion and several other parties executed a Memorandum of Agreement ("MOA") concluding the Section 106 consultation process. AR3123-50. The MOA

acknowledged that the Project will adversely affect numerous historic sites, including each of the sites listed above. (AR3125.) The MOA purported to "resolve" those adverse effects largely through compensatory mitigation — for example, by requiring Dominion to install interpretive signs. (AR3127.) The MOA does not contain any findings or analysis addressing Section 110(f) of the NHPA. (AR3123-50.)

In connection with the execution of the MOA, ACHP invoked a rarely used provision of the Section 106 regulations and submitted formal comments on the Project pursuant to 36 C.F.R. § 800.7(b). (AR3253-61.) In a remarkable six-page letter, ACHP's Chairman criticized the Corps for (among other things) inadequate coordination between federal and state reviews; an "extremely problematic" alternatives analysis; an "unfortunate" lack of coordination between the Corps' NEPA and Section 106 reviews (AR3258); a failure to "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" (AR3259); and a "disappointing" emphasis on mitigation, rather than consideration of alternatives that would avoid and minimize harm to historic resources (AR3260).

On June 12, 2017, the Corps executed a document entitled "Memorandum for the Record" ("MFR"). (AR661-772.) The MFR purports to be an "Environmental Assessment and Statement of Findings" for the Project. (AR661.) Among other things, the MFR concedes that the Project will be built across a stretch of the James River that is a "unique and highly scenic" area and a "national treasure" (AR762); that "the Corps has concluded that the proposed project will have adverse impact on scenic viewsheds" (AR726); that "the proposed project crosses the James River in an area that is currently designated by the Commonwealth of Virginia as scenic and listed on the Nationwide River Inventory for its outstanding [and] remarkable values

pertaining to history" (AR733); that the project will result in "diminished integrity of setting and feeling" on and near the James River (AR740); that the Project will "introduce elements that diminish the integrity of [historic] properties' significant historic features and may change physical features within the properties' settings" (AR761); that the Project will "intrude upon the viewsheds of historic properties and on a unique and highly scenic section of the James River" (AR762); and that, when viewed from historic properties near the James River, including Carter's Grove National Historic Landmark, "the project will be a modern intrusion." (AR763.) Nevertheless, the Memorandum concluded that the Project's impacts would be less than significant, dismissed potential alternatives, and authorized Dominion to proceed with the Project. (AR771.)

D. Proceedings in this Court

Plaintiffs filed suit on August 3, 2017. Counsel for Plaintiffs conferred with counsel for the Federal Defendants and counsel for Dominion in an effort to determine (i) Dominion's construction schedule and (ii) the need for preliminary injunction proceedings. *See* Plaintiffs' Motion for Preliminary Injunction (ECF 22-1) at 10. In the course of those conversations, counsel for Dominion indicated that in-water construction of the River Crossing portion of the Project was anticipated to begin on approximately October 15, 2017 and counsel for the Federal Defendants indicated that the administrative record would not be completed, certified, and lodged for at least several weeks. *Id*. Plaintiffs concluded that they had no choice but to pursue preliminary injunctive relief. *Id*.

Plaintiffs moved for preliminary injunctive relief on August 30, 2017. The motion was heard together with a request for preliminary injunctive relief in number 1:17-cv-01361-RCL, another challenge to the Corps' approval of the Project. During the hearing, counsel for

Dominion represented that near-term in-water construction would be limited to foundation piers, and, further, that the company did not expect to begin construction of any in-water towers until April, 2018. Counsel for Dominion and counsel for the Federal Defendants both asserted that this case can be fully briefed and resolved before tower construction begins.

The Court denied Plaintiffs' request for preliminary injunctive relief, holding that the harm associated with construction of the towers was not sufficiently imminent to justify a preliminary injunction at that point in the proceedings. Memorandum Opinion (ECF 45) at 5-10. In doing so, the Court expressly declined to rule on any other aspect of Plaintiffs' request for preliminary injunctive relief. *Id*. at 5. The Court did, however, note that Plaintiffs had made "a powerful argument on the merits." *Id*.

III. STANDING

A plaintiff demonstrates Article III standing by showing (i) it has suffered a concrete and particularized injury-in-fact that is actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly traceable to the challenged actions of the defendants; and (iii) the injury is likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An organization has standing to bring suit on behalf of its members if the members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181.

Plaintiffs easily meet each of these requirements. The National Trust is a private charitable, educational, nonprofit corporation chartered by Congress in 1949 to protect and defend America's historic resources, to further the historic preservation policies of the United

States, and to facilitate public participation in the preservation of historic properties. 54 U.S.C. § 312102(a); Declaration of Robert Nieweg (ECF 22-11) at 1-2. Preservation Virginia is a non-profit membership organization dedicated to preserving and revitalizing Virginia's cultural, architectural and historic heritage. Declaration of Elizabeth Kostelny (ECF 22-8) at 1. Founded in 1889, it owns approximately 23 acres of Jamestown Island (including the area where the 1607 James Fort was located) and helps manage the site through a public/private partnership with the National Park Service. *Id*. at 1-2. The Project is causing — and will continue to cause — concrete and particularized injury to both organizations and their members. Declaration of Elizabeth Kostelny (ECF 22-8) at 1-7; Declaration of William Kelso (ECF 22-5) at 1-4; Declaration of Robert Nieweg (ECF 22-11) at 1-4; Declaration of Kathleen Spencer Kilpatrick (ECF 22-6) at 1-7. That harm is fairly traceable to the Corps' actions to permit the Project. *Id.* A favorable decision would redress Plaintiffs' injury. *See City of Dania Beach v. Federal Aviation Admin*., 485 F.3d 1181, 1185-87 (D.C. Cir. 2007).

IV. STANDARD OF REVIEW

In approving the Project, the Corps violated NEPA, the NHPA, the CWA, and the RHA. These violations are reviewable under the Administrative Procedure Act ("APA"), which directs the courts to "hold unlawful and set aside" agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Agency action is arbitrary and capricious if the agency has "failed to consider an important aspect of the problem," if the agency's explanation for its decision "runs counter to the evidence before the agency," if the agency "has relied on factors which Congress has not intended it to consider," or if the result "is so implausible that it could not be ascribed to a difference in view or the product

of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-43 (1983).

Although the arbitrary and capricious standard is narrow, it nonetheless requires a "thorough, probing, in-depth review" of agency decision-making. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Friends of the Earth v. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 36 (D.D.C. 2000). Courts do not substitute their judgment for that of agencies, but neither do they "rubber-stamp" agency decisions. *Reed v. Salazar*, 744 F. Supp. 2d 98, 110 (D.D.C. 2009) (quoting *Nat'l Labor Relations Bd. v. Brown*, 380 U.S. 278, 290 (1965)); *see also Humane Soc. v. Johanns*, 520 F. Supp. 2d 8, 18 (D.D.C. 2007); *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 54 (D.D.C. 2005). Furthermore, an agency's decision may only be upheld on grounds articulated in the decision itself. *Motor Vehicle*, 463 U.S. at 43. Courts may not make up for deficiencies in an agency decision by "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *Id*. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

V. ARGUMENT

A. The Corps Violated NEPA

NEPA is our nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id*. § 1500.1(b), (c). To implement those objectives, NEPA imposes "action-forcing" requirements mandating that federal agencies must carefully identify, comprehensively evaluate, disclose to the public, and

thoroughly investigate reasonable alternatives to the environmental consequences of their proposed actions. 40 C.F.R. § 1501.1. Chief among these "action-forcing" requirements is the mandate that federal agencies prepare a comprehensive, public EIS on any action that may significantly impact the human environment. *Id.*; 42 U.S.C. § 4332(2)(C); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 14 (D.D.C. 2009) (citing *Found. on Econ. Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985)); *Sierra Club v. Watkins*, 808 F. Supp. 852, 858-59 (D.D.C. 1991).

The Corps fell far short of these requirements: it refused to prepare an EIS despite clear evidence that the Project will significantly affect the unique, historic environment surrounding the James River (Part V.A.1); it refused to make its NEPA analysis available for public review and comment (Part V.A.2); and it refused to fully investigate less-damaging alternatives to the Project (Part V.A.3). Each of these refusals was arbitrary, capricious, an abuse of discretion, and contrary to NEPA and its implementing regulations.

1. The Corps Arbitrarily and Capriciously Refused to Prepare an Environmental Impact Statement

As noted above, federal agencies must prepare a comprehensive, public EIS on any proposed action that may significantly impact the human environment. 42 U.S.C. § 4332(2)(C). If an agency is uncertain about whether an EIS is required, it may prepare an Environmental Assessment (or "EA"). 40 C.F.R. §§ 1501.3, 1501.4, 1508.9. An EA must describe the proposed action and address potential alternatives, but the document's primary purpose is to analyze whether the project at issue will significantly impact the environment. 40 C.F.R. §§ 1501.4(c), 1508.9; *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 340 (D.C. Cir. 2002). If the EA reveals <u>no</u> potential for significant environmental impacts, the agency may approve the proposed action on the basis of a Finding of No Significant Impact ("FONSI"). 40

C.F.R. § 1508.13. If the EA reveals that the proposed action *may* significantly impact the environment, an EIS must be prepared before the proposed action can proceed. 42 U.S.C. § 4332(2)(C) (EIS required for any action "significantly affecting" the environment); 40 C.F.R. § 1508.3 ("[a]ffecting" means "will or may have an effect on"). Either way, the agency is to base its determination of whether to prepare an EIS — that is, its determination about whether environmental impacts may be significant — on the environmental analysis within the EA. 40 C.F.R. §§ 1501.4(c), (e).

a. The Corps' Failure to confront the Significance of the Project was Arbitrary and Capricious

In evaluating whether a proposed action may significantly affect the environment, agencies must analyze both the context and the intensity of potential impacts. 40 C.F.R. § 1508.27. As explained below, both sets of considerations weigh heavily in favor of the preparation of an EIS, and the Corps' findings of no significant impact fail to articulate a "convincing case" to the contrary. *Grand Canyon Trust*, 290 F.3d at 341-42.

i. Context

NEPA's implementing regulations explicitly recognize that the significance of environmental impacts "varies with the setting of the proposed action." 40 C.F.R. § 1508.27(a). Here, the setting of the proposed action is one of the most historically important and culturally sensitive places in the entire Nation. Indeed, the Corps has admitted as much. *See, e.g.*, AR762 (referring to the Project area as a "national treasure"); AR122522 (referring to the Project area as "nationally significant"). In such a setting, adverse impacts to historic and cultural resources are particularly significant. The sensitivity of the Project's context weighs in favor of preparing an EIS. 40 C.F.R. § 1508.27(a).

ii. Intensity

An agency's analysis of the intensity involves ten different factors. 40 C.F.R. § 1508.27(b). An EIS must be prepared if these factors may be present, even if the agency believes that on balance the proposed action will be beneficial. *Id.* Indeed, the presence of even one such factor "should result in an agency decision to prepare an EIS." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218-19 (D.D.C. 2003); *see also Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 181 (D.D.C. 2004) (presence of a single factor may establish significance); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1220 (9th Cir. 2008) (action may be significant "if one of these factors is met").

When reviewing whether a federal agency has properly applied the intensity factors, the courts give effect to "the plain language of the regulations" and do not defer to agency interpretations of the regulations. *Grand Canyon Trust*, 290 F.3d at 342. That plain language, as applied to the Administrative Record in this case, confirms that multiple intensity factors required the Corps to prepare an EIS.

Effects on Historic Sites, Districts, or Highways. Adverse effects on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places" indicate significance. 40 C.F.R. §1508.27(b)(8). The Corps has admitted that the Project will be constructed within the Jamestown-Hog Island-Captain John Smith Trail Historic District and across the Captain John Smith Historic Trail. AR694, 740-741, 22839-55. The Corps has also admitted that that the Project will adversely affect six other National Register-eligible historic resources, including a National Historic Landmark and a historic parkway. AR716 , 730-31 , 140598. There can be no reasonable dispute that the adversely affected resources are unique, irreplaceable, and of the highest national importance. *See, e.g.*, AR6012-

74, AR3253-61, AR29026-32. And the federal agencies charged by Congress with overseeing those resources have made it quite clear that the Project will significantly affect the environment and an EIS should be prepared. *See, e.g.,* AR3253-59; AR6015, AR6020, 73715 (proposed alternative "would have significant adverse effects on multiple historic properties, NPS units and areas of NPS interest").

Unique Characteristics of the Geographic Area. Impacts to "[u]nique characteristics of the geographic area" such as " historic or cultural resources, park lands…wild and scenic rivers, or ecologically critical areas" indicate significance. 40 C.F.R. §1508.27(b)(3); *Sierra Club v. VanAntwerp,* 719 F. Supp. 2d 58, 64 (D.D.C. 2010); *see also Friends of Back Bay v. Army Corps of Eng'rs,* 681 F.3d 581, 589 (4th Cir. 2012). There can be no reasonable doubt that the Project will impact unique resources. As noted above, the Project is proposed to be built within a historic district, across the first historic water trail ever designated under the National Trails System Act, and within the "scenic viewshed" of a National Historic Landmark. AR694, 731, 733, 22839-55. Moreover, it would place industrial infrastructure within a segment of the James River that is listed on the Nationwide Rivers Inventory of the Wild and Scenic Rivers Act as "[o]ne of the most significant historic, relatively undeveloped rivers in the entire northeast region" (AR118588, 111274, 118589-118601) and has been recognized as "America's Founding River" by the United States Congress (H. Res. 16, 110th Cong., 1st Sess. (July 30, 2007)). The Project would also adversely affect a National Park containing both the site of the earliest permanent English settlements in America and the battlefield where the Revolutionary War was won. AR661-772, 6012-6074, 118218-33, 143489-95. Impacts to a more unique geographic area are difficult to imagine.

Controversy. Significance also exists where "the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The effects of an action are "highly controversial" if there is "a substantial dispute" about the action's size, nature, or impact. *Friends of the Earth, Inc*., 109 F. Supp. 2d at 32 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). Courts have found actions to be "highly controversial" where large numbers of commenters dispute the lead agency's conclusions; where public agencies and officials express concerns; and where experts have challenged the lead agency's methodology and conclusions. *See, e.g., Humane Soc. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 19 (D.D.C. 2006) (expressions of concern by other agencies); *Nat'l Wildlife Fed'n* , 332 F. Supp. 2d at 185 (scientific evidence calls lead agency's analysis into question); *Friends of the Earth, Inc.*, 109 F. Supp. 2d at 43 (multiple agencies "disputed the Corps evaluation of the environmental impacts…and pleaded with the Corps to prepare an EIS"); *see also National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (450 comments on EA); *Sierra Club v. Forest Serv*., 843 F.2d 1190, 1193 (9th Cir. 1998) (experts dispute agency's methodology and conclusions); *Friends of Back Bay*, 681 F.3d at 590 (objections from other agencies); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (substantial dispute regarding significance of project impacts).

All three of these circumstances are present here. Although the Corps refused to circulate its draft NEPA documents for public review and comment (Part V.A.2, *infra*), the agency nonetheless received an extraordinary volume of public comments — more than 50,000 letters urging further environmental analysis, and an additional 28,000 signatures on a petition requesting consideration of Project alternatives. *See, e.g.*, AR8511, 36353, 54687, 75243, 114092, 120457, 133075 (discussing numbers of comments received); AR114092 (petition).

Public agencies and elected officials expressed significant concerns and disputed the Corps' environmental analysis. *See, e.g.,* AR24280-89, 31842-44, 32150-63, 32177-89, 36930-32 (National Park Service); AR24337-40, 32834-36, 30858-62, 143422 (Advisory Council on Historic Preservation); AR148541, 148576 (members of Congress); AR53483 (member of Virginia House of Delegates). Experts disputed the Corps' methodology and conclusions. *See, e.g.,* AR6015, 0121247-49, 29991, 28816 (visual impacts); AR72112, 72120, 72130-32, 72154 (cultural landscapes); AR21982-22004, 53498, 29729, 7280, 7003 (alternatives). By any reasonable measure, the Project is highly controversial.

Indeed, the Corps has repeatedly admitted as much. For example, in discussions with the United States Environmental Protection Agency, the Corps described the Project as "highly controversial." AR120057. The Corps also called the Project "highly controversial" in a fact sheet (AR 140677) prepared for Congress (AR140675). And in a meeting of the parties to the Section 106 consultation process, the Corps' project manager conceded "I think we can all agree this project is a controversial project." AR120783. Plaintiffs <u>do</u> agree. The Project <u>is</u> highly controversial. An EIS is therefore required. 40 C.F.R. §1508.27(b)(4).

<u>Cumulative Effects</u>. An EIS is also required "if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7). Cumulative impacts are the environmental consequences resulting from "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or Non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. Significant cumulative impacts may occur even if individual actions are "minor." *Id.* Here, the individual Project is in no way "minor." Furthermore, it is explicitly designed to remove obstacles to additional long-term growth in an area of extreme historic and scenic sensitivity.

See AR56243-67. Therefore, it is "reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7).

iii. Findings

The portion of the Corps' MFR purporting to address NEPA is notable for its failure to squarely and specifically confront the regulatory significance factors outlined above. To the extent the regulatory standard of significance is addressed at all, it is only in the most general terms:

> A number of commenters believed the impacts to be significant and therefore requested the Corps review the proposed project under an Environmental Impact Statement (EIS). [¶] NEPA requires an EIS for any project that will result in significant [e]ffects to the human environment. The decision on significance is based on both context and intensity. The majority of environmental impacts associated with this project are minimal in nature, or have been minimized through mitigation. 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.

AR688. Conclusory assertions such as these are simply not enough to satisfy NEPA. *See, e.g.*, *Grand Canyon Trust*, 290 F.3d at 340-41 (EA must provide a hard look at potential impacts); *Humane Soc.*, 432 F. Supp. 2d at 18-19 (conclusory EA inadequate); *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 18-20 (D.D.C. 2000) (failure to specifically address relevant significance factors); *Friends of the Earth*, 109 F. Supp. 2d at 42-43 (conclusory EA inadequate); *Ctr. for Biological Diversity*, 538 F.3d at 1223 (invalidating EA that "shunted aside significant questions with merely conclusory statements"). An EA "must at a minimum address the considerations relevant to determining whether an EIS is required." *Grand Canyon Trust*, 290 F.3d at 345. That did not happen here.

The portion of the Corps' MFR purporting to serve as a FONSI likewise fails to supply a convincing case for the agency's refusal to prepare an EIS. AR771. The purported FONSI

covers less than a page and contains just three specific "findings" regarding the significance of the Project's environmental consequences. *Id*. None of the three withstands scrutiny.

The Corps' first finding touches on the Project's potential to impact historic and cultural resources:

> While the affected cultural resources are clearly important, our inquiry does not end here. NEPA significance requires that we evaluate the intensity of the effects on those resources. The Corps does not minimize the value of the surrounding area. However we conclude that the actual aesthetic effect of this project will be moderate at most.

Id. The finding is arbitrary and capricious in several respects. First, it is contrary to — and fails to address or account for — the views of NPS, ACHP, and the National Trust, all of which have Congressionally-delegated responsibilities and recognized expertise regarding historic resources and have provided the Corps (which has no such delegated authority or expertise) with robust, well-supported analyses explaining how the Project will significantly impact the James River and its historic surrounds. AR3001-03, 6012-17, 6020-22, 114266-68, 29026-32, 22700-027003-18, 5839-91, 5761-91; ECF 22-12, ¶¶ 9-12. Second, the finding is contrary to the Corps' own admissions that the Project will adversely affect historic resources (AR729, 771); diminish the integrity of a unique historic setting (AR743); and diminish the significant historic features of historic properties and districts (AR761). Third, the finding is based on a fundamental misapplication of NEPA's implementing regulations. The Corps has purported to find that the Project's "general environmental impacts" overall impact will be insignificant (AR771) notwithstanding admitted effects to unique features and historic resources. AR729, 743, 771. But effects on unique features and historic resources *are explicit elements of the regulatory definition of significance*. 40 C.F.R. §§ 1508.27(b)(3), 1508.27(b)(8). The existence of such impacts demands a finding of significance, whatever the other impacts (or alleged benefits) of the Project might be. *See, e.g., Sierra Club*, 719 F. Supp. 2d at 66 (unique characteristics require

EIS); *Fund for Animals*, 281 F. Supp. 2d at 218-19 (presence of one significance factor should result in EIS); *Nat'l Wildlife Fed'n*, 332 F. Supp. 2d at 181 (single factor may establish significance); 40 C.F.R. § 1508.27(b) (EIS may be required even if overall impact of proposed action will be beneficial).

The Corps' second finding attempts to explain away the significant public controversy surrounding the Project:

> [W]e conclude that the comments requesting that the Corps prepare an EIS represent passion for the affected resources (i.e., opposition to the project based on importance placed on the resources), rather than substantive dispute over size, nature, or effect of the action.

AR771. This is not an accurate representation of the evidence in the Administrative Record. While it is true that the public overwhelmingly opposes the Project, it is also true that the vast majority of public and agency comments substantively disputed the Corps' assessment of Project impacts. *See, e.g.*, AR22759-61, 25967-68, 51172-73, 51222-24, 7257-59, 5827-28; *see also* AR3253 ("the majority of consulting parties believe the adverse effects…cannot be appropriately mitigated"). Plaintiffs and others clearly and repeatedly disputed the "effect of the action." *Id.*; AR24412-24518, 3001-03, 143248-50, 22249-50, 24704-16; 40 C.F.R. § 1507.27(b)(4). Federal agencies opined that these disputes had rendered the Project "highly controversial." AR3256. Dominion recognized the substantive nature of the controversy over Project impacts: "as the [Corps] is aware, there is a divergence of opinions regarding the extent of adverse effects on the historic properties at issue." AR23036. So did the company's paid environmental consultant: "[t]here may be fundamental differences [about] what specific resources are [affected] and the degree to which they are…." AR72297. The Corps' contrary conclusion is so fundamentally inconsistent with the evidence as to be arbitrary and capricious. *See Sierra Club*, 719 F. Supp. 2d at 65 (Corps' FONSI was "so contrary to the record that the Court can find it to be nothing

short of arbitrary and capricious"); *Humane Soc.*, 432 F. Supp. 2d at 19-20 (rejecting agency assertion that requests for preparation of an EIS were non-substantive).

Perhaps recognizing that its first two findings lacked basis, the Corps made a third finding purporting to dismiss the significance of the Project's impacts as a "subjective" question:

> Because the effects of greatest concern are subjective, we conclude that the qualitative analysis we have conducted as a part of our environmental assessment is as informed and reliable as it would be through preparation of a much more costly and time-consuming environmental impact statement.

AR771. This, too, was arbitrary and capricious. Although impacts to historic resources are not inherently *quantitative*, neither are they *subjective*. There are clear, well-defined standards for evaluating impacts on historic resources, and NEPA's implementing regulations mandate that those standards be *objectively* applied. 40 C.F.R. § 1508.27(b)(8); *see also* AR6012-6074, *Lemon v. McHugh*, 668 F. Supp. 2d 133, 142-44 (D.D.C. 2009) (requiring supplemental EIS where agency failed to evaluate impacts on historic district). Moreover, nothing in NEPA or its implementing regulations allows the Corps to refuse to prepare an EIS due to concerns about cost or delay. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3, 1501.4, 1502.3, 1508.9, 1508.13, 1508.27. A decision about whether to prepare an EIS must be based on the proposed action's environmental consequences. *Id*. In resting its decision on cost and delay, the Corps arbitrarily and capriciously "relied on factors which Congress has not intended it to consider." *Motor Vehicle*, 463 U.S. at 43.

b. The Corps' Reliance on Inadequate and Uncertain Mitigation Measures was Arbitrary and Capricious

The portion of the MFR purporting to serve as a FONSI fails to address the topic of mitigation. AR771. But other portions of the document appear to assume that mitigation measures will reduce the Project's impacts on historic resources to insignificance. *See, e.g.*, AR688. In particular, the Corps seems to rely on a provision of the MOA requiring Dominion to

fund $85 million in "compensatory mitigation"— *i.e.*, other actions intended to remedy damage the Project is anticipated to cause — for impacts to historic resources. AR731. Any such reliance was arbitrary and capricious. First, as a matter of common sense, the fact that $85 million is needed to compensate for damage to historic resources seems to confirm the need for an EIS. Second, the historic resources at issue are unique and irreplaceable; impacts to such resources cannot be fully mitigated by making "compensatory" improvements elsewhere. Third, although the MOA ensures the availability of mitigation funding, it does not require that $85 million worth of compensatory mitigation actions be fully implemented. AR672-74. In fact, the MOA contemplates that a portion of the funds earmarked for compensatory mitigation could remain unspent. AR672-73. Fourth, neither the MOA nor the MFR details the specific compensatory actions that must be taken; without that information, the Corps could not have reasonably concluded that those compensatory actions will reduce all impacts to insignificance. *See, e.g.,* AR 676-86 (explaining that compensatory mitigation projects will be identified by Dominion at a later date). Fifth, the Corps has ignored a fundamental timing problem: the MOA anticipates that compensatory mitigation funds may not be fully disbursed for a decade (AR3135), but the impacts of the Project will be felt right away and will last for the entire life of the Project. Sixth, NPS, the federal agency with expertise and jurisdiction over several of the affected historic resources, has made it clear that the Corps' proposed mitigation will not reduce impacts to a level of insignificance. AR6017-18, 110816. Seventh, the MOA details the adverse nature of the Project's effects on historic properties, but does not address the magnitude of those effects (*see* AR3195-3203); therefore, the compensatory mitigation provisions of the document cannot reasonably be interpreted as confirming that all impacts will be reduced to insignificance.

For each of these reasons, the Corps' reliance on the compensatory mitigation provisions of the MOA to avoid preparation of an EIS was arbitrary and capricious.[1]

2. The Corps Arbitrarily and Capriciously Refused to Allow Public Review of the EA and FONSI

Public disclosure, participation, and input are central to NEPA. Agencies are required to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment," (40 C.F.R. § 1500.2(d)), and must "insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Indeed, the Supreme Court has recognized that one of NEPA's fundamental purposes is to guarantee that environmental information is "made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 349 (1989).

Throughout the permit review process, Plaintiffs and others repeatedly requested that the Corps circulate draft NEPA documents for public review and comment and convene a meeting at which the general public could discuss those documents. AR3001-03, 6015, 5827-28, 143576-79, 110767-69, 120781-82. Although the Corps eventually, grudgingly agreed to hold a meeting at which members of the public could generally express their views on the Project (AR73344-45), it never provided a draft of its NEPA documents — specifically, its EA and FONSI — for public review or comment. *See* AR3001.

NEPA's implementing regulations require that a draft EA and FONSI be circulated for review and comment whenever the proposed action is similar to one requiring an EIS or the

[1] As we have previously explained (*see* Plaintiffs' Motion for Preliminary Injunction (ECF 22-1) at 21), Plaintiffs do not contend that compensatory mitigation is never appropriate. There are circumstances in which such an approach may effectively and efficiently mitigate potential environmental impacts. Those circumstances are not present in this case, however.

nature of the proposed action is without precedent. 40 C.F.R. §1501.4(e)(2). Applicable guidance clarifies that the regulations require public review and comment whenever (i) there is a reasonable argument for preparation of an EIS; (ii) the proposed action is new, unusual, or precedent-setting; (iii) there is either scientific or public controversy over the proposed action; *or* (iv) the proposed action is located in a floodplain or wetland. *See* 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981). All four of those factors are present here. As explained above, the arguments for preparing an EIS are more than "reasonable" and the Project has engendered significant public and scientific controversy. There can be little doubt that the Project is new, unusual, and precedent-setting — after all, it would be located within one of the most historic landscapes of the James River, an area currently without overhead crossings of any kind. AR694, 731, 733, 22839-55. And it is beyond dispute that portions of the Project will be located in wetlands and floodplains. Therefore, the Corps' refusal to circulate a draft EA and FONSI for public review and comment was arbitrary, capricious, and contrary to NEPA.

3. The Corps Arbitrarily and Capriciously Dismissed Reasonable, Less-Harmful Alternatives to the Project

NEPA also requires that EAs discuss alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). This is "an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact." *Sierra Club v. Watkins*, 808 F. Supp. at 870. Applicable guidance provides that "[r]easonable alternatives include those that are *practical* or *feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant." 46 Fed. Reg. at 18027 (emphasis original). An alternative may be excluded from consideration "only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action." *Pub. Emp. For Envtl. Responsibility v. U.S. Fish & Wildlife Serv*., 177 F.

Supp.3d 146, 154 (D.D.C. 2016) (citing *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)). Here, the Corps unreasonably, arbitrarily, and capriciously dismissed from consideration viable alternatives capable of satisfying the purpose and need for the Project while avoiding impacts to the James River and its historic surrounds.

a. Underwater 230kV Alternatives

One of the most obvious alternatives to the Project is to place Dominion's proposed transmission line beneath the James River rather than above it. Such an approach would maintain Dominion's preferred route while avoiding impacts to the historic landscape.

In 2013, a variety of different underwater options were raised during utility regulatory proceedings before the Virginia State Corporations Commission ("SCC"). AR151922-48. Dominion claimed that none would work. AR151936. The SCC Hearing Officer expressed doubts about the company's claims and ordered Dominion to prepare additional studies. AR151936-38. Those studies demonstrated that an underwater double-circuit 230 kV line from Surry to Skiffes Creek plus upgrades to existing infrastructure (a combination referred to by the Hearing Examiner as "Alternative B") would address all short-term and long-term electric reliability concerns in the region. AR151938-39. Dominion further objected that the cost and construction time for Alternative B — estimated by the company to be $488.6 million and 5 years, respectively — could not be justified. AR151945, 151948. The Hearing Officer found evidence that "steps could be taken to sequence the construction work to complete [Alternative B] sooner than projected" and concluded "[Dominion] was not convincing that all of the additional projected time would be required to complete [Alternative B]." AR151948. Ultimately, the Hearing Officer recommended an overhead crossing of the James River as the "least cost viable option" for addressing potential reliability issues. AR151970. But his August

2, 2013 report and findings put all relevant parties on notice that (i) an underwater double-circuit 230 kV line from Surry to Skiffes Creek, combined with upgrades to existing infrastructure, could resolve reliability concerns; and (ii) Dominion's five-year construction estimate for such a project was "not convincing." AR151945-48.

The very next week, Dominion applied to the Corps for the permits necessary for construction of the Project. AR150081-151122. The application purported to address potential alternatives, but it failed to mention the Hearing Officer's finding that an underwater double-circuit 230 kV line from Surry to Skiffes Creek could be combined with upgrades to existing infrastructure to address potential reliability issues. AR150104-25. To the contrary, the application inaccurately stated that "a 230 kV line, either overhead or underground, does not meet electrical NERC reliability requirements and is therefore excluded from further analysis." AR150105-26.

In 2014 and early 2015, Dominion prepared and submitted to the Corps an "alternatives analysis" in support of the company's permit application. AR135972-136004, 121760-96. The analysis made no mention of the SCC Hearing Officer's findings regarding the possibility of an underwater double-circuit 230 kV line from Surry to Skiffes Creek. AR135998, 121788. Instead, it stated that such an alternative would not resolve potential reliability issues and was therefore infeasible. The analysis estimated the cost of an underwater double-circuit 230 kV line from Surry to Skiffes Creek as $310-390 million and expressed a generalized concern about oyster leases and "construction timeline." *Id*. No supporting evidence was provided.

On August 28, 2015, Dominion submitted an "alternatives analysis summary" to the Corps. AR75070-75100. The summary included a chart purporting to identify all potential alternatives to the Project. AR75088-98. But the chart makes no mention of the possibility of

combining an underwater double-circuit 230 kV line from Surry to Skiffes Creek with other upgrades. *Id*.

From late-2015 through early-2017, Dominion and the Corps addressed the topic of alternatives on several occasions but produced nothing resembling a coherent, thoughtful analysis of options involving an underwater double-circuit 230 kV line from Surry to Skiffes Creek. Sometimes, they acknowledged that such a line could be combined with other upgrades to address all reliability concerns. *See, e.g.*, AR23167, 73307, 4337, 52505. At other times, they suggested that the opposite was true. *See, e.g.*, AR110791. Construction time estimates varied without meaningful explanation. *Compare, e.g.*, AR23167 (more than 7 years) *with* AR4337 (5 years). So did cost estimates. *Compare, e.g.*, AR23167 (more than $400 million) *with* AR73307 ($515 million). None of these feasibility, cost, or time estimates was supported by specific, verifiable data.

Finally, after nearly four years of inconsistent, unsupported, and inaccurate explanations, the Corps decided that an underwater double-circuit 230 kV line from Surry to Skiffes Creek was not workable because it would require five years to implement. AR711-13. The agency refused for years to meaningfully pursue a promising underground option and then eliminated that option from consideration on the theory that there was no longer time to pursue it. This is hardly the sort of reasoned decision-making NEPA requires. *See Sierra Club*, 808 F. Supp. at 871-72 (agency's efforts to address alternatives must be reasonable). Alternatives involving an underwater double-circuit 230 kV line from Surry to Skiffes Creek represented a feasible means of addressing potential NERC reliability issues in 2013 (AR151945-48) and they remain feasible today. The Corps cannot avoid alternatives by burying its head in the sand. After all, "[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its

actions and it considers options that entail less environmental damage, it may be persuaded to alter what it has proposed." *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008).

b. Tabors Alternatives

The independent engineers at Tabors were retained to investigate whether less-harmful alternatives to the Project might feasibly address potential reliability concerns. Before Tabors began work, the National Trust requested that the Corps and Dominion share any data they might believe necessary to the preparation of an accurate analysis. AR22700-02; AR22282-83. Dominion refused to share any data unless the National Trust would agree to (i) restrict its use to modeling (i.e., confirming) the need for the Project; (ii) allow Dominion to oversee all work; and (iii) refrain from taking any action that could delay Dominion's preferred Project. AR22506. Of course, each of those conditions is fundamentally antithetical to an independent investigation of Project alternatives. But the Corps — the federal agency charged with creating and safeguarding an open, participatory environmental review process — did not attempt to arrange Dominion's cooperation, share its own data, or otherwise respond to the National Trust's request.

In light of Dominion's refusal to share information (and the Corps' tacit endorsement of that refusal), Tabors instead relied on publicly-available data submitted by Dominion to the Federal Energy Regulatory Commission ("FERC"). AR22282-83. This was a reasonable choice. In submitting the data to FERC, Dominion had attested to its accuracy and its suitability for use in transmission reliability planning. *Id*. The data showed there were at least four reasonable alternatives to the Project that could be built faster, less expensively, and without an overhead crossing of the James River: (i) upgrading and reconfiguring existing infrastructure to increase capacity; (ii) operating the existing Yorktown 3 generation facility as needed during "summer peak" conditions; (iii) operating Yorktown 3 on stand-by during "summer peak"

conditions and reconfiguring existing transmission lines; and (iv) developing new 230kV transmission infrastructure in certain "hot spots" within existing Dominion rights-of-way or along exiting highway routes. AR21982-0022004.

Although Tabors' analysis had used Dominion's own data, the company nonetheless contested the results. AR21636-61. In particular, Dominion alleged that (i) the data used by Tabors was flawed; (ii) an accurate analysis would require access to data held only by Dominion; (iii) Tabors' cost estimates were inaccurate; and Tabors' alternatives would not be NERC-compliant. *Id.*

The independent engineers at Tabors responded in two letters, both of which provided point-by-point rebuttals of Dominion's assertions along with citations to neutral third-party information. AR7003-18, 5839-45. In the first letter, Tabors offered to repeat their analysis using data of Dominion's choosing. AR5840. Dominion never specifically responded to that offer. In the second letter, Tabors asked for the data supporting Dominion's contentions regarding the cost of alternatives to the Project. AR7007. Again, Dominion failed to respond.

The Corps did not take any public action either. In private, however, some at the agency expressed significant concerns about Dominion's analysis. For example, after reviewing the analyses prepared by Tabors and Dominion one Corps official had the following observations:

- "I would lean towards the fact that the opponents [*i.e.*, Tabors'] proposed alternatives may be NERC compliant." AR6211.
- "Dominion's cost estimates of the [Tabors] alternatives seem bloated and excessive. The construction duration seems too high…I could not justify upwards of 75% of some of their estimates." AR6211.

- "We will have to search for an independent modeling expert to avoid a court case." AR6211.

She then provided her "bottom line" advice: "I believe *Dominion can take a harder look at the alternatives* otherwise they are open to lengthy litigation. I think that the *continued engagement of both parties will get us closer to the right decision*. However, *we do need an unbiased facilitator* knowledgeable in the NERC evaluation and load flow modeling." AR6212 (emphasis added).

None of this was shared with Tabors, the National Trust, or any of the other stakeholders who had repeatedly urged the Corps to undertake a truly independent analysis of alternatives. *See, e.g.,* AR24353, 33916, 51491. Nor did the Corps initiate the recommended "continued engagement" or secure an "unbiased facilitator knowledgeable in the NERC evaluation." *See* AR6212. Instead, the agency encouraged Dominion to procure a comfort letter from PJM, the regional transmission organization that coordinates wholesale electricity in Virginia. *See* AR4564. The PJM letter states, in a single conclusory paragraph, that the Tabors alternatives do not address all potential NERC reliability issues. AR5132. That conclusion is presented without reference to any supporting data, without explanation of the data PJM received from Dominion, and without description of the analyses (if any) PJM performed. In fact, the PJM letter does not even identify the specific NERC concerns at issue. *Id*. The Corps nonetheless treated the PJM letter as conclusive evidence, and dismissed the Tabors alternatives from further consideration. AR702-03.

The Corps' decision-making with respect to the Tabors alternatives, like its treatment of underwater double-circuit 230 kV alternatives, was arbitrary and capricious. In essence, the Corps allowed Dominion to withhold data from Tabors and then dismissed Tabors' alternatives

for failing to use Dominion's data. The agency then compounded its error by ignoring specific concerns and recommendations from its own officials in favor of a vague comfort letter procured by Dominion.

Congress has assigned federal agencies — and not the National Trust, Tabors, Dominion, or PJM — the task of evaluating alternatives under NEPA. 42 U.S.C. §4332(2); 40 C.F.R. §1508.9. NEPA does not permit agencies "simply to sit back, like an umpire." *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1119 (D.C. Cir. 1971). Instead, they must "take the initiative of considering environmental values at every distinctive and comprehensive stage of the process." *Id*. In failing to do so here, the Corps abdicated one of its most fundamental responsibilities in the NEPA process and arbitrarily and capriciously refused to pursue feasible alternatives to an overhead crossing of the James River. *See, e.g., Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (lead agency may not delegate its responsibilities to project proponent); *S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52-54 (D.D.C. 2002) (lead agency has a "duty to conduct an independent analysis of alternatives").

B. The Corps Violated the NHPA

Congress enacted the NHPA in 1966 to preserve "the historical and cultural foundations" of the United States" and "insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation" in the face of proposals to extend "urban centers, highways, and residential, commercial, and industrial developments." Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966). Two sections of the statute are particularly relevant here.

Section 106 establishes a process by which federal agencies must "take into account" the impact of their undertakings on any site listed on or eligible for listing in the National Register of Historic Places. 54 U.S.C. § 306108. Congress gave the ACHP authority to promulgate

regulations governing the implementation of the Section 106. 54 U.S.C. § 304108(a). Among other things, those regulations establish a consultation process requiring federal agencies to assess the effects of their undertakings on historic properties, and to develop and meaningfully evaluate alternatives or modifications that would avoid, minimize, or mitigate such effects. 36 C.F.R. §§ 800.4-800.6.

Section 110(f) requires stronger protections for a special category of highly significant historic resources designated as National Historic Landmarks (or "NHLs"):[2]

> Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall *to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark.* The head of the Federal agency shall afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306107 (emphasis added).[3] The legislative history of Section 110(f) makes it clear that this requirement "does not supercede Section 106, but complements it by setting a higher standard for agency planning in relationship to landmarks …." H.R. Rep. No. 96-1457, at 38 (1980) (reprinted in 1980 U.S.C.C.A.N. 6378, 6401). Thus, the mandate of Section 110(f) "stands on top of the more general duty in the Section 106 consultation process." *Presidio Historical Ass'n v. Presidio Trust*, 811 F.3d 1154, 1170 (9th Cir. 2016). Under Section 110(f), "something more [is] required." *Id.*

None of this bears any sort of resemblance to a proper NEPA analysis. Congress gave NPS (rather than ACHP) authority to interpret and issue implementing guidance for Section

[2] NHLs are properties that have "exceptional value to the nation as a whole rather than to a particular State or locality," must retain a high degree of historic integrity, and may only be designated by the Secretary of the Interior. 36 C.F.R. §§ 65.2(a), 65.4.

[3] Previously codified at 16 U.S.C. § 470h-2(f).

110(f). 54 U.S.C. § 306101(b).[4] Pursuant to that authorization, NPS has issued *Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act of 1966* ("Section 110 Guidelines"), a regulatory guidance document applicable to all federal agencies. *See* 63 Fed. Reg. 20495, 20496 (Apr. 24, 1998). Among other things, the Section 110 Guidelines memorialize the "higher standard" required for compliance with Section 110(f):

> Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs.

Id. at 20503. The Section 110(f) Guidelines further mandate that agencies "consider all prudent and feasible alternatives to avoid an adverse effect on the NHL." *Id*. This directive, read in light of the plain language of Section 110(f) and its legislative history, provides clear guidance as to the statute's mandate — to set the strongest and highest standard possible for protection for the nation's NHLs.[5]

It is undisputed that the Project will adversely affect Carter's Grove, an NHL. AR731. The Corps must have recognized that this adverse effect triggers Section 110(f) because on May 29, 2015, it sent a letter to the NPS initiating "coordination with [NPS] concerning effects on Carters Grove (NHL)." AR118052-82.[6] NPS responded by letter dated June 17, 2015,

[4] 54 U.S.C. § 306101(b) refers to "the Secretary." Other sections of Title 54 clarify that this means the Director of the NPS. *See* 54 U.S.C. §§ 100102(1), 100102(3), 300316, 320102(a).

[5] Indeed, the requirement that agencies "consider all prudent and feasible alternatives to avoid an adverse effect on [an] NHL" This language mirrors that of Section 4(f) of the Department of Transportation Act (23 U.S.C. § 138(a); 49 U.S.C. § 303(c)), which the Supreme Court has referred to as a "plain and explicit bar" prohibiting damage to historic resources. *See Citizens to Preserve Overton Park*, 401 U.S. at 411.

[6] The record suggests Dominion also understood that Section 110(f) applies here. In August of 2015, the company sent the Corps an "alternatives analysis" contemplating the application of Section 110(f) and admitting that it imposes a "higher standard" than Section 106. *See* AR75071, 75080-81, 75088 n.14.

requesting additional review of the Project's impacts and the preparation of an EIS. AR116877-79. Over the course of the administrative process NPS went on to send no fewer than eight letters to the Army Corps on this topic, a consistent theme of which was that the Project would cause severe impacts to Carter's Grove and all possible steps should be taken to avoid and minimize the harm. AR110220-33, 72497-98, 37175-94, 30030-33, 29026-32, 24369-24411, 6147-49. Likewise, Plaintiffs repeatedly reminded the Corps of its responsibilities under Section 110(f). *See, e.g.*, AR24412-18. The Corps never provided specific, substantive responses.

Indeed, the Corps has implicitly conceded its failure to address Section 110(f). In an early draft of the MOA, the Corps included a provision stating that it had complied with Section 110(f) by undertaking "consideration of all available project alternatives to minimize harm to National Historic Landmarks to the maximum extent possible and avoid adverse effects to nationally significant historic properties." AR26125. NPS, the agency with responsibility for implementing Section 110(f), objected in the strongest imaginable terms:

> The USACE identified a preferred alternative before any Section 106 analysis had been undertaken, much less the analysis required to protect National Historic Landmarks under Section 110 of the National Historic Preservation Act. No consulting party discussion or correspondence from the USACE shows any evidence that the effects to Carter's Grove National Historic Landmark were considered beyond the identification of an adverse effect. No consultation took place to minimize those effects, and in fact, the proposed project is the most harmful to the NHL of the possible alternatives. This clause should be deleted as it is not true.

AR24398. The Corps did not dispute NPS' objection. Nor did it undertake any further efforts to comply with Section 110(f). Instead, it withdrew its assertion of compliance.

The MFR — the Corps' decision document — also fails to address the issue. AR661-772. It provides no explanation whatsoever as to how the Corps believes it may have complied with Section 110(f)'s stringent mandates to exercise a "higher standard of care" (63 Fed. Reg. at 20503); to "consider all prudent and feasible alternatives to avoid an adverse effect on the NHL"

(*id*.); and "to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm" (54 U.S.C. § 306107). For that reason alone, Plaintiffs are entitled to summary judgment.

Although the relevant decision document says nothing substantive about Section 110(f), the Corps and Dominion have offered *post hoc* rationalizations suggesting no compliance was required because the Project will not *directly* affect Carter's Grove. *See* Federal Defendants' Opposition to Preliminary Injunction (ECF 33) at 32-34; Dominion Opposition to preliminary Injunction (ECF 29) at 26-27. It is true that Section 110(f) applies only to proposed actions directly affecting NHLs. 54 U.S.C. § 306107. But Defendants' arguments fail for each of two independent reasons.

First, agency action may only be upheld on the basis articulated by the agency at the time of its decision. *Motor Vehicle,* 463 U.S. at 43. The Corps' decision document contains no findings or analysis supporting Defendants' newly-adopted litigation position, and the courts may not make up for such deficiencies by supplying a reasoned basis for agency action that the agency decision does not itself provide. *Id*.

Second, the Project's effects on Carter's Grove are, in fact, ***direct***. Carter's Grove is recognized as one of the best-preserved and most important examples of eighteenth-century Georgian architecture in North America and it derives a substantial part of that historic significance from its views of and connection to the James River. AR143501, 143509-10 . The Corps has admitted that building the Project will physically occupy and adversely affect that same viewshed. AR729-31. There is no intervening cause of this impact — it is the ***direct*** result of the Project. By any reasonable definition, the Project will directly and adversely affect Carter's Grove. *See, e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "direct" as "free

from extraneous influence; immediate").[7] Indeed, NPS, the agency charged with interpreting Section 110(f), has clearly stated that the Project will directly affect Carter's Grove and has vigorously objected to the Corps' efforts to avoid that conclusion. AR143492, 110229.[8] To the extent there is any dispute about whether the Project's impacts are direct or indirect, the Court should defer to NPS' view. 54 U.S.C. §§ 306101(b), 100102(1), 100102(3), 300316, 320102(a); *see also Ass'n of Amer. RRs v. Costle*, 562 F.2d 1310, 1319 (D.C. Cir. 1977) (refusing to defer to lead agency's interpretation where agencies with relevant expertise disagreed); *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (refusing to defer to Corps on matters outside the agency's expertise). The Corps' *post hoc*, litigation-driven interpretation of Section 110(f) is not entitled to deference.

C. The Corps Violated the CWA

The CWA and the RHA govern the Corps' permitting responsibilities with respect to proposed federal actions requiring construction or discharge of pollutants in rivers, harbors,

[7] In prior briefing, the Corps (ECF 33 at 33) and Dominion (ECF 29 at 27) took issue with Plaintiffs' reference to a definition of "direct" in *Black's Law Dictionary*. There is nothing improper about the reference. *See, e.g.*, *Watervale Marine Co. v. U.S. Dep't of Homeland Sec*., 807 F.3d 325, 331 (D.C. Cir. 2015) (Griffith, J., concurring) (relying on *Black's* in discussing ordinary meaning).

[8] It is worth noting that ACHP, the agency charged with interpreting other provisions of the NHPA (including Section 106), also noted the Corps' failure to comply with Section 110(f) and confirmed that the statute applies here: "We would like to restate that in considering the nature of the adverse effects, the Corps has yet to demonstrate that it has complied with Section 110(f) of the NHPA regarding Carter's Grove, an NHL. Section 110(f) is a statutory requirement that instructs federal agencies to take steps to minimize, to the maximum extent, harm to NHLs from undertakings they sponsor, authorize, or assist. Direct physical effects and indirect effects such as visual effects, can all directly result from an undertaking and trigger federal agency responsibility to comply with Section 110(f). The use of the term "directly" in Section 110(f) of the NHPA and 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 the federal agency's responsibility to comply with Section 110(f). Accordingly, the Corps should document how Section 110(f) has been considered in this undertaking. AR30861.

wetlands, and other waters of the United States. *See* 33 U.S.C. §§ 403, 1344. Two particular sets of permit requirements are at issue here: (i) the Corps' obligation to select the least environmentally damaging practicable alternative (40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i)); and (ii) the Corps' obligation to ensure that any permitted action is in the public interest (33 C.F.R. § 320.4(a)). Here, the agency failed to satisfy either obligation.

1. The Corps Arbitrarily And Capriciously Concluded That The Project Is The Least Damaging Practicable Alternative.

The Corps is prohibited from issuing a permit if there is a practicable alternative that will cause less adverse impact to the environment. 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i). Practicable alternatives are those which are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Where, as here, a non-water dependent project is proposed for a special aquatic site, practicable alternatives are presumed to exist unless "clearly demonstrated" otherwise. 40 C.F.R. § 230.10(a)(3).

As explained above, the Corps' alternatives analysis arbitrarily and capriciously fails to address reasonable, less-damaging alternatives to the Project as required by NEPA. For that same reason, the Court should find that the Corps has also failed to "clearly demonstrate" the absence of practicable alternatives to the Project as required under the CWA. *See* 40 C.F.R. § 230.10(a)(3).

The analysis above also explains how the Corps improperly delegated its alternatives analysis to Dominion. This, too, is contrary to the CWA. In evaluating alternatives under the CWA, the Corps must "independently evaluate" the practicability of all options. *Sierra Club v. VanAntwerp*,719 F. Supp. 2d at 64. Although some of the Corps' documents contain boilerplate statements about independent evaluation, there is little evidence that the Corps conducted its own

evaluation of potential alternatives and their costs. *See, e.g.*, AR 110810 (stakeholders informed that alternatives are "not the Corps' responsibility at this point"). As explained above, this failure was particularly acute in the case of the Tabors alternatives, each of which would (i) avoid the impacts to wetlands and waters of the United States caused by the Surry-to-Skiffes Creek portion of the Project and (ii) have fewer impacts on wetlands, historic properties, and other environmental resources than would the Project.

2. The Corps Arbitrarily And Capriciously Concluded That The Project Is In The Public Interest.

The Corps is also prohibited from issuing a permit if the proposed action is not in the public interest. 33 C.F.R. § 320.4(a). The Corps' public interest review must consider conservation, economics, aesthetics, environmental concerns, wetlands, and impacts to historic properties, among other things. *Id*. Here, the Corps evaluation of the public interest factors are arbitrary and capricious in a number of ways. The agency failed to properly account for long-term and cumulative impacts (AR728-34) despite finding that the impacts would be "detrimental" and "permanent." AR736. The Corps also concluded, contrary to the mounds of evidence, that the detrimental impacts of the Project would be "minimal." For example, the Corps' "public interest" analysis finds that the project would have "adverse impacts on scenic watersheds," "adverse effects on historic properties, a number of which are the focal point on local heritage tourism," and "detrimental effects to certain historic resources," (AR729, 731) yet concludes that the Project would have "minimal" detrimental impacts. AR736. That conclusion is not supported by the evidence, and is arbitrary, capricious, and a violation of law.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their Motion for Summary Judgment be granted, that the permits authorizing the Project be vacated, and that the matter be remanded to the Corps for further proceedings consistent with NEPA, the NHPA, the CWA, and the RHA.[9]

Respectfully submitted this 15th day of December, 2017.

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[9] Remand with vacatur is the presumptively appropriate remedy for violations of the APA. 5 U.S.C. § 706(2). The rare circumstances justifying remand without vacatur are not present here because Plaintiffs' claims identify serious deficiencies at the heart of the Corps' decisionmaking process and because vacatur will not disrupt the Corps' statutory mission. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993).