



Preservation
Virginia

March 5, 2020

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VIA EMAIL

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VIA EMAIL

Re: James River Water Authority's Proposed Water Supply Project

Dear Ms. Frye and Mr. Vanderploeg:

The Southern Environmental Law Center and Preservation Virginia are writing to express our concerns with the James River Water Authority's (JRWA) proposed water supply project in Fluvanna County, Virginia. SELC is a non-partisan, non-profit organization headquartered in Charlottesville that works to protect its natural and cultural resources throughout the southeast. Preservation Virginia is the state's leading historic preservation organization, and works to support and promote Virginia's communities and historic places.

The currently proposed water in-take, pump station, and pipeline are likely to have serious impacts on significant historic, cultural, and archaeological resources in the area, including harm to sites associated with Rassawek, the historic capital of the Monacan Indian Nation.¹ As you know, JRWA plans to seek approval of this project from the U.S. Army Corps of Engineers. However, the damage the proposal is likely to cause raises substantial questions about whether granting a permit for this project would be in the public interest, and whether less-damaging alternatives may be available. We urge the Western Virginia Regulatory Section to ensure a comprehensive and thorough review of this proposal, its adverse effects, and potential alternatives in connection with any permit application for this project.

¹ The Virginia Department of Historic Resources (DHR) has already found that the proposed project would adversely affect the Rivanna Canal Navigation Historic District and the James and Kanawha River Canal and Railroad for the purposes of Section 106 of the National Historic Preservation Act (NHPA). *See*, Letter from Richard W. Kirchen, Dir. of Review and Compliance Div., Va. Dep't of Historic Res., to Jennifer Frye, Chief of the Western Va. Regulatory Section, U.S. Army Corps of Engineers (Jul 27, 2018). JRWA's initial treatment plan prepared for the proposed project also identified four additional archaeological sites that will be adversely affected by the project, although DHR requested more information in order to determine the full scope of effects on these sites. *Id.* *See also*, Circa~ Cultural Res. Mgmt., LLC, *Treatment Plan for Sites 032-0026, 032-5124, 44FV0022, 44FV0024, 44FV0268, and 44FV0269, James River Water Supply Pump Station and Pipeline Alignment, Fluvanna County, Virginia VDHR Number 2015-0984* (Aug. 2018).

I. Point of Fork's Unique Resources

The area at the confluence of the James and Rivanna Rivers is home to a unique and rich mix of historical, cultural, and archaeological resources that highlight the region's complex and diverse past. Early historical documents, such as John Smith's 1606 map of Virginia,² place the Monacan Indian town of Rassawek at Point of Fork. Although it does not appear that English settlers ever visited the site, Rassawek was known as "the principal town of the Monacans, to which all other villages paid tribute."³ The Smithsonian Institution undertook excavations in the late 1880s after a flood exposed between forty and fifty fireplaces, over twenty-five graves, and a large number of artifacts at the site.⁴ Although local knowledge of the site continued, further archaeological investigation did not occur until construction of the Colonial Pipeline in 1980. Unfortunately, archaeological work associated with the pipeline construction took place on an emergency basis; bulldozers had already destroyed much of the prehistoric town that intersected with the pipeline's route and archaeologists only had one weekend to conduct their survey.⁵ Despite these limitations, archaeologists uncovered and documented an astounding number of artifacts, including three Indian pits, at the site (DHR No. 44FV0019).⁶ Additional disturbances associated with the pipeline construction exposed other clusters of artifacts and human bones along Point of Fork, indicating that the archaeological remains of Rassawek are widespread (e.g., DHR Nos. 44FV0020, 44FV0021, and 44FV0022).⁷ In fact, archaeological investigations associated with the proposed water supply project "result[ed] in the identification of three new sites ([DHR Nos.] 44FV0268, 44FV0269, and 44FV0270) and the relocation and expansion of three previously recorded sites ([DHR Nos.] 44FV0022, 44FV0024, 44FV0025)."⁸ The Virginia Department of Historic Resources (DHR) has found several of the archaeological sites to be potentially eligible for listing in the National Register of Historic Places.⁹

In addition to the archaeological resources associated with Native American history, there are also extensive resources that correspond to United States' development as a nation at Point of Fork. During the Revolutionary War, Point of Fork was a place of strategic importance and served as one of Virginia's primary military installations with a training ground, barracks, supply depot, and arsenal.¹⁰ The Point of Fork arsenal was raided and destroyed by the Queen's Rangers

² Document Bank of Va., "Captain John Smith, Map of Virginia, circa 1606," (last visited Jan. 23, 2020), <https://edu.lva.virginia.gov/dbva/items/show/53>. "The map is dated 1606; however, Smith did not reach the shores of Virginia until 1607, and he did not publish this map until three years after his return to England in 1609." *Id.*

³ Samuel R. Cook, MONACANS AND MINERS: NATIVE AMERICANS AND COAL MINING COMMUNITIES IN APPALACHIA 30 (2000).

⁴ Gerard Fowke, ARCHEOLOGIC INVESTIGATIONS IN JAMES AND POTOMAC VALLEYS 12-14 (1894).

⁵ Daniel L. Mouer, *A Review of the Archaeology and Ethnohistory of the Monacan Indians*, PIEDMONT ARCHAEOLOGY: RECENT RES. AND RESULTS 21-39 (1983).

⁶ *Id.*

⁷ *Id.*

⁸ Letter from Richard W. Kirchen, Dir. of Review and Compliance Div., Va. Dep't of Historic Res., to Jennifer Frye, Chief of the Western Va. Regulatory Section, U.S. Army Corps of Engineers (Jun. 29, 2018).

⁹ *Id.*

¹⁰ Nat'l Register of Historic Places Inventory Nomination Form, Point of Fork Plantation (Aug. 13, 1974), https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/032-0024_Point_of_Fork_Plantation_1974_Final_Nomination.pdf.

in 1781 "in a move [that coincided] with Tarleton's raid on the legislature at Charlottesville."¹¹ After it was rebuilt, the arsenal manufactured and repaired arms and equipment—including for the federal army and Virginia militia to use during the Whiskey Rebellion and Fallen Timbers campaign—until 1801.¹² The archaeological site associated with the arsenal is listed in both the Virginia Landmarks Register (DHR No. 032-0026) and the National Register of Historic Places (NPS No. 69000242).

By the 1830s, the Point of Fork Plantation had been built at the site by prominent Richmond businessman William Galt.¹³ The plantation was occupied and plundered by Union troops during the Civil War and General Philip Sheridan set up headquarters at the main house.¹⁴ The property was also home to James Galt—William Galt's great-nephew—who served in the Virginia General Assembly for two sessions after he was pardoned by President Johnson.¹⁵ Point of Fork Plantation "ranks among the major examples of plantation architecture in the upper James region" and is listed in both the Virginia Landmarks Register (DHR No. 032-0024) and the National Register of Historic Places (NPS No. 74002116).¹⁶ It is also home to the Point of Fork Servant Quarters (DHR No. 032-0024-0001).

The proposed project also intersects with the area's important navigational history. The Rivanna Canal Navigation Historic District is a four-and-a-half-mile-long canal and lock system along the Rivanna River in this area. Thomas Jefferson started navigational improvements to the Rivanna River in 1763, and the work culminated with the completion of the Rivanna Navigation in 1854.¹⁷ Already listed in the Virginia Landmarks Register (DHR No. 032-0036), DHR has found that the Rivanna Canal Navigation Historic District is also eligible for listing in the National Register of Historic Places. Similarly, the James River and Kanawha Canal and Railroad, which is also located in this area, is listed in the Virginia Landmarks Register (DHR No. 032-5124) and has been found to be eligible for listing in the National Register of Historic Places.

II. The Corps' Review

Due to the significant impacts the proposed water supply project may have on such resources, the Corps is requiring an individual permit for the project under Section 404 of the Clean Water Act. This will also require the Corps to comply with requirements under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). Under all three of these statutes, the Corps must thoroughly review available alternatives to the proposed project, which will bring to light serious questions about whether Point of Fork is an appropriate location for a water supply project.

¹¹ Nat'l Register of Historic Places Inventory Nomination Form, Point of Fork Arsenal Nomination Form (Dec. 9, 1968), https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/032-0026_Point_of_Fork_Arsenal_Site_1969_Final_Nomination.pdf.

¹² *Id.*

¹³ Nat'l Register of Historic Places Inventory Nomination Form, Point of Fork Plantation, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See*, Va. Dept. of Historic Resources Architectural Survey Form, Rivanna Canal Navigation Historic District.

A. Clean Water Act Section 404 Permit Review

Under the Corps' Clean Water Act permitting regulations, a comprehensive analysis of whether issuing a permit would be in the “public interest” based on a careful weighing of the proposal’s benefits against its costs and reasonably foreseeable impacts is required.¹⁸ This analysis includes consideration of the potential direct, indirect, and cumulative impacts of the proposed project on historic properties, wetlands and water quality, floodplains and flood hazards, fish and wildlife habitat, economics, and the general public welfare.¹⁹ As the Corps’ regulations state, with regard to historic and cultural values,

evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with . . . historic properties and National Landmarks, . . . archaeological resources, including Indian religious or cultural sites, and such other areas as may be established under state or federal law for similar and related purposes.²⁰

The Corps' review must also consider the public and private need for the proposal, as well as the practicability of reasonable alternative locations for the project.²¹ Federal courts have recognized that the public interest must be given “significant consideration” in the review of a Section 404 permit.²²

The extent and diversity of historical, cultural, and archaeological resources at Point of Fork heighten the need for the Corps' review of the permit application submitted for the proposed water supply project to include careful analysis of the public interest and of possible alternatives. The potentially severe impacts of the project on these resources raise significant questions about the public interest of siting the project in such a historically and culturally important area, and evaluation of these impacts must be a central part of any public interest review for this project.

In addition, under guidelines developed by the U.S. Environmental Protection Agency to implement Section 404(b)(1) of the Clean Water Act, which the Corps must apply in its review of discharge permits,²³ “no discharge of dredged or fill materials shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”²⁴ This means the Corps may only grant a Section 404 permit for the “least environmentally damaging practicable alternative” for a proposed project.

¹⁸ See 33 C.F.R. § 320.4(a)(1).

¹⁹ See *id.* The Corps’ regulations further provide that the appropriate weight and level of analysis to be given to each factor will be determined by its “importance and relevance to the particular proposal.” *Id.* at (a)(3).

²⁰ *Id.* at (e).

²¹ *Id.* at (a)(2).

²² *Ohio Valley Envtl. Coal. v. Aracoma*, 556 F.3d 177, 191 (4th Cir. 2009).

²³ See 33 C.F.R. § 323.6(a); 33 C.F.R. § 320.4(a).

²⁴ 40 C.F.R. § 230.10(a); see also *B&B P’ship v. U.S.*, 133 F.3d 913 (4th Cir. 1997); *Precon Devel. Corp. v. U.S. Army Corps Eng’rs*, 658 F. Supp. 2d 752, 767 (E.D. Va. 2009).

B. National Historic Preservation Act Section 106 Review

The Corp's permitting process for this project also must ensure compliance with Section 106 of the National Historic Preservation Act (NHPA),²⁵ as outlined in the Corps' "Procedures for the Protection of Historic Properties."²⁶ Under Section 106, the Corps is required to comprehensively review the potential direct and indirect effects of the proposal on historic resources and seek to avoid or minimize any adverse effects to the greatest extent possible.²⁷ This review is not limited to historic properties within the permit area; while the analysis must "take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S.,"²⁸ it must also "consider the effects of undertakings on any known historic properties that may occur outside the permit area."²⁹

The project and its associated infrastructure and impacts will alter the historic setting of the area and may negatively affect the integrity of the area's historic, cultural, and archaeological resources. It is clear that archaeological remnants of Rassawek, the historic capital of the Monacan Indian Nation located at Point of Fork, are widespread. In order to appropriately assess the potential impacts of the project, it is imperative that the Corps analyze the project's impacts to the Rassawek site as a whole, and not just to the portion of archaeological resources that intersect with the permit area. The Corps must also carefully consider impacts to the Point of Fork Plantation and its associated servant quarters, as well as to the Rivanna Canal Navigation Historic District and the James River and Kanawha Canal and Railroad, which will be transected by the project.

Furthermore, it is essential that this review include close coordination and ample input opportunities for DHR, interested stakeholders and organizations, and the public.³⁰ Preservation Virginia has previously expressed concerns regarding the Section 106 consultation process, especially since consulting parties were brought into the discussion so late in the process.³¹ Significant questions have also been raised about the qualifications of JRWA's archaeology expert, as well as previous archaeological work performed at the site. If the Corps determines that this archaeological work has caused anticipatory demolition of the site, it cannot grant a permit to JRWA for the proposed project.³² For these reasons, we urge the Corps to conduct a

²⁵ See 54 U.S.C. § 306108.

²⁶ 33 C.F.R. Part 325, App. C.

²⁷ See *id.* at §2(f) (noting that the Corps' historic resource review procedures are "intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program").

²⁸ *Id.* at § 2(a).

²⁹ *Id.* at §5(f).

³⁰ See *id.* (also noting that "[w]ithin the time constraints of applicable laws, executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties").

³¹ See, Letter from Justin A. Sarafin, Dir. of Preservation Initiatives & Engagement, Preservation Virginia to Steven Vanderploeg, Environmental Scientist, U.S. Army Corps of Engineers (Jun. 29, 2018).

³² Under Section 110(k) of NHPA, "[e]ach Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of [Section 106 of the NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the [Advisory Council on Historic Preservation (ACHP)], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant." 54 U.S.C. § 306113.

robust and comprehensive Section 106 analysis for the proposed water supply project, and thoroughly explore all options to avoid or minimize any adverse effects.

C. National Environmental Policy Act Review

The Corps also will have to satisfy the requirements of the National Environmental Policy Act (NEPA) in its review of any Section 404 permit submitted for the proposed project.³³ NEPA requires the Corps to "[r]igorously explore and objectively evaluate all reasonable alternatives" to meet the purpose and need of a proposed action³⁴ and the Corps cannot predetermine or preordain the results of the analysis.³⁵ "In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative."³⁶ We strongly urge the Corps to ensure that this NEPA process comprehensively reviews the adverse effects of this proposal on the site, as well as any reasonable alternatives.

Given the significant extent and uncertainty of potential impacts of this proposal, the preparation of an environmental impact statement (EIS) will likely be necessary to inform the Corps' decision. NEPA provides that an EIS must be prepared for any major federal action "significantly affecting the quality of the human environment."³⁷ The proposed water supply project appears to implicate several of the "significance" factors identified in the Council on Environmental Quality's (CEQ) NEPA regulations,³⁸ which provide for the consideration of both "context" and "intensity," with "intensity" based on a list of several factors, including³⁹:

- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources...;
- (4) The degree to which the effects on the human environment are likely to be highly controversial; and
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

³³ See 33 C.F.R. § 325.2(a)(4) (stating in regards to Department of the Army permits: "The district engineer will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.").

³⁴ 40 C.F.R. § 1502.14; *see also*, *North Carolina Wildlife Fed'n v. North Carolina Dept. Transp.*, 677 F.3d 596, 602 (4th Cir. 2012); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (noting that "a viable, but unexamined alternative renders [and EIS] inadequate.").

³⁵ *See*, *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714-15 (10th Cir. 2010).

³⁶ Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* at 2a. (1981) ("Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint using common sense, rather than simply desirable from the standpoint of the applicant.").

³⁷ 42 U.S.C. 4332(C).

³⁸ 40 C.F.R. §1508.27.

³⁹ *Id.* at §1508.27(b).

The proposed location for JRWA's proposed project is rich in historic and cultural resources, many of which are listed in or eligible for listing in the National Register of Historic Places. Furthermore, there is growing public opposition to siting the project at Point of Fork, especially because of its impact on historic, cultural, and archaeological resources. We therefore strongly urge the Corps to require preparation of an EIS for this proposal to ensure adequate review and analysis of the proposed project's adverse effects and available alternatives. As in the case of the Section 404 and Section 106 reviews discussed above, we also urge the Corps to provide ample opportunities for public input and involvement in this NEPA process.

Thank you for your consideration, and we look forward to participating in these reviews in relation to any permit application submitted for this project.

Sincerely,



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