



Preservation
Virginia

February 3, 2020

James River Water Authority
Fluvanna County Board of Supervisors
Louisa County Board of Supervisors

VIA EMAIL

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

Dear Chair and Members of the James River Water Authority; Chair and Members of the Fluvanna County Board of Supervisors; and Chair and Members of the Louisa County Board of Supervisors:

The Southern Environmental Law Center and Preservation Virginia are writing to express our concern with the proposed James River Water Supply Project in Fluvanna County at the site known as Point of Fork or Rassawek. While we do not oppose or challenge the counties' need for a new water source, 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 These impacts raise substantial questions about whether the proposed site is the right place for the water supply project. Federal review of the project will require a comprehensive analysis of all reasonable alternatives, and there is a significant risk that the proposed location will not be approved or that any approval will be challenged. There is also growing public opposition to locating the water supply project at the site. In light of all of these factors, we urge the James River Water Authority (JRWA), Fluvanna County, and Louisa County to reevaluate the proposed location for the project, use the development of a robust alternatives analysis as a chance to take a hard look at other sites, and select another site for the proposed project.

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

¹ In fact, 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). Although the quality of the archaeological field work is contested, *see* Letter from Cultural Heritage Partners, Counsel of the Monacan Indian Nation, to Steven VanderPloeg, Environmental Scientist, U.S. Army Corps of Engineers (Oct. 21, 2019), JRWA's initial treatment plan prepared for the proposed project also identified four additional archaeological sites that will be adversely affected by the project and DHR requested more information in order to determine the full scope of effects on these sites. 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); *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).

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 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

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.

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.

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 While 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. Federal Review of Alternatives

Due to the significant impacts the proposed water supply project may have on such resources, the U.S. Army Corps of Engineers (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. This will bring to light serious questions about whether Point of Fork is an appropriate location for a water supply project.

a. Clean Water Act Section 404 Permit Review

The Corps' Clean Water Act permitting regulations require 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.¹⁸ Among the factors that must be weighed in this analysis are the potential impacts (direct, indirect, and cumulative) on

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.

¹⁸ *See* 33 C.F.R. § 320.4(a)(1).

historic properties.¹⁹ This review must also consider the extent of public and private need for the proposal, as well as the practicability of reasonable alternative locations for the project.²⁰ Federal courts have stated that the public interest must be given "significant consideration" in the review of a Section 404 permit.²¹ The Corps' review of a permit application must therefore include careful analysis of the public interest and potential alternatives, particularly given the potentially severe impacts of the project on the area's historical, cultural, and archaeological resources.

b. Section 106 of the National Historic Preservation Act (NHPA) Review

The Clean Water Act permitting process will also require compliance with Section 106 of the NHPA,²² as outlined in the Corps' "Procedures for the Protection of Historic Properties."²³ 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.²⁴ This review is not limited to historic properties within the permit area; while the Corps must "take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S.,"²⁵ they must also "consider the effects of undertakings on any known historic properties that may occur outside the permit area."²⁶ Under Section 106, the Corps must fully evaluate the proposed project's potential effects on important historic, cultural, and archaeological resources, and opportunities to avoid or minimize any adverse effects must be thoroughly explored.

c. The National Environmental Policy Act (NEPA) Review

Finally, the Corps also will have to meet the requirements of NEPA in its review of the Clean Water Act Section 404 permit.²⁷ NEPA requires the Corps to "[r]igorously explore and objectively evaluate all reasonable alternatives" to meet the purpose and need of a proposed action,²⁸ and the Corps cannot predetermine or preordain the results of the analysis.²⁹ "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."³⁰

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 (a)(2).

²¹ *Ohio Valley Envtl. Coal. v. Aracoma*, 556 F.3d 177, 191 (4th Cir. 2009).

²² See 54 U.S.C. § 306108.

²³ 33 C.F.R. Part 325, App. C.

²⁴ 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").

²⁵ *Id.* at § 2(a).

²⁶ *Id.* at §5(f).

²⁷ 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.").

²⁸ 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 [an EIS] inadequate.").

²⁹ See, *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714-15 (10th Cir. 2010).

³⁰ 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

III. JRWA's Alternatives Analysis

It has been clear for some time that the proposed water in-take, pump station, and pipeline are likely to have serious impacts on significant historic, cultural, and archaeological resources, but JRWA is only now thoroughly evaluating alternative locations for the proposed project. In the face of a searching and comprehensive federal review of alternatives, JRWA will be well-served by conducting a robust alternatives analysis that will provide the Corps with accurate information about the proposed project and its alternatives, as well as associated impacts on historical, cultural, and archaeological resources. Although this alternatives analysis is being undertaken quite late in the project development process, it is essential that the assessment remain unbiased towards the existing permitted project. Furthermore, due to the importance of this site to many groups—including the Monacan Indian Nation—JRWA and the counties should engage with the public and stakeholders in developing alternatives.

However, based on what is already known about Point of Fork, the diversity and density of historical, cultural, and archaeological resources makes this a truly special place—and one that is not suited for a water supply project. Public opposition to the project at Point of Fork highlights that this is an important site that is inappropriate for this type of infrastructure development. Beyond the federal permitting questions, some of the project's required state permits remain in flux, and there are serious questions about the archaeological work that has been completed at the site thus far. For these reasons, the alternatives analysis currently underway provides JRWA and the counties with an opportunity to reassess its decision to site the water supply project at Point of Fork, and we strongly urge JRWA and the counties to select another site.

Sincerely,



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technical and economic standpoint using common sense, rather than simply desirable from the standpoint of the applicant.").