



**National Trust for  
Historic Preservation**  
*Save the past. Enrich the future.*

May 7, 2020

Mr. Steven VanderPloeg  
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Richmond, VA 23236  
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**Re: Application Number NAO-2014-00708 - Request for  
Extension on Public Comment Period, Public Hearing, and  
Environmental Impact Statement**

To Mr. VanderPloeg:

On April 7, 2020, the Norfolk District of the U.S. Army Corps of Engineers published notice of an application by the James River Water Authority (JRWA) for a discharge permit to construct a water in-take and pump station (Project) along the James River in Fluvanna County, at a site known as Point of Fork or Rassawek (Application Number NAO-2014-00708). The public notice allowed only 30 days for public comment, failed to schedule a public hearing, and indicated that the Corps intends to proceed to review this permit request without preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). On May 7, 2020, the Corps filed a notice extending the time for comment for an additional thirty days through June 7, 2020. The National Trust for Historic Preservation is concerned that the Project will cause adverse effects to cultural, historic, and natural resources and we respectfully request that the Corps further extend the comment period, make plans to hold a public meeting, and prepare an EIS.

The National Trust is a private, nonprofit organization chartered by Congress in 1949 to facilitate public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. Congress intended the Trust "to mobilize and coordinate public interest, participation and resources in the preservation and interpretation of sites and buildings." In fulfilling this role, the National Trust strives to protect a cultural legacy that is as diverse as the nation itself so all of us can take pride in our part of the American story.

The site selected by the JRWA for the water pumping station is the likely site of Rassawek, the capital of the federally recognized Monacan Nation. The location of Rassawek at the confluence of the James and Rivanna rivers was recorded by John Smith in his 1606 map of Virginia.<sup>1</sup> Rassawek was the principal

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<sup>1</sup> "Captain John Smith, Map of Virginia, circa 1606," *Document Bank of Virginia*, accessed May 5, 2020, <https://edu.lva.virginia.gov/dbva/items/show/53>.

town of the Monacans. Prior archeological investigations have unearthed human burials at the site believed to be Monacan ancestors, which provide a tangible connection between contemporary Monacans and their collective past.<sup>2</sup> Moreover, the Virginia Department of Historic Resources has determined that the site proposed for development contains several archeological sites eligible for listing in the National Register of Historic Places, making it an important source of historical information.<sup>3</sup> In sum, Rassawek is not an appropriate place to build the Project. Alternative sites should be fully explored that balance the need to provide water resources to the local community with the need to preserve this significant historic place.

### **Inadequate Public Notice**

Upon review of the materials initially posted on the Corps' website for the Project, we discovered that a large portion of the materials submitted to support the permit application were not available online for public review. For example, the Table of Contents for the "James River Water Supply Project Supplemental Information Package" prepared by JRWA's consultants the Timmons Group, and filed to support the permit application, indicated that multiple appendices, numbered through Appendix M-1-2, are a part of this report. However, the information posted on the Corps' website abruptly stopped at the cover page for Appendix C-2-2. When the Corps issued its notice on May 7, 2020 extending the comment period, the missing information was updated and posted online. The newly posted information includes approximately 2,000 additional pages. Given the volume of additional material provided for public review, a thirty-day extension is insufficient time to allow the public to fully evaluate and comment on the Project. The Corps should extend the comment period for at least sixty days, through July 7, 2020, to allow adequate time for the public to evaluate the materials.

### **Extension of Time and Public Meeting**

Due to the current COVID-19 public health crisis in Virginia and the United States, Governor Ralph Northam has issued a series of executive orders responding to the health emergency. This includes Executive Order 55, issued on March 30, 2020, requiring all Virginia citizens to stay at home until June 10, 2020. Under these circumstances, it is not legal or safe to convene an in-person public meeting prior to the current comment deadline of June 7, 2020.

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<sup>2</sup> Letter from Trip Pollard and Carroll Courtenay of Southern Environmental Law Center, with Elizabeth Kostelny of Preservation Virginia to Stephen VanderPloeg and Jennifer Frye, Western Virginia Regulatory Section, U.S. Army Corps of Engineers (March 5, 2020).

<sup>3</sup> Letter from Roger W. Kirchen of Virginia Department of Historic Resources to Jennifer Frye, Western Virginia Regulatory Section, U.S. Army Corps of Engineers (June 29, 2018).

However, a public meeting in this situation is certainly warranted. Public meetings ensure that all interested members of the public have an opportunity to engage with the federal agencies making decisions that impact cultural and environmental resources in their local communities. Permit applications and planning documents can be dense and complex. Here, a meeting would allow the public to ask questions to better understand the Project, as well as to better understand the process that the Corps will use to make a permitting decision.

There is clear evidence of public concern and interest in this Project to justify convening a public meeting. At the meeting held by JRWA in early March to vote on proceeding with this permit application, over 100 citizens participated.<sup>4</sup> The regulations governing NEPA provide that: “Agencies shall...[h]old or sponsor public hearings or public meetings whenever appropriate[.]” 40 C.F.R. § 1506.6(c)(1). Criteria includes whether there is “substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.” *Id.* In this instance, there is substantial public interest, as demonstrated by the number of participants in the JRWA meeting, and substantial controversy, as discussed more fully below.

We respectfully request that the comment deadline be extended to allow time for a public meeting to be held prior to the expiration of the comment period. Given the current timing for Governor Northam’s order to expire on June 10, 2020, at least a sixty-day extension from the original deadline of May 7, 2020 is needed. This would allow time for an in-person meeting to be held, if conditions improve such that a meeting could be held safely, or for the Corps to develop plans for virtual public outreach. If the Corps decides to engage in a virtual public engagement process, then we urge the agency to carefully consider ways to ensure full participation is available. This includes paying special attention to ensure that people without broadband internet access are afforded an opportunity to meaningfully participate.

### **Preparation of an EIS is Required**

The National Environmental Policy Act is intended 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.” 40 C.F.R. § 1500.1(b)-(c). To meet these goals, NEPA requires federal agencies to carefully identify, comprehensively evaluate, disclose to the public, and thoroughly investigate reasonable alternatives to their proposed actions.

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<sup>4</sup> Allison Warbel, *Despite Opposition, JRWA Still to Pursue Rassawek Site for Water Pump Station*, THE DAILY PROGRESS (Mar. 11, 2020), [https://www.dailyprogress.com/news/local/despite-opposition-jrwa-still-to-pursuerassawek-site-for-water/article\\_6595e519-b6c0-5d14-a689-91453a6caf3b.html](https://www.dailyprogress.com/news/local/despite-opposition-jrwa-still-to-pursuerassawek-site-for-water/article_6595e519-b6c0-5d14-a689-91453a6caf3b.html).

Most importantly, federal agencies must prepare a comprehensive EIS, that considers alternatives, discloses impacts, and guides federal decision-making, for federal actions with potentially significant impacts. 42 U.S.C. § 4332(2)(C).

The Corps must consider the context and intensity factors under NEPA's regulations in determining whether the preparation of an EIS is required for any given permit application. Both factors weigh heavily in favor of preparing an EIS in this situation. Here, the setting of the proposed action contains multiple sites listed in or determined eligible for listing in the National Register of Historic Places, including Rivanna Canal Navigation Historic District, the James and Kanawha River Canal Railroad, and at least five known archaeological sites.<sup>5</sup> The area is also an extremely significant cultural site to the Monacan Indian Nation. The sensitivity of the Project's context weighs in favor of preparing an EIS. 40 C.F.R. § 1508.27(a).

The regulations governing NEPA include ten intensity factors that an agency must consider when determining whether to prepare an EIS. *Id.* § 1508.27(b). An EIS is required if these factors *may* be present, *even if the agency believes that on balance the proposed action will be beneficial.* *Id.* The Project satisfies at least three of NEPA's intensity factors. The Project would cause adverse effects to properties that are listed in or eligible for listing in the National Register of Historic Places, *Id.* § 1508.27(b)(8); impact "[u]nique characteristics of the geographic area" such as "historic or cultural resources," *Id.* § 1508.27(b)(3); and, would cause "effects on the quality of the human environment [that] are likely to be highly controversial." *Id.* § 1508.27(b)(4).

The public controversy factor deserves special attention in this situation. Courts have found actions to be "highly controversial" where large numbers of public 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.<sup>6</sup> While this is the Corps' first public comment period for the Project, previous opportunities for public comment have produced large numbers of participants. Virginia's Department of Historic Resources (DHR) has also expressed significant concerns regarding flaws in the identification of historic resources for the Project, including disqualifying JRWA's consultant, which resulted in JRWA filing a state lawsuit challenging the agency's decision.<sup>7</sup> Certainly, under these circumstances, the Project qualifies as "highly controversial."

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<sup>5</sup> *James River Water Supply Project Supplemental Information Package*, Timmons Group, March 18, 2020, pg. 163, available at:

<https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/14202>

<sup>6</sup> See generally, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019).

<sup>7</sup> Letter from DHR to JRWA disqualifying consultant and declining to issue state permit (Sept. 26, 2019). See also *James River Water Auth. v. Virginia Dept. of Historic Resources*, No. 19-CL-702 (Va. Cir. Ct. filed Nov. 4, 2019).

Additionally, there are multiple potential alternative locations available to develop the Project. A full analysis of cultural and environmental resource impacts of various alternatives should be included in the Corps' EIS. We understand that to date the cultural resource identification efforts for the various alternatives have been limited primarily to a desktop analysis of previously identified sites included in DHR's V-CRIS database. This is insufficient to analyze and compare the impacts of various proposed alternatives.<sup>8</sup> Additionally, special attention should be given to the Forsyth alternative, which has emerged as a realistic option, deserving of close analysis, which could avoid harm to Rassawek.<sup>9</sup>

Given the public controversy and the existence of project alternatives that have not yet been fully evaluated, failure to prepare an EIS for this Project is likely to result in litigation. We are aware of a press report citing the Surry-Skiffes Creek Project and noting that "just because you have a challenge to a permit does not necessarily mean construction stops."<sup>10</sup> This misses the lesson of that case entirely. There, the Corps did not prepare an EIS prior to permitting the project and was subsequently ordered to do so by the D.C. Circuit Court of Appeals after the project was already put into service. After-the-fact NEPA review processes, such as what is now occurring with the transmission line across the James River near Jamestown, are complex, time consuming, costly to the federal agency and the project applicant, and create uncertainties in terms of final outcomes. NEPA review is intended to be completed before decisions are made so that the types of cultural and natural resource harms caused by the Surry-Skiffes Creek project can be avoided. Preparing an EIS for this Project now will ensure that the Corps has full information available before a permit decision is made. An EIS will lead to better federal decision-making and support the public interest.

## **Conclusion**

Based on the significance of the anticipated adverse effects to cultural resources an EIS should be prepared to fully consider alternatives to the proposed Project. Additionally, given the unprecedented situation caused by the coronavirus pandemic, we further request that the Corps extend the public comment period

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<sup>8</sup> Letter from DHR to the Corps, dated May 7, 2020, describing cultural resource identification efforts and expressing concern that these efforts do not "fully consider the relative significance of the archaeological resources identified at the preferred alternative [Rassawek] in comparison to the anticipated resources at the other alternatives."

<sup>9</sup> The Forsyth alternative appears to have a willing seller of land that could meet the Project's purpose and need, while avoiding adverse impacts to historic resources. Letter from Cultural Heritage Partners to JWRA, dated March 10, 2020, available at:

[http://www.culturalheritagepartners.com/wp-content/uploads/2020/03/CHPLettertoJWRA\\_ForsythAlternative\\_3\\_10\\_2020.pdf](http://www.culturalheritagepartners.com/wp-content/uploads/2020/03/CHPLettertoJWRA_ForsythAlternative_3_10_2020.pdf).

<sup>10</sup> Allison Warbel, *Consultants Recommend Keeping Pump Station at Rassawek*, THE DAILY PROGRESS (Feb. 25, 2020), [https://www.dailyprogress.com/news/local/consultants-recommend-keeping-pump-station-at-rassawek/article\\_f0067342-332c-597f-9bf7-b691f9f8e99f.html](https://www.dailyprogress.com/news/local/consultants-recommend-keeping-pump-station-at-rassawek/article_f0067342-332c-597f-9bf7-b691f9f8e99f.html).

for at least an additional sixty days and conduct a public hearing. We appreciate the opportunity to comment and thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Sharee Will". The signature is written in a cursive style with a long horizontal stroke at the end.

Sharee Williamson  
Associate General Counsel

A handwritten signature in black ink that reads "Kendra Parzen". The signature is written in a cursive style with a long horizontal stroke at the end.

Kendra Parzen  
Field Officer