



PAMUNKEY INDIAN TRIBE

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Steven VanderPloeg
Environmental Scientist
US Army Corps of Engineers, Norfolk District
Western Virginia Regulatory Section
9100 Arboretum Parkway, Suite 235
Richmond, VA 23236

RE: NAO-2014-0708 James River Water Authority Rassawek impacts

Dear Mr. VanderPloeg,

Thank you for contacting the Pamunkey Indian Tribe regarding the proposed undertaking to construct a raw water intake, raw water lines and upgrade an existing access road in Fluvanna County, Virginia. My office offers the following comments regarding the undertaking.

My office wishes to participate as a consulting party for this undertaking.

It is the opinion of my office that the Army Corps of Engineers (ACOE) should conduct public meetings to address concerns regarding this undertaking. There was well over 100 attendees at the March 11, 2020 public meeting held by the James River Water Authority (JRWA) which is considerable considering the limited advance notice of the meeting (1 day), the time of the meeting (9 am on weekday) and the location of the meeting (gated community). Given the circumstances surrounding the COVID-19 pandemic and the shut-down order currently enacted by the Governor of Virginia, it is our recommendation that an extension of the public comment period be enacted until such time as public meetings can be safely and responsibly conducted. Additionally, it is the recommendation of our office that an environmental impact statement be undertaken for the proposed undertaking considering the significant impacts to cultural properties that will be affected if the preferred route is utilized under the permit issued by the ACOE.

Section 106

Given the questionable nature of one of the earliest archaeological studies conducted at this site for this undertaking, it is my offices recommendation that the studies conducted by Circa and any

further archaeological studies based off of or including those results not be included in the Section 106 process for this undertaking. This recommendation is not solely based on the allegations which came to light by the former employee of Circa who worked at Rassawek but is more predominantly based on work conducted by Circa at another site in Virginia that Circa conducted the archaeological investigations at and their work was severely questionable and deficient. The site I am referring to was investigated by Circa in 2008 as part of a home development proposal at a known site and the majority of the known site was determined by Circa to not contain archaeological material or features. The site was recommended by Circa to be modified in terms of its dimensions with only a small portion of the original site boundary protected and found to contain archaeological material. This determination by Circa would have cleared the majority of the site for the home development and only one proposed house lot would have been protected from development due to the proposed new dimensions for the site. Thankfully, the home development was never developed at that location. A subsequent investigation for a park currently proposed at the site found that there was cultural material in all of the area of the original site dimensions previously assessed and determined by Circa to be negative for cultural materials. The current archaeological investigation for the park placed shovel test pits directly beside previous shovel test pits investigated by Circa and every single one was found to contain cultural materials and every single one investigated by Circa was negative for cultural material. This discrepancy in results at the park site coupled with the allegations made during the Rassawek investigations has resulted in my office deciding to not accept any work conducted by Circa to be sufficient for determining presence or absence of cultural materials or to accept any recommendation made by Circa in terms of a sites significance or eligibility on any proposed undertaking. For this reason, my office does not accept JRWA's response to the claims made by the former Circa employee for justifying the work conducted by Circa as there is an inherent conflict of interest in that the work conducted by Circa diminishes the importance of Rassawek and is therefore the preferred result of the applicant as it justifies its destruction. My office will not accept the recommendations of any archaeological investigations conducted by anyone which diminish the importance of Rassawek based on shovel testing and test unit excavations that does not include relevant discussions with the Monacan Nation pertaining to the continued importance of this site to the Monacan Nation and descendant communities.

The ACOE must acknowledge that the Monacan Nation possesses specialized expertise in assessing the eligibility and significance of historic properties that may possess religious and cultural significance to them consistent with 36CFR800.4 (c) (1) and therefore, that information, possessed only by the Tribe, must be given equal if not greater weight than the archaeological studies conducted at this site in determining significance and potential effects consistent with 36CFR800.4 (d), 800.5 and 800.6.

My office supports the Monacan Nations assertion that additional archaeological investigations at Rassawek for this undertaking by the applicant or contractor would constitute a Section 110 (k) violation of the National Historic Preservation Act (NHPA) as it would be anticipatory demolition as the sites significance does not need further analysis as the specialized expertise of the Monacan Nation has already established the sites significance consistent with 36CFR800.4 (c) (1). There would be no justifiable reason for additional archaeological investigations at Rassawek to determine eligibility or significance as the comments made by the Monacan Nation

have already addressed it. Therefore, any attempts made by the applicant or its contractors to further assess the eligibility or significance of the site can only be viewed as an attempt to circumvent the Section 106 process to artificially create an eligibility determination in favor of their preferred route.

This undertaking and its adverse effects to a significant site is a textbook example of how the ACOE's pre-application permit process fails to account for effects to historic properties in a manner consistent with the Section 106 regulations by not allowing the Tribes to identify its concerns with historic properties that may be affected by the undertaking and advise on the identification and evaluation of sites prior to any impacts at sites consistent with 36CFR800.2 (c) (2) (ii) (A). The ACOE should be conducting its Section 106 archaeological investigations after the Section 106 process has been initiated when the applicant submits its pre-application documents and not by the applicant prior to any consultation with Tribes or other stakeholders by the ACOE. Significant adverse effects to sites as a result of the archaeological investigation would be avoided if the archaeological investigations were conducted after the Section 106 process has been initiated and not as part of the pre-application process. The ACOE should be advising their applicants to not conduct archaeological investigations during the pre-application process in order to avoid the irreversible adverse impacts that occurred at Rassawek and to ensure that Tribal and other stakeholder concerns can be properly addressed.

Alternatives Analysis

My office supports the Monacan Nations request for an alternative route to be chosen for the proposed undertaking. We would like to thank the Army Corps of Engineers (ACOE) for requiring the alternative analysis review. However, given the circumstances surrounding archaeological investigations at this location which diminished the importance of Rassawek, the Corps should conduct an independent alternative analysis for accountability and not rely solely on the contractors and applicants' analysis due to potential conflicts of interest inherent with such an analysis. The alternative analysis was conducted by the same engineer firm who is contracted by JRWA for the proposed undertaking so they stand to benefit from any favorable analysis which advances this project with the least amount of delays and cost. Not surprisingly, the alternative analysis conducted by the applicant's contractor determined that the preferred route by JRWA would be the best route for the proposed undertaking. This conflict of interest in this alternative analysis should not and must not be ignored by the ACOE.

It has been stated that the applicant could not choose any alternative route due to the inability of the Monacan Nation to select a preferred route. At the March 11, 2020 JRWA meeting, the Chief for the Monacan Nation had stated that at least three of the alternative routes were acceptable. This statement by the Chief seems to be inconsistent with the statement made by JRWA. The primary obstacle to considering alternative routes should not be predicated on a preferred route by the Monacan Nation. A preferred route should be predicated on the fact that the Monacan Nation has consistently stated numerous times that the preferred route by JRWA is unacceptable. An alternative route defined by the perceived inability of the Monacan Nation to select a preferred route is essentially irrelevant when all of the alternative routes would be considered

preferable to the preferred route currently proposed by the JRWA as has been stated by the Monacan Nation.

During the March 11, 2020 public meeting regarding this undertaking, the main consideration discussed for not selecting an alternative route was monetary concerns. Tribal heritage and human remains should not be destroyed in order to save money. The damage done to such sites and burials cannot be conceived in the capitalist terms as was proposed during the public meeting in that it would be acceptable to destroy these sites and disturb the remains as long as it was the cheapest alternative. Additionally, the monetary analysis of an alternative route did not account for the added expense of litigation that will occur by choosing the preferred route or the cost of delays to the project as it winds through the courts. This analysis is not surprising as the beneficiary of such litigation is likely the lawyers for the contractor who conducted the alternative analysis. Once again these statements display an inherent conflict of interest within the alternative analysis conducted by contractors for the applicant. This litigation and delay cost will far exceed the amounts discussed in the alternative analysis and privately by the applicant.

My office rejects the statement allegedly made by lawyers for the JRWA and the counties of Louisa and Fluvanna that the applicants hands were tied in not selecting an alternative route by the inability of the Monacan Nation to select a preferred route as it places the blame on the inability to select an alternative route incorrectly on the Monacan Nation instead of just admitting that there is apparently no intention by the applicant to consider an alternative route due primarily to monetary considerations as was evidenced at the March 11, 2020 public meeting. This statement displays that this whole alternative analysis process is not being conducted in good faith for all concerned parties. This enforces our recommendation to the Army Corps of Engineers that an independent alternative analysis of routes should be undertaken.

My office encourages JRWA and ACOE to collaborate with the Monacan Nation to establish a mutually agreed upon preferred route. This collaboration would be consistent with the regulations at 36CFR800.5 and 36CFR800.6 to address and mitigate adverse effects to such an important site and Executive Order 13175 in addressing the ACOE trust responsibility to consult with Tribal Nations.

It is the opinion of my office that the ACOE should not issue any permit which will affect Rassawek as the costs associated with its destruction cannot be justified.

If you have any questions feel free to email me at terry.clouthier@pamunkey.org.

Sincerely,