



June 4, 2020

Steven VanderPloeg
9100 Arboretum Parkway, Suite 235
Richmond, VA 23236
steven.a.vanderploeg@usace.army.mil

VIA EMAIL

Re: Public Comment for Application Number NAO-2014-00708

Dear Mr. VanderPloeg:

On behalf of the Southern Environmental Law Center and Preservation Virginia, we submit the following comments to the U.S. Army Corps of Engineers' Norfolk District on application number NAO-2014-00708, submitted by the James River Water Authority (JRWA) for a Clean Water Act (CWA) Section 404 permit authorizing the construction of a raw water intake and pipeline to withdraw water from the James River in Fluvanna County and transport it to Louisa County for treatment and ultimate use by both localities.¹ The water in-take and pump station are proposed to be located at a site known as Point of Fork or Rassawek, a historically and culturally significant site that Preservation Virginia recently listed as one of Virginia's most endangered historic places due to the proposed project.² Preservation Virginia is the state's leading historic preservation organization, and works to support and promote Virginia's communities and historic places. The Southern Environmental Law Center is a non-profit organization headquartered in Charlottesville that works to protect natural and cultural resources throughout the southeast.

While JRWA originally applied for a nationwide permit, we support the Norfolk District's determination that an individual permit must be prepared due to "concerns and uncertainty regarding the proposed project's impacts to historic properties" and the need to provide further analysis to inform the public interest evaluation required as part of the project's CWA Section 404 permit review.³ Available information about these impacts and the existence of reasonable alternatives suggest that this application is not in the public interest and should be denied. If the Norfolk District does not deny the application at this point based on the available information, it must ensure that these impacts are further reviewed before any other decision is made by preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), as well as by conducting a thorough review under Section 106 of the National Historic Preservation Act (NHPA). We also urge you to schedule a public hearing to ensure adequate opportunity for the public to voice their substantial concerns with this application.

¹ Norfolk District, Public Notice, Application NAO-2014-00708 (Apr. 7, 2020).

² Preservation Virginia, *Most Endangered Historic Places* (last visited May 21, 2010), <https://preservationvirginia.org/our-work/most-endangered-historic-places/>.

³ Letter from William T. Walker, Norfolk District, to Christian Goodwin, Louisa County Administrator, and Eric Dahl, Fluvanna County Administrator (Sept. 10, 2019).

I. The Corps should deny the Section 404 permit application because issuing such a permit would not be in the public interest, especially since reasonable practicable alternatives exist.

A. The proposed project is not in the public interest.

The Corps' Public Interest Guidelines for evaluating Section 404 permits under the CWA require a comprehensive analysis of whether the proposal would be in the "public interest" based on a balancing of the project's benefits against its costs and reasonably foreseeable impacts.⁴ This review requires the assessment of potential direct, indirect, and cumulative impacts of the project, including the proposal's impact on wetlands and water quality, floodplains and flood hazards, fish and wildlife habitat, economics, the general public welfare, and historic properties.⁵ In addition, the Corps' regulations 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."⁶ With regard to historic, cultural, scenic, and recreational values, the Corps' regulations pertaining to public interest review further require 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 other such areas as may be established under federal or state law for similar and related purposes.⁷

Federal courts have recognized that the public interest must be given "significant consideration" in the review of a Section 404 permit,⁸ and the Corps cannot grant a Section 404 permit if the project is found to be "contrary to the public interest."⁹

While we do not take a position on the need for a new water supply for Fluvanna and Louisa counties at this time, the proposed project will seriously harm highly significant historic properties and cultural resources and substantially diminish the historic and cultural values of the area. The Corps should give special weight to these impacts, as the project's proposed location—a site known as Rassawek or Point of Fork—is truly unique.

As we have noted in previous letters to the Norfolk District,¹⁰ Rassawek is the historic capital of the Monacan Indian Nation,¹¹ a federally recognized tribe, and numerous

⁴ 33 C.F.R. § 320.4(a)(1).

⁵ *See id.*

⁶ 33 C.F.R. § 320.4(a)(3).

⁷ 33 C.F.R. § 320.4(e).

⁸ *Ohio Valley Envtl. Coal. v. Aracoma*, 556 F.3d 177, 191 (4th Cir. 2009).

⁹ 33 C.F.R. § 320.4(a)(1).

¹⁰ *See*, letter from Trip Pollard & Carroll Courtenay, SELC, and Elizabeth Kostelny, Preservation Virginia, to Jennifer Frye & Steven VanderPloeg, Norfolk District (Mar. 5, 2020); letter from Trip Pollard & Carroll Courtenay, SELC, and Elizabeth Kostelny, Preservation Virginia, to Steven VanderPloeg, Norfolk District (Apr. 12, 2020).

¹¹ Although it does not appear that European settlers ever visited the site, early maps, including John Smith's 1606 map of Virginia, place the Monacan town of Rassawek at Point of Fork. Document Bank of Va., "Capital 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 this return to England in 1609." *Id.* Rassawek with known as "the principal town of the

archaeological and potential burial sites associated with Native American settlement have been documented at the site.¹² Limited archaeological investigations associated with the construction of the Colonial Pipeline in 1980 uncovered numerous artifacts at the site, as well as other clusters of artifacts and human bones that suggest the Native American settlement may be widespread.¹³ In fact, archaeological investigations associated with the current proposal have "result[ed] in the identification of three new sites . . . and the relocation and expansion of three previously recorded sites."¹⁴ 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.¹⁵ Furthermore, the site holds immense cultural importance to the Monacan Indian Nation.

Beyond resources associated with the site's Native American history, the Rassawek/Point of Fork area contains historic resources from the Revolutionary War and Civil War periods that are listed in the National Register of Historic Places and the Virginia Landmarks Register.¹⁶ Additionally, the proposed project will intersect with the area's important navigational history, since the project would cross both the Rivanna Canal Navigation Historic District and the James River and Kanawha Canal and Railroad, which are both listed in the Virginia Landmarks Register and are eligible for listing in the National Register of Historic Places.¹⁷

The Director of DHR has called Rassawek a "highly significant site" and has noted that "[d]ocumenting and preserving Native American sites is a priority for our department because it was an important part of Virginia history and it is not well understood or documented."¹⁸ The protection of an area with such a diverse and dense mix of historic, cultural, and archaeological resources is extremely important to the public's understanding and appreciation of our shared history. There will be direct impacts to highly significant historic and archaeological resources in the path of the proposed project,¹⁹ and the indirect and cumulative impacts of the project will

Monacans, to which all other villages paid tribute." Samuel R. Cook, *MONACANS AND MINERS: NATIVE AMERICANS AND COAL MINING COMMUNITIES IN APPALACHIA* 30 (2000).

¹² Gerard Fowke, *ARCHAEOLOGIC INVESTIGATIONS IN JAMES AND POTOMAC VALLEYS 12-14* (1894); Daniel L. Mouer, *A Review of the Archaeology and Ethnohistory of the Monacan Indians*, *PIEDMONT ARCHAEOLOGY: RECENT RES. AND RESULTS* 21-39 (1983).

¹³ Daniel L. Mouer, *A Review of the Archaeology and Ethnohistory of the Monacan Indians*, *PIEDMONT ARCHAEOLOGY: RECENT RES. AND RESULTS* 21-39 (1983).

¹⁴ Letter from Richard W. Kirchen, DHR, to Jennifer Frye, Norfolk District (Jun. 29, 2018).

¹⁵ *Id.*

¹⁶ The archaeological site associated with the Point of Fork arsenal, which was active during the Revolutionary War, is listed in both the Virginia Landmarks Register (DHR No. 032-0026) and the National Register of Historic Places (NPS No. 69000242). Point of Fork Plantation, which was built in the 1830s, is listed in both the Virginia Landmarks Register (DHR No. 032-0023) and the National Register of Historic Places (NPS No. 74002116), and it is also home to the Point of Fork Servant Quarters (DHR No. 032-0024-0001).

¹⁷ The Rivanna Canal Navigation Historic District is listed as DHR No. 032-0036 in the Virginia Landmarks Register. The James River and Kanawha Canal and Railroad is listed as DHR No. 032-5124 in the Virginia Landmarks Register.

¹⁸ Gregory S. Schneider, *Virginia's Monacan tribe uses new federal status to take a stand for what could be its long-lost capital*, *THE WASHINGTON POST* (Jan. 5, 2020), https://www.washingtonpost.com/local/virginia-politics/virginias-monacan-tribe-uses-new-federal-status-to-take-a-stand-for-what-could-be-its-long-lost-capital/2020/01/05/66a6f826-227f-11ea-bed5-880264cc91a9_story.html.

¹⁹ *See*, letter from Jennifer S. Fry, Norfolk District, to Richard W. Kirchen, DHR (May 30, 2018) (finding that the proposed project, based on earlier application materials, would adversely affect at least six resources that are listed or eligible for listing in the National Register of Historic Resources).

irrevocably change the setting, and perhaps the integrity, of the site. These impacts are not in the public interest.

B. There are alternatives that will meet the counties' water needs and will minimize impacts to important historic and cultural resources.

The Public Interest Guidelines also require that the Corps evaluate the practicability of reasonable alternative locations for the proposed project.²⁰ The project's purpose is to provide "a new and reliable raw water supply of sufficient quantity to meet the short and long-term needs of Fluvanna and Louisa Counties for delivery to an agreed-upon T interconnection point."²¹ In this case, alternatives exist that would provide an adequate long-term water supply for the two localities²² while likely minimizing impacts on the significant historic and cultural resources found at Rassawek/Point of Fork. All of the other alternatives examined by JRWA are sited some distance away from the confluence of the James and Rivanna Rivers, where much of the historic and cultural resources impacted by the proposed project are located. Many archaeological remnants associated with Rassawek have been found in the vicinity of this "point" and the Monacan Indian Nation has indicated a willingness to study alternatives that move the project from this location, which they consider to be the "heart" of Rassawek.²³ JRWA has also not assessed opportunities to use horizontal directional drilling in lieu of trench excavation to build the pipeline. This type of construction technique may reduce impacts to historic and cultural resources by allowing the pipeline to be placed under historically and culturally significant resource layers.

Furthermore, the cost differential between the alternatives may not be as large as JRWA estimates. For example, the alternatives analysis prepared by JRWA leaves out consideration of important historic and cultural survey, recovery, and mitigation costs²⁴—costs that are likely to be substantial due to the project's currently proposed location in the likely heart of Rassawek. The estimated property acquisition costs for each alternative may also be inflated. JRWA paid substantially more for two of the five easements it acquired for the proposed project, and these outliers greatly increased the default figure used to estimate property acquisition costs for each

²⁰ 33 C.F.R. § 320.4(a)(2)(ii). Consideration of practicable alternatives under the Public Interest Guidelines is separate from the requirement established under the Environmental Protection Agency's 404(b)(1) Guidelines, which prohibits the Corps from issuing a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (commonly known as the least environmentally damaging practicable alternative, or LEDPA). See 40 C.F.R. § 230.10(a). See also, *Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254, 1259 (S.D. Fla. 2009).

²¹ JRWA, *James River Water Supply Project Supplemental Information Package NAO-2014-0070 27* (Mar. 2020).

²² All of the alternatives examined appear to provide a sufficient quantity of water to meet the counties' long-term water supply needs, although additional water treatment may be needed to ensure sufficient quality of water from some of the alternative in-takes. *Id.* at 111-20 (Mar. 2020).

²³ Letter from Greg Werkheiser, Monacan Indian Nation Attorney, to Justin W. Curtis, JRWA Attorney, Frederick W. Payne, Fluvanna County Attorney, Helen E. Phillips, Louisa County Attorney (Mar. 10, 2020).

²⁴ JRWA, *James River Water Supply Project Supplemental Information Package NAO-2014-0070 95* (Mar. 2020). As the DHR notes, the analysis of alternatives "does not fully consider the relative significance of the archaeological resources identified at the preferred alternative in comparison to the anticipated resources at the other alternatives" and a "[q]uantitative analysis of the number of sites and acreage that may be impacted by the project fails to wholly grasp this significance." Letter from Richard W. Kirchen, DHR, to Steven VanderPloeg, Norfolk District (May 7, 2020).

alternative.²⁵ Finally, there appear to be opportunities to co-locate much of the pipeline route with existing road, railway, and utility right-of-ways for many of the alternatives considered. The current alternatives analysis appears to only consider the potential benefits of utility easement co-locations,²⁶ but the ability to co-locate the project along roads and railroads may further decrease property acquisition costs and also allow much of the pipeline to be sited in previously disturbed or encumbered areas.

In short, granting this permit would not be in the public interest given the proposed project's potentially severe impacts on the unique historic and cultural resources at Rassawek/Point of Fork and the availability of reasonable practicable alternatives that would help minimize such impacts. We therefore urge the Corps to deny this permit.

II. To comply with NEPA, the Corps must prepare an EIS for the proposed project.

A. The proposed project will have a significant effect on the environment.

If the Corps does not deny the permit due to its failure to meet the requirements of Section 404 based on the information available, then it must satisfy the requirements of NEPA in any further review of the permit application.²⁷ NEPA is "designed to prevent agencies from acting on incomplete information and to 'ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'"²⁸ To this end, NEPA obligates the Corps to prepare an EIS if "*any significant environmental impacts might result*" from a project permitted by the Corps.²⁹

To evaluate whether a potential impact is "significant," the Corps must analyze both the context in which the proposed action would take place and the intensity of its impact.³⁰ The "context" requirement "means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality."³¹ "Considering context is critical because the significance of an action can vary based on the setting and surrounding circumstances."³² As described above, due to the numerous historic and cultural resources found in the area, Rassawek/Point of Fork is a place of local and national historical significance. Additionally, Rassawek is a place of importance to all citizens of the Monacan Indian Nation as the Nation's former capital. The Monacan's territory once

²⁵ JRWA acquired two easements at a cost of \$86,416 per acre and \$22,352 per acre. The other three easements were obtained for \$7,698 per acre, \$2,274 per acre, and \$1,536 per acre. JRWA, *James River Water Supply Project Supplemental Information Package NAO-2014-0070* App. H-9-4 (Mar. 2020).

²⁶ *See id.* at 123, tbl. 22.

²⁷ *See* 33 C.F.R. § 325.2(a)(4) (In reviewing Department of Army permits, "[t]he 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 *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1214 (11th Cir. 2002) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)) (internal quotation marks omitted).

²⁹ *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original); 42 U.S.C. § 4332(2)(C).

³⁰ 40 C.F.R. § 1508.27.

³¹ *Id.*

³² *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32, 49 (D.C. Cir. 2018); *see also* 40 C.F.R. § 1508.27 ("Significance varies with the setting of the proposed action.").

stretched from the Fall Line in Richmond to the Blue Ridge Mountains, and the Nation currently has over 2,300 citizens.³³

The second consideration, "intensity," concerns "the severity of impact."³⁴ NEPA regulations prescribe several factors that can make a project significant, including:

- "Unique characteristics of the geographic area such as proximity to historic or cultural resources . . . ;"
- "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;" and
- "The degree to which the effects on the quality of the human environment are likely to be highly controversial."³⁵

JRWA's proposal implicates each of these intensity factors. First, it is located in a unique geographic area due to the numerous historic and cultural resources located on the site and nearby. Even the limited and highly constrained archaeological work that has been completed in the area to date has revealed extensive archaeological and cultural resources associated with Native American history; and the list of documented resources has grown with each successive investigation.³⁶ Furthermore, Rassawek/Point of Fork is home to numerous other resources, with historic sites from the Revolutionary War, Civil War, and the area's navigational history.

Second, the project will adversely affect and/or cause loss or destruction of these very same significant resources, many of which have been deemed eligible for listing in the National Register of Historic Places. For example, the Corps' initial review of the nationwide permit application concluded that the proposed project would adversely affect at least eight resources that are listed in or eligible for listing in the National Register of Historic Resources.³⁷ These resources include six archaeological sites associated with Native American history, as well as the Rivanna Canal Navigation Historic District and the James River and Kanawha Canal Railroad. Furthermore, JRWA's permit application acknowledges that "[e]xcavation activities necessary to construct the pump station and water main are considered destructive of buried archaeological resources."³⁸

³³ Monacan Indian Nation, *About Us* (last visited Apr. 30, 2020), <https://www.monacannation.com/about-us.html>.

³⁴ 40 C.F.R. § 1508.27(b).

³⁵ 40 C.F.R. § 1508.27.

³⁶ *See e.g.*, letter from Richard W. Kirchen, DHR, to Jennifer Frye, Norfolk District (Jun. 29, 2018) (noting that investigations associated with the proposed project "result[ed] the identification of three new sites . . . and the relocation and expansion of three previously recorded sites.").

³⁷ Letter from Jennifer S. Fry, Norfolk District, to Richard W. Kirchen, DHR (May 30, 2018).

³⁸ JRWA, *James River Water Supply Project Supplemental Information Package NAO-2014-0070* 165 (Mar. 2020).

Finally, there is considerable controversy and uncertainty about the extent of the project's impacts, as well as the adequacy of historic and cultural resource studies undertaken so far.³⁹ For one thing, Rassawek has not been well-studied. However, previous archaeological and anthropological work suggests that the remains of this historic capital are likely extensive.⁴⁰ The project would also result in an inter-basin transfer of water between the James River watershed and the York River watershed, and the potential environmental and human impacts of such a transfer have yet to be evaluated.⁴¹

There is also substantial controversy about the proposal in the ordinary sense of the term. The Monacan Indian Nation and local historical groups are opposed to siting the project at the proposed location.⁴² The National Trust for Historic Preservation has also opposed the proposal, as have our organizations. Over 100 members of the public attended the weekday meeting where JRWA voted to proceed with the Corps' Section 404 permit application, and 50 people spoke out in opposition to the project (and none spoke in favor).⁴³ Additionally, over 2,200 individuals and organizations have signed onto a public letter asking both the Corps and Governor Northam to deny permits for this project. The City of Richmond also has significant concerns about the project related to its water rights.⁴⁴

Considering the unique and sensitive context of the proposed project and the fact that it clearly meets several of the NEPA significance factors, an EIS is warranted if the Corps proceeds with further consideration of this proposal in order to ensure adequate review of this project and the significant impacts it would have on the project area.⁴⁵

³⁹ In this context, "highly controversial" means there is "a substantial dispute about the size, nature or effect" of the proposed action. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008).

⁴⁰ 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. Gerard Fowke, *ARCHEOLOGIC INVESTIGATIONS IN JAMES AND POTOMAC VALLEYS 12-14* (1894). Archaeological work associated with the 1980 construction of the Colonial Pipeline uncovered and documented an astounding number of artifacts, including three Indian pits, at the site (DHR No. 44FV0019). Daniel L. Mouer, *A Review of the Archaeology and Ethnohistory of the Monacan Indians*, *PIEDMONT ARCHAEOLOGY: RECENT RES. AND RESULTS* 21-39 (1983). 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). *Id.*

⁴¹ See generally, Wen Zhuang, *Eco-environmental Impact of Inter-basin Water Transfer Projects: A Review*, 23 *ENVTL. SCI. & POLLUTION RES.* 12867-79 (2016).

⁴² Letter from Marvin F. Moss, Fluvanna Historical Society, to William T. Walker, Norfolk District (Dec. 14, 2018); Letter from Roger C. Nelson, Va. Canals & Navigation Society, to Steven VanderPloeg, Norfolk District (Dec. 21, 2018).

⁴³ 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-pursue-rassawek-site-for-water/article_6595e519-b6c0-5d14-a689-91453a6caf3b.html.

⁴⁴ Letter from Robert C. Steidel, City of Richmond, to Sarah Marsala, DEQ (Nov. 17, 2015); letter from Robert C. Steidel, City of Richmond, to Sarah Marsala, DEQ (Sept. 21, 2015).

⁴⁵ See, *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 235 (D.D.C. 2003) (noting that "the existence of one or more significance factors" can trigger the need for an EIS).

B. An environmental assessment (EA) cannot replace an EIS.

When the significance factors are present, an EA, no matter how lengthy or detailed, can never replace an EIS. That is because "an EA and an EIS serve very different purposes."⁴⁶ An EA focuses on determining whether any effects might be significant; an EIS is a complete investigation of what those effects would be. "To treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment."⁴⁷ "For one thing, those outside the agency have less opportunity to comment on an EA than on an EIS. For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS."⁴⁸

C. The alternatives analysis required in an EIS will provide important information about the effects of the project on historic and cultural resources.

The alternatives analysis is the heart of NEPA.⁴⁹ Under NEPA, agencies are required to "rigorously explore and objectively evaluate all reasonable alternatives to a proposed action" in an EIS,⁵⁰ and the alternatives analysis must explore the direct and indirect individual effects of each alternative.⁵¹

While JRWA has provided some information about the alternatives analyzed as part of its Supplemental Information Package, much still remains unknown about the true impacts of alternatives—including the currently proposed project—on historic and cultural resources. Questions have been raised about the archaeological work undertaken during the survey work for the proposed project, and JRWA's analysis has failed to consider the cultural significance of the "point" of Rassawek to the Monacan Indian Nation. Furthermore, only the proposed project has received much analysis at all. For the other alternatives, only a desktop analysis of sites previously identified in DHR's Virginia Cultural Resources Information System (V-CRIS) database was completed,⁵² and DHR has raised concerns that JRWA's alternatives analysis "does not fully consider the relative significance of the archaeological resources identified at the preferred alternative in comparison to the anticipated resources at the other alternatives."⁵³

Since the proposed project is the only site that has been formally studied, the comprehensive alternatives analysis required in an EIS will provide more information about the

⁴⁶ *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (Breyer, J.).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 40 C.F.R. § 1502.14.

⁵⁰ *Id.*; *see also*, 23 C.F.R. § 771.123(c) ("The draft EIS must evaluate all reasonable alternatives to the action . . ."); Council on Envtl. Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations at 2a.* (1981) ("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. Reasonable 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.").

⁵¹ 40 C.F.R. § 1502.16.

⁵² JRWA, *James River Water Supply Project Supplemental Information Package NAO-2014-0070* 143 (Mar. 2020).

⁵³ Letter from Richard W. Kirchen, DHR, to Steven VanderPloeg, Norfolk District (May 7, 2020).

impacts of each of the alternatives on historic and cultural resources in the area, and allow for a more accurate comparison between the alternatives. This will help ensure that both public officials and members of the public understand the full environmental consequences of the project.

III. Review under Section 106 of the NHPA requires review of impacts to resources outside the proposed project's footprint.

We also reiterate our earlier calls for a thorough review of the proposed project under Section 106 of the NHPA.⁵⁴ It is clear that the archaeological remnants of Rassawek are extensive, and it is imperative that the Corps analyze the proposal's impacts to the Rassawek site as a whole and not just the portion of archaeological resources that intersect with the permit area. The Corps' procedures for implementing Section 106 note that 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.," and must "consider the effects of undertakings on any known historic properties that may occur outside the permit area."⁵⁵ This comprehensive review must take into account potential direct and indirect effects of the proposed project, and the Corps must seek to avoid or minimize any adverse effects to the greatest extent possible.⁵⁶

As discussed above, Rassawek/Point of Fork is home to a number of resources listed in both the National Register of Historic Place and the Virginia Landmarks Register, and the diversity and density of historic and cultural resources in the area make is a truly unique place. The Corps must take a hard look at how the project's direct and indirect impacts will alter the historic setting of the area, especially since these impacts have the potential to negatively affect the integrity of Rassawek/Point of Fork's historic, cultural, and archaeological resources.

IV. Request for Public Hearing

Finally, we request that the Corps schedule a public hearing for this application.⁵⁷ As discussed above, this project is extremely controversial and has the potential to substantially impact important historic, cultural, and archaeological resources. Moreover, as we wrote in our previous request for an extension to the public comment period, the COVID-19 pandemic has severely hampered the public's ability to participate in the review of this application.⁵⁸ Ideally, an in-person public hearing scheduled after the conclusion of Virginia's safer-in-place order will give the public an opportunity to learn more about this project and to raise their concerns directly with the Corps, in addition to hearing the concerns raised by others. We recognize, however, that decisions to hold an in-person public hearing may need to be revisited as more information about the Commonwealth's reopening becomes available. No matter the format of the public hearing,

⁵⁴ See, letter from Trip Pollard & Carroll Courtenay, SELC, and Elizabeth Kostelny, Preservation Virginia, to Jennifer Frye & Steven VanderPloeg, Norfolk District (Mar. 5, 2020).

⁵⁵ 33 C.F.R. Part 325, App. C. §§ 2(a), 5(f).

⁵⁶ See, 33 C.F.R. Part 325, App. C., §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").

⁵⁷ 33 CFR § 327.4.

⁵⁸ Letter from Trip Pollard & Carroll Courtenay, SELC, and Elizabeth Kostelny, Preservation Virginia, to Steven VanderPloeg, Norfolk District (Apr. 12, 2020).

we urge the Corps to ensure that members of the public have an adequate and equitable opportunity to participate in the public hearing process.

V. Conclusion

We appreciate the Norfolk District's thoughtful review of this application. Based on current information available about the proposal, the project's impacts to historic and cultural resources demonstrate that this project is not in the public interest, especially since viable alternative locations exist. For these reasons, we urge the Corps to deny the permit. If the Corps does not deny the permit at this point, to comply with the CWA, NEPA, and the NHPA it is imperative that the Corps undertake a thorough study of the project's impacts on the environment and historic and cultural resources, including by preparing an EIS for the project and by holding a public hearing.

Thank you for your consideration, and please contact us if you have any questions or would like to discuss any of the issues raised in this letter.

Sincerely,



Trip Pollard
Senior Attorney
Southern Environmental Law Center



Elizabeth Kostelny
Chief Executive Officer
Preservation Virginia



Carroll Courtenay
Associate Attorney
Southern Environmental Law Center