D.C. Cir. No. 18-5179
(Consolidated with 18-5186)

NOT YET SCHEDULED FOR ORAL ARGUMENT

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

and

ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES

Plaintiffs-Appellants

v.

TODD T. SEMONITE,Chief, U.S. Army Corps of Engineers, *et al*.,

Defendants-Appellees

and

VIRGINIA ELECTRIC & POWER CO.

Intervenor-Appellee.

Consolidated Appeals from the United States District Court for the District of Columbia

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INITIAL OPENING BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Parties who appeared in the district court and are also parties here are (1) Plaintiffs-Appellants the National Trust for Historic Preservation in the United States and the Association for the Preservation of Virginia Antiquities; (2) Defendants-Appellees Todd Semonite, Chief of the United States Army Corps of Engineers and Mark Esper, Secretary of the Army, in their official capacities; and (3) Intervenor-Appellee Virginia Electric & Power Company (d/b/a Dominion Energy Virginia). Parties who filed amicus curiae briefs in the district court are the Mattaponi Indian Tribe, Scenic Virginia, and PJM Interconnection, LLC.

Rulings. The rulings under review are (1) the May 24, 2018, Memorandum Opinion granting Defendants' motions for summary judgment and denying Plaintiffs' motions for summary judgment, entered by the United States District Court for the District of Columbia (Lamberth, J.); and (2) the May 24, 2018, Order accompanying the Memorandum Opinion (Case No. 17-cv-1361-RJL, Dkt. 86-87).

Related Cases. *Nat'l Parks Conservation Ass'n v. Semonite*, D.C. Cir. No. 18-5169 is a separate challenge to the same agency action at issue in this appeal. On July 9, 2018, the Court ordered the cases consolidated (Dkt. 1739750).

Corporate Disclosure Statement. Appellants certify that neither has a parent corporation or has issued stock of which 10% or more is owned by a publicly held corporation.

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GLOSSARY

ACHP	Advisory Council on Historic Preservation
CREA	Cultural Resources Effects Assessment
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding Of No Significant Impact
MFR	Memorandum For the Record
NEPA	National Environmental Policy Act
NHL	National Historic Landmark
NHPA	National Historic Preservation Act
NPS	National Park Service
SCC	State Corporation Commission

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1346, and it issued a final order disposing of all claims on May 24, 2018. Plaintiffs the National Trust for Historic Preservation in the United States ("National Trust") and the Association for the Preservation of Virginia Antiquities ("Preservation Virginia") filed a timely notice of appeal on June 11, 2018. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the United States Army Corps of Engineers ("Corps") arbitrarily and capriciously refuse to comply with the requirements of Section 110(f) of the National Historic Preservation Act ("NHPA")?

2. Did the Corps arbitrarily and capriciously refuse to prepare an Environmental Impact Statement ("EIS") before approving a proposal by Virginia Electric & Power Company ("Dominion") to construct overhead transmission lines across the James River and surrounding historic sites at Jamestown, Virginia (the "Project")?

3. Did the Corps arbitrarily and capriciously reject alternatives to the Project that would have avoided significant impacts to the James River's unique historic, natural, and recreational resources?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in a separate Addendum.

STATEMENT OF THE CASE

This case is about common sense and plain language.

The Corps has authorized massive electric transmission infrastructure, including steel towers up to 295 feet tall, through the heart of one of the most sensitive historic landscapes in the United States. The Project will be built within an Historic District, will cross through a Congressionally-designated National Historic Trail, and will adversely affect eight sites listed in the National Register of Historic Places, including a National Historic Landmark.

Common sense dictates that such an undertaking may have significant environmental impacts requiring the preparation of an EIS under NEPA. Plain language leads to the same result: the Corps' own decision-making documents acknowledge that the Project will adversely affect historic sites, impact unique resources, and be highly controversial, all of which mandate a finding of significance—and therefore an EIS—under the plain language of NEPA's implementing regulations. Ignoring both common sense and plain language, the Corps instead dismissed the Project's impacts as insignificant.

The Corps also ignored common sense and plain language by refusing to comply with NHPA Section 110(f). Rather than following the statute's plain mandate to minimize harm to National Historic Landmarks, the agency instead

relied on a counter-textual interpretation which had been explicitly, categorically, and repeatedly rejected by the agencies authorized to interpret the Act.

STATEMENT OF FACTS

To avoid duplication, the National Trust and Preservation Virginia incorporate the National Parks Conservation Association's Statement of Facts and add the following statement.

The James River flows through some of our Nation's most significant historic and cultural resources. **Jamestown Island** is the site of the first permanent English settlement in America and is listed in the National Register of Historic Places. AR74025, 118221, 143501-17. The Project would be visible from the island, marring its historic setting. AR74026, 143507. The Corps has admitted that the Project will adversely affect Jamestown Island. AR74027.

Jamestown is part of **Colonial National Historical Park**, which is co-managed by the National Park Service ("NPS") and Preservation Virginia. AR118221. The Park's walking trails lead visitors to Black Point, from which views extend across an expanse of the James River that is largely devoid of visible modern development. AR151845, 151923-24. The Project will be built across that same view.

Colonial National Historic Park also includes the Yorktown battlefield and Colonial Williamsburg. Linking these sites is the historic **Colonial Parkway**,

listed in the National Register in its own right. AR74017. The Parkway provides designated lookouts across the James River, the most scenic and historic of which face southeast as visitors leave Jamestown toward Williamsburg—the area through which the Project will pass. AR74017-19, 143510. The Corps has admitted that the Project will adversely affect Colonial Parkway and "detract from the [ ] characteristics and integrity qualifying it for listing on the National Register." AR74019.

Carter's Grove is an eighteenth-century plantation located on the shore of the James River. Designed to face the river (AR143492), it is a National Historic Landmark ("NHL")[1] and recognized as one of the best-preserved and most important historic properties of its kind in North America (AR119221). Dominion's consultants (on which the Corps also relied) have admitted that the Project would adversely affect characteristics "integral to" the site's eligibility for the National Register and its NHL status. AR73896.

The **Captain John Smith National Historic Trail** was established by Congress to recognize the historic significance of the James River. AR143493. Visitors access and use the trail from the land and the water. *Id.* The Keeper of

[1] NHLs are a special category of especially significant historic resources possessing "exceptional value or quality in illustrating or interpreting the heritage of the United States." 36 C.F.R. §65.4. This designation is limited to approximately 2,500 sites nationwide.

the National Register has determined that the portion of the James River through which the Project will be built is "among the most historically significant portions" of the Trail. AR74165.

The entire Project area is within the **Jamestown-Hog Island-Captain John Smith Trail Historic District** (the "District"). The Keeper of the National Register found the entire District to be "a significant cultural landscape." AR74163. The Project will cut through the District, and Dominion's consultants have admitted that the resulting impacts will be "significant." AR74053-54.

SUMMARY OF ARGUMENT

1. NHPA Section 110(f) prohibits federal agencies from taking any action that may directly and adversely affect a National Historic Landmark ("NHL") without undertaking, to the maximum extent possible, such planning and actions as may be necessary to minimize harm. Relying on a counter-textual interpretation of the statute, the Corps refused to comply. In the process, it ignored determinations by NPS and ACHP—the agencies Congress charged with interpreting the NHPA—that such compliance was mandatory.

2. NEPA requires federal agencies to prepare an EIS for any federal action that may significantly impact the environment. Regulations identify factors indicating significant impacts. The Corps refused to prepare an EIS despite the presence and severity of three such factors.

3. NEPA requires federal agencies to study, develop, and describe reasonable alternatives to their proposed actions. Organizations and agencies with expertise suggested multiple alternatives capable of addressing Dominion's need for the Project while avoiding and minimizing impacts to historic resources. The Corps unreasonably eliminated these alternatives from detailed consideration.

STANDARD OF REVIEW

To avoid duplication, the National Trust and Preservation Virginia incorporate the National Parks Conservation Association's Standard of Review and submit two additional points:

1. An agency's decision may only be upheld on grounds the agency itself has articulated. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. The district court's decision is reviewed *de novo*. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 922 (D.C. Cir. 2017).

ARGUMENT

I. THE CORPS FAILED TO COMPLY WITH THE NATIONAL HISTORIC PRESERVATION ACT

Congress enacted the NHPA to preserve "the historical and cultural foundations of the [United States]" and "insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation" in the face of "proposals to extend urban centers, highways, and residential, commercial, and

industrial developments." Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966). Two sections of the Act are relevant to this case, though only one of them is at issue.

NHPA Section 106 establishes a process by which federal agencies must "take into account" the effects of their undertakings on sites listed or eligible for listing in the National Register. 54 U.S.C. §306108. Congress gave ACHP authority to implement and interpret Section 106, and, pursuant to that authority, ACHP has issued regulations specifying a "consultation process" federal agencies must use to assess the effects of their undertakings. *See* 54 U.S.C. §304108; 36 C.F.R. part 800. These consultation regulations are explicitly limited to Section 106 and do not govern any other section of the NHPA. 36 C.F.R. §800.1(b).

NHPA Section 110(f) establishes stronger protections for NHLs. 54 U.S.C. §306107. Enacted as part of a comprehensive set of NHPA amendments designed to expand agency historic preservation responsibilities, Section 110(f) mandates

> Prior to the approval of any Federal undertaking that may directly and adversely affect any [NHL], the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark."

Id. Legislative history clarifies that this requirement "does not supercede Section 106, but complements it by setting a higher standard ... in relation to landmarks." H.R. Rep. 96-1457 at 38 (1980) (reprinted in 1980 U.S.C.C.A.N. 6378, 6401). Thus, the more specific mandate of Section 110(f) "stands on top of the more general duty in the Section 106 consultation process." *Presidio Historical Ass'n v.*

Presidio Trust, 811 F.3d 1154, 1170 (9th Cir. 2016). Under Section 110(f), "something more [is] required." *Id*.

Congress gave NPS authority to implement and interpret Section 110(f). 54 U.S.C. §306101.[2] Pursuant to that authority, NPS has issued *Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act* ("*Guidelines*") applicable to all federal agencies. 63 Fed. Reg. 20496 (Apr. 24, 1998). Among other things, the *Guidelines* identify decision-making criteria to be used in complying with Section 110(f)'s mandate to exercise "a higher standard of care" and "undertake such planning and actions as may be necessary to minimize harm." *Id*. at 20503.

One of the decision-making criteria addressed in the *Guidelines* is the obligation to consider alternatives under Section 110(f). *Id*. The *Guidelines* direct federal agencies to "consider all prudent and feasible alternatives to avoid an adverse effect on the NHL." Before writing off an alternative as "infeasible," the lead agency must undertake a three-part balancing test weighing the potential grounds for infeasibility against the preservation purpose of Section 110(f). *Id*.

[2] 54 U.S.C. §306101 refers to "the Secretary," which is defined elsewhere as the Director of NPS. 54 U.S.C. §§100102(1), 100102(3), 300316, 320102(a).

A. Section 110(f) Applies To The Project

Section 110(f) applies to every Federal action that "may directly and adversely affect any [NHL]." 54 U.S.C. §306107. It is undisputed that the Project will adversely affect Carter's Grove, an NHL. AR731, 73894-96. It is also undisputed that these adverse effects will be the direct result of the Project; there is no intervening cause. *Id*. Carter's Grove derives part of its historic significance from its setting, views, and connection to the James River (AR143501, 143509-10, 143492), and the Corps has admitted that the Project will occupy and adversely affect those very features (AR729-31; 73894-96). After reviewing the Project and its impacts, NPS, ACHP, and the National Trust, all of which have been recognized by Congress for their expertise on historic sites, advised the Corps that the direct adverse effects of the Project on Carter's Grove require compliance with Section 110(f). AR24398, 143491-92, (NPS); 24562, 30861 (ACHP); AR24412-19 (National Trust).

The Corps nonetheless refused to comply. Instead, it has asserted in this litigation (but, as discussed below, *not* in the MFR) that the Project will not "directly and adversely affect" Carter's Grove because "directly" means "physically" for purposes of Section 110(f). [Dkt. 59-1, 63-67]; [Dkt. 61-1, 61-64].

Congress gave the Corps no authority to interpret Section 110(f), and the agency's reading of "directly" is not entitled to deference. *Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999). This Court reviews the Corps' statutory interpretation *de novo*, using standard interpretive tools. *Scheduled Airlines Traffic Officers v. Dep't of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996).

In evaluating the plain language of a statute, the courts consider ordinary meaning. *United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002). The ordinary meaning of "directly" refers to *causation* rather than *physicality*. *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "direct" as "free from extraneous influence; immediate"). Therefore, plain language confirms that Section 110(f)'s applicability turns on whether a proposed project will directly *cause* an adverse effect on an NHL, and not, as the Corps would have it, on whether a proposed project will *physically* touch an NHL. *Id.*; *see also Arthur Andersen v. United States*, 544 U.S. 696, 705 (2005) (relying on Black's).

The language and context of the remainder of the NHPA further confirm that "directly affecting" refers to causation rather than physicality. Nothing in any other section of the Act suggests that Congress used "direct" to mean "physical." On the contrary, other sections refer to physical effects by using clear, natural terms such as "alter" or "demolish." *See, e.g.*, 54 U.S.C. §306103. Moreover, defining "direct" as "physical" would create absurd results elsewhere in the

statutory scheme. For example, "undertaking," a critical term for purposes of Section 106, is defined in relevant part as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 54 U.S.C. §300320. Substituting "physical" for "direct" would result in nonsense: "a project, activity, or program funded in whole or in part under the [***physical***] or indirect jurisdiction of a Federal agency." *Id*. (emphasis added). Thus, the broader statutory context also precludes the Corps' interpretation.

Nor is there anything in the legislative history of Section 110(f) to support the Corps' reading of the statute. In fact, the Corps' interpretation would undermine Congressional intent. The purpose of Section 110(f) is to establish "a higher standard of care" for the treatment of NHLs. H.R. Rep. 96-1457 at 38 (1980) (reprinted in 1980 U.S.C.C.A.N. at 6401). To qualify as an NHL, an historic site must have "a high degree of integrity" of "setting…feeling and association." 36 C.F.R. §65.4(a). In other words, NHLs—the resources Congress sought to protect with a "higher standard of care"—are not merely defined by the physical integrity of individual structures, but also by the integrity of their surroundings. *Id*. By excluding those surroundings from the "higher standard of care" mandated by Congress, the Corps' interpretation is contrary to legislative intent.

To the extent any ambiguity remains, the Corps' reading of Section 110(f) is further undermined by the interpretation of NPS, the agency charged by Congress with construing the statute. *See* 54 U.S.C. §306101.[3] NPS was deeply involved throughout the administrative process. It comprehensively reviewed the Project, applied specialized expertise, and consistently concluded that the Corps was required to comply with Section 110(f). *See, e.g.*, AR24398 (compliance required); 110230 (direct effects).[4] The Corps (and, later, the district court) erred in not giving that conclusion the deference to which it was entitled. *United States v. Mead Corp.*, 533 U.S. 218, 234-39 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Instead, the Corps claims to have relied on guidance issued by ACHP on the relationship between Section 106 and NEPA. [Dkt. 59-1, 63-67]; [Dkt. 61-1, 61-64]. The argument fails for each of three independent reasons. First, neither Section 110(f) nor the ACHP guidance is explicitly addressed in the MFR. AR661-772. An agency decision may only be upheld on the basis set forth in the decision itself. *Motor Vehicle*, 463 U.S. at 43. Here, the Corps' decision says

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[3] See note 3.

[4] NPS's reading of Section 110(f) was not just consistent throughout this administrative process but also consistent with the views it has expressed in other administrative proceedings. Although the agency reviews Section 110(f) compliance on a case-by-case basis, it has regularly taken the position that "a visual intrusion can cause a direct and adverse effect on an NHL." *See* AR30098.

nothing about Section 110(f). AR661-772. Second, the ACHP guidance, by its own terms, does not apply. AR29679-80. This makes sense. After all, ACHP is not charged with interpreting Section 110(f). Having received the interpretation of the agency that ***is*** so charged, there was no sound reason for the Corps to rely on ACHP guidance that was issued in another statutory context. Third, and most important, the record demonstrates that ACHP explicitly, repeatedly, and categorically informed the Corps that Section 110(f) it is not limited to physical effects and therefore applies to the Project. *See, e.g.*, AR24562 ("the distinction the Corps is making between direct and indirect effects is not supported by an appropriate interpretation of the statute"); 30861 ("the term 'directly' in Section 110(f)…refers to causation and not physicality"). Even if it had been reasonable for the Corps to follow ACHP rather than NPS, there would be no defensible basis to find Section 110(f) inapplicable here.

B. The Corps Failed To Comply With Section 110(f)

In this litigation (though, again, not in the MFR), the Corps has also claimed compliance with Section 110(f) [Dkt 61-1, 64-66]. That claim rings hollow given the agency's strenuous assertions that the statute did not apply—and that it never believed the statute applied—in the first place. [Dkt 61-1, 61-64]; [Dkt. 59-1, 64-67]. As noted above, Section 110(f) compliance "stands on top of the more general duty in the Section 106 consultation process" and requires a "higher

standard of care." *Presidio*, 811 F.3d at 1170. Merely complying with other statutes is not enough; "something more" is required. *Id*. There is nothing "more" in the MFR (or anywhere else in the record) that could plausibly be read as a reasoned application of the statutory mandate (54 U.S.C. §306107) or the *Guidelines*' three-part balancing test for evaluating alternatives (63 Fed. Reg. at 20503).

II. THE CORPS FAILED TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires federal agencies to identify, evaluate, and disclose the environmental effects of proposed projects and to reasonably consider alternative courses of action. 42 U.S.C. §4332(2)(C),(E); 40 C.F.R. parts 1500-1508. The Act and its implementing regulations specify procedural requirements for this environmental review. *Id*. Among other things, those requirements mandate preparation of a comprehensive EIS for any proposed action that may significantly affect the environment. 42 U.S.C. §4332(2)(C).

Here, the Corps refused to prepare an EIS despite clear evidence that the Project will significantly affect the unique historic environment of the James River and its surrounds (part II.A). And it refused to fully and reasonably investigate less-damaging alternatives to the Project (part II.B). For each of these independent reasons, the Corps' decision to approve the Project was arbitrary, capricious, an abuse of discretion, and a violation of NEPA.

A. The Corps Arbitrarily And Capriciously Refused To Prepare An EIS

An EIS is required for any proposed "action that might significantly affect the human environment." *Am. Rivers v. FERC*, 895 F.3d 32,49 (D.C. Cir. 2018). To determine whether an EIS is needed—that is, whether any of the environmental effects of a proposed action might be significant—an EA may be prepared. 40 C.F.R. §1508.9. Relevant environmental effects may be "ecological…aesthetic, historic, [or] cultural…whether direct, indirect, or cumulative." 40 C.F.R. §1508.8. If the EA reveals no possibility of any significant effect, the proposed action can be implemented on the basis of a FONSI. 40 C.F.R. §1508.13. But "[i]f *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) (emphases original).

NEPA's implementing regulations set out factors that must be considered when evaluating the significance of environmental impacts. 40 C.F.R. §1508.27. One of the purposes of these factors is to ensure the analysis properly incorporates "the views of all affected governmental entities." *Am. Rivers*, 895 F.3d at 50. In reviewing whether an agency has properly applied the significance factors, courts give effect to "the plain language of the regulations" and do not defer to agency interpretations of regulatory language. *Grand Canyon Trust*, 290 F.3d at 342.

A single significance factor may be enough to invalidate a FONSI or require an EIS. *Id.* at 347 (invalidating FONSI based on "cumulative impacts" factor and declining to reach other factors); *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) (effects may be significant "if one of these factors is met"). Here, at least three factors render the Corps' FONSI arbitrary and capricious.

1. Historic Resources

Adverse effects on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places" are one indication of significance. 40 C.F.R. §1508.27(b)(8). It is undisputed that the Project will adversely affect numerous historic resources. AR731, 74017-19, 143510, 74053-54. The record contains robust, well-supported analyses, from agencies with Congressionally-delegated authority and recognized expertise, demonstrating that these adverse effects would be significant. AR110220-33, 14389-95. And the Corps itself has admitted that the Project will diminish the integrity of the features which render the affected resources eligible for the National Register. AR761-63, 73896,74019, 74027, 74055.

Despite this evidence, the Corps dismissed the Project's impacts on historic resources as insignificant. AR771. The MFR articulates three bases for that conclusion, none of which withstands scrutiny.

First, the MFR claims the Project will be too far away to have a significant impact, asserting that "[w]here the [P]roject will be visible, it is generally at such a distance that it is on the horizon." AR763. Defendants' own studies demonstrate otherwise. For example, in evaluating the Project's impacts on Carter's Grove, the Project's Cultural Resources Effects Assessment ("CREA") finds that "[t]he [Project's] ***close proximity*** … would detract from the resource's characteristics of setting and feeling which are integral to [its] qualifications for listing on the [National Register] and as a NHL property." AR73896 (emphasis added). The CREA also confirms that the Project will be built across and through the District, a National Register-eligible site, and, as a result, "nearly all of the proposed [transmission towers], land based and riverine" will be visible up close. AR74051-52. These visual impacts "would be ***significant***" within the District. AR74053-54 (emphasis added). The MFR's conclusion that visual changes will only occur near the horizon, far from any historic sites, is factually erroneous.

Second, the MFR asserts that the Project's "intru[sion] upon the viewsheds of historic properties" (AR762) is insignificant because there will be no "blockage to viewing the river or the surroundings" (AR763). This is hardly the "convincing case" NEPA requires. *Am. Rivers*, 895 F.3d at 49. The "no blockage" standard assumes that a significant effect can occur only if historic sites disappear from view. It fails to account for any other potentially significant impact to the setting,

feeling, or features of the historic environment. By this logic, only a riverside wall could trigger an EIS. NEPA, the APA, and common sense all demand a contrary conclusion. *See, e.g., Am. Rivers*, 895 F.3d at 50-51 (invalidating FONSI where agency's standard of significance was unreasonable); *Ctr. for Biological Diversity*, 538 F.3d at 1220 (same); *Friends of Back Bay v. Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) ("An unjustified leap of logic or unwarranted assumption…can erode any pillar underpinning an agency action.").

Finally, the MFR finds that "[b]ecause the effects of greatest concern are subjective, we conclude that the qualitative analysis we have conducted as part of our [EA] is as informed and reliable as it would be through preparation of a much more costly and time-consuming [EIS]." AR771. This, too, was arbitrary and capricious. Nothing in NEPA or its implementing regulations allows the Corps to refuse to prepare an EIS due to (perceived) cost or delay. 42 U.S.C. §4332(2)(C); 40 C.F.R. §§1502.3, 1508.13, 1508.27; *see also Public Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Service*, 177 F.Supp.3d 146, 154-56 (D.D.C. 2016) ("resource constraints" not an appropriate basis for failure to prepare NEPA analysis). Decisions about whether to prepare an EIS must be based on the environmental effects of the proposed action. *Id.* By resting its FONSI on questions of cost and delay, the Corps arbitrarily and capriciously "relied on

factors which Congress has not intended it to consider." *Motor Vehicle*, 463 U.S. at 43.

2. Unique Characteristics Of The Environment

"Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, … wild and scenic rivers, or ecologically critical areas" also indicate significance. 40 C.F.R. §1508.27(b)(3). There can be no reasonable dispute that the Project will impact a unique geographic area. The Project's proximity to and impacts on uniquely important historic sites are addressed above. In addition, the Project area is listed on the Wild and Scenic Rivers Act's National Rivers Inventory for its "outstanding remarkable values" (AR765, 118588-602); contains a Wildlife Management Area (AR728, 773, 73952-53); and is part of a 50-mile stretch of the James River currently without overhead crossings of any kind (AR149805). Indeed, the Corps has admitted that the Project will "intrude upon…a ***unique*** and highly scenic section of the James River." AR762 (emphasis added).

Defendants have taken the position that impacts will be insignificant because "modern intrusions" have compromised the uniqueness of the Project area. ([Dkt. 59-1, 46-47], [Dkt. 61-1, 28-29]). As the Corps put it, the James River is "not a wilderness area." ([Dkt. 61-1, 28-29]). But the plain language of the "unique characteristics" factor does not require "wilderness." 40 C.F.R. §1508.27(b)(3).

The regulation requires only that one or more listed characteristics be present (*id*.), and it is beyond dispute that several are present here. Indeed, the record confirms that the Project area retains its unique historic, scenic, and ecological qualities. The Nationwide Rivers Inventory identifies this segment of the James as "[o]ne of the most significant historic, relatively undeveloped rivers in the entire northeast" (AR118588, 111274, 118589-601). The Keeper of the National Register found the entire Project area is a "significant cultural landscape" that retains sufficient historic integrity to qualify for the National Register. AR74163. As part of the Keeper's determination, the Corps admitted that "many sections of the James River and Hog Island … retain sufficient integrity to convey the appearance of the area during the early 17th century" (AR74146), and that most of the modern buildings in the area are "low density intrusions that became relatively lost within the overall landscape" (AR74147). On this record, it was arbitrary and capricious for the Corps to conclude that the uniqueness and significance of the Project area have been eliminated by "modern intrusions." *See Back Bay*, 681 F.3d at 589.

3. Controversy

Significant impacts also exist where "effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. §1508.27(b)(4). In this context, "controversial" refers to "a substantial dispute as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a

use." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (quoting *Found. for N. Am. Wild Sheep v. Dep't of Agric*., 681 F.2d 1172, 1182 (9th Cir. 1982)). Courts in this circuit and others have required an EIS where controversy is reflected in public input, in the concerns of commenting agencies, or in the lead agency's own documents. *See, e.g.*, *Humane Soc. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 19-20 (D.D.C. 2006); *Friends of the Earth v. Corps of Eng'rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000); *Back Bay*, 681 F.3d at 589-90; *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1224 (10th Cir. 2002). All three of those circumstances exist here.

Public commenters overwhelmingly disputed the Corps' environmental evaluation. All told, more than 50,000 comments alleged substantive deficiencies in the Corps' methods and analyses, and an additional 28,000 signed a petition requesting further study of alternatives. AR8511, 36353, 54687, 75243, 114092, 120457, 133075 (discussing number of comments). These are remarkable numbers given the Corps' stubborn refusal to circulate a draft EA and FONSI for public review. AR3001,6015. Agency actions have been found "highly controversial" based on far less. *See National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (450 comments on EA).

Public agencies and officials also expressed significant concerns. *See, e.g.*, AR24337-40, 32834-36, 30858-62, 143421-22 (ACHP); 24280-89, 31842-44,

32150-62, 32177-89, 36930-32 (NPS); AR148541, 148676 (Congress); AR53483 (Virginia Legislature). As noted above, these critiques included detailed analyses, by entities with Congressionally-delegated authority and recognized expertise, identifying substantial problems with the Corps' evaluation of historic and other affected resources. *See, e.g.*, AR24398, 143491-92; 24562, 30861; AR24412-19. This is precisely the sort of controversy for which an EIS is required. *See, e.g.*, *Found. for N. Am. Wild Sheep*, 681 F.2d at 1182; *Back Bay*, 681 F.3d at 590; *Friends of the Earth*, 109 F. Supp. 2d at 43.

Moreover, the Corps, Dominion, and Dominion's consultants have repeatedly acknowledged the "highly controversial" nature of the Project. *See, e.g.*, AR120057, 120783, 140675-77, 142460, 143357, 148586-87 (Corps); AR23036, 72558-59 (Dominion); AR72297, 120783 (consultants). These were not passing references or ambiguous notes. The Corps explicitly described the Project as "highly controversial" in communications with the Environmental Protection Agency ("EPA") (AR120057), NHPA stakeholders (AR120783), and Congress (AR140675-77), and it adjusted its internal decision-making procedures as a result of the controversy (AR143357). Dominion acknowledged a "divergence of opinions regarding the extent of adverse effects on … historic properties" (AR23036) and labeled the Project "controversial" in filings with the EPA (AR72558-59). Dominion's consultants admitted the existence of controversy

(AR120783) and described "fundamental differences" about "what specific resources are [affected] and the degree to which they are." AR72297.

The MFR does not specifically confront the evidence described above. Instead, it summarily concludes that "the comments requesting that the Corps prepare an EIS represent passion for the affected resources (i.e., opposition to the project based on importance placed on the resources), rather than substantive dispute over size, nature, or effect of the action." AR771. This conclusion is so thoroughly inconsistent with the evidence in the record that it raises questions about whether the Corps genuinely considered the referenced material. Even the most cursory glance at the record reveals thousands of pages of serious, substantive comments disputing the Corps' analyses. AR8511, 36353, 54687, 75243, 114092, 120457, 133075; *see also Humane Society*, 432 F. Supp. 2d at 19-20 (rejecting agency effort to characterize controversy as "opposition").

Perhaps recognizing that the MFR's finding lacks support, Defendants have also asserted that all controversy was resolved prior to the close of the administrative process. [Dkt. 59-1, 41-42]; [Dkt. 61-1, 36]. Not so. Although a few participants in the administrative process decided that their concerns had been addressed, many more continued to dispute the Corps' analysis of environmental issues. Notably, ACHP, the National Trust, and NPS, the entities with expertise and authority on matters involving historic resources, were among the many

stakeholders in the latter category. *See, e.g.*, AR3256-61 (ACHP); AR3001-03 (National Trust); AR6012-74 (NPS). Indeed, on May 2, 2017, at the close of the Section 106 process, ACHP identified substantial ongoing concerns about the Corps analysis (AR3256-61) and explicitly referred to the Project as "highly controversial" (AR3256).

4. Mitigation

Portions of the MFR seem to suggest that the Corps' FONSI was based on Dominion's mitigation plans. *See, e.g.*, AR729-30. In the proceedings below, the National Trust and Preservation Virginia explained why those mitigation plans would not, in fact, render environmental impacts insignificant. [Dkt 53-1, 22-24]; [Dkt 67, 16-20]. But the Corps argued, and the district court found, that mitigation did not play a role in its FONSI. [Dkt 70, 20-22]; [Dkt 102, 26-28]. Because the Corps has now waived any argument that it prepared a "mitigated" FONSI, this Court must evaluate the significance of the Project's impacts without reference to mitigation.

B. The Corps Arbitrarily And Capriciously Failed To Reasonably Consider Less-Damaging Alternatives To The Project

EAs must "study, develop, and describe" alternatives to the proposed federal action. 42 U.S.C. §4332(2)(E). This is an independent requirement of an EA, separate from its role in determining the significance of environmental impacts. *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991). If this Court

concludes the Project may have a significant impact on the environment, it need not reach the EA's alternatives analysis because, on remand, an EIS would include an independent evaluation of alternatives. 40 C.F.R. §1502.14. Alternatively, if this Court upholds the Corps' finding of no significant impact, it should nonetheless invalidate the agency's Project approval for failing to reasonably consider alternative courses of action.

An EA's alternatives analysis can be "brief" (40 C.F.R. §1508.9), but it must nonetheless be "reasonable" (*Watkins*, 808 F. Supp. at 870). An alternative may be excluded from consideration "only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action." *Pub. Employees For Envtl. Responsibility*, 177 F. Supp. 3d at 154.

1. Underwater Alternatives

One of the most obvious alternatives to the Project is to place Dominion's transmission lines beneath the James River. The record shows that an underwater double-circuit 230-kilovolt transmission line from Surry to Skiffes Creek, with complementary infrastructure upgrades (hereinafter, the "Underwater Alternative")[5] holds particular promise. This option would address reliability

[5] In the SCC proceedings, the Underwater Alternative was frequently referred to as "Alternative B." AR151938-39. In the MFR, the Underwater Alternative is referred to as "Underwater Double Circuit 230kV (w/add'l Transmission Facilities)." AR711.

concerns (AR711, 151938-39) while avoiding impacts to historic resources associated with an overhead river crossing (AR110227,150104-25).

The Corps nonetheless found the Underwater Alternative to be unreasonable, and eliminated it from consideration. AR711-13. The basis for that finding is set forth in section 5.3 of the MFR, which lists a series of "alternatives evaluated for practicability" and identifies the "constraints" according to which the Corps found each one "practicable" or "impracticable." AR709-714. The Underwater Alternative is identified as addressing reliability concerns, costing an estimated $488.6 million, and being "impracticable" because it is estimated to require "5 years to construction." AR711-13. The agency's decision must stand or fall based on these construction estimates. *Motor Vehicle*, 463 U.S. at 43.

Although the Corps based its finding on the construction estimates, there is no meaningful evidence that the agency independently obtained, verified, or evaluated specific information about the Underwater Alternative's construction. Instead, it appears to have blindly relied on Dominion's representations. The Corps' failure to independently evaluate those representations was arbitrary and capricious. A private project proponent may offer information for inclusion in a NEPA analysis, but the lead agency must "make its own evaluation of the environmental issues and take responsibility for the scope and content of the [document]." 40 C.F.R. §1506.5(b).

The Corps' failure to independently evaluate Dominion's construction estimates was particularly problematic because in 2013 the Virginia State Corporation Commission ("SCC") Hearing Officer charged with reviewing the Project found those very same estimates—$468.8 million and 5 years—to be exaggerated and unreliable. AR151948. The Corps accepted the SCC Hearing Officer's findings into its administrative record (AR151789-977) and relied on other aspects of the SCC proceedings (AR672). But there is no evidence the Corps ever addressed the Hearing Officer's findings addressing the reliability of Dominion's construction estimates. This, too, was arbitrary and capricious. The Corps cannot avoid alternatives by burying its head in the sand. After all, "[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and it considers options that entail less environmental damage, it may be persuaded to alter what it has proposed." *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008).

2. Tabors Alternatives

In light of the Corps' refusal to meaningfully consider alternatives to the Project, the National Trust retained an independent engineering firm ("Tabors") to investigate whether other, less harmful options might be available. AR22700-02. Before Tabors began work, the National Trust asked the Corps and Dominion to share any data they believed necessary for an accurate analysis. *Id.*; AR22282-83.

Dominion refused to share any data unless the National Trust would agree to (i) ensure the data would only be used to support the Project; (ii) allow Dominion to oversee all work; and (iii) refrain from taking any action that could delay the Project. AR22506. Each of those conditions is obviously antithetical to an impartial investigation of alternatives. But the Corps—the federal agency charged with safeguarding an open, participatory process—did not arrange or encourage Dominion's cooperation, share its own data, or otherwise respond to the National Trust's request.

Instead, Tabors used publicly-available data submitted by Dominion to the Federal Energy Regulatory Commission. AR22282-83. That data showed there were at least four reasonable alternatives to the Project that could be built faster, less expensively, and without an overhead crossing of the James River: (i) upgrading and reconfiguring existing infrastructure to increase capacity; (ii) operating an existing generation facility known as "Yorktown 3" as needed during peak conditions; (iii) operating "Yorktown 3" on standby during peak conditions; and (iv) developing new 230-kilovolt transmission infrastructure in certain "hot spots." AR21982-22004.

Although Tabors had used Dominion's own data, the company contested these findings. AR21636-61. Specifically, Dominion alleged that the data used by Tabors was inadequate to demonstrate NERC compliance and that Tabors' cost

estimates were too low. *Id*. Tabors responded with point-by-point rebuttals of Dominion's objections. AR5839-45,7003-18. In addition, it offered to repeat its analysis using data of Dominion's choosing (AR5840), and asked for the cost information on which Dominion had based its critique (AR7007). Dominion never responded.

The Corps took no public action, either. In private, however, some Corps officials expressed significant concerns about Dominion's analysis. The agency eventually requested an internal review by management. The reviewer stated, among other things, that she "would lean towards the fact that the [Tabors] alternatives may be NERC compliant." AR6211. "Dominion's cost estimates of the [Tabors] alternatives seem bloated and excessive," she continued, noting that "[t]he construction duration seems too high…I could not justify upwards of 75% of some of their estimates." *Id*. She recommended that the Corps engage with both parties, using an objective, independent facilitator. AR6212.

The Corps never engaged with Tabors or the National Trust to further develop Project alternatives. Nor did it arrange for an unbiased facilitator. Instead, Dominion privately contacted the transmission organization responsible for wholesale distribution in Virginia ("PJM"). AR4564. PJM responded with a letter stating, in a single conclusory paragraph, that the Tabors alternatives will not address all NERC reliability issues. AR4569. That conclusion is presented

without reference to supporting data, without any description of the analyses PJM performed, and without even identifying the specific NERC concerns at issue. *Id*. The Corps nonetheless treated the PJM letter as dispositive, and dismissed the Tabors alternatives from further consideration. AR702-03. In short, the Corps allowed Dominion to withhold data from Tabors and then, after ignoring its own management's recommendations, dismissed Tabors' alternatives for failing to use Dominion's data.

None of this bears any resemblance to an appropriate NEPA process. Congress has assigned federal agencies—and not the National Trust, Tabors, Dominion, or PJM—the task of evaluating alternatives under NEPA. 42 U.S.C. §4332(2)(E). Agencies cannot simply "sit back, like an umpire." *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1119 (D.C. Cir. 1971). Instead, they must "take the initiative of considering environmental values at every…stage of the process." *Id*. The Corps' failure to do so here was arbitrary, capricious, and an abuse of discretion. *Idaho v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. Rule 32(g) and this Court's order of July 31, 2018 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 6,498 words, and this document has been prepared in a proportionally spaced typeface using Microsoft Word 10 in Times New Roman size 14 font.

/s/ Matthew Adams

Matthew G. Adams

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I caused service of the foregoing Appellants' Opening Brief to be made by filing it with the Clerk of the Court via the CM/ECF System, which sends a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consented to electronic service. To the best of my knowledge, all parties to this action receive such notices.

/s/ Matthew Adams
Matthew G. Adams

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