

MJB&A Issue Brief ■ March 25, 2019 (updated June 7, 2019¹)

D.C. Circuit Requires Environmental Impact Statement (EIS) For Transmission Project in Virginia

On March 1, 2019, the U.S. Court of Appeals for the D.C. Circuit held that the Army Corps of Engineers' (Corps') permit allowing Dominion to build a 500 kV transmission line without requiring an Environmental Impact Statement (EIS) was arbitrary and capricious. The transmission line, which was energized on February 26, 2019, crosses the James River and "cut[s] through the middle of the historic district" in Jamestown, Virginia. It is also located in "close proximity" to Carter's Grove, a National Historic Landmark. In 2017, after a four-year process, the Corps issued an Environmental Assessment (EA) that found the project would have "no significant impact" as defined under the National Environmental Policy Act (NEPA). Several groups (Petitioners) challenged the Corps' decision to issue the permit, arguing that the Corps failed to satisfy obligations under NEPA, the Clean Water Act (CWA), and the National Historic Preservation Act (Preservation Act).

The D.C. Circuit's three-judge panel (comprised of Judges Garland, Millett, and Tatel) remanded the case to the district court with instructions to vacate Dominion's permit and to direct the Corps to prepare an EIS.

In response to the Corps' subsequent request for rehearing on the issue of remedy, the D.C. Circuit remanded the case to the district court for further proceedings, including "whether vacatur [of the permit] remains the appropriate remedy" given that the transmission project has commenced operation.

Background

In response to the Environmental Protection Agency's (EPA's) Mercury and Air Toxics Standards (MATS), Dominion determined that it would retire two of its coal-fired units to comply with the standards. In order to replace this generation, Dominion applied to the Corps in 2013 for a permit to construct a transmission project, stating that it was necessary to ensure adequate reliability due to the anticipated shutdown of the two units.²

¹ This MJB&A Issue Brief was updated to incorporate the D.C. Circuit's decision on the Corps' request for rehearing on the issue of remedy.

² PJM Interconnection projected that the retirement of these units would violate the North American Electric Reliability Corporation's (NERC's) mandatory Reliability Standards, threatening the reliability of the power grid during peak load conditions. As a result, EPA provided Dominion extensions for MATS compliance until April 2017. In June 2017, the Department of Energy (DOE) granted a PJM request to issue an emergency order under Section 202(c) of the Federal Power Act until the transmission project commenced operation. The emergency order directed Dominion to operate the units "on a very limited basis" as necessary to ensure reliability until September 14, 2017. Throughout the second half of 2017 and 2018, PJM continually renewed and DOE granted the applications for the emergency orders. On March 1, 2019, PJM withdrew its most recently submitted application for a renewal of the emergency order due to the transmission project's commencement of operation on February 26, 2019 resolving anticipated grid reliability issues. *See, e.g.,* <https://www.pjm.com/-/media/documents/other-fed-state/20190301-doe-report-construction-schedule-and-withdrawal-of-20190208-renewal-application.ashx>.

Under NEPA, if the Corps determined that the project would “significantly affect[] the quality of the human environment,” NEPA would require the Corps to prepare an EIS that analyzed the impact of the proposed action, including its effect on historic properties, and evaluate alternatives to the proposed action before issuing the permit.³ If, however, the Corps determined, based on a preliminary EA, that there was “no significant impact,” NEPA allows the Corps to issue a “Finding of No Significant Impact” in lieu of preparing an EIS. NEPA directs agencies to evaluate “significance” in light of a proposed action’s “context” (such as location) and “intensity” (“severity of impact”).⁴

The opinion also notes that Dominion’s project required Corps approval under the CWA for work within, and proposed impacts to, waters of the United States.⁵ Before issuing a permit, the CWA requires the Corps to determine that no “practicable alternative” to the proposed project existed that “would have less adverse impact on the aquatic ecosystem.”⁶ Additionally, section 106 of the Preservation Act requires the Corps to “take into account the effect of [the proposed project] on any historic property.”⁷ If the project might “directly and adversely” affect a National Historic Landmark, section 110 of the Preservation Act requires the Corps to “undertake such planning and actions as may be necessary to minimize harm” “to the maximum extent possible.”⁸

Permitting Review Process

From 2013 to 2017, the Corps engaged in an interagency review process to evaluate the project’s potential impacts and to consider alternatives, pursuant to its obligations under NEPA, the CWA, the Preservation Act.⁹

In the initial EA, the Corps determined that the proposed project would have an “overall adverse effect” on historic resources, finding that the project would “adversely affect Jamestown Island – Hog Island Cultural Landscape through direct placement of towers within the landscape,” and that it would “adversely affect Carters Grove (National Historic Landmark), Colonial National Historic Parkway and portions of Jamestown Island as a result of impacts to the surrounding view sheds.”¹⁰

The Court noted in its opinion that the Corps received roughly 50,000 comments throughout the review process, “many of which urged the Corps to prepare an EIS.” The opinion quotes the Advisory Council on Historic Preservation’s (Advisory Council’s) comment that the Project “threaten[s] to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for the historic properties encompassed within.” The Court also noted that the National Parks Service wrote to the Corps twenty times, warning that the proposed project “would forever degrade, damage, and destroy the historic setting of these iconic resources.”

To evaluate project alternatives, the Corps evaluated 28 alternatives and eliminated all but one alternative, which it found “would indisputably have been more environmental[ly] damaging.”¹¹ The opinion highlights that that several

³ See, 42 U.S.C. §4332(2)(C); 40 C.F.R. §1508.8.

⁴ 40 C.F.R. § 1508.27.

⁵ 33 U.S.C. §403.

⁶ 40 C.F.R. § 230.10(a).

⁷ 54 U.S.C. § 306108

⁸ 54 U.S.C. § 306107.

⁹ Final Brief for Federal Appellees.

¹⁰ U.S. Army Corps of Engineers, Federal Public Notice regarding Skiffes Creek Section 106 NHPA Effects (May 21, 2015): <https://www.nao.usace.army.mil/Media/Public-Notices/Article/589487/nao-2012-00080-13-v0408-skiffes-creek-section-106-nhpa-effects/>

¹¹ Final Brief for Federal Appellees.

state and federal agencies also submitted comments criticizing the Corps' evaluation of alternatives, including the accuracy of data and assumptions, cost estimates, and the thoroughness of the consideration of alternatives.

During the review process, the Corps also executed a Memorandum of Agreement with Dominion, in which Dominion agreed to take certain actions to offset the harm to historic resources. The Advisory Council, the Virginia Department of Historic Resources, the Corps, and the Department of Interior on behalf of the National Parks Service approved and signed the Memorandum “as the resolution of the Project’s adverse effects’ on historic properties in the project area” under section 106 of the Preservation Act.¹² However, the Court noted that “most [participants] declined [to sign the Memorandum] because they remained concerned that the adverse effects resulting from this undertaking [could not] be mitigated.”

On June 12, 2017, the Corps signed an EA and a Finding of No Significant Impact. The accompanying documents acknowledged that the project would “intrude upon the viewsheds of historic properties and on a unique and highly scenic section of the James River,” but concluded that the effects on these “national treasure[s] were “moderate at most” and that “aesthetic impacts are inherently subjective and do not lend themselves to quantitative or statistical analysis.”¹³ Therefore, the Corps concluded that an EIS was not required and issued the required permits. The transmission lines were energized on February 26, 2019.

Decision

Petitioners raised three arguments in the case before the D.C. Circuit: 1) NEPA required the Corps to prepare an EIS due to the significance of the Project’s projected impacts; 2) the Corps’ alternatives analyses fell short of the requirements under NEPA and the CWA; and 3) the Corps failed to fulfill its obligations under section 110(f) of the Preservation Act, which requires an agency to minimize harm to any National Historic Landmark “directly and adversely” affected by a project.

Obligation to Prepare an EIS

The Court agreed with the Petitioners, finding that the Corps’ finding of “no significant” impact was arbitrary and capricious and that the Corps “failed to make a ‘convincing case’ that an EIS is unnecessary” under NEPA. The Court explained that the project would likely implicate three of the ten “intensity” factors that NEPA requires be considered in an EA: “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial”, “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources,” and the “degree to which the action may adversely affect districts [or] sites . . . listed in or eligible for listing in the National Register of Historic Places.”¹⁴ The Court also explained that the “[t]hree intensity factors demonstrate not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS.”

The Court noted that “important questions about both the Corps’ chosen methodology and the scope of the project’s impact remain unanswered, and federal and state agencies with relevant expertise harbor serious misgivings about locating a project of this magnitude in a region of such singular importance to the nation’s history.” The opinion notes that Congress created the EIS process to provide “robust information in situation precisely like this one, where...the scope of a project’s impacts remains both uncertain and controversial.”

¹² Final Brief for Federal Appellees.

¹³ Opinion and Final Brief for Federal Appellees.

¹⁴ 40 C.F.R. § 1508.27.

In the opinion, the Court noted that “the Corps’ assessment of the scope of the Project’s effect drew consistent and strenuous opposition, often in the form of concrete objections to the Corps’ analytical process and findings, from agencies entrusted with preserving historic resources and organizations with subject-matter expertise.” Regarding how the Corps should consider agencies’ input in the NEPA process, the opinion cites caselaw to note that as the lead NEPA agency, the Corps “does not have to follow [other agencies’] comments slavishly—it just has to take them seriously.”¹⁵

The Court also rejected the Corps’ reasoning that then-Secretary of the Interior Ryan Zinke’s letter approving the project “effectively withdrew” the National Park Services’ previous stance that an EIS was required. The opinion notes that even if Zinke’s letter withdrew the National Parks Services’ opposition, “numerous other groups remained adamantly opposed,” and that it was “unsure...whether the Zinke letter actually responds to the Park Service’s concerns” as it did not respond to the question of whether the Corps acted arbitrary and capriciously in declining to prepare an EIS.

Additionally, while the Corps maintained that the mitigation steps contained in the Memorandum of Agreement with Dominion “would reduce [the Project’s] impact to a minimum,” the Court noted that the relevance of the Memorandum was “dubious given that the Corps declined to rely on it when making its ‘no significance’ findings.”

Therefore, due to the project’s projected impacts, the opinion remands the case to the district court with instructions to vacate Dominion’s permit and to direct the Corps to prepare an EIS.

Additional Issues

In addition to the holding requiring the Corps to prepare an EIS, the Court noted that such a process will require the Corps to reevaluate its CWA and Preservation Act analyses. While the opinion does not address the remaining issues raised by the Petitioners, the Court urged the Corps to “give careful consideration to its sister agencies’ concerns that the prior iterations were ‘superficial’, ‘inadequate’, and ‘extremely problematic’.”

The opinion also provides guidance on the implementation of section 110(f) of the Preservation Act, which requires an agency to “to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark” for any project that “directly and adversely affects any National Historic Landmark.” In the opinion, the Court explained that “[a]lthough section 110(f) clearly encompasses physical effects, nothing in the statute’s text so limits its reach.” As such, the opinion directs the Corps to reconsider its Preservation Act analysis using this broader definition of “directly.”

Panel Rehearing on Issue of Remedy

In response to the decision by the D.C. Circuit, the Corps petitioned for a rehearing on the issue of the remedy, requesting that the Court modify its order to remand to the agency *without* vacating the underlying permit for the transmission project. In its petition, the Corps explained to the Court that because there is at least a “serious possibility” that the Corps will reissue the permit after completing an EIS, vacating the permit now “could cause serious disruption and harm to the public interest—or at minimum create needless uncertainty—by calling into question the legal status of the already-operational transmission line and its already-constructed support towers.”

However, the National Parks Conservation Association and the National Trust for Historic Preservation opposed the Corps’ petition, arguing that the Corps forfeited its ability to oppose vacatur by failing to raise it during the merits stage of the appeal.

¹⁵ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991).

The D.C. Circuit’s opinion regarding the remedy notes that the arguments raised by the Corps were “more than a little troubling” explaining that “[h]ad the Corps and Dominion said all along what they say now, either the district court or this court might have enjoined tower construction, in which case our consideration of ‘disruptive consequences,’...would focus not on shutting down and removing the towers, but rather on prohibiting their construction—a very different balance indeed.” Nonetheless, the D.C. Circuit remanded the case to the district court to consider whether vacature is the appropriate remedy.

Next Steps

In response to the D.C. Circuit decisions on the case and on the petition for rehearing, the Corps must now prepare an EIS and the district court will consider whether vacatur of the project permit is the appropriate remedy. If the district court were to vacate the permit, it remains unclear how the project would be treated and whether the transmission line could continue to be used. If Dominion were unable to continue to operate the transmission project, PJM would be expected to consider whether a reliability need would exist and the potential solution(s) to meet that risk.

Contacts

Carrie Jenks
Executive Vice President
cjenks@mjbradley.com
(978) 369-5533

Sophia Hill
Policy Analyst
shill@mjbradley.com
(978) 369-5533

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