

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL PARKS CONSERVATION)	
ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-cv-01361-RCL
)	
TODD T. SEMONITE, <i>Lieutenant General, U.S.</i>)	
<i>Army Corps of Engineers et al.</i>)	
)	
Defendants,)	
)	
VIRGINIA ELECTRIC & POWER COMPANY)	
)	
Defendant-Intervenor.)	
_____)	
)	
NATIONAL TRUST FOR HISTORIC)	
PRESERVATION IN THE UNITED STATES)	
and ASSOCIATION FOR THE PRESERVATION)	
OF VIRGINIA ANTIQUITIES,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:17-cv-01574-RCL
)	
TODD T. SEMONITE, <i>Lieutenant General, U.S.</i>)	
<i>Army Corps of Engineers et al.</i>)	
)	
Defendants,)	
)	
VIRGINIA ELECTRIC & POWER COMPANY)	
)	
Defendant-Intervenor.)	
_____)	

FEDERAL DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR

In this latest phase of the two above-captioned cases, on May 31, 2019, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) issued an amended judgment and remanded these cases with instructions that the parties brief two issues: (1) whether the defendants should be judicially estopped from opposing vacatur and (2) whether vacatur of the Clean Water Act (“CWA”) Section 404 permit at issue is an appropriate remedy. *Nat’l Parks Conserv. Ass’n (“NPCA”) v. Semonite*, Amended Judgment, 925 F.3d 500 (D.C. Cir. 2019). Federal Defendants should not be judicially estopped from opposing vacatur of the U.S. Army Corps of Engineers (“Corps”) permit and removal of the towers that Defendant-Intervenors (collectively “Dominion”) constructed in the James River (and thus, the recently-energized transmission line those towers support). As Federal Defendants have consistently argued throughout this case, vacatur of that permit and removal of the towers is unwarranted under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993) and its progeny, including *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002). Should the Court find vacatur to be appropriate, however, at a minimum, it should not order removal of the towers, because such action would lead to even more serious and disruptive consequences than vacatur of the permit document alone.

More specifically, Federal Defendants should not be judicially estopped from opposing vacatur or tower removal, because judicial estoppel requires that a party take inconsistent positions at different stages of litigation, and that the change prejudice opposing parties. *See New Hampshire v. Maine*, 532 U.S. 742, 748-51 (2001). Federal Defendants have consistently taken the position throughout this case that vacatur of the permit and removal of the towers is not appropriate unless the National Parks Conservation Association and the National Trust for

Historic Preservation (collectively, “Plaintiffs”) both prevail on the merits of their claims, *and* demonstrate that such a remedy is appropriate under the factors articulated in *Allied-Signal* and *Sugar Cane Growers*. Federal Defendants have not changed this litigating position, and Plaintiffs have not been prejudiced during any phase of this litigation.

Furthermore, and without diminishing the concerns expressed by the D.C. Circuit, vacatur is unwarranted under *Allied-Signal*. First, the Corps’ environmental review in this case was comprehensive and included numerous opportunities for stakeholder involvement. After Plaintiffs sought emergency injunctive relief and it was denied, the Project was constructed and is now operational. Though the D.C. Circuit found the Corps’ environmental analysis to be deficient, those deficiencies were related primarily to effects on the regional viewshed. The Corps is actively evaluating the issues and explaining its reasoning in its preparation of an Environmental Impact Statement (“EIS”), with a draft EIS anticipated to be completed for public review by November 2019.

Second, vacating the Section 404 permit will not provide Plaintiffs with a remedy in the traditional sense, but it will spawn collateral administrative processes (and possibly meritless litigation) that will divert the Corps’ time and resources away from preparing an EIS as the D.C. Circuit ordered. As explained more fully below, Dominion completed dredging and filling in the James River under the then-upheld permit and no longer needs a Section 404 permit.¹ Vacatur

¹ That said, Dominion must comply with the requirements imposed by the permit unless and until it is vacated, including but not limited to the mitigation measures set forth in the April 2017, Memorandum of Agreement between the Virginia Electric and Power Company, the Virginia State Historic Preservation Office, the U.S. Army Corps of Engineers Norfolk District and the Advisory Council on Historic Preservation. Section 404 Permit at 5, ¶ 7, attached as Ex. 1 (“Permit”). While not provided here, the oversized attachments can be provided upon request or are available at U.S. Army Corps of Eng’rs, Norfolk Dist., *Section 10 and 404 Authorization, Permit*, “Dominion Power Surry-Skiffes Creek-Whealton Permit Application,”

would neither enable Plaintiffs to seek relief under the CWA, nor have any practical effect on Dominion's power line. Vacatur also would not speak to whether or not the towers should be removed, and is not necessary to enable the Court to fashion an appropriate remedy in light of the D.C. Circuit's merits decision. *See Nt'l Parks Conserv. Ass'n v. Semonite*, No. 17-1361-RCL, 2018 WL 3838809, at *2 (July 3, 2018).

Third, if the Court were to consider vacating the permit with respect to Section 404 of the Clean Water Act (which it should not), the Court should clarify that it is not vacating with respect to Section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403. Dominion's permit document has two distinct components: 1) a permit to place fill in navigable waters under Section 404 of the Clean Water Act, 33 U.S.C. § 1344; and 2) an authorization to maintain an obstruction to navigation under Section 10 of the RHA.² Permit at 1. Section 10 authorizations must be maintained for the life of an obstruction, and vacatur would require the Corps to determine whether to exercise its enforcement discretion under 33 C.F.R. § 326.3 to require corrective measures. That delay and diversion of resources would directly frustrate the Corps' efforts to prepare an EIS.

Fourth, as explained in more detail below, this Court should not order removal of the towers (and therefore the transmission line) because such an action would cause even more disruptive consequences. Loss of the transmission line would immediately destabilize the electrical grid in the Hampton Roads area, placing the public at imminent risk of rolling

<https://www.nao.usace.army.mil/Missions/Regulatory/SkiffesCreekPowerLine.aspx> (last accessed July 15, 2019).

² While Plaintiffs mentioned the RHA in their Complaints, they did not articulate any substantive claims under it at any stage of this case. This fact has been noted at many points in the parties' briefing in both this Court and the D.C. Circuit. Fed. Defs.' Cross-Mot. for Summ. J., Dkt. No. 78, at 67 n.34.

blackouts, as well as requiring construction work in the James River that imposes its own attendant environmental consequences. The *Allied-Signal* factors weigh heavily against imposing such consequences on the public prior to the Corps' completion of the EIS process, especially since that process is already underway with a draft EIS expected during this calendar year. Ultimately, if the EIS leads the Corps to alter its original decision, the existing permit may be modified, suspended, or revoked, which may eventually result in removal of the towers. The environmental, safety, and economic impacts of accelerating that potential outcome prior to the completion of the EIS process outweighs any aesthetic benefit to be gained by the Plaintiffs in so doing. Federal Defendants therefore respectfully request that the Court remand the permit to the agency to address the deficiencies identified by the D.C. Circuit without vacating the Section 404 permit document, and without ordering removal of the towers.

I. BACKGROUND

Plaintiffs each pursued injunctive relief in August 2017, challenging the Corps' issuance of a Section 404 permit to Dominion for the construction of a transmission line crossing the James River based on alleged violations of the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the CWA. This Court denied both motions. *Nat'l Parks Conserv. Ass'n v. Semonite*, 282 F. Supp. 3d 284 (D.D.C. 2017). Thereafter, Federal Defendants acted swiftly to lodge an administrative record on November 6, 2017. Notice of Filing Administrative R., *Nat'l Parks Conserv. Ass'n v. Semonite*, No. 17-1361 (D.D.C. Nov. 6, 2017), Dkt. No. 65.³ The parties then filed cross-motions for summary judgment which were fully briefed on March 27, 2018. *See id.*; *see also* Fed. Defs.' Cross-Mot.

³ Federal Defendants submitted identical briefs in both of the above-captioned cases because the cases were litigated together despite not being consolidated. For brevity, Federal Defendants cite to the copies filed in Case No. 17-1361 (D.D.C.).

for Summ. J., Dkt. No. 78; Fed. Defs.’ Reply in Supp. of Cross-Mot. for Summ. J., Dkt. No. 88. This Court granted Federal Defendants’ and Dominion’s cross-motions for summary judgment on all claims. *Nat’l Parks Conserv. Ass’n v. Semonite (Nat’l Parks Conserv. Ass’n I)*, 311 F. Supp. 3d 350 (D.D.C. 2018), *rev’d and remanded*, 916 F.3d 1075 (D.C. Cir. 2019) *and rev’d and remanded* per curiam, 925 F.3d 500 (D.C. Cir. 2019). Thereafter, Plaintiffs moved for an injunction pending appeal, which this Court denied. *Nat’l Parks Conserv. Ass’n v. Semonite (Nat’l Parks Conservation Ass’n II)*, No. 17-1361-RCL, 2018 WL 3838809 (D.D.C. July 3, 2018); *see* Fed. Defs.’ Opp’n to Pl.’s Mot. for Inj. Pending Appeal, Dkt No. 115 (Federal Defendants’ Opposition).

Plaintiffs appealed, alleging that the Corps violated NEPA in its evaluation of impacts and alternatives, and violated the NHPA. On March 1, 2019, the D.C. Circuit found in favor of Plaintiffs, vacated the Corps’ decision and the permit, and ordered the Corps to prepare an EIS. *Nat’l Parks Conserv. Ass’n v. Semonite (Nat’l Parks Conservation Ass’n III)*, 916 F.3d 1075 (D.C. Cir.); *amended on reh’g in part*, 925 F.3d 500 (D.C. Cir. 2019) (per curiam); Final Answering Br. for the Fed. Appellees, *Nat’l Parks Conservation Ass’n v. Semonite*, No. 18-5179, Dkt No. 1757784 (Federal Defendants’ Brief). Federal Defendants and Defendant-Intervenors sought panel re-hearing solely on the issue of remedy, and Dominion sought rehearing en banc. Dkt. No. 1782986 (Federal Defendants’ Pet’n). On May 31, 2019, the D.C. Circuit denied rehearing en banc, and issued a decision and amended judgment on rehearing, remanding the questions of judicial estoppel and remand without vacatur to this Court. *Nat’l Parks Conserv. Ass’n v. Semonite (Nat’l Parks Conservation Ass’n IV)*, 925 F.3d 500 (D.C. Cir. 2019) (per curiam).

II. ARGUMENT

A. Federal Defendants Should Not Be Estopped from Opposing Permit Vacatur or Tower Removal.

Federal Defendants should not be estopped from opposing vacatur of the permit or removal of the towers. Judicial estoppel is an equitable doctrine invoked by the courts to prevent parties from prevailing based on one position, and later in the same case, to the detriment of other parties, seeking to prevail based on a contrary position. *New Hampshire*, 532 U.S. at 748-51; *Nat'l Parks Conserv. Ass'n v. Semonite IV*, 925 F.3d at 502. While the criteria for applying the doctrine are not set in stone,

[S]everal factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position; . . . Second, . . . the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled" . . . ; [and Third] whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire, 532 U.S. at 750-51 (internal quotation and citations omitted). If a party does not assert inconsistent positions, none of these criteria can be fulfilled.

Federal Defendants have argued throughout this case that the CWA section 404 permit should not be vacated, even if the Court were to find non-harmless error, unless the factors articulated by the D.C. Circuit in *Allied-Signal* weigh in favor of that remedy. Mem. in Supp. of Fed. Defs.' Cross-Mot. for Summ. J. 74-75, Dkt. No. 78-1 (Federal Defendants' Summary Judgment Brief); Dkt. No. 88 at 49-50 (Reply); Appellee's Pet. at 5-14 (Rehearing Petition). Federal Defendants expressly discussed Plaintiffs' heavy legal burden to establish entitlement to vacatur, and the many reasons why Plaintiffs could not shoulder it. Federal Defendants maintain this position today, and continue to argue that the *Allied-Signal* factors weigh heavily

against vacatur. Hence, there has never been a change in Federal Defendants' position regarding vacatur of the Section 404 permit, and there is no basis whatsoever for estopping the government from continuing to assert it.

Federal Defendants also have consistently taken the position in this Court and the D.C. Circuit that the courts may order Dominion to remove its towers if Plaintiffs both prevail under NEPA or the NHPA *and* establish that such relief is appropriate under the factors articulated in *Allied-Signal* and its progeny.⁴ *See Nat'l Parks Conserv. Ass'n IV*, 925 F.3d at 501-02 (discussing Federal Defendants' assertion of this argument in both courts); Dkt. No. 115 at 8-9, 9 n.4, 11 (Federal Defendants' Opposition to Injunction Pending Appeal); Appellee's Pet. 5 (Petition for Rehearing). This argument figured prominently in this Court's decision not to enjoin tower construction during the appeal:

Both Defendant-Intervenor Dominion and Federal Defendants indicate that they could be compelled to remove the towers if the permit was ultimately found to be unlawful. *See* ECF No. 114 at 14-15; ECF No. 115 at 8-9 [T]he Defendants have now provided the Court with numerous cases indicating that the Court would have the authority to order the towers removed. *See* ECF No. 114 at 14-15 (citing cases); ECF No. 115 at 8-9 (citing cases). The Plaintiff does not contest that the Court would have the authority to order the removal of the towers. But the plaintiff protests that "in the real world, construction of the towers will render the project a fait accompli." ECF No. 116 at 6 (emphasis in original).

The Court disagrees. Should it ultimately be determined that the Army Corps of Engineers unlawfully issued the permit for the project, the Court can order the towers removed. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 43 (D.C. Cir. 2015), *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 592 n.1, 614 (9th Cir. 1981) ("[W]ere this Court to find the EIS inadequate . . . the agency would have to correct the decision-making process, and ultimately could be required to remove the [transmission] line from this route."). And since the Court could order the removal of the project, the plaintiff has not established that the injury is "beyond remediation."

⁴ Federal Defendants argued this position beginning in June 2018 shortly after Dominion notified the Court that construction had progressed to a point that tower installation could start in August 2018. *See* June 20, 2018 Status Report 2, Dkt. No. 112.

Nat'l Parks Conserv. Ass'n II, 2018 WL 3838809, at *2 (last three alterations in original). Federal Defendants maintain that position today. Hence, the Federal Defendants have never asserted a contrary position with respect to the Court's power to order removal of the towers, and there is no basis whatsoever for estopping the government from continuing to oppose removal.

B. Vacatur is Unwarranted under *Allied-Signal* and *Sugar Cane Growers*.

Under the D.C. Circuit's decision in *Allied-Signal*, 988 F.2d 146, an "inadequately supported" agency decision "need not necessarily be vacated" upon remand to the agency for further analysis. *Id.* at 150; *e.g.*, *Sugar Cane Growers*, 289 F.3d at 97-98; *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 97 (D.D.C.), *subsequent determination*, 280 F. Supp. 3d 187 (D.D.C. 2017). *Allied-Signal* imposes a two-factor test for determining whether an agency action should be vacated upon remand. The first factor looks to "the seriousness of the [agency action's] deficiencies" and whether there is a "serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 150-51 (quotation omitted). The second factor looks to the disruptive consequences of vacating the decision while on remand. *Id.* at 151. *See also Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an adequate explanation for its actions"); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 (D.D.C. 2019). There is no requirement, however, requiring "the proponent or opponent of vacatur to prevail on both factors." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F.Supp.3d 240, 270 (D.D.C. 2015).

Both *Allied-Signal* factors militate against vacating the permit document or ordering removal of the towers during the remand process. First, there is a serious possibility that the Corps may arrive at the original conclusion on remand, and the EIS process already is underway

with a proposed draft EIS expected to be available for public comment this calendar year. Second, both actions are likely to result in unnecessary and potentially severe disruption. Vacating the permit document would require the Corps to divert time and resources needed to prepare the EIS, and may spawn collateral litigation. And, tower removal would directly cause electrical grid instability that could lead to rolling blackouts occurring in the Hampton Roads area.

1. There is a serious possibility that the Corps may come to the same conclusion in its decision on remand.

Plaintiffs appealed three issues from this court's ruling in favor of Federal Defendants on Federal Defendants' cross motion for summary judgment. Those issues were: (1) whether the Corps should have prepared an EIS due to the significance of the Project's impacts; (2) whether the Corps' alternatives were insufficient under NEPA and the CWA; and (3) whether Section 110(f) of the NHPA, 54 U.S.C. § 306107, requires the Corps to minimize harm to any National Historic Landmark "directly and adversely" affected by a project. *Nat'l Parks Conserv. Ass'n. v. Semonite*, 916 F.3d at 1081. Regarding whether an EIS should have been prepared, the D.C. Circuit found that the Corps must prepare an EIS to further consider the potential significance of the Project's impacts. Regarding the significance factors under NEPA, the D.C. Circuit held that the Corps did not adequately analyze the surrounding controversy regarding impacts because critical comments post-dated Dominion's revisions, and the Corps did not succeed in resolving the controversy among opposing viewpoints. *Id.* at 1085-86. The D.C. Circuit also held that, with respect to the remaining significance factors Plaintiffs appealed, the Corps did not fully evaluate the unique characteristics of the geographic area and the degree to which the action may adversely affect districts listed in or eligible for listing in the National Register of Historic

Places, given that the Project was intended to be built in the vicinity of historic Jamestown. *Id.* at 1087.

With respect to the second issue, the D.C. Circuit determined that it was not necessary to make a finding regarding the Corps' chosen alternatives in the first instance because the Corps will have to conduct a new analysis of alternatives when preparing the EIS. *Id.* at 1088. And, with respect to the NHPA, the D.C. Circuit held that the Corps should consider the direct effects to Carter's Grove when preparing the EIS. *Id.*

Given the importance of the D.C. Circuit's determination, on June 21, 2019, the Corps initiated the process for preparing the EIS. Intent to Prepare a Draft EIS, 84 Fed. Reg. 29,177-02 (June 21, 2019). The Corps has planned for a robust process to fully evaluate the environmental impacts through the preparation of an EIS. *Id.* As delineated in the Notice of Intent and Letters to Cooperating Agencies, the Corps has outlined the following schedule:

- A public scoping meeting to be held on July 17, 2019
- Publishing of the Notice of Availability of a Draft EIS in November 2019
- Publishing of the Notice of Availability of a Final EIS in February 2020
- Issuance of the Record of Decision in April 2020

June 14, 2019 Letters to Cooperating Agencies, attached as Ex. 2. As part of the development of the EIS, it is anticipated that the Corps will analyze approximately twenty-eight alternatives in its scoping process, and has invited multiple agencies, including the Advisory Council on Historic Preservation, the Environmental Protection Agency, and the National Park Service, as having special expertise important in the review of the action, to serve as cooperating agencies in the development of the EIS. Intent to Prepare a Draft EIS, 84 Fed. Reg. at 29,178.

Since the Corps has started the EIS process, and deficiencies identified in the D.C. Circuit's decision are primarily factual determinations that the agency can resolve on remand, the Corps could arrive at the same decision upon remand. *See Nat'l Parks Conserv. Ass'n v. Semonite*, No. 18-5179, Dkt. No. 1775491 (D.C. Cir. March 1, 2019) (noting that "[b]ecause the facts underlying the Park Service's concerns changed not at all between the Jewell and the Zinke letters, the Corps had to either confront those factor or explain why the Zinke letter rendered them irrelevant (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.")). The Corps conducted a robust analysis of the aesthetic effects and is positioned to conduct the additional analysis to assess the potential significance of the impacts upon remand.

In similar circumstances, courts have declined to vacate agency decisions. *See Standing Rock Sioux*, 282 F. Supp. 3d at 98-99, 103 (finding that "[o]n remand, the Corps must exercise its judgment in analyzing Plaintiffs' expert critiques. The Court finds a serious possibility that, in doing so, it will be able to substantiate the prior EA" and that the "lengthy procedural history of this case shows, moreover that there has been nothing hasty about the Corps' decisionmaking thus far" and that "[t]here is no reason to think that it will be any less thorough in analyzing the three deficiencies on remand." (citing *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008); *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *Black Oak Energy, LLC v. F.E.R.C.*, 725 F.3d 230, 244 (D.C. Cir. 2013) ("declining to vacate agency action when 'plausible that [agency] can redress its failure of explanation on remand while reaching the same

result’’); *Williston Basin*, 519 F.3d at 504 (“declining to vacate when ‘significant possibility that the [agency] may find an adequate explanation for its actions’”) (alterations in original))).

Indeed, the D.C. Circuit has applied the standard for remand without vacatur even more leniently. *See Susquehanna Int’l Grp., LLP v. S.E.C.*, 866 F.3d 442, 451 (D.C. Cir. 2017) (remanding without vacatur where agency “*may* be able to approve the Plan once again, after conducting a proper analysis on remand” (emphasis added)); *Sugar Cane Growers*, 289 F.3d at 97-98 (remanding without vacatur where “it is at least possible” that agency could justify its original decision on remand); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 342 (D.D.C. 2016) (finding that the “fair likelihood that the agency will be able to make use of its expertise to justify its reliance on data and information” counsels in favor of remand without vacatur). Thus, under the first prong of *Allied-Signal*, remand without vacatur is appropriate.

2. Vacating the permit document will have disruptive consequences.

The second *Allied-Signal* factor—disruptive consequences resulting from vacatur—also weighs against vacatur of the permit document. Federal Defendants use the term “permit document” advisedly in this context, because the document that constitutes Dominion’s CWA Section 404 permit also constitutes Dominion’s RHA Section 10 authorization to maintain an obstruction to navigation in the James River.⁵ *See* Permit, Ex. 1, at 1. As explained below, vacating the permit document would not confer any benefit on Plaintiffs or assist the Court in fashioning a remedy. Moreover, different consequences would flow from vacating the CWA Section 404 and the RHA Section 10 aspects of the permit document—all of which would frustrate the Corps’ efforts to timely issue the EIS ordered by the D.C. Circuit.

⁵ Both of those components, which are not readily separable, also were supported by the EA at issue in this suit.

As Federal Defendants explained in the D.C. Circuit, Dominion no longer needs a CWA section 404 permit because it completed all dredging and filling associated with its project, and because it does not need a Section 404 permit to keep legally discharged fill in place. 33 U.S.C. § 1311(a). Vacating Dominion's CWA Section 404 permit therefore would not enable Plaintiffs to seek relief under the CWA, and would not have any direct immediate effect on Dominion's power line. And as discussed in *Nat'l Parks Conserv. Ass'n v. Semonite II*, 2018 WL 3838809, at *2, the Court also does not need to vacate the permit in order to issue an appropriate order (if any) regarding the towers. At this juncture, vacatur with respect to CWA Section 404 would likely only facilitate additional litigation by other parties who fail to understand that the presence or lack of a CWA Section 404 permit at this juncture simply does not speak to whether Dominion's towers should remain standing or the operation of its transmission line. And such litigation would require the Corps to divert time and resources from preparing the EIS in the timeframe set forth in the recent Federal Register notice.

Even more serious consequences could ensue if the Court were to vacate the RHA Section 10 authorization aspect of the permit document. Although (as discussed above) Dominion no longer requires a CWA Section 404 Permit, parties must be authorized *at all times* under Section 10 of the RHA to maintain obstructions to navigation. 33 U.S.C. § 403. When an obstruction is not authorized, implementing regulations instruct the Corps to conduct an investigation, and where appropriate engage in inter-agency consultation, to evaluate the need for corrective action (if any). 33 C.F.R. § 326.3. If in its discretion the Corps decides to order corrective action, the administrative process for identifying such action also may be extensive. *Id.* §§ 326.3, 326.4.

Dominion's towers and their concrete foundations span the James River, crossing its shallow and deep-water navigation channels. Consequently, vacating the RHA Section 10 aspects of the permit document would likely place the project in violation of Section 10, and would potentially implicate additional Corps administrative process and actions under its RHA implementing regulations. This would be fundamentally inequitable because the Plaintiffs never challenged this aspect of the permit document, and those issues were not briefed or argued at any stage of this litigation. Neither this Court nor the D.C. Circuit was accordingly able to consider consequences flowing from this aspect of vacating "the permit." These consequences include diverting at least some time and resources that otherwise could be spent preparing the EIS. They also could include meritless collateral litigation by parties seeking to compel enforcement action by the Corps, or attempting to assert a private cause of action against Dominion. *See California v. Sierra Club*, 451 U.S. 287 (1981) (no private right of action for alleged violation of RHA); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (Corps' exercise of enforcement discretion is non-reviewable).

In other situations where vacatur would cause more harm than maintaining the status quo during the remand period, this Circuit has recognized that remand without vacatur is appropriate. *See Ctr. for Biologic Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1987) (per curiam). *Accord Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) (per curiam). While Federal Defendants do not believe that any aspect of the permit document should be vacated, they respectfully request that the Court except the RHA Section 10 aspect if vacatur is nonetheless ordered.

3. Removing the towers will have even more disruptive consequences.

By far the most disruptive consequences would result if the Court were to go so far as to order the removal of the towers prior to completion of the EIS. The towers are required to support the transmission lines that carry power to stabilize the electrical grid in the Hampton Roads area. During peak load conditions (*e.g.*, extreme heat and cold), Dominion is required to “arm” and if necessary implement PJM Interconnection’s⁶ Remedial Action Scheme to prevent the catastrophic failure of the Hampton Roads grid which would in turn cause the catastrophic failure of the larger multi-state electrical grid. *See* Dkt. No. 29-9 at 9-11. That plan calls for rolling blackouts across the Hampton Roads area, which would at any given time, deny power without warning to more than 169,000 electric customers; eight hospitals; thirty water and sewage treatment plants; four large military bases; fifty-five police, fire, rescue and emergency operation centers; four airports and other transportation systems; fifteen central telecommunication facilities; and five power transmission and delivery facilities. *Id.* at 10-11; Dkt. No 61-2, at 75. Between June 2017 and June 2018 alone, Dominion had to operate two 1970s-era coal-fired units at the Yorktown Power Station units pursuant to Emergency Orders issued by the Department of Energy to maintain grid stability on fifty-eight peak load days. *See* Dkt No. 111-5 at 3. Those units are no longer operational since the Department of Energy Emergency Order expired on February 27, 2019, and they are in the process of being decommissioned. Dkt. No. 114 at 13. Removing the towers would require shutting off the

⁶ PJM Interconnection is a Regional Transmission Organization designated by the Federal Energy Regulatory Commission. Such organizations serve to “coordinate the transmission of electricity across a geographic region”; “must be independent of any individual market participant”; and “must possess certain forms of control over transmission of electricity in the region.” Fed. Defs.’ Mem. in Opp’n to Pl.’s Mot. for Prelim. Inj. 12 & n.5, Dkt. No. 26; *Black Oak Energy LLC*, 725 F.3d at 232 n.1 (D.C. Cir. 2013) (citing *Reg’l Transmission Orgs.*, 89 FERC ¶ 61,285 (1999), *on reh’g*, 90 FERC ¶ 61,201 (2000)).

transmission line, destabilizing the Hampton Roads power grid, and once more placing the area at risk for rolling blackouts during extreme weather events.

In addition, removing the towers and transmission line would require construction to take place on the James River, which would have attendant environmental consequences and presumably be subject to weather- and endangered species-related restrictions and delays. If the Court were to require removal of the concrete foundations that extend from slightly above the water line down into the river bed, that likely would entail construction activities similar to those required to construct the project in the first place. To the extent those activities would result in the release of fill into the James River (e.g., backfilling, incidental fall back), they also would require their own CWA Section 404 permits. *See* 33 U.S.C. § 1311(a).

For all of these reasons, ordering such removal prior to the completion of the EIS is entirely unwarranted in light of the associated potential economic, safety, and environmental impacts of power line removal. Plaintiffs' short term aesthetic enjoyment is heavily outweighed by the resulting risk of rolling blackouts during extreme weather events, and environmental impacts.

V. CONCLUSION

For all of the foregoing reasons, this Court should decline to judicially estop Federal Defendants from opposing vacatur or tower removal, and remand the permit document without vacatur and without ordering the removal of the towers.

Dated: July 15, 2019

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Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
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Heather.Gange@usdoj.gov

EXHIBIT 1

National Parks Conservation Association v. Semonite
Case No. 17-1361



**U.S. Army Corps
Of Engineers**
Norfolk District

Fort Norfolk, 803 Front Street
Norfolk, Virginia 23510-1096

DEPARTMENT OF THE ARMY PERMIT

Permittee: Virginia Electric & Power Company (c/o: Dominion Energy)
Permit No.: NAO-2012-00080 / VMRC# 13-V0408
Issuing Office: U.S. Army Corps of Engineers Norfolk District Regulatory Branch
(CENAO-WR-R)

Note: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below pursuant to:

- ☒ Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).
- ☒ Section 404 of the Clean Water Act (33 U.S.C. 1344).
- ☐ Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

Project Location: The project will begin in Surry County near the Surry Nuclear Power Plant, cross the James River towards Skiffes Creek in James City County, and continue through Newport News, York County, and Hampton to the existing Whealton Substation. The project is located within the Lower James and Lynnhaven-Poquoson watersheds; specifically the James River, Skiffes Creek, Lee-Hall Reservoir, Harwood's Mill Reservoir, Woods Creek, Jones Run, Brick Kiln Creek, Newmarket Creek, and Whiteman Swamp. Hydrologic Unit Code (HUC): 02080206 & 02080108.

Project Description: Dominion Virginia Power proposes to construct new electrical transmission line infrastructure, known as Surry-Skiffes Creek -Whealton project. The proposed project involves the construction of two new overhead transmission lines, a 500kV line and a 230kV line, as well as an electrical switching station.

The proposed project consists of; (1) Surry – Skiffes Creek 500 kV Line, (2) Skiffes Creek 500 kV – 230 kV – 115 kV Switching Station, and (3) Skiffes Creek – Whealton 230 kV Line. The project will include overland routes and crossings of the James River and tidal portions of Wood Creek and Skiffes Creek. In total, the proposed project will permanently impact 2712 square feet (0.06 acres) of subaqueous river bottom and 281 square feet (0.006 acres) of non-tidal wetlands, and convert 0.56 acres of palustrine

forested non-tidal wetlands to palustrine scrub shrub non-tidal wetlands. Detailed information is provided below and depicted on the "Permit Drawings" attached.

1. Surry – Skiffes Creek 500kV Segment

Surry – Skiffes Creek 500kV Line --- The first of three components proposes construction of a 7.92-mile single circuit 500 kV overhead transmission line that extends from an existing Surry Nuclear Power Plant Switching Station to the proposed Skiffes Creek Switching Station in James City County. This 7.92-mile segment proposes a 4.11-mile crossing over the James River. This crossing will involve the construction of 17 steel lattice towers and 4 fender protection systems resulting in 2712 square feet of direct impacts to subaqueous river bottom caused by the installation of (416) 24-inch steel piles encased within 26-inch fiberglass sleeves for transmission tower foundations and (240) 30-inch fiber piles for fender protection systems. As part of this crossing, the proposed aerial transmission line will span Tribell Shoal Federal Navigation Channel and neighboring dredge spoil disposal area, a secondary navigational channel, and several private oyster lease areas within the James River. The aerial transmission line has been designed with a minimum vertical clearance of 201 feet above mean high water at Tribell Shoal Federal Navigation Channel, 188 feet at the secondary channel, and ≥ 60 feet across the remainder of the river. A minimum distance of 261 feet will be maintained between those structures adjacent to the federal navigational channel, and a minimum distance of 112 feet between those structures adjacent to the secondary navigational channel.

James River Tower Foundations: 17 steel lattice towers ranging in height from 128 feet to 297 feet are proposed to cross the James River. {Tower Numbers 582/12 – 582/28} Three different types of foundation support systems (PP4's, PP8's, & PP10's) are proposed. Foundations will consist of 24-inch steel hollow pile supports, encased with a 26-inch protective fiberglass sleeve, along with a concrete cap located 7 feet above mean high water. Towers will be constructed from barge work platforms. During construction, each pile will be impact driven into the river bottom to the required design depth and then encased with a fiberglass sleeve that will be hand jetted into the river bottom. The sleeve will be backfilled with grout that will be poured from the surface.

James River Fender Protection Systems: Navigational protective structures will be installed on the channel side of the transmission tower structures proposed adjacent to both the federal and secondary navigation channels. Each of the four fenders will be 600 linear feet and constructed with 12-inch by 12-inch fiberglass reinforced sea timber wales attached to 30-inch diameter hollow fiber piles on 10-foot centers. Installation of fiber piles will occur either by impact or vibratory methods. Five wales will be attached to each fiber pile starting at approximately mean high water elevation and extending 9 feet above mean high water to the top of the fiber pile. Each sea timber wale will be spaced using 8-inch by 12-inch

by 12-inch sea timber blocks. A total of 60 fiber piles will be required for each fender.

Wood Creek Crossing: In addition to the James River crossing, the proposed alignment requires an aerial crossing of Wood Creek, which is a Section 10 of the Rivers and Harbors Act jurisdictional tidal waterbody. The proposed crossing would span 183 feet and have 70 feet of minimum vertical clearance above mean high water. Corresponding towers needed to support the aerial crossing are to be located in uplands. {Towers Numbers 582/33 – 582/34}

Land Based Towers: One Double Dead End, 3-Pole tower structure will be replaced with a weathering steel 3-pole structure which utilizes a “pipe pile” foundation system for a total of 21 square feet of non-tidal wetland impacts. {Tower Number 7/16} These foundation types use a 42-inch diameter outer pile driven to an appropriate depth. Bottom material is excavated from within the pile and then a 30-inch diameter inner pile will be driven in place and the space between the inner and outer pile filled with grout. Leveling bolts which extend beyond the outer piles will be used to level the foundation. Each completed pipe pile foundation has a footprint of approximately 10 square feet per pile. All additional land based tower placements within this segment of the project are proposed outside of waters of the US, including wetlands.

Land Clearing: Approximately 14.9 acres of new and expanded right of way (ROW) will be cleared resulting in permanent conversion of 0.41 acres of palustrine forested wetlands to scrub shrub wetlands. Conversion of the forested wetlands will be performed by selective hand clearing, resulting in no discharge of fill material.

2. **Skiffes Creek Switching Station** --- In addition to the transmission line construction, Dominion proposes to build a new Switching Station in James City County that includes the installation of one 500 kV terminal, five 230 kV terminals, and three 115 kV terminals, as well as transformers and additional transmission equipment. Storm water management will be provided onsite with the construction of a storm water pond to the northwest of the station. Approximately 20.6 acres of forest will be cleared. As part of this acreage, 0.02 acres of forested wetlands will be permanently converted to scrub shrub wetlands via selective hand clearing, resulting in no discharge of fill material. With exception to the aforementioned conversion impacts, all additional work associated with the proposed Station is proposed outside of waters of the US, including wetlands.

3. **Skiffes Creek – Whealton 230kV Segment**

Skiffes Creek – Whealton 230kV Line --- The third and final component, involves construction of a new 230kV double circuit overhead transmission line that extends approximately 20.2 miles within an existing utility ROW from the

proposed Skiffes Creek Switching Station to an existing Whealton Substation in Hampton. Proposed work will include new transmission towers and replacement structures within the existing ROW which must be reconfigured to accommodate the new 230kV double circuit line.

Skiffes Creek Crossing: This segment requires an aerial crossing of Skiffes Creek, which is a Section 10 of the Rivers and Harbors Act jurisdictional tidal waterbody. The proposed crossing would span 629 feet and have 74 feet of minimum vertical clearance above mean high water. Corresponding towers needed to support the aerial crossing are proposed in uplands. {Towers Numbers 2138/20; 285/435 – 2138/21; 285/436}

Land Based Towers: Tower replacement will generally be at a 1:1 ratio with existing structures, and will be replaced as near as possible to the existing structure location. Along this segment, 26 structures are located within non-tidal wetlands resulting in 260 square feet (0.005 acres) of structural discharge. {Tower Numbers 2138/47; 285/463, 2138/49-2138/55; 58/276-58/282, 2138/60-2138/63; 58/287-58/290, 2138/65; 58/292, 2138/69; 58/296, 2138/73; 58/300, 2138/95; 292/594, 2138/96; 292/595, 2138/99; 292/598, 2138/108; 292/606, 2138/109; 292/607, 2138/114; 292/612, 2138/133-2138/136; 292/625-292/628, and 209/546} Foundations for these structures will utilize a pipe pile foundation system. These foundations use a 42-inch diameter outer pile driven to an appropriate depth. Bottom material is excavated from within the pile and then a 30-inch diameter inner pile will be driven in place and the space between the inner and outer pile filled with grout. Leveling bolts which extend beyond the outer piles will be used to level the foundation. Each completed pipe pile foundation has a footprint of approximately 10 square feet per pile. All additional tower installations are proposed outside of waters of the US, including wetlands.

Land Clearing: A 1.16-mile segment of existing right of way (ROW), located near Newport News/Williamsburg Airport, would require expansion to accommodate the proposed project. The proposed ROW expansion includes 6.5 acres of tree clearing, resulting in 0.11 acres of permanent conversion from palustrine forested non-tidal wetlands to scrub shrub. An additional 0.30 acres of tree clearing at the existing Warwick Substation is also proposed, resulting in 0.02 acres of additional conversion palustrine forested wetland conversion to scrub shrub. All non-tidal wetland conversion impact areas will be performed via selective hand clearing methods, resulting in no discharge of fill material.

Project Specific Conditions:

1. Attached is your 408 permission letter (33 USC 408). Any special conditions of the 408 permission letter are also special conditions of this permit.
2. Prior to the commencement of any work authorized by this permit, you shall advise the project manager, Randy Steffey, in writing at: Norfolk District, Corps of

Engineers, 803 Front Street, Norfolk, Virginia 23510-1011, of the time the authorized activity will commence and the name and telephone number of all contractors or other persons performing the work. A copy of this permit and drawings must be provided to the contractor and made available to any regulatory representative during an inspection of the project site.

3. The time limit for completing the work authorized ends on **June 12, 2020**. Should you be unable to complete the authorized activity in the time limit provided, you must submit your request for a time extension to this office for consideration at least one month before the permit expiration date.
4. Enclosed is a "compliance certification" form, which must be signed and returned within 30 days of completion of the project, including any required mitigation. Your signature on this form certifies that you have completed the work in accordance with the permit terms and conditions.
5. Prior to the commencement of any work authorized by this permit, you shall submit and received Corps approval of Final Plans and specifications for authorized activities.
6. Prior to the commencement of any work authorized by this permit, you shall provide the Corps proof of purchase for a total of 0.56 acres of non-tidal wetland mitigation credit from a Corps approved mitigation bank authorized to serve the watersheds where the proposed impacts are occurring. A total of 0.43 credits shall be purchased within the Lower James River Watershed (Hydrologic Unit Code [HUC] 02080206) and 0.13 credits shall be purchased within the Lynnhaven-Poquoson Watershed (HUC 02080108).
7. As outlined in the "April 24, 2017 MEMORANDUM OF AGREEMENT AMONG VIRGINIA ELECTRIC AND POWER COMPANY, THE VIRGINIA STATE HISTORIC PRESERVATION OFFICE, U.S. ARMY CORPS OF ENGINEERS NORFOLK DISTRICT, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION" executed on May 2, 2017, you shall implement and complete all mitigation initiatives pursuant.
8. A Private Aid to Navigation application (Form CG-2554) must be filed with the United States Coast Guard (USCG) for approval prior to you commencing any work authorized by this permit in and/or over navigable waters.
9. Three weeks prior to the commencement of any work authorized by this permit in or over navigable waters, you shall notify the United States Coast Guard with pertinent information so it can be included in the Local Notice to Mariners (LNM).
10. During all pile driving activities in the James River you shall utilize bubble curtains at all times.

11. During all pile driving activities in the James River, you shall use ramp-up methods which will gradually increase impact hammer intensity over the course of single pile install.
12. All pile driving work associated with the construction of Towers 21, 22, 24, 25, and 26, located in deep water habitat areas of the James River, must only occur between November 16th and February 14th of any given year.
13. Each fender protection system shall be properly lit with a visible all around slow flashing amber light that has a minimum twenty-four (24) candela setting placed in the center of each fender.
14. Towers 21, 22, 25, and 26 within the James River shall be properly lit with a minimum of one visible all around slow flashing white light with a minimum twenty-four (24) candela setting. You shall ensure this associated lighting equipment is placed on the tower side opposite of the fender light and at a minimum height of 15 feet above mean high water.
15. Towers 20, 23, 24, and 27 within the James River shall be properly lit with a minimum of two visible all around slow flashing white lights with a minimum candela setting of twenty-four (24). You shall ensure this lighting equipment is placed on opposite sides of each tower in an approximate east/west alignment and at a minimum height of 15 feet above mean high water.
16. To control the spread of invasive species, Dominion shall ensure that any seed mixes used for control of soil erosion or to stabilize disturbed areas anywhere in the vicinity of wetlands adjacent to the project shall be free of tall fescue, Bermuda grass, and other allopathic turf grass species, as well as plant species on the Virginia Department of Conservation and Recreation's Invasive Alien Plant List.

Special Conditions:

All project specific conditions listed above are special conditions of this permit.

1. No discharge of dredged or fill material may consist of unsuitable material (e.g.: trash, debris, car bodies, asphalt etc.) and material discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).
2. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.
3. Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. The construction or work authorized by this permit will be conducted in a manner so as to minimize any degradation of water quality and/or damage to aquatic life. Also, you will employ measures to prevent or control spills of fuels or lubricants from entering the waterway.
5. Any heavy equipment working in wetlands other than those permitted for permanent impact must be placed on mats or other measures must be taken to minimize soil disturbance.
6. Failure to comply with the terms and conditions of this permit can result in enforcement actions against the permittee and/or contractor.
7. In granting an authorization pursuant to this permit, the Norfolk District has relied on the information and data provided by the permittee. If, subsequent to notification by the Corps that a project qualifies for this permit, such information and data prove to be materially false or materially incomplete, the authorization may be suspended or revoked, in whole or in part, and/or the Government may institute appropriate legal proceedings.
8. All dredging and/or filling will be done so as to minimize disturbance of the bottom or turbidity increases in the water which tend to degrade water quality and damage aquatic life.
9. Your use of the permitted activity must not interfere with the public's right to reasonable navigation on all navigable waters of the United States.

General Conditions:

1. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 3 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
2. If you discover any previously unknown historic or archaeological remains while accomplishing the activity authorized by this permit, you must immediately stop work and notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.
3. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

4. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit.
5. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.
6. The permittee understands and agrees that if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required upon due notice from the Corps of Engineers to remove, relocate, or alter the structural work or obstructions caused thereby without expense to the United States. No claim shall be made against the United States on account of any such removal or alternation.

Further Information:

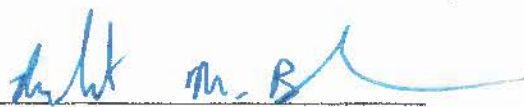
1. Limits of this authorization:
 - a. This permit does not obviate the need to obtain other Federal, state or local authorizations required by law.
 - b. This permit does not grant any property rights or exclusive privileges.
 - c. This permit does not authorize any injury to the property or rights of others.
 - d. This permit does not authorize interference with any existing or proposed Federal projects.
2. Limits of Federal Liability: In issuing this permit, the Federal Government does not assume any liability for the following:
 - a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
 - b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
 - c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
 - d. Design or construction deficiencies associated with the permitted work.
 - e. Damage claims associated with any future modification, suspension, or revocation of this permit.
3. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.
4. Reevaluation of Permit Decision: This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

- a. You fail to comply with the terms and conditions of this permit.
- b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 3 above).
- c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.


5. Extensions: Project Specific Condition #2 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as a permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.


(Permittee) Robert M. Blue ENP & President & CEO Power Delivery Group

6/30/2017
(Date)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.


Jason E. Kelly, PMP
Colonel, U.S. Army
Commanding

7/3/2017

(Date)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

EXHIBIT 2

National Parks Conservation Association v. Semonite
Case No. 17-1361



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

U.S. Environmental Protection Agency, Region III
Mr. Cosmo Servidio
1650 Arch Street
Philadelphia, PA 19103-2029

Dear Mr. Servidio:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers (USACE), Norfolk District for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

USACE is preparing an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), evaluating Dominion's request. USACE has determined that this project is a major infrastructure project and that the One Federal Decision (OFD) policies of Executive Order 13807 apply. In accordance with 40 CFR 1501 and Council on Environmental Quality (CEQ) guidance, USACE has identified your agency as having special expertise important in the review of this action. Therefore, we invite you to serve as a cooperating agency in the EIS preparation, and as such, provide input on identified concurrence points and timely review and comment on issues of concern within your agency's field of expertise.

Dominion has identified a need for the project. Dominion is responsible for supplying power to the North Hampton Roads Load Area (NHRLA) which consists of approximately 285,000 customers. This need was previously met through generation from Yorktown Power Station (approximately 1,141 MW) and delivery via two transmission corridors. To comply with the United States Environmental Protection Agency (EPA) Mercury Air and Toxics Standards (MATS) Rule requiring power generation facilities to reduce their toxic air pollutant emissions, Dominion is decommissioning the Yorktown Plant. Due to growth within the NHRLA and the decommissioning of the Yorktown Plant, Dominion would be unable to maintain compliance with the North American Electric Reliability Corporation (NERC) standards after 2021 without additional generation or delivery. NERC has confirmed that these standards are absolute requirements that have no waiver provision.

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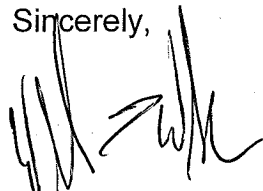
The purpose of the project, as determined by the Corps, is to provide sustainable electrical capacity into the NHRLA in a manner that addresses future load growth deficiencies, replaces aging infrastructure, complies with Federal regulations (including MATS), and maintains compliance with NERC Reliability Standards.

We propose the following Permit Timetable:

- Issuance of Notice of Intent to prepare an EIS – June 21, 2019
- Scoping period initiation – June 21, 2019
- Public Scoping Meeting – July 17, 2019
- Notice of Availability of a Draft EIS – November, 2019
- Notice of Availability of a Final EIS - February, 2020
- Issuance of Record of Decision – April, 2020

USACE request 10 DAYS FROM DATE OF LETTER, your response indicating your intention to serve as a cooperating agency, as well as identifying a point of contact from your agency. We look forward to working with you to successfully complete this process. If you have any questions or concerns, you can contact me at (757) 201-7657 or email at William.T.Walker@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. T. Walker', with a stylized flourish at the end.

William T. Walker
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

Federal Aviation Administration
Southwest Regional Administrator
Mr. Terry Biggio
10101 Hillwood Parkway
Fort Worth, TX 76177-1524

Dear Mr. Biggio:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers (USACE), Norfolk District for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

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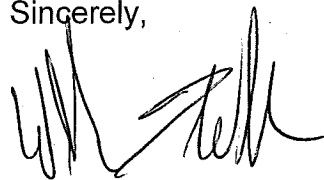
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William T. Walker
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

Federal Energy Regulatory Commission
Director Office of Electric Reliability
Mr. Andrew Dodge
888 First Street, NE
Washington, DC 20426

Dear Mr. Dodge:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers (USACE), Norfolk District for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

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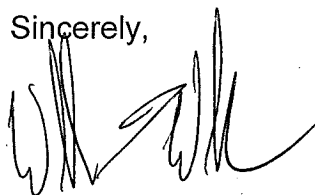
The purpose of the project, as determined by the Corps, is to provide sustainable electrical capacity into the NHRLA in a manner that addresses future load growth deficiencies, replaces aging infrastructure, complies with Federal regulations (including MATS), and maintains compliance with NERC Reliability Standards.

We propose the following Permit Timetable:

- Issuance of Notice of Intent to prepare an EIS – June 21, 2019
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USACE request 10 DAYS FROM DATE OF LETTER, your response indicating your intention to serve as a cooperating agency, as well as identifying a point of contact from your agency. We look forward to working with you to successfully complete this process. If you have any questions or concerns, you can contact me at (757) 201-7657 or email at William.T.Walker@usace.army.mil.

Sincerely,

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William T. Walker
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

NOAA Fisheries
Greater Atlantic Regional Fisheries Office
Mr. Michael Pentony, Regional Administrator
55 Great Republic Drive
Gloucester, MA 01930

Dear Mr. Pentony:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers, Norfolk District (USACE) for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

USACE is preparing an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), evaluating Dominion's request. USACE has determined that this project is a major infrastructure project and that the One Federal Decision (OFD) policies of Executive Order 13807 apply. In accordance with 40 CFR 1501 and Council on Environmental Quality (CEQ) guidance, USACE has identified your agency as having authorization decision responsibilities in this action and hereby invites you to be a cooperating agency in the EIS preparation.

As a cooperating agency with authorization decision responsibilities, we request you review all information and ensure it is sufficient to inform your decisions and, if applicable, meet your NEPA requirements. We also request that you work with us to establish and meet milestones identified in the permit timetable. This includes input on identified concurrence points and timely review and comment on issues of concern within your agency's field of expertise. You retain full responsibility for making your respective authorization decision and for maintaining any required administrative record.

Dominion has identified a need for the project. Dominion is responsible for supplying power to the North Hampton Roads Load Area (NHRLA) which consists of approximately 285,000 customers. This need was previously met through generation from Yorktown Power Station (approximately 1,141 MW) and delivery via two transmission corridors.

-2-

To comply with the United States Environmental Protection Agency (EPA) Mercury Air and Toxics Standards (MATS) Rule requiring power generation facilities to reduce their toxic air pollutant emissions, Dominion is decommissioning the Yorktown Plant. Due to growth within the NHRLA and the decommissioning of the Yorktown Plant, Dominion would be unable to maintain compliance with the North American Electric Reliability Corporation (NERC) standards after 2021 without additional generation or delivery. NERC has confirmed that these standards are absolute requirements that have no waiver provision.

The purpose of the project, as determined by the Corps, is to provide sustainable electrical capacity into the NHRLA in a manner that addresses future load growth deficiencies, replaces aging infrastructure, complies with Federal regulations (including MATS), and maintains compliance with NERC Reliability Standards.

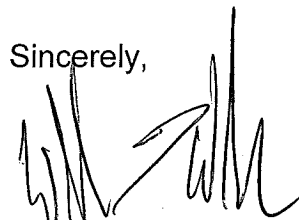
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Copies of this letter will be forwarded to Mr. Mark Murray-Brown; NOAA Fisheries, and Ms. Karen Greene; NOAA Fisheries

USACE request that by 10 DAYS FROM DATE OF LETTER you respond indicating your intention to serve as a cooperating agency, as well as identifying a point of contact from your agency. Further, we request your concurrence on the above purpose and need and permit timetable. We look forward to working with you to successfully complete this process. If you have any questions or concerns, you can contact me at (757) 201-7657 or William.T.Walker@usace.army.mil.

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William T. Walker
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

United States Department of the Interior
National Park Service, Northeast Regional Director
Ms. Gay Vietzke
1234 Market Street, 20th Floor
Philadelphia, PA 19107

Dear Ms. Vietzke:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers (USACE), Norfolk District for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

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Dominion has identified a need for the project. Dominion is responsible for supplying power to the North Hampton Roads Load Area (NHRLA) which consists of approximately 285,000 customers. This need was previously met through generation from Yorktown Power Station (approximately 1,141 MW) and delivery via two transmission corridors. To comply with the United States Environmental Protection Agency (EPA) Mercury Air and Toxics Standards (MATS) Rule requiring power generation facilities to reduce their toxic air pollutant emissions, Dominion is decommissioning the Yorktown Plant. Due to growth within the NHRLA and the decommissioning of the Yorktown Plant, Dominion would be unable to maintain compliance with the North American Electric Reliability Corporation (NERC) standards after 2021 without additional generation or delivery. NERC has confirmed that these standards are absolute requirements that have no waiver provision.

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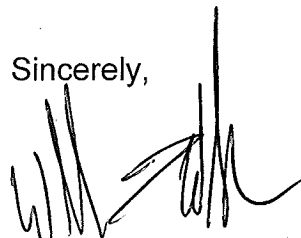
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A copy of this letter will be forwarded to Ms. Kym Hall; NPS Colonial National Historic Park, Captain John Smith Chesapeake National Historic Trail, and Ms. Emily Kambic; NPS American Battlefield Protection Program.

USACE request 10 DAYS FROM DATE OF LETTER, your response indicating your intention to serve as a cooperating agency, as well as identifying a point of contact from your agency. We look forward to working with you to successfully complete this process. If you have any questions or concerns, you can contact me at (757) 201-7657 or email at William.T.Walker@usace.army.mil.

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DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR

Commander Fifth Coast Guard District
RADM Keith M. Smith
431 Crawford Street
Portsmouth, VA 23704-5504

Dear Admiral Smith:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers, Norfolk District (USACE) for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Wheaton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

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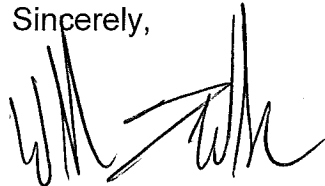
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William T. Walker
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DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

June 14, 2019

CENAO-WRR
NAO-2012-00080 (James River)

United States Fish and Wildlife Service
Virginia Field Office
Ms. Cindy Schulz
6669 Short Lane
Gloucester, Virginia 23061

Dear Ms. Schulz:

Dominion Virginia Power (Dominion) applied to the U.S. Army Corps of Engineers, Norfolk District (USACE) for authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, for the Surry-Skiffes Creek-Whealton Transmission Line project. Dominion's project involves construction of a new high-voltage aerial line originating at the Surry Switching Station in Surry County Virginia, spanning the James River, and connecting to a proposed switching station in James City County, Virginia. The project also includes improvements along an existing aerial line corridor terminating in Hampton, Virginia.

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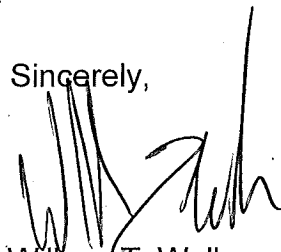
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William T. Walker
Chief, Regulatory Branch

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL PARKS CONSERVATION
ASSOCIATION,

Plaintiff,

v.

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

Defendants,

VIRGINIA ELECTRIC & POWER COMPANY

Defendant-Intervenor.

NATIONAL TRUST FOR HISTORIC
PRESERVATION IN THE UNITED STATES
and ASSOCIATION FOR THE PRESERVATION
OF VIRGINIA ANTIQUITIES,

Plaintiffs,

v.

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

Defendants,

VIRGINIA ELECTRIC & POWER COMPANY

Defendant-Intervenor.

Civil Action No. 1:17-cv-01361-RCL

Civil Action No. 1:17-cv-01574-RCL

[PROPOSED] ORDER

Upon consideration of the Motion for Remand Without Vacatur submitted in the above-captioned cases by the Federal Defendants, the supporting memoranda, exhibits and the responses thereto. For the reasons set forth in the Federal Defendants' motion and for good cause shown, the Court hereby **GRANTS** the Federal Defendants' Motion.

IT IS HEREBY ORDERED that the Federal Defendants' motion is granted, and the permit at issue is remanded without vacatur to the U.S. Army Corps of Engineers.

Dated: _____

Hon. Royce C. Lamberth
United States District Judge