

INSIGHTS

## D.C. Circuit Overturns USACE Permit for Transmission Line

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On March 1, 2019, the D.C. Circuit issued its opinion in *National Parks Conservation Association v. Semonite*, No. 18-5179, finding that the U.S. Army Corps of Engineers (USACE) violated the National Environmental Policy Act (NEPA) and misinterpreted the National Historic Preservation Act (NHPA) when it issued a permit that allowed the construction of towers to support an electrical transmission line as it crosses the James River in Virginia. The line crosses the river in the vicinity of Jamestown, the Carter's Grove National Historic Landmark, and the Captain John Smith National Historic Trail – the Nation's only historic water trail. According to the D.C. Circuit, USACE should have prepared an Environmental Impact Statement (EIS), because of potentially significant impacts caused by the project, rather than relying on a less intensive Environmental Assessment before making its decision. The court directed the District Court to vacate the permit and USACE to undertake additional environmental review. The transmission line is already built and, assuming the decision withstands any further appellate review, the opponents may argue that it should be removed while USACE reconsiders its decision.

The D.C. Circuit focused on the "context" and "intensity" factors in the NEPA regulations, 40 C.F.R. § 1508.27, which provide guidance to a federal agency trying to decide whether an action may "significantly" impact resources meriting preparation of an EIS. The context of the project, an area of important cultural resources, was of central importance to the Court's analysis. With respect to "intensity," or the severity of the impact, the Court focused on three factors: the level of controversy, "unique characteristics" of the area, and the nature of the potential effect on sites listed or eligible for listing in the National Register of Historic Places. The Court considered questions regarding the extent of the visual impact of the project on both Carters Grove and the National Historic Trail, the proximity of the project to unique cultural sites, uncertainty about the scope of the project's impacts, and the validity of the methodology used by USACE in its review. Underscoring the analysis were the numerous concerns expressed by agencies with relevant expertise, including twenty letters written by the National Park Service and its outside consultants. Ultimately, the Court found that the "intensity factors demonstrate not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS."

With respect to the NHPA, the Court held that USACE misinterpreted section 110(f) of the Act which directs minimization of harm to a National Historic Landmark "directly and adversely" affected by a project. USACE argued that section 110(f) is triggered only by physical intrusion on a National Historic Landmark, not by visual effects. The court noted that while no agency has

issued regulations, both the Advisory Council on Historic Preservation and the National Park Service have interpreted “directly” in section 110(f) as referring to “causation and not physicality.” The D.C. Circuit rejected USACE’s construction of the NHPA, holding that section 110(f) is not limited to physical impacts on a National Historic Landmark and that, on remand, USACE must use the definition as articulated by the Council and the National Park Service.

While this case presents some unique facts, it is another example of the challenges faced by linear project planning and construction and the importance of cultural resource impact assessment in any permit process. In addition, it implicates issues that may be addressed by the White House Council on Environmental Quality in its proposed update to the regulations implementing NEPA – specifically, the definition of “significantly” and the proper approach to evaluating that issue. See 83 Fed. Reg. 28591 (June 20, 2018). Perhaps most significantly, the decision overturns USACE’s interpretation of section 110(f), potentially widening the scope of the agency’s review in future permit proceedings.