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Testimony of

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before the

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON DOMESTIC POLICY
UNITED STATES HOUSE OF REPRESENTATIVES

Hearing on

FEDERAL ELECTRIC TRANSMISSION CORRIDORS: CONSEQUENCES FOR PUBLIC AND PRIVATE PROPERTY

April 25, 2007

Good afternoon Mr. Chairman and members of the Subcommittee. Thank you for the opportunity to testify before you today regarding Section 1221 of the Energy Policy Act and the designation of National Interest Electric Transmission Corridors. My name is Elizabeth Merritt and I am Deputy General Counsel for the National Trust for Historic Preservation, where I have served as in-house counsel for twenty-four years.

Background on the National Trust

Congress chartered the National Trust in 1949 as a private nonprofit organization to "facilitate public participation" in historic preservation, and to further the historic preservation policies of the United States. 16 U.S.C. §§ 461, 468. With the strong support of our 277,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our eight regional and field offices throughout the country, and our Washington, DC headquarters, we have 29 diverse Historic Sites open to the public around the country.

Congress has also designated the Chairman of the National Trust as one of twenty members of the Advisory Council on Historic Preservation, the independent federal agency whose regulations govern the implementation of Section 106 of the National Historic Preservation Act (NHPA). *See* 16 U.S.C. §§ 470f, 470i(a)(8); 36 C.F.R. Part 800. The

Advisory Council works with other federal agencies, including the Department of Energy, to assist them in fulfilling their responsibilities under the NHPA.

Section 1221 of the Energy Policy Act

Over the past year, the National Trust has tracked the implementation of two key provisions in the Energy Policy Act of 2005 – Section 368,[1] which provides for the designation of energy right-of-way corridors on federal lands, and Section 1221(a),[2] which provides for the designation of National Interest Electric Transmission Corridors (NIETCs or National Corridors). The National Trust submitted comments in July 2006 on the preliminary maps for the federal energy corridors, and we submitted comments in October 2006 on the Congestion Study issued by the Department of Energy (DOE). We have also met with the Bureau of Land Management, the Advisory Council on Historic Preservation, and other groups in an effort to ensure that federal agencies "take into account" the effects of corridor designation on historic properties, as required by Section 106 of the NHPA.

The National Trust is concerned about several aspects of Section 1221 where ambiguities in the statutory language pose broad threats to historic properties and cultural resources. *First*, the law does not clearly define how broad a geographic area constitutes a national "corridor." *Second*, DOE is interpreting its responsibilities under Section 1221 to exclude compliance with the National Environmental Policy Act (NEPA), and other environmental laws such as Section 106 of the NHPA, prior to designating National Corridors. *Third*, the Federal Energy Regulatory Commission (FERC) narrowly defines the elements of "public interest" in balancing whether it should assume control over the approval process for a proposed transmission project. Current agency policies on these issues are setting in motion potential decisions that will preclude meaningful consideration of adverse effects to historic resources under NEPA and the NHPA, and will provide only the most limited ability to seek alternatives that avoid, minimize, or mitigate the potential adverse effects to historic resources.

National Corridor Designation Threatens Harm to Significant Historic and Cultural Resources.

The siting of overhead transmission lines can have dramatic adverse impacts on historic resources. As the attached map prepared by the National Park Service illustrates, a wide variety of our nation's most significant, public historic places are right in the path of,

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[1] Section 368 is substantially related to the NIETC designations outlined in Section 1221, although it is not an issue presently before this Committee. Section 368 requires federal land-managing agencies to designate energy right-of-way corridors on federal public lands. These corridors will become designated zones for the transmission of various types of energy, including oil and gas pipelines as well as electric lines. Importantly, because of the need for interconnectivity, the location of these federal corridors will often dictate the location of transmission lines and other rights-of-way on non-federal property.

[2] Section 1221(a) amended the Federal Power Act (FPA), 16 U.S.C. §§ 824 et seq., by adding Section 216 (to be codified at 16 U.S.C. § 824p). 119 Stat. 946 (Aug. 8, 2005).

or adjacent to, many of the proposed transmission corridors. These resources include historic battlefields, rural landscapes, historic districts, and other places that still retain their authentic setting. These places offer members of the public the opportunity to take a step back in time in order to understand our nation's heritage and experience in some small degree what life was like for those who founded our country, fought for its freedom, and settled its frontiers. These areas derive their significance, and their ability to convey the story of our history, in large part from their visual context and setting. As a result, they can be highly susceptible to visual intrusions.

It is also important to understand that harm to historic places can be much more difficult to mitigate, in contrast to some environmental resources. Historic places are unique, authentic, and irreplaceable; they cannot be moved or recreated or replanted or bred. Many of these historic battlefields and landscapes have sweeping views that are highly significant. Visual intrusion to those views often cannot be avoided by shifting the alignment of a project within a designated corridor. Once the corridor is designated, the visual impacts will be unavoidable. As a result, the consideration of alternatives must occur before the corridor is designated.

We also want to draw specific attention to the impact of the proposed corridors on National Heritage Areas, many of which would be cut through by proposed corridors, as the attached map illustrates. National Heritage Areas are designated by Congress as places where historic, cultural, and natural resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. The goal of Congressional designation is to preserve, promote, and celebrate the assets of each Heritage Area, through community and economic development, for the benefit of current and future generations. The Alliance of National Heritage Areas estimates that every year 68 million people visit our country's 37 Congressionally-designated National Heritage Areas. These visitors generate considerable local economic benefits through their spending on lodging, food, hospitality services, and retail sales. According to the Alliance, the direct and indirect economic impact of visitor spending on local economies within the nation's 37 Heritage Areas exceeds $8.5 billion annually.

Because of the enormous economic benefits from heritage tourism, we are concerned that local communities will suffer economically, not just environmentally, if projects such as massive powerlines are allowed to harm the historic areas that draw these visitors in the first place. Unless the problems inherent in the Energy Policy Act are resolved, the Act could have the effect of undermining the very economic revitalization that Congress is working so hard to create in partnership with local communities.

Beyond the resources on the National Park Service map, which are publicly owned and nationally significant, these transmission projects will also harm thousands of other significant historic properties, including local historic districts, landscapes protected by conservation easements, and privately owned historic properties whose owners have relied on federal, state, and local legal protections that could be overridden by Section 1221.

The Definition of a "Corridor" is Ambiguous.

The designation of National Corridors under Section 1221 is intended to identify areas that have a high transmission congestion problem, and to prioritize areas for building new infrastructure to alleviate that congestion. A National Corridor designation would have the effect of all but assuring the approval of proposed transmission lines within the corridors.

However, the Energy Policy Act did not clearly define the term "corridor" in Section 1221(a). These corridors are simply defined as "any *geographic area* experiencing electric transmission capacity constraints or congestion that adversely affects consumers," FPA § 216(a)(2) (emphasis added). The statute includes five factors that DOE should consider in determining whether to designate a National Corridor, such as a lack of reasonably priced electricity, economic growth, energy independence, etc. FPA § 216(a)(4)(A)-(E).[3]

Because the statutory language is vague, there is much confusion as to whether a National Corridor is an entire geographic area, e.g., Washington to New York City, or whether it is an individual right-of-way corridor, e.g., Dominion Power's proposed Meadowbrook 500 kV transmission line through Northern Virginia, or perhaps something in between. The numerous requests for "early designation" of National Corridors reflect a wide range in their degree of specificity.

Unfortunately, DOE has done little to clear up the confusion in the statute or to further define the parameters for designating National Corridors. In fact, DOE has presented confusing and inconsistent statements as to whether it will designate large geographic areas or very specific rights-of-way as National Corridors. In the National Electric Transmission Congestion Study,[4] required by the Act, DOE takes the position that it has broad discretion to interpret what is an NIETC. DOE's implicit position expressed in the Congestion Study is that "a Corridor must be a 'geographic area,' and therefore [DOE] does not intend, as some parties have suggested, to entertain suggestions that it designate 'conceptual' Corridors that do not have specific geographic boundaries. (Congestion Study, at 60.) However, DOE also states that it "will consider the designation of broader geographic areas as National Corridors that are not focused on a single transmission line or facility." *Id.* These statements are confusing, and do not explain whether it is appropriate to designate site-specific proposals as National Corridors, or how "broad" the Corridors may be.

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[3] Unfortunately, the factors for consideration in the Act do not require the consideration of other methods to alleviate energy congestion, such as conservation and demand management, nor do they require the consideration of corridors that will minimize environmental impacts.

[4] *Available at* http://www.oe.energy.gov/DocumentsandMedia/Congestion_Study_2006-9MB.pdf (Aug. 2006).

The Consequences of Corridor Designation by DOE Will Override State Efforts to Balance Energy Development with the Protection of Historic and Environmental Resources.

The designation of specific National Corridors will have draconian results, including the potential effect of overriding or preempting reviews by state and local governments, and other federal agencies. Under Section 1221(a), a National Corridor designation by DOE allows FERC to step in and specifically authorize the construction of transmission facilities, notwithstanding any other federal, state, or local review procedures. *See* FPA § 216(b)-(f). For example, National Corridor designation sets severe time-limits for approving a project. A state regulatory board has one year to issue a transmission line permit, after which the applicant can request that FERC take control of the site approval process in an expedited review – even if the state has denied an application for legitimate reasons under state law, or has requested consideration of alternatives and mitigation measures that the applicant would prefer not to include. Most worrisome, Section 1221 authorizes the broad use of federal "eminent domain" power to advance transmission projects. Although FERC's regulations do require an environmental review in connection with these scenarios, such a review would be unduly constrained, given the limited timeframe, and the fact that the basic corridor will already have been designated. DOE and FERC interpret Section 1221 to make site-specific transmission lines and facilities a foregone conclusion. As a result of this interpretation, applicants for proposed projects within National Corridors will have virtually no incentive to satisfy environmental or historic preservation reviews. Applicants will simply wait out the statutory one-year period, and then invoke FERC review, after which time the project will likely be approved, as long as it meets FERC's subjective standard of the "public interest."[5]

Many states have sophisticated regulatory agencies that review major energy transmission projects, and the state legislatures have developed carefully crafted policies for balancing the considerations of energy distribution and the protection of sensitive resources potentially affected by these projects. National Corridor designation threatens to override and preempt these important state policies. In Virginia, for example, Section 56-46.1(B) of the Virginia Code requires the State Corporation Commission to determine "that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned." Even if the Commission were to deny an application, or require an alternative alignment, because a proposal failed to "reasonably minimize adverse impacts" on scenic, historic, or environmental resources, Section 1221 would allow the federal government to overrule that legitimate decision.

The National Trust has direct experience with the Virginia review process, because Dominion Power has proposed the construction of a major 230 kV powerline directly within the viewshed of Oatlands Plantation, which is a National Trust Historic Site near Leesburg, Virginia. Even though the original proposal did not consider the adverse impacts on Oatlands, the State Corporation Commission required the evaluation of alternative routes

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[5] FPA § 216(b)(1)-(6) requires that six criteria be satisfied in order for FERC to assume control over proposed project with a designated National Corridor, one of which is consistency with the "public interest."

and significant mitigation measures in order to ensure that harm to historic resources would be minimized. We do not want to see the federal government preempting or overruling that kind of thorough, balanced review at the state level.

The Energy Department Does Not Intend to Comply with NEPA or the National Historic Preservation Act Prior to Designating These Corridors.

Section 1221 includes a specific provision that states, "nothing in this section [1221] affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). FPA § 216(j). Although this provision does not specify the timing when environmental review should occur, we believe that compliance with NEPA and other environmental laws such as the NHPA[6] inherently requires that the review must take place prior to the designation of National Corridors. Since the legal consequences of National Corridor designation will likely lead to the approval of specific transmission projects within the corridors almost as a foregone conclusion, delaying the environmental review process until after the Corridor has been designated will almost certainly be too late for a meaningful consideration of alternatives.

However, DOE has not complied, nor does it intend to comply, with the requirements of NEPA and the NHPA prior to designating National Corridors. We are gravely concerned by DOE's interpretation, because we believe that Section 1221(a) does not grant DOE the authority to make these designations in the absence of NEPA review.

DOE announced last November that it has not yet decided whether or where to designate any National Corridors, but promised to issue any proposed designations in draft form, so as to allow an additional opportunity for public comment. However, DOE takes the position that even this additional comment period is "not required by section 1221." We strongly disagree, and in fact, we believe a full Environmental Impact Statement (EIS) is needed prior to National Corridor designation.

DOE's refusal to comply with NEPA and the NHPA prior to the designation of National Corridors exacerbates the potential consequences of the designation process. The future designation of site-specific transmission lines in areas designated as National Corridor when FERC has assumed control of the decision-making process is an unlikely point in which the agency can meet the letter and spirit of NEPA and the NHPA. After all, DOE and FERC have interpreted Section 1221 as a statute aimed at making the elimination of energy congestion a priority above all other national interests, and therefore, any attempt to comply with federal environmental and preservation statutes is disingenuous. It is clear that once a specific area or geographic region is designated as a National Corridor, applicants will have little difficulty getting the location they desire with little or no resistance due to adverse

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[6] In our view, the NHPA clearly falls within the generic statutory reference to "environmental law," and thus, DOE must consider how it will meet the specific requirements of Section 106 of the NHPA, which requires the agency to "take into account" the effects of its actions on historic resources, by seeking ways to avoid, minimize, and mitigate any adverse effects. 16 U.S.C. § 470f; 36 C.F.R. § 800.1(a).

effects on significant historic properties and landscape, as well as natural resources, by FERC.

FERC Does Not Establish Standards for Determining Whether a Proposed Transmission Line "is Consistent with the Public Interest."

Finally, we are concerned that Section 1221 does not adequately define what is in the interest of the public. Section 1221 requires FERC to consider six threshold factors before it can assume control over the permitting of a proposed transmission line within a designated National Corridor, including a determination that the proposed project "is consistent with the public interest." FPA § 216(b)(3). However, FERC's regulations do not establish a standard for defining whether the "public interest" is satisfied.[7] Without clarity in the implementation of Section 1221, it is unclear whether FERC will be including consideration of the public interest in a variety of resource values, such as the preservation of historic properties and protection of the environment, when determining whether a proposed project "is consistent with the public interest." We encourage Congress to clarify the statute in order to address this issue.

Conclusion

Overall, the National Trust, along with many other preservation and conservation organizations, is concerned about the ambiguity of Section 1221 of the Energy Policy Act and the way in which DOE and FERC are implementing Section 1221. Most importantly, we are concerned that the National Corridor designation process, as implemented by DOE, will not include compliance with NEPA and NHPA. We believe the impact of such an approach could be the future approval of transmission lines and facilities without fully considering the adverse consequences on significant historic properties and landscapes, or providing an adequate examination of alternatives. We hope that this hearing will help to elevate awareness of the potential devastating and irreversible consequences of National Corridor designations upon our nation's historic and natural resources. Mr. Chairman and members of the Subcommittee, the National Trust urges Congress to amend Section 1221 of the Act in order to resolve the concerns that we have raised today.

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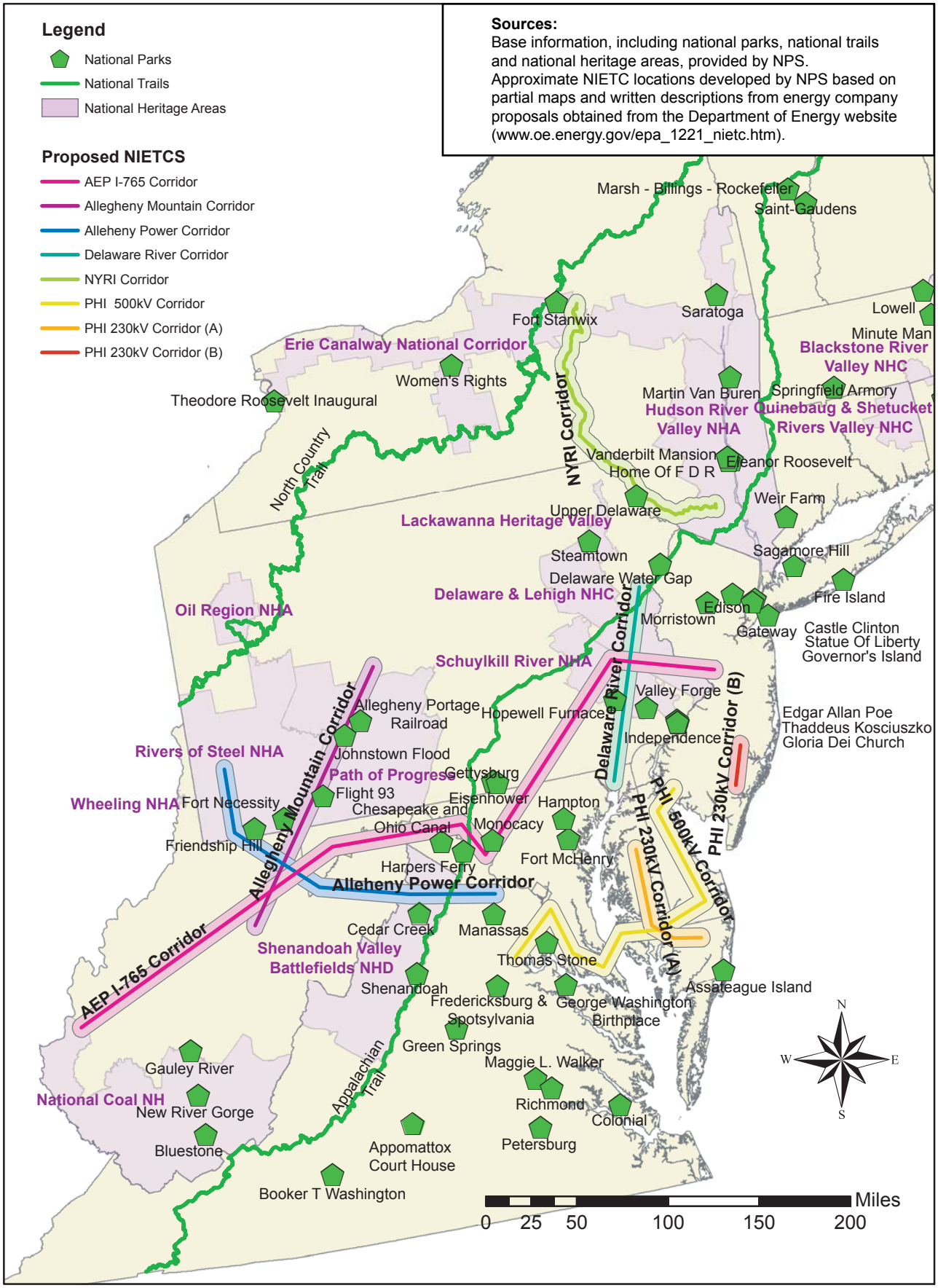
[7] *See* 71 Fed. Reg. 36,258, 36,259 (June 26, 2006); 71 Fed. Reg. 69,440 (Dec. 1, 2006).

Proposed National Interest Electric Transmission Corridors



Prepared by the National Park Service, Northeast Region, Resource Planning and Compliance Division

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