NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. CIRCUIT CASE NO. 18-5186
(consolidated with 18-5179)

NATIONAL TRUST FOR HISTORIC PRESERVATION
IN THE UNITED STATES

and

ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES,

Plaintiffs-Appellants,

v.

TODD T. SEMONITE, LTG, U.S. ARMY CORPS OF ENGINEERS; ET AL,

Defendants-Appellees

and

VIRGINIA ELECTRIC & POWER CO.,

Intervenor-Appellee.

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

INITIAL *AMICI CURIAE* BRIEF OF THE LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION AND THE CULTURAL LANDSCAPE FOUNDATION

SOUTHERN ENVIRONMENTAL LAW CENTER
Daniel L. Timmons (Bar No. SC103477)
J. Blanding Holman (D.C. Cir. Bar No. 61180)
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270
(843) 414-7039 (fax)

Attorneys for Amici Curiae THE LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION and THE CULTURAL LANDSCAPES FOUNDATION

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Parties. Except for the *amici curiae* filing this brief, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Opening Brief of The National Trust for Historic Preservation and The Association for the Preservation of Virginia Antiquities.

Rulings. References to the rulings at issue appear in the Opening Brief of The National Trust for Historic Preservation and The Association for the Preservation of Virginia Antiquities.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, The Lawyers' Committee for Cultural Heritage Preservation and The Cultural Landscapes Foundation ("*Historic Preservation Amici*") – each 501(c)(3) organizations – certify that neither has a parent corporation or has issued stock of which 10% is owned by a publicly held corporation.

RULE 29(A)(4) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Historic Preservation Amici* certify that their Counsel authorized the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than *Historic Preservation Amici*—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(B) STATEMENT

Pursuant to Circuit Rule 29(b), Counsel for *Historic Preservation Amici* contacted counsel for all parties to inform them of *Historic Preservation Amici*'s interest in filing this *amicus curiae* brief. Counsel for all parties consented to the filing of an *amicus* brief by *Historic Preservation Amici* in compliance with all D.C. Circuit rules. Counsel for all parties further consented to the filing of separate *amici* briefs by *Historic Preservation Amici* in this case and by *amici curiae* in Case No. 18-5179 ("*Park Service Amici*"), so long as the collective word count of the separate briefs totaled less than 6,500 words.

CIRCUIT RULE 29(d) CERTIFICATE

Pursuant to Circuit Rule 29(d), counsel for *Historic Preservation Amici* is not aware of any other *amici curiae* filing a brief in support of Appellants in Case No. 18-5186. Though this case is consolidated with Case No. 18-5179, the Appellants in the two appeals are filing separate briefs because of the different

legal claims at issue in the two appeals arising under different statutes and the impracticability of filing a single consolidated brief.

Counsel for *Historic Preservation Amici* have conferred with counsel for *Park Service Amici* and certify that it is impracticable for all *amici curiae* in these consolidated appeals to file a single, consolidated brief. In support of Appellants National Trust for Historic Preservation and The Association for the Preservation of Virginia Antiquities, *Historic Preservation Amici* offer their expertise on a particular legal issue arising only in Case No. 18-5179 under Section 110(f) of the National Historic Preservation Act, as well as the broader implications of the district court's statutory interpretation. By contrast, *Park Service Amici* are filing only in support of Appellant National Parks Conservation Association, and the *Park Service Amici*'s brief is limited to issues raised only in that appeal arising under the National Environmental Policy Act, based on *Park Service Amici*'s significant factual experience with the specific environmental review process challenged in that appeal.

In addition, *Park Service Amici* includes former National Park Service Director Jonathan B. Jarvis and other current and former National Park Service officials, and counsel for *Park Service Amici* believe it inappropriate to require them to sign onto another party's brief raising different issues under a different statute. Moreover, former Director Jarvis obtained permission from the Office of

the Solicitor of the Department of the Interior to join an *amicus* brief with the other *Park Service Amici*, but not the *Historic Preservation Amici* in Case No. 18-5186.

The separate briefs from all *amicus curiae* collectively contain no more than 6,500 words, one-half the space allotted to a party's initial brief. *See* FRAP 29(a)(5).

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GLOSSARY

Advisory Council	Advisory Council for Historic Preservation
Guidelines	Standards and Guidelines for Federal Agency Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act of 1966, 63 Fed. Reg. 20496 (April 24, 1998)
Landmark	National Historic Landmark
Historic Preservation Amici	The Lawyers' Committee for Cultural Heritage and The Cultural Landscape Foundation
Park Service	National Park Service
Park Service Amici	Former National Park Service Director Jonathon B. Jarvis, Coalition to Protect America's National Parks, Inc., and American Rivers, Inc.
Preservation Act	National Historic Preservation Act
Project	Surry-Skiffes Creek-Whealton Project

INTERESTS OF AMICI CURIAE

This *amicus curiae* brief is submitted on behalf of The Lawyers' Committee for Cultural Heritage and The Cultural Landscape Foundation, two non-profit organizations dedicated to the preservation of cultural and historic preservation in the United States.

The *Historic Preservation Amici* offer this brief for consideration by this Court because the interpretation of Section 110(f) of the National Historic Preservation Act ("Preservation Act"), 54 U.S.C. § 306107, raises important legal and policy issues of first impression, and the *Historic Preservation Amici* have significant Preservation Act expertise likely to be helpful to the court. The district court's interpretation of Section 110(f) threatens the integrity of the National Historic Landmark system, including some of our nation's most important cultural heritage and landscapes. We urge this Court to reverse the district court's interpretation of Section 110(f).

SUMMARY OF ARGUMENT

Section 110(f) of the Preservation Act establishes a heightened standard of care for consideration and mitigation of federal activities that "directly affect" nationally significant historical resources designated as National Historic Landmarks. 54 U.S.C. § 306107. Visual impacts from offsite activities can directly and irredeemably impair important attributes, such as location and setting,

directly contributing to a site's national significance and eligibility for landmark designation. 36 C.F.R. § 65.4(a). The district court's narrow interpretation of Section 110(f) would exclude visual impacts, ignoring plain meaning, Congressional intent, the reasoned interpretations of the National Park Service and the Advisory Council for Historic Preservation, applicable case law, and its ramifications for our historic and cultural heritage.

ARGUMENT

National Historic Landmarks ("Landmarks") are among our nation's most treasured historic and cultural resources, set aside as having "exceptional value as commemorating or illustrating the history of the United States." Historic Sites Act of 1935, 49 Stat. 666, ch. 593, §1. Recognizing the importance of these places to our national memory, Congress amended the Preservation Act to provide a rigorous review process for federal undertakings affecting Landmarks. *See* Pub. L. No. 96-515, 94 Stat. 2981 (1980).

The National Trust's Preservation Act claims in this case turn on the distinctions between Sections 106 and 110(f) – two distinct statutory requirements interpreted by two different agencies under separate regulations and guidance. The district court's errors largely stem from a fundamental failure to distinguish between these two statutory provisions.

Section 106 of the Preservation Act establishes a process by which federal agencies must "take into account" the effects of their undertakings on sites listed or eligible for listing in the National Register of Historic Places, 54 U.S.C. § 306108, through consultation with the Advisory Council on Historic Preservation ("Advisory Council"), the agency authorized to implement and interpret Section 106. *Id.* § 304108.

By contrast, Section 110(f) establishes a heightened standard of protection for Landmarks, a much more limited category of highly significant historic resources, providing as follows:

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

54 U.S.C. § 306107. Congress gave the National Park Service ("Park Service"), not the Advisory Council, the authority to implement and interpret Section 110(f), the key statute at issue. *See e.g.*, 54 U.S.C. § 306101.[1]

I. The District Court's Interpretation of Section 110(f) is Contrary to the Plain Meaning of the Statute.

The threshold issue is whether Section 110(f) applies to federal permitting for the Project, a large electric transmission line located near and within the direct line of sight of a Landmark. With "no disputing that Carter's Grove, [a Landmark],

[1] 54 U.S.C. § 306101(b) refers to "the Secretary." Other sections of Title 54 clarify that this means the Director of the NPS. 54 U.S.C. §§ 100102(1), 100102(3), 300316, 320102(a).

will be impacted by the proposed Project," the "key question" for the district court was "whether Carter's Grove will be *directly* impacted." Dkt. 102, 40 (emphasis added).[2] More fundamentally, the case turns on the legal question of whether visual impacts can – *under any circumstance* – "directly … affect" a Landmark, triggering Section 110(f). 54 U.S.C. § 306107.

The court erred in holding that "when the statute refers to 'direct' effects, it refers to effects with a *physical* impact." Dkt. 102, 40. Instead, the ordinary meaning of "direct effects" establishes a causal test, as to "directly affect" is to cause immediate effects without an intervening cause. *See* Black's Law Dictionary (10th Ed. 2014) (defining "direct" as "free from extraneous influence; immediate," and "directly" as "in a straightforward manner" or "immediately"). Had Congress intended Section 110(f) to be strictly limited to physical impacts, it could have easily substituted the word "physical" for the word "direct." Hence, where visual impacts to Landmark directly result from a federal undertaking, Section 110(f) review is required.

The fact that Congress intended to use the word "directly" in its normal and ordinary sense is illustrated by the word salad that results from repeating this word substitution throughout the statute. For example, the statutory definition of "undertaking," a critical term triggering compliance obligations under both Section

[2] All docket cites are to the district court proceedings, Civ. No. 17-cv-01574-RCL, on appeal in Case No. 18-5186.

106 and 110(f), is rendered meaningless when that substitution is made: "a project, activity, or program funded in whole or in part under the [*physical*] or indirect jurisdiction of a Federal agency…." 54 U.S.C. § 300320. (emphasis added).

II. The District Court's Interpretation is Contrary to the Relevant Regulatory Guidance.

The Park Service – the agency tasked by Congress with interpreting and issuing implementing guidance for Section 110(f), 54 U.S.C. § 306101(b) – issued the *Standards and Guidelines for Federal Agency Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act of 1966*, 63 Fed. Reg. 20496 (April 24, 1998) ("*Guidelines*"), as regulatory guidance applicable to all federal agencies. 63 Fed. Reg. at 20496. The district court wrongly found the *Guidelines* to be "silent on [the] issue" of direct versus indirect effects. Dkt. 102, 42. To the contrary, the *Guidelines* explain:

> Full consideration of historic properties includes consideration of all kinds of effects on those properties: direct effects, indirect or secondary effects, and cumulative effects. Effects may be visual, audible, or atmospheric.

63 Fed. Reg. at 20503. According to the *Guidelines*, not only must "visual" effects be considered, "direct effects" are specifically contrasted with "indirect or secondary effects," not "non-physical effects," as the district court's interpretation would require. "Secondary" means "not first in order of occurrence or development; dependent or consequent on another . . . condition." Merriam-

Webster, *https://www.merriam-webster.com/dictionary/secondary* (Aug. 16, 2018); *see also* Black's Law Dictionary (10th Ed. 2014) (defining "secondary" as "subordinate or subsequent"). By contrast, direct effects are primary or first order effects, independent of other conditions. Thus, the *Guidelines* support a causal effects standard for Section 110(f).

Supporting this interpretation, the *Guidelines* are also rendered nonsensical when "physically" is substituted for "directly," as demonstrated by the following phrase: "use of historic properties involves the integration of those properties into the activities [*physically*] *associated* with the agency's mission." *Id*. at 20505 (emphasis added). Instead, Section 110(f) and the *Guidelines* only make sense if "directly" is read in its ordinary, causal sense.

III. The District Court's Interpretation Inappropriately Equates Section 106 to Section 110.

Section 110(f) raises the bar for undertakings that affect Landmarks, as compared to the broader category of historic resources covered under Section 106, requiring federal agencies to "the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark." 54 U.S.C. § 306107. As the legislative history explains, this requirement "does not supersede Section 106, but complements it by setting a higher standard for agency planning in relationship to landmarks." H.R. Rep. No. 96-1457, at 38 (1980) (reprinted in 1980 U.S.C.C.A.N. 6378, 6401). Thus, Section 110(f) "stands on top

of the more general duty in the Section 106 consultation process." *Presidio Historical Ass'n v. Presidio Trust* ("*Presidio*"), 811 F.3d 1154, 1170 (9th Cir. 2016). Under Section 110(f), "something more [is] required." *Id.*

This interpretation is supported by the *Guidelines*, which define Section 110(f)'s "higher standard of care," requiring agencies to "consider all prudent and feasible alternatives to avoid an adverse effect on the [Landmark]." 63 Fed. Reg. at 20503.

Instead of relying on the Park Service's *Guidelines*, however, the district court focused on guidance regarding an entirely different statutory provision – Section 106 – promulgated by a different agency – the Advisory Council. Dkt 102, at 41 (citing 36 C.F.R. § 800.5). But the Advisory Council guidance only applies to specific issues regarding the relationship between Section 106 and NEPA; it does not address Section 110(f) at all.

The district court's erroneous interpretation of "directly affects" was, moreover, contradicted, not only by the Park Service (the agency charged by Congress with interpreting Section 110(f)), AR 24395, 110230, but by the Advisory Council itself, which explained:

> Direct physical effects and indirect effects such as visual effects can all *directly* result from an undertaking and trigger federal agency responsibility to comply with Section 110(f). The use of the term "directly" in Section 110(f) . . . refers to causation and not physicality. Thus, visual effects can be a direct consequence of an undertaking,

> and trigger the federal agency's responsibility to comply with Section 110(f).

AR0030861. Neither the district court nor the Corps ever addressed the Advisory Council's direct disagreement with their interpretations of Section 110(f).

Focused solely on the Advisory Council's interpretation of an inapplicable statutory provision – Section 106 – the district court erred in ignoring both the Advisory Council's and the Park Service's interpretation of the statutory provision actually at issue – Section 110(f).

IV. The District Court Erred in Failing to Defer to the Park Service's Interpretation that Visual Impacts Can "Directly Affect" Landmarks.

While acknowledging that the Park Service's interpretation of "directly affects" was "not inconsistent" with its approach elsewhere, Dkt. 102, 42 n.8, the district court nonetheless provided no deference to the agency's interpretation. Instead, the court dismissed the Park Service's interpretation as a mere litigation position, noting only: "That NPS took the position that the effects were direct in this case does not provide the Court with reason to defer to their interpretation of Section 110(f)." *Id.* at 42.

But as the Supreme Court has explained, "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and it has been "long recognized that considerable weight should be accorded to an

executive department's construction of a statutory scheme it is entrusted to administer." *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001) (internal citations and quotations omitted). Further, "an agency's interpretation may merit some deference whatever its form," with courts looking to "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position" to determine the appropriate level of deference. *Id.* at 227-28, 234 (internal citations and quotations omitted).

Here, the Park Service's statutory interpretation is consistent with its actions elsewhere. For example, regarding a new cruise ship terminal proposed near the Charleston National Historic Landmark District in South Carolina, the Park Service rejected the "position that Section 110(f) applies only when an undertaking may physically impact a [ ] Landmark." Letter from J. Beasley, Park Service, to LTC M. Luzzatto, Army Corps (Sept. 21, 2017) (attached as Exhibit A).

Similarly, in the Cape Wind matter discussed by the district court in a footnote, Dkt. 102, 42 n.8, the Park Service noted that in certain circumstances "a visual intrusion can cause a direct and adverse effect" on a Landmark. AR 30098.

Thus, while determining whether particular adverse effects are direct or indirect is "necessarily made on a case by case basis," *id.*, the Park Service and the Advisory Council have consistently interpreted Section 110(f) as establishing a

causation standard, not a physicality test. The court erred in failing to provide any deference to these expert agencies.

Instead, the court gave disproportionate weight to the absence of judicial cases where Section 110(f) has previously been applied to visual impacts on Landmarks. Dkt. 102, 40-41. In so doing, the district court relied too heavily upon a handful of readily distinguishable cases.

First, in several of the cited cases, Section 110(f) was inapplicable because there were no "adverse effects" on a Landmark, not because impacts were visual or non-physical. *Coliseum Square Ass'n, Inc.*, 465 F.3d at 244; *Vieux Carré Property Owners, Residents & Assoc., Inc. v. Pierce*, 719 F.2d 1272, 1280–81 (5th Cir. 1983); *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 64 (1st Cir. 2006).

Another case cited by the district court, *Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989), simply did not address Section 110(f) whatsoever.

Thus, the district court is left with only two cases to support its conclusion that "*every court* that has found Section 110(f) to be implicated in a project dealt with physical effects." Dkt. 102, 41 (emphasis added). Neither of these cases addresses the meaning of "directly affects" in Section 110(f). *See Lesser v. City of Cape May*, 110 F. Supp. 2d 303 (D.N.J. 2000), *aff'd*, 78 F. App'x 208 (3d Cir. 2003); *Presidio*, 811 F.3d 1154.

In *Presidio*, moreover, the Section 110(f) analysis for a new lodge proposed within the footprint of a Landmark specifically considered the development's visual impact. 811 F.3d at 1170–71. As a result, the project "changed dramatically over time," with the lodge broken into smaller buildings with space between them "to preserve *visual continuity*." *Id.* at 1171 (emphasis added). *See also Pierce*, 719 F.2d at 1280–81 (considering visual impacts, including whether building height and scale would negatively affect the adjacent Landmark District, in evaluating whether Section 110(f) applies).

There is no basis in statute, regulation, or case law for the notion that direct adverse effects triggering Section 110(f) review are limited to "physical impacts." An offsite undertaking that has substantial visual impacts on a Landmark can undoubtedly undermine its historical integrity, warranting the protection of Section 110(f) provided by Congress.

V. The District Court's Erroneous Interpretation of Section 110(f) Undermines the Fundamental Purpose of this Statutory Provision.

Congress intended Section 110(f) to establish a higher standard of care for federal undertakings that could impact Landmarks, among our nation's most important historic resources. To qualify for designation, Landmarks must have the "quality of national significance," which requires sites to "possess a high degree of integrity of location . . . setting . . . feeling and association." 36 § C.F.R. 65.4(a). In considering only physical impacts to Landmarks under Section 110(f), the

district court completely ignored these essential attributes of historical and cultural significance, which visual impacts can readily destroy.

The district court's interpretation of Section 110(f) would significantly limit the scope of Section 110(f). Under the district court's reading of the statute, the federal government could permit construction of a 100,000 seat football stadium within inches of the boundary of James Madison's Montpelier, destroying the rural character and setting of that Landmark, or allow a hog farm to be sited next to the hallowed ground of Gettysburg National Military Park – without the heightened Section 110(f) review mandated by Congress.

As an immediate, non-hypothetical example, the district court's interpretation could preclude Section 110(f) review of the proposed new cruise ship terminal adjacent to the Charleston National Historic Landmark District. If permitted, docked cruise ships would tower above the highest church steeples of the Holy City, dramatically affecting sightlines and the historic feel of the Charleston peninsula. Yet according to the district court's interpretation of "directly affects," Section 110(f) analysis would not be required to account for these visual impacts.[3]

[3] The district court's opinion offers no clear definition of "physical impacts" to clarify whether noise and vibration impacts from the proposed cruise terminal would be considered "physical impacts" triggering Section 110(f) review.

If the district court's interpretation of Section 110(f) stands, the heightened protections for Landmarks intended by Congress will be dramatically undermined.

CONCLUSION

For the foregoing reasons, the *Historic Preservation Amici* respectfully request this Court overturn the district court's interpretation of Section 110(f) of the Historic Preservation Act.

Dated: August 17, 2018

Respectfully submitted,

/s/ Blan Holman

J. Blanding Holman (D.C. Cir. Bar No. 61180)
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270
bholman@selcsc.org

Daniel L. Timmons (Bar No. SC103477)
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270
dtimmons@selcsc.org

Attorneys for The Lawyers' Committee for Cultural Heritage Preservation and The Cultural Landscapes Foundation

RULE 32(G) CERTIFICATE OF COMPLIANCE

This document complies with Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7), and 32(g), Circuit Rules 28(c) and 32(e), and this Court's order of July 31, 2018 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,700 words, and this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

/s/ Blan Holman

J. Blanding Holman

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I caused service of the foregoing *AMICI CURIAE* BRIEF OF THE LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION AND THE CULTURAL LANDSCAPE FOUNDATION to be made by filing it with the Clerk of the Court via the CM/ECF System, which sends a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consented to electronic service. To the best of my knowledge, all parties to this action receive such notices.

/s/ Blan Holman

J. Blanding Holman

Exhibit A

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, DC 20240

H34(7228)

SEP 21 2017

Matthew W. Luzzatto, P.E., PMP
Lieutenant Colonel, U.S. Army
Commander and District Engineer
Department of the Army
Charleston District, Corps of Engineers
69-A Hagood Avenue
Charleston, SC 29403-5107

Dear Lieutenant Colonel Luzzatto:

In September 2016, the U.S. Army Corps of Engineers (Corps) submitted a request to the National Park Service (NPS) Southeast Regional Office concerning the proposed Charleston Union Pier Terminal project in Charleston, South Carolina (project). The Corps requested the NPS' official interpretation of language in Section 110(f) of the National Historic Preservation Act (NHPA), which refers to undertakings that "may directly and adversely affect any National Historic Landmark," as it pertains to the project (54 U.S.C. § 306107). More specifically, the letter asks for clarification as to NPS' interpretation of the word "directly" as used in Section 110(f) of the NHPA, the types of effects that meet the intended definition of this term, and whether Section 110(f) of the NHPA applies to the project. The NPS Southeast Regional Office formally requested the assistance of the Washington Support Office (WASO) in responding to the Corps' September 8, 2016, letter.

The Corps' position, as articulated in its September 8, 2016 letter, is that the term "directly" in Section 110(f) refers only to undertakings that physically impact a National Historic Landmark. The Corps then posits that, because the project's effects on National Historic Landmarks in its vicinity are not expected to physically impact any such Landmarks, the project would not "directly" affect any National Historic Landmarks. Rather, the project's effects would be limited to "indirect" effects. The Corps, therefore, concludes that the project is not subject to Section 110(f) of the NHPA and requests that the NPS concur with this conclusion.

The NHPA establishes Federal agency responsibilities for the preservation of historic properties. Section 110(f) (54 U.S.C. § 306107) provides that:

> *Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.*

Pursuant to Section 101(g) (54 U.S.C. 306101(b)), the Secretary of the Interior has promulgated guidelines for these Federal agency responsibilities, including *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act* (Federal Register, April 24, 1998, pages 20496-20505). Standard 4 of these Guidelines, subsections (j)–(l), pertain specifically to National Historic Landmarks. Subsection (j) of Standard 4 emphasizes the importance of National Historic Landmarks and states that:

> National Historic Landmarks (NHL) are designated by the Secretary under the authority of the Historic Sites Act of 1935, which authorizes the Secretary to identify historic and archaeological sites, buildings, and objects which ''possess exceptional value as commemorating or illustrating the history of the United States.'' Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs. The law requires that agencies, ''to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark.'' In those cases when an agency's undertaking directly and adversely affects an NHL, or when Federal permits, licenses, grants, and other programs and projects under its jurisdiction or carried out by a state or local government pursuant to a Federal delegation or approval so affect an NHL, the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the NHL. (Sec. 110(a)(2)(B) and sec. 110(f)).

The NPS does not agree with the Corps' position that Section 110(f) applies only when an undertaking may physically impact a National Historic Landmark. NPS WASO staff has reviewed Section 110(f) and NPS guidance pertaining to Section 110(f), and has not found published guidance that specifically interprets the term "directly" as used in Section 110(f). The NPS is, therefore, considering issuing additional published guidance regarding the interpretation of the term "directly" in Section 110(f) to clarify this issue.

Whether or not Section 110(f) applies to an undertaking, it is necessary for the Corps to fully consider the project's potential effects to identified historic properties. For most projects, such consideration is achieved through analysis and study of the project, including the identification of historic properties in the proposed Area of Potential Effects and the potential for the project to affect these resources. It is our understanding that, to date, full consideration of properties within the Charleston Union Pier Terminal project's proposed Area of Potential Effects and its potential effects to the Charleston Historic District National Historic Landmark and other National Historic Landmarks in this area, has yet not been completed. Without the benefit of such information, the NPS is not able to assess how the project may affect National Historic Landmarks, and thus cannot concur with the Corps' conclusion that the project does not require the "higher standard of care" referenced in Subsection (j) of Standard 4 quoted above.

Thank you for your inquiry and the opportunity to assist with the proposed Charleston Union Pier Terminal project. Should you have any questions, please contact me at (202) 354-6991 or Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Programs, at (202) 354-2003 or paul_loether@nps.gov.

The National Park Service appreciates your efforts to preserve and protect our nation's heritage.

Sincerely,

Joy Beasley
Acting Associate Director, Cultural Resources,
Partnerships, and Science

cc: John Eddins, Charlene Vaughn, and Reid Nelson, Advisory Council on Historic Preservation
Charles R. Smith, Federal Preservation Officer, Corps
Skipper Scott, Corps
Jeff Durbin, Section 106 Compliance Officer, NPS
Cynthia Walton, National Historic Landmarks Program Manager, NPS
Eric Emerson, State Historic Preservation Officer, State of South Carolina
Sara Porsia, Attorney-Advisor, Office of the Solicitor, U.S. Department of the Interior
Christopher Hetzel, Branch Chief, NHL Program, NPS