IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE COMMITTEE OF 100 ON THE FEDERAL CITY	)	
Plaintiff	)	
v.	)	
	)	**Case No. 1:14-01903 CRC**
ANTHONY FOXX, Secretary of Transportation, et al.	)	
Defendants	)	

PLAINTIFF'S REPLY IN SUPPORT OF ITS APPLICATION FOR A PRELIMINARY INJUNCTION

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A. APPLICABLE LAW

When considering injunctive relief, courts must consider (1) the moving party's likelihood of success; and whether: (2) the movant will suffer irreparable injury; (3) the injunction will harm other parties; and (4) an injunction would further the public interest." *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 670 (D.C. Cir. 2005). "[I]njunctive relief may be justified …where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.*

CSXT asserts that the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) eliminated the "sliding scale" that courts have used in order to determine whether a preliminary injunction can be used. CSXT is the only party to forward that argument. The most straightforward reading of *Winter* is that, to show irreparable harm, the moving party must show that harm is likely (rather than possible) in the absence of an injunction. 555 U.S. at 22. *See United States v. Sum of $70,990,605*, 991 F. Supp. 2d 154 n. 3 (D.D.C. 2013) (After *Winter*, "plaintiff must demonstrate that irreparable injury is 'likely,' not just 'possible,'"). The only reference to the "sliding scale" in *Winter* occurred in Justice Ginsburg's dissent – in which she stated that *Winter* did <u>not</u> reject the sliding scale approach. 555 U.S. at 51.

To be clear, Plaintiff is not arguing that it is excused from the requirement to demonstrate the likelihood of irreparable harm. Plaintiff contends, however, that an unusually strong showing on one factor can make up for a *weaker* showing on another factor. *Davis v. Pension Ben. Guar. Corp*., 571 F.3d 1288, 1291–92 (D.C. Cir. 2009) ("If a plaintiff 'makes an unusually strong showing on one of the factors, then it does not necessarily have to make <u>as strong</u> a showing on another factor.") (emphasis added).

Judges on the District Court continue to apply the sliding scale test in the absence of clear direction from the D.C. Circuit. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp.3d 32 (D.C. 2014) (Ketanji-Brown) ("If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak.") *and see id*. at fn. 2 ("in the absence of a precedential ruling to this effect, this Court will apply the more lenient sliding scale standard to the injunction at issue here.").[1]

B. LIKELIHOOD OF SUCCESS ON THE MERITS

1. Predetermination

a. DDOT's Predetermination is Attributable to FHWA and Violates NEPA

The Federal Defendants and CSXT insist that there can be no predetermination because "FHWA was not a party to any of [the] agreements" between CSX and DDOT. Fed Opp. at 16; CSXT Opp. at 31-32. Neither CSXT nor the Federal Defendants has cited to any cases that indicate that predetermination by a co-lead agency is not a violation of NEPA. The District's only comment on this point is that the predetermination cannot be attributed to FHWA because "NEPA places the responsibility for preparing an EIS only on Federal agencies." District Opp. at

[1] *See also Aviles-Wynkoop v. Neal*, 978 F. Supp. 2d 15, 21 (D.D.C. 2013) (Bates) ("If the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor."); *ConverDyn v. Moniz*, -- F.Supp.3d --, 2014 WL 4477555, at *8, fn 2 (D.D.C. Sept. 12, 2014) (Walton) ("because it remains the law of this Circuit, the Court must employ the sliding-scale analysis here."); *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014) (Contreras) ("this Court will also proceed by analyzing the factors on a sliding scale, absent contrary binding authority from the D.C. Circuit."); *United States v. Sum of $70,990,605*, 991 F. Supp. 2d 154, 160 (D.D.C. 2013) (Roberts, Chief Judge) appeal dismissed, No. 14-5031, 2014 WL 4629117 (D.C. Cir. July 18, 2014) ("The four factors should be balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor."); *Henke v. Dep't of the Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) (Boasberg) ("Whether sliding-scale analysis still exists or not, courts in our Circuit have held that 'if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors.'").

25.

But there is no question that the District – not FHWA managed this EIS process. Under DDOT's Environmental Manual (2012), even when FHWA is technically the lead agency under NEPA, DDOT has primary responsibility for drafting the NEPA mandated documents. *See* Exhibit 1, p. 94 ("FHWA is responsible for submitting the NOI to the Federal Register; however, as the applicant, DDOT personnel or a DDOT consultant will prepare the NOI for FHWA's submittal."); *Id.* at 95 (Table 7-1, demonstrating DDOT's role in making recommended decisions as to whether an Environmental Impact Statement is necessary under NEPA, with FHWA approving or rejecting the recommended decision; and with DDOT drafting the Environmental Impact Statement for FHWA approval; *And See Id.* 97 § 7.5 (After the appropriate agencies have reviewed and approved the DDOT Draft and Final EISs, a Notice of Availability is published in the Federal Register."). *See Also* Fed. Def. Opp. at 17 (FHWA approved the FEIS). Furthermore, DDOT's December 21, 2012 agreement with CSXT demonstrates that CSXT and DDOT viewed DDOT as providing oversight for the EIS process *See* Exhibit 2 at ¶ 5 ("DDOT shall continue to provide oversight of the EIS process for the Virginia Avenue Tunnel Project as co-lead agency"). See also District Motion for Extension of Time to Compile Administrative Record, Docket 40.

The District and Federal Defendants and Intervenor all make variations on the argument that "FHWA has expressly confirmed it did not consider the agreements between DDOT and CSX in making its decision" (Fed Opp. at 16, District Opp. at 25). This assurance does nothing to refute the undisputed facts that FHWA reviewed and approved the Final EIS, including the agreements between DDOT and CSXT that were attached thereto and that the Record of Decision was premised entirely on that FEIS. *See* Fed Opp. at 18 ("The ROD provides FHWA's

well-reasoned, rational decision based on the FEIS and supporting technical documents to approve the [expansion project].") (emphasis added). Consequently, even if FHWA did not predetermine the outcome of the EIS process, FHWA's record of decision relied entirely on the FEIS, which FHWA knew to be the product of DDOT's predetermination.

This situation is directly analogous to the situation in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002).[2] FHWA was the lead agency, working with the State DOT and the affected cities. *Id.* at 1110. The Environmental Analysis (EA) was prepared by a private engineering firm, under contract with Sandy City. *Id.* The problem was that the engineering firm "was contractually obligated to prepare a FONSI [Finding of No Significant Impact] and to have it approved … by FHWA by a date certain." 302 F.3d at 1112. The predetermination was attributed to FHWA because of FHWA's close involvement in the process. 302 F.3d at 1113 (FHWA "failed to conduct a sufficient independent review of [the engineering firm's] work to insulate itself from the biases toward a FONSI reflected in [the engineer's] draft EA."). The same considerations are in play here, where FHWA was co-lead agency and was aware of the agreements between DDOT and CSXT.

Colorado Wild Inc. v. U.S. Forest Service, 523 F.Supp.2d 1213 (D. Colo. 2007) is also germane. There, the court granted a preliminary injunction because there was evidence of an improper relationship between the project proponent and the private engineering firm that violated the integrity of the NEPA process. 523 F. Supp. 2d at 1230. Whether FWS had insulated itself and its decision from the improper relationship was a question of fact that was

[2] *Davis* has been referenced with approval by several judges in this District Court as well as by the D.C. Circuit Court of Appeals. In particular, *see Oceana, Inc. v. Locke,* 725 F. Supp. 2d 46, 67 (D.D.C. 2010) rev'd, on other grounds 670 F.3d 1238 (D.C. Cir. 2011) (citing *Davis* with approval for its predetermination analysis); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Pension Ben. Guar. Corp*., 2006 WL 89829, at *14 (D.D.C. Jan. 13, 2006).

"ripe for litigation and deserving of deliberative investigation." *Id.*

Plaintiff submits that *Staub v. Proctor Hosp.,* 562 U.S. 411, 131 S.Ct. 1186 (2011), although not a NEPA case, may also be useful for the Court's analysis. In that case, a subordinate supervisor's bias was found to be the proximate cause of an employee's termination, even though the ultimate decisionmaker did not share the same. 131 S. Ct. 1186 at 1190. *And see Id.* at 1192 ("the exercise of judgment by the decisionmaker does not prevent the earlier agent's action from being the proximate cause of the harm."). Consequently, even if FHWA was ignorant of the predetermination, predetermination remained the proximate cause of FHWA's decision to endorse the Tunnel Expansion project. Consequently, NEPA has been violated.

b. The Agreements Between CSXT and the District Establish Unlawful Predetermination

i. The August 23, 2010 Memorandum of Agreement

In an August 23, 2010 Memorandum of Agreement between CSXT and DDOT (Exhibit 3), DDOT agreed:

1. To declare that the Virginia Avenue Tunnel Expansion Project was "critical" to rail transportation and agreed to "work together" with CSXT to effectuate the project, including submitting grant applications for the project. *Id.* p. 1, "Whereas" clauses; and Art. II (B); Art. III);
2. To provide support for CSXT's National Gateway Initiative, the largest (in dollars) aspect of which was the Virginia Avenue Tunnel expansion project. *Id.*, Art. II (A) *And See* Exhibit 4, National Gateway Initiative at 12 (referenced at FEIS, Ch. 10, Exhibit 5 at 10-2);

3. To write a letter to U.S. Department of Transportation in support of the National Gateway Initiative, which included the Virginia Avenue Tunnel expansion project. Exhibit 3, Art. II (A);

4. To support "legislative efforts to secure funding" for the National Gateway Initiative. *Id.*, Art. II (A);

5. To "submit the TIGER II grant application for a planning grant that includes the Virginia Avenue Tunnel expansion project." *Id.*, Art. II (B);

6. To "expedite approvals of the required public space permits for the Virginia Avenue Tunnel Expansion Project." *Id.*, Art. III (D);

In exchange for DDOT's obligations, CSXT agreed to:

7. Pay DDOT $4,171,044 for design and construction costs associated with redesigning and reconstructing one of the access ramps of the 11th Street bridge to accommodate CSXT's plans for an enlarged, two track tunnel that was ultimately selected in the FEIS as the preferred alternative. *Id.*, Art. IV (C).

8. Remove a communication tower from DDOT property that was interfering with the proposed 11th Street Bridge ramp. *Id.* at Art. IV (B)

9. Negotiate with DDOT for permanent easements associated with two different CSXT properties so that DDOT could ultimately build pedestrian and bicycle trails that spanned over CSXT rail lines.[3]

[3] These included the following major projects: (1) The Anacostia Pedestrian Walkway/Trail (*Id*. Art. VI (C)). This easement was key to complete a 1,185 foot pedestrian and bicycle bridge that was a part of the Anacostia Riverwalk Trail. *See* DDOT press release, Exhibit 6; And (2) The Rhode Island Avenue Pedestrian/Bicycle Bridge (Exhibit 3, Art. VI (D)). The easement was key to the pedestrian access project, slated to take 18 months to build, which will link the Metropolitan Branch Trail and its connecting neighborhoods to the Rhode Island Avenue Metro Station and adjacent communities. *See* DDOT press release, Exhibit 7.

10. Negotiate with DDOT over DDOT's use and development of CSXT's Shepherds Branch Property. *Id.*, Art. VII.

The August 23, 2010 agreement also makes reference to a July 26, 2010 agreement between DDOT and CSXT (*See* Exhibit 3, First "Whereas" Clause on p. 2) that was not disclosed in the Final EIS. That earlier agreement may evidence additional commitments that have not been disclosed in the FEIS.

In its opposition brief, the District neglected the vast majority of the terms of the August 2010 agreement. Instead, the District merely claims that the agreement contains DDOT's agreement that the Virginia Avenue Tunnel was "critical" to rail transportation and to work with CSXT to submit grant applications. The District should be deemed to have waived Plaintiff's arguments with respect to all other aspects of the August 2010 Agreement.

Moreover, Both CSXT and the District have failed to address the argument that DDOT would have been in breach of contract had it failed to support the Tunnel Expansion project. By failing to address the argument that the District would have breached its contractual obligations by failing to support the tunnel expansion, the Defendants and CSXT have conceded the point.

ii. May 16, 2011 Change Order for 11th Street Bridge Modifications

On May 16, 2011 the District executed a change order with Skanska/Facchina, the engineering joint venture that was constructing the 11th Street bridge to redesign the bridge "in such a way as to not preclude the construction of a CSX temporary shoo-fly track … and the widening of the CSX Virginia Avenue Tunnel." The change order cost the District of Columbia $4,171,044. *See* Exhibit 8.

The District claims that this agreement does not show an irreversible commitment to the

Virginia Avenue Tunnel Expansion project because CSXT was required to "absorb" the cost of the modifications to the 11th Street Bridge. DDOT Opposition at 18-19. This is false.

DDOT was most certainly responsible the $4.2 million. First, DDOT had already agreed to credit CSXT up to the exact same amount ($4,171,044) toward its liability to restore Virginia Avenue upon completion of the Tunnel expansion project. *See* Exhibit 3, August 2010 agreement, Art. III (B). Consequently, whereas CSXT would have been obligated for a total of approximately $8.4 million, relating to the Virginia Avenue Tunnel expansion ($4.2 of which was for the modifications necessary to the 11th Street Bridge, and another $4.2 million of which was for resurfacing Virginia Avenue following the tunnel expansion project), CSXT only had to pay half of that amount ($4.2 million), with DDOT being liable for the remainder.

Second, DDOT was liable to Skanska/Facchina for the change order. *See* Exhibit 8. Although CSXT agreed to *reimburse* DDOT, in the future, that agreement did not negate the fact that DDOT was responsible to Skanska/Facchina for the change order amount, and nothing in the agreement would have permitted Skanska/Facchina to recover from CSXT. Exhibit 8. Third, CSXT was permitted to pay DDOT in four installments, with the last installment due in the first quarter of 2012. *See* Exhibit 3, Art. IV(C). CSXT's payments were not specifically tied to the schedule by which DDOT was required to pay Skanska/Facchina. *Id.*

Fourth, CSXT's agreement to reimburse DDOT for the amount that DDOT paid to Skanska/Facchina was contingent on DDOT's agreement to abide by the terms of the August 2010 agreement. *See* Exhibit 3, top of p. 2 ("Now therefore, in consideration of the mutual promises contained herein, the Parties hereto agree as follows …"). According to the plain language of the agreement, all of CSXT's obligations to DDOT were contingent on DDOT abiding by all of its obligations to DDOT. Had DDOT failed in its obligations under the August

2010 agreement, then CSXT would have been justified in withholding subsequent payments toward the $4.2 million and/or pursuing the District for any portion of the $4.2 that CSXT had already paid. The Defendants have utterly failed to address these impacts of the $4.2 million change order, and they should be deemed to have waived the argument.

iii. September 27, 2012 CSXT Letter to City Administrator

In a September 27, 2012 letter from CSXT to the D.C. City Administrator, CSXT identified the significant elements of an agreement titled "11th Street Bridge and Virginia Avenue Tunnel Projects Joint Cooperation and Development Agreement." Exhibit 9. Neither Renjel's letter nor the "Joint Cooperation and Development Agreement" was included in the FEIS, and the Plaintiff has not been given access to the Joint Cooperation agreement.

The September 27, 2012 letter indicates that the District and CSXT agreed to a schedule for the District to grant permits and approvals for the Virginia Avenue Tunnel (*See Id,* under Phase 1). The letter also documented the District's agreement to fund 1/3 of the cost of lining the 11th Street SE sewer, and established when CSXT would grant the District easements over the Parkside Pedestrian Bridge and Anacostia Pedestrian Bridge.[4]

According to the letter, CSXT would only be required to work with the District to seek authority to abandon Shepherds Branch and enter into a Trails Use Agreement after the Virginia Avenue Tunnel construction project was completed. *Id.* Phase 5.

iv. September 28, 2012 Email from CSXT to City Administrator Lew

On September 28, 2012, CSXT Vice President Renjel explained that CSXT had offered, as an "olive branch" to "extend our tunnel – beyond what our project calls for and for the sole

[4] The Parkside Pedestrian Bridge, which was not addressed in the August 23, 2010 MOA, was $22 million pedestrian bridge that spanned CSXT tracks north of the DC 295 and Benning Road interchanges and connect to the Minnesota Avenue Metrorail and Bus transfer stations. *See* Exhibit 11.

benefit of DC – at our expense." *See* Exhibit 10. The December 21, 2012 agreement, discussed immediately below, establishes that the District accepted CSXT's offer to extend the tunnel – an additional inducement to DDOT to support the tunnel expansion project.[5]

v. December 21, 2012 Term Sheet Agreement

A December 21, 2012 Term Sheet Agreement between DDOT and CSXT (Exhibit 2), shows that CSXT and DDOT agreed as follows:

1. To enter into a State-Railroad Agreement for the completion of the 11th Street Bridge Project; Exhibit 2 at ¶ 1.
2. That CSXT would revise its then-current construction plans to extend the Virginia Avenue Tunnel to the east side of 12th Street SE, at no cost to the District. *Id.* ¶ 2.
3. DDOT agreed to issue the public space permit and right of way that CSXT would require in the event that the FHWA Record of Decision (ROD) endorsed one of the "build alternatives" (*Id.* ¶ 4 and Exhibit 12);
4. DDOT agreed to "continue to provide oversight of the EIS process for the Virginia Avenue Tunnel as co-lead agency with FHWA" and to "partner" with CSXT to "manage the EIS process" (Exhibit 2, ¶ 5); and
5. DDOT granted CSXT a permanent right of way for the space occupied by the expanded Virginia Avenue Tunnel (*Id.* at ¶ 3-4; Exhibit 12, Art. I (A) and Art. IV (A)).

[5] In March 30, 2014, DDOT modified CSXT's Public Space Occupancy Permit to include the at-grade portion of land that would permit CSXT to extend the tunnel to 12th Street SE and to extend the tracks eastbound beyond the new tunnel opening, to join the currently existing double rail track, which commences between 12th and 13th Streets, SE. Exhibit 13, Attachment B (As a result of the modification, the right of way included "Under Virginia Avenue SE Generally Between 2nd Street SE and 12th ST SE, Washington DC and at-grade to the east of 12th Street").

6. Only after CSXT and DDOT agreed to the above five obligations would CSXT negotiate with DDOT with respect to the following matters (Exhibit 2, ¶ 6):

a. "Credits to CSXT and DDOT."

b. "Parkside Bridge";

c. "Sewer-related costs and agreements";

d. "Anacostia Bridge (East)";

e. "Shepherds Branch"; and

f. "Barney Circle;"[6]

Furthermore, the D.C. City Administrator agreed that it supported "the purposes of the Term Sheet Agreement" and obliged the District to address "Permits and Approvals … for construction of the Virginia Avenue Tunnel Project" by no later than January 31, 2013. *See* Exhibit 2 at ¶ 6(b)(i). Consequently – based on this document – the District of Columbia appears to have pre-approved the permits for the Virginia Avenue Tunnel expansion.

vi. October 29, 2013 Agreement

As demonstrated in the October 29, 2013, CSXT agreed to give DDOT an option to acquire the Shepherds Branch right of way. This was a powerful inducement (and potential penalty) to ensure DDOT's support for the Tunnel Expansion project.

The Shepherds Branch ROW encompassed two segments of the now inactive stretch of rail, including over 55 acres of land and extending 5.38 miles. *See* Exhibit 16, Permit attached to October 29, 2013 agreement. Shepherds Branch is key to the District's plans to construct a 2400-foot, multi-use trail connecting the South Capitol Street Trail with the Anacostia Metrorail

[6] Barney Circle is just east of the Virginia Avenue Tunnel, and is at the heart of a new planning study designed to "Transform[] the Southeast Expressway Interstate into a boulevard that is integrated with adjacent neighborhoods between the new 11th Street Bridge and Barney Circle and the Anacostia River Waterfront. *See* Exhibit 15.

Station. *See* South Capitol Street Supplemental EIS, Exhibit 17. Shepherds Branch is also one of the preferred routes for the District's streetcar program. *See* Exhibit 18, Environmental Analysis, p. 16 (Shepherd's Branch (not mentioned by name) was carried forward as a preferred option).

The Option agreement contained "a precondition to CSXT's obligation to convey the SB ROW [Shepherd Branch Right of Way] to DDOT." According to that precondition, CSXT was not obligated to convey the Right of Way unless "CSXT shall have obtained from the District of Columbia the necessary permits and approvals needed from any agency of the District of Columbia to commence and construct the VAT [Virginia Avenue Tunnel] Project in accordance with the build alternative, if any, determined to be the acceptable alternative pursuant to the Record of Decision issued in connection with the Environmental Impact Statement being undertaken pursuant to NEPA as of the date hereof." Exhibit 16, ¶ II (B)(7) (**emphasis in the original**).

Consequently, DDOT's ability to acquire the Shepherds Branch ROW depended on the NEPA process endorsing the Tunnel Expansion project and the District agreeing to issue all necessary approvals and permits that CSXT required for the tunnel expansion.

DDOT claims that the option to acquire the Shepherds Branch ROW is of no consequence to the predetermination issue because it does not "expose the District to any liability for denying permits or approvals relating to the Build Alternative where the ROD as not explicitly authorized such construction." District Opp. at 25. But an option to acquire property is a tangible contract right, and agreeing to give up such a right constitutes an irreversible commitment of the District's resources. *Commercial Res. Grp., LLC v. J.M. Smucker Co*., 753 F.3d 790, 794 (8th Cir. 2014) ("Courts generally construe the attempt to exercise an option

strictly and require exact compliance because the optionee is free to exercise the option if he chooses, but an optionor is bound to perform if the option is properly exercised.").

Whereas the District claims that there is no predetermination because "any obligation on the part of the District is contingent upon its authorization through the FHWA' s ROD," (District Opp. at 25) the contrary is also true – the District loses the right to acquire important properties in the event that either (1) it failed to support the Tunnel expansion; (2) the ROD did not endorse the Tunnel Expansion; or (3) CSXT did not get all permits and approvals it needed to proceed with the tunnel expansion.

It would appear that the District has locked in it ability to acquire Shepherds Branch. In the December 21, 2012 agreement, the City Administrator committed to issue all necessary permits and approvals for the tunnel expansion project, (*supra*; Exhibit 2 at ¶ 6(b)). Additionally, a Supplemental EIS prepared for South Capitol Street (issued jointly by the U.S. Department of Transportation, FHWA, and DDOT) states "the Shepherds Branch right-of-way … is being acquired in Fiscal Year (FY) 2015 by DDOT from CSXT." Exhibit 17 at 2-33 (emphasis added).

CSXT argues that there was no predetermination because the agreements between CSXT and the District were only "standard planning agreements" designed to indicate the District's "general support for the project and its willingness to help with the permitting process if the Record of Decision approves a build alternative." CSXT Opp. at 28-29. DDOT's arguments mirror CSXT's position. DDOT Opposition at 18-25.[7] CSXT also argues that the agreements to

[7] The Federal Defendants argue – in the alternative – that "the agreements on which Plaintiff bases its predetermination argument fail to establish irreversible and irrevocable commitments to a particular NEPA outcome, even by DDOT." Fed. Opp. at 17. This conclusory statement – which the Federal Defendants' only argument on the predetermination issue, is entitled to no consideration at all because it is bereft of any analysis. *Herbert v. Architect of Capitol,* 839 F. Supp. 2d 284, 298 (D.D.C. 2012) (argument ignored where Defendant failed "to support its argument with any meaningful measure of factual or legal argument").

which Plaintiff has cited were merely conditional promises (promises to commit resources once the NEPA process has concluded) that cannot constitute predetermination. Both of these positions are wrong.

Nothing in the August 23, 2010 agreement (Exhibit 3) conditions DDOT's obligations on an endorsement in the EIS. CSXT's contention that Article III (F)'s provision that DDOT would seek "expedient assistance on the National Environmental Policy Act requirements for the Virginia Avenue Tunnel Expansion Project," somehow made all of the obligations in the August 23, 2010 agreement contingent on the outcome of the EIS or ROD is inaccurate. For instance, CSXT agreed to absorb the cost of removing a communication tower on DDOT property that interfered with the 11th Street ramp (associated with the 11th Street Bridge project) in reliance on all of the mutual obligations recited in the agreement. Likewise, CSXT paid $4.2 million to make adjustments to the 11th Street Bridge project that were required to accommodate the future Virginia Avenue Tunnel expansion. Had DDOT not pledged its support for the Tunnel Expansion, then CSXT would not have agreed to incur that cost, because all of the parties' obligations and promises were interdependent. *See* Exhibit 3, p. 2 ("Now Therefore, in consideration of the mutual promises contained herein, the Parties hereto agree as follows …").

CSXT also claims that the agreements do not illustrate the irreversible commitment on the part of the District because "the District of Columbia could always decline to issue the permits necessary to allow construction to begin." CSXT Opp. at 32. CSXT's argument is simply wrong. In the event that the District fails to issue the permits necessary for the Virginia Avenue Tunnel – a project to which the District promised its support – the District will lose its option to acquire the Shepherds Branch property. This is apparently a point on which plaintiff

and CSXT agree, as CSXT states in its Opposition (at 35): "[the Shepherds Branch option] is expressly made contingent on the outcome of the NEPA process."

Had DDOT failed to support the Virginia Avenue Tunnel expansion, the District would have been in breach of its obligations in the August 23, 2010 agreement. That breach would have jeopardized CSXT's agreements relating to the Virginia Avenue Tunnel, as well as the 11th Street Bridge project. To wit: CSXT could have walked away from its obligations to: (1) remove a communication tower that was located on DDOT property and that interfered with the proposed 11th Street ramp; (2) pay the $4.2 million for redesign and construction costs that DDOT incurred in order to make adjustments to the 11th Street Bridge Project; (3) the State-Railroad Agreement for the construction of Ramp A-1 of the 11th Street Bridge; (4) pay $100,000 in flagging services for the 11th Street project; (5) grant the District temporary easements (and negotiate terms of permanent easements) over the Parkside, Anacostia Pedestrian Walkway/Trail and Rhode Island Avenue Pedestrian/Bicycle Bridge; (6) negotiate with DDOT over DDOT's use and development of CSXT's Shepherd's Branch property; and (7) extend the Tunnel to 12th Street SE, at no cost to the District.

Additionally, had the EIS failed to endorse one of the build alternatives, and if DDOT fails to issue all permits required for CSXT to complete the Virginia Avenue Tunnel Expansion, then DDOT would lose the option to acquire Shepherds Branch. Moreover, CSXT would have had a claim against DDOT to recover the $4,171,000 that CSXT paid to DDOT in expectation that the Virginia Avenue Tunnel expansion project would proceed, as well as any costs associated with modifying the tunnel expansion plans to accommodate extending the tunnel to 12th Street. *See* Exhibit 16.

CSXT points to *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43 (D.C. Cir.

1999), for the proposition that an Agency may take substantial steps in support of a project without committing unlawful predetermination. *Wyoming Outdoor Council* is inapplicable here because it only addressed whether the plaintiff had standing to challenge a NEPA action – not whether predetermination had occurred. 165 F.3d at 49 ("we conclude that WOC has not established the irreversible and irretrievable commitment of resources necessary to establish ripeness.") (emphasis added).

CSXT also relies heavily on *Forest Guardians* for the proposition that preparatory action does not irrevocably commit the agency to a particular outcome. CSXT Opp. at 30. CSXT argues that if a grant agreement that the Fish and Wildlife Service entered into with The Peregrine Fund before the NEPA process was completed did not constitute predetermination, then the agreements in this case should not be considered evidence of predetermination either. *Id.* CSXT misreads *Forest Guardians*. In that case there was no predetermination because the grant funds were to be used for other purposes that would have been consistent with a negative NEPA outcome, such as "research [and] captive breeding." *Forest Guardians*, 611 F.3d at 718-19. Consequently, unlike the case here, FWS was not bound to a course of action that relied on the NEPA outcome.

This case is similar to several cases in this jurisdiction and elsewhere, in which courts have found predetermination or have acknowledged they would have found predetermination under similar circumstances.

In *Fund For Animals v. Norton,* 281 F. Supp. 2d 209, 229 (D.D.C. 2003) the District Court endorsed the view that taking action that "swings the balance decidedly in favor" of the proposed action is "impermissible under NEPA." *Id.* at 229 (relying on *Thomas v. Peterson*, 753 F.2d 754 (9th Cir.1985)). *Fund for Animals* also recognized that an agency would violate NEPA

by "essentially lock[ing] itself into a position which bound it to a certain course of action before it had completed its NEPA review." *Id.* (referring to *Fund* for *Animals v. Glickman*, Civil Action No. 99–245, Tr. of Hr'g on Mot. for T.R.O. at 61 (Feb. 12, 1999)).

In this case, as in the cases cited by *Fund for Animals*, the District had locked itself into supporting the Virginia Avenue Tunnel expansion, and then incurred contractual obligations and took specific steps in furtherance of the project. *Supra.*

In *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988), the Ninth Circuit found a NEPA violation where the agency had issued contracts to build timber roads in question in advance of the NEPA process. *Id.* at 718 ("In this case, the reconstruction contracts were awarded prior to preparation of [NEPA assessments were] prepared, [and] construction had already begun."). Here, DDOT entered into contracts with CSXT requiring it to support the Tunnel Expansion and made agreements with CSXT that depended on the NEPA process resulting in the approval of one of the tunnel expansion options, including the Right of Way agreements and the Shepherds Branch Option agreement.

Even *Forest Guardians*, the case on which CSXT relies, conceded that if the plaintiff "had been able to prove [the existence of a contract] firmly committing the FWS to the … outcome before its NEPA analysis, we … very likely would have [found a violation of NEPA.]" 611 F.3d at 718. Because the case at bar involves DDOT affirmatively agreeing to support the build alternative and entering into agreements that firmly committed DDOT to the build option, the *Forest Guardians* court would have found for the Plaintiff in this case.

In *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000),[8] the Ninth Circuit found an irreversible commitment in violation of NEPA because "NOAA entered into a contract with the

[8] The District Court in *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 229 (D.D.C. 2003) relied heavily on *Metcalf*.

Makah pursuant to which it committed to (1) making a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah and (2) participating in the management of the harvest" before the NEPA process was completed. A negative NEPA outcome might have concluded that the hunt should not be allowed, which would have put NOAA in breach of its agreement to petition the IWC for approval of the Makah's right to hunt the whale. *Id.* at 1144. The Ninth Circuit held that the "point of commitment to this proposal clearly had come and gone," because "NOAA and other agencies made the decision to support the Tribe's proposal in 1996, before the EA process began and without considering the environmental consequences thereof." *Metcalf*, 214 F.3d at 1144.

Neither DDOT nor the Federal Defendants have addressed *Metcalf* in their opposition briefs. CSXT attempts to distinguish *Metcalf* and *Fund For Animals* by claiming that – in both those cases – the government had already issued permits before the NEPA process had concluded. CSXT Opp. at 32. That is simply not the case. As described immediately above, no permit was issued in *Metcalf.* Just as in *Metcalf,* in this case DDOT signed agreements with CSXT guaranteeing that it would support the Virginia Avenue Tunnel expansion and then worked to support the Virginia Avenue Tunnel expansion.

Lastly, CSXT conceded – at the January 26, 2015 hearing on CSXT's Motion to Quash Plaintiff's Subpoena – that the engineering firms that conducted certain studies on which the Environmental Impact Statement was premised are also under contract to perform the engineering and construction of the tunnel expansion project. *See* Exhibit 19, Transcript from Hearing at 13 ("there were some entities that did work for the primary contractor that assisted with the EIS preparation. These entities, again, in kind of more of a subcontracting role as it were, are involved in the actual construction effort."). It is elementary that these engineering firms

stood to gain from the tunnel expansion project proceeding, and that there was a risk that the studies underlying the EIS were biased in favor of the tunnel expansion.

The EIS does not clearly identify this connection or potential bias, and it therefore failed to advise the public so that the matter could be explored in the public notice and comment sessions that accompanied the EIS process. Additionally, there is nothing in the FEIS or FHWA's Record of Decision that indicates that FHWA conducted any type of investigation to ensure that the portions of the EIS that were prepared by the interested engineering and construction firms were reliable. Consequently, the EIS runs afoul of *Nat'l Wildlife Fed'n v. F.E.R.C.*, 912 F.2d 1471, 1485 (D.C. Cir. 1990). In that case, the D.C. Circuit considered a challenge to the EIS based on a similar charge of bias (the engineering firm owned property that would have increased in value if the project proceeded). The D.C. Circuit relied on the fact that "The Commission noted that it was aware of the inherent bias in party-submitted information, but explained that it had independently confirmed the reasonableness of the analyses of the capacities of the project and the estimated construction costs for the project and alternatives." *Id.* at 1485. In this case, however, there was no clear disclosure that Parsons and Clark Construction had interests in the project proceeding,[9] and there is no indication in the ROD that FHWA independently verified the reliability of the reports on which Parsons and Clark contributed in light of that potential bias.

[9] Instead, the ROD claimed that the engineering firms that were working on the tunnel expansion project were not involved in the EIS. See ROD at C-97 ("Parsons Brinckerhoff, the lead NEPA consultant, is not the same company as or is affiliated with Parsons, the company that formed a joint venture with Clark Construction hired by the project sponsor to prepare engineering designs for the Project. Parsons Brinckerhoff has no financial stake in the outcome of the NEPA process."). This statement failed to acknowledge that the joint venture formed by Parsons and Clark Construction performed studies used in the EIS and were also contracted to perform the tunnel expansion. *See* e.g. Plaintiff's P&A in Support at 3; Exhibit 13, Transcript at 13.

In this case the District irreversibly committed itself and its resources to the Tunnel Expansion project before the NEPA process was concluded. Consequently, the Plaintiff has either shown that NEPA *has been* violated or that it will be ultimately prevail on the merits.

2. Segmentation

The District and Federal Defendants intimate that this project was excepted from the rule prohibiting segmentation, which prevents agencies from evading their responsibilities under NEPA "by artificially dividing a major federal action into smaller components, each without significant impact." *Jackson Cnty., N. Carolina v. F.E.R.C.*, 589 F.3d 1284, 1290 (D.C. Cir. 2009). District Opp. at 27; Fed Opp. at 19.

The Federal Defendants contend that the "logical termini" question is not germane in this case and that the independent utility examination is more appropriate in transportation projects such as this one. Fed Opp. at 19 (relying on *Coal. On Sensible Transportation v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987)) ("*COST*"). But *COST* was a highway case, in which the D.C. Circuit held "in the context of a highway within a single metropolitan area-as opposed to projects joining major cities-the "logical terminus" criterion is unusually elusive." The tunnel at issue here is part of a rail corridor, not a web of intersecting roads and on and off ramps. Consequently, this case is more akin to a pipeline case, because it does not involve numerous interconnected on and off points as would be the case with a highway or street project.

Federal Defendants contend that this case is not similar to *Delaware Riverkeeper Network*, on which Plaintiff has relied, because there are aspects of the project that have independent utility, including replacing the single track with a dual track. Fed Opp.at 19-21. CSXT and the District add that there is a benefit to replacing the earth floor with a concrete one. CSXT Opp. at 37-38; District Opp. at 30-31.

The Defendants recharacterize the scope of this project to avoid the Plaintiff's segmentation argument. *See* Fed Opp. at 20 (claiming that Plaintiff's argument that double stacking was a primary purpose of the project is a "false premise"). As this project was explained to the public and other agencies involved, a primary purpose of the tunnel expansion project was to increase the clearance of the tunnel to permit double-stacked freight rail. But increasing the height of the tunnel to permit double-stack clearances is only useful if all of the other impediments to double-stacked rail in the region are also removed.

Double stacking was identified as a major reason for the project on over two dozen instances in the FEIS.[10] FHWA's ROD, additionally makes clear that it is the combination of dual rails and double-stacking that removes the current bottleneck at the Virginia Avenue Tunnel. Exhibit 20 at 6 ("Virginia Avenue Tunnel would also remain a bottleneck in the network with its single-track configuration, and along with the inability to accommodate double-stack intermodal container trains").

Agencies are permitted to change the scope or objectives explained in a Draft EIS in order to respond to comments from the public or other agencies. *City of Grapevine, Tex. v. Dep't of Transp.* 17 F.3d 1502, 1507 (D.C. Cir. 1994) ("The very purpose of a DEIS is to elicit suggestions for change"). Plaintiff is unaware, however, of any precedent that permits an agency to change the objectives of a project after the Final Environmental Impact Statement and Record of Decision are issued. *See Fund For Animals,* 281 F. Supp. 2d at 232 (court refused to consider

[10] The benefit of increased capacity resulting from double stacking was mentioned in 17 places in the FEIS. Exhibits 21 (Exec Summary), 22 (Ch. 2), 23 (Ch. 3), 24 (Ch. 5); 25 (Ch. 6) at S-3, S-4, S-34, 2-2, 2-3, 2-6, 3-4, 3-42, 3-43, 3-62, 3-63, 3-64, 5-82, 5-99, 5-106, 6-3, and 6-4. The FEIS references that possibility that the overall number of trains required to use the tunnel on a daily basis might be reduced if the trains were double-stacked, on seven different occasions. Exhibit 21 (S-21, S-34), Exhibit 26 (1-3), Exhibit 24 (5-5, 5-82), and Exhibit 25 (6-3, 6-4). The FEIS also mentions that double-stack trains are standard practice on three occasions (Exhibit 21 (S-3), Exhibit 22 (2-2), Exhibit 25 (6-3), and adds fuel efficiency. Exhibit 24 (5-99).

new arguments presented for the first time outside of the EIS); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 997 (D.D.C. 1983) ("Any substantial information pertinent to the cost-benefit analysis or the analysis of alternatives found in the administrative record, but not in the environmental impact statement, would render the impact statement inadequate under NEPA").

It is, moreover, a well-recognized tenet of Administrative Procedures Act law that "Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003); *See also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("agency must provide reasoned explanation for [change in policy] … An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.") (internal citations omitted).

An Environmental Impact Statement has three primary goals: (1) "Ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" (2) "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision;" and (3) "insur[ing] the integrity of the administrative process." *Audubon Naturalist Soc'y of The Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 662 (D. Md. 2007) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The purpose and need statement is a key part of the Environmental Impact Statement because it "certainly affects the possibility of alternatives for that particular project." 524 F. Supp. 2d at 663.

The entire cost/benefit analysis would change if double stacking rail cars were to be dropped from the goal of the project. Whether the Tunnel Expansion would have been approved only on the bases of structural improvements and adding a second track alone was never considered. Thus based on all of the foregoing, if the only purposes of the Tunnel expansion – as CSXT and the Federal Defendants now contend – was to make structural improvements and add a second track, then the FEIS should be conducted again and the statement of purpose and need should be limited to only that work.

CSXT and the District add to their argument on segmentation that Plaintiff has not shown that the Tunnel forecloses consideration of alternatives or that it irretrievably commits federal or District funds for closely related projects. DDOT Opp. at 31. But Plaintiff was not required to show that none of the four segmentation factors existed. Even if Plaintiff was required to show that the Tunnel expansion project irretrievably commits federal or District funds for closely related projects, the Plaintiff can show that the Virginia Avenue Tunnel did have implications for other projects. These include, at a minimum, the 11th Street Bridge, Phase II of which had to be redesigned in order to accommodate the expanded tunnels (See Exhibit 3, August 23, 2010 MOA, Exhibit 8, Skanska Facchina Change Order, and Exhibit 27, 11th Street Bridge Project Description) and extending the tunnel from its current footprint all the way to 12th Street. *See* Exhibit 13, revised Public Space Right of Way Permit.

Additionally, the study to assess the capacity of the Long Bridge, which is owned by CSXT and is the only rail crossing within 70 miles, is currently studying "short-term needs and long-term capacity improvements, identify and analyze alternatives that meet the short-term and long-term multi-modal needs." *See* Exhibit 28. Expanding the Virginia Avenue Tunnels in advance of the completion of the Long Bridge Study forecloses options that may have improved

passenger rail capacity for Amtrak and VRE trains. *See generally,* http://longbridgeproject.com. The Metropolitan Washington Council of Governments' Regional Transportation Priorities Plan (RTPP) adopted on January 15, 2014 underscores this point: "[T]he Long Bridge's two tracks, which is nearing its practical capacity during rush hours. The bridge's private owner, CSX, maintains the right to give priority to freight traffic over passenger traffic, limiting the scheduling … of passenger trains using the facility. This issue will only get worse as demand for freight and passenger traffic increase in coming decades." *See* Exhibit 29, RTTP, p. 29.

The Federal Defendants argue that Plaintiff has not identified "any larger project with potentially significant environment impacts." Fed Opp. at 21. This position is confounding on more than one level. Clearly, the Plaintiff has identified a larger project. In fact, there is no dispute that the Virginia Avenue Tunnel is merely one part of CSXT's National Gateway Initiative. *See* Exhibit 4. CSXT does not dispute Plaintiff's point that there were 60 other impediments to carrying double-stack freight in this region. *See* CSXT Opp. at 37. The fact that the FEIS labels the other impediments as "minor" in nature (Fed Opp. at 21, fn 17) is certainly not dispositive on that point. The Federal Defendants have certainly not introduced evidence that none of the other projects involve environmental impacts.

Lastly, the Federal Defendants indicate that addressing structural deficiencies is another aspect of the project that has independent utility, and the District claims that replacing the aging tunnel had independent utility because the tunnel had "reached the end of its useful life."[11] District Opp. at 31 ("replacement, for safety purposes, of a bridge [*sic*] that has reached the end

[11] CSXT refers to the benefit of replacing the existing earth floor with a concrete floor, which would prevent flooding in the tunnel. CSXT does not bother to explain why replacing the dirt floor with the concrete floor is required to be paired with adding a second track and increasing the clearance so that double stacked rail could be transported through the tunnel. If the project was billed as simply replacing the earth floor with concrete floor, then this dispute would be changed in character entirely.

of its useful life, has independent utility"). But nothing in the FEIS indicates that the tunnel has reached the end of its useful life. Indeed the opposite is the case, as the FEIS indicates that the tunnel could operate well into the foreseeable future, with only an undefined and speculative risk of structural problems that could exhibit "over the next few decades". *See* FEIS, Exhibit 22 at 2-4 ("the overall structure is in relatively good shape"); *and see Id.* 2-5 ("the tunnel is in no danger of collapsing in part due to tunnel reinforcements and reconstruction made in late 1985 and early 1986 … Nevertheless, even with CSX's active maintenance and inspection program, a major structural deficiency could materialize over the next few decades").

3. Cumulative Impacts

Plaintiff's position is that the cumulative impacts analysis was insufficient because the EIS focuses almost entirely on the impacts that will occur during the construction period, and it does not adequately address the impacts that will result from actually operating the two new, larger, rail tracks, with double-stacked freight operating at speeds of up to 40 miles per hour.

Hemmed in as they are by the Record of Decision, the Federal Defendants conceded that the cumulative effects analysis was limited to the construction phase of the project: "The direct and cumulative impacts from the Project will occur during the construction period." Fed Opp. at 12 Relying on ROD 9. The Federal Defendants justified the limited scope of the cumulative impact analysis on the basis that "the cumulative impacts analysis in the FEIS explain[ed] that the 'vast majority of the impacts' from the build alternatives would occur during the construction period, and therefore the cumulative impacts analysis primarily focuses on the construction period." Fed Opp. at 23.

CSXT and the District disagree with the Federal Defendants' position. Both claim that the FEIS did consider the post-construction impacts in numerous different sections of the FEIS.

CSXT Opp. at 38; DDOT Opp. at 35-36. Neither CSXT nor DDOT address the specifics of the Plaintiff's arguments (Pl's P&A at 23-25), which is that the Final Environmental Impact Statement fails to discuss, among other things, the "the impacts that are expected in that area from the proposed project." *See Delaware Riverkeeper Network*, 753 F.3d at 1319 ("A meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.").

The Federal Defendants claim that it was acceptable to limit the focus on the construction impacts because the "FEIS analysis of post-construction impacts adequately support[ed]" doing so. But this highlights the Plaintiff's point. The FEIS post-construction analysis failed to consider the impact of running double-stacked freight through the tunnel, in both directions, at significantly greater speed. The post-construction analysis also failed to factor in the fact that the only reason that CSXT is not transporting explosive, toxic by inhalation or poisonous by inhalation materials through the District is by a voluntary agreement on the part of CSXT. *See* Exhibit 30 CSXT P&A in Support of Prelim. Injunction in *Williams* at 3.

Indeed, in its 2005 litigation with the District, CSXT indicated that it will not re-route the most hazardous materials around the District in perpetuity. "Total rerouting in perpetuity of these hazardous materials will impose serious operational burdens on CSXT and will almost certainly be counter-productive." Exhibit 30 at 3. *See also* Exhibit 31 (CSXT Reply Brief) at 2-3, indicating that CSXT views its agreement to re-route extremely hazardous materials around

the Virginia Avenue Tunnel as temporary ("CSXT has … voluntarily reroute[ed] when necessary and appropriate, based on specific information and conditions, for limited time periods."). The fact that CSXT clearly anticipates transporting the most dangerous of hazardous materials through the Tunnel again was never considered in the EIS process.

The Federal Defendants contend that there will be no increase in the volume of freight passing through the tunnel; instead, they assert that "post-construction the FEIS notes the Build Alternatives will allow CSX to move the same amount of freight with fewer trains." Fed Opp. at 24 (emphasis added). But, in the very next section, on the "Alternative Analysis" the Federal Defendants concede "FHWA's purpose and need included addressing the structural and operational deficiencies of the century-old Tunnel, accommodating expected increases in freight transportation". Fed Opp. at 27 (emphasis added). The Federal Defendants cannot have it both ways. They cannot argue that there will be no increase in freight traffic through the tunnel to justify their failure to consider the environmental impacts associated with carrying a greatly increased volume of freight at greatly increased speed (under the cumulative impacts analysis), while taking the opposite position to excuse the refusal to consider reasonable alternatives.

This fluid approach to justifying the FEIS by cherry-picking those elements that support its argument while ignoring those that cut against it are among the hallmarks of arbitrary and capricious decisionmaking. *Metro. Life Ins. Co. v. Conger*, 474 F.3d 258, 266 (6th Cir. 2007) (it was arbitrary and capricious to cherry-pick evidence in order to ensure the preferred result); *Columbia Broad. Sys., Inc. v. F.C.C.*, 454 F.2d 1018, 1035 (D.C. Cir. 1971) ("succession of factual distortions and shifting justifications" rendered agency decision arbitrary and capricious); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 799 (D.C. Cir. 1984) ("It would be arbitrary and capricious for HHS to bring varying interpretations of the statute to bear, depending

upon whether the result helps or hurts").

Moreover, if – as one of the federal Defendants positions portrays – the purpose of expanding the Tunnel was only to move the same volume of freight through the tunnel on fewer trains, and not to increase the volume of freight through the tunnel at all, then the EIS was undertaken under false premises. The clear underpinning of the NEPA process was that this expansion was necessary in order for CSX to have the capacity to ship the increased freight that will be shipped to eastern seaboard ports after the Panama Canal expansion is completed. *See, inter alia,* Exhibit 21, FEIS at S-3 (citing need to "Accommodate expected increases in freight transportation that, in part, would stem from the Panama Canal expansion scheduled for 2015). If the entire thesis behind expanding the tunnel is changed, then the EIS must be performed again. The EIS should now ask the question: Is expanding the tunnel preferable to taking no action (with the exception of performing significant maintenance) when the goal of expanding the tunnel is to convey the exact same volume of freight through the tunnel.

4. Analysis of Alternatives

The discussion of alternatives is the "heart" of the NEPA process and is intended to "provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The alternatives analysis should "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g). "The test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences." *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977).

Even though the EIS is only required to "briefly discuss the reasons" why rejected

possibilities were not reasonable (see 40 C.F.R. § 1502.14(a)), some discussion is necessary. For example, in *Tongass Conservation Soc. v. Cheney*, 924 F.2d 1137, 1142 (D.C. Cir. 1991), the D.C. Circuit found an EIS sufficient, with regard to the explanation of dismissed concepts, where the agency explained the "criteria and procedures" by which the potential alternatives were screened and described the studies that eliminated certain alternatives from further consideration. Similarly, in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (1991), the D.C. Circuit found the explanation for rejecting alternatives to developing a cargo hub in Toledo, Ohio, including an explanation of the number of jobs the cargo hub was expected to create, the payroll associated with those jobs, the addition of $68 million to the local economy after three years of operation, and forecasts for attracting other companies to Toledo. *Busey*, 938 F.2d at 197-98.

This EIS failed to analyze the project alternatives in accordance with the criteria defined in the Draft and Final EIS. The EIS failed simply failed to consider important aspects of the project and their implications. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (Agency action is arbitrary and capricious if it "failed to consider an important aspect of the problem."); *and see New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 704 (10th Cir. 2009) (Applying same standard to agency's actions in furtherance of NEPA).

a. Inadequate Discussion of Costs

The criterion on which CSXT and the District principally rely was Criterion 8: "The concept has a comparatively low cost." See Exhibit 23, FEIS at 3-42. *See* District Opp. at 35; CSXT makes a similar argument. *See* CSXT Opp. at 42 ("rerouting options [were dropped] because … "[e]ach would involve costs of extraordinary magnitude.").

But the description of the "cost" criterion provides no basis on which to evaluate the alternatives. There is no indication of whether "comparatively low cost" means: (1) a low cost compared to the revenues that CSXT will generate as a result of the ability to transport double stacked rail without the single-track bottleneck (either via a deep-bore tunnel, rerouting or tunnel expansion); (2) a low cost of construction compared to the cost of ongoing maintenance, monitoring and security; (3) a low cost of construction versus the costs associated with rail incidents or disasters in a heavily populated area adjacent to numerous Federal Agency headquarters, Congressional Offices and the centers of Federal and District Government (i.e. the Capitol and the Wilson Building); or (4) simply a lower cost of construction without factoring any other costs or benefits. The failure to explain the criteria against which alternatives were judged violated NEPA. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87, 105 (1983) (Courts reviewing the sufficiency of an agency's EIS must assess whether the agency's decision was "within the bounds of reasoned decisionmaking," and determine whether the agency was arbitrary and capricious in "consider[ing] the relevant factors and articulated a rational connection between the facts found and the choice made.").

CSXT and the District cannot simply claim that the other alternatives would have been too expensive and then close the book. The EIS should have included an analysis of why the re-routing or deep-bore alternatives were too expensive in this case.

The District of Columbia Council has made findings that "a terrorist attack on a large-quantity hazardous material shipment near the United States Capitol ("Capitol") would be expected to cause tens of thousands of deaths and a catastrophic economic impact of $5 billion or more." D.C. Code § 8-1421. In 2005, when the Mayor of the District of Columbia was litigating against CSXT, the District asserted that "A terrorist attack on a train containing hazardous

materials in the area of the Capitol would be catastrophic" and endorsed testimony before the D.C. Council that "such an attack could cause tens of thousands of deaths and economic impacts of upwards of $5 billion." Exhibit 32 at 10.

The EIS never explained how or why the costs of re-routing were prohibitive in light of the catastrophic costs associated with a significant rail disaster. There is no discussion of the additional revenue and profits that CSXT stands to gain, over the life of the expanded tunnels, by upgrading the tunnel to a double-stack, two-rail configuration. The failure to compare the cost of re-routing versus the economic gains to CSXT is another instance in which the EIS fails to consider important aspects of the problem. *Motor Vehicle Mfrs. Ass'n* 463 U.S. at 43.

Moreover, while DDOT and CSXT claim that the re-routing or deep-bore alternatives would have been prohibitively expensive, they both fail to recognize that the very study (the 2007 Railroad Realignment Feasibility Study (RRFS) issued by the National Capital Planning Commission) on which the EIS relies for its conclusion that re-routing would be prohibitively expensive, actually concluded that the benefits of re-routing far outweighed the associated costs. *See* Pl's P&A at 31-34. Because DDOT co-managed the RRFS and endorsed the cost-benefit analysis therein, DDOT cannot take the opposite position in the EIS process without providing a reasoned explanation for the change in position. *Fox Television Stations, Inc*., 556 U.S. at 515 ("agency must provide reasoned explanation for [change in policy] … An agency may not, for example, depart from a prior policy *sub silentio* … And of course the agency must show that there are good reasons for the new policy.") (internal citations omitted); *Ramaprakash*, 346 F.3d at 1124-25 (D.C. Cir. 2003) (agency must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

The Federal Defendants claim that the lack of substantive analysis given to the re-routing

alternatives was justified because the alternatives were not reasonable in relation to the goals of the proposed action. But the only specific dispute that the Federal Defendants have identified is that the tunnel would still need to be serviceable for deliveries to CSXT's clients in the District of Columbia. Fed Opp. at 28-29. CSXT echoed this argument as well. CSXT Opp. at 42

Certainly, CSXT and the Federal Defendants cannot possibly be making the assertion that CSXT would need to expand and enlarge the Virginia Avenue Tunnel to service its customers in the District, such that re-routing would not obviate the need to expand and enlarge the Tunnel. Indeed, the EIS fails to explain what CSXT's local freight delivery needs are at all. There is no indication or discussion in the FEIS explaining why the Tunnel – in its existing state – would be inadequate to accommodate CSXT's local freight rail needs, or what work would be needed in order to ensure the tunnel could continue to handle that local freight traffic safely. Indeed, the FEIS states that the tunnel will remain serviceable – with proper maintenance – for decades to come. *See* FEIS, Exhibit 22 at 2-4 to 2-5.

By failing to address the Plaintiff's substantive arguments on the alternatives analysis, the Federal Defendants have conceded the arguments. [12]

CSXT's approach to the alternatives analysis is to attack the Plaintiff as a NIMBY organization seeking only to re-locate the project to someone else's backyard. Plaintiff wishes to be clear on this point: Plaintiff will accept the result of a lawful NEPA process. This one, unfortunately, was not lawful.

CSXT claims that NEPA does not require a thorough analysis of alternatives because of the limited federal involvement in the Virginia Avenue Tunnel expansion project. *See* CSXT

[12] *See Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F.Supp.2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded."); *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 238 F.Supp.2d 174, 178 (D.D.C. 2002).

Brief at 41 ("The Committee errs in arguing that NEPA *required* the agency to treat this relatively minuscule federal approval as an opportunity for a federal remapping of the entire region's rail network."). CSXT cites to no authority for the proposition that NEPA's provisions did not apply – in full force – to the Tunnel Expansion project.

Pressing this argument further, CSXT retorts that the extremely limited nature of the alternative analysis was justified because of how the purpose and need of the project was defined in the EIS process. CSXT implores the Court to defer to its preference for the tunnel expansion project – over all others – and to give great deference to the Agency's decision to limit the alternative analysis only to alternatives the hewed to CSXT's desires. *See* CSXT Opp. at 41-42.

It is significant that while CSXT insists that the Court give great deference to the stated goals of the project, CSXT's brief does not discuss the project criteria that were actually used to eliminate the re-routing options. CSXT claims that the project goals were as follows:

> The project is needed to [1] address the structural deficiencies in an aging tunnel, [2] to accommodate expected increases in demand for freight rail, and [3] to ensure continued and uninterrupted freight service during tunnel reconstruction.

CSXT Opposition at 41-42.

The criteria against which alternatives were to be compared, as listed in the EIS, however, were as follows:

> **Criterion 1**: The concept, upon completion, will address the deficiencies of the Virginia Avenue Tunnel.
>
> **Criterion 2**: The concept, upon completion, will provide the necessary improvements for operating double-stack intermodal containers and have two railroad tracks for the efficient flow of commercial rail freight through the Washington Metropolitan Area.
>
> **Criterion 3**: The concept will avoid major impacts to the structures, traffic or access to or from I-695.
>
> **Criterion 4**: The concept must allow for the maintenance of traffic across Virginia Avenue and along adjacent streets throughout the duration of construction.
>
> **Criterion 5**: The concept will maintain interstate rail commerce without a

substantial negative impact to the level of service during construction.

Criterion 6: The concept will be implemented in a time frame that accommodates the near term anticipated increase in freight traffic.

Criterion 7: The concept has a comparatively reasonable duration of construction in the vicinity of the existing tunnel.

Criterion 8: The concept has a comparatively low cost

In other words, CSXT has attempted to alter the alternatives analysis to examine only three of the 8 criteria listed in the EIS. There is no question, however, that "'an agency's choice of "reasonable alternatives" [must be considered] in light of the objectives of the federal action." *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). Thus any attempt to assess the alternatives based on an abridged set of the criteria identified in the EIS would be unlawful.

b. Inadequate Considerations of Costs of Rail Incidents at Virginia Avenue Tunnel

The EIS fails to compare the costs of re-routing with the costs associated with a rail disaster in the heart of Washington D.C.

In the context of the alternatives analysis, the failure to consider the reasonably foreseeable costs, in terms of life, property, and damage to the local and national economy resulting from a rail disaster at the Virginia Avenue tunnel renders the EIS legally deficient under NEPA. *City of Alexandria,* 198 F.3d at 869; *Warm Springs Dam Task Force*, 565 F.2d at 552 (The test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences."); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *New Mexico ex rel. Richardson*, 565 F.3d at 704.

Rail incidents involving explosions, fire, hazardous materials and evacuations are an ordinary part of the business of operating a railroad. In the last two years, CSXT has had at least two large rail disasters including combustion and explosion of hazardous materials. *See* NBC articles, Exhibit 33. CSXT trains also derailed in the Virginia Avenue Tunnel in 2009. See

Exhibit 34. Additionally, in a 2007 derailment, six CSXT cars dumped their cargo of coal into the Anacostia River when the operator failed to secure the brakes on the 89-car train. *See* Exhibit 35. The NTSB has investigated numerous derailments or collisions involving CSXT trains and/or rail lines. *See* Exhibit 36.

Additionally, the following table compiles reported incidents involving CSXT, according to statistics compiled by the Federal Railroad Administration Office of Safety Analysis. Abridged versions of the excel spreadsheets downloaded from the public access portal (http://safetydata.fra.dot.gov/officeofsafety/publicsite/on_the_fly_download.aspx) are included as Exhibit 37

Year	Total Incidents Reported	Incidents involving Trains carrying Hazardous Materials	Incidents involving damage to, derailment, or release of Hazardous Materials	Incidents requiring evacuations due to the release of hazardous materials (Column Z)
2014	280	78	36	3
2013	281	92	31	4
2012	307	77	24	2
2011	347	113	46	5
2010	358	102	37	0
2009	348	105	42	4
2008	427	127	42	1
2007	455	121	53	17
2006	524	139	58	6
2005	623	157	54	0

See Also Exhibit 38, FRA Guide at 118 (defining pertinent columns pertaining to Hazardous Materials).[13]

Despite the frequency of rail incidents involving explosions and fire, hazardous materials,

[13] It is important to note that the foregoing table lists only incidents that involved cars carrying hazardous materials. It does not indicate the number of hazardous material cars were involved. For example, in 2014, alone, there were 1216 individual cars carrying hazardous materials and 111 Hazmat cars that were damaged, derailed or released their hazardous materials.

and evacuations, the EIS did not include any analysis of safety or environmental consequences among the alternative proposals, including the deep tunnel or re-routing options. Nor did the EIS include any analysis of the costs associated with what appears to be reasonably likely (perhaps inevitable) rail incidents at the Virginia Avenue Tunnel in the event the expansion proceeds compared to costs associated with re-routing the freight around the District.

Despite the complete absence of any discussion or acknowledgement of the risk of environmental impacts resulting from rail disasters, the Federal Defendants insist "There will be no significant additional adverse environmental impacts from the Project, with the exception that some mature trees will be replaced with younger trees: the streetscape will be improved and freight operations will return to pre-construction levels (but with improved service and efficiency)." Fed Opp. at 12, relying on ROD 9.

Consequently, the alternatives analysis failed to consider the environmental impacts of each proposed alternative, in violation of NEPA. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)(Courts reviewing the sufficiency of an agency's EIS must assess whether the agency's decision was "within the bounds of reasoned decisionmaking," and determine whether the agency was arbitrary and capricious in "consider[ing] the relevant factors and articulated a rational connection between the facts found and the choice made."). *Tongass Conservation* Soc, 924 F.2d at 1140 (reviewing court should "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to . . . make a reasoned decision." (internal citations omitted).

c. Rejection of Alternatives Due to Time Constraints

The EIS asserts that construction duration estimates were compared for all 12 alternatives

and "the concepts with the shorter construction periods within the Virginia Avenue SE corridor satisfy Criterion 7." Exhibit 23 at 3-63. This claim was inaccurate, as the duration discussion and tables does not include the estimated duration of the re-routing alternatives. *See* Exhibit 23, FEIS Section 3.5.6 and table 3-4, FEIS at 3-36 to 3-37. Pl. P&A at 30-31.

With respect to Criterion 6 (concept implemented in a time frame that accommodates the near term anticipated in crease in freight traffic, *See* Exhibit 23, FEIS at. 3-42), the FEIS claimed that CSXT "requires that double-stack intermodal container train operations be available through the Washington Metropolitan Area by 2015". This criterion was unachievable, and it appears to have been offered as a pretext to justify eliminating the re-routing options.

There are no circumstances under which the tunnel expansion project could have been completed in 2015. To wit: The FEIS indicates that construction was not slated to start until the end of 2014 or beginning of 2015 (*See* Exhibit 24 at 5-85), and CSXT estimated that active construction on the tunnel expansion project would last up to 42 months under the preferred alternative. Measured from the date the Final EIS was issued, the build alternative would not be completed until 2019, and that is without factoring the time required to attain any outstanding approvals and permits. *See* Exhibit 21 at S-27 and S-32. Consequently, the 2015 deadline unnecessarily disqualified other alternatives that may have taken longer to effectuate, including re-routing. Neither Defendants nor CSXT have addressed this point, which was made in the Motion for Preliminary Injunction. P&A at 30-31.

5. Failure to Consider Reasonably Foreseeable Impacts

a Risk of Attack or Incident

The EIS generally fails to discuss the increased threat of a rail incident (including spills, derailments, terrorist attacks, or criminal conduct or mischief). The failure to discuss this risk is

particularly striking in light of the fact that DDOT co-managed the National Capitol Planning Commission's 2007 Railroad Realignment Feasibility Study (RRFS), which cited the risk of a freight rail disaster involving the Virginia Avenue Tunnel as the first justification for re-routing freight rail outside of the District. *See* Exhibit 39, RRFS Section 1, p. 6. The opening page of the study explained:

> The line's location raises security concerns because railroads carry hazardous materials. … [H]azardous materials on this rail line would be a tempting target for attack because the line is in the Monumental Core. An attack here could have dramatic effects:
>
> - Significant loss of life. An attack would jeopardize the lives of many federal employees, elected officials, and nearby residents—more than 100,000 federal employees work within a half-mile of the line, and more than 54,000 people live in this same area within Washington, DC.
>
> - Large economic losses. An attack could damage not only the rail line but also adjacent government offices and public facilities. Crippling the rail line would inhibit regional commerce, and wrecking buildings would interfere with the operation of government.
>
> - Damage to national iconic structures. An attack would strike at Washington's Monumental Core, the symbolic center of the nation's governance.

See Exhibit 39, RRFS Section 1, p. 1

For its part, CSXT acknowledges that the FEIS failed to address the foreseeable risks of a rail disaster or terrorist attack, but insists that the FEIS was not required to take into consideration such potential impacts. CSXT Opp. at 40 ("the EIS was not required to analyze the potential "impact" of a derailment involving hazardous materials.").

Clearly the increased risk of a major rail disaster, and the increased scope and extent of such a disaster (considering larger volumes and speeds) were among the things that policy makers should have considered before approving the tunnel expansion project. "In an EIS, the agency must take a 'hard look' at the environmental consequences before taking a major action."

Baltimore Gas & Elec. Co., 462 U.S. at 97, 103 S.Ct. 2246 (1983) (citations omitted)." *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 72 (D.D.C. 2012) ("A central purpose of NEPA's requirements is for the agency to consider environmental impacts before approving a project."). Indeed, CSXT acknowledged the catastrophic risk of a rail incident at the Virginia Avenue Tunnel, in the 2005 litigation with the District – that it does not "minimize the potential risks of terrorist acts against railroad cars carrying hazardous materials." Exhibit 31, CSXT Reply Brief in 05-338 at 2. *See CSX Transp., Inc. v. Williams,* 2005 WL 902130, at *29 (D.D.C. Apr. 18, 2005) rev'd, 406 F.3d 667 (D.C. Cir. 2005) ("no party disputes the fact that a terrorist attack on a train carrying hazardous materials is a real threat that could cost tens of thousands of lives and billions of dollars in costs and damages.").

It is well settled that the Court's analysis, under the Administrative Procedures Act Standard, focuses on "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment" (Fed Opp. at 12, relying on *Theodore Roosevelt Conservation*, 616 F.3d at 503). Because the EIS did not consider the risk of serious rail accident or terrorist attack, the FEIS and ROD should be declared unlawfully arbitrary and capricious.

b. Increased Speed and Volume

Rather than argue that there is no inherent risk in freight rail trains traveling at increased speeds through the expanded tunnels, the Federal Defendants contend that there is no support in the record for the contention that trains will travel through the new tunnels with increased volumes or speed after the Tunnel Expansion project is complete. Fed Opp. at 29-30. It is apparent from these comments that the Federal Defendants failed to recognize and consider the increased train speeds and freight volume expected to travel through the Tunnels.

Currently, trains can travel no faster than 15 miles per hour through the Virginia Avenue Tunnel. *See* Exhibit 22, FEIS at 2-4. After the expansion project is complete, trains will travel at or near 40 mph through the tunnel. *See* Exhibit 40, FEIS Appendix F, at 5-3 ("however, trains in the proposed tunnel would be traveling at a maximum speed of 40 mph.").[14] Indeed, even during the construction period trains will be permitted to travel at 25 mph on the temporary track – an increase of nearly double the existing speed of 15 mph. Exhibit 41, Appendix L at L-365 (Response to Comment 61-11).

The failure of the FEIS to consider the increased speed at which trains will be operating in the tunnel reveals the Federal Defendants' decision to endorse the FEIS in the ROD to have been arbitrary and capricious, in violation of the Administrative Procedures Act. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 *New Mexico ex rel. Richardson*, 565 F.3d at 704.

Similarly, the Plaintiff's argument that the tunnel will permit CSXT to carry up to four times the freight it currently handles is drawn directly from the FEIS: "The Project will transform the tunnel into a two-track configuration and provide the necessary vertical clearance (minimum 21 feet) to allow double-stack intermodal container freight train operations. This will allow more efficient freight movement, especially in light of expected increases in freight traffic." FEIS Executive Summary, Exhibit 21 at S-3. Whether it was accurate that the volume of freight would reach 4 times the current rate is not relevant. The point is that the EIS failed to take the increased volume into consideration at all. *See* Fed. Opp. at 24 ("Instead, post-construction the

[14] *And See* Appendix L, Exhibit 41 at L-80 ("vibration modeling was based on the design speed of the new tunnel, which will be 40 mph"); Appendix F, Exhibit 40, at ES 3 ("The proposed maximum operating train speed for the new tunnels of 40 mph was used."); Exhibit 22, FEIS at 2-1 ("For a mainline freight rail line, the current industry standard for this type of transportation infrastructure is at least two railroad tracks (to allow for simultaneous two-way traffic) with a minimum operating speed of 40 mph … [T]he rail route through the Southwest and Southeast areas of DC is an integral part of CSX's mainline freight rail network..") (emphasis added)."

FEIS notes "the Build Alternatives will allow CSX to move the same amount of freight with fewer trains.") (Citing the FEIS at 5-82).

Consistent with the Plaintiff's characterization, the FEIS describes the expected growth intermodal freight volume as "substantial." *See* FEIS, Exhibit 24 at 5-82 ("it is generally accepted in the freight transportation industry that the opening of the expanded Panama Canal in 2015 would lead to a substantial growth in container traffic demand along the east coast of the U.S.") (emphasis added). *See also* FEIS, Exhibit 22 at 2-3 ("The ability to double-stack intermodal containers allows a single freight train to essentially double its intermodal freight capacity, if needed.").

The Federal Defendants should be held to their representations that they did not consider the substantial growth in freight traffic during the FEIS process. This represents another instance in which the Federal Defendants failed to consider an important aspect of the Virginia Avenue project, in violation of the Administrative Procedures Act. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (Agency action is arbitrary and capricious if it "failed to consider an important aspect of the problem."); *and see New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 704 (10th Cir. 2009) (Applying same standard to agency's actions in furtherance of NEPA).

c. Failure to Consider Risk of Rail Incidents and Terrorist Attacks

CSXT asserts that there was no failure to consider reasonably foreseeable rail incidents in this case because it is a "mistaken belief" that "a reconstructed tunnel will enable CSXT to begin moving large volumes of crude oil or hazardous materials through the District." CSXT Opp. at 39. The Federal Defendants echo the same argument and claim that CSXT does not carry explosive, toxic by inhalation, poisonous by inhalation or crude oil trains through the District.

Fed Opp. at 30. The Federal Defendants' representations in this regard show additional failures to consider important aspects of the Virginia Avenue Tunnel, in violation of the Administrative Procedures Act.

With respect to carrying explosive, toxic and poisonous materials, the Defendants fail to account for the fact that - according to CSXT's statements in the 2005 litigation - CSXT will revoke its voluntary agreement not to transport these products through the District (*supra* at 26). While it is undisputed that CSXT could revoke its agreement at any time, the FEIS did not account for that possibility.

Additionally, the Federal Defendants appear unaware that CSXT actually does transport numerous types of hazardous materials through the District. Fed. Opp. at 30 (referring only to explosive, toxic by inhalation, or poisonous by inhalation materials). CSXT has agreed not to transport "certain extremely hazardous materials." See Exhibit 42, p. 34 testimony of CSXT Representative Tom Murta. According to Mr. Murta, those extremely hazardous materials make up only 1/10 of a percent of the hazardous materials that are moved by rail through the District of Columbia. *See Id*. at 61 ("Less than a 10th of a percent of the hazardous materials that are moved by rail transportation are covered in the reroute around the District of Columbia.").

Similarly, it appears that the Federal Defendants were under the incorrect understanding that CSXT does not transport any crude oil through the District. Fed Opp. at 30 ("nor does [CSXT] transport crude oil trains through the District."). Instead, the FEIS makes it clear that CSXT does transport crude oil trains through the District in individual tank cars, rather than on "crude oil unit trains." Exhibit 21, FEIS at S-35. Apparently, the Federal Defendants failed to appreciate the meaning of a "unit train" during the FEIS process. A unit train is a "freight train composed of cars carrying a single type of commodity that are all bound for the same destination"

(*See* Encyclopedia Britannica online).

In the 2005 litigation between CSXT and the District, CSXT conceded that: "forty to fifty percent of all CSXT trains include some cars carrying hazardous materials. CSXT has for decades transported hazardous materials, including the Banned Materials, via its I-95 Line and B&O Line through the District of Columbia." *See* Exhibit 30, CSXT P&A in support of Preliminary Injunction at 12. According to a CSXT affidavit submitted in the 2005 litigation, CSXT carries an estimated 11,400 cars per year of Hazardous Materials that would have been banned by the law that CSXT sought to enjoin. *See* Exhibit 43, Gifford Affidavit.

A recent investigative report by NBC news reveled that – on the days that NBC monitored the Virginia Avenue Tunnel – CSXT was carrying molten sulfur, ammonium nitrate, styrene monomer, clarified oil and molten phenol. *See* Exhibit 33. CSXT has also conceded that it transports oil cars through the Virginia Avenue Tunnel. *Supra.*[15]

Therefore, to the extent that the Federal Defendants failed to consider the fact that CSXT

[15] According to the 2012 Emergency Response Guidebook ("ERG"), published by the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (Exhibit 44): (1) Molten Sulfur, which falls under Guide No. 133, which requires isolation and suggests an evacuation zone of 330 feet downwind from any spill and one-half mile in all directions in the event of a fire (See ERG at 140 and 218); (2) Ammonium Nitrate, which falls under Guide No. 140, which requires isolation and suggests an evacuation zone of 330 feet downwind from any spill and one-half mile in all directions in the event of a fire (See ERG at 150 and 206); Styrene Monomer and Crude Oil (which CSXT has conceded it transports through the Virginia Avenue Tunnel) both fall under Guide No. 128P, which is highly flammable and requires isolation and suggests an evacuation zone of 1000 feet downwind from any spill and one-half mile in all directions in the event of a fire (See ERG at 26, 46 and 196); and (4) Molten Phenol, which falls under Guide No. 153, and involves a risk of death if inhaled, ingested or upon contact with skin and which suggests an evacuation zone of one-half mile in the event of a fire (See ERG at 137 and 244).

The one-half mile radius surrounding the Virginia Avenue Tunnel includes nearly all of the National Mall, including the monuments and museums, all of the federal buildings situated on the south side of the Mall, the United States Capitol, all U.S. House of Representatives Office Buildings, and the Library of Congress. The evacuation zone would also include the Smithsonian, L'Enfant Plaza, Federal Center and Capitol South, Potomac Avenue, Eastern Market, and Navy Yard metro exits, as well as Interstates 395 and 695.

transports numerous hazardous materials through the District of Columbia (in even greater volumes and at over double the current speed), the Federal Defendants have failed to consider important aspects of the problem. Act. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

In an apparent attempt to excuse the failure to consider the risk of a rail disaster, the Federal Defendants claim that "[r]easonable foreseeability does not include 'highly speculative harms' that 'distort[] the decisionmaking process' by emphasizing consequences beyond those of 'greatest concern to the public and of greatest relevance to the agency's decision.'" Fed. Opp. at 41. In a similar vein, CSXT and the Defendants and claim that they were not required to consider possible criminal actions of third parties. CSXT Opp. at 40, DDOT Opp. at 37; Fed. Opp. at 31. This is not the position taken by the D.C. Circuit.

In *Glass Packaging Inst. v. Regan*, 737 F.2d 1083 (D.C. Cir. 1984), addressing a challenge to ATF's decision to permit alcohol to be sold in plastic containers, the D.C. Circuit did not *carte-blanche* relieve agencies from considering criminal actions by third parties in the NEPA process. Instead, the Circuit Court held: "No cognizable *environmental* effect is implicated by the introduction of a new plastic container into the market place merely because it may be susceptible to tampering." *Id.* at 1091 (emphasis in the original). Defendants cannot make the same argument in this case. Here, a rail incident would clearly involve environmental harms, including fire, explosion, and the release of smoke and toxins into the air, soil and possibly ground water. It was also important in *Glass Packaging,* that FDA, which was not involved in the NEPA process, had primary responsibility of safeguarding the lives and health of consumers of food and drugs. *Id*. at 1085. In this case, DOT and the Federal Railroad Administration, which has jurisdiction over rail safety (see CSXT Opp. at 40; Fed. Opp. at 30; District Opp. at 5), participated in the EIS as a cooperating agency specifically because of its

"special expertise in railroad safety." District Opp. at 5. Consequently, in this case the EIS included agencies that had specific jurisdiction over rail safety, unlike the case in *Glass Packaging*.

In *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 22 (D.D.C. 2009) (Kollar-Kotelly), the District Court repudiated the notion that *Glass Packaging* held that "NEPA does not require consideration of environmental effects caused by the criminal acts of third parties." *Id.* at 22. Judge Kotelly explained that *Glass Packaging* "supports the more modest principle that an act need not be evaluated if it is not "an environmental health risk" and that the case "did not circumscribe the well-settled rule that an agency must evaluate foreseeable environmental impacts even if they are the result of the yet-unknown actions of third parties." *Id.* at 22.

The District relies heavily on *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). But *Metro Edison Co.* is inapposite here. The issue in that case was whether an EIS was required to consider the public's fear of a nuclear accident. 460 U.S. 771. The Court concluded that consideration of the psychological impact on residents of the community was too attenuated to be required by NEPA. 460 U.S. 775-776. It is important to note, however, that the risk of an actual nuclear accident was something that the NRC had addressed in the EIS. Plaintiff in this case faults the EIS for failing to consider the likelihood of an actual rail incident, not the public's fear of a rail incident.

DDOT also relies on *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004) for the notion that the risk of a rail disaster was too remote to be considered in the EIS. District Opp. at 38. *Public Citizen* is not applicable here. In that case the question was whether NEPA required the Federal Motor Carrier Safety Administration "to evaluate the environmental effects of cross-

border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur." 541 U.S. at 756. The Court recognized that an important aspect of the case was that FMCSA "has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are 'willing and able to comply with' the applicable safety, fitness, and financial-responsibility requirements" and had no authority "to impose or enforce emissions controls or establish environmental requirements unrelated to motor carrier safety." 541 U.S. at 758-59. Under these circumstances, the Court held that FMCSA's action (the proposed safety and inspection rules it had promulgated) was not the proximate cause of the entry of Mexican buses and trucks into the U.S. and that it was not required to issue an EIS that considered the environmental impacts of the entry of Mexican buses and trucks. *Id.* at 769 ("the legally relevant cause of the entry of the Mexican trucks is not FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.").

The facts of the case at bar distinguish it from *Public Citizen*. In this case, the Federal Agencies and DDOT do have control over whether or not CSXT can construct this tunnel, and the expansion of the tunnel will result in trains carrying more cargo and traveling at higher speeds. Additionally, the Federal Railroad Administration has jurisdiction over rail safety, and it participated in the EIS as a cooperating agency specifically because of its "special expertise in railroad safety." *Supra.* Consequently, in this case the EIS included agencies that had specific jurisdiction over rail safety. Consequently considering rail safety issues would not have been an empty gesture, as was the case in *Public Citizen.*

New Jersey Dept. of Env. Prot. v. NRC, 561 F.3d 132 (3d Cir. 2009) on which the District

also relies, is likewise inapplicable. In that case the Third Circuit held that the NRC was not responsible for analyzing the risk of an airplane – based terrorist attack on a nuclear facility because the agency had no jurisdiction over the air space around the nuclear facility. *Id.* at 139-140. In this case, however, the EIS included the Federal Railroad Administration – which is responsible for rail safety - as a Coordinating Agency. *Supra.*

Plaintiff's argument that the Environmental Impact Statement should have considered the dangers associated with a major rail incident is in line with decisions in this Circuit.

In *Blue Ridge Environmental Defense League v. Nuclear Regulatory Com'n*, 716 F.3d 183 (D.C. Cir. 2013), the D.C. Circuit was called on to determine whether the NRC had to conduct a supplemental EIS on a planned nuclear reactor in light of the Fukushima disaster in Japan. Among other things, the D.C. Circuit noted, with approval, that the NRC had already taken into consideration – in the course of conducting the original EIS - potential causes of a Fukushima type nuclear reactor disaster. 716 F.3d at 197 ("NRC's original EIS for Vogtle considered precisely the types of harm that occurred as a result of the Fukushima accident.").

In *Brady Campaign to Prevent Gun Violence*, the District Court repudiated the notion that "NEPA does not require consideration of environmental effects caused by the criminal acts of third parties" (*Id.* at 22) and explained that *Glass Packaging* "did not circumscribe the well-settled rule that an agency must evaluate foreseeable environmental impacts even if they are the result of the yet-unknown actions of third parties." *Id.* at 22.

In the Ninth Circuit case of *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006), the court held that a categorical decision "that NEPA does not require consideration of the environmental effects of potential terrorist attacks" was unlawful. The 9th Circuit ultimately described the analysis that was required as "whether such

attacks are so 'remote and highly speculative' that NEPA's mandate does not include consideration of their potential environmental effects." 449 F.3d 1030.

The D.C. Circuit referenced *San Luis Obispo Mothers for Peace* positively in *Blue Ridge Environmental Defense League*. *See* 716 F.3d at 189 (citing *San Luis Obispo Mothers for Peace* for "rule of reason, which excuses the agency from supplementing an environmental report based only on remote and highly speculative consequences.").

A rail disaster, as CSXT well knows, does not have to be the result of third-party criminal action. Many of the rail incidents catalogued herein were the result of carelessness, not any act of terrorism. Clearly rail disasters are a foreseeable outcome of operating a railroad. Consequently, even if the FEIS was not required to take into consideration criminal acts by third parties (a point Plaintiff does not concede), the Federal Defendants fail to explain why they did not consider simple acts of negligence that can lead to train derailments and other disasters.

The Federal Defendants claim that *San Luis Obispo Mothers for Peace* is distinguishable from this case because it dealt with the construction of a new facility, while the case at bar involves the "modernization of existing infrastructure like the Tunnel Project." Fed Opp. at 32 at fn 22. The District makes a similar argument. District Opp. at 39. If this project were only a modernization of an existing tunnel, that argument may have some resonance, but that is not the case. The tunnel expansion involves constructing a <u>new, second tunnel</u> underneath Virginia Avenue that will accommodate the second rail line. Once the second tunnel is complete, the existing Virginia Avenue Tunnel will be entirely demolished and rebuilt. *See* Exhibit 21, FEIS at S-5. Additionally, the eastern portal of the tunnel will be extended an entire city block, to 12th Street (supra). Following the completion of the project CSXT will have the ability to transport double-stacked intermodal cargo and to increase speed from 15 mph to 40 mph. This is no mere

modernization project.

Furthermore, the Defendants present no argument or support that NEPA requirements are somehow less stringent for projects that impact pre-existing facilities. In fact, in the NEPA context, "cumulative impact is 'the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions.'" 40 C.F.R. § 1508.7. Consequently – according to the regulations – the impacts associated with the tunnel expansion project have to be considered with past impacts (namely building the tunnel itself). *See,* generally, *Grand Canyon Trust v. F.A.A.,* 290 F.3d 339, 340 (D.C. Cir. 2002), as amended (Aug. 27, 2002) (FAA failed adequately to consider the cumulative impact on the natural quiet of the Park and instead addressed only the incremental impact of the replacement airport). *See also Fund For Animals v. Hall,* 448 F. Supp. 2d 127, 133 (D.D.C. 2006) (FWS violated NEPA because it did not "engage in any cumulative impacts analysis that looked at the overall, synergistic effect of significantly expanding hunting on various Refuges, particularly Refuges in the same general geographic areas.") (emphasis added).

The District claims that the FEIS analyzes both the risk of hazardous material spills and terrorist attacks. District Opp. at 39. But this so-called analysis is limited to a mention that a concrete floor would make derailments less likely than the current dirt floor and that the center wall between the two tunnels will isolate a derailment within the tunnel. *Id.* First, there is no support for the position that the risk of derailment with double stacked trains, operating at 40 mph on a concrete floor is any less than single-stacked trains, operating at 15 mph on the current floor. Additionally, while the center wall might reduce the risk of one train impacting a second train in the tunnel, under the current, single-track configuration there is no risk of a two-train

derailment in the tunnel at all. The District also claims that the FEIS specifically addresses the risk of a terrorist attack and concludes that the removal of the existing bottleneck will reduce the risk of attack. District Opp. at 40. No such analysis appears in the FEIS, however, including at the location cited by the District.

6. Reliance on Inaccurate Information

Both Defendants and CSXT claim that the only inaccurate information that Plaintiff identified in the FEIS was the degree to which the Virginia Avenue Tunnel, standing alone, acts as a bottleneck to the flow of freight rail along the Eastern Seaboard and impairs CSXT's ability to carry double-stacked freight rail. District Opp. at 40-41.Fed. Def. Opp. at 32; CSXT Opp. at 43. All three argue that Plaintiff's arguments should fail because numerous studies have concluded that the Tunnel is a bottleneck. *Id.*

Plaintiff stands by its position that the statements in the EIS were inaccurate and misleading. CSXT's own press releases and National Gateway documents demonstrate that the Virginia Avenue Tunnel was just one bottleneck among numerous other bottlenecks involving inadequate clearance or single tracking along the eastern seaboard. *See* Exhibit 4. An accurate statement, therefore, would have explained that, while the Virginia Avenue Tunnel would be the most costly impediment to resolve, expanding Tunnel would serve no purpose unless the remaining impediments in the region were also corrected. It remains to be seen if the EIS process would have endorsed the tunnel expansion option had the project been correctly described as merely one among many necessary clearance improvement projects associated with the National Gateway Initiative.

In addition to the foregoing, Plaintiff's Motion for Preliminary injunction identified numerous problems associated with the FEIS' reliance on a 2007 Railroad Realignment

Feasibility Study (RRFS) issued by the National Capital Planning Commission to support rejecting the re-routing options due to their cost. Pl. P&A at 31-33. Among other things, the Plaintiff noted the dated nature of certain portions of the study. Most importantly, Plaintiff noted that the study concluded that the benefits of re-routing freight away from the Virginia Avenue Tunnel outweighed the costs by a significant margin. Pl. P&A at 32. Neither Defendants nor CSXT addressed the RRFS in their opposition briefs.

Consequently, DDOT and FHWA, as co-lead agencies, violated their public disclosure obligations and the requirement to insure the integrity of the information in the EIS under NEPA. As a result they undermined NEPA's goal of promoting informed decisionmaking and reliance on the political process to "check" important decisions regarding the environment. *See* 40 C.F.R. § 1500.1 ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."). *Tongass Conservation Soc. v. Cheney*, 924 F.2d 1137, 1140 (D.C. Cir. 1991) (reviewing court should "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to . . . make a reasoned decision." (internal citations omitted); Robertson *v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provides a springboard for public comment.") *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009) ("By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed

decisionmaking by agencies and allows the political process to check those decisions.").

7. Violation of District Law

a. Violation of DCEPA

The District claims that it was impossible for it to have violated the D.C. Environmental Policy Act because "the entirety of the proposed work area is within the District's Central Employment Area" which – according to the District – entitled this project to an exemption from the DCEPA. District Opp. at 43. But the claim that this project would have been exempted from the DCEPA contradicts the statement, which DDOT included in the FEIS, that

> Due to the closure of certain portions of Virginia Avenue SE during construction for the proposed Project and the need to use and occupy certain public right-of-way for the reconstructed tunnel, DDOT must also provide approval because it has jurisdiction of Virginia Avenue SE and the surrounding streets. Ordinarily, the requirements of the District of Columbia Environmental Policy Act (DCEPA) would apply to the DDOT role and responsibility. However, because the Project is already subject to the requirements of NEPA, no additional action is needed under DCEPA.

See Exhibit 26, FEIS at 1-8 to 1-9. The District should be bound by its statement in the FEIS.

The District does not dispute Plaintiff's position that a violation of NEPA would equate to a violation of DCEPA. Instead, the District simply responds that there was no violation of DCEPA because "the FEIS does satisfy NEPA and its regulations." *Id.* at 43. Consequently, the District should be deemed to have conceded that a violation of NEPA would also constitute a violation of DCEPA.[16]

b. Violation of D.C. Code §§ 10-801 and 9.101.01 et seq.

With respect to D.C. Code 10-801, the District Claims that the grant of the Public Spacy Right of Way (VAT ROW) was not a "sale, conveyance, lease or other disposal of real property

[16] In the alternative, the District consented to, and the Court granted Plaintiff's motion to defer briefing on this point until the merits briefing stage. *See* Docket 39 and January 27, 2015 Order.

owned in fee simple by the District" because at issue here is only a "Public Right of Way Occupancy Permit" that "merely affords CSXT the right to occupy certain public space."

D.C. Code 10-801 provides: "[T]he Mayor is authorized and empowered … with the approval of the Council … to sell, convey, lease … or otherwise dispose of real property, *in whole or in part*". D.C. Code § 10-801. D.C. Code 10-801.01, in turn, defines "real property" as used in 10-801 to include "any air space located above or below the property or any street or alley under the jurisdiction of the Mayor."

In this case, the VAT ROW constitutes a disposition, at least in part, of real estate because it "grants" CSXT the "right to occupy and use exclusively" the "as-built location of the Virginia Avenue Tunnel Improvements." *See* Exhibit 12 (December 21, 2012 ROW, Art. I (A) and (B)). The grant lasts for as long as CSXT operates the expanded Virginia Avenue Tunnel. *Id.* (grant in effect for "the duration of the Virginia Avenue Tunnel Reconstruction Improvements.")

Section 4 of the Center Leg Freeway (Interstate 395) Amendment Act Of 2008, D.C. Law 17-253 (2008) confirms that D.C. Code 10-801 is applicable to the VAT ROW, because that law was required to specifically exclude similar conveyances of easements under Massachusetts Avenue. Specifically, Law 17-253 reads: "Notwithstanding the procedures and requirements set forth in … D.C. Official Code § 10–801 et seq. … the Mayor may: (1) Grant … subsurface easements under the portions of 2nd Street, N.W., and 3rd Street, N.W., between Massachusetts Avenue, N.W., and E Street, N.W., … for the purposes of the construction and maintenance of a deck or other supporting structure beneath the streets and for the occupancy of the easement area by such deck and structures and for other purposes". *Id.*

Although the District claims that this transaction was merely the grant of a public space occupancy permit, that is simply not the case. D.C. Code § 10.1141.03, which governs public

space occupancy permits, clearly states that the Mayor shall have the right to "revoke any permit issued pursuant to this subchapter at any time." *See* D.C. Code § 10.1141.03. The Mayor has no right, however, to revoke the VAT ROW. *See* Exhibit 12 ("The Permit shall terminate only upon written consent executed by Permittee and Department" or "in the event of a major casualty" to the tunnel, subject to CSXT's right to cure). This restriction on the Mayor's ability to terminate the permit puts the VAT ROW outside the purview of a public space occupancy permit, as the District contends. Even if the VAT ROW was merely a permit, DDOT violated District Law in granting the ROW by failing to include the right to revoke the permit required by D.C. Code § 10.1141.03, *supra.*

The District's naked conclusion, that this right of way grant does not constitute a disposition of real property under D.C. Code § 10-801 is the kind of conclusory statement, bereft of analysis, that Judges in this Court reject. *Herbert,* 839 F. Supp. 2d at 298.

The District's argument that D.C. Code § 9-101.01 is inapplicable is likewise bereft of any analysis, and should be disregarded. D.C. Code § 9-202.01 *et seq.* requires D.C. Council approval, after notice and comment by affected parties and upon specific showings by the Mayor, for the closure of any city street or right of way. D.C. Code § 9-202.01 defines "street" to mean "any public right-of-way, recorded as a street, road, or highway in the records of the Office of the Surveyor." D.C. Code § 9-201.01(7). The District has provided no argument that the sub-surface land underneath a street road or highway is excluded from the purview of D.C. Code § 9-202.01.

Even if D.C. Code § 9-202.01 does not apply to the area underneath Virginia Avenue, it certainly would apply to DDOT's conveyance of the at grade portions of the Right of Way, which CSXT and the District agreed to add when they modified the public space occupancy

permit on March 30, 2014. Exhibit 13. As a result of that modification, the right of way included "Under Virginia Avenue SE Generally Between 2nd Street SE and 12th ST SE, Washington DC and at-grade to the east of 12th Street, SE". *See* Exhibit 13.

The September 27, 2012 letter from CSXT to D.C. City Administrator Allen Lew acknowledged that that permit would require D.C. Council approval: "We understand that … the disposition of ancillary property rights around Virginia Avenue … contemplated by the 2010 MOA … require DC Council approval." Exhibit 9 p. 2-3. This admission reflects that at least CSXT understood that one or both of the above-cited statutory provisions applied.

C. IRREPARABLE HARM

A plaintiff seeking a preliminary injunction meets its burden of establishing a likelihood of irreparable harm by showing that the agency action will have "*some* environmental impacts." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009).

NEPA regulations define environmental impacts to include "ecological, ... *aesthetic*, historic, cultural, economic, social, or health," effects, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8 (emphasis added); *see also Brady Campaign*, 612 F. Supp. 2d at 24.

1. Procedural Harm

"When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury." *Brady Campaign*, 612 F. Supp. 2d at 24; *Sierra Club v. United States Army Corps of Engineers*, 990 F. Supp. 2d 9, 41 (D.D.C. 2013); *Fund for Animals,* 281 F.Supp.2d at 221 (emphasis in original); *Fund for Animals v. Clark,* 27 F.Supp.2d 8, 14 (D.D.C.1998). As Plaintiff has demonstrated in its Application for the Preliminary Injunction, and *supra,* the EIS violated NEPA on several counts, including impermissible predetermination on the part of DDOT. Consequently, Plaintiff has

demonstrated a procedural harm.

In addition, without injunctive relief, Plaintiff will suffer the environmental harms detailed below.

2. Environmental Harm

In addition to procedural harm, the Plaintiff also demonstrates that it, and its members, are likely to suffer environmental harm, sufficient for a preliminary injunction to stand.

a. Noise, Vibration, Air Pollution

CSXT and the Federal Defendants seek to trivialize Plaintiff's concerns about "noise, vibrations… and other environmental impacts and 'inconveniences' from the construction," by citing to the allegedly thorough analysis of the FEIS. Fed Opp. at 34; CSXT Opp. at 20. As Plaintiff has demonstrated above, however, the FEIS was conducted in large part by engineering firms that had a strong interest in moving the tunnel expansion project forward. Additionally, the FEIS was unlawfully predetermined in violation of NEPA. Both of these factors call into doubt the integrity of the FEIS's analysis.

Even accepting the FEIS at face value, it still supports the Plaintiff's argument that she will suffer irreparable injury as a result of noise, vibrations, air pollutants and related environmental impacts caused by the construction of the Virginia Avenue Tunnel. Increased noise and vibration are certain to occur, and Plaintiff's member, Maureen Cohen Harrington, lives in such close proximity to the Virginia Avenue Rail Tunnel that the noise and vibration will irreparably harm her. *See* Exhibit 48, Second Harrington Declaration. *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1240. The FEIS recognizes that "front row" residents, like Ms. Harrington, "will be subject to the construction effects of the Project, such as the operation of construction equipment that produce high noise levels." Exhibit 24, FEIS 5-11.

Indeed, the FEIS acknowledge that "major vibration producing construction activities are predicted to cause human annoyance to those Capitol Quarter townhouses nearest to the LOD, as well as to the north facing units of Capper Senior Apartments. According to FTA guidelines, vibration levels of at least 80 VdB have the potential to cause human annoyance in residences. The construction activities predicted to cause human annoyance at these locations are excavation, tunnel construction and backfilling." Exhibit 24, FEIS at 5-39. In addition, airborne dust emissions and increased vibration levels will disproportionately affect front row residents. Exhibit 24, FEIS 5-12.

On January 21, 2015, moreover, CSXT issued Ms. Harrington, and all other front-row residents, a community mitigation package, in which CSXT is offering to pay Front Row residents, such as Ms. Harrington $500.00 per month in acknowledgement that "CSXT understands and appreciates how a large construction project in front of your home can inconvenience and impact your daily routine." *See* Exhibit 46.

Vibration, noise and increased traffic can rise to the level of irreparable harm.[17] *See San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009) ("Individual members of Plaintiffs' organizations have established that they will be affected by noise and that their aesthetic interests will be affected by the increased traffic and drill rigs. The drill rigs are expected to operate 24 hours a day and will have bright lights that several members said they would be able to see and hear, given the anticipated location of the rigs."); *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 4 (E.D.N.Y. 2003) ("The State

[17] Similarly, the Federal Defendants' assertion that Plaintiff's harms are temporary is without merit, as even where the noise might be temporary, "it may be irreparable in the sense that it is not compensable by money damages." *San Luis,* 657 F. Supp. 2d 1233 at 1241. In this case, Ms. Harrington's declaration establishes that the unique nature of her home render the harm to her irreparable, and that there is no way for her to leave her home to avoid the construction impacts under the terms of her financing agreement. Exhibit 46.

and Town have shown likely irreparable harm resulting from the construction of a gambling casino at Westwoods without adherence to State and local laws. First and foremost, the construction of a casino like the one proposed by Defendants would cause incredible traffic congestion in the surrounding community."); *Envtl. Def. Fund v. Tennessee Val. Auth.*, 468 F.2d 1164, 1183 (6th Cir. 1972) (upholding a finding of irreparable harm where the plaintiffs—residents in close proximity to the construction of a dam—alleged that they would suffer the effects "the cutting and burning of timber, the movement of massive amounts of earth, the construction of large earthworks, and the relocation of roads and bridges").

CSXT cites to *Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760 (10th Cir. 2014) for the suggestion that Plaintiff's likely injuries would not be severe enough to constitute irreparable injury. CSXT Opp. at 21. But CSXT misses the fact that, in *Village of Logan*, the activity that the plaintiff sought to enjoin had already occurred. Consequently, the Tenth Circuit held that "any harms allegedly resulting from *past* detonation activities cannot be relieved, let alone prevented, by enjoining the Project at this point." *Id.* at 767. In addition, the plaintiffs in *Village of Logan* failed to "appraise this court of any evidence showing what aesthetic damage will occur, where it will occur, how it will occur, or when it will occur—it merely posits that such harm will result." *Id.*

Unlike in *Village of Logan*, the noise, dust, increased traffic, and vibration in the present case are certain to occur in the absence of injunctive relief, and Plaintiff's member, Maureen Cohen Harrington, lives in such close proximity to the Virginia Avenue Rail Tunnel that the noise and vibration will irreparably harm her. *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1240 (ruling that plaintiff established irreparable harm by showing the proximity of plaintiff's members to a proposed drilling site, which would harm their aesthetic interests due to

dust, noise, and an increase in traffic); *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding plaintiff's proximity to the aesthetic harm instructive in ruling that plaintiff was able to demonstrate irreparable harm).

Also unlike in *Village of Logan*, where the plaintiff provided no indication of what, where, or how aesthetic harm would occur, in this case, the FEIS states plainly that Ms. Harrington, a resident directly facing the tunnel, will suffer the worst of the noise, vibration, and airborne pollutants caused by the Virginia Avenue Tunnel expansion. *See* FEIS 5-11, 5-12, 5-14, 5-39, discussed *supra*.

The District Defendants rely primarily on *Appalachian Voices v. Chu*, 725 F. Supp.2d 101 (D.D.C. 2010), in arguing that the irreparable harms Plaintiff complains of lack imminence. The court in *Chu* ruled that the plaintiffs in that case had failed to demonstrate "ongoing or imminent irreparable injury" because the harms to the plaintiffs' aesthetic interests caused by air pollution would only begin once a proposed clean coal facility became operational, approximately two years from the plaintiffs' NEPA suit. *Id.* at 106. Unlike the aesthetic harms in *Chu*, however, the aesthetic harms at issue here will not commence on some far-off date after the completion of the Virginia Avenue Tunnel, but rather, the moment construction at the Virginia Avenue Tunnel begins, Plaintiff will immediately suffer increased noise, vibration, and airborne pollutants. *See* Exhibit 24, FEIS 5-11, FEIS 5-12, and FEIS 5-14 (referencing noise, vibration, and airborne pollutants that will commence upon construction, and impact "front-row" residents to a greater extent than other residents in the vicinity). *Village of Logan*, moreover, establishes that now is the time to seek the injunction – before construction activities commence. *Supra.*

b. Rail Incidents

Each of the Defendants asserts that the risks of rail accidents and terror attacks along the

rail line are too speculative to constitute irreparable harm.[18] The District and Federal Defendants both rely on *Sierra Club v. Corps of Engineers,* 990 F. Supp.2d 9, 24 (D.D.C. 2013) as supposed support for their contention that the possibility of a future terror attack and rail disaster are too certain. *Sierra Club* is inapplicable here because, in that case, the plaintiffs offered no independent documentary evidence that the oil spills they feared were likely. Instead, the plaintiffs in that case provided the court with a series of declarations in which plaintiffs' members detailed their fears of an oil spill. *and* n.18. In this case, however, the Committee has catalogued numerous CSXT rail incidents in recent years, many of which involved derailments, the release of hazardous materials, fire and/or explosions. *Supra*.

Additionally, the anticipation of a rail disaster is not a figment of the Plaintiff's imagination. DDOT co-managed the 2007 Freight Rail Realignment Feasibility Study, which contains a detailed discussion of the devastating impact of a terrorist attack on the rail line, and cautions that hazardous materials traveling on the rail line would be a "tempting target for attack," especially given the proximity of the tunnel to the Monumental Core. Exhibit 47, RRFS § 5, p. 1. Plaintiff submits that this possibility, combined with the documented fact that the Virginia Avenue Tunnel expansion will result in greater volumes of freight, including hazardous materials, traveling at substantially greater speeds, results in a concrete likelihood of a rail disaster in the expanded Virginia Avenue Tunnel.

Unlike in *Winter*, where the harm alleged would affect an unknown number of animals (555 U.S. at 26), Plaintiff's member, Maureen Cohen Harrington, is one of many "front row"

[18] The Federal Defendants seek to bolster their claims of the unlikelihood of rail disaster by making the demonstrably false claim that trains will not travel at greater speeds through the rail tunnel, and that the volume of freight through the tunnel will not increase. The Federal Defendants' claims contradict numerous provisions of the Final Environmental Impact Study. *Supra* at *.

residents to the rail tunnel, ensuring that a rail disaster would put Ms. Harrington's life and property at risk.

Each of the Defendants claims that CSXT's activities will be subject to appropriate regulations and mitigation measures described in the FEIS, and that Plaintiff cannot support a preliminary injunction on the grounds that the government will not be able to control every aspect of the construction of the expanded tunnels or CSXT's use of the tunnels. Plaintiff has made no such argument. On the contrary, Plaintiff maintains that once the tunnels are built, the Federal agencies essentially relinquish control over how CSXT operates its trains through those tunnels and is left with only the ability to assess penalties and mitigation requirements. *See Sierra Club*, 717 F.2d at 1414 (calling into doubt the agency's ability to preclude the harm-causing course of action where the agency approved the course of action prior to assessing its environmental impacts).

c. Damage to Property

The Federal Defendants argue that lost property values lack a nexus to Plaintiff's claims because they are an economic loss. The Federal Defendants' conclusory assertion is not the end of the inquiry, however, as this Court has held that economic harms may justify a finding of irreparable harm where the economic injury is both irretrievable and "serious in terms of its effect on the plaintiff." *Mylan Pharm., Inc. v. Shalala,* 81 F.Supp.2d 30, 42 (D.D.C.2000); *see also Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) ("While the injury to plaintiffs is admittedly economic, there is no adequate compensatory or other corrective relief that can be provided at a later date, tipping the balance in favor of injunctive relief.") (quotations omitted).

In this case, Ms. Harrington's declaration establishes that the unique nature of her home

render the harm to her irreparable, and that there is no way for her to leave her home to avoid the construction impacts under the terms of her financing agreement. Exhibit 48. Specifically,, Ms. Harrington purchased her home under an interest free mortgage, which does not have to be repaid until 30 years from the date the home was purchased, under the Workforce Housing Program from the D.C. Housing Authority. This program imposes restrictions on Ms. Harrington's ability to sell her house and requires her to use the home as her primary residence. In the event that she decided to sell her home in order to avoid the construction of the tunnels or to remove herself from the danger that the tunnels would represent to Front Row residents, Ms. Harrington would be required to immediately repay the entirety of the loan, which would be impossible for her. Exhibit 48, Harrington Second Declaration. Ms. Harrington also catalogues numerous reasons why monetary damages could not compensate her in the event she were forced to leave her home during the construction due to the unique characteristics of her home and community amenities. Exhibit 48.

Additionally the tunnel construction would change the character of Ms. Harrington's home. Once the expanded tunnels are completed, then they will become a defining characteristic of Ms. Harrington's home and community. Rather than being a front row resident to an antiquated rail tunnel through which trains currently travel, in single file fashion, at 15 miles per hour, Ms. Harrington's home would front a tunnel through which double stacked rail travels, in both directions at 40 miles an hour - nearly three times the current speed. The change in character is akin to replacing a dirt road with an interstate – a change that alters the basic character of a home.

d. Damage to Parks

Another aspect of irreparable harm is the harm to Garfield Park, Bridge Spot and Virginia

Avenue Parks. Specifically, the FEIS notes that, during construction 15 trees will be removed from Virginia Avenue Park," Exhibit 21, FEIS S-17. Exhibit 20, ROD at 14. The project will "also require construction-period occupancy of Virginia Avenue Park." Exhibit 25, FEIS 6-14. *And See* FEIS 6-19 ("The reason for the Section 4(f) use of the CHHD and Virginia Avenue Park is very similar to the reason for the use of the L'Enfant Plan--trenching lasting dozens of months within the park--which will temporarily close a large portion of the park to the general public."). Access to Bridge Spot Park, a popular skate-park will also be blocked during the construction. *See* Exhibit 41 at L-186, Response to Comment. Additionally, access to Garfield Park will be closed during construction.

These parks are important amenities to Ms. Harrington's neighborhood, which Ms. Harrington uses on a regular basis. *See* Exhibit 48. Ms. Harrington will suffer harm from the closed access to the parks and the removal of trees in Virginia Avenue Park as well as Virginia Avenue. *Id.* Additionally, such harms, which are squarely within the Plaintiff's purview as a planning organization devoted to good city planning and ensuring that Washington remains "livable" are sufficient to support a preliminary injunction. *Saunders v. Washington Metro. Area Transit Auth*., 359 F. Supp. 457, 462 (D.D.C. 1973) ("Plaintiffs would suffer irreparable injury in the removal of trees from their neighborhood"). *And See Buckeye Forest Council v. U.S. Forest Serv*., 337 F. Supp. 2d 1030, 1039 (S.D. Ohio 2004) ("Although Plaintiffs may not ultimately prevail on the merits, if an injunction does not issue and the trees are cut down, Plaintiffs will not have an opportunity to even argue the case on the merits because the alleged harm will have already occurred.").

D. THE DEFENDANTS WILL NOT SUFFER HARM AND BALANCE OF HARM IS IN PLAINTIFF'S FAVOR

CSXT asserts that it will suffer "substantial daily business costs," and that it will lose

significant revenue. This claim contradicts CSXT's testimony in public hearings associated with the Virginia Avenue Tunnel expansion project. In a D.C. Council hearing dated August 26, 2014, CSXT Vice President testified that the only problem with delaying the project was that – as time goes by the neighborhood gains more residents who would be inconvenienced by the construction. *See* Pl. P&A for Prelim. Injunction at 43 and n. 9. CSXT has elected not to address this admission in its Opposition brief.

Even if CSXT could contradict its position at the August 2014 hearing, CSXT offers no support or specifics for its claim of irreparable harm. CSXT stakes its entire claim of harm on the declaration of Louis E. Renjel, the Vice President of Strategic Infrastructure Initiatives of CSXT. Mr. Renjel's statement regarding the harm to CSXT in the event an injunction is granted is as follows:

> A preliminary injunction would cause CSXT to suffer significant harm in the form of the substantial daily business costs arising from an outdated tunnel that cannot accommodate double-stacked containers and is a bottleneck that slows CSXT's freight traffic throughout its network. Such an order would also significantly increase CSXT's construction costs.

See Exhibit 49, Renjel Declaration at ¶ 13.

Mr. Renjel's declaration provides only conclusory statements, devoid of any factual detail, that would permit the Court to consider the actual costs that CSXT would experience as a result of granting the requested injunction. *See Herbert,* 839 F. Supp. 2d at 298; *Humane Soc'y of U.S. v. Cavel Int'l, Inc.*, No. 07-5120, 2007 WL 4723381, at *3 (D.C. Cir. May 1, 2007) (Rogers, Dissenting against grant of stay on appeal) ("conclusory statements amount to no more than an articulation of a potential, rather than a certain, great, and irreparable economic harm").

In cases in which the balance of harms has favored the project proponent, the proponent has offered specific facts concerning its harm. *See, e.g., The Lands Council v. McNair*, 537 F.3d

981, 1005 (9th Cir. 2008) (citing evidence that enjoining the project would lead to the layoff of up to the entire 27-person workforce); *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531 (1987) (finding harm to the defendant where it had committed nearly $70 million to oil exploration, which it would be unable to recover if the exploration were enjoined).

CSXT cites *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75, 79 (4th Cir. 1989) for the proposition that the balance of harm is in its favor because delay will increase construction costs. But, in *Quince Orchard*, the defendant produced *evidence* of the construction contracts into which it had entered after the EIS was issued in that case. *Id.* at 79. *And See Id.* at 80 ("the cost of the next phase of the project increases to the Defendants if the construction contract is delayed"). CSXT has not introduced any construction contracts in this case, and it has produced no evidence that its construction costs will increase in the event of a delay. Additionally, the deciding factor in *Quince Orchard* was that the plaintiffs had unreasonably delayed filing suit after the EIS had been issued. *Id.* at 80 ("Equity demands that those who would challenge the legal sufficiency of administrative decisions concerning time sensitive public construction projects do so with haste and dispatch"). Plaintiffs in this case, however, filed suit shortly after the ROD was issued.

CSXT has not produced any evidence that the inability to start construction on the tunnel expansion project is a limiting factor at all at this point in time. Specifically, CSXT has offered no evidence with regard to its progress in removing all of the other obstacles to double-stacked rail along the eastern seaboard or even just in this region. It is also important to note that the third set of locks for the Panama Canal expansion project, which is referenced on numerous occasions as an impetus for expanding the Virginia Avenue Tunnels, are not even currently scheduled to be completed until December 2015. *See* Exhibit 50, Panama Canal Expansion at 6, last paragraph.

Lastly, the grant of the preliminary injunction does not stop CSXT from using the tunnel. In the event the Court grants the preliminary injunction relief, CSXT will be able to continue transporting freight through the Virginia Avenue Tunnel at the current volume and speed. Consequently, CSXT has not shown that delay caused by an injunction would be of any consequence to the overall aim of upgrading the entirety of the eastern seaboard rail line.

CSXT also charges that Plaintiff has ignored the costs of maintaining an aging tunnel, the risk of collapse, and "significant business costs" arising from an "inability to carry modern double-stacked freight containers." But CSXT has provided no evidence in support of these claims, such as the cost of ongoing maintenance for the tunnel. Moreover, the EIS makes clear that the tunnel is structurally sound and that no significant structural defects are expected in the near future, which undercuts CSXT's speculative fears. *See* FEIS, Exhibit 22 at 2-4 ("the overall structure is in relatively good shape"); *and see Id.* 2-5 (no danger of collapse).

The balance of harms is clearly on the side of the Plaintiffs here. In the event that construction commences, there will be noise, vibration, impacts to Virginia Avenue Park, removal and destruction of trees and other disruptions caused by the construction, as CSXT has conceded (*supra*). On the other hand, CSXT has not pointed to any specific harm that it will suffer, and it will be permitted to continue to use the tunnel in the interim.

The Federal Defendants focus their balance of harms argument on the supposed losses to CSXT's business interests, but – like CSXT – they offer no specifics or evidence in support of their position. Federal Defendants rely on *The Lands Council*, 537 F.3d 981 and *Vill. of Gambell*, 480 U.S. 531. But in those cases the defendants provided documentary evidence of large monetary investments that they had made or layoffs that would occur in the event that the injunction was granted. *Supra.* The Federal Defendants provide no such support here.

The District Defendants provide a litany of benefits that the Virginia Avenue Tunnel expansion will supposedly bring to the District, including an allegedly safer tunnel and reduction in pollution. D.C. Opp. at 43. But, at worst, the grant of an injunction would only temporarily delay the tunnel expansion project. The District cannot point to any actual harm that it would suffer in the event that the injunction is granted, as was the case in *The Lands Council*, 537 F.3d 981 and *Vill. of Gambell* or *Quince Orchard*. Moreover, the Virginia Avenue Tunnel expansion is not so "bound by exigencies of time and funding" that "delay may prove fatal." *Jones v. D.C. Redevelopment Land Agency,* 499 F.2d 502, 513 (D.C. Cir. 1974).

Weighing the specific harms that the Plaintiff will suffer in the event the tunnel expansion proceeds, versus the unidentified and unquantified harms (if any) associated with delay, the balance of equities tips toward the party whose harms would be permanent. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) ("balance of equities tips toward the LOWD plaintiffs, because the harms they face are permanent, while the intervenors face temporary delay.") Moreover, courts have recognized that a "delay in reaping economic benefits" is a "temporary economic harm that can be outweighed by the permanent harm to the environment" *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 528 F. Supp. 2d 625, 632 (S.D.W. Va. 2007); *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers*, 890 F. Supp. 2d 688, 695 (S.D.W. Va. 2012).

E. THE PUBLIC INTEREST WEIGHS IN FAVOR OF AN INJUNCTION

As a general rule, "The public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption

that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance."). *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) ("there is a strong public interest in meticulous compliance with the law by public officials"); *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) (same, quoting *Fund for Animals v. Espy*). As this Court explained in *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009), "There is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely." This is because the public "has an interest in ensuring that [agency action] does not give way to unintended environmental consequences that have not (but should have) been evaluated by Defendants." *Id.*

Completely ignoring the public's interest in compliance with NEPA's requirements, the Defendants and CSXT offer various long-term public benefits they claim the Virginia Avenue Tunnel expansion will bring once it is completed. Even assuming the importance of these benefits, the Defendants and CSXT point to no reason that the Virginia Avenue Tunnel expansion "absolutely *must* begin at this time in order to achieve [these] long-term goal[s]." *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 237 (D.D.C. 2003) (ruling that public interest weighed in favor of an injunction where there was no pressing need for the proposed action in order to achieve the long-term benefits touted by the defendants, despite the defendants' showing of strong public interests in favor of the proposed action). Consequently, because there is no pressing need to address the alleged long-term benefits of the Virginia Avenue Tunnel expansion, and because the public's strong interest in the Government's compliance with NEPA is of more current value than the supposed long-term benefits of the expansion, the public's interests would be best served by requiring the Defendants to perform a new Environmental Impact Statement, correcting the deficiencies Plaintiff has noted.

F. NO SECURITY BOND SHOULD BE REQUIRED

The Federal Defendants assert that if this Court grants injunctive relief it should require Plaintiff to post a security bond. Plaintiff submits that such a requirement would be contrary to the very purpose of NEPA, and as such this Court should not require a security bond, or in the alternative, any security bond should be for only a nominal amount.

Contrary to the Federal Defendants' claim that a bond is required, without exception, as a condition of injunctive relief, "It is well settled that Rule 65(c) gives the Court wide discretion in the matter of requiring security" *Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971). "The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." *Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, 1995 WL 748246, at *12 (D.D.C. Dec. 8, 1995). An exception to Rule 65(c)'s bond provision exists where "the purposes of the security bond conflict with those of the Act at issue." *And See Id.* ("It should be noted that courts have held that security is not necessary where requiring security would have the effect of denying the plaintiffs their right to judicial review of administrative action.").

Further, this Court has ruled that because Congress intended for private environmental organizations to assist in enforcing NEPA, requiring plaintiffs to post security "would have the effect of denying [plaintiff organizations] from obtaining judicial review of the defendant's actions under NEPA." *Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971). Consequently, in cases where the enforcement of NEPA is involved, a security bond is not required.

Nevertheless, in NEPA cases where courts have required a security bond, only nominal bonds have been required. *See, e.g., Environmental Defense Fund v. Corps of Engineers*, 331 F.Supp. 925 (D.D.C.1971) ($1.00 bond); *Wilderness Society v. Hickel*, 325 F.Supp. 422

(D.D.C.1970) ($100.00 bond); *West Virginia Highlands Conservancy v. Island Creek* Coal Co., 441 F.2d 232 (4th Cir. 1971) ($100.00 bond). As such, should the Court require a security bond, it should be a nominal amount, not to exceed $100.00.

G. IN THE ALTERNATIVE, IF THE COURT FINDS THAT PLAINTIFF WILL PREVAIL ON THE MERITS, THEN THE COURT SHOULD RULE IN PLAINTIFF'S FAVOR ON THE MERITS

Rule 65(a)(2) permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2); *Gellman v. State of Md.*, 538 F.2d 603, 604 (4th Cir. 1976) ("Fed.R.Civ.P. 65(a)(2) wisely permits the district court in an appropriate case to hear a motion for preliminary injunction and conduct a hearing on the merits at the same time."). *Kohner v. Wechsler*, 477 F.2d 666, 666 (2d Cir. 1973). Courts can give clear and unambiguous notice of its intent to consolidate on the very day of the hearing. *See Chiarella v. Vetta Sports*, 1994 WL 557114, at *2 (S.D. N.Y. 1994) ("The trial court can transform a preliminary injunction hearing into a consolidated hearing on the merits at any time and may do so *sua sponte.*"); *See also, e.g. Metro. Washington Coal. For Clean Air v. D.C.*, 373 F. Supp. 1089, 1091 (D.D.C. 1974) *rev'd on other grounds,* 511 F.2d 809 (D.C. Cir. 1975).

In the event that the Court finds that the Plaintiff will prevail on the merits of its challenge – based on the briefs submitted to date and oral argument – then it would serve no purpose to delay consideration and decision on the merits.

Respectfully Submitted,

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