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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CSXT'S MOTION TO QUASH PLAINTIFF'S SUBPOENA

Plaintiff, The Committee of 100 on the Federal City, respectfully opposes Defendant CSX Transportation, Inc.'s ("CSXT") motion to quash the Plaintiff's subpoena, served on December 26, 2014.

INTRODUCTION

Plaintiff seeks to enjoin the expansion of the Virginia Avenue Tunnel because the Final Environmental Impact Statement (FEIS or Final EIS), and the Record of Decision (ROD) endorsing the preferred "build alternative" therein violate the National Environmental Policy Act (NEPA) and the Administrative Procedures Act ("APA").

As is explained below, while APA cases are generally confined to the administrative record, NEPA cases are unique in that the very sufficiency of the administrative record is called into question. NEPA requires agencies to follow certain administrative procedures *prior* to entering into commitments that may have environmental consequences. On the contrary, DDOT and CSXT commenced the requisite administrative procedures *after* they entered into agreements that irreversibly committed DDOT to the desired course of action. This evidence of

unlawful predetermination justifies limited discovery, by way of the subpoena served on CSXT, in order to thoroughly assess the extent of DDOT's predetermination.

Plaintiff attempted to avoid discovery and issuing subpoenas. Specifically, Plaintiff has submitted FOIA requests to DDOT, among other agencies involved in the NEPA process, in order to procure the requested agreements involving CSXT and documents related to those agreements. Nonetheless, DDOT failed to produce all of the requested information, leaving Plaintiff no choice but to serve CSXT with a subpoena demanding specific information related to agreements between CSXT and DDOT, and other information that establishes that the Final EIS and the ensuing Record of Decision were tainted by unlawful predetermination.

Recognizing that NEPA cases inherently challenge the sufficiency of administrative evidence, this Court has opined, "in cases arising under the National Environmental Policy Act, a court may need extra-record review to evaluate whether an agency's analysis of potential environmental impacts of a proposed action was arbitrary and capricious." *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006).

Further, CSXT has failed to meet its burden of establishing that Plaintiff's subpoena is unreasonable. As this Court has ruled, a party seeking to quash a subpoena bears the burden of establishing the unreasonableness of a subpoena request. *United States v. Hunton & Williams*, 952 F. Supp. 843, 855 (D.D.C. 1997). CSXT offers this court only blanket claims that it would be burdened by Plaintiff's subpoena, which is hardly the "extraordinary" circumstance that would merit the "extraordinary measure" of quashing the subpoena. *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005).

BACKGROUND

In May of 2008, CSXT launched the "National Gateway" Initiative, which involved 61 projects including the expansion of the Virginia Avenue Tunnel.[1] The FHWA assumed lead agency status over the expansion project for NEPA compliance on May 9, 2011, and DDOT acted as the joint lead agency. The NEPA process began as an Environmental Assessment, which commenced in the summer of 2011. In the spring of 2012, the project was reclassified as one that would require an Environmental Impact Statement. *See* 77 Fed. Reg. 25782.

Parsons Brinckerhoff, Parsons Corp. and Clark Construction, three large engineering and construction companies, separately and in collaboration, prepared numerous studies underpinning the EIS and drafted numerous portions of the FEIS. FEIS at 8-3, FEIS at 10-1, *et seq.* CSXT has contracted with Parsons Brinckerhoff, Parsons and Clark to perform the tunnel expansion design, engineering and construction work.

The Notice of Intent to issue an Environmental Impact Statement was published in the Federal Register on May 1, 2012. *See* 77 Fed. Reg. 25781. The Draft EIS was issued on July 12, 2013, and the public comment period extended through September 25, 2013. *See* FEIS at 1-9.

The Final EIS, which was issued on June 5, 2014, endorsed "Alternative 3" one of the so-called "Build Options," which CSXT and DDOT both preferred from the outset. The Preferred Alternative entails shifting the existing Virginia Avenue Tunnel from its current location, building a new second tunnel adjacent to the existing one, and increasing the height of the tunnel to accommodate double-stack freight rail cars ("the Preferred Alternative"). *See* FEIS § 3.2. The Record of Decision was issued on November 4, 2014. The ROD selected the Preferred Alternative for Implementation. *See* ROD at 3.

[1] Plaintiff relies on the more thorough recitation of the facts, with citation to record evidence, found in Plaintiff's Motion for Preliminary Injunction.

Prior to the time the EIS process began, CSXT and the District of Columbia Department of Transportation (DDOT) entered into a series of agreements that pertained to the Virginia Avenue Tunnel.

The earliest of these agreements that was included in the Final Environmental Impact Statement was dated August 23, 2010. *See* Exhibit 1. In this agreement, DDOT agreed to provide support for CSXT's National Gateway Initiative, which included the Virginia Avenue Tunnel expansion project, by submitting a letter of support to U.S. DOT, supporting lobbying efforts to secure federal funding, and submitting a TIGER II grant application for a grant that included funding for the Virginia Avenue Tunnel expansion project. *Id.* Additionally, DDOT incurred $4,171,044 for redesign and construction that would be necessary to modify a bridge at 11th Street to accommodate the expanded Virginia Avenue Tunnel (even though the expansion had not been approved at that point). *Id.* CSXT agreed to reimburse DDOT for the $4.1 million that DDOT paid to modify the 11th Street Bridge, but only on condition that DDOT issue CSXT a credit for the exact same amount toward CSXT's expected obligations for street repair as a result of the Virginia Avenue Tunnel expansion project. DDOT agreed to make up the $4.1 shortfall[2] for the Virginia Avenue Tunnel expansion by way of federal appropriations. *Id.*

DDOT further committed itself to the Virginia Avenue Tunnel expansion in an October 29, 2013 agreement. *See* Exhibit 2. In that agreement, DDOT agreed to a penalty in the event that CSXT does not obtain the requisite permits and approvals from the District of Columbia to expand the Virginia Avenue Tunnel in conjunction with the Preferred Alternative. *Id.* at 3.

Effective December 21, 2012, DDOT granted CSXT a right of way that encompassed the

[2] Considered together, CSXT's obligations for modifying the 11th Street bridge and street repair, both associated with the Virginia Avenue Tunnel was approximately $8.2 million. DDOT agreed to accept payment from CSXT of only $4.1 million. DDOT agreed to make up for the shortfall by pursuing federal appropriations. *See* Exhibit 1.

area required for constructing the two Virginia Avenue Tunnels that were ultimately selected as the preferred alternative under the Final EIS. *See* Exhibit 3, Art. I and Art. IV(A). This Right of Way Agreement also granted CSXT a right of way over the actual footprint of the new tunnels for as long as CSXT operated the tunnel for railroad purposes. Exhibit 3, Art. I (B); *and See Id.* at Art. IV(A) ("The Permit shall be effective on December 21, 2012, and shall remain in effect for the duration of the Virginia Avenue Tunnel Reconstruction Improvements in the Virginia Avenue Tunnel ROW being used for railroad purposes."). The right of way was modified in a subsequent agreement, dated April 30, 2014 to expand the area of the right of way. *See* ECF Doc. No. 3-18.

On November 12, 2014, the Plaintiff sued under NEPA and the District of Columbia Environmental Protection Act challenging the EIS and Record of Decision, and on November 14, 2014 the Court granted CSXT's motion to intervene. Plaintiff submitted a FOIA request to DDOT on September 30, 2014. Exhibit 4. This request demanded many of the same documents Plaintiff now requests from CSXT in its subpoena. *See Id.* Unfortunately, DDOT withheld numerous documents from its FOIA production, and in documents that were produced, much of the content was redacted. *See* DDOT's Response, dated November 5, 2014, (Exhibit 5 hereto); *see also* Exhibit 6. Plaintiff submitted an appeal of the FOIA production on December 10, 2014. Exhibit 6. Plaintiff has yet to receive any substantive response to the FOIA appeal.

On December 11, 2014, the Committee served its subpoena on CSXT, and on December 26, 2014, CSXT served a motion to quash subpoena on Plaintiff.

ARGUMENT

I. Discovery Outside Of The Administrative Record Is Permissible And Necessary In Order To Conduct A Thorough Predetermination Inquiry.

A. Extra-record evidence is regularly part of a thorough predetermination inquiry

CSXT asserts that in claims brought under the Administrative Procedure Act ("APA"), reviewing courts are typically confined to the administrative record in assessing agency actions.[3] CSXT neglects, however, any discussion of the general rule that reviewing courts regularly look to evidence outside of the administrative record where the record fails to include records that the agency considered during the EIS process, including evidence of unlawful predetermination in violation of NEPA that is not apparent on the face of the record. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716-17 (10th Cir. 2010).

This rule stems from a reviewing court's unique function in NEPA cases, which "is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives." *Suffolk Cnty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (citations omitted). The adequacy of this discussion "can sometimes be determined only by looking *outside* the administrative record to see what the agency may have ignored." *Id.* (emphasis added). *See also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009); *See also Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 666-67 (D.N.M. 1980) *aff'd sub nom. Nat'l Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981) ("extra-administrative evidence may be necessary in NEPA cases because it is the administrative record itself — the EIS and its supporting documents — which is the target of a court's scrutiny….").

[3] Both the District of Columbia Defendants and Federal Defendants submitted brief Responses to CSXT's motion to quash in which they echo CSXT's argument and indicate that they will oppose any attempt on the part of the Plaintiff to introduce documents that were not specifically included in the administrative record.

A NEPA case, "is inherently a challenge to the adequacy of the administrative record," which is why courts may "look outside of the record when assessing the adequacy of an EIS or a determination that no EIS is necessary." *Ohio Valley Envtl. Coal.*, 556 F.3d at 201.

In *Forest Guardians*, the Tenth Circuit recognized that extra-record evidence was essential for a "predetermination inquiry to be conducted with sufficient analytic rigor." *Id.* at 717. In rejecting a NEPA inquiry limited to the administrative record, the type of inquiry CSXT would have this Court engage in, the *Forest Guardians* court explained:

> [W]e doubt the wisdom and efficacy of an approach that would limit the focus of the predetermination inquiry to the environmental analysis alone. That approach could fail to detect predetermination in cases where the agency has *irreversibly and irretrievably committed itself to a course of action*, but where the bias is not obvious from the face of the environmental analysis itself…. Accordingly, irrespective of the facial regularity of the agency's NEPA analysis, we should not ignore relevant evidence that suggests that the agency may have violated the procedures established by NEPA, thereby contravening the statute's overarching purpose.

Id. (emphasis added).

This Court has recognized the inherent difference between NEPA cases and other APA cases, noting, "in cases arising under the National Environmental Policy Act, a court may need extra-record review to evaluate whether an agency's analysis of potential environmental impacts of a proposed action was arbitrary and capricious." *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006); *See also Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001) ("courts have looked beyond the record when it is necessary to determine whether the agency considered all the relevant factors.").

As such, to the extent that the agency record is inadequate and/or was tainted by unlawful predetermination, this Court must look outside of the record to assess any agency

action. *Pac. Shores Subdivision, California Water Dist.*, 448 F. Supp. 2d at 6; *Forest Guardians*, 611 F.3d at 716.

B. There Is Ample Evidence Of Predetermination, Necessitating Extra-record Evidence In This Case.

In its Motion to Quash, CSXT argues that the Committee has produced no evidence that the "Government acted in bad faith by approving the Virginia Avenue Tunnel project." CSXT Mot. to Quash at 7. Contrary to CSXT's assertion, however, there is evidence of predetermination in the form of numerous agreements and commitments made between DDOT and CSXT prior to the commencement of the EIS process. *Supra,* discussion of Exhibits 1-3. These agreements, which were only made public in the Final Environmental Impact Statement, show that commitments were exchanged between DDOT and CSXT that carried substantial benefits and penalties for both parties. *Id.*

This evidence is akin to the extra-record evidence on which courts have relied in other NEPA cases involving predetermination. *See Forest Guardians*, 611 F.3d at 716–17 (considering an extra-record memorandum and meeting minutes, which evidenced that parties had agreed to a particular environmental outcome prior to completing the procedural requirements of NEPA).

CSXT cites to a number of D.C. Circuit cases in which the court rejected any consideration of evidence outside of the administrative record. CSXT Mot. to Quash at 8–9 (citing *Air Transport Association v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011); *Commercial Drapery Contractors v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458 (D.C. Cir. 1994)). The weak link in CSXT's argument is that none of the cases cited by CSXT were NEPA suits.

As Plaintiff has already established above, reviewing courts treat NEPA cases differently with regard to extra-record evidence, because a NEPA case, "is inherently a challenge to the adequacy of the administrative record," necessitating a "look outside of the record when assessing the adequacy of an EIS or a determination that no EIS is necessary." *Ohio Valley Envtl. Coal.*, 556 F.3d at 201. *See also Pac. Shores Subdivision, California Water Dist,*, 448 F. Supp. 2d at 6 ("in cases arising under the National Environmental Policy Act, a court may need extra-record review to evaluate whether an agency's analysis of potential environmental impacts of a proposed action was arbitrary and capricious."); *See also Amfac Resorts, L.L.C.*, 143 F. Supp. 2d at 11 ("courts have looked beyond the record when it is necessary to determine whether the agency considered all the relevant factors.").

As a result of CSX's and DDOT's unlawful predetermination, evidenced by pre-EIS agreements and commitments, and as a result of this court's obligation to conduct a predetermination inquiry "with sufficient analytic rigor," to borrow a phrase from *Forest Guardians*, 611 F.3d at 717, it is essential that extra-record evidence be considered.

C. Plaintiff Is Entitled to Discovery

Plaintiff is entitled to discovery in order to supplement the FOIA response and support its predetermination argument.

The questions of (1) whether discovery will be allowed and (2) whether extra-record material should be considered are two halves of the same coin, for how would a party typically find extra-record evidence but for the ability to conduct discovery?

Several cases refer to the ability to conduct discovery and present extra-record evidence as a single question. *See*, e.g., *Nat'l Audubon Soc. v. U.S. Forest Serv.,* 46 F.3d 1437, 1447 (9th Cir. 1993) ("certain circumstances may justify expanding review beyond the record or permitting

discovery …"); *Sierra Club v. U.S. Dep't of Transp*., 245 F. Supp. 2d 1109, 1118 (D. Nev. 2003) ("In NEPA cases, discovery and consideration of evidence outside of the administrative record is permissible in certain circumstances.").

This Court has applied the same standard for considering extra-record evidence – namely where a party can show that the record does not include all of the information that an agency considered in making its decision – to requests for conducting discovery in a NEPA cases. *Greenpeace, U.S.A. v. Mosbacher*, 1989 WL 15854, at *1 (D.D.C. Feb. 15, 1989) ("Discovery should be permitted when there are supported allegations that the record may not include all the evidence that was considered in making the administrative determination").

In *Amfac Resorts, L.L.C.*, similarly, the District Court noted:

> To obtain discovery from an agency in an APA case … a party must provide good reason to believe that discovery will uncover evidence relevant to the Court's decision to look beyond the record. Thus, a party must make a significant showing … that it will find material in the agency's possession indicative of bad faith or an incomplete record.

143 F. Supp. 2d at 12 (citations omitted).

In *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971), the D.C. Circuit reversed the District Court's grant of summary judgment, in order to allow discovery in a NEPA case. *Id.* At 787. The plaintiffs in that case sought discovery to establish that there existed "responsible scientific opinion as to possible adverse environmental consequences," which the agency omitted from its environmental assessment. *Id.* At 787–88. The plaintiffs had also alleged the existence of reports that recommended against the agency's proposed course of action. *Id.* In ruling that plaintiffs were entitled to discovery, the D.C. Circuit noted "NEPA clearly indicates that the agency responsible for a project should obtain and release

such adverse reports." *Id.* at 788. The court was particularly swayed by the fact that discovery would allow plaintiffs an "opportunity to substantiate their allegations." *Id.*

In light of these cases, Plaintiff should be granted discovery as a means of gathering additional extra-record evidence that it has not been able to procure by way of its FOIA requests.

CSXT argues that Plaintiff has not made the requisite showing to obtain further discovery. CSXT, however, ignores the fact that in this case, there is actual, direct evidence of pre-determination in the form of at least: (1) the August 23, 2010 agreement (Exhibit 1) – in which DDOT agreed to support the preferred build alternative in exchange for certain commitments by CSXT; and (2) the October 29, 2013 agreement (Exhibit 2), in which DDOT agreed to accept a penalty in the event that CSXT did not get approval for the tunnel expansion project.

There is also direct evidence, disclosed in the August 23, 2010 and October 23, 2013 agreements, as well as documents produced in response to Plaintiff's FOIA requests, that show that additional documents that are relevant to the predetermination analysis exist.

The documents in the record, and documents produced in response to Plaintiff's FOIA request specifically reference additional agreements between DDOT and CSXT that were not made a part of either the Draft EIS, the Final EIS or the FHWA Record of Decision. *Pac. Shores Subdivision, California Water Dist.*, 448 F. Supp. 2d at 6 (ruling that to be entitled to discovery, plaintiff "must identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record."). It is these documents that Plaintiff seeks by way of the subpoena served on CSXT on December 11, 2014.

For example Plaintiff's subpoena targets the following documents or information that are specifically referenced in documents that were disclosed in the Final Environmental Impact Statement:

(1) The July 26, 2010, agreement between CSXT and DDOT that is referenced in the August 23, 2010 memorandum of agreement (Exhibit 1, p. 2). *See* Subpoena, Exhibit 7 paragraphs 1 and 2;

(2) All "agreements to implement the terms" of the August 23, 2010 agreement between DDOT and CSXT (Exhibit 1, p. 1). *See* Exhibit 7, Subpoena paragraph 3;

(3) The letters of support and grant applications that DDOT agreed to submit in support of the Tunnel expansion project, as referenced in Exhibit 1, Art. II (A); *Id.* at Art. II (B). *See* Exhibit 7, Subpoena paragraphs 4-5;

(4) All documents referring to the disposition of the $4,171,044 CSXT Credit, as identified in the August 23, 2010 agreement (Exhibit 1, Art. III (A); *Id.* at Art. II (B)). *See* Exhibit 7 Subpoena paragraph 6-7;

(5) The documents describing the permits, licenses, conditions and easements that would be needed for the Virginia Avenue Tunnel expansion, as referenced in the August 23, 2010 agreement (Exhibit 1, Art. III (C); *Id.* at Art. II (D); *Id.* at Art. III (E)). *See* Exhibit 7 Subpoena paragraph 8.

(6) The contracts between CSXT and Parsons, Clark, and Parsons Brinkerhoff, all of which companies were heavily involved in the studies that support the EIS (and the selection of the build alternative) and with whom CSXT has contracted to perform the actual tunnel expansion. Plaintiff seeks these documents to determine

whether or not any of these engineering firms was contractually obligated to produce an EIS that would select the build option that CSXT clearly preferred at the outset. *See Davis v. Mineta*, 302 F.3d 1104, 1110 (10th Cir. 2002),

The subpoena also targets, *inter alia*, the following documents, which are referenced in records produced in response to Plaintiff's FOIA requests to DDOT:

(1) The listing of fees and charges CSXT was to pay to the District of Columbia associated with the Virginia Avenue Tunnel expansion, as referenced in a September 27, 2012 letter from CSXT Vice President Louis Renjel to City Administrator Allen Lew (Exhibit 6). *See* Exhibit 7, Subpoena paragraph 13;

(2) All documents associated with an agreement on the part of DDOT to pay 1/3 of the cost of lining the 11th Street SE sewer, in association with the Virginia Avenue Tunnel expansion, as referenced in the September 27, 2012 letter (Exhibit 6, "Phase 3"). *See* Subpoena, Exhibit 7 at paragraph 14;

(3) Any and all documents associated with CSXT's decision whether to extend the Virginia Avenue Tunnel to 12th Street, as referenced in the September 27, 2012 letter (Exhibit 6, "Phase 2"). *See* Subpoena, Exhibit 7 at paragraph 15;

(4) All versions of the "11th Street Bridge and Virginia Avenue Tunnel Projects Joint Cooperation and Development Agreement" (and all documents that refer or relate to that agreement which was apparently attached to the September 27, 2012 letter) (Exhibit 6, first paragraph), but which was not produced along with the letter in response to the FOIA request. *See* Subpoena, Exhibit 7 at paragraphs 16-17;

(5) Agreements by which CSXT granted the District easements over the "Parkside Pedestrian Bridge and the "Anacostia Pedestrian Bridge (East)," as referenced in

the September 27, 2012 letter (Exhibit 6, "Phase 4"). *See* Subpoena, Exhibit 7 at paragraphs 18-19;

(6) All documents referring or relating to CSXT and the District of Columbia's communications, negotiations, agreements, proposals relating to Shepherd's Branch, as referenced in the September 27, 2012 letter (Exhibit 6, "Phase 5"). *See* Subpoena, Exhibit 7 at paragraph 20;

(7) The 2010 Memorandum of Agreement as referenced in the September 27, 2012 letter (Exhibit 6, p. 2). *See* Subpoena, Exhibit 7 at paragraph 22;

(8) Documents referencing the disposition of contributions made by CSXT under the 2010 MOA, as referenced in the September 27, 2012 letter (Exhibit 6, p. 2). *See* Subpoena, Exhibit 7 at paragraphs 23-24;

(9) Documents referencing the disposition of ancillary property rights associated with the Virginia Avenue Tunnel and Franklin Bridge Easement, as referenced in the September 27, 2012 letter (Exhibit 6, p. 2). *See* Subpoena, Exhibit 7 at paragraphs 21 and 25;

(10) Communications between CSXT and members of the D.C. Council pertaining to the Virginia Avenue Tunnel Expansion Project, particularly associated with any effort to secure a necessary D.C. Council resolution associated with the Tunnel Expansion project as referenced in the September 27, 2012 letter (Exhibit 6, p. 3). *See* Subpoena, Exhibit 7 at paragraph 26.

CSXT cites chiefly to *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476 (D.C. Cir. 2011), a case that this Court should note is not a NEPA case. In that case, the D.C.

Circuit affirmed the denial of a plaintiff's discovery request, because the plaintiff had failed to make a significant showing of the Government's bad faith. *Id.* at 488.

Plaintiff in this case stands on much firmer ground than did the plaintiff in *Air Transp. Ass'n of Am., Inc.* In that case, the plaintiff's showing in that case was limited to an intra-agency letter in which an agency official insinuated that his colleague's conduct gave "'the impression' of prejudgment." *Id.* In rejecting the plaintiff's entitlement to discovery in *Air Transp. Ass'n of America*, the D.C. Circuit concurred with the district court's finding, that the intra-agency letter fell short of the substantial showing necessary to justify discovery. *Id.* CSXT cites to a number of other cases in which the alleged bad faith was found to be too insignificant to warrant discovery. *See James Madison Ltd. by Hecht*, 82 F.3d at 1095 (ruling that affidavits stating that "it appeared" that officials had a "predetermined agenda" were "conclusory statements" falling short of a strong showing of bad faith); *Commercial Drapery Contractors*, 133 F.3d at 7 (finding no strong showing of bad faith where party seeking discovery offered one affidavit comprised of inadmissible hearsay); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997) (finding no strong showing of bad faith based on extra-record affidavits); *Saratoga Dev. Corp*, 21 F.3d at 458 (finding no strong showing of bad faith where party seeking discovery offered unsupported speculation that agency acted improperly). *San Luis Obispo Mothers for Peace*, 789 F.2d at 44-45 (finding no strong showing of bad faith where party offered no independent evidence of bad faith).

In the present case, to the contrary, Plaintiff has established that agreements and other commitments existed between DDOT and CSXT, in which DDOT irreversibly committed itself to supporting the Virginia Avenue Tunnel expansion project. Consequently, the evidence in this case goes far beyond merely the "impression of prejudgment" that was involved in *Air Transp.*

Ass'n of Am., Inc., 663 F.3d at 488. In this case, we have specific agreements that bound DDOT to support the Virginia Avenue Tunnel expansion and to accept a penalty in the event that the expansion project did not go through. The documents in the record, moreover, specifically identify additional agreements and documents that will be probative of prejudgment, as identified above.

II. CSXT Has Failed To Establish That The Subpoena is Unduly Burdensome

As this Court has ruled, the subpoenaed party bears the burden of establishing the unreasonableness of a subpoena request. *United States v. Hunton & Williams*, 952 F. Supp. 843, 855 (D.D.C. 1997). Further, "the quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances." *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005). Where possible, courts should avoid quashing a subpoena in favor of "other protection of less absolute character…." *Id.*

A. Plaintiff's Subpoena Requests Documents That Are Directly Relevant To The Issue of Predetermination.

CSXT argues that Plaintiff's subpoena imposes an undue burden, because it allegedly demands documents that are not relevant to the lawsuit. In support, CSXT argues, without citing to any case law, that Plaintiff cannot seek discovery of CSXT documents based on the Government's unlawful predetermination. Further, CSXT argues that its communications with the District of Columbia cannot be subject to discovery because the District of Columbia was not the NEPA decisionmaker. But as the Tenth Circuit has recognized, the predetermination of other involved parties *can* be attributed to federal agencies. *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). As such, any documents that shed light on the issue of predetermination are relevant to the instant case regardless of whether they were generated by CSX, DDOT, or FHWA.

In *Davis*, a NEPA case involving the construction of a freeway interchange, FHWA was the lead agency working with the Utah Department of Transportation and the cities of Draper, Sandy and North Jordan. *Id.* at 1110. A private engineering firm prepared the Environmental Analysis, under an agreement with Sandy City to commit itself to a favorable outcome of the Environmental Assessment. *Id.* Despite this predetermination, FHWA adopted the Environmental Analysis and issued a Finding of No Significant Impact. *Id.* Accordingly, The Tenth Circuit held that the predetermination could be attributed to FHWA because FHWA was so closely involved in the Environmental Analysis process and "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." 302 F.3d at 1113. *See also Forest Guardians.*, 611 F.3d at 716.

In the present case, DDOT was co-lead agency and, at least as of the time of the issuance of the FEIS, FHWA was aware of the agreements between DDOT and CSXT (since those agreements were included in the Appendix to the FEIS). Additionally, the Plaintiff put FHWA on notice of the predetermination by way of a detailed letter, with Exhibits, on September 11, 2014 - well in advance of the time that FHWA issued its Record of Decision. (See Exhibit 8 (without exhibits). Despite that notice, FHWA relied entirely on the FEIS when it issued its Record of Decision. Consequently, similarly to *Davis*, FHWA was aware that CSXT and DDOT had unlawfully predetermined the outcome of the EIS and it did nothing to neutralize or insulate its ultimate decision from that predetermination.

Consequently, CSXT must comply with Plaintiff's subpoena, as the documents sought are directly relevant to CSXT's, DDOT's, and FHWA's involvement in the predetermination of the EIS. *See Davis, supra*.

B. CSXT Has Failed To Show That Plaintiff's Requests Are Overbroad.

CSXT argues that the subpoena should be quashed or modified because it is overbroad. This is not the case. CSXT complains that Plaintiff seeks "all documents 'associated with' or 'referring or relating to' certain topics," CSXT Mot. to Quash at 12, yet it completely omits any mention of the specific "topic" Plaintiff's requests are concerned with—agreements and other documents that are directly relevant to the issue of CSXT 's and DDOT's unlawful, irreversible commitment to the Virginia Avenue Rail Tunnel project prior to the EIS. Subpoena, Exhibit 7 at paragraphs 2, 3, 5, 6, 14, 15, 18, 19, 20, 23, 24, 25.

Second, CSXT complains that, other than requests 26 and 27, the requests contain no date limitations. This is untrue. The vast majority of the documents Plaintiff requests are related to, or reference, specific agreements and documents generated by CSXT, which are specifically dated. As such, those documents would inherently be temporally proximate to the specific agreements referenced in the subpoena.

Lastly, CSXT offers a "blanket assertion of undue burden," *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers*, 2012 WL 112325, at *2-3 (N.D.W.Va. Jan. 12, 2012), complaining of the alleged great volume of documents it would have to identify, review and prepare, attributing some of that volume to Plaintiff's definition of "CSXT." Such assertions "fail to meet the high burden of showing, with particularity, the source and extent of the burden claimed." *Id.* Further, "with the prolificacy of extensive electronic discovery in modern litigation, the argument that a subpoena requests large amounts of materials which would require a significant amount of time to produce is often insufficient to show undue burden." *Id.*; *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984) (noting that "volume alone is not determinative" for a movant to support a motion to quash); *Democratic*

Nat. Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973) ("The fact that the materials requested cover an extended period of time and are voluminous will not render the subpoenas invalid.").

Likewise, CSXT's claims that the requested documents will "likely" contain confidential or sensitive information are unpersuasive and lack the requisite particularity required to quash a subpoena. *See Ohio Valley Envtl. Coal., Inc.*, 2012 WL 112325, at *2-3 (noting that a movant must show "with particularity, the source and extent of the burden claimed"); *see also Hunton & Williams*, 952 F. Supp. at 855 (noting that the subpoenaed party bears the burden of establishing the unreasonableness of a subpoena request); *Flanagan*, 231 F.R.D. at 102 ("the quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances.").

Consequently, CSXT must comply with the subpoena, as it has failed to establish that Plaintiff's requests are overbroad.

C. Plaintiff Seeks A Subpoena Now Only After Numerous Attempts At Securing The Requested Documents Through Other Means.

Plaintiff has made various efforts, prior to resorting to a subpoena, to obtain the requested Information through other means. An important factor this Court has relied upon in deciding whether subpoena requests are burdensome is "whether the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive" *In re Denture Cream Products Liab. Litig.*, 292 F.R.D. 120, 123 (D.D.C. 2013).

In the present case, Plaintiff submitted multiple FOIA requests, including a FOIA request to DDOT on July 30, 2014. Exhibit 4. This request demanded many of the same documents Plaintiff now requests from CSXT in its subpoena. Exhibit 7. Unfortunately, DDOT withheld numerous documents from its FOIA production. *See* Exhibit 6. As such, had DDOT complied

with the FOIA request, there would be no need to subpoena the documents Plaintiff's now request. In order to procure the documents through the FOIA process, Plaintiff would be required to file a new lawsuit, based on the DC Freedom of Information Act, which will be more timely and burdensome than if CSXT simply responds to the subpoena that has already been served on it.

Another, factor that weighs heavily in favor of the pressing necessity for Plaintiff's subpoena is "the importance of the proposed discovery in resolving the issues." " *In re Denture Cream Products Liab. Litig.*, 292 F.R.D. at 123. As Plaintiff has already established, the predetermination inquiry is one that must be conducted with "analytic rigor," requiring the use of extra-record evidence. *Forest Guardians*, 611 F.3d at 717. As such, Plaintiff's requests are of the utmost importance to resolve the extent of DDOT's predetermination.

CONCLUSION

For the foregoing reasons, this Court should deny CSXT's motion to quash the subpoena and order CSXT to comply with the requests within the subpoena.

Respectfully Submitted,
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