*** EMERGENCY MOTION ***

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

THE COMMITTEE OF 100 ON THE FEDERAL CITY	)	
Plaintiff	)	
v.	)	
	)	**Appeal No. 15-5112**
ANTHONY FOXX, Secretary of Transportation, *et al.*	)	
Defendants	)	
	)	
And	)	
	)	
CSX TRANSPORTATION, INC.	)	
Defendant-Intervenor	)	
	)	

PLAINTIFF'S EMERGENCY MOTION FOR STAY PENDING APPEAL OF DISTRICT COURT'S DENIAL OF PRELIMINARY INJUNCTION
AND
EMERGENCY MOTION FOR SUMMARY REVERSAL

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TABLE OF AUTHORITIES[1]

[1] The cases on which we chiefly rely are marked with asterisks.

STATEMENT OF PROCEDURAL POSTURE AND TIME EXIGENCY

The Committee of 100 is appealing the District Court's denial of a preliminary injunction that would prohibit the Federal and District Agencies from issuing permits and approvals and from taking any other action in furtherance of the Virginia Avenue Tunnel Expansion Project as a result of Appellees' violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

Plaintiff files this Motion as an Emergency Motion because irreversible construction activities, including cutting down mature trees, which the District Court found to constitute irreparable harm, is imminent. CSXT has indicated that construction would begin in April 2015. Appendix (Appx.) at 427, and it is in the process of relocating utilities in preparation for construction. Appx. at 1214. This Motion could not be filed sooner, due to the time it took the Committee to review the large Administrative Record (consisting of over 130,000 documents), which was filed on April 13, 2015 and the time it took to file the Motion for Stay before the District Court, the decision on which was issued on April 23, 2015.

The Committee will also be filing a Fed. R. Civ. P. 59(e) Motion to Alter Judgment in the District Court, pursuant to Fed. R. App. P. 12.1.

The Committee filed suit and a preliminary injunction pending a determination of the merits on November 12, 2014 [ECF 1 and 3]. The District

Court held hearings on the Committee's application for a preliminary injunction on February 20, 2015 (Appx. 304, *et seq*.). The court rejected the Application for Preliminary Injunction on April 7, 2015 [ECF 59]; *See* Appx. 15.

Pursuant to the Court's grant of Defendant's contested motion to extend time to file the Administrative Record [ECF 55, 57 and Minute Orders dated March 26, 2015 and April 7, 2015], the Defendants filed the full Administrative Record on April 13, 2015 [ECF 61]. The Committee did not have access to the Administrative Record at the time that it briefed or argued the Application for Preliminary Injunction. The Committee filed its notice of appeal on April 15, 2015 [ECF 64]. On that same date, and pursuant to the requirements of Rule 8 of this Court's Rules of Procedure, the Committee filed a Motion for Stay before the District Court [ECF 63]. The District Court denied that motion on April 23, 2015 [ECF 68], Appx. 61.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, the Committee of 100 on the Federal City ("Committee"), seeks an order staying the effectiveness of the Environmental Impact Statement and Federal Highway Administration (FHWA) Record of Decision issued in this matter until this Court has the opportunity to decide the Appeal of the denial of the Preliminary Injunction.

The Committee requests an administrative stay, suspending the effectiveness of the Environmental Impact Statement and Record of Decision until briefing has been completed and this Court can issue a decision on this motion, pursuant to this Court's Handbook of Practice and Internal Procedures.

The District Court's predetermination standard permits an agency to enter agreements and accept all manner of valuable inducements that lock it into a course of action so long as it refrains from issuing permits until after the NEPA process concludes. This seriously undermines the "hard look" required by NEPA. Plaintiff will suffer irreversible damages and CSXT failed to introduce any specific evidence that they will suffer any harm; consequently, the balance of harm swings in Plaintiff's favor. The public has a strong interest in enforcing NEPA. Consequently, the District Court should have issued the Preliminary Injunction.

II. FACTS

CSX Transportation, Inc. (CSXT) launched the National Gateway Initiative

in May 2008, to create double-stack clearances beneath public overpasses along the railroad [which would] allow rail carriers to stack intermodal containers atop each other, enabling each train to carry about twice as many cargo boxes." Appx. 63. The Initiative involved 13 clearance projects in the Washington Region. Appx. 67. Six of the projects were in the District. Appx. 76. The Virginia Avenue Tunnel (Tunnel) is located in Capitol Hill, four blocks away from the U.S. Capitol. The Tunnel portals are located near 2nd Street SE and 11th Street SE. Appx. 81. On May 18, 2011 CSXT committed $160 million to expanding the Tunnel. Appx. 77-78.

CSXT began communicating with the D.C. Department of Transportation (DDOT) no later than August 2009 about expanding the Tunnel, as well as several other National Gateway Initiative Projects. Appx. 76. CSXT characterized DDOT's expected role as "to facilitate the process of review and approval of the NEPA documentation." *Id.*

From early on DDOT viewed its support for the Tunnel Expansion Project as a bargaining chip to attain property and rights from CSXT. On January 20, 2010, Karina Ricks (Ricks), DDOT head of Policy and Planning, advised DDOT Director, Gabe Klein (Klein), that DDOT should determine "what leverage we have with the Virginia Avenue tunnel … and how we can use that [against CSXT] for other acquisitions." ARDDOT565. In March 2010, Ricks asked Klein for

approval to work on the NEPA process. Appx. 101-104.

A May 14, 2010 DDOT memo (Appx. 105) shows that its "position on the National Gateway" depended on "resolving issues with CSX on other projects," (Appx. 114-115), including costly modifications to the 11th Street Bridge project, obtaining Shepherds Branch for the development of the Street Car program and other easements and right of way agreements. Appx. 110-111.

On May 27, 2010, Steven Seigel, Development Director for the Office of the Deputy Mayor for Planning & Economic Development, asked Ricks and Klein: "Does DDOT need anything from CSX? They're asking for an easement from the District and it is really important to them. So, speak now." Appx.121. In response DDOT identified all of the outstanding projects and needs, including Shepherds Branch, that DDOT needed from CSXT. Negotiations between DDOT and CSXT ensued over projects and disputes between CSXT and DDOT. Appx. 124-125.

On July 1, 2010, DDOT agreed to work "on CSXT's behalf" regarding its NEPA obligations if CSXT agreed to DDOT's terms: "DDOT is open to acting on CSX's behalf for the environmental work associated with the Virginia Avenue Tunnel project. The next step is for CSX to review the [draft agreement] and provide any additional comments …". Appx.124-125 (emphasis added).

In a July 1, 2010 email exchange between Cleckley and Jared Kahn (Ofc. of Deputy Mayor for Planning and Economic Development), Kahn noted the

District's support for the tunnel expansion, but indicated that it should not be made public: "Not that we don't support it, just there is no need to make a public announcement." Appx.127.

As of August 20, 2010, DDOT was waiting to start the environmental work for the Virginia Avenue Tunnel until "some outstanding issues" were resolved between DDOT and CSXT. Appx.131. CSXT managed to secure DDOT's irreversible commitment to the tunnel expansion on August 23, 2010, when DDOT and CSXT came to an agreement that exchanged DDOT's support for the Virginia Avenue Tunnel with numerous incentives from CSXT.

In the August 23, 2010 Memorandum of Agreement between CSXT and DDOT (Appx.135-144), DDOT agreed: **(1)** that the Virginia Avenue Tunnel Expansion Project was "critical" to rail transportation and agreed to work together with CSXT to advance the project, including submitting grant applications for the project. Appx. 135-137 ("Whereas" clauses; and Art. II (B); Art. III)); **(2)** To provide support for CSXT's the Virginia Avenue Tunnel expansion project. Appx.136 (Art. II (A)); **(3)** to write a letter to U.S. Department of Transportation in support of the National Gateway Initiative (i.e., the Virginia Avenue Tunnel expansion). Appx.136 (Art. II (A)); **(4)** to support "legislative efforts to secure funding" for the National Gateway Initiative (i.e., the Virginia Avenue Tunnel expansion). *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." Appx.137 (Art. III (D));

In exchange for DDOT's obligations, CSXT agreed to: **(1)** pay DDOT $4,171,044 for design and construction costs associated with the 11th Street bridge. Appx.138 (Art. IV (C)); **(2)** remove a communication tower from DDOT property. *Id.* at Art. IV (B); **(3)** negotiate with DDOT for permanent easements associated with different CSXT properties so that DDOT could ultimately build pedestrian and bicycle trails that spanned CSXT rail lines; Appx.139;[2] and **(4)** negotiate with DDOT over DDOT's use and development of CSXT's Shepherd Branch.[3] Appx.140 (Art. VII).

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[2] 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, Appx. 158; and (2) The Rhode Island Avenue Pedestrian/Bicycle Bridge (Appx. 139, 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* press release, Appx. 161-63.

[3] According to the May 14, 2010 briefing (Appx. 110), DDOT considered the Shepherds Branch spur to be "vital to the development of the street car … [because] the design on the street car line will depend on the Shepherd spur ROW and proposed usage along Firth Sterling Ave." Shepherds Branch has a long history of freight service to and through the region. Shepherd Branch was formerly used to service Bolling Air Force base, the Blue Plains water treatment plant and St. Elizabeth's hospital. Its use for rail traffic ended in 2001. See, generally, The History of Baltimore & Ohio's Shepherd Branch, http://ctr.trains.com/railroad-reference/operations/2001/12/the-history-of-baltimore-and-ohios-shepherd-branch.

On August 26, 2010 Faisal Hameed, the lead of the Tunnel expansion project for DDOT, invited Michael Hicks (Hicks), from FHWA, among others to an "interagency scoping meeting." Appx.200-02. According to the invitation, the scoping meeting was to discuss "The VAT project [,which] involves reconstruction of the tunnel to accommodate two railroad tracks and lowering the existing rail bed to increase vertical clearance." Hicks was no stranger to the Tunnel expansion project. On November 4, 2009, Hicks was briefed on all of the National Gateway Initiative projects, including the Tunnel expansion project. Appx. 445. A March 2010 Briefing paper from Ricks to Klein (Appx. 209) states that FHWA was resisting taking on the role of lead agency for the NEPA process, and had indicated that it had issues with segmenting the National Gateway Initiative into smaller pieces.

After being invited to the Interagency Scoping Meeting, in August 2010, Hicks wrote back to Hameed:

> NOT SURE HOW TO HANDLE THIS ONE, THEY HAVE AN ANNOUNCED PREFERRED ALTERNATIVE SO *IT'S ALREADY PRE-DECISIONAL.* THIS ONE IS GONNA BE WEIRD … FHWA HEADQUARTERS HAS DROPPED THE BALL ON THIS THING BECAUSE THEY ISSUED NO GUIDANCE ... I'LL TIE THEM IN KNOTS WITH MY QUESTIONS/CONCERNS WITHOUT IT.

Appx. at 210 (Allcaps in original, additional emphasis added).

CSXT and DDOT carried on with project planning and analysis for an additional nine months before FHWA agreed to take on the role of lead agency for

NEPA, on May 9, 2011. *See* Appx. 211; Appx. 81. Even after FHWA entered the project as the federal lead agency, DDOT was considered the lead agency by all involved, and it directly supervised Parsons Brinckerhoff, CSXT's hired consultant. *See* organizational chart, Appx. 212. DDOT made the decision, in April 2012, about which project concepts would be carried forward. Appx. 213.[4]

On August 31, 2010, consistent with the August 23, 2010 agreement (*supra*), DDOT Director Klein and City Administrator Neil Albert committed to the Virginia Avenue Tunnel project in a letter to the Secretary of Transportation, saying "I am [*sic*] writing to express my support for the National Gateway initiative … As part of the National Gateway, the Virginia Avenue Tunnel will be upgraded to a double-track and double-stack structure … [W]e must take full advantage of these public-private investments in infrastructure to stimulate our economy and deliver high-paying jobs." Appx. 227 (emphasis added).

On May 16, 2011 the District executed a change order with Skanska/Facchina to redesign the 11th Street bridge "in such a way as to not preclude the construction of a CSX temporary shoo-fly track and the widening of the [Tunnel]. The change cost the District $4,171,044. Appx. 228.

[4] Under DDOT's Environmental Manual (2012), even when FHWA is the lead agency under NEPA, DDOT has primary responsibility for drafting the NEPA mandated documents. Table 7-1 of the Manual (Appx. 218) demonstrates that DDOT has the lead role in making initial decisions as to whether an Environmental Impact Statement is necessary under NEPA. DDOT then has responsibility for drafting the Environmental Impact Statement for FHWA approval.

On May 18, 2011, Anthony Bellamy (the new interim DDOT Director) issued a statement that "The completion of the National Gateway and Virginia Avenue Tunnel will help improve the flow of rail traffic through the District and the region, and we will be working with CSX to minimize the impact of the construction on our residents and neighborhoods." Appx. 232 (emphasis added).

On June 1, 2011 Parsons Brinckerhoff issued a timeline for the NEPA process that called for a Finding of No Significant Environmental Impact (FONSI) to be issued in June 2012. Appx. 249. However, on April 12, 2012, FHWA concluded that an Environmental Impact Statement was required, notice of which was published in the Federal Register on May 1, 2012. 77 Fed. Reg. 25781.

CSXT was responsible for drafting all NEPA documents, including responding to comments. *See* Appx.250 ¶ 2 ("it is the project sponsor's responsibility to develop the NEPA documentation … [t]herefore delete all references [that] imply either FHWA or DDOT have actively engaged in responding to comments or responses regarding the sponsor's actions"). Although Parsons Brinckerhoff was CSXT's lead consultant for the Environmental Impact Statement, Parsons Corp. and Clark Construction, were heavily involved and prepared numerous studies underpinning the Statement and they drafted portions of the Statement. *See* Appx. 148, 298. Parsons and Clark had conflicts of interest because they are the leading engineer and contractor to build the expanded tunnels.

See Appx. 302. *See also, e.g.,* Appx. 369-70 (66:22-67:3).

In August 2012, CSX "donated" money to the District. The agreement (which was not included in the Administrative Record) required some sort of conflict of interest waiver, which was apparently approved. *See* Appx. 452-464.

In a September 27, 2012 letter from CSXT to the City Administrator, CSXT identified the significant elements of an agreement titled "11th Street Bridge and Virginia Avenue Tunnel Projects Joint Cooperation and Development Agreement." Appx. 493. 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 Tunnel (*Id.,* Phase 1). *See also* Appx. 501-02. 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.[5] According to the Joint Cooperation Agreement, CSXT agreed to reimburse the District 1/3 of the cost of lining the sewer, only if the District did not default on its obligations, including the obligation to grant or approve permits and approvals, and to support CSXT's efforts to obtain FHWA approval for the tunnel expansion. Appx. 507.

The Joint Cooperation Agreement also elucidates the negotiations for easements over the Parkside and Anacostia Pedestrian Bridges. In both cases,

[5] The Parkside Pedestrian Bridge is a $22 million pedestrian bridge that spanned CSXT tracks and connected to the Minnesota Avenue Metro station. Appx. 1212.

CSXT made it clear that its agreement to issue the easements was conditioned on the District's granting and approving permits and approvals or to support CSXT's efforts to obtain FHWA approval for the tunnel expansion. Appx. 508-09.

According to the September 27, 2012 letter (Appx. 494, Phase 5), and the Joint Cooperation Agreement (Appx. 511-512) CSXT was only required to work with the District on the sale of Shepherd Branch after the Virginia Avenue Tunnel construction project was completed. *See Also* Appx. 529 ("CSX states that they will consider Shepherd's spur as a trails use only after the VAT is complete.")

DDOT officials were apparently unaware that the City Administrator was negotiating the Joint Cooperation Agreement with CSXT. Appx. 532.

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 benefit of DC – at our expense." *See* Appx. 534-35. A December 21, 2012 agreement, discussed below, establishes that the District accepted CSXT's offer to extend the tunnel, which was an additional inducement to DDOT to support the tunnel expansion project. Indeed, CSXT's agreement to extend the tunnel represented a value to the District of between $3.5 and $6.2 million because it avoided the construction of a bridge over the CSX rail line. *See* Appx. 536-537.

On October 12, 2012 CSXT wrote to District officials including Lew and

Bellamy, confirming the current state of negotiations between the District and CSXT. This included that the District "will agree to confirm and provide to CSX – at no cost – any and all property rights, easements and permits, etc. needed to construct any of the three build alternatives for the VAT." Appx. 541-42. CSXT made it clear that DDOT's agreement to the conditions was required for "the District and CSX to work together with diligence on other aspects of our respective projects including resolution of Shepherds Branch, easements on various projects, and permits from various agencies for the Virginia Avenue Tunnel." *Id.*

Negotiations between CSXT and the City Administrator continued, apparently in secret. For example, on November 18, 2012 CSXT's lobbyist, David Goldblatt remarked to the General Counsel for the City Administrator (Barry Kreiswirth) that the draft "term sheet agreement" that CSXT was negotiating with DDOT did not reflect communications between CSXT and the City Administrator. *See* Appx. 544.

On December 18, 2012, District officials advised FHWA (through Hicks) that the District and CSXT had been in "negotiations for several months on a number if issues regarding the VAT, 11th Street Bridge and other CSX/DDOT projects." Appx. 545. On December 19, 2012, Hicks issued an opinion that none of the Tunnel expansion options could be considered "reasonable alternatives" for the purposes of NEPA until a dispute between DDOT and CSXT over who owned

the Right of Way associated with the Tunnel was resolved: "An alternative … that lies within a disputed ROW cannot be considered as a 'reasonable alternative;' therefore, it would have to be eliminated from further consideration prior to the distribution of the draft environmental document." Appx. 547.

Two days later, on December 21, 2012, DDOT and CSXT reached an agreement on the right of way. Appx. 549, *et seq*. The December 21, 2012 agreement contains many of the provisions of the draft "Joint Cooperation Agreement" discussed above. The agreement made DDOT's agreements to continue to manage the EIS process and issue right of ways and public space permits a precondition on CSXT's agreement to negotiate over: the amount CSXT would reimburse DDOT for lining the sewer (mentioned *supra*), "Credits to CSXT and DDOT;" and easements associated with the: Parkside Bridge; Sewer-related costs and agreements; Anacostia Bridge (East); Shepherds Branch; and Barney Circle. Appx. 550, ¶ 6. Furthermore, just as was the case in the draft Joint Cooperation Agreement, the City Administrator agreed that he 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* Appx. 550 ¶ 6(b)(i). Consequently, this document – read together with the September 27, 2012 Renjel Letter and Joint Cooperation Agreement (Appx. 493 et seq.) - the City

Administrator appears to have pre-approved the permits for the Tunnel expansion.

On August 1, 2013, CSXT's lobbyist, David Goldblatt, emphasized that any sale of Shepherds Branch was contingent on CSXT receiving all permits needed for the Tunnel. "As the term sheet as amended is now drafted Shepherds branch will not be sold until all permits are provided for VAT construction." Appx. 556.

In an October 29, 2013 agreement (Appx. 563 *et seq.*), CSXT agreed to give DDOT an option to acquire Shepherds Branch. This was a strong inducement because, according to DDOT, "the street car line will depend on the Shepherd spur ROW [Right of Way]." Appx. 110. The option is of no value, however, 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." Appx. 565, ¶ II (B)(7) (emphasis in the original).

One of the alternatives to expanding the Tunnel that the Committee suggested in its comments to the EIS (Appx. 172, 194-198) was to use Shepherds Branch as a part of a re-routing alternative that would eliminate the need to use the Tunnel to carry freight through the heart of the capital. Because the District was

negotiating with CSXT to purchase Shepherds Branch, the District had an incentive to reject any concept wherein CSXT used Shepherds Branch.

On November 21, 2013, following a lunch between the CSX Chief Executive Officer and City Administrator Lew, Lew met with the Directors of all District agencies to discuss the permits CSXT needed for the Tunnel. Appx. 584.

On December 6, 2013, CSXT's lobbyist (Goldblatt) reminded Christopher Murphy – Chief of Staff to Mayor Gray – that Mayor Gray had "made sure Allen Lew was dedicated to ensuring this project has moved forward." Appx. 589 (bottom).

On December 11, 2013, between the time the Draft Environmental Impact Statement was issued (on July 12, 2013, *See* Appx.89) and the Final Statement was issued (June 5, 2014), DDOT recommended that the Mayor decline to hold a town hall meeting because the City did not intend to change its mind about pushing the tunnel expansion project forward: "We [DDOT] would then be putting the Mayor in a position of restating what has already been stated. This would probably enrage these concerned individuals even more because they are requesting and looking for us to change our position." Appx. 595 (¶ (a)).

As of December 11, 2013, CSXT and DDOT had agreed to First Source and Small Local and Disadvantaged Certified Businesses associated with the construction of the Tunnel "although finalizing and executing the agreements will

need to wait until the ROD is issued." Appx. 594.

The June 5, 2014 Final Environmental Impact Statement endorsed one of the tunnel expansion options. *See* Appx. 609, *et seq.*, EIS § 3.2. FHWA had grave misgivings about the studies and language used in the Statement, but did nothing to correct the misinformation – nor did it perform any studies of its own. Instead, FHWA coached CSXT as to how to avoid making the biased and flawed nature of the studies so obvious.

For example, Hicks cautioned that the vibration analysis CSXT was conducting was inconsistent with anecdotal information from residents. Appx. 681 ("If additional vibration test continue to evidence a lack of vibration attributable to train traffic, a viable and supportable explanation will have to be provided explaining the discrepancy"). In response to language that diminished the risk of Arsenic and Chromium 6 contamination, Hicks wrote: "The highlighted statement is yet another example of an opinion that leans toward dismissal of environmental consequences without benefit of supportive scientific analysis." Appx. 682. Rather than require CSXT to perform additional studies about the contamination and exposure risk (*id.*), Hicks asked that minimizing comments be removed. *Id.* As the Environmental Impact Statement reflects, CSXT ignored Hicks' comments. *See* Appx. 719.

Similarly, Hicks noted that there was no discussion about removing 8,000 sf

of asbestos from the tunnel. Appx. 683. Again CSXT ignored Hicks' comment, and the final document had no discussion of the risk of exposure. *See* Appx. 721.

Lastly, Hicks questioned the statements that not all of the residents of the Capper Residence for Seniors would be impacted during construction, and that there would be no pre-construction impacts. Hicks asked rhetorical questions: "If the statement was made, it is assumed some analysis was done …. Was there some analysis done that supports the conclusion drawn?" Appx. 698. The Final version does not reflect any analysis in response to Hicks criticism. Appx. at 734.

Following the issuance of the Environmental Impact Statement, FHWA relied on CSXT's contractor (Parsons Brinckerhoff) to draft and revise the FHWA Record of Decision. *See* Appx. 832; Appx. 833.

Hicks doubted Parsons Brinckerhoff's claim, in an early draft of the Record of Decision, that there would be no indirect impacts related to construction. But Hicks did not review the Environmental Impact Statement to verify that the claim was correct: "one discussion said there were no indirect impacts related to construction, which I find hard to believe …. If the FEIS supports that statement (which I did not have time to verify), then provide evidence of it." Appx. 837 (emphasis added).

In his subsequent comments to the draft document, Hicks exhorted Parsons Brinckerhoff to support the claim that there would be no indirect environmental

impacts from construction. Appx. 850-51; *Id. at* 888 ("I thought it was fairly simple … Just show evidence that **constructing the tunnel** won't have any indirect effects on any of the impact areas; you say it doesn't just show evidence that supports that … simple.") (emphasis in the original).

In the October 21, 2014 revised Record of Decision, Parsons Brinckerhoff claimed "Most of the direct effects of the Project will occur during construction" and then characterized the indirect effects to the environment related to the tunnel as having "already occurred." Appx. 890-91. With regard to "direct effects," Hicks responded: "what other direct effects are there that don't take place during construction?" Appx. 893. In the next draft, Parsons Brinckheroff changed the language to conceal the direct impacts that would occur outside of construction: "The direct effects of the Project will occur during construction." Appx. 897. Hicks accepted the revision without further due diligence or analysis. Appx. 899.

When it came to the "indirect impacts" language, *supra*, Hicks fumed:

> Jason, we are not discussing **the indirect effects of the tunnel**, we are discussing the **indirect effects of the construction of the tunnel!** They are two distinctly different things; therefore are there indirect effects caused by *the action* (construction) that are later in time or farther removed in distance, but are still reasonably foreseeable? **… So** … will the "construction" of the tunnel have *indirect effects* on: [the environment]? THAT IS THE QUESTION THAT MUST BE ANSWERED. **IF THE ANSWER IS NO,** PROVIDE EVIDENCE THAT SUPPORTS THAT. **IF THE ANSWER IS YES**, PROVIDE THE REQUIRED MITIGATION.

Appx. 894 (emphasis in the original). Hicks accepted the next draft, which

glossed over the impacts. Appx. 899.

Consequently, the Record of Decision (issued on November 4, 2014 (Appx. 902, *et seq.*) was not the product of FHWA's independent review of the FEIS and the underlying studies. Rather FHWA relied entirely on CSXT's consultant to draft the document and to delete troubling language rather than perform the independent research necessary to ensure that the findings in the Environmental Impact Statement were valid.

III. ARGUMENT

The Committee is likely to prevail in this Appeal because (1) the District Court misapplied the law when it denied the requested Preliminary Injunction; and (2), in the alternative, additional facts have been revealed in the Administrative Record, which were not available before the District Court ruled on the Preliminary Injunction, and which would have led to a decision in the Committee's favor even under the standard the District Court applied.

A. APPLICABLE LEGAL STANDARDS

In deciding whether to issue a stay pending appeal, the court must consider: "(1) whether the petitioner is likely to prevail on the merits of [its] appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest." *McSurely v. McClellan,* 697 F.2d 309, 317

(D.C. Cir. 1982). A sliding scale applies to the analysis. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

This Court reviews the District Court's "weighing of the four preliminary injunction factors" for abuse of discretion, but "[l]egal conclusions … are reviewed *de novo*." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal citations omitted).

Summary reversal is appropriate when the merits are so clear that further briefing is unnecessary. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987).

B. LIKELIHOOD OF SUCCESS ON THE MERITS[6]

1. Predetermination

Relying on *Wyo. Outdoor Council v. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) and *Sierra Club v. Peterson,* 717 F.2d 1409 (D.C. Cir. 1983), the District Court held this Circuit's precedent requires that in order for unlawful predetermination to occur, the agency's actions had to reach and "objective" threshold, and that no unlawful predetermination could be recognized unless the agency had issued "every permit necessary to begin the project prior to the issuance of the Environmental Impact Statement." Decision at 21-22 (Appx. 35-36, "Only when the agency had issued every permit necessary to begin the project

[6] The Committee does not waive any arguments made below in full merits briefing.

was there an irretrievable commitment of resources."). Plaintiff submits that this Circuit's precedent does not mandate the strict standard that the District Court applied here.

The District court erred by interpreting *Wyoming Outdoor Council* as governing the predetermination standard, because that case only addressed whether the plaintiff's NEPA challenge was ripe. 165 F.3d at 49 (no "irreversible and irretrievable commitment of resources necessary to establish ripeness.").

Sierra Club v. Peterson stands for the proposition that the Impact Statement must be undertaken before the occurrence of "irreversible and irretrievable commitments of resources to an action which will affect the environment." *Id.* at 357. Rather than the strict rule that this Court applied, *Sierra Club* holds that unlawful predetermination occurs when the Statement is prepared after the exercise of future options has been effectively precluded. 717 F.2d 1409, 1414 (D.C. Cir. 1983) ("the agency must ascertain to what extent its decision embodies an 'irretrievable commitment' of resources which precludes the exercise of future 'options.'").

Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000), stands for the proposition that entering into agreements that bind an agency into taking action, prior to the time an Impact Statement is completed, constitutes unlawful predetermination in violation of NEPA. *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.

Other Circuits have followed *Metcalf*,[7] as have District Court judges in this Circuit. In *Fund For Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003) the 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 (also relying on *Thomas v. Peterson*, 753 F.2d 754 (9th Cir.1985)). *Fund for Animals v, Norton* 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*.

According to *Metcalf, Sierra Club v. Peterson* and *Fund for Animals v. Norton*, the standard for predetermination is that an Agency irreversibly commits itself to a course of action when it makes a significantly firm commitment to the proposed project that other options are precluded and undermines the "hard look"

[7] *See Forest Guardians v. U.S. Fish & Wildlife Serv.,* 611 F.3d 692, 714 (10th Cir. 2010) ("As the Ninth Circuit explained in *Metcalf*, '[i]t is highly likely that because of the Federal Defendants' prior written commitment ..., the EA was slanted in favor of finding that the ... proposal would not significantly affect the environment."); *Defenders of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1116-17 (11th Cir. 2013); *Delaware Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Engineers,* 685 F.3d 259, 275 (3d Cir. 2012).

requirement found in NEPA. *Metcalf*, 214 F.3d at 1145. *See also Fund For Animals*, 281 F. Supp. 2d at 229 (taking action that "swings the balance decidedly in favor" of the proposed action is "impermissible under NEPA."); *Sierra Club*, 717 F.2d at 1414 (focusing on when agency "decision embodies an 'irretrievable commitment' of resources which precludes the exercise of future 'options.'").

That standard was met here. DDOT's agreements with CSXT and the inducements DDOT accepted from CSXT, swung the balance decidedly in favor of the project and effectively precluded the District from endorsing anything but CSXT's preferred options. *See Metcalf, Sierra Club v. Peterson* and *Fund For Animals v. Norton*, *supra.* The District's agreements with CSXT locked the District into supporting the Tunnel project before the NEPA process was concluded. *Metcalf*, 214 F.3d at 1145 ("before preparing an EA, the Federal Defendants signed a contract which obligated them [to the action] … by making such a firm commitment … Defendants failed to take a 'hard look' at the environmental consequences of their actions and, therefore, violated NEPA.").

If this conduct is condoned, then the purpose of NEPA – to ensure that environmental impacts are considered before projects are finalized (*See* 40 C.F.R. § 1500.1(a)-(c)) – would be seriously eroded. Project proponents would be free to enter into agreements that lock state and federal agencies into supporting projects – so long as they are careful enough to withhold permits – before the NEPA

processes are concluded.

DDOT's commitment to the tunnel expansion project was clear. As soon as the District learned that CSXT needed permissions to expand the tunnel, the District identified concessions and property that the District needed from CSXT. *Supra* at 3. The District's position, whether to support the tunnel expansion, was dependent on CSXT agreeing to the District's demands. DDOT agreed to act "on CSXT's behalf for the environmental work" if CSXT acceded to the District's demands, which is what ultimately occurred. *Supra at 3-4.* CSXT and the District then made agreements that required the District to support and approve the Virginia Avenue Tunnel in exchange for CSXT granting the District important easements and right of ways, and the option to purchase Shepherds Branch. *See, generally, fact section, Supra.* The District's commitment to the Tunnel was so strong that FHWA's lead (Hicks) declared that moving forward with the tunnel expansion project had been decided before any of the NEPA work had actually commenced. *Supra* at 7. The Mayor's office even refused to hold a town hall in December 2013 because there was no chance that the District would change its position. *Supra* at 15.

Had DDOT failed to support the Tunnel expansion, the District would have lost its ability to exercise the option to purchase Shepherds Branch. *Supra.* CSXT could have walked away from its numerous agreements (*supra* at 5). Indeed, the

Joint Cooperation Agreement shows that in the event of a breach, the District would be obligated to credit CSXT for the millions of dollars in inducements that CSXT had granted to the District. *Supra* at 11.

2. In the Alternative, the "Objective" Standard the District Court applied here was Satisfied.

According to the District Court, this Circuit requires that Plaintiffs seeking to establish a violation of NEPA based on predetermination must hew to an "objective approach to determining whether an agency has irreversibly committed resources towards a particular project." Decision at 21-22 (Appx. 35-36).

At least for the purposes of issuing a Preliminary Injunction, the Committee has met the objective standard. As explained above, the correspondence cited in this Motion and the District's agreements with CSXT explicitly and implicitly locked the District into supporting CSXT's preferred tunnel expansion project before the NEPA process was concluded and conditioned CSXT's inducements and concessions on the District's continued support for the project.

Under these circumstances, the practical effects of the District's conduct precluded other options before the NEPA process concluded.

3. Predetermination is Attributable to FHWA

In *Davis v. Mineta,* 302 F.3d 1104 (10th Cir. 2002),[8] the Environmental

[8] *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.*

Analysis required by NEPA was prepared by a private engineering firm, under contract with a local municipality. *Id*. As was the case here (*supra* at 8), the engineering firm was contractually obligated to prepare a 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. The same considerations are in play here, where FHWA was co-lead agency and was aware of the agreements between DDOT and CSXT.

FHWA was aware of the predetermination well before FHWA even agreed to act as the lead federal agency on the tunnel reconstruction project. *Supra at* 7. FHWA has also conceded that as of December 19, 2012 Hicks was aware of negotiations between DDOT and CSXT over what would become the December 21, 2012 Term Sheet Agreement. ECF 66-2, ¶ 5; see also Appx. 545 (email to Hicks about agreements between CSXT and DDOT). Consequently, as of December 19, 2012, Hicks was aware (or should have been aware), that agreements with CSXT bound DDOT to support the Tunnel expansion project.

The District Court relied on FHWA's conclusory statement in the Record of Decision that it conducted an independent review of the Environmental Impact

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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).

Statement before issuing its Record of Decision. Decision at 29 (Appx. 44, citing *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981) (agencies receive "the benefit of the presumption of good faith and regularity in agency action"). The presumption of regularity does not apply in the face of evidence that FHWA knew the outcome of the EIS was predetermined. *Fund For Animals v. Norton*, 281 F. Supp. 2d at 230 ("'presumption of regularity' does not overcome these arguments that defendants failed to take the requisite "hard look" at the proposed action."); *See also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (presumption does not shield "action from a thorough, probing, in-depth review.").

FHWA's naked statement that it conducted "its own independent review and consideration of the [Final Environmental Impact Statement, supporting technical documents and public and agency comments]," should have been insufficient to shield FHWA from DDOT's predetermination. *See* Decision at 29 (Appx. 43), citing Record of Decision at 44 (Appx 949). In *Hammond v. Norton*, 370 F. Supp. 2d 226, 251-52 (D.D.C. 2005), Judge Friedman "recognized the danger of agencies merely accepting the self-serving statements or assumptions of interested parties in the preparation of EIS's rather than doing their own analysis and investigation," and he noted that "while under normal circumstances an agency may rely on information provided by a project proponent, when the agency has good cause to believe that information is inaccurate or exaggerated, it has a duty to substantiate

it." *Id*. at 251-52. (emphasis added). *See also Nat'l Wildlife Fed'n v. F.E.R.C*., 912 F.2d 1471, 1485 (D.C. Cir. 1990) (a non-NEPA case, where FERC "independently confirmed the reasonableness of the analyses" provided by interested engineering firm).

In this case, not only did FHWA fail to independently substantiate the studies that underpinned the Environmental Impact Statement, but it actively advised Parsons Brinckerhoff on how to word the Environmental Impact Statement and Record of Decision, to obscure the biased and incomplete nature of the studies and conclusions that went into both documents.

The Supreme Court's decision in *Staub v. Proctor Hosp.,* 562 U.S. 411, 131 S.Ct. 1186 (2011), although not a NEPA case, supports the Committee's argument that a NEPA violation can stand on DDOT's actions. 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.").

C. PETITIONER WILL BE IRREPARABLY INJURED

For the purposes of this Motion, the Committee focuses on the District Court's finding that it will suffer irreparable harm as a result of CSXT's cutting down approximately 200 mature trees as part of the tunnel expansion project.[9] In addition to the destruction of trees, in the event that no stay pending appeal is

[9] The Committee does not waive the right, on full merit briefing, to make any argument on the irreparable harm issue that it made below.

granted in this case, Plaintiff's claims may be rendered moot. *See Finca Santa Elena, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 7474947, at *3 (D.D.C. Jan. 6, 2014) (citing Circuit cases for the proposition that "[a] NEPA claim does not present a controversy when the proposed action has been completed and no effective relief is available"). Consequently, issuing a stay may also be crucial to preserving this Court's jurisdiction over the present dispute. *Nken,* 556 U.S. at 426 (power to hold an order in abeyance is "inherent … in the grant of authority … to issue all writs necessary or appropriate in aid of their respective jurisdictions") (citations omitted).

D. ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY HARM OTHER PARTIES INTERESTED IN THE PROCEEDING

Before the District Court, CSXT failed to produce any evidence to show that the inability to start construction on the tunnel expansion project is a limiting factor in its operations along the Eastern Seaboard. During a D.C. Council hearing on August 20, 2014, CSXT Vice President Renjel testified that delaying the tunnel expansion would not cause CSXT significant financial harm, and that the only problem with delay was that more residents will be moving to the neighborhood in the interim.[10]

[10] See http://208.58.1.36:8080/DCC/August2014/08_26_14_COW.mp4, at 5:57:40-5:59:51.

CSXT also offered no evidence with regard to its progress in removing the other obstacles to double-stacked rail along the eastern seaboard or even just in this region. It is also significant that the grant of the preliminary injunction does not stop CSXT from using 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* Appx. 1207 ("the overall structure is in relatively good shape"); *and see Id.* at 1208 (no danger of collapse). The balance of harms is on the side of the Committee, due to the specific harm that it will suffer.

E. THE PUBLIC INTEREST LIES IN FAVOR OF ENFORCING NEPA.

As this Court explained in *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009), "[t]here 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. See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977).

Moreover, in the event that the stay and subsequent injunction are denied, and construction begins, but the Plaintiff ultimately prevails on the merits, then the 200 mature trees will have been destroyed and the Plaintiff and public will be left

with a half-complete project and questions about how to restore the site to the *status quo ante*. *See Population Inst. v. McPherson,* 797 F.2d 1062, 1082 (D.C. Cir. 1986) ("Any harm [non-moving parties] suffer by delay [associated with staying case on appeal … is outweighed by the clearly irreparable harm that appellant would sustain absent an injunction.").

IV. CONCLUSION

For all of the foregoing reasons, the FHWA Record of Decision and the supporting Environmental Impact Statement should be stayed pending appeal, which will result in a prohibition on the issuance of any permits and/or approvals by any Defendant, or agency thereof, and prohibition of any construction activity associated with the Virginia Avenue Tunnel expansion project.

Respectfully Submitted,
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