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	)	

SUPPLEMENTED MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, the Committee of 100 on the Federal City ("the Committee"), seeks an order pursuant to Fed. R. Civ. P. 59(e), setting aside this Court's denial of Plaintiff's Application for a Preliminary Injunction and, instead, Granting that Application. This Supplemented Motion replaces the Motion for Reconsideration that was filed on May 5, 2015.

The new documents included in the Administrative Record, which was filed after the Court originally denied the Committee's Application for Preliminary Injunction support a finding of predetermination, even under the standard that this Court applied (and which is under appeal in case no. 15-5112). The new evidence shows the sort of irreversible commitment to the Tunnel expansion option that this Court indicated would be required to violate the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, et seq..

If the evidence from the Administrative Record had been available during the briefing or hearing on the Committee's application for a preliminary injunction, the outcome would have been different. The evidence is of such consequence, that this Court's denial of Plaintiff's application for preliminary injunction should be set aside. For example, among other things, the newly produced records contain: DDOT's statements that it viewed the Virginia Avenue Tunnel as a negotiating chip that DDOT used to extract agreements from CSXT; DDOT's manipulation of the NEPA process to force CSXT into agreements; DDOT's agreement to act "on CSX's behalf" if CSXT agreed to DDOT's conditions; an email from DDOT to the Mayor's office advising the Mayor not to hold a public hearing on the Tunnel expansion project because DDOT had no intention of changing its position on the project and did not want the mayor to suffer politically; FHWA's comments that the tunnel expansion project was "going to be weird" because the outcome was "pre-decisional" and documents illustrating that CSXT's contractor

drafted the Record of Decision and that FHWA did not conduct its own independent review.

The new evidence contained in the Administrative Record, which substantiates a NEPA violation, changes the "public interest" factor of the preliminary injunction analysis. The public has a strong interest in NEPA compliance. Moreover, because of this new evidence, any temporary delays caused by this Court's reconsideration of its judgment are outweighed by the importance of ensuring compliance with NEPA.

II. PROCEDURAL POSTURE

The Committee filed suit and an Application for a Preliminary Injunction pending a determination of the merits on November 12, 2014 [ECF 1 and 3]. This Court held hearings on the Committee's Application for a Preliminary Injunction on February 26, 2015. The Court rejected the Application for Preliminary Injunction on April 7, 2015 [ECF 59].

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]. Consequently, the Committee did not have access to the Administrative Record at the time that it briefed or argued the Application for Preliminary Injunction. The Record contains approximately 130,000 pages of records. 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 the D.C. Circuit Court's Rules of Procedure, the Committee filed a Motion for Stay Pending Appeal before this Court [ECF 63]. This Court denied that Motion on April 23, 2015 [ECF 68].

Defendant FHWA filed a notice correcting misstatements concerning FHWA's knowledge of agreements between CSXT and DDOT pertaining to the predetermination claim on April 17, 2015 [ECF 66] – nearly two months after the hearing at which the incorrect statements

were made and after this Court rejected the requested preliminary injunction.

Plaintiff initially moved this Court to reconsider the decision to deny the Preliminary Injunction on May 5, 2015.

Plaintiff moved the D.C. Circuit Court of Appeals for a Stay of the effectiveness of the Environmental Impact Statement and for Summary Reversal. In light of the new evidence from the Administrative Record, on May 11, 205 the D.C. Circuit remanded the appeal to the District Court to act on the Rule 59(e) Motion.

During a conference call held on May 12, 2015, the Court permitted Plaintiff to supplement its Rule 59(e) Motion by the close of business today (May 13, 2015).

III. STANDARD FOR GRANTING MOTION TO ALTER JUDGMENT

A Rule 59(e) motion is discretionary and in order to prevail on such a motion, "there must be an intervening change of controlling law, new evidence, clear legal error or manifest injustice." *Leadership Conference on Civil Rights Id.* at 107 (emphasis added). This Court may grant a rule 59(e) motion where a plaintiff has established clear legal error or brought forth new evidence that "compel[s]' a change in the court's ruling…." *State of N.Y. v. United States,* 880 F. Supp. 37, 39 (D.D.C. 1995). Accordingly, for a plaintiff to succeed on a Rule 59(e) motion based on new evidence, it must show that it could not have presented the evidence at the judicial proceeding at issue. Plaintiff has satisfied this test because the documents from the Administrative Record were not available to Plaintiff before this Court issued its initial decision to deny Plaintiff's Application for a Preliminary Injunction.

IV. FACTS

The following facts incorporate what the Plaintiff has managed to glean from the 130,000

plus page record in the time since the Record was filed.[2]

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." Appendix[3] ("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.

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." Supplemental Exhibit 1, ARDDOT565.

In March 2010, Ricks asked Klein for approval to work on the NEPA process. Appx.

[2] Taking into consideration the Plaintiff's limited resources, the fact that many of the documents in the record have been rendered unsearchable by character recognition software, and the fact that, during the same time, Plaintiff filed a Motion for Stay Pending Appeal to this Court, and an Emergency Motion for Stay and For Summary Reversal before the D.C. Circuit Court of Appeals, the Plaintiff has not yet had a reasonable opportunity to finish reviewing all of the documents in the record.

[3] In order to preserve Plaintiff's resources, the Plaintiff has filed an Appendix of exhibits, which matches the appendix filed in the D.C. Circuit Court of Appeals. Supplemental Exhibits are included separately here.

101-104. A May 14, 2010 DDOT memo (Appx. 105) shows that DDOT's "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 Shepherd 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 Shepherd Branch, which DDOT needed from CSXT. Appx. 1584-86 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 from Cleckley (DDOT Manager of Statewide and Regional Planning) to Jared Kahn (Office 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. Three days later, on August 23, 2010, CSXT secured DDOT's irreversible commitment to the tunnel expansion, by finalizing agreement on the "outstanding issues" that DDOT had referenced in the August 20, 2010 internal communication. 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 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;[4] and **(4)** negotiate with DDOT over DDOT's use and development of CSXT's Shepherd Branch.[5] Appx. 140 (Art. VII).

On August 26, 2010 – three days after the August 23 Memorandum of Agreement (immediately *supra*) was finalized, Faisal Hameed, the lead of the Tunnel expansion project for DDOT, got the NEPA process back on track by initiating the "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 – who was invited to the scoping meeting (Appx 200) – 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.

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[4] 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.

[5] According to the May 14, 2010 briefing (Appx. 110), DDOT considered the Shepherd 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." Shepherd 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.

After being invited to the Interagency Scoping Meeting, in August 2010, Hicks noted:

> 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 (All caps 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.[6]

On August 31, 2010, consistent with the August 23, 2010 agreement (*supra* at 6), DDOT Director Klein and (then) City Administrator Neil Albert committed to the Virginia Avenue Tunnel project in a letter to Secretary of Transportation Lahood, 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 September 30, 2010 Klein wrote a follow-up letter to LaHood asking him to expedite the NEPA process by identifying the lead federal agency. Klein's letter identifies the tunnel

[6] 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.

expansion as a "lynchpin" of the National Gateway corridor (Supp. Exhibit 2, ARDDOT 2182). On April 20, 2011, Hicks helped Hameed draft DDOT's letter to FHWA, seeking FHWA's agreement to act as the federal lead agency. Exhibit 3, ARDDOT2710. FHWA agreed to take on the role of lead agency for NEPA, on May 9, 2011. *See* Appx. 211; Appx. 81.

On March 9, 2011, CSXT thanked DDOT for "the support that the DDOT has provided on the VAT" and proclaimed that it was "look[ing] forward to continuing to work closely with DDOT as the project approval process continues forward." Supp. Exhibit 4, ARRDDOT2651.

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.

On May 18, 2011 CSXT committed $160 million to expanding the Tunnel. Appx. 77-78. That same day, 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 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 and its paid consultants were 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).

On July 13, 2011, Cleckley wrote DDOT Director Bellamy indicating that disputes with CSXT "regarding the easement for Rhode Island Avenue," had prompted DDOT to "hold[] off on going forward with the public meetings regarding NEPA." Supp. Exhibit 5, ARDDOT3108. However, because negotiations over the easement had progressed to a satisfactory point, DDOT decided to permit the NEPA process to continue. *See* ARDDOT3108 ("we are going forward with the NEPA process."). CSXT was apparently not pleased with DDOT's tactics, a point that Cleckley wanted Bellamy to be aware of: "CSX is not necessarily happy with this, but I wanted to make sure you are aware." *Id.*

Consistent with its obligations to support the Tunnel expansion, in April 2012, DDOT eliminated all of the re-routing options from further consideration, which left only the "no build" option or one of several variations on similar tunnel expansion concepts. Appx. 213-214.

In August 2012, CSX "donated" money to the District. The agreement (which Plaintiff has not located 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.[7] 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 obligation, including the obligation to grant or approve permits and approvals or 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, CSXT made it clear that its agreement to issue the easements was conditioned on the District 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. On September 28, 2012, for example, Hameed

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

learned, from DDOT Chief Engineer Ronaldo Nicholson, about negotiations between the City Administrator and CSXT that had been kept secret from him. Appendix 532. Later the same day, Hameed declared that the agreement violated NEPA. Supplemental Exhibit 6, ARDDOT33647 ("there are many things in the document that are not consistent with the NEPA process."). Mr. Nicholson's note to Hameed shows that the Joint Cooperation Agreement may have actually been finalized and signed before DDOT became aware of it, as he wrote: "FYI and review … it's official." *Id.* (emphasis added).

After DDOT learned of the Joint Cooperation Agreement that had been in the works between CSXT and the City Administrator's office, CSXT and DDOT concealed the agreements that violated NEPA by cutting them up and spreading them out in separate agreements that were released over time. *Infra.* Side negotiations between CSXT and the City Administrator continued. As evidence of this, see *Appendix 544*, which is a November 18, 2012 letter from CSXT's lobbyist (Goldblatt) 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 the ongoing negotiations between CSXT and the City Administrator. *See* Appx. 544.

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 saved the District 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 Shepherd Branch, easements on various projects, and permits from various agencies for the Virginia Avenue Tunnel." *Id.*

On November 28, 2012, CSXT asserted a claim for damages arising from DDOT's unauthorized removal of rail lines from Shepherd Branch. *See* Supplemental Exhibit 7, ARDDOT36066. CSXT demanded that DDOT commit to replacing the rails and pay "compensation for all attendant damages to the track." This claim for damages was obviated by subsequent agreements that gave the District an option to purchase Shepherd Branch. *Infra.*

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 of 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* at 10-11), "Credits to CSXT and DDOT;"[8] and easements associated with the: Parkside Bridge; Sewer-related costs and agreements; Anacostia Bridge (East); Shepherd Branch; and Barney Circle. Appx. 550, ¶ 6.

Furthermore, just as was the case in the Joint Cooperation Agreement, the December 21 2012 Agreement required the City Administrator to agree 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.) – suggests that City Administrator pre-approved the permits for the Tunnel expansion, as part of his office's side-negotiations with CSXT.

On August 1, 2013, CSXT's lobbyist, David Goldblatt, emphasized that any sale of Shepherd Branch was contingent on CSXT receiving all permits needed for the Tunnel. "As the term sheet as amended is now drafted Shepherd branch will not be sold until all permits are provided for VAT construction." Appx. 556. This was again consistent with the Joint Cooperation Agreement. Appx. 510-11.

In an October 29, 2013 agreement (Appx. 563 *et seq.*), CSXT agreed to give DDOT an option to acquire Shepherd 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

[8] These credits were detailed in the Joint Cooperation Agreement. Appx. 15-17.

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 Shepherd 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 Shepherd Branch, the District had an incentive to reject any concept wherein CSXT used Shepherd 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. This was consistent with the Joint Cooperation agreement, which required the District to issue permits in accordance with a pre-agreed schedule. Appx. 501-503 ("Permits and Approvals for Virginia Avenue Tunnel"), 508 ("Permits and Approvals").

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 the City Administrator's Office had agreed, in principle, to First Source and Small Local and Disadvantaged Certified Businesses (CBE) associated with the construction of the Tunnel. But the parties agreed to withhold finalizing and signing the agreements until after FHWA issued the Record of Decision. *See* Internal City Administrator email, Appx. 594 ("finalizing and executing the agreements will need to wait until the ROD is issued."). The CBE agreement alone was worth approximately $1.5 million for the District in tax revenues. Supp. Exhibit 8 at ARDDOT1789.

The final Environmental Impact Statement, issued on June 5, 2014, 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 tests 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 the environmental risks of 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.

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 Parson, 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 (immediately *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.

V. ARGUMENT

This Court should grant Plaintiff's application for preliminary injunction for two independently valid reasons. First, the Court used an overly strict standard for NEPA predetermination claims; and second, the new evidence presented in the Administrative Record would have changed this Court's Decision on the Plaintiff's Application for a Preliminary Injunction, regardless of the standard used. Because Plaintiff has suffered irreparable harm, as this Court has recognized (Decision at 17), and because there is a reasonable likelihood that Plaintiff will prevail on the merits, Plaintiff has satisfied the two most important factors for attaining a preliminary injunction. *See Apotex, Inc. v. Sebelius,* 700 F. Supp. 2d 138, 140 (D.D.C. 2010) aff'd, 384 F. App'x 4 (D.C. Cir. 2010)("the likelihood of success requirement is the most important of these factors."); "Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered."). *Appalachian Voices v. Chu*, 725 F. Supp. 2d 101, 105 (D.D.C. 2010) (indicating that irreparable harm may be most important factor).6

1. PREDETERMINATION STANDARD

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), this Court held that the D.C. Circuit's precedent requires that, in order for unlawful predetermination to occur, the agency's actions had to reach an "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 ("Only when the agency had issued every permit necessary to begin the project was there an irretrievable commitment of

resources."). Plaintiff submits that this Circuit's precedent does not mandate the strict standard that the District Court has applied.

Wyoming Outdoor Council does not govern 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."). The dispute in *Wyoming Outdoor Council* was whether the Forest Service had violated NEPA by failing to undertake the environmental review required by the Act. The D.C. Circuit held that the dispute was not ripe because there was still time – before permits were issued – for the agency to fulfill its NEPA obligations. *See* 165 F.3d at 50. In this case, unlike in *Wyoming Outdoor Council*, the problem is not the absence of an Environmental Impact Statement; instead, the problem is that the Statement violated NEPA because it was predetermined.

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*,[9] 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 effectively precluded. *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,*

[9] *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).

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.

2. NEW EVIDENCE ESTABLISHES IRREVERSIBLE COMMITMENT, EVEN UNDER THE STANDARD THAT THIS COURT HAS EMPLOYED

According to this Court, 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." The documents included in the Administrative Record, combined with the evidence that has already been presented to the District Court, in Plaintiff's Application for a Preliminary Injunction (incorporated here by references) and Reply to the Defendants' and Intervenor's Oppositions (also incorporated by reference) show that the District made an irreversible commitment to the tunnel expansion project well before the NEPA process was concluded (indeed before it even began).

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 4-5. Internal memoranda show that the District used the NEPA process as a stick to force CSXT to

agree to the District's demands. On July 1, 2010, DDOT agreed to act "on CSXT's behalf for the environmental work" if CSXT acceded to the District's demands. *Supra at* 5. On August 20, 2010 DDOT indicated that it was waiting to start the environmental work for the Tunnel until "outstanding Issues" were resolved with CSXT. *Supra* at 5-6. Three days after the August 23, 2010 Memorandum of Agreement was signed, Hameed got the NEPA process going with an interagency scoping meeting. *Supra* at 7. Subsequently, in July 2011 DDOT held the NEPA process hostage again until CSXT moved forward with the easement for Rhode Island Avenue. *Supra.* at 10.

CSXT and the District 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 Shepherd Branch. *See, generally, Fact section, Supra.* Consistent with that obligation, for example, DDOT eliminated all of the rerouting alternatives from consideration in April 2012. *Supra* at 10.

The District's commitment to the Tunnel was so strong that FHWA's lead (Hicks) declared that the project was going to be "Weird" and that moving forward with the tunnel expansion project had been decided before any of the NEPA work had commenced. *Supra* at 7-8. 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 15-16.

Had DDOT failed to support the Tunnel expansion, the District would have lost its ability to exercise the option to purchase Shepherd Branch. Also, CSXT could have walked away from its numerous agreements. 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. *See* Appendix at 511-513 (Credits for CSXT's

contributions) and Appx. At 515 (Termination Rights and Defaults) (indicating that DDOT's obligation to honor the CSXT credits survived even if the agreement was terminated due, for example to the failure of the NEPA process to endorse a Tunnel expansion option, or in the event of a default). Furthermore, the District would have been liable to CSXT for damages, resulting from the District's unauthorized removal of tracks from Shepherd Branch. *Supra* at 13.

The District actively concealed its commitment to the Tunnel expansion from the public. None of the agreements between CSXT and the District were included in the draft Environmental Impact Statement that was issued on July 12, 2013. This omission occurred despite FHWA's knowledge that agreements were being negotiated. *Supra* at 13. Internal correspondence among DDOT officials and the City Administrator's office show the attempts to conceal the agreements. *See e.g*., *supra* at 5 ("not that we don't support it, just there is no need to make a public announcement about it."); *supra* at 15-16 (referring to decision not to hold town hall because the District was not changing its support for the Tunnel expansion). Indeed the Mayor's office was concealing its own separate agreements with CSXT, even from DDOT. On September 28, 2012, for example, Hameed learned about negotiations between the City Administrator and CSXT that had been kept secret from him. Exhibit 7, ARDDOT36066 and Appx. 532. Secret negotiations continued between CSXT and the City Administrator even after DDOT learned about the separate negotiations. *Supra* at 12 (evidence of secret side negotiations between CSXT and the City Administrator in November 2012)

3. NEW EVIDENCE ESTABLISHES PREDETERMINATION WAS ATTRIBUTABLE TO FHWA

In denying Plaintiff's application for preliminary injunction, this Court held "the Committee has failed to identify sufficient evidence in the current record to attribute that predetermination to FHWA." Decision at 29. New evidence, contained in the full Administrative

Record, however, provides a clear showing of FHWA's knowledge of DDOT's predetermination..

The new evidence from the Administrative Record shows that there is no difference between this case and *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). In *Davis*, the predetermination was attributable to FHWA for two independently sufficient reasons: (1) FHWA was involved in the NEPA process and was aware that a FONSI was being prepared before the NEPA process was completed; and (2) FHWA failed to conduct a sufficient independent review to insulate itself from the consultant's biases. 302 F.3d at 1112.

As for the first basis for attributing predetermination in *Davis* (knowledge of predetermination), FHWA was aware of the predetermination well before FHWA even agreed to act as the lead federal agency on the tunnel reconstruction project. In August 2010, Hicks commented: "THEY HAVE AN ANNOUNCED PREFERRED ALTERNATIVE SO IT'S ALREADY PRE-DECISIONAL. THIS ONE IS GONNA BE WEIRD." *Supra* at 7-8. 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's preference for expanding the tunnel undermined FHWA's management of the NEPA process. First, DDOT decided what project alternatives would be carried over to the Environmental Impact Statement, and it rejected the rerouting options. *Supra* at 10. FHWA was subsequently precluded from endorsing anything but the "no build" option (which did not address the Tunnel's limitations to handle double-stacked freight cargo or the alleged "choke

point" problem), or one of the Tunnel expansion variations.

Second, DDOT did not help FHWA ensure that CSXT's consultants hewed to NEPA's requirements when they drafted the Environmental Impacts Statement. For instance, on May 4, 2011, FHWA (Hicks) advised DDOT (Hameed) that it had approved a deficient outline for what was then planned for an Environmental Assessment. Exhibit 9, ARDDOT2741. Hicks gave Hameed the opportunity to withdraw DDOT's approval and ask for the necessary changes. Hameed responded that the defects were FHWA's problem: "I gave ok from DDOT side. The idea was to get FHWA approval as the next step." In other words, Hameed left FHWA to worry about NEPA compliance. *Id.* Because DDOT was the co-lead agency, its hands-off approach undermined the NEPA process.

Predetermination is also attributable to FHWA under the second Davis factor because FHWA failed to conduct any independent inquiry– despite the biased analysis that Hicks noted (*supra* at 16-18). Instead, FHWA permitted that bias to infect the Record of Decision. *Davis*, 302 F.3d at 1113; *Staub v. Proctor Hosp*., 562 U.S. 411, 131 S.Ct. 1186, 1192 (2011) ("the exercise of judgment by the decisionmaker does not prevent the earlier agent's action from being the proximate cause of the harm.").

This Court previously relied on FHWA's conclusory statement in the Record of Decision that it conducted an independent review of the Environmental Impact Statement before issuing its Record of Decision. Decision at 29 (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, however, 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 (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. *Supra* at 16-18.

As a result of the above-mentioned new evidence, contained in the full administrative record, Plaintiff submits that it has made a clear showing of FHWA's knowledge of DDOT's

predetermination. Accordingly, this Court should reconsider its holding as to whether DDOT's predetermination was attributable to FHWA.

4. THE COURT ERRED IN RULING THAT THE DEFENDANTS WOULD BE HARMED BY AN INJUNCTION

New evidence also mandates that the Court reconsider its analysis of the balance of harms between the parties. In the alternative, or in addition, this Court erred in ruling that the balance of the equities tipped "decidedly in the Defendants' favor…." Decision at 45.

This Court noted "reconstruction of the VAT will improve the safety and security of the tunnel and the efficiency of both the freight and passenger rail system in the Washington, D.C. area." Decision at 45. But documents in the Administrative Record make it clear that adding a second track in the tunnel posed a risk of derailment that could cause damage to the interstate highways above the tunnel. For instance, Hicks' January 14, 2014 notes on the Environmental Impact Statement states: "It is reasonably foreseeable (indirect impact) that there is the potential for derailment at the portal at 2nd Street which would have catastrophic effects to the Interstate substructure support system; therefore, a pier protection system should be in place to provide crash protection." Appx. 673. Rather than discussing the risk of derailment, the Environmental Impact Statement merely states that the "proximity" of the rails to the highway structure required the existing columns, supporting I-695, to be strengthened "where applicable." Appx. 612. There is no discussion of whether catastrophic damage to the Interstate remains foreseeable, even with the strengthening.

Additionally, the Administrative Record indicates that the construction process will disturb a large amount of asbestos containing materials – which was not discussed in the Environmental Consequences section of the Environmental Impact Statement. *Supra* at 16. Likewise, the Environmental Impact Statement obscures risks associated with Arsenic and

Chromium-6 contamination. *Supra* at 16-17. Consequently, the construction process itself involves hidden dangers that undercut any safety improvements inherent with the expansion of the tunnels.

The Court credited CSXT's claim that it would "suffer economically if the project is further delayed due to the continuing cost of maintaining and repairing the aging tunnel and the lost revenue associated with operating an inefficient freight rail system." Decision at 45 (citing Opp'n of CSXT at 23), but as Plaintiff has noted, during a D.C. Council hearing on August 20, 2014, CSXT Vice President Renjel testified that delaying the tunnel expansion would not cause CSXT any significant financial harm, and that the only problem with delay was that more residents will be moving to the neighborhood in the interim.[10]

CSXT also 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. To wit, CSXT 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 significant that the grant of the preliminary injunction would not stop CSXT from using the Tunnel. Should this Court reconsider its denial of Plaintiff's application for preliminary injunction, CSXT will be able to continue transporting freight through the Virginia Avenue Tunnel at the current volume and speed. Consequently, CSXT showed no harm in maintaining the status quo.

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

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

collapse).

In light of the specific harm that the Plaintiff will suffer,[11] as acknowledged by this Court, the balance of harms is on the side of the Plaintiff, and this Court's ruling to the contrary was clear error.

4. PUBLIC INTEREST FAVORS GRANTING THE PRELIMINARY INJUNCTION

The above-cited new evidence reveals that NEPA has been violated, or at least that there is a high probability that this Court will find a violation. That finding changes the calculus of the public interest factor.

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.*

[11] This Court held the removal of approximately 200 trees constituted "sufficiently severe and irreversible injury to Ms. Harrington and other residents to clear the bar of irreparable harm." Decision at 17.

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.").

The Public Interest factor weighs in favor of granting the Preliminary Injunction, because of the public's interest in strict NEPA compliance and because of the adverse consequences that will result if the project continues but the Plaintiff eventually prevails in this litigation.

VI. CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiff's Motion to Alter Judgment and Issue the Requested Preliminary Injunction.

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