IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff, The Committee of 100 on the Federal City ("The Committee"), seeks to prohibit the Defendants from issuing any federal or District of Columbia approvals and/or permits associated with the expansion of the CSX Transportation freight rail tunnel situated underneath Virginia Avenue in Southeast Washington, D.C. Plaintiff seeks to enjoin construction, use and occupancy, and storm water permits, because the Final Environmental Impact Statement (FEIS or Final EIS), and the Record of Decision (ROD) endorsing the preferred "build alternative" therein violate the National Environmental Policy Act (NEPA) and the Administrative Procedures Act ("APA").

II. FACTS

CSX Transportation, Inc. (CSXT) launched the "National Gateway" Initiative in May 2008. CSXT's goal was "to create a highly efficient freight transportation link between the Mid-Atlantic ports and the Midwest." *See* Exhibit 1. CSXT's rail line through Washington, DC is situated on the route between east coast ports, such as Norfolk, Virginia; Baltimore, Maryland; Charleston, South Carolina; and Savannah, Georgia; and markets in West Virginia,

Pennsylvania, Ohio, Indiana and Illinois. Exhibit 2, FEIS Ch. 1 at 1-5.

As CSXT explained it, "CSX would work together with state and federal government agencies 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." *See* Exhibit 1. The initiative was intended to enhance three separate rail corridors, one of which was the "I-95 Corridor between North Carolina and Baltimore via Washington, D.C." *Id.*

According to a June 2010 CSXT presentation, the National Gateway involved 61 projects required to permit double stack clearance (Exhibit 3 at 2) 13 of which were situated in the Washington Metropolitan Region. *See* Exhibit 4, Table at p. 3.[1] On May 18, 2011 CSX announced that it was committing $160 million, as part of the National Gateway Initiative, the majority of which would be devoted to renovating the Virginia Avenue Tunnel. *See* Exhibit 5.

The Virginia Avenue Tunnel is located in the Capitol Hill neighborhood of the District of Columbia, four blocks away from the U.S. Capitol Building. More precisely, the tunnel lies beneath eastbound Virginia Avenue SE from 2nd Street SE to 9th Street SE; Virginia Avenue Park between 9th and 11th Streets; and the 11th Street Bridge right-of-way. The tunnel portals are located a short distance west of 2nd Street SE and a short distance east of 11th Street SE. *See* Exhibit 2, FEIS Ch. 1 at 1-1. The tunnel and rail lines running through the District are part of CSX's eastern seaboard corridor, which connects Mid-Atlantic and Midwest states. *Id.*

The Final EIS describes the Virginia Avenue Tunnel as necessary for "the continued

[1] These included replacing two bridges in Montgomery County, Maryland and one in Prince William County, Virginia; renovating two tunnels in Frederick Maryland; lowering track at two points in Prince George's County, Maryland and four points in the District of Columbia; modifying one bridge in the District of Columbia; and replacing and enlarging the Virginia Avenue Tunnel, in Washington, D.C. *Id.*

ability to provide efficient freight transportation services in the District of Columbia, the Washington Metropolitan Area and the eastern seaboard." Exhibit 6, FEIS at S-3. According to the Final EIS, "the tunnel has just a single railroad track, which limits the flow of freight train traffic. Virginia Avenue Tunnel was identified as a bottleneck on the east coast. Furthermore, the tunnel does not have sufficient vertical clearance to accommodate rail cars that are loaded with two intermodal containers set one on top of the other, which is called 'double-stacking.'" *See* Exhibit 2 at 1-3

Among the federal agencies involved, the FHWA assumed lead agency status for NEPA compliance on May 9, 2011, and DDOT acted as the joint lead agency.[2] Exhibit 2 FEIS Ch. 1 at 1-1. The NEPA process began as an Environmental Assessment, which commenced in the summer of 2011. In the spring of 2012, the project was reclassified as one that would require an Environmental Impact Statement. *See* 77 Fed. Reg. 25782.

Parsons Corp. and Clark Construction, two large engineering and construction companies, separately and in collaboration, prepared numerous studies underpinning the EIS and drafted numerous portions of the FEIS. Exhibit 7, FEIS at 8-3, Exhibit 8, FEIS at 10-1, *et seq.* CSXT has contracted with both Parsons and Clark to perform the construction of the tunnel. *See* Exhibit 9 ("CSX and its design/build contractor, Clark/Parsons, will now finalize the tunnel design and begin applying for construction permits in compliance with D.C.'s established construction-permitting process.").

The Notice of Intent to issue an Environmental Impact Statement was published in the Federal Register on May 1, 2012. *See* 77 Fed. Reg. 25781. The Draft EIS was issued on July 12,

[2] Where the state and federal agencies coordinate to issue a single Environmental Impact Statement that addresses NEPA and similar state laws, the state agency and the lead federal agency are to be "joint lead agencies." *See* 40 C.F.R. § 1506.2.

2013, and the public comment period extended through September 25, 2013. *See* Exhibit 2, FEIS at 1-9.

Plaintiff submitted comments on the Draft EIS and Final EIS, during the public comment period, and Plaintiff's members also testified in public hearings and meetings associated with the NEPA process. *See* Exhibit 10. Primary among the Plaintiff's comments were that the FEIS failed to consider the option of routing freight cargo around Washington, D.C. – which would avoid environmental and security hazards (stemming from reasonably likely rail accidents and/or incidents), and conflicts between freight and passenger rail demands.

The Final EIS, which was issued on June 5, 2014, endorsed "Alternative 3" one of the so-called "Build Options," which entails shifting the existing Virginia Avenue Tunnel from its current location, building a new tunnel adjacent to the existing one, and increasing the height of the tunnel to accommodate double-stack freight rail cars ("the Preferred Alternative"). *See* Exhibit 11, FEIS § 3.2. The Final Environmental Impact Statement rejected, and did not give legally sufficient consideration to the alternate route options. *See* Exhibit 11 at § 3.7. The Record of Decision was issued on November 4, 2014 (Exhibit 12). The ROD selected the Preferred Alternative for Implementation. *See* Exhibit 12, ROD at 3.

Prior to the time the EIS process began, CSXT and the District of Columbia Department of Transportation (DDOT) entered into a series of agreements that pertained to the Virginia Avenue Tunnel. The earliest of these agreements that were included in the EIS was dated August 23, 2010. Exhibit 13. Earlier agreements were referenced in the EIS materials, but they were not disclosed to the public. *See e.g. Id.* p. 2 ("CSXT and DDOT intend this Agreement to supersede and replace the letter agreement between CSXT and DDOT dated July 26, 2010").

Among other things, DDOT agreed to provide support for CSXT's National Gateway

Initiative, which included the Virginia Avenue Tunnel expansion project, including submitting a letter of support to U.S. DOT and supporting lobbying efforts to secure federal funding; DDOT also agreed to submit a TIGER II grant application for a grant that included funding for the Virginia Avenue Tunnel expansion project. *See* Exhibit 13, pp. 1-2. CSXT agreed to pay DDOT $4,171,044 for redesign and construction that would be necessary to modify a bridge at 11th Street to accommodate the expanded Virginia Avenue Tunnel (even though the expansion had not been approved at that point), and DDOT agreed to credit CSXT for up to that amount of money with respect to CSXT's obligations for the Virginia Avenue Tunnel project. *Id.* at p. 2.

DDOT deepened its commitment to supporting the Virginia Avenue Tunnel expansion in an October 29, 2013 agreement. Exhibit 13, Section B. Therein, DDOT agreed to a penalty in the event that CSXT "shall [not] 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 Virginia Avenue Tunnel Project in accordance with the build alternative, if any, determined to be the acceptable alternative pursuant to the Record of Decision." *See* Exhibit 13 at 3, ¶ 7.

Effective December 21, 2012, DDOT granted CSXT a right of way that encompassed the area required for constructing the two Virginia Avenue Tunnels that were ultimately selected as the preferred alternative under the Final EIS. *See* Exhibit 15, Art. I and Art. IV(A). This Right of Way Agreement also granted CSXT a right of way over the actual footprint of the new tunnels for as long as CSXT operated the tunnel for railroad purposes. Exhibit 15, Art. I (B); *And See Id.* at Art. IV(A) ("The Permit shall be effective on December 21, 2012, and shall remain in effect for the duration of the Virginia Avenue Tunnel Reconstruction Improvements in the Virginia Avenue Tunnel ROW being used for railroad purposes."). The right of way was modified in a subsequent agreement, dated April 30, 2014 to expand the area of the right of way. Exhibit 17.

III. STATUTORY AND REGULATORY SCHEME

A. ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedures Act 5 U.S.C. § 702 provides that the reviewing court "shall … hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(2)(A). Also pertinent to this action, the APA directs reviewing courts to hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law. *Id.* § 706(2)(D).

B. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Among the critical purposes of the statute are to "insure that environmental information is available to public officials and citizens before … actions are taken," and to "help public officials make decisions that are based on understanding of environmental consequences." *Id.* § 1500.1(b)-(c). To accomplish these purposes, NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") addressing all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4. An EIS must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(C)(i)-(iii), (v).

The EIS must provide a "full and fair discussion of significant environmental impacts and

... inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. To that end, federal agencies must notify the public of proposed projects and allow the public the chance to comment on the environmental impacts of their actions. *See id*. § 1506.6. With regard to the information an agency includes in an EIS, its evaluation of environmental consequences must be based on scientific information that is both "[a]ccurate" and of "high quality." *Id.* § 1500.1(b).

Agencies must consider "[c]onnected actions," "[c]umulative actions," and "[s]imilar actions" together in one environmental impact statement. 40 C.F.R. § 1508.25(a)(1) - (3). Actions are "connected actions" if they: (a) "[a]utomatically trigger other actions which may require environmental impact statements," (b) "[c]annot or will not proceed unless other actions are taken previously or simultaneously;" or (c) "[a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id*. § 1508.25(a)(1)(i)-(iii).

The discussion of alternatives is the "heart" of the NEPA process and is intended to "provid[e] a clear basis for choice among options by the decisionmaker and the public." *Id.* § 1502.14. The alternatives analysis should "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2(g). Consequently, agencies are not permitted to predetermine the outcome of the EIS. *Id.* Prohibitions against predetermination also serve NEPA's goals of keeping the public informed of agency decisions. *Id.* § 1500.1(b) ("NEPA procedures must ensure that environmental information is available to public officials and *citizens before decisions are made and before actions are taken.*") (emphasis added).

C. DISTRICT OF COLUMBIA ENVIRONMENTAL POLICY ACT

The DCEPA is similar to NEPA in many respects and is intended to require "that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor … to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects." D.C. Code § 8-109.01

Also similar to NEPA, the DCEPA requires an EIS whenever an agency or other actor "proposes or approves a major action that is likely to have substantial negative impact on the environment … unless the Mayor determines that the proposed major action has been or is subject to the functional equivalent of an EIS." *Id.* § 8-109.03.

D. INTERPLAY BETWEEN NEPA AND THE ADMINISTRATIVE PROCEDURES ACT

Courts review compliance with NEPA under the APA to determine whether the Agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). An agency's actions in furtherance of NEPA requirements is arbitrary and capricious if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

E. OTHER DISTRICT OF COLUMBIA LAW

The City Council must first approve any sale, lease, conveyance or other disposition "in whole or part" of any real property belonging to the District. Specifically, D.C. Code § 10-801

requires the City Council to pass a resolution before any real property belonging to the City is conveyed. The law requires the Mayor to hold public hearings with respect to conveying the property and to submit a proposed resolution with*, inter alia*, an explanation of why it is in the District's interest to convey the property and a summary of the public comments received. *See* D.C. Code § 10-801 (a-1). The law also requires the Mayor to submit a separate proposed resolution that identifies and explains the intended use for the conveyed property, the developer(s) to whom the property is to be conveyed, confirmation that the developer will agree to contract with Certified Business Enterprises for at least 35% of the project, that the developer will enter into a First Source agreement with the District, and explaining the details of the disposition. *See* D.C. Code § 10-801 (a-2). D.C. Code § 10-801(c) grants the Council the ability to reject the conveyance: "If the Council does not approve or disapprove of the proposed disposition of the property, in whole or in part, by resolution within the 90-day period, the proposed resolution shall be deemed disapproved."

D.C. Code § 9-202.01 *et seq.* also requires D.C. Council approval, after notice and comment by affected parties and upon specific showings by the Mayor, for the closure of any city street or right of way.

IV. ARGUMENT

A. PLAINTIFF HAS STANDING

"The irreducible constitutional minimum" of standing requires: (1) an injury in fact; (2) causation; and (3) redressability. *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 82 (D.D.C. 2012) (*aff'd* 738 F.3d 298 (D.C. Cir. 2013)) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).

In cases in which a party "has been accorded a procedural right to protect his concrete

interests," the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (relying on *Defendants of Wildlife*, 504 U.S. at 572, fn. 7). "[A]n agency's failure to prepare (or adequately prepare) an EIS before taking action with adverse environmental consequences" is "the archetypal procedural injury." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).

"An association … has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *City of Olmsted Falls OH v. F.A.A.,* 292 F.3d 261, 267-68 (D.C. Cir. 2002).

In cases involving the violation of procedural rights, such as those created by NEPA, a plaintiff has standing if the procedural right was "designed to protect some threatened concrete interest of the plaintiff." *Florida Audubon Soc.*, 94 F.3d at 664. In order to show that the interest asserted is more than a mere "general interest in the alleged procedural violation common to all members of the public," the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. *Id.*

"Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *WildEarth Guardians v. Jewell*, 738 F.3d at 305.

In a case alleging a procedural deficiency, "an adequate causal chain must contain at least two links: one connecting the omitted EIS to some substantive government decision that may

have been wrongly decided because of the lack of an EIS and one connecting that substantive decision to the plaintiff's particularized injury." *WildEarth Guardians*, 738 F.3d at 306 (internal citations omitted). It is not necessary to establish "but for" causation. "All that is necessary is to show that the procedural step was connected to the substantive result." *Id.*

"A procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *WildEarth Guardians*, 738 F.3d at 306 (internal citations omitted). It is inconsequential, however, that "the inadequacy [of the EIS] concerns the same environmental issue that causes [plaintiff's] injury. *Id.* at 307.

In *WildEarth Guardians*, the plaintiff had standing because plaintiff's members had an aesthetic interest in the land surrounding the tracts of land that the Secretary of the Interior leased for coal mining, and pollution from the coal mines was adversely impacting the members' use and appreciation of the land. 738 F.3d at 306. In *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009) the plaintiffs established standing because they "possess[ed] a threatened particularized interest, namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program" and the Department of Interior's adoption of "an irrationally based Leasing Program could cause a substantial increase in the risk to their enjoyment of the animals affected by the offshore drilling."

In *Lujan v. Defenders of Wildlife*, the Supreme Court noted that a person living near the site of a proposed dam would have standing to challenge an Environmental Impact Statement (or, more specifically, the failure to prepare one): "Under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish

with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." 504 U.S. 555 at 573, fn 7.

In this case, the plaintiff is one of the District of Columbia's oldest community-based advocacy organizations, with standing subcommittees devoted to, among other things, parks and environmental issues, historic preservation and city planning. Additionally, the plaintiff has at least one member, Maureen Cohen Harrington, who resides in the immediate vicinity of the Virginia Avenue Tunnel. *See* Exhibit 16. Ms. Harrington is referenced as a "front row" resident, who will suffer first-hand, the significant environmental impacts associated with construction of the tunnel, and who will live with the increased possibility of a major rail incident or attack in the event that the Virginia Tunnel is expanded into two tunnels carrying double stack rail containers. *Id.*

The interests that cause the Plaintiff to file suit include the significant risk to the environment associated with freight rail accidents involving the spillage of cargo, including hazardous materials in or near the Virginia Avenue Tunnel. Indeed, in the immediate vicinity of the Tunnels are 4 metro entrances for the L'Enfant Avenue Metrorail station and 18 ventilation grills. Consequently, a spill in the region of the Tunnel would have a likelihood of contaminating the L'Enfant Plaza metro station and affecting a large number of passengers on the Metrorail system.

Additionally, the Plaintiff asserts that the expansion of the Virginia Avenue Tunnel will restrict passenger rail traffic between Virginia and the District of Columbia, which will have an adverse effect on local transportation and air quality resulting from increased automobile traffic.

B. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION

The purpose of a preliminary injunction is to maintain the *status quo* pending a final

determination of the merits of a case. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C. Cir. 1977).

Injunctive relief is appropriate where a plaintiff demonstrates: (1) it has a substantial likelihood of success on the merits; (2) it is likely to suffer irreparable harm if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause other parties; and (4) the injunction, if issued, will not adversely affect the public interest. *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). If a plaintiff "makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009).

1. Plaintiffs Are Likely To Succeed On The Merits

a) NEPA Violations

A "court owes no deference to [an agency's] interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to [any particular agency.]" *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002), as amended (Aug. 27, 2002).

(1) The Alternative Analysis Was Unlawfully Pre-Determined

Agencies are not permitted to predetermine the outcome of the EIS. 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."). The comprehensive "hard look" mandated by Congress and required by the statute … must be taken objectively and in good faith, not as an exercise in form over substance, and not as

a subterfuge designed to rationalize a decision already made. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). *See Also Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d 692, 714 (10th Cir. 2010) ("an agency may violate NEPA, and consequently the APA, when it predetermines the result of its environmental analysis.").

According to *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 229 (D.D.C. 2003) unlawful predetermination occurs when an agency engages in an "irreversible and irretrievable commitment of resources." *See also Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) ("adopting the irreversible and irretrievable commitment standard"); *And See Forest Guardians*, 611 F.3d at 715.

In *Metcalf*, a case in which plaintiffs challenged a decision by the National Oceanic and Atmospheric Administration to represent it in a petition to the International Whaling Commission for a license to hunt and kill up to five Gray Whales annually. The Ninth Circuit found an irreversible commitment when "NOAA entered into a contract with the Makah pursuant to which it committed to (1) making a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah and (2) participating in the management of the harvest." The court explained that had NOAA determined that the whale hunt would have a significant effect on the environment, then they would have had to undertake an EIS, which might have concluded that the hunt should not be allowed. Doing so would have put NOAA in breach of its agreement to petition the IWC for approval of the Makah's right to hunt the whale. *Metcalf,* 214 F.3d 1144. The 9th Circuit reasoned that "[b]y the time the Federal Defendants completed the final EA in 1997, the die already had been cast. 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.

This case is factually indistinguishable from *Metcalf* because DDOT – the co-lead agency for the Environmental Impact Study – agreed to cooperate with CSXT to achieve funding and all necessary permits and approvals for rebuilding and enlarging the tunnel within the Virginia Avenue Tunnel right of way. DDOT then paid one of its contractors over $4 million to modify a different project to insure that the Virginia Avenue Tunnel could be expanded according to CSXT's wishes. Subsequently, DDOT granted CSXT a right of way in advance of the issuance of the Record of Decision (ROD).

Specifically, in an August 23, 2010 Memorandum of Agreement between CSXT and DDOT (Exhibit 13):

1. DDOT agreed that the Virginia Avenue Tunnel Expansion Project was "critical" to rail transportation and agreed to "work together" with CSXT to effectuate the project, including submitting grant applications for the project. *Id.* p. 1, "Whereas" clauses; and Art. II (B); Art. III);
2. DDOT agreed to provide support for CSXT's National Gateway Initiative, which included the Virginia Avenue Tunnel expansion project. *Id.*, Art. II (A);
3. DDOT agreed to write a letter to U.S. Department of Transportation in support of the National Gateway Initiative, which included the Virginia Avenue Tunnel expansion project; *Id.*, Art. II (A);[3]
4. DDOT agreed to support "legislative efforts to secure funding for the NGI by supporting funding request in the next federal surface transportation bill or other

[3] Plaintiff has a D.C. Freedom of Information Act Request pending that should result in the production of this letter of support.

federal bills in which a funding mechanism could be applicable to the NGI freight program." *Id.*, Art. II (A);

5. DDOT agreed to "submit the TIGER II grant application for a planning grant that includes the Virginia Avenue Tunnel expansion project. *Id.*, Art. II (B);[4]

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

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

8. CSXT also agreed to negotiate with DDOT over DDOT's use and development of CSXT's Shepherd's Branch Property. *Id.*, Art. VII.

It is important to note that CSXT's agreed payment of $4,171,044 to was not intended to benefit the District or to actually offset the District's obligations. Instead, the District was required to issue a credit to CSXT for the exact same amount with respect to CSXT's liabilities associated with the expansion of the Virginia Avenue Tunnel. *Id.*, Art. III (B). Under the agreement DDOT was required to make up for the shortfall that resulted from granting CSXT this credit from federal funds *Id*;[5]

[4] Plaintiff has a D.C. Freedom of Information Act Request pending that should result in the production of this grant request.

[5] The CSXT Credit agreement was modified in an April 21, 2014 amendment. Pursuant to the amendment, DDOT was not permitted to apply the $4,171,000 million credit to the Virginia Avenue Tunnel; instead DDOT and CSXT agreed to "work together to identify an eligible project for the use of the CSXT Credit Amount" on or before October 21, 2014 and to fund the credit "using traditional federal appropriations and obligations for resurfacing of Federal Aid

On May 16, 2011 the District executed a change order with Skanska/Facchina, the engineering joint venture that was constructing the 11th Street bridge to redesign the bridge "in such a way as to not preclude the construction of a CSX temporary shoo-fly track … and the widening of the CSX Virginia Avenue Tunnel." The change order cost the District of Columbia $4,171,044. Exhibit 18.

In a December 21, 2012 Term Sheet Agreement between DDOT and CSXT (Exhibit 19), the DDOT agreed to:

1. Issue the public space permit and right of way that CSXT would require in the event that the FHWA Record of Decision (ROD) endorsed one of the "build alternatives" (Exhibit 19, ¶ 4 and Exhibit 15);
2. "Continue to provide oversight of the EIS process for the Virginia Avenue Tunnel as co-lead agency with FHWA" and to "partner" with CSXT to "manage the EIS process" (Exhibit 19, ¶ 5); and
3. DDOT granted CSXT a permanent right of way for the space occupied by the expanded Virginia Avenue Tunnel (Exhibit 15, Art. I (A) and Art. IV (A)).

On October 29, 2013, CSXT agreed to give DDOT an option to acquire the Shepherd's Branch right of way but only on condition that "CSXT shall have obtained from the District of Columbia the necessary permits and approvals needed from any agency of the District of Columbia to commence and construct the VAT [Virginia Avenue Tunnel] Project in accordance with the build alternative, if any, determined to be the acceptable alternative pursuant to the Record of Decision issued in connection with the Environmental Impact Statement being undertaken pursuant to NEPA as of the date hereof." Exhibit 14, ¶ II (B)(7) (**emphasis in the**

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facilities." Exhibit 20, ¶ 1.

original).

Significantly, all of these agreements were made prior to June 4, 2014, the date on which the Final Environmental Impact Statement – which endorsed one of the "build alternatives" – was approved. Nevertheless, none of these agreements were included in the Draft Environmental Impact Statement. The agreements were not disclosed to the public until the Final Environmental Impact Statement was published, in June 2014.

Consequently, in this case DDOT cast its die as early as August 23, 2010. After the agreement DDOT made with CSXT on that date, DDOT was committed to supporting the National Gateway Initiative, which included the Virginia Avenue Tunnel expansion project, and to procure grant and other funding to be used directly or indirectly for the Virginia Avenue Tunnel expansion project.

Had DDOT failed to support the Virginia Avenue Tunnel expansion, it would have been in breach of the August 23, 2010 agreement. Not only would DDOT have been in breach, but CSXT would have had no obligation to explore terms under which DDOT could acquire the Shepherd's Branch Right of Way. Moreover, CSXT would have had a claim against DDOT to recover the $4,171,000 that CSXT paid to DDOT in expectation that the Virginia Avenue Tunnel expansion project would proceed. In October 29, 2013 agreement, DDOT actually agreed to a penalty in the event that CSXT were not to receive "the necessary permits and approvals needed from any agency of the District of Columbia to commence and construct the VAT Project." Exhibit 13, ¶ II (B)(7).

Once DDOT was contractually bound to support the Virginia Avenue Tunnel, DDOT - the joint lead agency had irrevocably committed itself to the project. *See Metcalf*, 214 F.3d at 1143 ("The "point of commitment" in this case came when NOAA signed the contract with the

Makah in March 1996 and then worked to effectuate the agreement."). *See also Fund For Animals v. Norton*, 281 F. Supp. 2d at 230 (issuance of the permits in question "amounted to a surrender of the Government's right to prevent activity in the relevant area within the scope and duration of the permit."); *and see, e.g. Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d at 718 ("If Forest Guardians had been able to prove [the existence of a contract] firmly committing the FWS to the … outcome before its NEPA analysis, we … very likely would have [found a violation of NEPA]").

(2) The FEIS Unlawfully Segments the Virginia Avenue Tunnel from Other Regional Rail Projects, Including other Projects Associated with CSXT's National Gateway Initiative.

In preparing an EIS, agencies "may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without significant impact." *Jackson Cnty., N. Carolina v. F.E.R.C.*, 589 F.3d 1284, 1290 (D.C. Cir. 2009) (citation omitted). "[F]ederal projects may not be viewed myopically where they will have a cumulative or aggregate impact on the human environment. This is obviously true where separate projects are close in geographical proximity or where they combine as links in a chain," *Colony Fed. Sav. & Loan Ass'n v. Harris*, 482 F. Supp. 296, 302 (W.D. Pa. 1980).

Actions that are closely related are deemed connected and should be discussed in the same EIS. 40 C.F.R. § 1508.25(a)(1). In determining the proper scope of an EIS, the D.C. Circuit, among others, consider whether the proposed project: "(1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects." *Delaware Riverkeeper Network v. F.E.R.C.,* 753 F.3d 1304, 1315 (D.C. Cir. 2014) (quoting *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

FHWA regulations, based on CEQ guidelines, set forth the standard for segmentation:

> [i]n order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated ... shall (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f).

Determining logical termini can be a challenging exercise. In the case of a highway "within a single metropolitan area—as opposed to projects joining major cities—the 'logical terminus' criterion is unusually elusive." *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). "[T]he issue is easier to resolve (against segmentation) when the project is, for example, a highway between two cities, so that any segments shorter than the full length of the highway have no independent purpose." *Macht v. Skinner*, 715 F. Supp. 1131, 1136 (D.D.C. 1989) aff'd, 889 F.2d 291 (D.C. Cir. 1989).

In *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014), the D.C. Circuit found unlawful segmentation of a pipeline project where four construction projects on the same pipeline were completed in quick succession within the same leg of the pipeline and where the projects were a part of a complete overhaul and upgrade of the particular leg of the pipeline. *Id.* at 1314. In light of the interrelated nature of the construction projects, the D.C. Circuit held: "the end result is a single pipeline running from the beginning to the end of the Eastern Leg. The Northeast Project is, thus, indisputably related and significantly 'connected' to the other three pipeline upgrade projects." *Id.*

In this case, the purpose of expanding the Virginia Avenue Tunnel is to increase the height of the tunnel so that double-stacked intermodal rail can be transported through the tunnel,

and to add a second rail line in order to eliminate a bottleneck of freight rail travel. The Virginia Avenue Tunnel expansion is, moreover, a part of a major regional upgrade program for CSXT, the "National Gateway Initiative."

The FEIS describes how single-track tunnels such as the Virginia Avenue Tunnel act as bottlenecks on CSX's "mainline freight rail network:"

> The single railroad track within Virginia Avenue Tunnel … is a bottleneck to the eastern seaboard freight rail corridor because only a single freight train can pass through the tunnel at any one time. As a train passes through the tunnel, freight trains moving in the opposite direction near the tunnel must stop to allow the oncoming train to safely clear the tunnel, thus, limiting the total number of trains that could pass through the tunnel in a given time period.

Exhibit 2 at 2-2.

The FEIS also explains that upgrading tunnels such as the Virginia Avenue Tunnel to permit double stacking is CSXT's best option for responding to increase demand for freight rail on CSXT's mainline freight rail network:

> The industry solution to meeting higher freight transportation demands while still operating on the same network is to carry more freight per train. The ability to double-stack intermodal containers allows a single freight train to essentially double its intermodal freight capacity, if needed. In other words, double stacking intermodal containers is a way to increase capacity without increasing the number of trains, or the need to construct new rail lines.
>
> Thus, this inadequate vertical clearance of Virginia Avenue Tunnel effectively prevents CSX from operating double-stack intermodal container freight trains along its eastern seaboard freight rail corridor. As a result, the inadequate vertical clearance of the tunnel represents both a major deficiency of the tunnel and the ability to provide efficient service in the rail corridor.

Exhibit 2 at 2-3.

Condensing all of the foregoing into an analysis about the logical termini and independent utility of the Virginia Avenue Tunnel, it should be clear that CSXT cannot carry double-stack freight along the eastern seaboard unless *all* of the impediments to double-stacking,

including the Virginia Avenue Tunnel and the other 60 impediments described in CSXT's National Gateway Initiative presentation are addressed. The FEIS acknowledges this reality: "the inadequate vertical clearance at New Jersey Avenue SE, which is part of the Project area, would be resolved by lowering the grade beneath the crossing, a relatively minor construction activity that would not disrupt the surrounding community. Other crossings with inadequate vertical clearances in Southeast DC would be handled in a similar manner." Exhibit 2 at 2-3.

Even if the Virginia Avenue Tunnel is rebuilt to permit double stacking, CSXT still has to remove 60 other impediments before it can freely ship double stack rail along the corridor.

Lastly, after a diligent search of reported and unreported cases – nationwide – Plaintiff has not found a single case in which any court has determined that a tunnel (or bridge) – standing alone – has any "independent utility" except in one case in which a bridge had reached the end of its useful life and needed to be replaced for safety purposes. (*see Defenders of Wildlife v. N. Carolina Dep't of Transp.,* 971 F. Supp. 2d 510, 525 (E.D.N.C. 2013) *aff'd in part, rev'd in part,* 762 F.3d 374 (4th Cir. 2014) (referring to *Highway J Citizens Grp. v. Mineta,* 349 F.3d 938, 943 (7th Cir. 2003)). Indeed, FHWA regulations list logical termini for the purposes of NEPA as including major crossroads, populations centers, major traffic generators, or similar major …control elements." 37 Fed. Ref. 21810 (Oct, 14, 1972). Each of these elements has analogs in the freight rail world. Yet none of these elements were used to establish the termini in this case.

Defendants cannot support isolating the scope of this project at the entrance and exit termini of the Virginia Avenue Tunnel because the FEIS acknowledges that no major structural problems currently exist. *Supra.* A tunnel – standing alone has no independent utility because – standing alone – a tunnel comes from nowhere and leads to nowhere.

Based on the foregoing, it is incongruous – as well as arbitrary and capricious in violation

of the APA, for the FEIS to have limited the termini of the Virginia Avenue Tunnel expansion project to the termini of the tunnel itself. *See* Exhibit 2 at § 2.4, Logical Project Termini ("the Virginia Avenue Tunnel generally running under Virginia Avenue SE from 2nd Street SE to 11th Street SE and at grade at 12th Street SE represents logical termini of the Project.").

(3) The FEIS Fails to Take a Hard Look at the Cumulative Impacts of the Tunnel Expansion Project

NEPA is a "look before you leap" statue. It requires federal agencies to take a "hard look" at the environmental impact of its actions prior to making any "irreversible or irretrievable" commitment of resources. NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The purpose of an EIS is to insure that the agency considers all possible courses of action and assesses the environmental consequences of each proposed action. *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983); 42 U.S.C. § 4332.

"When determining the contents of an EA or an EIS, an agency must consider all 'connected actions,' 'cumulative actions,' and 'similar actions.'" *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1314 (D.C. Cir. 2014)(quoting 40 C.F.R. § 1508.25(a)). "Cumulative impacts" are those impacts "that result[ ] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions." 40 C.F.R. § 1508.7.

"A meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are

allowed to accumulate. *Delaware Riverkeeper Network*, 753 F.3d at 1319.

Notwithstanding the requirement to identify and consider the cumulative impacts of the project and the impacts of other projects on the same area, the FEIS primarily considers the impacts of the construction of the expanded tunnel, and not the impacts of the use and operation of the expanded tunnel. Specifically, in the discussion of cumulative impacts, the FEIS explains: "the cumulative impacts herein provided focused primarily on the construction period of the Project, and how it and other construction projects in the vicinity of the LOD could cumulatively affect the surrounding community." *See* Exhibit 21 at 5-100. The FEIS then limits discussion of cumulative impacts, with respect to transportation, land use, socio-economic conditions, air quality, noise, vibration, site contamination, water resources, vegetation and wildlife, historic resources, parks and recreational resources, and visual and aesthetic resources, to the construction of the expanded tunnel and not its intended use: carrying up to four times the freight that currently travels through the single-stack, single rail tunnel. *See* Exhibit 21 at 5-101 – 5-104

To wit, the FEIS indicates, in the Transportation Impacts analysis, that each of the Build Alternatives "will provide a single rail line through the Virginia Avenue Tunnel corridor during construction. Therefore, the level of freight rail capacity and service will remain at least the same as current conditions." Exhibit 21 at 5-101 (emphasis added). In the discussion on noise, the FEIS states: "At the conclusion of the Project's construction, the ambient noise will return to pre-construction conditions." *Id.* at 5-102. In the discussion of Water Resources, the FEIS states: "stormwater management measures are required during construction of the Project. … Therefore, adverse impacts to surface water resources from various construction projects occurring at the same time are not expected." *Id.* at 5-103 (emphasis added). With respect to historic resources, the FEIS mentions that, "Construction-period impacts to other historic properties, such as the

L'Enfant Plan (due to construction on a L'Enfant identified street, Virginia Avenue SE) and Capitol Hill Historic District (due to construction in Virginia Avenue Park) will be temporary." *Id.* at 5-104 (emphasis added). Considering Parks and Recreational Resources, the FEIS states: "the Project will require closing a portion of Virginia Avenue Park during construction." *Id.*

It was arbitrary and capricious to limit the cumulative impacts analysis to only the construction phase of the project and to ignore the environmental impact of transporting up to four times the volume of freight rail, including hazardous materials, at increased speeds through the heart of the capitol.

(4) Impact Analysis Disregards Reasonably Foreseeable Effects

Even when the FEIS does consider post-construction impacts of the tunnel, it does not consider reasonably foreseeable impacts resulting from rail accidents, disasters or terrorist attack involving trains using the newly expanded tunnel. Although there is no requirement that the EIS include a worst-case scenario analysis, the EIS is required to consider *reasonably foreseeable* impacts of the project. The CEQ regulation, 40 C.F.R. 1502.22 was designed to ensure that the EIS "focus on reasonably foreseeable impacts," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). "NEPA requires an agency to consider environmental impacts even if the effects are not entirely certain." *Reed v. Salazar*, 744 F. Supp. 2d 98, 118 (D.D.C. 2010) (quoting *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 22 (D.D.C.2009))

"NEPA and its regulations impose a duty … when evaluating the environmental impact of the proposed action, to provide all available information that is essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22 Consequently, in *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254 (S.D. Fla. 2009) *aff'd*, 362 F. App'x 100 (11th Cir. 2010), the court found that the

Corps of Engineers had violated NEPA because it failed to include the fact that the project was reasonably likely to require upgrades to the county's water treatment facility: "By failing to include in the EIS the County's estimates of the costs of the potential upgrades to the water treatment system, or any analysis by the Corps as to whether such upgrades were reasonably foreseeable, the Corps did not comply with NEPA's regulations." 709 F. Supp. 2d at 1271.

Specifically, no consideration was given to the impacts of a reasonably foreseeable rail accident, involving a spill of toxic material. There is no consideration or discussion of the impact of such an event on local landowners, residents, business or government agencies and branches. This is despite the fact that the EIS recognizes the risk, for example, for hazardous materials to leach into groundwater. A groundwater contamination study – included in the Phase 1 Environmental Assessment included as an Exhibit to the FEIS – indicating that "contaminants leaked or spilled on the Site would have a moderate potential to migrate vertically to underlying waterbearing zones[, and] … the uppermost water-bearing zone is moderately permeable." Exhibit 20, § 5.4.4.

Similarly, no discussion of the negative impacts on land values - stemming from concerns about increased volume of freight rail has been provided in the FEIS. A spill of hazardous materials is reasonably foreseeable, because CSXT will be quadrupling the volume of freight that travels through the Tunnel, and that freight will be traveling at substantially faster rates of speed (up to 40 mph). *See, e.g.* Exhibit 2 at 2-4 to 2-5. Moreover, there is no District of Columbia Office of Rail Safety with jurisdiction over ensuring that the tracks are clear and secure and minimizing the risk of rail incidents.

The FEIS makes reference to at least one other "high risk" spill of an unknown

contaminant that was listed in the Emergency Response Notification System[6] (ERNS) database. *See* Exhibit 20 at § 8.4.1. Consequently, a rail spill is not a "worst case" situation. Instead, it is a reasonably foreseeable situation. Yet, the FEIS does not address the risk of a spill or other incident.

Instead of addressing the foreseeable impacts of a spill, particularly in response to Plaintiff's comments on that subject (Exhibit 10, comment 20-26), the FEIS refers to regulations that govern the transportation of hazardous freight that would apply to CSXT, and it recites generic precautions that CSXT and the District have and will continue to take to avoid rail accidents and to respond to rail accidents. *Id.* Response to Comment 20-26 at L-119 (in which the FEIS refers back to the response to Comment 20-9, which can be found at L-107). No discussion or analysis is provided with respect to the adverse impacts on land use, the environment, transportation, stormwater, historical resources, air quality or other aspects the human environment of a spill or other freight disaster.

The foreseeable risk of rail accidents, disasters and attack should have been a significant consideration in the analysis of alternatives. Alternate routes for this freight may involve more up-front costs in terms of construction, but there is no indication or analysis of whether those up-front costs would be outweighed by the costs involved with a rail disaster in a heavily populated part of the District of Columbia that is located within short distance of the U.S. Capitol itself.

Because the "incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives," the EIS was required to obtain and include the information in the assessment – if doing so would not have involved "exorbitant"

[6] The ERNS is a national database within formation regarding releases of oil and hazardous substances. The FEIS was relying on a version of the ERNS that had not been updated since October 2011. *See* Exhibit 22 at p. 30.

costs. 40 C.F.R. §1502.22 (a). There is no indication in the EIS that obtaining information on the consequences of a foreseeable rail spill, disaster or other incident would have been exorbitant.

(5) The EIS Fails to Adequately Assess Alternatives to Expanding the Virginia Avenue Tunnel

The discussion of alternatives is the "heart" of the NEPA process and is intended to "provid[e] a clear basis for choice among options by the decisionmaker and the public." *Id.* § 1502.14. "The test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences." *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977). An EIS must "rigorously explore and objectively evaluate" all reasonable alternatives to a proposed action, in order to compare the environmental impacts of all available courses of action. 40 C.F.R. § 1502.14. For those alternatives eliminated from detailed study, the EIS must briefly discuss the reasons for their elimination. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703-04 (10th Cir. 2009).

In this case, the FEIS compared five different alternatives, but four of them were variations on the same theme – expanding the tunnel, while the fifth was the no-build option. No reasonable consideration was given to any options that involved re-routing CSXT's freight traffic around the city.

The criteria on which CSXT[7] evaluated the alternatives were as follows:

> **Criterion 1**: The concept, upon completion, will address the deficiencies of the Virginia Avenue Tunnel.

[7] The FEIS, analysis of alternatives section, indicates that CSXT, rather than the agencies involved in the EIS, selected from among the various alternatives: "unlike a proposed public infrastructure project, such as a new public road or bridge, that needs to compete with other projects for public funds, this Project represents CSX's judgment of the action it needs to take to satisfy its common carrier obligation." *See* FEIS at 134 (p. 3-42).

> **Criterion 2**: The concept, upon completion, will provide the necessary improvements for operating double-stack intermodal containers and have two railroad tracks for the efficient flow of commercial rail freight through the Washington Metropolitan Area.
>
> **Criterion 3**: The concept will avoid major impacts to the structures, traffic or access to or from I-695.
>
> **Criterion 4**: The concept must allow for the maintenance of traffic across Virginia Avenue and along adjacent streets throughout the duration of construction.
>
> **Criterion 5**: The concept will maintain interstate rail commerce without a substantial negative impact to the level of service during construction.
>
> **Criterion 6**: The concept will be implemented in a time frame that accommodates the near term anticipated increase in freight traffic.
>
> **Criterion 7**: The concept has a comparatively reasonable duration of construction in the vicinity of the existing tunnel.
>
> **Criterion 8**: The concept has a comparatively low cost

See FEIS at 134 (p. 3-42).

Re-routing would have accommodated the first seven criteria better than expanding the tunnel:

Re-routing freight around the District of Columbia would have avoided the Virginia Avenue Tunnel altogether; therefore the tunnel's deficiencies would have been of no further consequence to CSXT (Criterion 1). *See* Exhibit 11 at 3-62. The re-routed freight line could have been built to CSXT's exact specifications, and with two (or more) tracks, thus ensuring even more efficient flow of double-stacked intermodal containers (Criterion 2). *Id*. Re-routing would have avoided impacts with I-695 altogether (Criterion 3). *Id.* Re-routing would have avoided any traffic issues across Virginia Avenue and adjacent streets because no construction would have occurred in that area (Criterion 4). *Id*. Re-routing would maintain interstate rail commerce without any negative impact during construction. This is because CSXT could have

continued to transport freight through the Virginia Avenue Tunnel – which is perfectly serviceable in present state (*supra*) – while the new route was being constructed (Criterion 5). *See Id.* Since the construction would not be in the vicinity of the existing tunnel, the concern in Criterion 7 would no longer be relevant.

With respect to Criterion 6 (concept implemented in a time frame that accommodates the near term anticipated in crease in freight traffic, *See Id.*), CSXT claims that it "requires that double-stack intermodal container train operations be available through the Washington Metropolitan Area by 2015, the year in which the Panama Canal is projected to be expanded allowing passage of larger vessels with higher freight capacity." This criterion was unachievable, and it was offered as a pretext to justify eliminating the re-routing options.

To wit: The FEIS indicates that construction was not slated to start until the end of 2014 or beginning of 2015. *See* Exhibit 21 at 5-85. In light of the fact that the Record of Decision was not issued until November 4, 2014 and that none of the necessary permits and approvals for the project have been issued, however, even the beginning of 2015 is unrealistic as a start date. CSXT moreover estimates that active construction on the tunnel expansion project would last up to 42 months under the preferred alternative. Consequently, the build alternative will not be completed until sometime in 2019. *See* Exhibit 6 at S-27 and S-32.[8]

CSXT claims that construction duration estimates were compared for all 12 alternatives and "the concepts with the shorter construction periods within the Virginia Avenue SE corridor

[8] Under the proposed alternative, CSXT would complete the first double-stack capable line within 22 months. *See* Exhibit 11 at 3-37; *Id.* at 3-30 (Phase 1 encompasses time to build first track under preferred alternative). The Virginia Avenue Tunnel would still remain a choke point, however, until the second line is completed. *Supra.* Moreover, CSXT has not indicated when it believes it will have all other nearby obstructions to double-stacked intermodal freight on the eastern seaboard line cleared, all of which must be resolved before the eastern seaboard line is prepared to handle the increased freight that CSXT anticipates.

satisfy Criterion 7. Exhibit 11 at 3-63). This appears to be inaccurate, as the duration discussion and tables does not include the estimated duration of the re-routing alternatives. *See* FEIS Section 3.5.6 and table 3-4, FEIS at 128-129 (3-36 to 3-37)

CSXT relied on a 2007 Railroad Realignment Feasibility Study (RRFS) issued by the National Capital Planning Commission for the costs associated with re-routing. *See* Exhibit 11 at 3-56 to 3-60. The study was not attached to the FEIS, despite the fact that it played a central role in disqualifying the three re-routing alternatives. Instead, the study was listed only in the "references" section of the FEIS. *See* Exhibit 8 at 10-7.

According to the FEIS, the April 2007 RRFS was accessed in 2011, which means that the study was four years old at the time it was accessed in 2011, another three years passed before the time the RRFS was used to support the FEIS. *See* Exhibit 8 at 10-7. Due to the age of the RRFS study, the FEIS failed to adhere to the requirement that it be supported by high quality evidence.

Moreover, while the FEIS adopted the discussion of costs of re-routing included in the RRFS, the FEIS failed to consider the risks associated with transporting hazardous materials through the heart of the District of Columbia and the possible costs associated with a terrorist attack or rail disaster involving hazardous materials.

As described in the RRFS:

> The line's location raises security concerns because railroads carry hazardous materials. Railroads are a safe method of transport, but hazardous materials on this rail line would be a tempting target for attack because the line is in the Monumental Core. An attack here could have dramatic effects:
>
> Significant loss of life. An attack would jeopardize the lives of many federal employees, elected officials, and nearby residents—more than 100,000 federal employees work within a half-mile of the line, and more than 54,000 people live in this same area within Washington, DC.

> Large economic losses. An attack could damage not only the rail line but also adjacent government offices and public facilities. Crippling the rail line would inhibit regional commerce, and wrecking buildings would interfere with the operation of government.
>
> Damage to national iconic structures. An attack would strike at Washington's Monumental Core, the symbolic center of the nation's governance.

Exhibit 23 at 1.

Additionally, while the FEIS adopts the cost assessment included in the RRFS, it fails to acknowledge that the RRFS concluded that the benefits of realignment outweighed the those costs by a significant margin – even without considering the costs associated with a terrorist attack or other major rail disaster. Specifically, the RRFS concluded as follows:

> A realignment project on any of the three viable alternative alignments identified in this study would produce benefits that would exceed project costs. Even without accounting for the value of the most important benefit—security improvement, which this study did not attempt to quantify—the benefit-cost analysis showed that a realignment project is worth doing. Capturing some of these benefits could help to pay realignment project costs.

Exhibit 24 at 102.

Among the benefits cited by the RRFS include:

1) "Railroad realignment would reduce the threat of attack on the Washington, DC region by the removing freight trains from the Monumental Core;"
2) "Freight trains on any of the alternative alignments would be near places where fewer people live and work than the existing line. All the viable alternatives would meet environmental justice objectives better than the existing railroad;"
3) "Separating freight and passenger services onto separate tracks would provide the greatest benefits by removing conflicts between train types entirely;"
4) "Neighborhood access to the Anacostia River would be improved, and Anacostia Park would no longer be divided. Parts of the city's street network

could be restored to the intent of the historic L'Enfant Plan for the Nation's Capital;" and

5) "[O]pportunities for redevelopment are in neighborhoods east of the Anacostia River."

Id.

Despite the requirement to give a hard look to the alternatives, the FEIS does not consider any of these beneficial aspects of re-routing.

It is important to consider that the RRFS did not attempt to monetize the value of improved security (e.g. the savings associated with avoiding a terrorist attack or other rail disaster) associated with re-routing the rail lines. *See* Exhibit 25, p. 94. Even without considering the benefits to safety and security the RRFS determined that the benefits of re-routing the CSXT line away from the District (and the Virginia Avenue Tunnel) would outweigh the associated costs by a factor of between 1.37:1 (for a new tunnel underneath the Virginia Avenue Tunnel, without making other improvements to the corridor) to 1.98:1 (For the Indian Head alternate route, including other corridor improvements). *See* Exhibit 25, p. 94.

Lastly, limiting consideration only to the options discussed in the RRFS was arbitrary and capricious because it fails to consider other reasonable alternatives, such as using CSXT's Blue Plains rail line. Exhibit 10 at L-107-08)

(6) The FEIS Relies On Flawed Information

As the Supreme Court has stated, NEPA imposes a procedural requirement that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (citation omitted). "Publication of an EIS, both in draft and final

form, also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provides a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (emphasis added). "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 703 (10th Cir. 2009). NEPA regulations, moreover, require that the information be of "high quality," because "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1 (b).

Under NEPA, moreover, "[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [EISs]." *Earth Island Inst. v. Gibson*, 834 F. Supp. 2d 979, 987 (E.D. Cal. 2011) *aff'd* 697 F.3d 1010 (9th Cir. 2012) (quoting 40 C.F.R. § 1502.24.)

Defendants violated NEPA because the Final Environmental Impact Statement includes material misrepresentations that insured that the "no build option" would be rejected, including the statement that "[t]he single railroad track within Virginia Avenue Tunnel represents the single greatest constraint on rail headway … on CSX's mainline freight rail network. It is a bottleneck to the eastern seaboard freight rail corridor because only a single freight train can pass through the tunnel at any one time." *See* FEIS, Section 2.1.1 at 2-2; *See also* FEIS Section 2.1.2, at 2-3 ("this inadequate vertical clearance of Virginia Avenue Tunnel effectively prevents CSX from operating double-stack intermodal container freight trains along its eastern seaboard freight rail corridor.").

These statements were inaccurate and misleading, because they exaggerate the importance of the Virginia Avenue Tunnel. CSXT's own press releases and National Gateway documents demonstrate that the Virginia Avenue Tunnel was just one bottleneck among numerous other bottlenecks involving inadequate clearance or single tracking along the eastern seaboard. *See* Exhibit 3. Consequently, DDOT and FHWA, as co-lead agencies, violated their public disclosure obligations and the requirement to insure the integrity of the information in the EIS under NEPA. As a result they undermined NEPA's goal of promoting informed decisionmaking and reliance on the political process to "check" important decisions regarding the environment. *New Mexico ex rel. Richardson* and *Earth Island Inst*., *supra*.

b) DCEPA Violations

As is the case with NEPA, violations of the District of Columbia Environmental Policy Act (DCEPA) are analyzed under the D.C. Administrative Procedures Act, D.C. Code § 2-501(a)(3)(A) to determine whether the agency action was arbitrary or capricious, an abuse of discretion, or not in accordance with the law. *See Kingman Park Civic Ass'n v. Gray*, 2014 WL 4810189 at *3 (D.D.C. Sept. 29, 2014) ("To prevail on its D.C. EPA claim, the plaintiff must show that the agency's determination that preparing an EIS for the challenged project was not necessary was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (internal punctuation omitted).

The D.C. APA and the federal APA use the same standard: "just like the federal APA, the D.C. APA directs the court to 'set aside any action or findings and conclusions found to be ... [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" D.C. Code § 2–510(a)(3). *Rivera v. Lew*, 949 F. Supp. 2d 266, 270 (D.D.C. 2013).

The DCEPA provides that "Whenever the Mayor or a board, commission, authority, or

person proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented, the Mayor, board, commission, authority, or person shall prepare or cause to be prepared, and transmit, in accordance with subsection (b) of this section, a detailed EIS at least 60 days prior to implementation of the proposed major action, unless the Mayor determines that the proposed major action has been or is subject to the functional equivalent of an EIS." D.C. Code § 8-109.03.

The DCEPA bears great similarity to the NEPA requirements for an EIS. Specifically, D.C. Code § 8-109.03(a) requires that the EIS analyze:

> (1) The goals and nature of the proposed major action and its environment;
>
> (2) The relationship of the proposed major action to the goals of the adopted Comprehensive Plan, requirements as promulgated by the Zoning Commission, and any District or federal environmental standards;
>
> (3) Any adverse environmental impact that cannot be avoided if the proposed major action is implemented;
>
> (4) Alternatives to the proposed major action, including alternative locations and the adverse and beneficial effects of the alternatives;
>
> (5) Any irreversible and irretrievable commitment of resources involved in the implementation of the proposed major action;
>
> (6) Mitigation measures proposed to minimize any adverse environmental impact;
>
> (7) The impact of the proposed major action on the use and conservation of energy resources, if applicable and significant;
>
> (8) The cumulative impact of the major action when considered in conjunction with other proposed actions;
>
> (9) The environmental effect of future expansion or action, if expansion or action is a reasonably foreseeable consequence of the initial major action and the future expansion or action will likely change the scope or nature of the initial major action or its environmental effects;
>
> (10) Responses to comments provided by the Council, any affected Advisory Neighborhood Commission, and interested members of the public; and
>
> (11) Any additional information that the Mayor or a board, commission, or

> authority determines to be helpful in assessing the environmental impact of any proposed major action and the suggested alternatives.

See Also D.C. Mun. Reg. § 20-7206.2.

Consequently, the NEPA violations discussed above, including the requirements to analyze alternative proposals, cumulative impacts, and foreseeable environmental impacts of operating the rail tunnels, consequently carry over to DDOT and the Mayor's obligation under the DCEPA. Moreover, it would be arbitrary and capricious, in violation of the D.C. Administrative Procedures Act, D.C. Code § 2-510(a)(3)(A) for DDOT to have prejudged the result of the EIS in the manner exhibited here. *See Foggy Bottom Ass'n v. D.C. Zoning Comm'n,* 979 A.2d 1160, 1166 (D.C. 2009) ("As the statement of legislative purpose makes clear, the Council imposed "a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation...."). *See also e.g., Forest Guardians*, 611 F.3d 692, 714 ("an agency may violate NEPA, and consequently the APA, when it predetermines the result of its environmental analysis.").

Additionally, the District was required to conduct an EIS before it granted CSXT the right of way for the two tunnels.

Under the DCEPA, "Whenever the Mayor or a board, commission, authority, or person proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented, the Mayor, board, commission, authority, or person shall prepare or cause to be prepared … a detailed EIS." D.C. Code § 8-109.03. *See also* D.C. Mun. Regs. § 20-7200 ("[b]efore an agency … of the District of Columbia government shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement or permission to act for a proposed major action, the environmental impact of the action must be adequately considered and reviewed by the District government, as provided in these regulations."

DDOT has already classified the tunnel expansion project as a Major Action requiring an EIS for the purposes of NEPA; and has conceded that a DC EIS, or its equivalent was necessary. *See* Exhibit 2 at 1-8 to 1-9. Consequently, a DCEPA Environmental Impact Statement was required before DDOT granted CSXT the right of way over the construction area of disturbance and the footprint of the future tunnels. *See* D.C. Mun. Reg. § 20-7201.2.

Although DDOT claims that the preparation of a NEPA Environmental Impact Statement satisfied the DCEPA (*See* Exhibit 2 at 1-8 to 1-9), that is not the case here. This is because the NEPA EIS failed to address the consequences of granting the indefinite right of way that would permit CSXT to operate the two new freight rail tunnels. In other words, whereas the NEPA EIS was limited to an analysis of the environmental impacts caused by the construction activities related to expanding the Virginia Avenue Tunnel, the DCEPA required the District to conduct an Environmental Impact Statement that analyzed the actual operation of the rail tunnel. The failure to do so contradicted the DCEPA, in violation of the D.C. Administrative Procedures Act, D.C. Code 2-501(a)(3)(A). *See, e.g. Kelley v. Selin,* 42 F.3d 1501, 1519 (6th Cir. 1995) ("[A]n agency's determination not to prepare an EIS must be 'reasonable under the circumstances,' when viewed 'in the light of the mandatory requirements and the standard set by (NEPA).'" (quoting and relying on *Lower Alloways Creek Township v. Public Service Elec. & Gas Co., 687* F.2d 732, 742 (3d Cir.1982) and *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir.1974)). *See also Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) ("In reviewing an agency decision not to prepare an EIS pursuant to NEPA, our inquiry is whether the "responsible agency has 'reasonably concluded' that the project will have no significant adverse environmental consequences. If substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment, a

decision not to prepare an EIS is unreasonable.") (internal citations omitted).

c) Violation of D.C. Code § 10-801 and/or D.C. Code 9-202.01

Lastly, Plaintiff is likely to prevail because DDOT violated D.C. Code § 10-801 and/or D.C. Code 9-202.01 when it granted CSXT an indefinite right of way over the area of the two new Virginia Avenue Rail Tunnels.

Both D.C. Code § 10-801 (governing the conveyance in interests over real property belonging to the city) and D.C. Code 9-202.01 (governing the closure of streets (including rights of way) require the City Council approval. In this case, there is no indication that DDOT satisfied any of the prerequisites for Council approval under either statute. Among other things, neither the Mayor nor the City Council provided notice to the public or public hearings prior to the conveyance as required by D.C. Code § 10-801 (a-1). Nor did DDOT provide notice to the Historic Preservation Review Board, Advisory Neighborhood Commission, or abutting property owners, as required by D.C. Code 9-202.02. Likewise, neither the Mayor nor DDOT submitted a proposed resolution conforming to requirements of either statute. *See* D.C. Code § 10-801 (a-2) *and* D.C. Code §§ 9-202.01 and 9-202.02.

C. BALANCE OF HARMS

1. Plaintiff will suffer Irreparable Harm

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987). *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998). An injunction, moreover, may be justified, for example, "where there is a particularly strong likelihood of success on the merits

even if there is a relatively slight showing of irreparable injury." *City Fed Fin. Corp. v. Ofc. Of Thrift Supervision,* 58 F.3d 738, 747 (D.C. Cir. 1995).

Although the procedural harm of a NEPA violation cannot stand alone, that harm in conjunction with a purely aesthetic harm can satisfy the irreparable harm element of the TRO analysis. In *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998), for example, the irreparable harm element was satisfied by the combination of the procedural harm inherent in the NEPA violation and the aesthetic harm suffered by plaintiff's resulting from contemplating an organized hunt of bison.

Here, an important factor in favor of "plaintiff's harm" is that once the Defendants issue their approvals and permits, they will lose their ability to control CSXT's operations, both with respect to the construction and the actual operation of the newly expanded tunnel. A similar consideration was involved in *Sierra Club v. Peterson,* 717 F.2d 1409, 1414 (D.C. Cir. 1983). In that case, the D.C. Circuit Court weighed the fact that the Department of Interior would lose control over what activities could occur on federal lands once it was leased to a private mine operator. 717 F.2d at 1414 ("once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant."). The same factor applies here. Once CSXT is permitted to expand the tunnel, the Defendants surrender any ability to control how CSXT performs the construction and how it uses the tunnel, what cargo is transported through the tunnel, what safety precautions CSXT implements, and what security measures it puts into place. As was the case in *Sierra Club v. Peterson*, the Defendants lose control over CSXT's operations through the tunnel, and – after the permits are issued – they can only impose mitigation and corrective measure requirements on CSXT. *Id.* at 1414.

In this case, the irreparable harm to the Plaintiff is more substantial than in *Fund for Animals v. Clark.* Whereas in *Fund for Animals v. Clark*, the harm was only aesthetic in nature, in this case Plaintiff's member, Maureen Cohen Harrington, lives in the immediate vicinity of the Virginia Avenue Tunnel. *See* Exhibit 16. In the event that construction of the two tunnels moves forward, Ms. Harrington will suffer from noise, vibrations, air pollutants, and other environmental impacts, not to mention the traffic and parking problems and utility disruptions incumbent with the demolition of the old tunnel and reconstruction of the new tunnels. She will also suffer diminution in the value of her home. *See* Exhibit 16 at ¶¶ 4-6.

Additionally, in the event of a rail spill, Ms. Harrington's life and property would be at risk. Once the tunnel becomes operational, Ms. Harrington would be at an increased risk of a rail disaster resulting from the increased volume of rail passing through the tunnel at greater speed. *See* Exhibit 16 at ¶¶ 7-9.

2. The Harms Suffered By Plaintiffs Outweigh Any Harm To The Defendants

The alleged harm to the defendants cannot be speculative in nature. *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (defendants could not establish any substantial harm caused by an injunction where consequences of implementing an injunction were speculative). Courts have analyzed harm to the defendants by focusing on whether there is an urgent need for the desired agency action, and whether a temporary delay caused by an injunction will create a pressing harm to the defendant. *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 223 (D.D.C. 2003) (ruling that an injunction halting an agency decision to kill over 1,000 mute swans would not result in harm to the defendants where an injunction would result in only a minor increase in mute swan population).

In this case, there is no harm to the Defendants because they do not have a stake in the

outcome of the EIS or whether CSXT is ultimately able to attain the approvals and permits it will need to expand the Virginia Avenue Tunnel. The proposed project is for the benefit of CSXT and its customers, and not the Defendants. *See* FEIS at 29 (S-3) ("the proposed action is to preserve, over the long-term, the continued ability to provide efficient freight transportation services in the District of Columbia, the Washington Metropolitan Area and the eastern seaboard."). Indeed, most of the Defendants will only benefit from the injunction because they will be inconvenienced by the project in light of the fact that their property, including Park Service land and Marine Corps athletic grounds, will be disturbed during construction. *See* FEIS at 78 (p. 1-8). Additionally, portions of Virginia Avenue SE, owned by the District of Columbia would be closed during construction. *Id.*

CSXT will likewise not suffer any harm as a result of the grant of the preliminary injunction. First, CSXT is currently able to move freight through the Virginia Avenue Tunnel at the same rate and volume that it has been enjoying for many years. Second, CSXT's ability to build the tunnel depends on the grant of a right of way from the District of Columbia encompassing the two tunnels, as well as the grant of numerous permits and approvals from District and Federal Agencies. Consequently, the grant of an injunction will not prevent CSXT from undertaking action that it currently has an unrestricted right to perform.

Although the EIS describes problems inherent with the Virginia Avenue Tunnel, the EIS makes clear that the tunnel is structurally sound no significant structural defects were expected in the near future. *See* FEIS, Exhibit 2 at 2-4 ("the overall structure is in relatively good shape"); *and see Id.* 2-5 ("the tunnel is in no danger of collapsing in part due to tunnel reinforcements and reconstruction made in late 1985 and early 1986 … Nevertheless, even with CSX's active maintenance and inspection program, a major structural deficiency could materialize over the

next few decades"). Additionally, even if CSXT were to perform the Virginia Avenue Tunnel expansion, there are numerous additional obstacles to CSXT's ability to run double stack freight rail along the eastern seaboard. So any delay to CSXT would be of no consequence to the overall aim of upgrading the entirety of the eastern seaboard rail line. This is because all of the impediments must be resolved before CSXT may transport double-stacked intermodal freight freely along the eastern seaboard line.

During public hearings, CSXT testified that the only harm it would suffer in the event of a delay in beginning construction of the Virginia Avenue Tunnel was that, over time more people are likely to move into the fast-growing neighborhood in which the Tunnel is located.[9] Consequently, according to CSXT officials, the delay would result in more residents being affected by CSXT's construction. This appears to be an unintended concession that the expanded CSXT tunnel is inconsistent with the neighborhood and should be relocated. Alternatively, it is as if CSX is arguing that they should be permitted to go in and disrupt the neighborhood before any additional pesky humans move in. In any event, CSXT did not profess that the project would become more expensive, more difficult, or placed in jeopardy as a result of delay. *See, e.g. Jones v. D.C. Redevelopment Land Agency,* 499 F.2d 502, 513 (D.C. Cir. 1974) (no injunction granted because "unless project was completed expeditiously, "it may prove impossible to carry … out at all.").

[9] This concession was made in a City Council Hearing on August 26, 2014. A link to the video is http://208.58.1.36:8080/DCC/August2014/08_26_14_COW.mp4. In an exchange with Councilman Wells, Louis Renjel - CSXT's Vice President for Strategic Infrastructure Initiatives – testified, *inter alia*: "this tunnel ages every day, while the surrounding community continues to attract new residents, so any construction at a later time would inconvenience more residents, not fewer." Video at 4:25-4:26. Mr. Renjel also testified "more delay is just more and more inconvenience to more and more people … I think we'll have, there will be more concerns. Right? The concerns over time, with the population growing around that area will only grow." Video at 5:57-6:00.

Consequently, because there is no harm to the Defendants or to any other parties, including CSXT, the harm to the Plaintiff substantially outweighs the potential for harm to any other parties.

3. A Preliminary Injunction Would Be In The Public Interest

"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." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). There is a strong public interest in the "meticulous compliance" with NEPA. *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*). *See also Realty Income Trust*, 564 F.2d at 456 (referring to public interest in enforcing NEPA as "compelling."). 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.*

Requiring the Defendants to perform a new Environmental Impact Statement, correcting the deficiencies noted herein will have no adverse impact on the public. The EIS acknowledges that projected freight rail increases in the United States are not limited by the Virginia Avenue Tunnel and that the freight traffic will be absorbed by freight rail operators (including CSXT competitors) and commercial trucking. *See* Exhibit 2 at 2-5 ("According to the FHWA's 2011 Freight Analysis Framework (FAF) forecasts, overall freight tonnage would increase by 50

percent in 2040 from 2010 levels. This projection is independent of the Project.") (emphasis added); and *Id.* at 2-7) ("Any diminution in the ability to provide reliable, consistent, and timely freight rail service would make freight rail transport less competitive than truck transport, and the expected response of many freight customers would be to switch transport modes from rail to truck."). In this case, the public interest is strongly in favor of requiring Defendants to fulfill their obligations under NEPA.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Honorable Court grant a preliminary injunction, as detailed in the attached order, which will prevent the Defendants from issuing any permits or approvals that are premised on the unlawful Environmental Impact Statement and the Record of Decision, which relies on the faulty EIS.

Respectfully Submitted,

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