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 CONSOLIDATED REPLY TO THE OPPOSITIONS SUBMITTED BY CSX TRANSPORTATION, AND THE FEDERAL AND DISTRICT DEFENDANTS

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INTRODUCTION

The facts of this case and the procedural posture have been discussed *ad nauseum.* For the purposes of this Reply brief, Plaintiff relies on the facts asserted in its original Motion for Preliminary Injunction, and its Reply thereto, as well as in the currently pending Rule 59(e) Motion, as supplemented, which incorporates facts from the Administrative Record.

Plaintiff has attempted to structure this Reply in such a way as to correspond to the organization of the District's Opposition Brief, which was the lengthiest of the Opposition Briefs. Although this approach unfortunately impacts the "readability" of this brief, it was the best way to ensure that Plaintiff has flyspecked all of the Defendants' and CSXT's arguments in opposition.

1. THERE ARE NO PROCEDURAL DEFECTS

Defendants' argument (*e.g.* District Opp. at 8-9, 10-11) that portions of Plaintiff's motion should be ignored is without merit. The Court specifically permitted the Plaintiff to supplement its original Rule 59(e) Motion with evidence and arguments derived from the Administrative Record. That is precisely what the Plaintiff has done.

Plaintiff's current motion addresses the standard for predetermination, as this honorable Court characterized it in its decision denying the Preliminary Injunction. This is because the new evidence exposes the flaws of that standard and revealed the "clear error" and "manifest injustice" that results from the use of the Court's adopted standard. In their grousing about the Plaintiff's Motion, Defendants and CSXT ignore that Rule 59(e) motions can be filed to correct "clear legal error," which Plaintiff respectfully submits to be the case here. *State of N.Y. v. United States,* 880 F. Supp. 37, 39 (D.D.C. 1995).

Defendants repeatedly assert that this Court has already determined that the agreements

between DDOT and CSXT do not constitute evidence of predetermination (*see e.g*. District Opp. at 15, 19, fn 3, CSXT Opp. at 4-5). Defendants miss the point that the new evidence provides additional evidence that was not available to the Court at the time it denied Plaintiff's Application for a Preliminary Injunction. The new evidence changes the analysis entirely, even conclusions made about agreements that the Court already considered.[2] Consequently, asking the Court to re-examine its conclusion about the agreements the Plaintiff cited in its initial motion is not an attempt to re-litigate matters that have already been argued, because the Court has not had the opportunity to consider the evidence from the Administrative Record.

CSXT posits that the Plaintiff should have waited until the summary judgment phase to bring forward the new facts from the Administrative Record and foregone the opportunity of filing a Rule 59(e) motion. According to CSXT, this is the way things are ordinarily done. CSXT Opp. at 2. CSXT apparently takes Plaintiff for a fool, because that approach may have rendered Plaintiff's claims moot. *See Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt*., 460 F.3d 13, 18–19 (D.C. Cir. 2006) (NEPA challenge moot because policy in question had expired); *Finca Santa Elena, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 7474947, at *3 (D.D.C. Jan. 6, 2014) (citing Circuit cases for the proposition that "[a] NEPA claim does not present a controversy when the proposed action has been completed and no effective relief is available"); and see *Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 767 (10th Cir. 2014) ("It should go without saying that any harms allegedly resulting from past …. activities cannot be

[2] By way of example only, consider that Eulois Cleckley's July 1, 2010 email to CSXT, in which he wrote that "DDOT is open to acting on CSXT's behalf for the environmental work" if CSXT agreed to DDOT's conditions (Appx. 124, bottom paragraph), gives context to the provisions in subsequent agreements that call on DDOT to support the Virginia Avenue Tunnel. The Cleckley email also provides context and meaning to, for example, CSXT's March 9, 2011 correspondence in which it 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.

relieved, let alone prevented, by enjoining the Project.”).

2. *WYOMING OUTDOOR* COUNCIL DOES NOT ESTABLISH THE PREDETERMINATION STANDARD IN THIS CIRCUIT

In its initial decision denying the Plaintiff’s application for a Preliminary Injunction, this Honorable Court held that whether an irreversible commitment of resources has been made depends on “the practical effects of agency’s conduct rather than whether the conduct suggests subjective agency bias in favor of the project.” To that end, the District Court endorsed the view that the standard was only satisfied when “the agency had issued every permit necessary to begin the project.” Decision at 21-22 (*relying on Wyoming Outdoor Council v. Forest Service*, 165 F.3d 43, 50 (D.C. Cir. 1999)).

In its Rule 59(e) Motion, Plaintiff showed that *Wyoming Outdoor Council* is not applicable because the case involved a question of when a NEPA challenge became ripe, not whether there was predetermination. *See* Supp. Motion at 20. In their Oppositions, neither CSXT nor the Federal Defendants discuss *Wyoming Outdoor Council* at any length, and neither argues that the case is controlling over predetermination cases. CSXT Opp. at 1, Fed. Opp. at 2-3. The Federal Defendants also do not apparently endorse the view that all permits that are required for the project must be issued prior to the time the NEPA process concluded. Instead, the Federal Defendants concede that contract obligations can constitute the requisite commitment needed for a NEPA predetermination violation. Fed. Opp. at 3.

DDOT claims that *Wyoming Outdoor Council* governs this case because, under DDOT’s contorted analysis, the case adopted the predetermination standard for use as a proxy for ripeness. DDOT Opp. at 12-13. DDOT’s attempt to tie the strict standard applied in *Wyoming Outdoor Council* here falls flat. First, 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. 165 F.3d at 43 ("WOC contends that the Forest Service violated … the National Environmental Policy Act … by authorizing oil and gas leasing without first determining whether an adequate site-specific environmental review had been performed."). 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 ("Until the point of irreversible and irretrievable commitment of resources had been reached—i.e., the leases had actually been issued—any challenge to the Forest Service's NEPA compliance by WOC or anyone else remained premature [because "the Forest Service [remained] free to undertake additional efforts to comply with its NEPA obligations."]"). In this case, unlike in *Wyoming Outdoor Council*, the problem here is not that FHWA failed to issue an Environmental Impact Statement. Instead, the problem is that the Environmental Impact Statement violated NEPA because it was predetermined.

The Committee reiterates that the standard that the Court applied was erroneous – not because it requires an objective approach over a subjective one, but because the Court held that the objective standard cannot be met unless the agency issues all necessary permits before the NEPA process has concluded. *See* Decision at 21-22. This interpretation of the standard permits an agency to lock itself into supporting a project, by entering into binding commitments and contracts that are contingent on the agency's support for the project – so long as the agency waits to issue the permits until after the NEPA process has concluded. Neither the D.C. Circuit, nor any District Court in tis Circuit has ever endorsed such a view. *Sierra Club v. Peterson,* 717 F.2d 1409, 1414 (D.C. Cir. 1983) (irreversible commitment occurs at the point when "future options are precluded."); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 70 (D.D.C. 2012) (evidence that the decisionmaker has an "unalterably closed mind" is sufficient for predetermination); *Fund*

For Animals v. Norton, 281 F. Supp. 2d 209, 229 (D.D.C. 2003) (taking action that "swings the balance decidedly in favor" of the proposed action is "impermissible under NEPA.") *Id.* (agency violates 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.").

3. THE EVIDENCE SUFFICES TO DEMONSTRATE A LIKELIHOOD OF SUCCESS

The Defendants concede that the District of Columbia "supported" the Tunnel expansion project. *See* CSXT Opp. at 1, 5-6; District Opp. at 11 (advocating standard that would ignore agency conduct showing "subjective agency bias in favor of a project"). Likewise, the Court's initial decision acknowledges that agreements that the District entered into with CSXT caused it to favor the selection of the Tunnel expansion project. Decision at 26. The primary question here, therefore, is whether the new evidence demonstrates that the District's preference for the Tunnel Expansion project went beyond the lawful boundaries and intruded into unlawful predetermination territory.

In this Circuit it has been sufficient to show that an Agency's mind is "unalterably closed," that the Agency was locked into supporting the project, or the Agency was precluded from other options prior to the conclusion of the NEPA process. *Sierra Club v. Peterson,* 717 F.2d at 1414 (irreversible commitment occurs at the point when "future options are precluded."); *Flaherty*, 850 F. Supp. 2d at 70 (evidence that the decisionmaker has an "unalterably closed mind" is sufficient for predetermination); *Fund For Animals v. Norton*, 281 F. Supp. 2d at 229 (taking action that "swings the balance decidedly in favor" of the proposed action is "impermissible under NEPA.") *Id.* (agency violates 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."). *See also Metcalf v. Daley,* 214 F.3d 1135, 1142 (9th Cir. 2000) (agreements that bind an agency

into taking action, prior to the time an EIS is completed, constitutes unlawful predetermination).

The evidence here meets an "objective" standard of predetermination, as required by this Court, even though no permits may have been issued in advance of the NEPA process. To wit:

1) 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;[3]

2) August and September 2010 letters from the District to the Secretary of Transportation refer to the tunnel expansion as "necessary" and a "lynchpin" (Appx. 227; Supp. Exhibit 2, ARDDOT 2182);

3) The August 2010 email to CSXT communicates DDOT's agreement to work "on behalf of CSXT" for the NEPA environmental process. Appx. 124-125;

4) The August 23, 2010 contract between CSXT and DDOT requires DDOT to support the Virginia Avenue Tunnel expansion and ties agreements on CSXT's obligations (to pay the District money, and grant easements and right of ways) to the District's support for the Tunnel expansion project;

5) 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 <u>as the project approval process continues forward</u>." Supp. Exhibit 4, ARRDDOT2651 (emphasis added);

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[3] This document shows an intent to conceal the District's unalterably closed mind in support for the tunnel expansion project, not – as DDOT attempt to explain in its Opposition: "the refusal of a requested commitment." DDOT Opp. at 15.

6) In May 2011, the District incurred $4 million to make modifications to 11th Street Bridge so as not to preclude CSXT's tunnel expansion project and CSXT's obligation to reimburse that money was tied to the District's support for the tunnel expansion, per the August 23, 2010 agreement, *supra*;

7) A June 2011 timeline required CSXT's consultant to issue a Finding of No Significant Impact. Appx. 249;

8) The District held the NEPA process up in July 2011 until contract disputes between CSXT and the District were resolved. Supp. Exhibit 5;

9) In April 2012, DDOT eliminated all of the project concepts that involved permanently re-routing the CSXT rail line away from the Virginia Avenue Tunnel. Appx. 213-214;

10) In August 2012, CSXT donated money to the District in an agreement that has not been produced in the Administrative Record (nor has the agreement been addressed in any of the three opposition briefs). Appx 452-646;

11) In September 2012 the City Administrator and CSXT were negotiating a Joint Cooperation Agreement that they kept secret from DDOT (see Motion at 10-12);

12) In December 2012, CSXT, DDOT and the City Administrator agreed on a deal by which DDOT granted CSXT an easement that would cover the expanded Virginia Avenue Tunnel, and which referenced agreements for CSXT to reimburse DDOT for certain expenses, Credits that were owed to CSXT and future negotiations for easements and the acquisition of Shepherd Branch. Appx. 549 *et seq*. The Term Sheet Agreement also required the City Administrator to address all Permits and Approvals that CSXT would need for the Tunnel by January 31, 2013.

13) On October 29, 2013, CSXT and DDOT agreed to an Amendment to the December

21, 2012 Term Sheet Agreement (*supra*) which granted the District an option to acquire Shepherd Branch (pursuant to specific terms laid out at Appx. 564), but which precluded the District from exercising or closing the option, unless the tunnel expansion project is approved and all permits and approvals are granted.

14) On December 11, 2013 DDOT advised the Mayor to avoid a town hall because the District was not going to change its position on the tunnel. Appx. 595.

Viewed objectively, the District was "precluded" from selecting a re-routing or "no build" option, because doing so would have resulted in breaches of contract with CSXT and would have eliminated the District's chance to acquire Shepherd Branch.[4] The fact that contracts can be breached does not exclude them from the definition of "irreversible commitments." And the Federal Defendants have conceded that contracts suffice to establish the requisite irreversible commitment. *See* Fed. Opp. at 3. Neither CSXT nor the Defendants explain how the District could have withdrawn support for the Tunnel expansion project in light of these contractual obligations, as clarified by evidence from the Administrative Record. Instead, CSXT and the Defendants merely rehash the same (pre-Administrative Record) arguments on which they relied during the first motion exchange on Plaintiff's Application for a Preliminary Injunction.

Flaherty v. Bryson, 850 F. Supp. 2d 38, 70 (D.D.C. 2012), a case the Federal and District Defendants cite, endorses the view that evidence that the decisionmaker has an "unalterably closed mind" is sufficient for predetermination. *See* 850 F. Supp. 2d at 70 (quoting *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.,* 663 F.3d 476, 488 (D.C.Cir.2011); and *C & W Fish Co. v. Fox,* 931 F.2d 1556, 1565 (D.C.Cir.1991)). The foregoing facts certainly demonstrate the

[4] Indeed, an irreversible commitment of resources that precluded other options occurred on April 12, 2014, when DDOT disposed of all of the re-routing options, leaving only the possibility of the "no build" option or one of the variations on the tunnel expansion. See Appx. 214.

requisite "unalterably closed mind."

In this case, the evidence shows that the District's conduct was solidly in the impermissible zone. The District had an unalterably closed mind, took action that locked itself into supporting the tunnel and made contracts that penalized the District in the event that CSXT did not get all approvals necessary to expand the Virginia Avenue Tunnel. The evidence goes well beyond mere statements from agency employees expressing a preference for the tunnel expansion option, and it fits this Court's requirement of objective evidence of predetermination.

What follows here is Plaintiff's detailed response to the Defendants' arguments against predetermination and against attributing the predetermination to FHWA.

a. Evidence that DDOT used NEPA Process as Leverage to Secure Binding Agreements

The evidence that the Committee cited in the Administrative Record shows that DDOT officials used the Virginia Avenue Tunnel to exact beneficial agreements from CSXT. The internal emails cited in the Rule 59(e) Motion (as supplemented) show the internal thinking at DDOT and they give context to the agreements between the District and CSXT.

On January 20, 2010 Ricks told her superiors: "We need to know exactly what leverage we have with the Virginia Avenue Tunnel … and how we can use that for other acquisitions." On May 27, 2010, the District identified its wish list of concessions that it wanted to secure from CSXT in exchange for supporting the Tunnel Expansion. On July 1, 2010, Eulois Cleckley (Manager, Motor Carrier Program) told CSXT "DDOT is open to acting on CSX's behalf for the environmental work associated with the Virginia Ave Tunnel Project," if CSXT agreed to the District's contract terms. Appendix at 124. On August 20, 2010 DDOT noted that it was holding up the NEPA process until "outstanding issues" were resolved with CSXT. The result was that only three days after DC had halted the NEPA process (*supra*), on August 23, 2010,

CSXT and DDOT entered the Memorandum of Agreement that bound DDOT to support the Virginia Avenue Tunnel in exchange for promises of money, easements, right of ways and options on CSXT property.

Subsequently, a draft timeline, issued by CSXT's consultant on June 1, 2011 – after FHWA became lead federal agency for the NEPA process (Appx 211) – shows that a Finding of No Environmental Impact (FONSI) was required to be issued by June 2012. Appx. 249. CSXT argues that this document should not be considered because it was a draft (CSXT Opp. at 8). Significantly, CSXT does not deny the Plaintiff's characterization of the schedule as requiring a FONSI by a date certain, which renders this case even more similar to *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), in which predetermination was attributed to FHWA because the documents in the record showed that the consultant was obliged to produce a FONSI by a date certain). Also, neither CSXT nor any other party has identified documents in the Administrative Record showing that either DDOT or FHWA objected to the requirement that the consultant issue a FONSI.

Neither CSXT nor the Federal or District Defendants have offered any alternative explanation of the documents in the Administrative Record that dispel the clear indication that DDOT used the NEPA process to force CSXT to agree to DDOT's terms, and that the resulting agreements bound the District to support the tunnel expansion project.

Although the District repeatedly asserts that this Court has already determined that the agreements between DDOT and CSXT do not constitute evidence of predetermination (see e.g. District Opp. at 15, 19, fn 3), the District misses the point that the new evidence provides additional evidence of the contrary that was not available to the Court at the time it denied Plaintiff's Application for a Preliminary Injunction, and that the additional evidence changes the

analysis.

b. The Joint Cooperation Agreement and Evidence of Secret Communications between CSXT and the City Administrator.

CSXT and the District contend that the 2012 Joint Cooperation Agreement was never signed (District Opp. at 16; CSXT Opp. at 7). Neither party has provided evidence of that assertion by way of a declaration from any of the officials involved, however. CSXT and the District ignore Plaintiff's argument that the terms of the Joint Cooperation Agreement were divided among the several agreements between the District and CSXT over the life of the NEPA process, as explained in Plaintiff's Rule 59(e) Motion at 12-15. *See* District Opp. at 17; CSXT Opp. at 7-8.

The District flatly contradicts evidence in the Administrative Record when it claims that it "cannot be true" that the City Administrator was negotiating with CSXT on the Joint Cooperation (and possibly other) Agreements, and that the Administrator was keeping those secret from the relevant DDOT officials. District Opp. at 16. As the District notes, however, on September 27, 2012 CSXT copied DDOT Director Bellamy with the Joint Cooperation Agreement; and afterwards, on September 28, 2012, CSXT sent a follow-up email to the City Administrator, with copies to the DDOT Director (Bellamy) and Chief Engineer, Ronaldo Nicholson. Plaintiff's Supp. Exhibit 6. Later that same day, after the Chief Engineer shared the agreement with Hameed Faisal, Faisal asserted that DDOT had no previous knowledge about the negotiations between CSXT and the City Administrator. Appx. 532 ("This is the first time anyone at DDOT saw this. I am not sure why CSX put this together and why they did not share it with us.") (emphasis added). The communication clearly supports Plaintiff's assertion that CSXT had been in secret negotiations with City Administrator.

The District also argues that the Joint Cooperation Agreement could not have been

finalized because Renjel's September 28, 2012 email indicated that DDOT needed to review the agreement before it could be approved. District Opp. at 18. The District's characterization is not accurate. Renjel's letter implies that an agreement had already been made between CSXT and the City Administrator: "We will be prepared to discuss our agreement in the coming days with DC DOT in anticipation of a meeting with you the week of October 8." Supp. Exhibit 6 at ARDDOT33648 (emphasis added). The email DDOT Chief Engineer Nicholson sent to Faisal also supports the Plaintiff's position, that an agreement had been reached. Nicholson wrote: "FYI and review … its official." Supplemental Exhibit 6, ARDDOT33647 (emphasis added). Why would he indicate, "it's official" unless an agreement had been reached?

Lastly on this point, the District casts Faisal in the role of protecting against agreements that could violate NEPA. District Opp. at 19. Plaintiff contends that the evidence can be read to show that Faisal wanted to ensure that agreements, *that did violate NEPA*, were not apparent in documents that might later become public. For instance, in his first September 28, 2012 email, Faisal wrote: "We should not have anything in this document that puts DDOT at risk or jeopardizes the integrity of the NEPA process." Appx. 532 (emphasis added).

c. Extending the Tunnel to 12th Street

The District claims that this Court has already reviewed and opined upon whether the agreement to extend the Virginia Avenue Tunnel constituted evidence of predetermination and that it is, therefore, not a proper topic for a Rule 59(e) Motion. Plaintiff discusses this "olive branch" offering in its Rule 59(e) Motion because newly discovered evidence changes the analysis of the agreement to extend the Tunnel to 12th Street.

Specifically, the Joint Cooperation Agreement explained that CSXT would agree to extend the Tunnel to 12th Street in the event that the District "has issued or approved all Permits

and Approvals required … to have been issued or approved by December 31, 2012." The Joint Cooperation Agreement recounts that extending the tunnel would cost CSXT $2.5 million, and it would save the District $2.6 million in expenses the District would have otherwise incurred in building a bridge over the CSXT track to reconnect 12th Street SE in that location. *See* Appx. 504. Therefore, by supporting the Virginia Avenue Tunnel, and ensuring that the tunnel expansion option survived the NEPA process, DDOT would save approximately $2.6 million that it would otherwise have spent to reconnect the north and south portions of 12th Street SE at the CSXT rail. This "olive branch" was another inducement that locked the District into supporting the Tunnel expansion.

d. The December 2012 Term Sheet

The Defendants portray the December 21, 2012 Term Sheet Agreement as merely a step taken to ensure that CSXT would not be *precluded* from expanding the Virginia Avenue Tunnel. Plaintiff respectfully submits that it has the more accurate take on the evidence.

The December 2012 Term Sheet agreement shows the District acting consistent with its obligation to support the Virginia Avenue Tunnel. According to the documents in the record, there was a longstanding dispute between the District and CSXT about the right of way at the Virginia Avenue Tunnel. *See* Appx. 109 (May 2010 Briefing which noted that there was a dispute over the Right of Way at that time – two years prior to the December 2012 agreement). Within three days of learning, from FHWA, that the dispute endangered the Tunnel expansion project, the District changed its position and agreed to give CSXT a right of way. DDOT's swift action to resolve the dispute is consistent with Plaintiff's theory that the District was bound to grant all permits and approvals necessary for the Tunnel expansion project to proceed.

e. Concealed Agreements and Negotiations

The District professes that it is perfectly acceptable, under the auspices of NEPA, for a government agency to negotiate with proponents of private projects. But an agency is certainly not permitted to negotiate and finalize agreements that bind the agency into supporting a project before the NEPA process is complete. This seems elementary in accordance with *Peterson, Flaherty*, and *Fund for Animals v. Norton, supra*.

The District fails to recognize that the communications between the City Administrator's office and Goldblatt, who was CSXT's lobbyist and negotiator, confirm the existence of the side negotiations. District Opp. at 21. On or about November 18, 2012 Cleckley (DDOT) sent a revised version of the document that would shortly become the December 21, 2012 Term Sheet Agreement (Appx. 549) to Kreiswirth (General Counsel for City Administrator) and Goldblatt. Appx. 544. Upon seeing the updated draft, Goldblatt noted that the updated agreement failed to include dealings made between CSXT and the City Administrator. *Id.* This shows **both** that the City Administrator's office was dealing separately with CSXT and that the agreements between DDOT and CSXT may not have reflected those separate agreements.

The District also claims that it edited the Joint Cooperation Agreement extensively to remove the provisions that violated NEPA. But those edits, including edits made by Kreiswirth (Appx. 539, bottom) and Cleckley (Appx. 536) do not appear in the Administrative Record and have not been produced in Opposition to Plaintiff's Motion.

Although the District claims that there is no evidence that the agreements reflected in the Joint Cooperation Agreement were cut up and distributed among other agreements in order to obscure the NEPA violations, that is precisely what Cleckley's October 4, 2012 email advocates. He suggested a "strategy" for dividing up the various agreements that had been contained in the

Joint Cooperation Agreement into three phases. Appx. 536. The first phase was to get CSXT to agree to extend the Tunnel to 12th Street, which would result in a savings to DC of approximately 3.56 million. Appx. 536-37. This was achieved in the December 21, 2012 Term Sheet Agreement. Appendix 549, ¶ 2. Phase 2 included resolution of the Right of Way dispute and confirmation of the agreement to sell Shepherd Branch to the District. These goals were ultimately achieved in two subsequent agreements. The Right of Way was resolved in the December 21, 2012 Term Sheet Agreement. Appendix 549, ¶ 4. And the Shepherd Branch disposition was resolved in the Amendment to the Term Sheet Agreement, dated October 29, 2013. Appendix 563, et seq. Phase three of Cleckley's strategy was to secure an easement at H Street and to provide CSXT access at Rhode Island Avenue, and for DDOT to retain the Parkside and Anacostia Pedestrian Bridge Easements. It is unclear when these objectives were achieved as no subsequent agreements have been produced in the Administrative Record.

Additional support for the notion that the Joint Cooperation Agreement obligations were disbursed among other agreements comes in light of the fact that the Joint Cooperation Agreement called on the District to approve permits in advance of the conclusion of the NEPA process. *See generally* Appx at 501-503, and specifically, *e.g.* Appx. 503 (The City Administrator shall coordinate among all District agencies the process of obtaining Permits and Approvals for the Virginia Avenue Tunnel Project with a view to expediting the grant thereof and fulfilling the terms and intent of this agreement.) (emphasis added). The December 21, 2012 Term Sheet Agreement, which the City Administrator signed, satisfied that obligation by requiring the Administrator to address "Permits and approvals … for construction of the Virginia Avenue Tunnel Project" on or before January 31, 2013. *See* Appx. 550. Subsequently, 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.

Consequently, the documents in the record support Plaintiff's theory and illustrate that the Plaintiff has a likelihood of success on the merits that warrants a preliminary injunction. *See Colorado Wild Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1230 (D. Colo. 2007) (court granted a preliminary injunction because there was evidence of an improper relationship between the project proponent and the private engineering firm that violated the integrity of the NEPA process. Whether FWS had insulated itself and its decision from the improper relationship was a question of fact that was "ripe for litigation and deserving of deliberative investigation.").

As for the October 12, 2012 email from Chip Dobson (Director Strategic Transactions for CSXT) to various DDOT and District officials (including the DDOT Director and City Administrator) (Appx. 541), Plaintiff's point stands: the document shows that CSXT was dangling the possibility of a sale of Shepherd Branch in exchange for DDOT's agreement to "continue to provide oversight of the EIS process for the Virginia Avenue Tunnel." Neither CSXT nor either of the Defendants explain how the term (requiring DDOT to continue to manage the EIS process) would be of any benefit to CSXT (and worth including in the Term Sheet Agreement) had DDOT not been obligated to push the Tunnel expansion project successfully through the NEPA process.

f. Shepherd Branch

Plaintiff notes, first, that the District has not contradicted the Plaintiff's assertion (Motion at 13) that – in the event that DDOT does not acquire Shepherd Branch from CSXT – the District is liable to CSXT for damages resulting from DDOT's removal of rails from a section of Shepherd Branch, as discussed in CSXT's November 28, 2012 letter. *See* Supp. Exhibit 7. This

threat of damages provided additional incentive for the District to work on CSXT's behalf in procuring a favorable NEPA outcome, since DDOT's acquisition of Shepherd Branch (also dependent on a successful NEPA outcome) would obviate CSXT's claim for damages. *Id.*

Second, the District does not seriously dispute that the DDOT was precluded from endorsing any re-routing option that required the use of Shepherd Branch, due to the fact that the District was – at the same time – negotiating a deal to acquire Shepherd Branch for the Street Car Program. District Opp. at 24-25. Just because the agreement was only for an option does not eliminate the fact that there would have been no possibility of the District acquiring Shepherd Branch in the event the NEPA process endorsed the re-routing option.

Third, the Court erred when it ruled "the [October 29, 2013] agreement … does not bind DDOT to issue any permits or require it to invest any resources towards the project." Decision at 26-27. This was clear error because the agreement requires the District to issue "the necessary permits and approvals needed from any agency of the District of Columbia to commence and construct the VAT project in accordance with the build alternative, if any". Appx. 565, ¶ 7. Thus, in order to exercise the option – which the District clearly wanted – the District was obliged to issue all necessary permits. The Goldblatt email that Plaintiff included in its Rule 59(e) motion underscores this point. "Shepherd branch will not be sold until all permits are provided for VAT construction." Appx. 556.

This Court's ruling that the loss of the Shepherd Branch option does not constitute an irreversible commitment of resources was also clear error. Decision at 27. The option to acquire Shepherd Branch is a valuable contract right, which can be specifically enforced, even if it is not an absolute right to purchase the property. *See In re Competrol Acquisition P'ship, L.P.,* 203 B.R. 914, 918 (Bankr. D. Del. 1996) ("option holder possesses … a contract right to sue to enforce the

option"); *Commercial Res. Grp., LLC v. J.M. Smucker Co*., 753 F.3d 790, 794 (8th Cir. 2014) ("optionee is free to exercise the option if he chooses, but an optionor is bound to perform if the option is properly exercised."). Forfeiture of the option, therefore, would have been an irreversible loss (i.e. commitment) of a valuable resource for the District, particularly because Shepherd Branch was vital for the District's Street Car program. Appx. 110.

g. City Administrator Involvement

The evidence in the record shows that:

1. CSX and the City Administrator had been working on a Joint Cooperation Agreement that called on the District to approve permits in advance of the conclusion of the NEPA process. *See generally* Appx at 501-503, and specifically, *e.g.* Appx. 503 (The City Administrator shall coordinate among all District agencies the process of obtaining Permits and Approvals [defined as "all permits, approvals, authorizations, rights and licenses that will be needed from any Agency of the District of Columbia in connection with the planning or construction of the Virginia Avenue Tunnel"; *see* Appx. 501] for the Virginia Avenue Tunnel Project with a view to <u>expediting the grant</u> thereof and fulfilling the terms and intent of this agreement.) (emphasis added);

2. The City Administrator kept the agreement and the fact it was being negotiated secret from DDOT and continued to negotiate separately with CSXT. Appx. 532, 544;

3. The City Administrator signed the December 21, 2012 Term Sheet Agreement, which required the CSXT and the Administrator to address "Permits and approvals … for construction of the Virginia Avenue Tunnel Project" on or before January 31, 2013. *See* Appx. 550;

4. 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;

5. The Joint Cooperation Agreement also calls on CSXT and DDOT to enter into First Source and Certified Business Entity (CBE) agreements before CSXT commences construction of the Virginia Avenue Tunnel Project. *See* Appx. 504-505;

6. The City Administrator negotiated the First Source and CBE Agreements with CSXT by approximately December 11, 2013. *See* Motion at 16 (referring to Supplemental Exhibit 8). But the Administrator's Office knew to wait until "after the Record of Decision was issued" before signing the agreements. Appx. at 594.

The City Administrator's actions are consistent with the obligations discussed in the Joint Cooperation Agreement, and – even if the Joint Cooperation Agreement was never executed - the evidence strongly indicates that the City Administrator pre-approved the required permits and approvals for the Virginia Avenue Tunnel. *See Colorado Wild Inc.*, 523 F.Supp.2d at 1230.

h. DDOT's Advice to Mayor Shows Unalterably Closed Mind

The District offers a contorted explanation for its advice that the Mayor should not hold a town hall meeting on the Virginia Avenue Tunnel. District Opp. 25-29

The District first argues that there is nothing wrong with the Mayor refusing to cave to political pressure. District Opp. at 25. But that is just an admission that the Mayor had made up his mind about the Tunnel expansion project before the NEPA process was concluded. The NEPA process was meant to educate the public as well as their government about environmental risks before they occur. *See* 40 C.F.R. § 1500.1(b)-(c). (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."). If the Mayor and/or DDOT were unwilling to change their position (or "cave to political pressure," as the District puts it) about the Virginia Avenue Tunnel, as the District concedes, then there is a NEPA violation according to the very case that the District cites in its Opposition. *See Flaherty v. Bryson*, 850 F. Supp. 2d 38, 70 (D.D.C. 2012) (evidence of an "unalterably closed mind" is sufficient for predetermination).

The District also appears to claim that the Mayor refused to attend the meeting because one resident (Mr. McPhillips, who is not associated with the Plaintiff) wanted the Mayor to ensure that additional studies were performed before a decision to expand the tunnel was made. District Opp. at 25-26, 28-29. But the communication between the Mayor's Office and DDOT, in which DDOT advised the Mayor not to hold the town hall because of the District's unalterable support for the project, occurred on December 11, 2013 (Appx. 595 ¶ (a)), while Mr. McPhillips' email (on which the Plaintiff has never relied) dates from 2014. Consequently, the District's "explanation" is ineffective.

i. Plaintiff's Claim Satisfies *Metcalf v. Daley* Because the Agreements Were not Conditioned on NEPA Approval

The District claims that the facts of this case would not satisfy *Metcalf v. Daley* because all of the agreements were allegedly made conditional on NEPA approval. District Opp. at 30-31. This misconstrues the evidence, as explained above and in the Plaintiff's Motion. For instance, nothing in the August 23, 2010 Memorandum of Agreement conditions the District's obligations on NEPA approval for the Tunnel. Similarly, DDOT's (via Cleckley) July 2010 agreement to work "on CSXT's behalf regarding its NEPA obligations" in exchange for CSXT's agreements to the District's contract terms belies the claim that the District's obligations were dependent on the outcome of the NEPA process. To the contrary, as Cleckley's email shows, DDOT's obligation was to ensure that the Tunnel Expansion project survived the NEPA process.

Just as was the case in *Metcalf*, the District's agreements with CSXT locked the District into supporting CSXT's preferred tunnel expansion 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 both to make a proposal to the IWC for a gray whale quota and to participate in the harvest of those whales. We hold that by making such a firm commitment before preparing an EA, the Federal Defendants failed to take a 'hard look' at the environmental consequences of their actions and, therefore, violated NEPA.").

j. DDOT's Predetermination is Attributable to FHWA

The Federal Defendants contend that, insofar as it is relevant to whether the District's predetermination can be attributed to FHWA, the Plaintiff has not identified any evidence showing that the District's predetermination undermined the NEPA process or FHWA's management of it; Defendants also protest that the Plaintiff has not produced evidence that Hicks allowed himself to be used as a rubber-stamp. Fed. Opp. at 4-9. CSXT makes very similar arguments. *See* CSXT Opp. at 9-14. But to agree with the CSXT and Federal Defendants' position, it is necessary to first suspend common sense and ignore the facts in evidence.

i. Hicks Identified the Predetermination Early On in the Process

CSXT and the Federal Defendants claim that Michael Hicks' comment "THEY HAVE AN ANNOUNCED PREFERRED ALTERNATIVE SO IT'S ALREADY PRE-DECISIONAL. THIS ONE IS GONNA BE WEIRD" was not an indication that Hicks believed that DDOT had already predetermined the outcome before the NEPA process had begun. Fed. Opp. at 5, CSXT Opp. at 10. This seems laughable.[5] As Defendants have pointed out in this case, project

[5] Also unlikely is the notion, intrinsic to CSXT's argument, that Mr. Hicks had the D.C. Circuit decision of *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) in front of him, and was relying on the definition of Pre-Decisional he found in that decision, when he wrote his ALLCAP note about how the NEPA process was going to be weird, because the

proponents like CSXT, clearly have preferred alternatives; indeed the whole NEPA process commences when a company like CSXT approaches federal and state agencies asking for approvals to build their preferred project. Consequently, had it simply been a matter of CSXT endorsing the tunnel expansion from the outset, Hicks – who was experienced in the NEPA process – would not have been taken by surprise to learn that CSXT wanted to expand the tunnel. It would take sworn testimony from Mr. Hicks to dispel the obvious inference from his note about predetermination; but neither Defendants nor CSXT included a declaration from Hicks in their Opposition briefs. Having failed to do so, CSXT and the Federal Defendants are stuck with the obvious (and undisputed) inference of Hicks' statement, which is that DDOT had already endorsed the Tunnel Expansion option before the NEPA process was even underway.

CSXT argues that there was no way for the alternative to have been decided as of August 2010, when Hicks wrote his comment. CSXT posits that the ultimate preferred alternative was the product of changes that came as a result of the NEPA process, which began in earnest after Mr. Hicks made his "Pre-Decisional" comment. CSXT Brief at 10. The evidence does not support the argument.

The preferred alternative has always involved the expansion of the Virginia Avenue Tunnel in some manner that would add an additional rail and permit double-stacked freight, using the same approximate tunnel location. *Compare* FEIS at 3-2 (describing the three build options, with the first being a single tunnel with two rails, the second being the construction of 2 new tunnels, and the third being building a new partitioned tunnel with two rails) with the description of the Tunnel expansion project as it was originally pitched to the District in on August 11, 2009: "Current design consists of … replacement of the existing tunnel with a new

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decision on the preferred alternative had already been made.

tunnel that will provide the needed additional clearance. The completed tunnel project will provide an additional track to increase train movement efficiency." Appx. 76. Thus, Faisal's comment at the 2014 public hearing that "the preferred alternative was nowhere in existence [in 2010]," which CSXT cites in its Opposition (at 10-11) is a carefully worded half-truth.

ii. CSXT and its Consultant Considered DDOT to be the Lead for NEPA

Additionally, the documents that Plaintiff has discovered in the Administrative Record make it very clear that DDOT – not FHWA was considered the lead agency. First, DDOT acted as lead for the NEPA process for the first two years of the life of the project, between the time that CSXT approached the District, in 2009 (Motion at 4) until the time that FHWA finally agreed to act as co-lead agency, in May 2011. *See* Motion at 9.

Second, the organization chart (Appx. 212) shows that CSXT and its paid contractor, Parsons Brinckerhoff, reported directly to DDOT, which is listed at the top of the organization chart. Even though FHWA was listed as a "lead" there was no reporting relationship between the CSXT or its consultant and FHWA.

iii. DDOT Undermined the NEPA Process

DDOT undermined the NEPA process by essentially abdicating its oversight role, despite its position of authority over CSXT and Parsons Brinckerhoff. As Plaintiff demonstrated in its Motion, on one occasion Faisal essentially told Hicks that it was not DDOT's job to ensure that the key documents were NEPA compliant. *See* Motion at 26. The Federal Defendant has not disputed Plaintiff's characterization of that exchange of correspondence. Fed. Opp. at 6.

In dispute of Plaintiff's demonstration that DDOT (not FHWA) eliminated the re-routing concepts from further consideration, FHWA now claims to have been responsible for eliminating one of the re-routing options. Fed. Opp. at 5. That assertion is incorrect. On April 2, 2012, Faisal asserted that DDOT had eliminated all of the permanent re-routing options. Appx. 214. He did

not reference any FHWA involvement or consultations associated with that decision. *Id.* As of the time of the 10:50 am email on April 2, 2012, the only concepts that continued under consideration were the (1) no build (2) temporary south side tunnel (concept 2); (3) Permanent Twin Tunnels (south side permanent tunnel) (Concept 5); and (4) the temporary re-routing (concept 7) options.[6] None of the permanent re-routing options remained. On April 12, 2012 Faisal revised his list of concepts that would go forward by replacing the temporary re-routing option (concept 5) with concept 6, which was characterized as "rebuild with on-line construction." Appx. 213.

Thus, FHWA's assertion that it was responsible for eliminating one of the re-routing options is deceptive. Even if FHWA played some role in eliminating the temporary re-routing option (and there is no evidence in the Administrative Record of produced by FHWA to indicate that this was actually the case), there is no dispute that it was DDOT's decision – without input from FHWA – to eliminate the permanent re-routing options.

CSXT pushes the envelope even further than FHWA on this point. CSXT claims that "FHWA independently reviewed the re-routing proposals and agreed that Shepherds Branch was not a reasonable option." CSXT Opp. at 8-9. FHWA has made no such argument (instead it only contended that it had some involvement in removing the temporary rerouting option from consideration). *Supra.* None of the Defendants or CSXT, moreover, has identified evidence from the Administrative Record showing that FHWA scrutinized the re-routing options.

[6] Contrary to FHWA's assertion that concept 7 was one of the re-routing options, concept 7 only involved temporarily re-routing trains during the construction period. Concept 7 was not one of the permanent re-routing options. *See* FEIS at 3-44 ("Concept 7 would temporarily reroute freight trains outside the District during construction.").

iv. FHWA Failed to Exercise Appropriate Oversight in Light of the Evidence of Predetermination

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). FHWA failed in this regard, and it therefore failed to insulate itself, and the NEPA process, from DDOT's unlawful predetermination.

In the attempt to show that FHWA was not a rubber-stamp for approving the Tunnel expansion, the Federal Defendants claim that FHWA's insistence resulted in requiring an Environmental Impact Statement, rather than a simple Environmental Assessment. Opposition at 6. But Hicks essentially apologized to CSXT for requiring an EIS, and made sure CSXT knew that this was "not a desired conclusion" even for him. Def. Joint Appx. At 93-94. Hicks then assured CSXT that he understood the need to expedite the project, "given the implications and relationship between rail transit, the Port in Baltimore and the Panama Canal." *Id.* He also assured CSXT that converting to an EIS at that early stage (April 4, 2012) would be the fastest way to speed the project on since there was no conceivable way that an Environmental Analysis would result in a Finding of No Significant Impact. *Id.* Consequently, rather than show Hicks as a staunch defender of the NEPA process, Hicks' email – which FHWA has introduced (Def. Joint Appendix at 93-94) – contains something close to an assurance that Hicks would speed the project on toward approval so that the expanded tunnel would be ready in time for the opening of the enlarged Panama Canal. *Supra.*

It also cannot be forgotten that, as CSXT now concedes, the June 1, 2011 draft schedule shows that CSXT's consultant was obliged to issue a FONSI by June 2012. *Supra.* FHWA was the lead federal agency for NEPA purposes at that time, having been appointed on May 9, 2011. But neither Defendants nor CSXT has produced any evidence that FHWA objected to the requirement of a FONSI at that time.

Although the Federal Defendants claim that CSXT responded to Hicks' criticisms of the EIS (Fed. Opp. at 7-8), they fail to contradict the specific evidence the Committee submitted to the contrary. Instead, the Federal Defendants leave it to the Court to attempt to pick through the record to discern any changes that CSXT's paid consultants made in response to Hicks' criticisms. *See* Joint Opp. at 26-27. "Judges are not like pigs, hunting for truffles buried in … the record." *Potter v. D.C.*, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, concurring).

In fact, CSXT's consultants did not correct deficiencies that Hicks identified, and Hicks ultimately let the defects remain in the Environmental Impact Statement and Record of Decision.

For instance, CSXT and the Federal Defendants imply that CSXT's paid consultants conducted "additional vibration measurements" in response to Hicks' criticism that accounts from residents of the Capper Senior Residences (Capper) contradicted the claim that vibrations at Capper were not associated with freight trains. CSXT Opp. at 11-12; Fed Opp. at 7. The glaring problem with this argument is that the "additional studies" were conducted between December 19 and 20, 2013 (Def. Joint Appendix at 206), before Hicks offered the criticism (which was transmitted a month later, on January 24, 2014). Appx. 673, 681. Moreover, the new studies did not address the contradictory anecdotal accounts from the Capper residents, who testified that vibrations from trains were a significant annoyance. Appx. 681. To wit, the "additional study" (which only captured the passage of five trains) concluded that none of the vibrations that were

picked up could have caused human annoyance. Def. Joint Appx at 206, 208. While the EIS may have *mentioned* the discrepancy between the studies and the anecdotal accounts, FHWA did not require any additional, longer duration studies, to clarify the contradiction, even though longer duration samples had been taken from the Marine Band Practice Hall. Def. Joint Appx at 206.

In response to another of the Committee's arguments, CSXT and the Federal Defendants contend that CSXT clarified the risks of Arsenic and Chromium-6 exposure in the Environmental Impact Statement. CSXT Opp. at 12; Fed Opp. at 8.[7] Contrary to Defendants' claim, however, the minimizing language remained in the final Statement, and no additional studies were performed or referenced. *See e.g.* Appx at 719 ("arsenic and chromium are naturally occurring metals that are often present (naturally) in the environment at concentrations that exceed regulatory criteria. … [S]tatistical analysis conducted on the arsenic samples indicates that the concentrations are within the typical background concentrations found in the District … [Chromium-6] exceedences were found in samples collected from the deeper intervals … which may be indicative of natural background conditions."). Furthermore, there is no explanation of the kinds of health risks that Chromium-6 and Arsenic pose to the public.

As for the discussion of asbestos (Fed. Opp. at 8, CSXT Opp. at 11), the Committee noted that CSXT's consultant did not address Hicks' concern that "There is no mention/discussion in the environmental consequences section on … the impacts regarding removal of 8,000 square feet of asbestos from the tunnel." (emphasis added). While it may be true that the consultant added a mention of asbestos abatement in the *Mitigation Measures* section, that did not address FHWA's critique, which was about the lack of discussion of the risk

[7] CSXT and the Defendants again leave the Court to sift through the record to try to find the alleged clarification.

of the public's exposure to asbestos in sections 5.8.1 or 5.8.2 of the EIS. *See* Appx. 770-772.

CSXT and the Federal Defendants dispute Plaintiff's assertion that the consultant ignored Hicks' comments, which were critical of the failure to recognize that Capper residents would suffer disproportionately because of their age and disabilities (*See* Appx. 698). *See* CSXT Opp. at 12-13, Fed. Opp. at 8. But there can be no dispute that the Environmental Impact Statement maintained that Capper residents would be affected "similar to other residents who live near or adjacent to the LOD." *See* Appx. 734. Similarly the Statement maintained that Capper residents would only be impacted during construction, with no citation to evidence, in defiance of Hicks' request. Appx. at 698, 734. Neither CSXT nor the Federal Defendants point to any specifics in the record that contradict the Plaintiff's point.

The Federal Defendants gloss over the fact that CSXT's contractor drafted the Record of Decision (Motion at 1-2, 17), which FHWA had previously claimed to be the product of its independent review of the Environmental Impact Statement and Supporting documents. *See e.g.* Fed. Def. Opp. at 8 ("While Parsons Brinckerhoff provided some assistance to FHWA in drafting the Record of Decision, FHWA controlled the text and the decision."). This conclusory statement fails to recognize that FHWA identified numerous problems with the Record of Decision, but ultimately failed to ensure those errors were corrected before the Record of Decision was finalized. *See* Motion at 16-18, 27. The Federal Defendants have failed to address any of those points, and they have therefore conceded them. Fed. Opp. at 8.

CSXT fares no better on this point. It claims that Hicks "did in fact review and verify" a provision of the draft ROD that he had previously disputed. CSXT Opp. at 13. But the portion of the record to which CSXT cites merely shows Hicks permitting the consultant to conceal direct effects that are going to occur outside of the construction period, and to bury the

discussion of indirect impacts by way of ambiguous references to other sections of the Record of Decision and Environmental Impacts Statement, as the Plaintiff's Rule 59(e) motion explained. *See* Motion at 18. *And see* Appx. 898 "(Once implemented, the Selected Alternative would not result in indirect and cumulative effects beyond those described during the construction period for the locations noted for each resource."). Hicks permitted the defective and misleading discussions to stand: "I am willing to accept the revised language." Appx. 899.

CSXT has deposited over 100 pages of "truffles" that is asks the Plaintiff and the Court to sort through for examples of FHWA's scrutiny of the NEPA process. CSXT Opp. at 13. CSXT cannot expect the Plaintiff and the Court to root through these pages for examples that support CSXT's position; that was a task for CSXT, which it has chosen not to undertake. "Judges are not like pigs, hunting for truffles buried in … the record." *Potter v. D.C.*, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, concurring).

One document that the CSXT chose to include in the Supplemental Joint Appendix lends great support to the Plaintiff's argument that FHWA took a permissive approach to the NEPA documents and – in the end – permitted CSXT and its consultants to have their way.

The document, which appears at page 200 of the Defendants' Supplemental Appendix, shows that FHWA did not believe that the tunnel portals represented logical termini of the project, due to the interrelated nature of the New Jersey Avenue bridge project, which involved lowering the CSXT tracks to permit double-stacked rail cars. *See* Def. Joint Appx. 200. Hicks declared the statement, that the Virginia Avenue Tunnel portals were the logical termini for the project, "does not appear to be true" because "if the grade isn't lowered for the New Jersey Avenue Bridge, can the VAT project meet its purpose and need … doesn't one project depend on the implementation of the other? If that is the case the west portal is not the 'logical termini;' the

logical termini would seem to be the New Jersey Avenue Bridge [which is approximately one block to the west of 2nd Street SE] for the CSXT action." Def. Joint Appx. at 200 (emphasis added). Again, however, Hicks' allowed his criticism to go ignored. The Final Environmental Impact Statement maintained: "the Virginia Avenue Tunnel … 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." EIS at 2-8.[8]

The Federal Defendants have failed to respond to the Plaintiff's argument that the presumption of regularity – on which the Federal Defendants continue to strongly rely (Fed. Opp. at 9) – does not apply in the face of evidence of predetermination. Motion at 27 (relying on *Hammond v. Norton*, 370 F. Supp. 2d 226, 251-52 (D.D.C. 2005) (Friedman) ("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;" *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."); *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 failure to provide responsive argument to this and other points raised in Plaintiff's Motion should result in the Court deeming the Federal Defendants to have conceded the points. *Ord v. D.C.*, 810 F. Supp. 2d 261, 266 (D.D.C. 2011) (party concedes arguments by failing to respond).

Based on the evidence and argument adduced in this Rule 59(e) Motion, DDOT's predetermination should be attributed to FHWA because FHWA knew about the

[8] The Full Environmental Impact Statement has been filed, at ECF 25-2 to 25-7.

predetermination, and then it failed to exercise adequate oversight over the Environmental Impact Statement and Record of Decision, and failed to independently substantiate the findings in the Environmental Impact Statement, as well as in the Record of Decision.

4. THE COMMITTEE HAS SHOWN IRREPARABLE HARM

The District now disputes this Court's conclusion that the Plaintiff will suffer irreparable harm. District Opp. at 31-36. The Federal Defendants also attempt to reserve the right to contest this Court's finding of irreparable harm. Fed. Def. Opp. at 10. None of the Defendants, however, has preserved this dispute by filing a timely Rule 59(e) motion, or a cross-appeal.

The 28-day deadline found in Rule 59(e) is strictly applied and may not be expanded. *Trupei v. United States*, 274 F.R.D. 38, 39 (D.D.C. 2011) ("This deadline cannot be expanded.") (relying on *Derrington–Bey v. D.C. Dep't of Corrections*, 39 F.3d 1224, 1225 (D.C. Cir. 1994) ("District courts do not have even the customary discretion given by [Rule] 6(b) to enlarge the Rule 59(e) period.")).

Moreover, even a prevailing party who seeks to expand its rights or arguments on appeal, beyond that which was recognized by the District Court, must file a cross-appeal. *See Hartman v. Duffey*, 19 F.3d 1459, 1464-65 (D.C. Cir. 1994)("Even where it is the opposing party who has lodged the direct appeal, a litigant must raise any challenge of his own to the trial proceeding by filing a cross-appeal even though he might not otherwise have chosen to appeal at that time.").

Consequently, the Court should strike or ignore the Defendants' challenges to the finding that Plaintiff will suffer irreparable harm.

5. THE COMMITTEE HAS SHOWN THAT THE PUBLIC INTEREST IS IN FAVOR OF ISSUING A PRELIMINARY INJUNCTION

Defendants have failed to respond to the Plaintiff's cases, which stand for the proposition that the public has a strong interest in enforcing NEPA. The new facts from the Administrative

Record substantiate that the Court is likely to find in the Plaintiff's favor on the NEPA violation, and they therefore require the Court to reconsider the public interest analysis. As Judge Kollar-Kotelly 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. See also* Plaintiff's Motion at 30 (citing cases).

Plaintiff also pointed out that – based on new evidence in the Administrative Record – the Court should reconsider its conclusion that the Plaintiff did not show "that the potential environmental harm of reconstruction outweighs the public benefit from modernizing" the Virginia Avenue Tunnel. Decision at 3. CSXT and the Defendants take umbrage over Plaintiff's assertion that environmental impacts were concealed from the public in the Environmental Impact Statement. CSXT Opp. at 14-15; District Opp. at 38-40, Fed. Opp. at 11. None of the Defendants' points have merit.

With respect to the risk of train derailment, it is undeniable that the Environmental Impact Statement fails to explain that the location of the I-695 pier outside of the tunnel makes a derailment that causes "catastrophic" damage to the interstate foreseeable. Motion at 28 (citing Appx. 673). Rather than explain the risk of a catastrophic incident involving a derailment that damages the I-695 pier, the EIS merely explained that the I-695 pier would be strengthened, without addressing why there was a need for that strengthening.[9]

[9] There should be no question that the public had an interest in full disclosure of the risks that derailment outside of the tunnel posed to the Interstate over the tunnel. As written, the EIS did not even arm the public to be able to ask the right questions, including what force (i.e. how large a train, traveling at what speed) the pier would be capable of absorbing after strengthening, and

CSXT, and the District and Federal Defendants also contend that CSXT clarified the risks of Asbestos, Arsenic and Chromium-6 exposure in the final Environmental Impact Statement. CSXT Opp. at 14-15, District Opp. at 39, Fed. Opp. at 11. Contrary to the Defendants' claims, however, the minimizing language that Plaintiff identified, and that FHWA (Hicks) wanted removed, remained in the final Statement, and no additional studies were performed or referenced. *See, e.g*. Appx at 719 ("arsenic and chromium are naturally occurring metals that are often present (naturally) in the environment at concentrations that exceed regulatory criteria. … [S]tatistical analysis conducted on the arsenic samples indicates that the concentrations are within the typical background concentrations found in the District … [Chromium-6] exceedences were found in samples collected from the deeper intervals … which may be indicative of natural background conditions."). Furthermore, there is no explanation of the type of risk that Chromium-6 and Arsenic pose to the public.

As for the discussion of asbestos, the Committee noted that CSXT did not address Hicks' concern that "There is no mention/discussion in the environmental consequences section on … the impacts regarding removal of 8,000 square feet of asbestos from the tunnel." While it may be true that the consultant added a mention of asbestos abatement in the Mitigation Measures section, that did not address FHWA's critique, that there was no discussion of the risk in the pertinent Environmental Impact sections, 5.8.1 or 5.8.2, Appx. 770-772. The public was simply not informed of these environmental risks. Instead the risks were minimized or made to appear as if they could be reduced to zero with proper procedures. Again, the public was not given enough information to ask the right questions, as required by NEPA and its implementing regulations.

As for the harm to CSXT, the Defendants all fail to counter the Plaintiff's point – which

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what precautions would be put into place to ensure that trains did not exceed those impact tolerances.

was that CSXT conceded that it would not suffer significant financial harm as a result of delaying the tunnel expansion project.

For its part, CSXT complains that the equities are even more in favor of denying the preliminary injunction because "[t]he Virginia Avenue Tunnel is now an active construction site." CSXT Opp. at 1-2, 16. CSXT claims that "enjoining construction at this late stage would cause even greater harm to Defendants and the public interest." *Ibid.* The notion that CSXT's reckless charge to initiate construction activities should somehow be considered as a point in CSXT's favor lacks merit. CSXT chose to begin construction while litigation over the alleged NEPA violation remained in question and before any decision on the merits had been reached. CSXT's lack of restraint and foolhardy rush to advance construction provides greater impetus for granting the Preliminary Injunction.

The possible outcomes of litigation must be considered: (1) In the event that the Preliminary Injunction is granted, and Plaintiff ultimately prevails on its NEPA challenge, then no additional construction will occur, and the *status quo ante* should be quickly restored; (2) in the event that the injunction are imposed, but CSXT ultimately prevails on the merits, then CSXT and the Defendants will have suffered only a delay in their project; but (3) 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 public will be left with a half constructed tunnel expansion project going through the middle of the city 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."). *Akiachak Native Cmty. v. Jewell,* 995 F.

Supp. 2d 7, 17 (D.D.C. 2014) (no harm to non-moving side because it would only suffer delay); *also Singh v. Bank of Am., N.A.,* 2013 WL 1759863, at *3 (E.D. Cal. Apr. 24, 2013) ("balance of equities tips in Plaintiffs' favor as a TRO merely delays Defendant's right to foreclose."); *Lamson v. LFG, LLC,* 2000 WL 33539382, at *2 (N.D. Ill. June 22, 2000) ("The balance of harms weighs in favor of the injunction, with irreparable harm to the plaintiffs on one side and mere delay on the defendant's side.").

CONCLUSION

For all of the foregoing reasons, the Court should grant the Plaintiff's Rule 59(e) Motion, as Supplemented, and grant the Plaintiff's Application for a Preliminary Injunction.

Respectfully Submitted,
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