

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL PARKS CONSERVATION	)	
ASSOCIATION, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 12-1690 (RWR)
	)	
SALLY JEWELL, <sup>1</sup> <u>et al.</u> ,	)	
	)	
Defendants.	)	

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**MEMORANDUM OPINION**

The National Parks Conservation Association and nine other organizations<sup>2</sup> brought this suit against the Secretary of the Interior and the Northeast Regional Director of the U.S. National Park Service ("NPS") challenging NPS' decision to grant special use permits and an extended right-of-way for the construction of the Susquehanna to Roseland Transmission Line ("S-R Line") through three national park areas -- the Delaware Water Gap National Recreation Area, the Middle Delaware National Scenic and Recreational River, and the Appalachian National Scenic Trail

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<sup>1</sup> Under Federal Rule of Civil Procedure 25(d), current Secretary of the Interior Sally Jewell is automatically substituted for former Secretary Kenneth Salazar.

<sup>2</sup> The other plaintiff organizations include the Appalachian Mountain Club, Appalachian Trail Conservancy, Association of New Jersey Environmental Commissions, Delaware Riverkeeper Network, New Jersey Highlands Coalition, New York-New Jersey Trail Conference, Rock the Earth, Sierra Club and Stop the Lines.

(collectively, "the Parks"). PPL Electric Utilities Corporation and Public Service Electric and Gas Company, the utilities companies that applied to NPS to build the S-R Line, intervened in this matter. Plaintiffs moved for summary judgment arguing that the NPS failed to properly review the environmental consequences of the S-R Line project in the environmental impact statement ("EIS"), in violation of the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 et seq., and that NPS unlawfully decided to grant the special use permits and an extended right-of-way, in violation of the NPS Organic Act, 16 U.S.C. § 1 et seq. and the Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. § 1271 et seq. The federal defendants and the intervenor defendant utilities companies cross-moved for summary judgment. Because NPS' actions were not arbitrary and capricious, the plaintiffs' motion for summary judgment will be denied and the defendants' cross-motions for summary judgment will be granted.<sup>3</sup>

#### BACKGROUND

The intervenor-defendants own a right-of-way through the Parks upon which the current 230 kilovolt ("kV") Bushkill-to-

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<sup>3</sup> The federal defendants also move to strike the declaration of Pamela Underhill and all references to the declaration in the plaintiffs' summary judgment reply brief. Because the summary judgment motions will be decided without consideration of the Underhill declaration, the federal defendants' motion to strike will be denied as moot. Moreover, the plaintiffs' motion for a preliminary injunction will be denied as moot.

Kittatinny transmission line ("B-K Line") stands. Compl. ¶ 44; Pls.' Mem. of Law in Supp. of Mot. for Summ. J. ("Pls.' Mem.") at 7; Def.-Intervenors' Mem. of P. & A. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Def.-Intervenors' Cross-Mot. for Summ. J. ("Intervenor Defs.' Mem.") at 7; Mem. in Supp. of Fed. Defs.' Cross-Mot. for Summ. J. and Opp'n to Pls.' Mot. for Summ. J. ("Federal Defs.' Mem.") at 2. In 2007, PJM Interconnection, LLC, ("PJM"), which oversees the electrical transmission system in the region, identified electric grid reliability violations with the B-K Line. Intervenor Defs.' Mem. at 5; Federal Defs.' Mem. at 2; AR 73982, 78554. PJM decided that a 500-kV electric transmission line was the preferred solution for the reliability violations which had been identified. NPS Susquehanna to Roseland 500kV Transmission Line Right-of-Way and Special Use Permit Final Environmental Impact Statement ("FEIS") at 4 (AR 47865); AR 73982. The intervenor defendants applied to NPS for a special use permit to allow for "construction, maintenance and operation of the S-R Line across [the Parks], the expansion of the existing [right-of-way], and the replacement of an existing 230-kV transmission line it owns." FEIS at 4 (AR 47865); see also NPS Susquehanna to Roseland 500-kV Transmission Line Right-of-Way and Special Use Permit, Record of Decision ("ROD") at 1 (AR 116587); Compl. ¶ 53. The proposed S-R Line would replace the existing B-K Line and include larger towers, an additional circuit, and a

widened right-of-way to accommodate the changes. Compl. ¶ 53; FEIS at 4 (AR 47865); ROD at 1 (AR 116587).

NPS conducted an environmental review and published a Draft Environmental Impact Statement ("DEIS") in 2011 that identified various alternative routes for building a replacement transmission line, identified mitigation measures, and discussed the environmental consequences of each alternative. See Federal Defs.' Mem. at 8; Intervenor Defs.' Mem. at 11; ROD at 21 (AR 116607). In January 2012, the applicants proposed a methodology for compensatory mitigation and estimated that \$36,494,241 should be provided in compensatory mitigation for the project in their comments to the DEIS. AR 78239-48. After the public comment period closed, NPS issued the Final Environmental Impact Statement ("FEIS") and identified NPS' preferred alternative as the applicant's proposed route. FEIS at vii (AR 47840); Federal Defs.' Mem. at 5. NPS then issued the Record of Decision ("ROD") in October 2012 that granted the utilities companies' request for special use permits and an expanded right-of-way for the construction of the S-R Line. Pls.' Mem. at 26; Intervenor Defs.' Mem. at 13; Federal Defs.' Mem. at 6-7; ROD at 1-30 (AR 116586-616). In December 2012, NPS issued the special use permits to the utilities company for the project, and the utilities companies and the federal defendants entered into a Memorandum of Agreement that set forth details about the

compensatory mitigation measures and established the Middle Delaware Mitigation Fund ("the Fund"). Intervenor Defs.' Mem. at 16-17; Federal Defs.' Mem. at 7; see Federal Defs.' Opp'n to Pls.' Mot. for a Prelim. Inj., Ex. B, Memorandum of Agreement.

#### DISCUSSION

Summary judgment may be granted on a claim if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In a case involving review of a final agency action under the APA, however, the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record. . . . "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." . . . Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.

Center for Food Safety v. Salazar, 898 F. Supp. 2d 130, 138 (D.D.C. 2012) (quoting Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006)); see also Flaherty v. Bryson, 850 F. Supp. 2d 38, 47 (D.D.C. 2012) ("Because this case involves a challenge to a final administrative decision, the Court's review on summary judgment is limited to the Administrative Record.").

The complaint asserts eleven causes of action including eight<sup>4</sup> NEPA claims, one NPS Organic Act claim, and two WSRA

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<sup>4</sup> The complaint asserts that NPS violated NEPA by failing to consider all reasonable alternatives for the S-R Line project in

claims. See Compl. at 33-41. Review of final agency actions under these statutes is governed by the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. See Nevada v. Dep't of Energy, 457 F.3d 78, 87 (D.C. Cir. 2006) (stating that courts "apply the APA's arbitrary and capricious standard to a NEPA challenge"); Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 446 (D.C. Cir. 1994) (finding that the NPS' exercise of discretion under the NPS Organic Act must be upheld unless it violated the APA's arbitrary and capricious standard); Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1176-77 (9th Cir. 2000) (stating that review of the WSRA is governed by the APA). "Generally, '[t]he

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Count Four, failing to consider and disclose all direct and indirect effects of the S-R Line project in Counts Five and Six, failing to consider and disclose a connected action in Count Seven, failing to consider cumulative impacts of the S-R Line project in Count Eight, failing to consider and disclose mitigation measures in Count Nine, failing to prepare a supplemental EIS in Count Ten, and prejudging and approving the selected alternative in Count Eleven. However, the plaintiffs' summary judgment memorandum asserts arguments directed at claims in Counts Four, Five, Six, Nine, and Ten. The plaintiffs' summary judgment memorandum does not address directly Count Seven or Count Eight, but their arguments supporting Counts Five and Six regarding the scope of the agency's review appear to involve the claims in Counts Seven and Eight. In addition, the plaintiffs' arguments supporting Count Eleven's claim of prejudgment are based on the plaintiffs' arguments regarding mitigation measures. See Pls.' Mem. at 15-17. The plaintiffs' claim in Count Eleven, then, depends on the resolution of their claims in Count Nine. Counts Nine and Eleven will be addressed in Section I.A., Count Ten will be addressed in Section I.B., Count Four will be addressed in Section I.C., and Counts Five to Eight will be addressed in Section I.D. below.

scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.'" Pettiford v. Sec'y of Navy, 774 F. Supp. 2d 173, 181 (D.D.C. 2011) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). "However, this deferential standard cannot permit courts 'merely to rubber stamp agency actions,' . . . nor be used to shield the agency's decision from undergoing a 'thorough, probing, in-depth review.'" Flaherty, 850 F. Supp. 2d at 47 (quoting NRDC v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000); Midtec Paper Corp. v. United States, 857 F.2d 1487, 1499 (D.C. Cir. 1988)). "Courts 'will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Public Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

#### I. NATIONAL ENVIRONMENTAL PROTECTION ACT

"NEPA 'requires that agencies assess the environmental consequences of federal projects by following certain procedures during the decision-making process.'" Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 13 (D.D.C. 2009) (quoting City of Alexandria, Va. v. Slater, 198 F.3d 862, 866 (D.C. Cir. 1999)). "[T]he twofold purpose of NEPA [is] to ensure that a federal agency considers environmental consequences in making its decision and to inform the public that the agency has

done so.” Wilderness Soc’y v. Salazar, 603 F. Supp. 2d 52, 65-66 (D.D.C. 2009) (citing Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 143 (1981)); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

A. Mitigation measures

NEPA requires a federal agency to prepare an EIS for “‘major Federal actions significantly affecting the quality of the human environment.’” Duncan’s Point Lot Owners Ass’n v. Fed. Energy Regulatory Comm’n, 522 F.3d 371, 376 (D.C. Cir. 2008) (quoting 42 U.S.C. § 4332(2)(C)). One of the purposes of the EIS is to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The regulations of the Council on Environmental Quality<sup>5</sup> (“CEQ”) state that an EIS must “[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives[,]” 40 C.F.R. § 1502.14(f), and

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<sup>5</sup> The CEQ was established by NEPA and has promulgated regulations interpreting NEPA’s requirements. The D.C. Circuit has recognized that “‘the binding effect of CEQ regulations is far from clear,’” Nevada v. Dep’t of Energy, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (quoting TOMAC v. Norton, 433 F.3d 852, 861 (D.C. Cir. 2006)), but “both agencies and courts have consistently looked to them for guidance[,]” Flaherty, 850 F. Supp. 2d at 69 n.19 (citing, among others, Sierra Club v. Van Antwerp, 661 F.3d 1147, 1154-55 (D.C. Cir. 2011)).

discuss "means to mitigate adverse environmental impacts[,]" 40 C.F.R. § 1502.16(h).<sup>6</sup>

"[O]ne important ingredient of an [environmental impact statement] is the discussion of steps that can be taken to mitigate adverse environmental consequences." Robertson, 490 U.S. at 351. Robertson explained that without a discussion about mitigation measures, "neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Id. at 352. However, NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act" or a "detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action[.]" Id. at 353. Instead, an agency's discussion of potential mitigation measures in an EIS must include "sufficient detail to ensure that environmental consequences have been fairly evaluated." Theodore

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<sup>6</sup> The CEQ regulations state that Mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20.

Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting Robertson, 490 U.S. at 352). "NEPA 'does not require agencies to discuss any particular mitigation plans that they might put in place,' nor does it 'require agencies -- or third parties -- to effect any.'" Id. (quoting Citizens Against Burlington, Inc., v. Busey, 938 F.2d 190, 206 (D.C. Cir. 1991)). After preparing a draft EIS, an agency must "[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(a)(4).

"The court's role is to ensure that the agency takes a 'hard look' at the environmental consequences of an action, not to interject its own judgment as to the course of action to be taken.'" Wilderness Soc'y, 603 F. Supp. 2d at 59 (quoting Hammond v. Norton, 370 F. Supp. 2d 226, 240 (D.D.C. 2005)). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Robertson, 490 U.S. at 350.

Plaintiffs argue that NPS' discussion of mitigation measures in the EIS is deficient for two reasons. First, plaintiffs argue that NPS did not take a "hard look" at the environmental consequences because the FEIS included only general mitigation measures that do not include the contents of the mitigation

plans, and did not provide "supporting analytical data" about the mitigation measures or assessments about the actual mitigating effects of the plans. Pls.' Mem. at 42-43. Second, plaintiffs contend that NPS failed to analyze in the EIS the compensatory mitigation measures. Id. at 39-40. Thus, the public never had an opportunity to evaluate the compensatory mitigation measures and assess the merits of the Fund, including what land would be acquired and how the agency decided that the compensatory mitigation would mitigate the environmental harm arising from the project. Id.; Pls.' Reply at 33-35.

An EIS is not required to contain "detailed, unchangeable mitigation plans for long-term development projects." Theodore Roosevelt Conservation P'ship, 616 F.3d at 517. In Theodore Roosevelt, the D.C. Circuit considered whether the Bureau of Land Management ("BLM") satisfied NEPA's requirement to include mitigation measures when it issued an EIS before authorizing drilling permits in Wyoming. The EIS included several specific mitigation measures to protect wildlife and plants, including limitations on building structures near the greater sage grouse's habitat and muffling generator noises to avoid disturbances. Theodore Roosevelt, 616 F.3d at 516. The mitigation plan also discussed performance goals which the agency would strive to accomplish, included flexible monitoring and protection measures which the BLM could modify, and relied on a "review team" which

would develop specific criteria to evaluate adherence to those goals. Id. In addition, the mitigation plan included particular protective measures which should be applied for each drill plan but recognized that the "exact application of mitigation measures will be determined on a site-specific basis[.]" Id. The D.C. Circuit reviewed whether the EIS was sufficient and held that NEPA's mandate to discuss mitigation measures was met because the agency "set[] forth both fixed mitigation measures and an adaptive management plan[.]" Id. at 517.

In this case, the FEIS discusses potential mitigation measures and their effectiveness. See FEIS at 386 (AR 48247) (wetlands), 431 (AR 48292) (landscape connectivity), 463-64 (AR 48324-25) (special status species). Appendix F of the FEIS sets forth a wide range of potential mitigation measures and plans covering impacts to the Parks' resources. See FEIS, App. F (AR 48920-45). For example, NPS requires the applicants to submit specific mitigation plans (i.e., drilling plans, spill prevention and response plan, soil and erosion control plans, vegetation management plans, etc.) for NPS review and approval, identified the goals and procedures to be implemented by the applicants' plans, discussed particular materials to be used in construction, and asserted a variety of other mitigation measures. Id. Because the FEIS in this case sets forth both "fixed mitigation measures" and "adaptive management plan[s]" in the EIS similar to

those upheld in Theodore Roosevelt, NPS did not violate NEPA's mandate to discuss possible mitigation measures.

The plaintiffs' argument regarding compensatory mitigation also fails because the plaintiff has not shown that the agency's analysis in the EIS was insufficient. The FEIS states that

[i]n instances where impacts cannot be avoided and mitigation is not feasible, compensation for resources lost or degraded through project construction, operation, and maintenance would be required. . . . Compensation would be used to help ensure the stewardship of natural, cultural, scenic, and recreational resources, thus allowing for [among other uses] . . . acquisition in fee or easement of lands within or adjacent to [the Appalachian National Scenic Trail] and [the Delaware Water Gap National Recreation Area] . . . [and] implementation of the parks' existing natural, historic, and recreational plans[.]

FEIS at 72-73 (AR 47933-34). The FEIS further states that "[t]he preferred alternative also includes mitigation in the form of compensation for unavoidable adverse impacts. . . .

Compensation would only be considered for adverse impacts that cannot be completely avoided." FEIS at 75 (AR 47936). The discussion in the FEIS reflects that the environmental consequences of the construction of the S-R Line were identified and compensation was considered as a part of the multi-component mitigation plan. For example, the FEIS discussed a specific feature of the compensatory mitigation when it referred to the requirement that "for new actions where impacts on wetlands cannot be avoided, proposals must include plans for compensatory mitigation that restores wetlands on NPS lands at a minimum

acreage ratio of 1 to 1 for the preferred alternative." FEIS at 386 (AR 48247). This level of detail comports with NEPA requirements.

These circumstances are similar to those in Busey. In that case, the FAA issued an EIS that set forth a general plan regarding mitigation efforts to blunt the effects of a significant increase of noise from an expanded airport. Busey, 938 F.2d at 205. There, the EIS discussed mitigation measures that included buying property from owners of nearby locations, insulating doors and windows of nearby homes and buying easements from other home owners; estimated the cost of such measures; and explained that a future study will "flesh out the details of the mitigation plans." Id. The plaintiffs in that case "want[ed] the specifics now; . . . [and] demand[ed] that the FAA finish its . . . study before the agency be allowed to approve the . . . proposal." Id. at 206. The D.C. Circuit found that the plaintiffs sought more information in the EIS than NEPA required and that the EIS in Busey was reasonably complete even though the study that would have provided details for the mitigation plans had not been completed.

Here, the plaintiffs also want the specifics of compensatory mitigation measures now, but the FEIS was required to provide only "a reasonably complete discussion of potential mitigation measures." See Busey, 938 F.2d at 206 (quoting Robertson, 490

U.S. at 352). The plaintiffs note correctly that the FEIS did not provide an estimate of the compensatory mitigation amount. However, the administrative record reflects that the amount of potential compensatory mitigation varied significantly even after the FEIS was issued. For example, the January 2012 applicants' proposal in their comments to the DEIS was \$36 million, AR 78246-47, the July 2012 net environmental benefit analysis prepared by an NPS contractor was \$89 million, AR 58377, a September 2012 NPS internal draft memorandum reflects the total amount of \$62 million, AR 73356-57, the October 2012 ROD required at least \$56 million, ROD at 15 (AR 116601), and the Memorandum of Agreement creating the Fund required the applicants to deposit \$66 million in the Fund, Mem. of Agreement at 2. Although an estimate could have been provided by NPS at the EIS stage, the plaintiffs were aware of the applicants' proposed methodology and suggested compensation amount that was included in the DEIS comments, AR 78239-48, and appended to the FEIS for informational purposes, FEIS, App. N (AR 49830-50045). The plaintiffs have not shown that the omission of NPS' own compensatory mitigation estimate in the FEIS pending negotiations with the applicants to flesh out the full economic value of the compensatory mitigation constitutes a NEPA violation. In particular, the plaintiffs have not shown how the omission of this figure undermines the FEIS' detailed analysis of the environmental consequences of the agency

action. The general mitigation plans included in the FEIS were "reasonably complete" because it included "sufficient detail to ensure that environmental consequences have been fairly evaluated[.]" Robertson, 490 at 352. Because the plaintiffs have not shown that NPS did not take a "hard look" at the environmental consequences of the agency action or that the agency failed to include mitigation measures as required by the CEQ regulations, the defendants are entitled to summary judgment on this claim.

B. Supplemental EIS

The plaintiffs argue that NPS violated NEPA when NPS did not prepare a supplemental EIS when NPS and the applicants reached an agreement that the applicants would deposit \$66 million in the Fund. Pls.' Mem. at 40-41. A supplemental EIS is required when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). "A supplemental EIS is only required where new information provides a *seriously* different picture of the environmental landscape." City of Olmsted Falls, Ohio v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002) (internal quotation marks omitted); see also Blue Ridge Evtl. Def. League v. Nuclear Regulatory Comm'n, 716 F.3d 183, 196 (D.C. Cir. 2013) ("New and significant information presents a seriously different picture of the environmental impact of the

proposed project from what was previously envisioned." (internal quotation marks omitted)). "[W]hether a change is 'substantial' so as to warrant [a supplemental EIS] is determined not by the modification in the abstract, but rather by the significance of the environmental effects of the changes." Pub. Emps. for Env'tl. Responsibility v. U.S. Dep't of the Interior, 832 F. Supp. 2d 5, 29-30 (D.D.C. 2011).

The CEQ regulations reflect that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

[E]ven if post-EIS changes in a project are *beneficial* to the environment or are intended to mitigate environmental impact, if those changes are significant, a supplemental statement is required:

The proper question is not the intent behind the actions, but the significance of the environmental impacts. And even if . . . the new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.

National Wildlife Fed'n v. Marsh, 721 F.2d 767, 782-83 (11th Cir. 1983) (quoting Env'tl. Def. Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981)); but see Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 606 F. Supp. 2d 121, 137 (D.D.C. 2009) ("When a change reduces the environmental effects of an action, a supplemental EIS is not required."). However, supplementation of an EIS is not necessary when the mitigation measure is within the scope of the EIS's discussion of mitigation measures or is a

minor variation from it. See Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (finding that where a proposed action is a "minimizing measure," the agency does not need to supplement the EIS because "a minimizing measure's effects on the environment will usually fall within the scope of the original NEPA analysis"); see also Russell Country Sportsmen v. United States Forest Serv., 668 F.3d 1037, 1045 (9th Cir. 2011) ("[A] modified alternative [that] only lessens environmental impacts may tend to show that the new alternative is a 'minor variation of one of the alternatives discussed in the draft EIS' and is 'qualitatively within the spectrum of alternatives that were discussed in the draft [EIS].'" (quoting Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981))). Therefore, new information that provides *significant* beneficial environmental effects triggers the supplemental EIS requirement, but new information which results in environmental effects that are within the scope of the EIS' analysis do not require supplementation.

"The decision to undertake a supplemental EIS is subject to a 'rule of reason.'" City of Olmsted Falls, Ohio, 292 F.3d at 274 (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989)).

Application of the "rule of reason" . . . turns on the value of the new information to the still pending

decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Or. Natural Res. Council, 490 U.S. at 374; see also Nat'l Comm. for the New River v. Fed. Energy Regulatory Comm'n, 373 F.3d 1323, 1330 (D.C. Cir. 2004).<sup>7</sup> An agency's decision whether to prepare a supplemental EIS is entitled to deference under the arbitrary and capricious standard. Nat'l Comm. for the New River, 373 F.3d at 1330 (citing Or. Natural Res. Council, 490 U.S. at 375-76); City of Olmsted Falls, Ohio, 292 F.3d at 274.

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<sup>7</sup> The significance of the impacts depends on the "context" and "intensity" of the impacts as defined by the CEQ regulations. Or. Natural Res. Council, 490 U.S. at 374 n.20. The CEQ regulations state:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. . . .

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. . . .

Here, the plaintiffs assert that the new information identified in the ROD -- the amount of money that the applicants must place in the Fund -- is significant enough to necessitate a supplemental EIS. Pls.' Mem. at 40-41. Specifically, "[t]he expenditure of \$66 million to undertake land acquisitions and to implement stewardship activities in and around the Parks will have significant environmental impacts that have not yet been considered under NEPA, and an SEIS is required accordingly." Pls.' Reply at 35. The federal defendants argue that no supplemental EIS is required because the amount of compensatory mitigation does not change the environmental consequences that were identified and addressed by the FEIS. Federal Defs.' Mem. at 38-39; Federal Defs.' Reply at 17-20. Overall, the federal defendants argue that "[a]lthough the details and final figure would change as a result of NPS' independent assessment and computations," the FEIS was sufficient by disclosing the adverse impacts and acknowledging that cash compensation would be used to obtain other lands. Federal Defs.' Reply at 19-20.

The plaintiffs have not met their burden of showing that the new information is significant enough to require NPS to prepare a supplemental EIS. The amount of compensatory mitigation and the details about the Fund revealed by the ROD and the Memorandum of Agreement do not change the assessment of adverse environmental consequences of the action addressed in the FEIS. The

applicant's comments to the DEIS provided the utilities companies' methodology for arriving at the compensatory mitigation figure, including the specific per acre value. The plaintiffs point to no authority that reflects that the change in potential mitigation funds from the applicants' proposed figure of \$36,494,241 to the Memorandum of Agreement's figure of \$66 million is significant or that this increase in compensatory mitigation substantially changes the beneficial environmental consequences of the action. The FEIS includes compensatory mitigation as a part of the mitigation plan and the plaintiffs have not shown how the new information, the precise amount of compensation, represents a major variation from or was qualitatively different than the discussion of compensatory mitigation in the FEIS.

Although NPS could have provided its own independent analysis and methodology for identifying the corresponding monetary value between the compensatory mitigation measures and the adverse impacts in the FEIS, the plaintiffs have not shown that NPS was required to do so. Thus, NPS' decision to not prepare a supplement regarding compensatory mitigation is entitled to deference and the plaintiffs have not shown that the NPS acted arbitrarily and capriciously when it failed to supplement the FEIS after determining the final amount of compensatory mitigation.

C. Scope of alternatives

The plaintiffs also argue that NPS did not consider a reasonable range of alternatives in the EIS to the approval of the special use permits and expanded right-of-way for the S-R Line project. Pls.' Mem. at 43-44. In particular, the plaintiffs assert that NPS failed to consider non-transmission alternatives such as "[t]he use of distributed energy generation sites and localized renewable energy[.]" Id. at 44. Under NEPA, agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). "[A]n agency bears the responsibility for deciding which alternatives to consider in an [EIS]." Busey, 938 F.2d at 195. An agency must follow the "rule of reason" which governs "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them" and the CEQ regulations require an agency to "discuss only alternatives that are feasible, or (much the same thing) reasonable." Id. (internal quotation marks omitted). Courts should "uphold [the agency's] discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail." Id. at 196. The "agenc[y] must look hard at the factors relevant to the definition of purpose" and when asked to approve a specific plan, "the agency

should take into account the needs and goals of the parties involved in the application.” Id. Busey further explained that “[a]n agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process.” Id. at 199. “The goals of an action delimit the universe of the action’s reasonable alternatives.” Id. at 195. The CEQ regulations require that the “reasonable alternatives” in an EIS must include the alternative of taking no action. 40 C.F.R. § 1502.14.

In Hammond v. Norton, 370 F. Supp. 2d 226 (D.D.C. 2005), the Bureau of Land Management approved the construction of a petroleum pipeline. There, the FEIS discussed the no action alternative to building the pipeline briefly, stating that there was a need for additional petroleum products, identifying the annual deficits in petroleum if the pipeline were not built and concluding that the purpose and need of the application would not be met if the no action alternative were selected. Id. at 241-42. The court found that “this discussion, while brief, lays out the costs and benefits of the no action alternative with enough specificity to allow meaningful comparison with other alternatives. No more is required.” Id. at 242.

In this case, the NPS discussed the purpose of the action as "deciding whether to issue the applicant the permits it needs to construct a double-circuit 500-kV transmission line across three units of the national park system." FEIS at i (AR 47834). In addition, the NPS explained that the need to replace the current B-K line with the new S-R Line arose from "grid reliability criteria violations" identified by PJM and was based on the approvals of Pennsylvania Public Utility Commission and New Jersey Board of Public Utilities. Id. at iv-v (AR 47837-38). NPS identified the no action alternative as denying the utilities companies' application to build the S-R Line, id. at v (AR 47838). The proposal that "arouse[d] the call to action" was the utilities companies' request for a special use permit and expanded right-of-way to replace the current transmission line with the larger S-R Line. The FEIS states that the application was "driven by a need for transmission capacity." Id. at 71 (AR 47932). Further, NPS specifically considered, among other alternatives, the use of "distributed energy generation sites and localized renewable energy[," and decided that this alternative did "not meet the purpose and need for federal action or that of the applicant." Id.

Here, NPS followed NEPA's requirements by considering the range of alternatives flowing from the proposal's purpose, including consideration of the application's method of achieving

the goals and alternative methods. In particular, the no action alternative is considered and dismissed in the FEIS and ROD. See FEIS at 35 (AR 47896); ROD at 15-16, 18 (AR 116601-02, 116604). The agency decided that the alternatives would not meet the applicants' goals and that it was likely that the applicants would attempt to unilaterally replace the B-K Line within the current right-of-way if the NPS denied the application. Even if plaintiffs disagree with NPS' analysis, the plaintiffs have not shown that NPS violated NEPA by failing to review alternatives which were raised, discussed and rationally rejected in the FEIS.

D. Scope of environmental impacts

The plaintiffs also argue that the agency did not take a "hard look" at the full scope of the project's environmental impacts. Pls.' Mem. at 44-45. NPS recognized that the utilities companies could determine the route of the S-R Line outside of the boundaries of the Parks. Thus, NPS identified Visual Split Location ("VSL") points which refer to "[t]he geographical point outside the parks at which it becomes physically possible for the applicant to route the line as it sees fit." FEIS at 33 (AR 47894). "The determination of the VSLs is important because while NPS can require the applicant to follow a specific route inside the VSLs, the NPS cannot require the applicant to follow a certain route beyond these points." Id. at 34 (AR 47895). Therefore, NPS limited its review to the area between the VSLs

for each alternative. Id. at 33-34 (AR 47894-95). Plaintiffs argue that NPS did not consider the impact of construction of the S-R Line on the viewshed of another national park unit: Steamtown National Historic Site in Pennsylvania and that "the agency's narrowly delimited review failed to consider the full scope of harm that construction of the length of the S-R Line might inflict on resources and values within the Delaware Water Gap[.]" Pls.' Mem. at 44-45.

An agency's decision about the appropriate scope of the FEIS is entitled to deference. See *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (finding that the "determination of the extent and effect of these [cumulative environmental impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies"). As is stated above, an agency's NEPA review is limited to major Federal actions which "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. "'Effects' is defined to 'include: (a) Direct effects, which are caused by the action and occur at the same time and place,' and '(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.'" *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting 40 C.F.R. 1508.8).

"NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* at 767 (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)). A reasonably close causal relationship is similar to the requirement of proximate causation in tort law. *Id.* (citing Metro. Edison Co., 460 U.S. at 774). To determine whether an agency must consider a particular effect, courts must "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." Metro. Edison Co., 460 U.S. at 774 n.7; see also *Dep't of Transp.*, 541 U.S. at 768.

The plaintiffs rely on *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006). In that case, the court considered the impact of directional drilling on land outside of a national preserve to extract oil and gas from beneath the preserve. *Mainella*, 459 F. Supp. 2d at 79. *Mainella* found that the NPS' decision to allow directional drilling operations under the preserve violated NEPA because the NPS failed to evaluate the environmental effects from the surface activities of the directional drilling that occurred outside of the preserve. *Id.* at 105-06. *Mainella* reasoned that

it makes sense for NPS to assess the impacts from surface activities because there is a reasonably close causal relationship between such impacts and NPS's decision to grant an operator access to oil and gas

beneath the Preserve pursuant to an exemption from the 9B regulations. The surface drilling activities are functionally inseparable from the downhole drilling activities, which may not take place until NPS grants the operator access through the Preserve, either pursuant to a 9B plan of operations or by an exemption from that requirement under section 9.32(e).

Id. at 105. Therefore, "NEPA requires NPS to evaluate impacts on the Preserve from adjacent surface drilling activities[.]" Id. at 105-06.

The plaintiffs assert that Mainella requires the agency to look beyond the Parks' boundaries to assess other indirect effects of the S-R Line based on the "'reasonably close causal relationship' between the agency's grant of right-of-way and special use permits and the siting of the S-R Line on either side of the Park." Pls.' Reply at 38. Here, the challenged agency action was not NPS' approval of the entire S-R Line. Instead, NPS decided to grant the applicants an extended right-of-way and special use permits to construct the S-R Line through the Parks. ROD at 2 (AR 116588). Thus, the environmental consequences of the entire S-R Line were not at issue before the agency in creating the EIS. Instead, the agency's review was limited to the portion of the S-R Line through the Parks and any environmental effects caused by the construction in the Parks. To satisfy NPS' duty to consider the environmental effects of the S-R Line construction on areas outside of the Parks, NPS rationally used the VSLs to limit the area of study to the area

where NPS controlled the utilities companies' decision to construct the S-R Line along a particular route.

However, NPS had an obligation to assess any environmental effects that had a reasonably close causal relationship to the agency action allowing construction through the Parks. This situation is dissimilar from the circumstances in Mainella because the plaintiffs have not shown how construction of the S-R Line outside of the Parks is functionally inseparable from any activities inside of the Parks that NPS must regulate. If the plaintiffs' arguments are limited to the construction of the S-R Line immediately outside of the Parks, the plaintiffs have not explained why the agency's use of VSL points was insufficient to satisfy NEPA's requirements for assessing environmental impacts outside of the Parks. The plaintiffs do not identify any environmental effects arising from the S-R Line's construction similar to the directional drilling that occurred in Mainella.

The plaintiffs argue that NEPA required NPS to assess the environmental impacts to the Steamtown National Historical Site. However, the plaintiffs have not shown how any environmental effects to Steamtown have a reasonably close causal relationship to the decision to allow construction within the Parks. To trigger NEPA's requirement to assess areas beyond the boundaries of the Parks, the plaintiffs must do more than show that the S-R Line as a whole would have environmental effects on another area

of federal land. Instead, the plaintiffs must show why the agency action in this case, the decision to allow the S-R Line to be built through the Parks, caused the environmental effects of the S-R Line's construction elsewhere. Whether the environmental effects were on federal lands or non-federal lands, the issue is whether the environmental effects were caused by the agency's action.

Here, the plaintiffs simply assert that NPS knew what the entire route of the S-R Line would be and that this knowledge required NPS to assess the indirect effects of the S-R Line to locations outside the Parks. See Pls.' Reply at 37-38. However, the plaintiffs have not identified the reasonably close causal relationship between the environmental effects that they have identified, such as impacts to the viewshed of Steamtown, and the decision to grant the permits for the expanded right-of-way and construction in the Parks. Thus, the plaintiffs have not shown that the scope of NPS' analysis in the FEIS was arbitrary and capricious. Because the plaintiffs have not shown that the NPS' actions violated NEPA, the plaintiffs' motion for summary judgment on the NEPA claims will be denied and judgment will be entered for the defendants on the NEPA claims.

## II. NPS ORGANIC ACT

The NPS Organic Act was implemented to "promote and regulate the use of the Federal areas known as national parks, . . . which

purpose is to conserve the scenery and the natural and historic objects and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. The D.C. Circuit has recognized that “[b]ecause the Organic Act is silent as to the specifics of park management, the Secretary has especially broad discretion on how to implement his statutory mandate.” Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). However, the NPS Organic Act “prohibits uses which impair park resources and values.” Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 194 (D.D.C. 2008). “An impairment is an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources and values, including the opportunities that otherwise would be present for the enjoyment of those resources or values.” Mainella, 459 F. Supp. 2d at 99 (internal quotation marks omitted); accord, NPS Management Policies § 1.4.5. In reviewing an agency’s action under the APA, the court must determine whether the agency “articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Mainella, 459 F. Supp. 2d at 90 (alteration in original) (quoting Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006)). This standard requires NPS to provide a “specific and detailed explanation as to how it arrived at [its] conclusion[.]” Bluewater Network v. Salazar, 721 F.

Supp. 2d 7, 30 (D.D.C. 2010). In particular, “[m]erely describing an impact and stating a conclusion of nonimpairment is insufficient, for this merely sets forth ‘the facts found’ and ‘the choice made,’ without revealing the ‘rational connection’ -- the agency’s rationale for finding that the impact described is not an impairment.” Mainella, 459 F. Supp. 2d at 100. “The agency’s decisions are entitled to a ‘presumption of regularity,’ and although ‘inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.’” Id. (citation omitted) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971)).

In Mainella, NPS’ description of the environmental consequences to park resources from directional drilling outside of the national preserve used undefined conclusory labels such as “negligible,” “minor,” “moderate,” and “major” to describe the adverse impacts from the drilling with “little or no explanation of how NPS reached them.” Id.

As NPS notes in each decision, “[w]hether an impact meets this [impairment] definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.” But it is just that assessment that is lacking here. Any reasoned explanation must set forth which of those factors were significant in leading NPS to conclude that an impact is not an impairment -- or that a group of impacts collectively is not an impairment.

Id. (alterations in original) (citations omitted). Similarly, in Bluewater, NPS failed to identify a "logical link" between the description of the consequences of PWC emissions on water quality and NPS' non-impairment decision. Bluewater, 721 F. Supp. 2d at 30. In particular, NPS provided "little or no basis for understanding why an identified impact fails to rise to the level of an impairment." Id.

The plaintiffs argue that NPS' decision to grant the special use permits and expanded right of way violated the NPS Organic Act because NPS did not articulate the rational connection between the identified adverse environmental impacts arising from building the S-R line and the non-impairment determination. Pls.' Mem. at 28. In particular, the plaintiffs argue that NPS' Non-Impairment Determination ("NID")<sup>8</sup> shows that NPS' decision was arbitrary and capricious because NPS failed to 1) explain why adverse impacts did not result in impairment, 2) connect the impairment threshold to any objective standards, and 3) explain the inconsistencies between restoration projections in the FEIS and the ROD. Id. at 28-33.

The plaintiffs cite the NID's rationale regarding impairment to the visual resources and rivers in the affected areas. Pls.'

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<sup>8</sup> The parties agree that the NID included in the Administrative Record is not the final version. Pls.' Mem. at 7 n.6; Intervenor Defs.' Mem. at 16 n.10; Federal Defs.' Mem. at 7 n.7. The final NID was included as an attachment to the federal defendants' motion for summary judgment.

Mem. at 28-30. The NID's section on visual resources acknowledges significant environmental impacts arising from the S-R Line project. The NID states that "[t]he selected alternative will . . . result in unavoidable adverse impacts because the larger transmission line structure will remain a visible intrusion that degrades the existing scenic quality of the area that it traverses." Federal Defs.' Mem., Ex. A, NID at 12. However, the NID explains that the S-R Line will be built along the route of the existing transmission line and will include measures to reduce the impact to the visual resources. Id. In particular, the NID states that the non-impairment decision is based on the mitigating effects of placing tower structures at the maximum feasible distance from roadway and trail crossings, using non-reflective neutral colored painting, using monopoles to replace the current lattice towers, revegetating the disturbed areas, reducing the width of the permanent cleared right-of-way, and "allowing areas not needed to maintain the line to succeed to forest inside the [right-of-way.]" Id. Unlike in Mainella and Bluewater, the NID in this case does not simply identify the environmental impacts and assert a non-impairment decision based on a conclusory label. Instead, NPS provided specific reasons why the S-R Line project would not impair the visual resources of the Parks. Although NPS could have included more detail assessing "the severity,

duration, and timing of the impact" to visual resources, the discussion in this case sets forth a rational explanation for the agency's actions. Although the plaintiffs may disagree with the agency's conclusion regarding non-impairment, NPS has set forth "a rational connection between the facts found and the choice made" that the adverse environmental impacts on visual resources will not impair the Parks resources.

The plaintiffs also cite the NID's discussion of the adverse consequences to the Middle Delaware River. The NID states that "[a]dverse impacts to visual qualities of the river will extend beyond the river itself" and "[t]he presence of taller towers, thicker and more numerous lines, and bird diverters will be seen not only as boaters pass below the wires, but as they approach from both upstream and downstream directions." *Id.* at 13. However, the NID refers to the explanation discussed above concerning visual resources as a partial basis for the non-impairment decision regarding the river resources of the Parks. *Id.* In addition, the NID refers to the explanations in the historic structures and archaeology sections of the NID. *Id.* Those sections describe specific mitigation measures to limit the adverse impacts to the resources in the Parks such as avoiding any archeological resources, halting construction where unknown resources are discovered and placing trees and vegetation between the historic resources and the transmission line. *Id.* at 9-10.

The NID states that “[s]cientific resources, including water quality, also will not be impaired because construction or disturbance will not occur in the river nor within a 100-foot buffer from the river’s edge.” Id. at 13. Overall, the NID states that the line will cross the river at only one location and that the access roads for the S-R Line construction will not be visible from the river. Id. Thus, unlike in Bluewater and Mainella, NPS has asserted a rational basis for why the adverse impacts identified in the NID do not rise to the level of impairment and provided a logical link between the description of the impact and the non-impairment decision.

The plaintiffs further argue that NPS “failed to connect the impairment threshold to ‘any objective standards that have been announced or evaluated.’” Pls.’ Mem. at 28 (quoting Bluewater, 721 F. Supp. 2d at 33). Both Bluewater and Mainella support the proposition that general descriptions of impacts or “unbounded terms” that provide no objective standard for comparison are insufficient to satisfy the requirements of the NPS Organic Act under APA review. See Bluewater Network, 721 F. Supp. 2d at 33; Mainella, 459 F. Supp. 2d at 101 (“An unbounded term cannot suffice to support an agency’s decision because it provides no objective standard for determining what kind of differential makes one impact more or less significant than another.” (citing Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco,

Firearms, & Explosives, 437 F.3d 75, 81 (D.C. Cir. 2006))).

Specifically, the plaintiffs challenge NPS' analysis in the geological resources section that the project's adverse impacts will not "*substantially change the scenic landscapes*" in the parks. Pls.' Mem. at 31 (quoting NID at 4). However, NPS explained that the basis for that conclusion was that the adverse impacts to geological resources "will occur entirely within the [right-of-way] corridor and will be limited to specific locations where towers will be installed." NID at 4. Further, the NID discussed the low probability of boreholes and the shallow nature of the drilling. Id. at 3-4. Although the NID could have provided more details regarding the geological consequences, the NID asserted reasons for the conclusion and objective statements about the extent of damage to the geological resources.

The plaintiffs also challenge the NID's discussion of archeological impacts. That section states that "*known archeological sites will be avoided for the most part or the effects will be limited to just a portion of the site[.]*" Pls.' Mem. at 31 (quoting NID at 10). However, the archeological resources portion of the FEIS states that a total of 25 archeological sites were identified along the alignment for the alternative that was selected. FEIS at 221 (AR 48082). Then, the NID specifies that two archeological sites could be affected and discusses specific mitigation measures for project work near

archeological resources in the Parks including "avoid[ing] or minimiz[ing] ground-disturbing activities to the most significant portions of the site." NID at 9. NPS also referred to the intended mitigation measures as described in Appendix F of the FEIS. Id. NPS has provided a sufficient rationale as the basis for the non-impairment determination because the non-impairment determination is not built on undefined and conclusory terms as happened in Bluewater and Mainella.

Plaintiffs contend that the NID is inconsistent with the FEIS with respect to how long the disturbed areas of the Parks would take to return to their original conditions. In particular, the plaintiffs assert that the NID states that disturbed areas will "'succeed to forest over time[,]" but the FEIS states that these areas, including mature forests and wetlands, may not return to the previous condition. Pls.' Mem. at 31-32 (quoting NID at 6-9). However, the NID is consistent with the FEIS because both documents reflect that certain disturbed areas would not be able to recover fully after construction. Specifically, the NID concedes in each section cited by the plaintiffs that cleared areas within the right-of-way will result in permanent losses to vegetation, but that areas outside of the right-of-way and areas within the right-of-way that are not required for the operation of the S-R Line (such as the access roads and tower foundations) will be "allowed to

succeed to forested area over time." See NID at 6. The NID states that the cleared areas in this project will be allowed to recover, but the NID does not contradict the FEIS because the NID does not claim that any mature forest will be restored to its original state within the 15-year period that the FEIS analyzed. See NID at 6; FEIS at 411 (AR 48272). Further, the NID states that compensatory mitigation will restore impacted wetlands at a minimum acreage of 1 to 1 and that the project does not entail the conversion of wetland to non-wetland. NID at 5. Thus, NPS' non-impairment decision will be upheld because the plaintiffs have not shown that NPS acted arbitrarily and capriciously in concluding that the S-R Line project will not result in impairment of the Parks' resources and values.

Plaintiffs further argue that NPS did not provide a reasoned analysis for the approval of the special use permits and expanded right of way for the S-R Line in light of the significant adverse environmental impacts which would result from the construction. Pls.' Mem. at 33-37. In particular, plaintiffs argue that the ROD reflects that the agency based the decision to reject the no action alternative on "speculation[] about potential litigation" and that the agency was incorrect in its legal assessment. Id. at 34.

An agency's decision may be rationally based on legal advice and analysis regarding contractual or easement matters. See

Daingerfield Island Protective Soc'y v. Babbitt, 823 F. Supp. 950, 956-57 (D.D.C. 1993). In Daingerfield, the district court reviewed the NPS' decision to approve an interchange design. Id. at 953. The government had entered into a Land Exchange Agreement that granted a developer an easement to build an exchange that would have access to the George Washington Memorial Parkway. Id. at 952. NPS assessed the potential interchange designs and considered recommending that no interchange be built, but NPS was advised by counsel that the Land Exchange Agreement required that the interchange be built and that "the only choice left to NPS was to approve the least intrusive interchange possible, which it did, or to refuse to approve any interchange at all, which would have violated the Exchange Agreement that it had been informed was legally binding on the federal government." Id. at 956. The plaintiffs challenged NPS' decision arguing that no interchange should have been built based on environmental concerns. Id. The district court explained that "[w]here several administrative solutions exist for a problem, courts will uphold any one with a rational basis, so long as the balancing of competing solutions is not an arbitrary one." Id. Because the administrative record in Daingerfield reflected that NPS had evaluated the options and decided on the least intrusive design alternative, the NPS' decision was upheld and the district court's decision and rationale was affirmed by the D.C. Circuit.

Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 446 (D.C. Cir. 1994).

In this case, the feasibility of the no-action alternative lies at the center of this dispute. The ROD explains that the no action alternative was not feasible because the utilities companies own a property interest in the existing right-of-way, upon which they could build a new line within the current right-of-way without NPS approval. ROD at 18. The plaintiffs contest the utilities companies' rights under the easements and argue that the utilities companies were required to gain NPS approval even if they attempted to build the transmission line without an expanded right-of-way. Specifically, the plaintiffs contend that NPS has the authority to prohibit the utilities companies from building the S-R Line within the existing right-of-way. The plaintiffs state that the utilities companies may not use their easement in a way that would create a "high risk of fire" caused by insufficient clearance between the proposed S-R Line and the trees around the right-of-way. Pls.' Mem. at 34-35. This legal dispute remains unresolved.<sup>9</sup>

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<sup>9</sup> The essence of the dispute is whether the utilities companies' easements include the right to cut down and remove trees outside of the right-of-way on either side of the easement. The plaintiffs argue that the utilities companies do not have the right to remove trees outside of the right-of-way. Thus, the utilities companies cannot safely construct the new S-R Line within the existing right-of-way and NPS approval is required for any attempt to build the S-R Line within the existing right-of-way. Pl.'s Reply at 22-23. If true, that conclusion would

The question presented here is not whether the utilities companies could have built the S-R Line within the current right-of-way without NPS approval. Instead, the narrow question presented here is whether NPS made a rational decision that the no action alternative was not feasible and that an alternative option was preferred. Faced with "significant uncertainty" and a "strong probability" that the outcome -- either the unilateral building of the new transmission line within the intervenor-defendants' right-of-way or future litigation regarding the easements and a potential takings claim -- would be "worse for park resources than the selected alternative[,] " NPS decided that the no action alternative was not feasible. ROD at 18. Much like in Daingerfield, NPS recognized that the best alternative for the environment was the no action alternative. However, NPS considered in reaching its decision the legal analysis regarding whether the utilities companies could build the S-R Line without approval and the utilities companies' statements that they intended to build the line without NPS approval. *Id.*; see AR

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undermine NPS' decision to reject the no action alternative. However, the utilities companies counter that the easements expressly release the utilities companies from any liability from trimming or cutting down trees that interfere with the transmission lines. Intervenor Defs.' Mem. at 26-28. Thus, the utilities companies argue that they can clear vegetation on either side of the easement and avoid any risk of fire and can safely build the S-R Line without NPS approval. Intervenor Defs.' Reply at 3-7. Further, the utilities companies state they have removed trees near the transmission line as recently as 2010. *Id.* at 5 n.3 (citing AR 77470).

28475-77; 77432-33. NPS decided that the "least intrusive" option would be the best alternative. While plaintiffs argue that the NPS' authority over the utilities companies' use of the easements is uncontroversial, this property dispute paired with the strong likelihood that the utilities companies would seek to continue construction of the transmission line, provided a rational basis for NPS to reject the no action alternative. The plaintiffs have not shown that NPS' decision was arbitrary and capricious and the defendants are entitled to summary judgment on the NPS Organic Act claim.

### III. WILD AND SCENIC RIVERS ACT

The WSRA was implemented to protect and preserve the values of designated rivers in the United States. See 16 U.S.C. § 1271. The WSRA states that each component of the wild and scenic rivers system "shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without . . . limiting other uses that do not substantially interfere with public use and enjoyment of these values." 16 U.S.C. § 1281(a). Additionally, the WSRA provides that

no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established . . . . Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area . . . which will not invade the area or unreasonably diminish the scenic, recreational, and

fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System.

16 U.S.C. § 1278(a). The WSRA provides three classifications for rivers in the system: scenic, recreational and wild. See 16 U.S.C. § 1273(b). The portion of the river which the S-R Line will cross is designated as scenic. See Publication of Classification Map for the Middle Delaware River, 45 Fed. Reg. 3396 (Jan. 17, 1980).

The plaintiffs allege that NPS' decision to grant the permits and the expanded right-of-way was arbitrary and capricious because the NPS did not give "primary emphasis" to protecting the river, Compl. ¶ 102 (citing 16 U.S.C. § 1281(a)), and because the project qualified as a water resources project that would have a "direct and adverse effect on the values for which such river was established," Compl. ¶ 105 (quoting 16 U.S.C. § 1278(a)). The plaintiffs argue that the record reflects that the project violates the WSRA because construction would substantially interfere with the public use and enjoyment of the rivers. Pls.' Mem. at 37-38. The defendants counter that, although the NPS acknowledged that the S-R Line will have some negative effects on the river's scenic values, the S-R Line creates no substantial interference because most of the river view will remain unchanged and the NPS required measures to mitigate the detrimental impacts to riparian areas. See

Intervenor Defs.' Mem. at 38; Federal Defs.' Mem. at 23-24 (citing ROD at 13 (AR 116599)).

In general, an agency's assessment about whether an action substantially interferes with public use and enjoyment of the river's values is entitled to deference. See Rivers Unlimited v. U.S. Dep't of Transp., 533 F. Supp. 2d 1, 5 (D.D.C. 2008); Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1178 (9th Cir. 2000). Furthermore, "the mere existence of some decline in scenic value does not establish . . . substantial[] interfere[nce.]" Hells Canyon Alliance, 227 F.3d at 1178. In evaluating whether new construction or modifications would create a substantial interference, an agency may consider the existing structures and uses of a river, including those that pre-date the river's protection under the WSRA. See Rivers Unlimited, 533 F. Supp. 2d at 5.

In this case, NPS acknowledged that "[t]he presence of the taller towers, thicker and more numerous lines, and bird diverters" will have an adverse impact upon visitors in the Parks. ROD at 13 (AR 116599). The FEIS discusses the adverse impacts resulting from the construction of the S-R Line in further detail as well. See, e.g., FEIS at 695-96 (AR 48556-57) (considering the potential detrimental impacts of new construction on the river's scenic value). However, the NPS provided a reasonable basis for finding that the S-R Line will

not violate the WSRA by substantially interfering with the visual quality of the river. The S-R Line will cross the river at the same place as the existing B-K Line does and the agency referred to the visual resources section which cited the use of neutral colored paints to reduce reflection and the use of monopoles rather than lattice towers as factors underlying their decision. NID at 12-13. The NPS considered the extent to which the new towers and access roads would be visible within the Appalachian National Scenic Trail and the Delaware Water Gap National Recreation Area, identified the potential negative effects of the S-R Line and discussed measures to lessen its visual impact. Id. at 12-13. The agency's consideration of potentially adverse consequences to public use and enjoyment of the river and its identification of methods to mitigate and avoid such effects demonstrate that its decision was not arbitrary and capricious. See Hells Canyon Alliance, 227 F.3d at 1178-79; Rivers Unlimited, 533 F. Supp. 2d at 5. The agency therefore rationally determined that the S-R Line does not substantially interfere with the visual quality of the river.

While the plaintiffs may disagree with NPS' conclusion, they have not carried their burden of showing that the agency's decision was arbitrary or capricious. Thus, the plaintiffs' motion for summary judgment on the WSRA claims will be denied and

