UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES and ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES Plaintiffs, v. TODD T. SEMONITE, Lieutenant General Chief of Engineers and Commanding General, U.S. Army Corps of Engineers and ROBERT M. SPEER Acting Secretary of the Army Defendants.	Civ. No. 17-cv-01574-RCL

COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Regulations

Other Authorities

I. INTRODUCTION

In defending the Surry-Skiffes Creek-Whealton ("Project"), the Federal Defendants ("Corps") and Virginia Electric & Power Company ("Dominion") claim that an electric transmission line built through the heart of an Historic District, across a Congressionally-designated National Historic Trail, and adversely affecting eight sites eligible for listing on the National Register of Historic Places (including a National Historic Landmark) will have no significant impact on historic resources; that placing industrial infrastructure within a segment of the James River identified on the Nationwide Rivers Inventory as "one of the most significant historic, relatively undeveloped rivers in the entire northeast region" poses no threat to unique resources; that a project triggering more than 50,000 comments and three years of unresolved environmental disputes involving local, state, and federal agencies is entirely uncontroversial; and that a project specifically designed to facilitate development in a sensitive environment poses no reasonable likelihood of significant cumulative impacts.

As if that were not enough, Defendants have asked this Court to overlook the Corps' failure to follow the public review and comment procedures of the National Environmental Policy Act ("NEPA"); its decision to ignore Section 110(f) of the National Historic Preservation Act ("NHPA"); and its refusal to investigate reasonable, less-damaging alternatives to the Project under each of these three bedrock federal environmental laws.

Defendants position is contrary to the law, the administrative record, and sound common sense, and, for the reasons set forth below, Plaintiffs respectfully request that they be granted summary judgment and that Defendants' cross-motions for summary judgment be denied.

II. THE CORPS VIOLATED NEPA

A. The Corps Arbitrarily and Capriciously Refused to Prepare an EIS

1. The Corps' Significance Determinations Were Arbitrary and Capricious

a. Historic Sites and Districts

Adverse effects on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places" are another indicator of significance. 40 C.F.R. § 1508.27(b)(8). It is undisputed the Project will adversely affect eight National Register-eligible sites, including a National Historic Landmark (AR 691, 731, 733, 22839-55); the adversely affected resources are unique, irreplaceable, and of the highest national importance (AR 3253-61, 29026-32); and the federal agencies charged with protecting those resources have concluded that the Project will have a significant impact (*see, e.g.*, 3253, 6015, 6020, 73714-15).

Defendants' primary counter-argument is that the Project's effects on historic resources are limited to "secondary visual impacts" that will only be experienced from far away, and are therefore insignificant. Corps at 24-26; Dominion at 33-34, 44-47. They repeat the term "secondary" like a mantra, insinuating that visual changes to an historic environment are somehow less important than other considerations. *See, e.g.*, Dominion at 21, 33-34, 37, 50; Corps at 27. But there is no such thing as a "secondary" impact under NEPA. Neither the statute (*see* 42 U.S.C. §§ 4321-4347) nor its implementing regulations (*see* 40 C.F.R. parts 1500-1508) allows for visual impacts — or any other impact category, for that matter — to be downplayed as "secondary."[1]

[1] NEPA's implementing regulations do establish the concept of "indirect" impacts, which refer to "induced" changes occurring later in time or farther removed in distance from the proposed action. *See* 40 C.F.R. § 1508.8. But indirect impacts are not "secondary" in the sense of being

Defendants' "secondary visual impacts" argument also fails to account for the fact that the Project will be built *across* the Captain John Smith National Historic Trail and *within* the Jamestown-Hog Island-Captain John Smith Historic District, both of which are (i) eligible for listing in the National Register of Historic Places (AR 73081-85; 74050-51); (ii) part of a National Register-eligible cultural landscape that includes both the James River and its adjacent shoreline (*id.*; *see also* AR 74049-55, 118218-33); and (iii) experienced from the water as well as the shore (*see, e.g.*, AR 134832-34, 134837, 141498-500).[2] The Keeper of the National Register has determined that these resources are part of a "significant historic landscape" (AR 73081-82), the Virginia Department of Historic Resources concurs in that determination (AR 73084),[3] and the administrative record shows that the Project's visual impacts on both the resources and the landscape (as a whole) will be adverse and significant. *See, e.g.*, AR 761, 23694-96, 74049-55, 134832-34, 134934-39, 141497-501, 141511, 143462-64. Defendants' contention that visual changes will only occur near the horizon, far from any historic sites, is not factually accurate.

The threshold of significance which the Corps applied to (what it has deemed) "secondary visual impacts" was also unreasonable. The agency concluded that such impacts will

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less important. *Id*. Under NEPA, they are no more and no less important than direct impacts (those caused by the action and occurring at the same time and place) and cumulative impacts (those resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions identify three categories of effects). *See* 40 C.F.R. §§ 1508.7, 1508.8. Here, the visual effects of the Project fall into the first and third categories. The Project will also have direct visual effects which occur at the same time and in the same viewshed as the Project itself. 40 C.F.R. § 1508.8. The Project will have cumulative visual impacts because its appearance will combine with other past, present, and reasonably foreseeable future changes to that same viewshed. 40 C.F.R. §1508.7.

[2] Also see the supplemental standing declaration of Carolyn Black, provided as Attachment A.

[3] In fact, the Virginia Department of Historic Resources asserted that the National Register-eligible historic landscape is even more extensive than the area on which the Keeper focused. *See* AR 73084.

be insignificant because the Project "is not a blockage to viewing the river or the surroundings" and so "will not dominate the view." AR 762-63. By that standard, only a wall could trigger an EIS. The administrative record shows that the Project will adversely affect eight National Register-eligible historic sites, including an NHL, and will be built through a Historic District and a National Historic Trail; the affected resources are of exceptional importance; and the federal agencies charged by Congress with overseeing their protection have determined that the effects will be significant. Under these circumstances, the notion that the Project is "not a blockage to viewing the river" simply does not provide a reasonable justification for the Corps' refusal to prepare an EIS.

Repeating many of the analytical errors described above, Defendants also claim that the Project's effects on historic resources should be discounted as merely "aesthetic" and "subjective." Corps at 26-27; Dominion at 34-36. Not so. This case does not present an open-ended, subjective question of aesthetic judgment. No one has asked the Corps to render an opinion on whether the James River is beautiful or inspiring or otherwise aesthetically-pleasing. The issue here involves tangible impacts to specific historic sites. The historic context, setting, and features of those sites are objectively known, and the Corps has admitted that they will be compromised. AR 694, 740-41, 22839-55. Furthermore, the other federal and state agencies that have a legal role in objectively evaluating adverse effects under established criteria have all agreed that those effects will be adverse. That is a matter of record, not a subjective aesthetic judgment, and it demands the preparation of an EIS.

Moreover, neither NEPA nor its implementing regulations allows aesthetic concerns to be discounted or shunted aside in the manner Defendants have proposed. To the contrary, the statute explicitly identifies "***esthetically*** and culturally-pleasing surroundings" as one of NEPA's

environmental policy objectives. 42 U.S.C. §4331(b)(2) (emphasis added); *see also* 42 U.S.C. §4342 (directing that the members of CEQ be "conscious and responsive to" aesthetic issues). And the statute's history further confirms that aesthetics were a matter of considerable importance to Congress during the lengthy legislative process resulting in NEPA's enactment.[4]

None of the five cases on which Dominion relies (at 35-36) compels a contrary conclusion. Four of the five reviewed minor projects having nothing to do with historic sites, and can be readily distinguished on that basis:

- *Maryland-National Capital Park & Planning Commission v. United States Postal Service*, 487 F.2d 1029, 1033 (D.C. Cir. 1973) raised a question of whether the Postal Service had planned sufficient landscaping around a new parking lot and loading dock. The D.C. Circuit refused to enjoin the project and expressed doubt that minor matters of individual taste could require an EIS. *Id*. at 1039 ("the matters at hand pertain essentially to issues of individual and potentially diverse tastes"). In contrast, Dominion's transmission line is planned to cross over a 4-mile stretch of the James River through the heart of an historic district. Its visual impacts cannot be screened with any amount of landscaping and its impacts cannot credibly be characterized as minor.

[4] *See, e.g.*, S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) at 20 ("All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to…incorporate those values in official planning and decisionmaking"); 115 Cong. Rec. 3706 (Feb. 18, 1969) (confirming that the "range of values" incorporated in NEPA is broad enough to include "the scientific economic, social, esthetic, and cultural needs and interests of this Nation"); 113 Cong. Rec. 36854 (Dec. 15, 1967) (expressing "dissatisfaction with traditional methods by which environment-affecting actions have often been undertaken" and specifically identifying the need for improved consideration of "parks, aesthetics, and other types of land use" in the construction of "power lines").

- *Olmsted Citizens for a Better Community v. United States,* 793 F.2d 201 (8th Cir. 1986) involved the conversion of an existing mental hospital into a prison hospital. Although the hospital was located in a "wooded campus," the Eighth Circuit found "no evidence that [the area] contains unique, rare, or even unusual features." *Id*. at 206. In contrast, Dominion's transmission line would adversely affect extraordinarily unique historic resources that tell the story of the very beginnings of our country.
- *REACH v. Metropolitan Transit Agency,* 638 F. Supp. 99 (S.D.N.Y. 1986) involved renovation of trackside infrastructure for an existing commuter rail line. After noting that "the aesthetic effect of a project is an important concern," the court found that no EIS was required under the facts of the case. *Id*. at 107. Dominion's transmission line would present an entirely new, large industrial intrusion into a landscape that has sufficiently retained its historic setting and feeling to be determined eligible for the National Register.
- *River Road Alliance v. Corps of Engineers,* 764 F.2d 445 (7th Cir. 1985) addressed a proposal to *temporarily* park 30 barges in stretch of the Mississippi River through which more than 300 other barges regularly passed each day. *Id.* at 447. Like *Maryland-National Capital Park & Planning Commission , Olmsted,* and *REACH* — and in direct contrast to the case at bar — *River Road Alliance* involved a purely aesthetic question for a minor and temporary project having nothing to do with historic sites.[5]

[5] Judge Wood's dissent notes the presence of two "little historic towns" a few miles downstream, but (i) the temporary barge parking was not within the viewsheds of those towns (*River Road,*

Dominion places particular weight on the fifth case, *Pogliani v. Army Corps of Engineers*, 166 F.Supp.2d 673 (N.D.N.Y. 2001), alleging that it bears "striking similarities " to this one. Dominion at 36. A careful review reveals otherwise. *Pogliani* involved the construction of a new power plant, but that development was not located along or over an historic stretch of the Hudson River. *Id*. at 675-76. The project was two miles inland, and, more importantly, it was completely outside the viewsheds of the two historic sites at issue in the case. *Id*. The *Pogliani* court found these facts "significant" to its decision (*id*.), a point nowhere disclosed in Dominion's enthusiastic endorsement of the case (Dominion at 36). *Pogliani* does simply not apply here.[6]

One issue nowhere addressed in Defendants' voluminous briefing is the Corps' finding that the Project's effects on historic resources do not warrant an EIS because "the qualitative analysis we have conducted as part of our environmental assessment is as informed and reliable as it would be through preparation of a much more costly and time-consuming environmental impact statement." AR 771. But, as we explained in our Motion, nothing in NEPA or its implementing regulations allows the Corps to refuse to prepare an EIS due to concerns about cost or delay. NTHP at 22. A decision about whether to prepare an EIS must be based on the proposed action's environmental consequences. *Id*.; 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3, 1501.4, 1502.3, 1508.9, 1508.13, 1508.27. In basing its decision on concerns about cost and delay, the Corps arbitrarily and capriciously "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S.

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764 F.2d at 465) and (ii) historic sites apparently played no role in the resolution of the case (*id*. at 447-53).

[6] It is also worth noting that plans for the power plant at issue in *Pogliani* had been extensively modified to eliminate the most visible elements of the facility. *Pogliani*, 166 F. Supp. 2d at 680. For this reason, too, *Pogliani* is distinguishable.

29, 43 (1983); *see also Public Employees for Envtl. Responsibility v. United States Fish & Wildlife Service*, 177 F. Supp. 3d 146, 156 (D.D.C. 2016) (allowing agencies to invoke cost concerns "has the potential to eviscerate NEPA, since many an agency would frequently so argue"). Neither Dominion nor the Corps has provided any specific response. For this reason alone, the FONSI cannot be upheld.

b. Unique Characteristics of the Geographic Area

Impacts to "[u]nique characteristics of the geographic area" also indicate that environmental effects are significant. 40 C.F.R. § 1508.27(b)(3); *see also Sierra Club*, 719 F. Supp. 2d at 64,66; *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 589 (4th Cir. 2012). As we explained in our moving papers, there can be no reasonable doubt that the Project will impact unique resources: the Project is proposed to be built within an historic district, across the Nation's first historic water trail, and within the viewshed of a National Historic Landmark (AR 694, 730-31, 733, 22839-55); it would place industrial infrastructure within a segment of the James that is listed on the Nationwide Rivers Inventory as "[o]ne of the most significant historic, relatively undeveloped rivers in the entire northeast region" (AR 118588, 111274, 118589-118601); and it would adversely affect a National Park containing both the site of the earliest permanent English settlements in America and the battlefield where the Revolutionary War was won (AR 661-772, 6012-74, 118218-33).

Defendants provide little in the way of detailed response, choosing instead to rely on their contentions (addressed above) regarding visual and aesthetic impacts. Dominion at 45-48, Corps at 28-31. To the extent they offer any additional argument, it is the Corps' assertion that the historic James River is "not a wilderness area." Corps at 28-29. Fair enough. But 40 C.F.R. § 1508.27(b)(3) does not require wilderness. Instead, it addresses "unique characteristics," such as

historic and cultural resources, parks, wild and scenic rivers, and ecologically critical areas. *Id*. There is no serious dispute that the Project will adversely affect unique resources squarely implicated by the plain language of this regulation. In fact, the Corps has effectively admitted as much in the MFR. *See, e.g.*, AR 762 ("The Corps acknowledges that this project will intrude upon…a unique and highly scenic section of the James River"); AR 765 (Project falls within a segment of the James that is listed on the Nationwide River Inventory, may be eligible for inclusion in the National Wild and Scenic River System, and possesses Outstanding Remarkable Values).

c. Controversy

Significance also exists where "the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). Controversy involves "a substantial dispute" about the action's "size, nature, or effect." *Friends of the Earth v. Army Corps of Engineers*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000); *see also Humane Society v. Department of Commerce*, 432 F. Supp. 2d 4, 19 (D.D.C. 2006) (same standard). As explained in our Motion, the courts in this Circuit and others have found actions to be "highly controversial" where large numbers of commenters dispute the lead agency's environmental analysis and conclusions; where comments from other agencies and public officials express serious concerns; and where experts have disputed the lead agency's methodology and conclusions. *See* NTHP at 17 (identifying cases).

Our Motion also explained that all three of the above-referenced circumstances are present here. NTHP at 17-18. An extraordinary number of commenters disputed the Corps' environmental analysis: *even though the Corps never circulated a draft EA and FONSI for public review* (part II.B, below), the agency nonetheless received more than 50,000 public

comments addressing deficiencies in its environmental analysis and urging further study. *See, e.g.,* AR 8511, 36353, 54687, 75243, 114092, 120457, 133075 (discussing number of comments received). Comments from agencies and public officials revealed the existence of controversy: among many others, the National Park Service ("NPS"), the Advisory Council on Historic Preservation ("ACHP"), and state and federal elected officials all expressed substantive environmental concerns. *See, e.g.,* AR 24280-89, 31842-44, 32150-62, 32177-89, 36930-32 (NPS); AR 24337-40, 32834-36, 30858-62, 143421-22 (ACHP); AR 148541, 148576 (Congress); AR 53483 (Virginia House of Delegates). And experts have disputed the Corps' analyses, methodologies, and conclusions: the record reflects substantial disputes among technical experts regarding visual impacts, historic and cultural landscapes, and the viability of alternatives, among other things. *See, e.g.,* AR 6015, 28816, 29991, 121247-49 (visual impacts); AR 72112, 72120, 72130-32, 72154 (historic and cultural landscapes); AR 7003, 7280, 29729, 53498, 21982-22004 (alternatives).

Our Motion (NTHP at 18) further identified substantial record evidence that the Corps, Dominion, and Dominion's paid consultants have repeatedly acknowledged (i) the highly controversial nature of the Project and (ii) the existence of a substantial dispute about Project effects. *See, e.g.,* AR 120057 (Corps characterized the Project as "highly controversial" in communication to the Environmental Protection Agency); AR 140675-77 (Corps characterized the Project as "highly controversial" in briefing paper to Congress); AR 120783 (Corps conceded the Project is "controversial" to NHPA stakeholders); AR 23036 (Dominion informed Corps of a "divergence of opinions regarding the extent of adverse effects on the historic properties at issue"); AR 72297 (Dominion's consultant referred to "fundamental differences" about "what specific resources are [affected] and the degree to which they are"); *see also* AR 72558-59

(Dominion identified the Project as "controversial" in a filing with the Environmental Protection Agency); AR 142460 (Corps "regulatory fact sheet" identified the Project as "highly controversial"); AR 143357 (Corps adjusted decision-making procedures in light of controversial nature of the Project); AR 148586-87 (Corps admitted that the Project is "highly controversial" but decided not to require an EIS).

The Corps based its FONSI on a finding that the voluminous comments it received "represent passion for the affected resources (*i.e.,* opposition to the project based on importance placed on the resources), rather than substantive dispute over size, nature, or effect of the action." AR 771. The agency has continued that same counter-factual narrative here. Corps at 31-38. It begins by asserting that Plaintiffs have "admitted" that their participation in the administrative process was in the nature of "opposition" rather than "objective criticism" of the agency's environmental analysis. Corps at 31 ("as Plaintiffs admit, comments from Plaintiffs…and other historic preservation groups were in the nature of opposition"). This is flat wrong. The record overwhelmingly demonstrates that Plaintiffs submitted serious, substantive comments disputing the Corps' environmental analysis, and spent their own money to retain experts to develop alternatives that would allow the project to go forward in a much less harmful way. *See, e.g.,* AR 5761-67, 22195-96, 22287-88, 24583-90, 33294-304, 56243-67, 115435-41, 121517-29, 143501-17 (NTHP); AR 6165-67, 24704-16, 56269-71, 116884-87, 121382-91, 121627-30, 133398-99, 149912-14 (APVA). The record also demonstrates that this dispute was in no way limited to Plaintiffs — a wide variety of agencies, officials, and other stakeholders also disputed the Corps environmental analysis and conclusions. *See, e.g.,* AR 24280-89, 31842-44, 32150-63, 32177-89, 36930-32 (NPS); AR 5689-90, 5838, 6509-10, 22165, 22556 (Pamunkey Tribe); AR 24337, 32834-36, 30858-62, 143421-22 (ACHP); AR 53483, 148541,

148576 (state and federal legislators); AR 8511, 36353, 54687, 75243, 114092, 120457, 133075 (noting extraordinarily large numbers of public comments); AR 114092 (petition with 28,000 signatures). And, contrary to the Corps' assertion, Plaintiffs have never "admitted" that our comments (or any others) lack objectivity or substance.

Defendants attempt to explain away some (but not all) of the extensive methodological disputes associated with the Project. Corps at 33-35; Dominion at 40-42, 47. The effort is unavailing. As noted above, the record reflects legitimate and significant differences of opinion among recognized technical experts (and involving agencies and stakeholders with recognized expertise) on a number of environmental issues central to the Project, including historic resources, visual impacts, and alternatives.

The Corps (but not Dominion) also seeks to brush off extensive record evidence that the agency, as well as Dominion and Dominion's consultants, acknowledged the controversial nature of the Project during the administrative process. Corps at 37-38. But the cases on which it relies are readily distinguishable. *Hamilton v. Department of Transportation*, No. 08-CV-328, 2010 WL 889964 (E.D. Wash. Mar. 8, 2010) does not address the topic of public controversy at all and is off topic. And the evidence at issue in *Friends of Animals v. Phifer*, 238 F. Supp. 3d 119, 149 (D. Me. 2017) is very different from the evidence presented here. *Phifer* involved a pair of stray references to public controversy — one anonymous, the other ambiguous — buried in draft agency documents. *Id.*. Here, on the other hand, the evidence consists of (i) repeated and explicit representations by the Corps to Congress, federal agencies, and other stakeholders (*see, e.g.*, AR 120057, 120783, 140675-77, 142460); (ii) clear statements by Dominion and its environmental consultant (*see, e.g.*, AR 23036, 72297, 72558-59); and (iii) unambiguous agency

acknowledgments that the controversial nature of the Project would likely impact the Corps' decision-making process (*see, e.g.,* AR 143357, 148586-87).[7]

Dominion (but not the Corps) implausibly asserts that there is no dispute about the Project's effects, but instead a disagreement about "the significance of what will be seen." Dominion at 43. The argument is without merit. A substantial dispute about "the significance of what will be seen" is, in fact, a substantial dispute about what the effects of the Project will be. In turn, a substantial dispute about what the effects of the Project will be is public controversy within the meaning of NEPA. *See, e.g.*, *Humane Society*, 432 F. Supp. 2d at 19-20 (finding controversy based on dispute regarding effects of permit); *Friends of the Earth*, 109 F. Supp. 2d at 43 (finding controversy based, in part, on a substantial dispute about whether significant effects required preparation of an EIS); *see also Middle Rio Grande Conservancy v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (finding controversy in light of substantial dispute about the significance of project impacts).

Perhaps recognizing the absence of support for their positions, Defendants attempt to change the subject. They pretend that Plaintiffs' public controversy claims represent an attack

[7] The Corps' fallback argument on this point — namely, that the agency's admissions of controversy came during the middle of the administrative process rather than at its close (Corps at 38) — is unsupported by law and contrary to common sense. There is no requirement or reason that public controversy must be restricted to an agency's final decision-making documents. If there were, agencies could fully insulate themselves from judicial review simply by refusing to circulate draft EAs and FONSIs to the public, *just as the Corps has attempted to do here*. Moreover (and contrary to the Corps' implied suggestion), the controversy surrounding the Project did not disappear at the end of the administrative process. Although a few participants in that process ultimately decided that their concerns had been addressed, the vast majority continued to dispute the Corps' environmental analysis and conclusions. Notably, NPS, ACHP, and the National Trust (all of which have Congressionally-recognized expertise on matters involving the nation's historic resources) were among the many stakeholders to maintain their objections throughout. *See* AR 3001-03, 3253-61, 6012-74. In fact, not a single public interest organization that participated as a consulting party in the permit review process under NHPA signed the Project's MOA.

on the Corps' discretion to rely on the experts of its choosing.[8] Corps at 33-34; Dominion at 30. In doing so, however, Defendants have conflated two distinct issues. The Corps certainly has discretion to rely on its own experts. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). But that discretion does not allow the agency to ignore substantial disputes about the environmental analyses, methodologies, or conclusions of those experts. Such disputes represent "controversy" within the meaning of NEPA, and they require the preparation of an EIS. *Humane Society*, 432 F. Supp. 2d at 19; *Friends of the Earth*, 109 F. Supp. 2d at 43; *see also Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1998); *Friends of Back Bay*, 681 F.3d at 589-90.

Finally, unlike the cases relied on by the Corps (at 35-36) and Dominion (at 38-39), this case does not raise the specter of a "heckler's veto." *See Humane Society*, 432 F. Supp. 2d at 19-20 (distinguishing substantive dispute from heckler's veto). The administrative record shows that an extraordinary number of public officials, federal and state agencies and other stakeholders with jurisdiction and/or expertise reasonably disputed substantive aspects of the Corps environmental analysis, methods, and conclusions. That represents controversy, not heckling.

d. Cumulative Impacts

An EIS is also required "if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). Cumulative impacts are the environmental consequences resulting from "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or Non-Federal) or

[8] Throughout the administrative process, the Corps did not rely on <u>*its own*</u> experts but on those retained and paid for by Dominion. *See, e.g.*, Dominion at 67 n.51.

person undertakes such other actions." 40 C.F.R. § 1508.7. Thus, cumulative impacts may be significant even if the proposed action itself has only minor impacts. *Id*.

Our Motion explained that it is "reasonable to anticipate a cumulatively significant impact" here because the Project is explicitly designed to remove obstacles to development in an area of extreme historic and scenic sensitivity. *See* NTHP at 18-19. Indeed, the record contains substantial evidence that one of the justifications for the Project was its ability to support further growth and development. *See, e.g.*, AR 134754 (need for energy infrastructure to support "healthy and sustained economic growth"), 136841 (new facilities needed to "support regional economic growth"), 136849 (Project benefits include "local growth and economic development"), 140644 (stated need for project includes "sustained economic growth"). But the MFR does not provide any specific information about (i) what sort of growth projections were used or (ii) whether and how those projections were accounted for in the agency's cumulative impacts analysis. *See* AR 739-42.

Dominion offers no response, and has waived further argument.

For its part, the Corps does not seriously dispute that the Project is intended to support future growth and development along the James River. Corps at 38-39. Instead, it alleges that Plaintiffs are to blame for failing to identify significant issues that were omitted from the cumulative impacts analysis. Corps at 39. The argument turns NEPA on its head. The Corps is responsible for ensuring the adequacy of the EA and FONSI, and if those documents do not contain the relevant analysis it is the Corps that bears responsibility. *See Humane Society*, 432 F. Supp. 2d at 22-23 ("As [the agency] did not fulfill its obligation to thoroughly consider the combined effects of human activity on the environment, it is not relevant whether plaintiffs have identified potential impacts that should have been included").

The Corps also claims that cumulative impacts are fully addressed in the MFR. Corps at 38. But the portions of that document to which the agency has cited do not provide any meaningful *analysis*. *See* AR 696, 739-42. For example, there is nothing to tell the reader which future actions the Corps considered, where the information about those actions came from, or how those future actions might (or might not) interact with the Project. Indeed, it is not even clear that the Corps properly *added* the incremental effects of the Project to other past, present, and reasonably foreseeable future actions, as 40 C.F.R. § 1508.7 requires. Instead, the MFR seems to focus on *discounting* the effects of the Project by comparing them to those of prior actions. *See, e.g.,* AR 742 ("When considering the overall impacts that will result from this project, *in relation to* the overall impacts from past, present, and reasonably foreseeable future projects, the cumulative impacts are not considered to be significantly adverse") (emphasis added). The MFR does not provide a meaningful analysis of the overall effects associated with accumulating development in the area, and it therefore fails to satisfy NEPA. *Grand Canyon* 290 F.3d 339, 345 (D.C. Cir. 2002); *see also Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1319-20 (D.C. Cir. 2014); *Humane Society*, 432 F. Supp. 2d at 22; *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 138 (D.D.C. 2001).

2. The Corps' Mitigation Analysis and Assumptions Were Arbitrary and Capricious

Our moving papers identified seven specific reasons why it was arbitrary and capricious for the Corps conclude that the MOA's compensatory mitigation arrangements would be sufficient to render Project impacts insignificant. NTHP at 22-24.

First, we noted the fact that $85 million is needed to compensate for damage to historic resources seems to confirm that the Project's impacts to those resources will be significant. NTHP at 23. As we made clear in our moving papers (*cf.* Dominion at 52), this is primarily a

matter of common sense rather than a question of statutory or regulatory interpretation. And (again, as a matter of practical common sense) it applies with particular force where that sum (i) is equal to approximately 50% of the cost of building the approved Project (*see* AR 710); (ii) other alternatives, including alternatives that would avoid or substantially reduce impacts to historic sites, have been rejected on the basis of cost without any apparent consideration of mitigation costs (AR 22824); and (iii) cost has been invoked as a basis for refusing to prepare an EIS (AR 771).

Second, we explained that the historic resources at issue here are unique and irreplaceable; impacts to such resources cannot be fully mitigated by making "compensatory" improvements elsewhere. NTHP at 23. Dominion does not seriously dispute the substance of the argument. Dominion at 52-53. Instead it resorts to outrage, suggesting that Plaintiffs' position is "stunning" in light of Preservation Virginia's participation in, and support for, ongoing mitigation discussions. *Id*. at 52. But Preservation Virginia's continued interest in pursuing all available means of minimizing harm to the resources within its care should not be confused with support for the Project or a failure to dispute the Corps' decision to approve it. This litigation is proof enough of that.

Third, we noted that the MOA ensures the availability of compensatory mitigation funding but does not require that $85 million worth of compensatory mitigation actions actually be implemented. AR 672-74. In fact, the MOA contemplates that a portion of the funds earmarked for mitigation may remain unspent. AR 672-73. Dominion does not seriously dispute these facts either. Dominion at 53. And the case on which it relies stands only for the well-recognized proposition that *an EIS* need not contain a complete, enforceable mitigation plan. *See id*. (citing *NPCA v. Jewell*, 965 F. Supp. 2d 67, 77 (D.D.C. 2013)). Where, as here, mitigation is

relied on as an explicit basis *for avoiding the preparation of an EIS* the lead agency must ensure that the mitigation is more fully set out and implemented. *See, e.g., Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 65 (D.D.C. 2005) (mitigated FONSI must "completely compensate[s] for any possible adverse environmental impacts stemming from the original proposal") (citing *Cabinet Mountains Wilderness*, 685 F.2d at 682).

Fourth, we explained that neither the MOA nor the MFR details the specific compensatory actions that must be taken; without that information, the Corps could not have reasonably concluded that those compensatory actions will reduce all impacts to insignificance. *See* AR 676-86. Again, Dominion's counter-argument (at 53) confuses the requirements for addressing mitigation in an EIS with the requirements applicable to a mitigated FONSI.

Fifth, we pointed out that the Corps has ignored a fundamental timing problem: the MOA anticipates that compensatory mitigation funds will not be fully disbursed for a decade (if at all), but the impacts of the Project will be felt right away and will last for the entire life of the Project. *See* AR 3135. Dominion does not squarely address this point, but the Corps (at 53) asserts that "at least half the mitigation funds will be obligated within 5 years." The argument might have more force if there were evidence that half the mitigation funds are sufficient to mitigate all the Project's impacts. Without that information, the Corps' decision-making was arbitrary and capricious.

Sixth, we noted that NPS, the federal agency with jurisdiction over most of the affected historic resources, determined that the Corps' proposed mitigation will not reduce impacts to a level of insignificance. Dominion responds that NPS eventually signed the MOA, as did ACHP. Dominion at 53. That's not the whole story. Although an official from the Department of the Interior purported to sign the MOA on behalf of three NPS sub-units (AR 3173), the record

reflects that the agency's concerns — many of which were expressed by the Director himself, rather than a particular sub-unit — were never actually addressed or incorporated into the document. *See* AR 6012-74; 36930-32.[9] And, as explained in greater detail in part III (below), ACHP's execution of the MOA can hardly be considered an endorsement of the Corps' Project approval. To the contrary, ACHP's explicitly-stated intention was to *replace* the Project with an underwater transmission line. AR 3253.

Seventh, we explained that the MOA specifies the adverse nature of the Project's effects on historic properties, but it does not address in detail the magnitude of those effects; as a result, the compensatory mitigation provisions of the document cannot reasonably be interpreted as confirming that all impacts will be reduced to insignificance. *See* AR 3195-3203. Dominion responds that the relevant analysis was developed during the Section 106 process in consultation with "the expert agencies designated by law to address mitigation of impacts to historic resources — ACHP and VDHR — as well as the other Consulting Parties through numerous drafts." Dominion at 53-54. But this version of the story fails to account for several key facts: (i) NPS is also an "expert agency designated by law to address mitigation of impacts to historic resources" and, as noted above, it strongly objected to the Project (*see, e.g.*, AR 3260, 111048); (ii) as explained above, ACHP did not endorse the Project (or the Corps' mitigation measures) but instead sought to use the mitigation process as a means of reversing it (AR 3253); and (iii) the "other Consulting Parties" referenced by Dominion strongly disputed the adequacy of the mitigation plan as well. *See, e.g.*, AR 3257 (ACHP letter explaining that other consulting parties "continue to believe that adverse effects resulting from this undertaking cannot be mitigated");

[9] It is worth noting that Director Jarvis took the unusual step of filing an amicus curiae brief in *National Parks Conservation Association v. Semonite* (Case No. 17-cv-1361-RCL) (ECF 70-1), another challenge to the Corps' approval of the Project.

AR 33299-304 (NTHP letter explaining that "the compensatory and programmatic mitigation measures included in the Draft MOA prepared by Dominion to avoid, minimize and mitigate harm are grossly insufficient to resolve the project's adverse effects."); 24714 (APVA letter explaining that "[t]he proposed mitigation are inadequate compensation for marring the integrity of irreplacable historic resources and altering the historic scene . . . .") The notion that the consulting parties collectively supported or validated the Corps' decision-making with respect to mitigation is simply not supported by the record.

B. The Corps Arbitrarily and Capriciously Refused to Allow Public Review of a Draft EA/FONSI

NEPA's implementing regulations, promulgated by CEQ, require that a proposed FONSI be circulated for a 30-day public review and comment period when the proposed action is similar to one requiring an EIS or is without precedent. 40 C.F.R. § 1501.4(e)(2). CEQ explained what those regulatory requirements mean in a guidance document called the *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* ("*Forty Questions*"), 46 Fed. Reg. 18026 (Mar. 17, 1981), which identifies several specific circumstances triggering the need for public review and comment on a proposed FONSI: (i) "if the proposal is a borderline case, *i.e.*, when there is a reasonable argument for preparation of an EIS"; (ii) "if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area"; (iii) "when there is either scientific or public controversy over the proposal"; (iv) "when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS"; and (v) "if the proposed action would be located in a floodplain or wetland." 46 Fed. Reg. at 18037. As explained in Plaintiffs' Motion, all of these circumstances

are present here. NTHP at 24-25. Therefore, the Corps erred by refusing to allow public review and comment on its EA/FONSI.

Defendants have not presented detailed argument on each of the circumstances identified in the *Forty Questions* guidance. *See* Corps at 54-56; Dominion at 60-63. Instead, they have proposed that the *Forty Questions* be disregarded because it is not a regulation. Corps at 55; Dominion at 62-63. That proposition should be rejected. While the *Forty Questions* may not be a regulation, it is nonetheless applicable and relevant for the light it sheds on the meaning of CEQ's regulatory requirements. Indeed, courts in this Circuit and others have repeatedly relied on it for that very purpose. *See, e.g.*, *Citizens Against Burlington v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991) (relying on *Forty Questions* to interpret CEQ regulation regarding conflicts-of-interest and finding agency violation of same); *Oceana v. Bureau of Ocean Energy Management*, 37 F. Supp. 3d 147, 171-73 (D.D.C. 2014) (relying on *Forty Questions* to interpret CEQ regulation addressing alternatives analysis); *Young v. GSA*, 99 F.Supp.2d 59, 74-75 (D.D.C. 2000) (relying on *Forty Questions* to interpret CEQ regulation addressing "no action" alternative); *Sierra Club v. Watkins*, 808 F.Supp. 852, 872 n.34 (D.D.C. 1991) (citing *Forty Questions* and invalidating EA); *Sierra Club v. Sigler*, 695 F.2d 957, 972 (5th Cir. 1983) (relying on *Forty Questions* to reject Corps' interpretation of former CEQ "worst case analysis" regulation); *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1292-93 (1st Cir. 1996) (relying on *Forty Questions* to interpret CEQ regulations regarding Supplemental EIS and finding agency violation of same).

The Corps' related assertion that the Fifth, Ninth, and D.C. Circuits have all rejected the *Forty Questions* guidance is likewise without merit. *See* Corps at 55. Published decisions in each of those Circuits — as well as the First and Tenth — have explicitly relied on the *Forty*

Questions as an interpretive guide to CEQ's NEPA regulations. *See, e.g.*, *Sigler*, 695 F.2d at 972 (5th Cir. 1983); *Russell Country Sportsmen v. United States Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011); *Citizens Against Burlington*, 938 F.2d at 202; *Dubois*, 102 F.3d at 1292-93; *Associations Working for Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122, 1127-29 (10th Cir. 1998).

The authority cited by the Corps stands for the more limited proposition that the *Forty Questions* do not carry the same weight as CEQ's NEPA regulations. In *Cabinet Mountains Wilderness v. Peterson* (cited by the Corps at 55) the D.C. Circuit held that the *Forty Questions* guidance was not entitled to the "substantial deference" accorded CEQ's NEPA regulations, particularly since the guidance post-dated the project at issue. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 683 (D.C. Cir. 1982) ("[f]airness would require that [the *Forty Questions*] not be accorded binding retroactive effect"). In *Friends of the Earth v. Hinz* (also cited by the Corps at 55) the Ninth Circuit similarly distinguished between the *Forty Questions* and CEQ's NEPA regulations. *Friends of the Earth v. Hintz*, 800 F.2d 822, 837 n.15 (9th Cir. 1986) ("The 'Forty Questions' publication [] is not a regulation"). Plaintiffs do not claim that the *Forty Questions* are regulations. But there is a significant difference between declining to treat the *Forty Questions* as regulations (which both *Cabinet Mountains* and *Hintz* did) and ignoring them altogether (which the Corps and Dominion would have this Court do). The *Forty Questions* directly interprets one of the CEQ regulations at issue in this case, and there is no sound basis to ignore it.

The Corps and Dominion also assert that the EA/FONSI did not require public review and comment because the Project is not identified as requiring an EIS in the Corps' NEPA procedures. Corps at 54; Dominion at 61-62. It is true that the Corps' NEPA procedures do not

identify this Project on the list of actions normally requiring an EIS. *See* 33 C.F.R. § 230.6. But it is also true that the Corps' NEPA procedures are "intended to be used only in conjunction with the CEQ [NEPA] regulations" (33 C.F.R. § 230.1) and incorporate by reference the significance criteria set forth in the CEQ regulations (33 C.F.R. § 230.4), thereby requiring an EIS for any proposed action that would have significant impacts pursuant to those criteria. Moreover, a project need not be specifically identified in agency procedures to trigger the requirement for public review and comment in response to a draft FONSI. It is enough that the proposed action be "similar to" one requiring an EIS — or, in the language of the *Forty Questions*, that it be "a borderline case" where "there is a reasonable argument for preparing an EIS." 40 C.F.R. § 1501.4(e); 46 Fed. Reg. at 18037. Here, there is clearly "a reasonable argument for preparing an EIS" and the Project is at least "similar to" one requiring an EIS.

But even if there were no reasonable argument for preparing an EIS, the Corps was nonetheless required to circulate a draft EA/FONSI for public review because the Project would place transmission lines across one of the most historic landscapes of the James River, an area currently without overhead crossings of any kind.[10] 40 C.F.R. § 1501.4(e), 46 Fed. Reg. at 18037 (requiring public review and comment for new or unusual actions); *see also* AR 691, 731, 733, 22839-55 (historic environment, no overhead crossings). The Corps (but not Dominion) contends that other "modern intrusions" in the area serve as precedent for the Project and render public comment unnecessary. Corps at 54. This argument fails to account for the fact that the Project would be the first overhead river crossing within the historic area that includes Jamestown Island, Carter's Grove, Colonial Parkway, and the Jamestown-Hog Island-Captain John Smith Trail Historic District. Corps at 54. There is a significant difference between

[10] As noted above, the Project would be built within a 51-mile stretch of the James River that currently has no overhead crossings of any kind. AR 141450.

modern development in inland areas (the vast majority of which cannot be seen from the river) and towering industrial infrastructure built directly across the James River (which cannot be ignored).

The Corps (but not Dominion) also suggests that public review of a draft EA/FONSI was not required because the agency has permitted other power plants and other power lines, in other places. Corps at 54. This Court should decline to adopt such a broad rule. Every human action has previously been taken somewhere else, by someone else. Limiting the public's right to review and comment on draft EA/FONSIs to activities which have never been attempted anywhere else before would, for all practical purposes, eliminate one of CEQ's procedural safeguards. *See* 40 C.F.R. § 1501.4(e)(2). Such a result would be incompatible with regulations requiring context-specific analysis (*see, e.g.*, 40 C.F.R. § 1508.27(a)) and contrary to NEPA's overarching goal of promoting public disclosure, understanding, and involvement in environmental decision-making. *See Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 349 (1989); 40 C.F.R. §§ 1500.1(b), 1500.2(d).[11]

The Corps (again, without Dominion) further claims that no public review and comment was required because "the Project qualifies under Nationwide Permit 12, and, as such, does not normally, under Corps procedures, receive individual review." Corps at 54. This is directly contrary to the agency's own conclusions during the administrative process. Dominion originally asked the Corps to process the Project under Nationwide Permit 12. *See* AR 152035. After reviewing the request, the Corps' project manager determined that the Project did not qualify for Nationwide Permit 12 due to greater-than-allowable impacts on (i) aquatic resources

[11] Neither *Pogliani v. U.S. Army Corps of Engineers*, 306 F.3d 1235 (2d Cir. 2002) nor *City of New Haven v. Chandler*, 446 F. Supp. 925 (D. Conn. 1978), cited by the Corps at 54-55, supports the proposition that once power lines have been built *somewhere* the Corps need not circulate a draft EA/FONSI *anywhere*.

and (ii) historic resources and other public interest factors. AR 152035-36 (recommending that "the proposed project does not meet NWP-12"). His supervisor agreed. AR 152035 ("I am fine with his recommendations"). The Corps then prepared a Memorandum for the Record memorializing its conclusion that "the project as proposed…does not meet NWP-12" (AR 151997-98) and informed Dominion of that determination (AR 151995). The fact that the Corps has now attempted to invoke Nationwide Permit 12 as a defense to Plaintiffs' NEPA claims only serves to confirm the arbitrary and capricious nature of the agency's decision-making and the *post hoc* nature of its legal arguments.

As a fallback position, the Corps (this time joined by Dominion) suggests that its compliance with other public notice requirements somehow excuses its failure to provide public review and comment of a draft EA/FONSI. Corps at 56-57; Dominion at 60-63. Not so. CEQ's NEPA regulations (and the *Forty Questions* guidance interpreting those regulations) clearly state that a draft FONSI, not some other document, must be made available for public review and comment for at least 30 days before the lead agency makes its decision about whether an EIS is needed. 40 C.F.R. § 1501.4(e); 46 Fed. Reg. at 18037. This makes sense. The FONSI, not some other document, is where the lead federal agency must memorialize its reasons for deciding not to prepare a comprehensive EIS. 40 C.F.R. § 1508.13. If the public is to be provided a meaningful opportunity to review and comment on that decision, it is the FONSI, not some other document, which must be circulated. Other documents and notices, prepared for other purposes and pursuant to other statutes, are not a substitute.[12]

Dominion eventually resorts to hyperbole, going so far as to claim that "[i]t would be difficult to imagine a scenario where the Corps could have conducted its permit review more

[12] This is particularly true where, as here, the lead agency has elected not to follow federal regulations and guidance for integrating multiple environmental review processes.

transparently or the public could have been more closely involved." Dominion at 61. The task does not require nearly so much imagination as Dominion suggests. It is not at all difficult to conceive of an agency circulating a draft EA and FONSI for public review; in fact, agencies do it all the time. *See, e.g.*, 82 Fed. Reg. 59665 (Dec. 15, 2017) (Nuclear Regulatory Commission); 82 Fed. Reg. 57269 (Dec. 4, 2017) (General Services Administration); 82 Fed. Reg. 51398 (Nov. 6, 2017) (National Marine Fisheries Service); 82 Fed. Reg. 48309 (Oct. 17, 2017) (State Department). There is no defensible reason why the Corps could not have done so here.

C. The Corps Arbitrarily and Capriciously Dismissed Reasonable, Less-Harmful Alternatives

NEPA also requires that EAs discuss alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9. This is "an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact." *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991). An alternative may be excluded from consideration "only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action." *Pub. Employees for Envtl. Responsibility v. United States Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 154 (D.D.C. 2016) (citing *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)).

1. Underwater 230 kV Alternatives

One of the most obvious alternatives to the Project is to place Dominion's proposed transmission line beneath the James River rather than above it. Our Motion explained that several underwater alternatives were considered during the SCC proceedings, including the possibility of an underwater double-circuit 230 kV line from Surry to Skiffes Creek combined with upgrades to existing infrastructure (referred to as "Alternative B"). *See* NTHP at 26. This

option was found to satisfy all short- and long-term NERC reliability issues in the region. AR 151938-39. Dominion objected that the cost and construction time required for Alternative B — which it estimated at $488.6 million and five years, respectively — could not be justified. AR 151945, 151948. The SCC Hearing Officer found otherwise, concluding that "steps could be taken to sequence the construction work to complete [Alternative B] sooner than projected" and "[Dominion] was not convincing that all of the additional projected time would be required to complete [Alternative B]." AR 151948.

In addition, our Motion noted that just a few days after the SCC Hearing Officer made those findings, Dominion applied to the Corps for the permits necessary for construction of the Project. AR 150081-151122. The application purported to address potential alternatives, but it failed to mention the Hearing Officer's finding that Alternative B could resolve all NERC reliability issues. AR 150104-25. To the contrary, the application inaccurately stated that "a 230 kV line, either overhead or underground, does not meet electrical NERC reliability requirements and is therefore excluded from further analysis." AR 150105-26.

Our Motion also described the fate of Alternative B during the Corps' administrative process. NTHP at 27-28. In brief, Alternative B is referenced in several documents prepared during that process, but there is no real evidence that the Corps actually ***analyzed*** it, investigated its feasibility, or reviewed the SCC Hearing Officer's findings on that topic. *Id*. (collecting and citing record evidence). Finally, after nearly four years of failing to seriously investigate Alternative B, the Corps concluded in its MFR that such a project (referred to as "Underwater Double Circuit 230 kV (w/add'l Transmission Facilities)") was unworkable because it would take five years to construct — precisely the same estimate previously found unreliable by the SCC Hearing Officer. AR 711-13, 151948.

One of the most notable things about Defendants' briefs is their failure to dispute any of these specific, critical facts. *See* Corps at 44-47; Dominion at 56-57. Neither of them contends that Alternative B would violate NERC reliability standards. *Id*.; *see also* AR 711. Neither of them disputes that Alternative B was eliminated from consideration based on a five-year construction estimate. *Id*.; *see also* AR 713. Neither of them disputes that the SCC Hearing Officer found that same estimate to be inaccurate and unreliable. *Id*.; *see also* AR 151948. And neither of them has pointed to specific record evidence demonstrating that the Corps actually obtained or analyzed specific, verifiable data about the time and cost necessary to construct Alternative B. Corps at 44-47; Dominion at 56-57.

Instead, both Defendants discuss a variety of other potential concerns generally associated with underwater transmission lines, including aquatic impacts, construction complications, complexity of repairs, and costs. Corps at 45-46. But the Corps' decision, as memorialized in the MFR, did not dismiss Alternative B from consideration on the basis of any of those factors. AR 711-713. And the record (as distinguished from Defendants' litigation position) does not establish that any of them rises to a level that would render construction infeasible.

2. Tabors Alternatives

Faced with the Corps' refusal to meaningfully consider alternatives to the Project, Plaintiffs commissioned an independent engineering firm (Tabors Caramanis Rudkevich, or "Tabors") to investigate whether less-harmful options might be available. AR 22700-02, 22282-83. Our Motion explained that before Tabors began work, the National Trust asked the Corps and Dominion to share any data they might believe necessary to the preparation of an accurate analysis. AR 22700-02, 22282-83. Dominion refused to share any data unless the National

Trust would agree to (i) restrict the use of that data to modeling (*i.e.*, confirming) the need for the Project; (ii) allow Dominion to oversee all work; and (iii) refrain from taking any action that could delay Dominion's preferred Project. AR 22506. Although each of those conditions is obviously antithetical to an independent investigation of Project alternatives, the Corps — the federal agency charged with creating and safeguarding an open, participatory environmental review process — did not attempt to arrange Dominion's cooperation, share its own data, or otherwise respond to the National Trust's request.

Our Motion also explained that in light of Dominion's refusal to share information, Tabors instead relied on publicly-available data submitted by Dominion to the Federal Energy Regulatory Commission ("FERC"). AR22282-83. In submitting the data to FERC, Dominion had attested to its accuracy and its suitability for use in transmission reliability planning. *Id*. The data showed there were at least four reasonable alternatives to the Project that could be built faster, less expensively, and without an overhead crossing of the James River. AR 21982-22004. Dominion asserted that that (i) the data used by Tabors was flawed; (ii) an accurate analysis would require access to data held only by Dominion; (iii) Tabors' cost estimates were inaccurate; and Tabors' alternatives would not be NERC-compliant. AR 21636-61. Tabors offered to re-run its analysis using data of Dominion's choosing, but received no response to that offer. AR 5840; *see also* AR 5839-45, 7003-18 (complete Tabors' answers to Dominion). Although the Corps took no public action, in private some at the agency expressed significant concerns about Dominion's position and recommended that "an unbiased facilitator" be brought in for discussions with both parties. AR 6211-12. Instead, the Corps encouraged Dominion to solicit the views of PJM, the regional transmission organization that coordinates wholesale electricity in Virginia. *See* AR 4564. PJM then issued a letter stating that the Tabors alternatives do not

address all potential NERC reliability issues. AR 5132. That conclusion is presented without reference to any supporting data, without explanation of the data PJM received from Dominion, and without description of the analyses (if any) PJM performed. *Id*.

Defendants do not seriously dispute any of these points either. Corps at 47-51; Dominion at 57-59. Instead, they focus on bolstering PJM's conclusory assertion that the Tabors alternatives were infeasible. *Id*. The gist of their position seems to be that PJM provided a neutral, third-party analysis of the Tabors alternatives, thereby erasing any bias arising from Dominion's refusal to share its data (and the Corps' tacit endorsement of that refusal). The contention is flawed in two fundamental respects.

First, although PJM may be an "independent" entity in a legal, corporate sense, it is hardly a neutral party here. PJM is a membership organization, and its members include Dominion. In fact, when filing it *amicus curiae* brief in support of Dominion in this matter —an act that calls the organization's supposed neutrality into question in and of itself — PJM had to disclose that Dominion Resources, Inc. (one of Dominion's corporate parents) may have a current interest in PJM of 10% or more. *See* Corporate Disclosure Statement of PJM Interconnection, LLC (ECF 58-1) at 2.

Second, contrary to the Corps' contentions (Corps at 49-50; Dominion at 59-60), the PJM letter on which the Corps relied was indeed conclusory. *See* AR 5132. As noted above, it does not contain or refer to any data; does not explain what data PJM might have received from Dominion; and does not describe in detail the analyses PJM performed or the ways in which they differed from the analysis undertaken by Tabors. *Id*. In fact, the PJM letter does not even identify the specific NERC concerns at issue. *Id*. The Corps nonetheless treated the PJM letter

as conclusive evidence, and dismissed the Tabors alternatives from further consideration. AR 702-03. That decision was arbitrary and capricious.

D. The Corps' NEPA Violations Were Not Harmless Error

Dominion (but, critically, not the Corps) asserts that the extensive NEPA violations described above represent harmless error and argues, in a banner heading, that "Plaintiffs have not shown the result would be any different if the Corps were to prepare an EIS." Dominion at 63-64. That is not the proper legal standard. Plaintiffs need not prove to a certainty that the Corps would reach a different result if an EIS were prepared. *See, e.g., Public Employees for Environmental Responsibility*, 177 F. Supp. 3d at 156. The relevant question is whether the Corps' errors were material to its ultimate FONSI. *Id*. at 156-57. As we have explained, the Corps' errors in this case are central to the environmental issues implicated by the Project (historic sites, unique resources, public controversy cumulative impacts) and the fundamental purposes of the NEPA (public disclosure and participation, consideration of alternatives).[13] There is no reasonable basis to conclude that the Corps' arbitrary and capricious decision-making on these points was immaterial.

III. THE CORPS VIOLATED THE NHPA

This case turns on the distinctions between Sections 106 and 110(f) of the NHPA — two distinct statutory requirements interpreted by two different agencies using separate regulations and guidance documents.

[13] In contrast, the cases on which Dominion relies concern picayune procedural matters (*see Nevada v. Department of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006)); situations where the agency defendant had no statutory authority to act on any further environmental review (*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004); *Ill. Commerce Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988)); or fail to address any question of harmless error (*Mayo v. Reynolds*, 875 F.3d 11 (D.C. Cir. 2017)). They are entirely inapposite to this case.

Section 106 establishes a process by which federal agencies must "take into account" the effects of their undertakings on sites listed on or eligible for listing in the National Register of Historic Places:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

54 U.S.C. §306108. Congress gave the ACHP authority to implement and interpret Section 106 through the issuance of regulations. 54 U.S.C. § 304108. Those regulations, published at 36 C.F.R. part 800, specify a consultation process in which federal agencies must assess the effects of their undertakings on historic properties that are listed or eligible for listing on the National Register, and consider meaningful alternatives thereto. By their terms, the regulations are specifically limited to the implementation and interpretation of Section 106. *See, e.g.*, 36 C.F.R. 800.1(b) (other sections of the NHPA "may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the Section 106 process").

Section 110(f) establishes stronger protections for a special category of highly significant historic resources designated as National Historic Landmarks. 54 U.S.C. § 306107. Enacted as part of a comprehensive set of NHPA amendments which were designed to expand federal agency responsibilities to preserve and protect historic properties, Section 110(f) provides as follows:

> Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark.

Id. Congress gave NPS (and not ACHP) authority to implement and interpret Section 110(f). *See, e.g.,* 54 U.S.C. §306101.[14] NPS has issued guidelines addressing the implementation of Section 110(f) (the "*Section 110 Guidelines*"). 63 Fed. Reg. 20496 (April 24, 1998). The *Guidelines* confirm that Section 110(f) requires a "higher standard of care," and identify decision-making criteria to guide agency implementation of the statutory mandate to "undertake such planning and actions as may be necessary to minimize harm to [NHLs]" to the maximum extent possible. *Id.* at 20503.

One of the topics addressed in the *Section 110 Guidelines* is the scope of an agency's obligation to consider alternatives under Section 110(f). 63 Fed. Reg. at 20503. In situations where a project may directly and adversely affect an NHL, the *Guidelines* direct the lead federal agency to "consider all prudent and feasible alternatives to avoid an adverse effect on the NHL." *Id*. Before determining that any alternative is infeasible for cost or other reasons, the agency must undertake a three-part balancing test to weigh the potential grounds for infeasibility against the preservation purpose of Section 110(f). *Id*.

A. Section 110(f) Applies Here

As noted above, Section 110(f) applies whenever a Federal action "may directly and adversely affect any National Historic Landmark." 54 U.S.C. § 306107. It is undisputed that the Project will adversely affect Carter's Grove, a National Historic Landmark. AR 731. And it is indisputable that effects on Carter's Grove will be the direct result of the Project itself. There is no other intervening cause.

[14] 54 U.S.C. § 306101(b) refers to "the Secretary." Other sections of Title 54 clarify that this means the Director of the NPS. 54 U.S.C. §§ 100102(1), 100102(3), 300316, 320102(a).

In this litigation, the Corps and Dominion have nonetheless taken the position that Section 110(f) is inapplicable. Instead, they assert that (i) the statutory term "directly affect" really means "physically affect"; and (ii) the Project's effects on Carter's Grove will "only" be visual. Corps at 61-64; Dominion at 64-67.

Plaintiffs' motion pointed out that Defendants' litigation position is not supported by any findings or analysis in the MFR. NTHP at 35-36. In response, Defendants claim that the relevant material can instead be found in an e-mail prepared more than a year prior to the MFR's issuance. Corps at 65 n.49; Dominion at 63. The Corps (but not Dominion) further asserts that this June 20, 2016, e-mail is referenced in the MFR and therefore falls within the scope of the agency's decision. Corps at 65 n.49. But the Corps fails to disclose that this reference is nothing more than a passing citation buried in a recitation of procedural background. *See* AR 755. The MFR — the document in which the Corps is required to explain the basis for its decision — simply does not contain any findings or analysis in support of Defendants' litigation position on Section 110(f). *Id*. For that reason alone, Defendants' arguments should be rejected. *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947); *see also PSEG Energy Resources & Trade v. FERC*, 665 F.3d 203, 210 (D.C. Cir. 2011) ("an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself") (quoting *TNA Merchant Projects v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010)).

Even if a bare reference to an e-mail could substitute for reasoned agency analysis and findings, Defendants' reliance on the Corps' June 20, 2016, e-mail would not withstand scrutiny. The e-mail concludes that effects on Carter's Grove will be "indirect" within the meaning of a March, 2013 guidance document titled *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (the "*Handbook*"). AR 25871. That conclusion is flawed in two fundamental

respects. *First*, as its title makes clear, the *Handbook* does not — and does not purport to — address agency compliance obligations under Section 110(f); it focuses solely on NEPA and Section 106. AR 29676; *see also* 29679-80 (addressing scope). *Second*, the *Handbook's* purpose is to provide guidance for implementing defined procedures coordinating Section 106 with NEPA review. *Id*.; see also AR 29685-29708. During the administrative process, Plaintiffs repeatedly asked for better coordination between Section 106 and NEPA reviews, pointing out that the absence of such coordination compromised effective participation in both processes. *See, e.g.*, AR 24583-84 (NTHP comments); AR 3259 (ACHP summary of consulting party concerns). The Corps refused Plaintiffs' coordination requests and never made a draft EA available for public review and comment. Having denied reasonable requests for NEPA-Section 106 coordination, the Corps cannot now rely on the guidance that might have applied to a properly coordinated process. *See* AR 3259 (ACHP letter criticizing the Corps for failing to use the coordination process set forth in the *Handbook*).

The Corps vaguely suggests that its Section 110(f) decision-making is supported by ACHP's Section 106 regulations. Corps at 61. This argument fails for each of five independent reasons. *First*, the Section 106 regulations cited in the Corps' brief are nowhere identified in the MFR (or the July 20, 2016, e-mail, for that matter) as the basis for the agency's decision-making. *Second*, although the Section 106 regulations require agencies to consider both direct and indirect effects they do not draw a specific distinction between how the two are to be treated. *See* 36 C.F.R. §§ 800.5, 800.16. *Third*, the Section 106 regulations explicitly disclaim any application to other sections of the NHPA. 36 C.F.R. § 800.1(b) (other sections "are not intended to be implemented by the procedures in this part except insofar as they relate to the

Section 106 process").[15] The *Handbook* was authored exclusively by ACHP and CEQ, neither of which has been given authority from Congress to interpret Section 110(f); NPS, which does have that delegated authority, was not involved in the *Handbook*'s development. *Fourth*, Congress gave NPS (rather than ACHP) responsibility for interpreting and implementing Section 110(f), and NPS has made it very clear that the Project "directly" affects Carter's Grove within the meaning of the statute. *See, e.g.,* AR 24398, 143491-92. *Fifth*, Defendants' argument would fail even if the Court were to focus on ACHP's interpretation of Section 110(f) rather than that of NPS. After carefully reviewing the law and the facts relevant to this case ACHP found

> "The use of the term 'directly' in Section 110(f)…refers to causation and not physicality. Thus visual effects can be a direct consequence of an undertaking, and trigger the federal agency's responsibility to comply with Section 110(f)."

AR 30861. Speaking directly to the argument now presented in Defendants papers, ACHP went on to conclude that "the distinction the Corps is making between direct and indirect effects is not supported by an appropriate interpretation of the statute." AR 24562.

Dominion (but not the Corps) points to the fact that during the Section 106 process the Corps assigned Carter's Grove to the Project's "Indirect Area of Potential Effect" rather than the "Direct Area of Potential Effect." Dominion at 65. But that fact is not determinative of whether Section 110(f) applies. The concept of an Area of Potential Effect ("APE") is unique to Section 106. *See* 36 C.F.R. §§ 800.4 (a)-(c), 800.16. It is not part of Section 110(f) or the Section 110(f) Guidelines. 54 U.S.C. § 306107(f); 63 Fed. Reg. at 20503. It is hardly surprising, then, that the Corps' stated basis for separating the "Indirect Area of Potential Effect" from the "Direct

[15] Both Defendants have worked hard to create the impression that these regulations interpret and implement Section 110(f) as well as Section 106. *See, e.g.,* Corps at 63 (referring to "ACHP's regulations implementing Section 110(f)), Dominion at 68 (referring to "ACHP's regulations implementing Sections 106 and 110(f)"). The plain language of the regulations says otherwise (36 C.F.R. § 800.1(b)) as does the plain statutory language of the NHPA itself (54 U.S.C. § 306101).

Area of Potential Effect" made no mention of Carter's Grove or Section 110(f). *See* AR 142322-23. Rather, the Corps distinguished the two APEs in order to clarify survey requirements for sub-surface archaeological resources where ground disturbance was anticipated. *Id*. The distinction between the two APEs was a project management tool rather than a legal determination. *Id*. It does not render Section 110(f) inapplicable.[16]

Defendants also take issue with NPS's determination that that the Project is subject to Section 110(f), alleging that NPS' analysis of the Project is inconsistent with a prior Section 110(f) review of the Cape Wind energy project. Corps at 63-64; Dominion at 66. But alleged inconsistencies in NPS' analysis were not identified in the MFR as a reason for the Corps' decision, and they cannot now serve as the basis for upholding that decision. Moreover, the allegations are without basis. For the Cape Wind project, NPS carefully reviewed the facts and the law before concluding that the project's visual effects did not trigger the requirements of Section 110(f). AR 30087-30104. In doing so, the agency explicitly noted that "[d]eterminations like this are necessarily made on a case by case basis, on the facts of a particular undertaking, and the NHL at issue" (AR 30088) and, therefore, "the conclusions the NPS reaches [for Cape Wind] that the visual intrusions are not a direct and adverse effect does not affect the NPS's ability in other circumstances to find that a visual intrusion can cause a direct and adverse effect on an NHL" (AR 300098). NPS used the same fact- and location-specific approach in its

[16] Likewise, the fact that the State Historic Preservation Officer (SHPO) approved the Section 106 APE, referenced by Dominion at 65, is not relevant for Section 110(f) purposes. SHPOs have defined duties (including duties with respect to determining the boundaries of an APE) under Section 106 (*see, e.g.*, 36 C.F.R. §§ 800.4, 800.5, 800.6), but they have no authority to determine which projects are subject to Section 110(f) and which are not.

Section 110(f) analysis of the Project. Although the outcomes of the two analyses were different, the agency's approach was consistent. [17]

It is also worth noting that Defendants' proposed rule limiting Section 110(f) to physical effects would produce absurd results for a wide variety of projects where federal agencies have permitting, funding or other review roles that trigger the application of the NHPA. For example, Defendants' interpretation would allow construction of even the most massive federally permitted projects immediately adjacent to the boundary of an NHL without triggering Section 110(f) review. Such projects could harm the rural character and setting of an NHL like James Madison's Montpelier, or the sacred character and feeling of an NHL like the Sixteenth Street Baptist Church in downtown Birmingham, Alabama. In the West, the Bureau of Land Management could approve new mining operations or oil and gas drilling just six inches outside the boundary of Mesa Verde or other sensitive archaeological NHLs, without applying Section 110(f)'s heightened standard of care. Or a federally-permitted transmission line could be built immediately adjacent to the San Jacinto Battlefield NHL in Texas. Adopting the Respondents'

[17] NPS' analysis of Cape Wind addressed two NHLs: the Kennedy Compound and the Nantucket Historic District. For each one, NPS focused its analysis on whether the setting of the resources would be diminished so as to constitute a direct and adverse effect. The Cape Wind project was proposed to be developed approximately 13 miles from the Nantucket Historic District (significant primarily for its working waterfront) and 6 miles from the Kennedy Compound (significant primarily for its association with the Kennedy family). NPS considered the visual impact, the context, and the specific elements of historic significance for each NHL before making case- and resource-specific determinations that "the adverse effect to each NHL is visual only, limited in overall scope and impact, and does not diminish the core significance of either NHL." NPS used the same approach to consider impacts to Carter's Grove. Unlike the Cape Wind project, Dominion's Project is approximately 1.5 miles from the boundaries of Carter's Grove and would be much more visible. And unlike the NHLs at issue in Cape Wind, the undeveloped nature of the landscape of Carter's Grove and the view of a largely undeveloped riverscape from the property are integral to the significance of the site. NPS performed a visual impact study that quantified the impact to Carter's Grove and determined that it would be significantly harmed. As a result, NPS determined that Carter's Grove would suffer a direct and adverse effect that triggers the application of Section 110(f).

interpretation would effectively gut the statute's ability to provide a higher standard of care for NHLs, as Congress intended.

In the end, however, it is the plain language of the statute that is fatal to Defendants' position. Section 110(f) applies to "any Federal undertaking that may directly and adversely affect any National Historic Landmark." 54 U.S.C. § 306107. Plaintiffs' motion papers pointed out that plain language definitions of "directly" refer to causation rather than physicality (NTHP at 36-37 and n.7), and neither Defendant has meaningfully disputed that fact (Corps at 62; Dominion at 66). If Congress had meant to say "physically" rather than "directly," it could easily have done so.

Moreover, even if Defendants could establish that "directly" is ambiguous — a task neither one has even attempted — NPS's interpretation of Section 110(f), not the Corps', would be entitled to deference. The regulation and guidance invoked by Defendants apply to Section 106, not to Section 110(f). And, in any event, the agency which authored the regulation and guidance has explicitly rejected Defendants' position on Section 110(f). AR 30861, 24562. There is no reasonable basis to uphold the Corps' "finding" that Section 110(f) is inapplicable.

B. The Corps Failed to Comply With Section 110(f)

Reversing course, Defendants also claim that they did, in fact, comply with Section 110(f)'s heightened standard of care. Corps at 64-66; Dominion at 67-72. The claim is difficult to reconcile with their strenuous efforts to demonstrate that Section 110(f) never applied — and, moreover, that they never truly *believed* Section 110(f) applied — in the first place. *See* Corps at 61-64; Dominion at 64-67. Indeed, the MFR contains no findings or substantive analysis even referencing Section 110(f). AR 661-772. Nor have Defendants pointed to any other record evidence that could plausibly be interpreted as a reasoned, explicit, and intentional analysis in

which the Corps applied (i) the statutory mandate (54 U.S.C. § 306107) and (ii) the Guidelines' three-part balancing test for Section 110(f) alternatives (63 Fed. Reg. at 20503). *See* Corps at 64-66; Dominion at 67-72.

Instead, Defendants suggest that they "complied" with Section 110(f) by following ACHP's regulations for the Section 106 process. Corps at 64-65; Dominion at 67-69. In particular, they rely on 36 C.F.R. § 800.10, a regulation requiring that certain notices be sent to NPS and ACHP. But that regulation does not address the analyses mandated by Section 110(f) and the *Section 110 Guidelines.* 36 C.F.R. § 800.10. Nor does it excuse the Corps from completing those analyses. 36 C.F.R. § 800.10. The Corps' issuance of the notices required by 36 C.F.R. § 800.10 may have been necessary, but it was not sufficient to establish compliance with Section 110(f)'s directive that federal agencies to must "to the maximum extent possible" undertake actions and planning intended to "minimize harm" to NHLs. 54 U.S.C. § 306107.

Indeed, ACHP has made it clear that 36 C.F.R. § 800.10 was never intended to limit, define, or interpret agency compliance obligations under Section 110(f). The issue was explicitly addressed in a 2000 rulemaking process, during which a commenter questioned whether 36 C.F.R. § 800.10 implements Section 106 or Section 110(f). *See* 65 Fed Reg. 77698, 77709 (Dec. 12, 2000). ACHP's response explained that 36 C.F.R. § 800.10 addresses ACHP participation in Section 106 reviews involving NHLs:

> Section 211 of the NHPA authorizes [ACHP] to promulgate regulations to implement [NHPA] section 106 in its entirety. [ACHP] notes that undertakings affecting [NHLs] are subject to section 106 review. NHLs are 'historic properties' listed on the National Register. The provisions of §800.10 lay out how [ACHP] may participate in the section 106 review of these particularly important historic properties, how [ACHP] may request a report from the Secretary of the Interior pursuant to section 213 of the NHPA and how the Council will provide a report to the Secretary on the outcome of the consultation.

65 Fed. Reg. at 77709. This explanation is entirely consistent with the text of the Section 106 regulations (of which 36 C.F.R. § 800.10 is a part), which disclaims any applicability to other sections of the NHPA. 36 C.F.R. § 800.1(b). For this reason, too, compliance with the notice requirements of 36 C.F.R. § 800.10 does not establish compliance with the higher standards of Section 110(f).

Dominion (but not the Corps), also argues that the Corps complied with Section 110(f) because "the Project's route was chosen to minimize to the maximum extent visual effects on Carter's Grove." Dominion at 70. The argument is flawed in several respects. *First*, the portions of the record on which Dominion relies do not actually reflect any reasoned application or discussion of the standards set forth in Section 110(f) and the *Section 110 Guidelines*. *See* AR 741, 150107. *Second,* the Project route was developed and proposed by *Dominion* during the SCC proceedings. There is no evidence that the Corps — the federal agency which must comply with Section 110(f) — played a role in those proceedings. Nor is there evidence that the Corps subsequently revised (or even requested revisions to) Dominion's proposed route in order to reduce impacts on Carter's Grove. *Third,* Dominion fails to account for the fact that alternative project routes, including routes that would not have affected NHLs, were dismissed from consideration without application of the three-part balancing test set out in the *Section 110 Guidelines*. *See, e.g.,* AR 699-719 (failing to mention Section 110(f) in discussion of alternatives) ; 743-766 (failing to mention Section 110(f) in discussing "compliance with other laws, policies, and requirements"). There is simply no evidence to support the idea that the Corps applied Section 110(f) when designing the Project's route.

Dominion also refers to the MOA, arguing that ACHP's execution of the document is "especially significant" to demonstrating compliance with Section 110(f). Dominion at 70 and

n.53. But the MOA does not determine compliance with Section 110(f), and Congress did not give ACHP authority to interpret Section 110(f).[18] Moreover, Dominion reads far too much into ACHP's signature. As noted above, ACHP executed the MOA only after concluding that the Corps had decided to approve the Project with or without completing the Section 106 process (AR 3253). It signed the document "reluctantly" (AR 3257), and did so in the hope of "help[ing to] prevent the siting of similar projects" (AR 3253) and persuading the Corps and Dominion to undo the Project's "direct and indirect effects by replacing the overhead transmission line with a buried line under the James River" (AR 3253). ACHP's signature can hardly be considered evidence — let alone conclusive evidence — that the Corps complied with Section 110(f).

The Corps and Dominion place great weight on *Presidio Historical Association v. Presidio Trust*, 811 F.3d 1154 (9th Cir. 2016). Corps at 64-66; Dominion at 71. But that case only serves to highlight the inadequacy of the Corps' approach to Section 110(f). *Presidio* confirms that an agency cannot satisfy Section 110(f) simply by complying with Section 106. *Id*. Section 110(f) requires "something more." *Presidio*, 811 F.3d at 1170. In *Presidio*, the lead agency satisfied this requirement by "dramatically" changing its proposed action, adopting portions of an alternative design plan proposed by historic preservation groups, and carefully weighing (in an EIS) alternative project locations *with the objective of historic preservation in mind*. *Id*. at 1171. None of those things happened here. *Presidio* therefore confirms that the Corps failed to meet the "heightened standard of care" required by Section 110(f).

[18] It bears repeating (*see* NTHP at 35) that the Corps inserted in an early draft of the MOA some boilerplate language stating that the agency had complied with Section 110(f). AR 26125. NPS objected to the Corps' claim. AR 24398. Rather than explaining what it had done to comply with Section 110(f), the Corps withdrew its assertion of compliance. The final MOA makes no assertion of Section 110(f) compliance.

IV. THE CORPS VIOLATED THE CLEAN WATER ACT

A. The Corps Arbitrarily and Capriciously Concluded that the Project is the Least Damaging Practicable Alternative

As a preliminary matter, the Court need look no further than Section II.C, *infra* to find that the Corps violated the Clean Water Act ("CWA"). For all the reasons explained in that section, the Corps arbitrarily and capriciously dismissed less environmentally-damaging alternatives. For those same reasons, the Corps' exclusion of all but two single alternatives as "impracticable" was arbitrary and capricious. However, a finding supporting Corps' alternatives analysis under NEPA does not necessarily result in a proper alternatives analysis under the CWA. This is because, in contrast to NEPA's focus on process, the CWA "contain[s] substantive environmental standards." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engineers*, 524 F.3d 938, 947 (9th Cir. 2008). For all the additional reasons below, the Corps' decision that the Project was the least damaging practicable alternative ("LEDPA") under the CWA was arbitrary and capricious.

Defendants do not dispute that the Corps' decision here is subject to a heightened standard under the CWA because the Project is not water dependent and involves a special aquatic site. 40 C.F.R. § 230.10(a)(3); Corps at 71-72. In this situation, the Corps must rebut two presumptions that arise: 1) that there are "practicable alternatives that do not involve special aquatic sites," and 2) that these alternatives "have less adverse impact[s] on the aquatic ecosystem." 40 C.F.R. § 230.10(a)(3). These presumptions hold unless "clearly demonstrated otherwise." *Id.*; *see also Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269, n.12 (10th Cir. 2004) ("[U]nder the CWA, it is not sufficient for the Corps to consider a range of alternatives to the proposed project: the Corps must rebut the presumption that there are practicable alternatives with less adverse environmental impact.") The Corps is also required to

"independently evaluate" the information provided by Dominion in overcoming these presumptions. 40 C.F.R. § 230.10(a); *see also Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 543 (11th Cir. 1992) (The Corps has a duty to "conduct[] its own independent evaluation [of practicable alternatives].")

Taken together, these standards mean that "the Corps may not issue a § 404 permit unless the applicant, 'with independent verification by the [Corps], ... provide[s] detailed, clear and convincing information *proving*' that an alternative with less adverse impact is 'impracticable.'" *Greater Yellowstone Coal. v. Flowers*, 359 F.3d at 1269, n.12 (emphasis in original) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.,* 305 F.3d 1152, 1186-87 (10th Cir.2002) (requiring denial of a permit "where insufficient information is provided to determine compliance").

The crux of Defendants' CWA argument is that the Corps properly dismissed 26 of 28 alternatives based on impracticability, and then selected the LEDPA from the remaining two alternatives. Corps at 68. Plaintiffs are not arguing, as the Corps suggests, that the CWA requires the Corps to conduct a LEDPA analysis for every single alternative, even those properly determined to be "impracticable." *Id.* Rather, the Corps excluded from consideration a number of alternatives (including less environmentally damaging alternatives) based on unfounded premises and unverified information. The Corps points to four factors justifying their exclusion of all but two alternatives: NERC compliance, cost, time and logistics. Corps at 70. However, a closer look at the Corps' "evaluation" of these factors (*id.* at 69) demonstrates that the Corps did not "articulate[] a rational connection between the facts found and the choices made." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606 (D.C. Cir. 2016).

1. The Corps Failed to Conduct an Independent Evaluation

To uphold the Corps' permit decision in this case, this Court must satisfy itself that the Corps "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *State Farm,* 463 U.S. at 43; *see also Sierra Club v. Van Antwerp,* 709 F. Supp. 2d 1254, 1267-68 (S.D. Fla.), *aff'd*, 362 F. App'x 100 (11th Cir. 2010). In *Sierra Club v. Van Antwerp,* the Corps had relied heavily on industry information (a report from the applicant) in determining practicable alternatives under section 404 of the CWA. *Id.* In setting aside the agency's decision, the *Antwerp* Court concluded that "[t]he Corps made no effort, or at least the record is silent as to any such effort, to independently evaluate" the practicability of alternatives. *Id.* at 1266.

Aware of this duty, the Corps' decision documents assert in a number of locations that it "independently evaluated" Dominion's conclusions. AR 674, 699, 718, 4337, 22824-85. However, the record is notably absent of any such independent evaluation of three critical pieces of information — NERC compliance, the cost of construction and the timeline for construction — the three reasons Dominion asserted for determining certain alternatives are impracticable. AR 701-14. The Corps simply did not perform rigorous independent evaluations of Dominion's conclusions on these issues, but instead relied on analysis and information provided by Dominion and PJM. *See, e.g.,* AR 702-03 (noting that PJM not the Corps "independently evaluated" the Tabors Alternatives.)

2. The Corps Improperly Excluded Alternatives as Not Practicable Based on NERC Compliance Issues

The Corps did not independently evaluate whether the various alternatives were NERC compliant. When pressed to demonstrate its independent evaluation substantiating the exclusion of 17 alternatives for NERC violations, the Corps points to a single type of evidence —

conclusory, boilerplate letters from PJM asserting that the Skiffes Creek Project is the "most effective and efficient" solution to address the identified reliability criteria violations. AR 5132, 33823, 6401 (collectively,"PJM Letters"). The Corps' reliance on PJM's "independent" analysis for NERC compliance is misplaced for numerous reasons and fails to support their decision to exclude 17 alternatives for NERC violations.

First, PJM is far from an "independent third party" as the Corps asserts. (Corps at 49). In reality, PJM and Dominion are not "independent" of each other and PJM is not a "third party" to this Project. PJM is a regional transmission system operator comprised of member entities. Dkt. 58-1, i (PJM's Corporate Disclosure Statement). Not only is Dominion a member of PJM, but Dominion is listed as a member with an interest of 10% or more in PJM. *Id.* at ii. Thus, the record shows that, when the Corps was faced with suggestions from its own internal engineer to "search for a[n] **independent modeling expert** to avoid a court case" (AR 6211 (emphasis added)), and "**find an unbiased facilitator knowledgeable in the NERC evaluation and load flow monitoring**," (AR 6212 (emphasis in original)), the Corps instead encouraged Dominion to procure a comfort letter from PJM, a related entity in which it possesses a large interest. Dkt. 58-1.

Second, the PJM Letters fail to substantiate the Corps' LEDPA analysis because they do not address the *practicability* of the alternatives. AR 5132, 33823, 6401. The PJM Letters only assert that the Skiffes Creek project is the "*most* effective and efficient solution." *Id.* The PJM Letters do not assert that the Project was the *only* solution. *Id.* The PJM Letters do not assert that other excluded alternatives were impracticable or would fail to meet NERC compliance. *Id.* The PJM Letters do not even state whether they had conducted the same "series of analyses" on all 28 of the alternatives to determine NERC compliance. *Id.* Rather, the Corps uncritically

accepted the boilerplate language in each PJM letter and relied on this for the exclusion of 17 alternatives.[19] *See Friends of the Earth,* 800 F.2d at 835-36 (recognizing that the Corps must rely on information provided by the applicant but must not do so "uncritically".)

PJM's finding that the Project was the "most" effective and efficient solution fails to substantiate the LEDPA analysis because it demonstrates that the Corps improperly disregarded otherwise practicable alternatives for not being the *most* practicable alternative. But that is not the test. The CWA standard does not allow an inquiry or weighing of the relative practicalities of alternatives. *See Delaware Riverkeeper Network v. United States Army Corps of Engineers,* 869 F.3d 148, 159 (3d Cir. 2017) (quoting 40 C.F.R. § 230.10(a)(2)); *Utahans,* 305 F.3d at 1188-89 ("The test is not … whether features of a proposal would make a project *more* desirable.")

3. The Corps Excluded Alternatives as Not Practicable Based on "Cost, Time and Logistics" Without an Independent Evaluation

The Corps also rejected a number of alternatives due to the cost of construction, time of construction, and logistics, but the record is void of any evidence demonstrating that the Corps "independently evaluated" those factors. AR 702-14. Like the NERC compliance issues, the Corps' own internal engineer again questioned the veracity of Dominion's information. AR 6211-12 ("**Dominion's cost estimates of the Trust's alternatives seem bloated and excessive. The construction duration seems too high** … I could not justify upwards of 75% of some of their estimates." *Id.* (emphasis in original).) Yet, the Corps goes on to state in the MFR that they found "no reason to suspect costs are erroneous or misrepresented." AR 689. Because the Corps fails to demonstrate a "rational connection between the facts found and the choices made," its

[19] In fact, the Trust reached out to PJM regarding the analysis, seeking more information. The Trust responded to PJM's letter explaining that TCR sought to develop a technical response, but PJM's letter "does not provide sufficient information to allow TCR" to do so because "the lack of detail ... makes it impossible to assess the validity of PJM's approach or results." AR 5131-32, AR 5002-03. PJM did not respond.

practicability determination based on unverified costs, time and logistics renders its decision arbitrary and capricious. *State Farm,* 463 U.S. at 4.

Moreover, although, increased cost can render an alternative impracticable, increased cost does not support an impracticability determination, if the Corps fails to independently verify and evaluate cost estimates provided by the applicant. *Utahns*, 305 F.3d at 1165-66, 1187. "Alternatives might fail abjectly on economic grounds. But the Corps and, more importantly, the public cannot know what the facts are until the Corps has tested its presumption." *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d at 1267 ("[T]he fact that an alternative might have some unquantified higher operating cost does not mean the alternative is not 'available' or 'capable of being done.'")

B. The Corps Arbitrarily and Capriciously Concluded that the Project is in the Public Interest

Defendants are incorrect that Plaintiffs simply "disagree with the outcome" of the Corps' "careful weighing" of the public interest factors listed in section 320.4(a) of the CWA regulations. 33 C.F.R. § 320.4(a). Rather, the record demonstrates that in determining that the Project is in the public interest, the Corps arrived at a conclusion contrary to its own findings,[20] improperly determined that the Project had no "unresolved conflicts," and failed to properly weigh the negative impacts of the Project, particularly to the historic, cultural, scenic and recreational values outlined in 33 C.F.R. § 320.4.

[20] We have already discussed in detail the ways in which the public interest determination was contrary to the evidence in its Opening Brief in Support of its Motion for Summary Judgment. NTHP at 39.

1. The Corps Improperly Determined That There Were No "Unresolved Conflicts As to Resources Use"

Section 320.4(a)(2)(ii) requires the Corps to consider "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work" in any instance in which there are "unresolved conflicts as to resource use." 33 C.F.R. § 320.4(a)(2)(ii). Despite the public outcry, opposition from other federal agencies and Corps' own recommendations that more investigation was needed into the alternatives, cost estimates and timelines, the Corps determined that "there were no unresolved conflicts as to resources use." AR 736. There were (and still are) a number of unresolved conflicts as to resource use including: 1) the improper disregard of practicable and reasonable alternatives (*see* Section II, C, *infra*); 2) the ability of the MOA to properly mitigate the damaging impacts of the project (*see* Section II.A.2, *infra*); and 3) continuing comments from many agencies and members of the public disputing the Corps' assessment of the Project impacts (*see* Section II.A.1.C.; *E.g.*, AR 114310-12; AR 7257-59, AR 5827-28; *see also* AR 3253 ("the majority of consulting parties believe the adverse effects … cannot be appropriately mitigated"). In light of these unresolved conflicts, the Corps had no rational basis to conclude that "the Corps has left no issue unaddressed." AR 736. *See Brodsky v. U.S. Nuclear Regulatory Comm'n,* 704 F.3d 113, 119 (2d Cir. 2013); *Sierra Club*, 719 F. Supp. 2d at 65. Based on this finding of no unresolved conflict, the Corps excused itself from its mandatory duty to analyze the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work, as is required under 33 C.F.R. § 320.4(a)(2)(ii). The Corps' failure to do so was arbitrary and capricious.

2. The Corps Did Not Properly Weigh The Negative Effects of the Project

Many concerns about negative effects from this project were raised by the public and federal agencies. *See, e.g.*, AR 11431012, 7257-59, 5827-28; *see also* AR 3253 ("the majority of consulting parties believe the adverse effects … cannot be appropriately mitigated"). However, those concerns were cursorily dismissed as "subjective" and "isolated." AR 729. The Corps also failed to properly account for long-term and cumulative impacts (AR 728-734), despite finding that the impacts would be "detrimental" and "permanent." AR 736. In doing so, the Corps failed to comply with its own general standards regarding "historical, cultural, scenic and recreational values." 33 C.F.R. § 320.4(e). That section explains that a proper "full evaluation" of the public interest "requires" that the Corps provide "due consideration" to certain factors:

> [D]ue consideration [must] be given to **the effect which the proposed structure or activity may have on values** such as those associated with **wild and scenic rivers, historic properties and National Landmarks, National Rivers**, National Wilderness Areas, **National Seashores**, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas …. **Action on permit applications should … be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established**.

(Emphasis added.) The Corps' public interest analysis failed to give due consideration to historic, cultural, scenic and recreational values impacted by the Project. The Corps cannot simply disregard these values as "subjective" or simply a "passion" for a property (Dominion, 73); it is mandated to provide "due consideration" to these values and "avoid significant adverse effects" on those values. 33 C.F.R. § 320.4(e).

The Corps also dismissed concerns about the Project's permanent visual impacts by pointing to the proposed mitigation. AR 728-36. The Corps found that the Project would have

an "adverse" impact on six of the public interest factors it is mandated to consider. AR 728-31, 733 (finding "adverse" and/or "detrimental" impacts on the following factors: conservation, economics, aesthetics, wetlands, historic properties and recreation). For each of these factors, the Corps heavily relied on the unsubstantiated assertion that "the implementation of the proposed mitigation" would render those adverse impacts "negligible." *Id.* However, as explained in more detail in section II.A.2, *supra,* and as consistently pointed out by the public and many of the agencies, the MOA fails to adequately mitigate all adverse impacts. AR 728-36.

In short, the Corps consistently heard the views of Dominion about alleged benefits of the Project, and the Corps simply adopted those views without independently verifying them through supporting factual data, studies or analysis. Yet Plaintiffs and members of the public — the people who will suffer the environmental consequences — were denied the same treatment. The balancing of harms and benefits, and the presumption against wetland fills and in favor of wetland preservation, required a full, informed process by the agency. That did not occur. This Court should vacate the permit because the Corps' conclusion that the public interest test was met was arbitrary and capricious.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment, vacate Dominion's permit, and remand for further proceedings consistent with federal law and the Court's instruction to properly examine project impacts and explore all reasonable and practicable alternatives under NEPA and CWA.

Respectfully submitted this 2nd day of March, 2018.

/s/ Matthew Adams

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Attachment A

I, Carolyn Black, declare as follows:

1. The facts set forth in this declaration are based upon my personal and professional knowledge and if called as a witness in this proceeding, I could and would testify competently thereto under oath. As to those matters that reflect an opinion, they reflect my personal and professional opinion on the matter.

2. I live in Williamsburg, Virginia and am a member of the National Trust for Historic Preservation. I work in the Visitor Center at Jamestown Island as a contractor with the Chesapeake Conservancy. My work involves environmental education, historical research, and public outreach and communications. One of the Chesapeake Conservancy's main conservation partners is the Captain John Smith Chesapeake National Historic Trail (Trail) managed by the National Park Service. Through this partnership, we have worked to increase public access to the Trail by providing opportunities for underserved youth to learn how to kayak on its waters. I have also had the experience of working directly with American Indian tribes in the Chesapeake Bay to protect and interpret ancestral lands in Virginia, including lands in and around the James River near Jamestown, Virginia and other areas located along the Trail.

3. The Trail, which was established by Congress in 2006, includes parks, museum sites, driving tours, and related land and water trails that are located along the route of Captain John Smith's historic voyage routes from 1607-1609. The Trail starts and ends at Jamestown where Smith and his crew began and ended their exploration. The lower James River, and particularly the area near Jamestown, is one of the most significant sections of the Trail.

4. Visitors to the Trail enjoy it both by land and on water. Just by driving or cycling on the Colonial Parkway, one is experiencing the Trail. On my way home from work every day, I enjoy the Trail myself, and I observe people walking and biking along the Trail, in awe of the

pristine beauty of the surrounding James River. Powhatan Creek, including where it intersects the James River near Jamestown, is a particularly popular canoeing and kayaking destination. It is my favorite place to paddle in Tidewater Virginia, and it hosts paddlers daily throughout the spring and summer months who depart from the James City County Marina and paddle down past Jamestown Island and into the James River. My experience of the Trail, and that of many other kayak and canoe enthusiasts who experience it on the water, will be greatly impacted by the viewshed damage caused by transmission towers.

5. This area is also a popular place for the abundance of bird species which migrate throughout Virginia and the people who observe them. The active and dedicated Williamsburg Bird Club frequents College Creek Beach, which is on the Trail and is an incredibly popular swimming and fishing spot accessible by the Colonial Parkway. The transmission lines would be readily visible from the Trail at College Creek Beach. During a recent one-hour walk on the beach, the bird club observed 28 different species of birds here including six bald eagles, ten Great Blue Herons, and a Bonaparte's Gull. The Williamsburg Bird Club and other local naturalist groups report these data to an international database managed by the Cornell Lab of Ornithology as an ongoing citizen science project. Virginia is a critical habitat for bird populations, where over 470 of the 900 bird species found in the continental United States are found in the Commonwealth. The transmission lines may disrupt their flight patterns and possibly contribute to habitat loss if bird species find the damaged landscape to be unsuitable for nesting and breeding. Additionally, the transmission lines would harm the experience and enjoyment of those, like me, who use and enjoy the natural, historic setting of the College Creek Beach area.

6. This transmission line would cause permanent and irreparable harm to the Trail, as well as to my ability, and the ability of all visitors, to use the Trail to retrace the steps of Captain John Smith.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Carolyn Black

Carolyn Black

Executed this 28th day of February, 2018.