UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, *et al.*, Plaintiffs, v. KENNETH SALAZAR, *et al.*, Defendants, and PPL ELECTRIC UTILITIES CORPORATION and PUBLIC SERVICE ELECTRIC & GAS COMPANY, Intervenor-Defendants.	Case No. 1:12-cv-01690-RWR

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

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GLOSSARY OF ABBREVIATIONS

Plaintiffs cite to the following items using the abbreviations described below.

AR	The Administrative Record in this action
DEIS	Draft Environmental Impact Statement, Nov. 21, 2011 (AR 46458 *et seq.*)
FEIS	Final Environmental Impact Statement, Aug. 31, 2012 (AR 47826 *et seq.*)
NID	Non-Impairment Determination, appended as Attachment A to the ROD docketed at ECF No. 22-2
ROD	Record of Decision, Oct. 1, 2012 (AR 111758 *et seq.*)

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INTRODUCTION

Defendants have not put forward any reasoned justification for the National Park Service's ("Park Service") decision to grant a right-of-way and special use permit that would cause severe unmitigated impacts on three national park units ("Parks"). Intervenors PPL Electric Utilities Corporation and Public Service Electric and Gas Company (jointly, "Companies") suggest that, notwithstanding the enormous investment of resources in the environmental review process and the high-level involvement of the Secretary of the Interior, the transmission line at issue in this case will result in minor impacts to the Parks that do not implicate the National Park Service Organic Act's "impairment" standard. 16 U.S.C. § 1 (1978). However, the Companies' own obligation to provide $66 million in compensatory mitigation funds underscores the environmental significance of this project.

The Park Service has recognized and disclosed the serious adverse impacts that will flow from construction of the Susquehanna to Roseland Transmission Line ("S-R Line" or "Project") but has failed to explain why those adverse impacts do not amount to impairment of iconic scenic values and incomparable natural resources. The agency insists that its "Non-Impairment Determination" represents a professional judgment that cannot be second-guessed. However, having failed to provide any rationale for non-impairment that is consistent with the factual record, and having failed to announce any principled grounds for distinguishing between major adverse impacts and impairment, the Park Service's determination is not entitled to deference from this Court.

Much of the argument presented by the Companies and the Park Service boils down to the proposition that the Park Service made the best deal it could in light of existing property rights that would allow the Companies to proceed with construction of the S-R Line with or

without approval from the Park Service. However, as the Park Service itself made clear to the Companies, they cannot build the S-R Line in their existing right-of-way without violating safety standards. Given the Park Service's broad discretion to deny any new request for a right-of-way, it had an affirmative obligation to prevent construction that is inconsistent with preserving the Parks as the Organic Act requires.

The agency also had an obligation to submit its compensatory mitigation plan for public review under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4371 (1970) ("NEPA"). Remarkably, the Park Service and the Companies both take the position that $66 million in cash mitigation funds is incidental to the Park Service's approval of the Companies' proposal. However, the record is clear that approval of the Companies' preferred Alternative 2 was contingent on payment of millions in compensatory mitigation. The decision to countenance the damage associated with approving Alternative 2 in exchange for mitigation funds was a compromise that significantly affects the environment, and it requires full and fair consideration in the NEPA process.

ARGUMENT

I. THE PARK SERVICE VIOLATED THE ORGANIC ACT

The Park Service could not select the Companies' proposed project – Alternative 2 – if it would impair park resources and values in violation of the Organic Act, 16 U.S.C. § 1. This central premise is undisputed. Thus, in issuing the challenged permit and granting the challenged right-of-way, the Park Service was required to assess whether the impacts of Alternative 2 would rise to the level of impairment and to "articulate a satisfactory explanation" for its ultimate conclusion. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 100 (D.D.C. 2006) (internal quotation marks omitted) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d

1194, 1198 (D.C. Cir. 2005)). Because the agency failed to provide that essential rationale, the permit and right-of-way cannot stand. Contrary to the Companies' arguments, this major transmission project will result in serious harm to the Parks, and as disclosed in the Park Service's own analysis, that harm may rise to the level of impairment. In making a finding of non-impairment, the Park Service failed to reconcile its conclusion with the full suite of adverse impacts disclosed in its NEPA documents or to explain why enduring, unmitigated damage to core park resources does not amount to impairment. While Defendants argue that the Park Service was effectively constrained to select Alternative 2 in order to prevent the Companies from proceeding unilaterally with Alternative 2b in their existing ROW, this argument misrepresents the Companies' property right and ignores the agency's broad discretion to protect the Parks.

A. The Impacts of the S-R Line Implicate Impairment

Defendants mischaracterize the Project as a minor expansion of an existing use with only minimal incremental impacts on the Parks. In fact, the record shows that the approved S-R Line is a massive undertaking with concededly significant impacts that "degrade scenic and other intrinsic values of the parks, resulting in unavoidable and unmitigated losses to recreational use and visitor enjoyment." AR 73356 (September 18, 2012 Park Service information memorandum for Secretary Salazar).[1] The Project will deconstruct and remove 22 existing transmission towers

[1] The Park Service protests Plaintiffs' emphasis on this statement, claiming that the emphasis is misplaced because recreational use and visitor enjoyment are "not park resources and values whose potential impairment must be considered under the Organic Act." Gov't Br. at 22 n.13. But visitor enjoyment is specifically identified in the Organic Act, which requires the Park Service to "conserve the scenery and the natural and historic objects and the wildlife [of the national park system] *and to provide for the enjoyment of the same*." 16 U.S.C. § 1 (emphasis added). Moreover, the agency's Management Policies, cited verbatim in the Non-Impairment Determination at 2, affirm that "appropriate opportunities to experience enjoyment of [park] resources" is a value that may be impaired. NPS Mgmt. Policies § 1.4.6.

in the Park and erect 26 new, significantly taller towers carrying three times as many high-voltage electric lines across the heart of the most scenically and biologically significant area of the Delaware Water Gap. As the former Superintendent of the Appalachian Trail involved in the review of the Project stated:

> It is not the case that harms from the S-R Line project will represent a mere incremental impact within the existing right-of-way. This is a major new infrastructure project that is slated to slice through some of the most sensitive areas of the Park, and its effect will be different in kind – and substantially worse.

Declaration of Pamela Underhill (Jan. 10, 2012) ("Underhill Decl.") (ECF No. 23-1). Indeed, the record confirms that the impacts of the S-R Line are ones that "would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values." NPS Mgmt. Policies § 1.4.5 (defining impairment).

In attempting to downplay the significance of the S-R Line, the Companies ignore the indisputably significant impacts that required preparation of a voluminous EIS. For instance, erecting 195-feet-tall transmission towers in place of the 80-feet-tall towers of the B-K Line will have major adverse consequences for the Parks' scenic values as the transmission lines will tower above tree line.[2] Thus, the Park Service recognized that the height and location of the new

[2] Defendants emphasize that the B-K Line and its ROW predate the parks' establishment and suggest that authorizing the S-R Line merely continues this "existing use." *See* Gov't Br. at 19. But, setting aside the Park Service's arguments in litigation, the record shows that the agency itself viewed the S- R Line as far more harmful to the Parks than the existing B-K Line. *See* FEIS at 83-87 (Table 4) (AR 47944-48). In the Final EIS, for instance, the agency notes in its assessment of visual resources that the existence of the B-K Line is "in keeping with the parks' enabling legislations, NPS *Management Policies 2006*, and all other applicable federal and state laws." FEIS at 598 (AR 48459). For Alternative 2, by contrast, the agency concluded that "[i]nstallation of new taller towers would *introduce* a noticeable visual intrusion that would diminish scenic quality." FEIS at 614 (AR 48475) (emphasis added); *see also id.* at 623 (AR 48484) (finding that Alternative 2 will "create a dramatic visual disturbance *where very little disturbance currently exists*") (emphasis added).

S-R Line will "pose[] [a] high risk for drastic scenic degradation." FEIS at 614 (AR 48475). Specifically, the agency concluded that:

> Alternative 2 would result in considerable, and in some cases, severe adverse impacts on visitor experience. Installation of new taller towers would introduce a noticeable visual intrusion that would diminish scenic quality. The presence of large and obtrusive infrastructure in a relatively undeveloped zone would be a distraction and detract from the experience visitors seek when coming to the parks. The visual change would affect a relatively large area, a large number of users, and would exist for the life of the project. It would degrade the regionally unique and unusual wilderness-like viewshed for [the Appalachian Trail] that [the Delaware Water Gap] and [Middle Delaware] provide.

FEIS at 680 (AR 48541).

The location and height of the new S-R Line also will pose a greater hazard for migratory birds and bald eagles because the line "bisect[s] a major migratory bird flyway [along the Kittatinny Ridge] and is adjacent to an important communal roost for wintering bald eagles that is one of only two known winter roosts in [the Delaware Water Gap]." FEIS at 480 (AR 48341). Notably, while the existing B-K Line is consistent with the U.S. Fish and Wildlife Service's Bald Eagle Guidelines, the S-R Line is not. *Compare* FEIS at 467 (AR 48328) *with id.* at 474 (AR 48335). Furthermore, the need to grade and install new and larger tower foundations for the taller towers of the S-R Line translates into significant adverse impacts to geological resources, particularly because seven tower foundations and crane pads would be installed in "rare or unique features and in unstable geologic formations." FEIS at 83 (AR 47944); *id.* at 362 (AR 48223).

All of these impacts will occur in "a particularly sensitive area" of the Delaware Water Gap that happens to be "one of the most undeveloped areas of the park, containing large swaths of contiguous mature forest, few manmade intrusions, unique geological formations, a globally significant rare plant community, and abundant opportunities for solitude." FEIS at 680 (AR

48541). Rare and unique communities comprise approximately 52% of the route, and several of the resources crossed by the S-R Line "are recognized for their superlative biodiversity (e.g., Hogback Ridge and Arnott Fen) and are significant in both park and regional contexts, making any impacts in these locations even more acute." FEIS at 508, 514 (AR 48369, 48375). These features and attributes attract visitors, and this area consequently "plays host to a large proportion of [Delaware Water Gap] users." FEIS at 680 (AR 48541). "Overall," in the agency's assessment, "the significance of the impact of alternative 2 is a result of two considerations: the particularly resource-rich area through which the alternative crosses and the potential to inflict harm to those resources because of the magnitude and duration of the adverse impacts." FEIS at 397 (AR 48258).

In light of these agency findings, Defendants' characterization of the Project's impacts as minor and incremental, bears no rational relationship to the facts in the administrative record. The Park Service found the Project's impacts so severe that the agency signaled its awareness that these impacts "have the potential to violate the Organic Act" by making park resources "unavailable for the enjoyment of future generations." FEIS at 80 (AR 47941); *see also id.* at 397, 680 (AR 482588, 48541) ("Allowing such adverse effects in order to facilitate private infrastructure expansion *would be contrary to NPS practice and principle of protecting and improving these resources*, and of removing incompatible infrastructure to do so.") (emphasis added). Indeed, despite Defendants' portrayal of the Project in briefing, the $66 million put forth

by the Companies as a "necessary offset to the impacts imposed on park resources," ROD at 19 (AR 111777), belies their argument that the project's impacts will be insignificant.[3]

Both the Companies and the Government focus on vegetation clearing within the right-of-way to argue that the S-R Line will have only minor impacts on the Parks. The Companies claim that current vegetation maintenance along the existing B-K Line right-of-way creates a baseline that will not be changed much by construction of the S-R Line. *See, e.g.*, Companies' Br. at 13-15; *id.* at 35. The Defendants point to the Companies' willingness to limit the right-of-way clearing to 200 feet to suggest that the adverse impacts of the Project have been successfully mitigated. *See, e.g.*, Gov't Br. at 8-9. Even if these arguments were accurate, they would not address the serious impacts discussed above that do not relate to vegetation, and in any case, these arguments are unpersuasive with respect to the key vegetation impacts identified by the Park Service in the FEIS.

First, whatever the Companies' post-hoc narrative about clearing vegetation and cutting trees in the right-of-way may be, the record shows that the agency itself found that the most harmful impacts on vegetation will occur outside the right-of-way. *See* AR 73121 (explaining that "the relatively minor impacts of additional cutting and clearing in the existing right-of-way are outweighed by the more significant environmental damage that will certainly occur with the construction and operation of a larger transmission line within the parks"). In other words, Defendants fail to account for the severe and unmitigated vegetation impacts of building high-

[3] Although the Park Service recognized the $66 million compensatory mitigation as a "necessary offset," the agency claims that it "do[es] not rely on compensatory mitigation to establish the decision's compliance with the Organic Act." *See* Gov't Br. at 26 n.15; *see also* Companies' Br. at 36 (noting that the Park Service "was well aware" that it could not rely on compensatory mitigation to justify an action that would result in impairment). In Defendants' characterization, the Companies simply "offered" to transfer this "important and welcome" $66 million to the Park Service to compensate for impacts they were under no legal obligation to compensate. ROD at 19 (AR 111777).

voltage transmission infrastructure beyond clearing within the existing right-of-way. De-construction of the existing B-K Line and construction of the S-R Line will require new access roads and spur roads, pulling and splicing sites, staging areas, and use of heavy equipment – all of which will entail major clearing outside the right-of-way.

Access and spur roads will be constructed outside the right-of-way, leading to permanent loss of vegetation on national park lands. ROD at 2-3 (AR 111760-61); FEIS at 39, 412 (AR 47900, 48273). Although spur roads would be restored after construction, "based on the time taken to reach those existing conditions since the creation of DEWA in 1965, return to existing conditions could take more than 50 years or perhaps complete restoration would never occur." FEIS at 39 (AR 47900). Construction also will require two pulling and splicing sites, each 240,000 square feet or 5.5 acres, both located outside the right-of-way. FEIS at 38 (AR 47899). The pulling and splicing sites and associated spur roads would result in "approximately 22 acres of forest cleared." FEIS at 17 (AR 49126). Vegetation removal also will include clearing a portion of the rare eastern hemlock forest on Hogback Ridge, which would fragment the ridge's forests, essentially "divid[ing the] park into a north and south section." FEIS at 510 (AR 48371). Defendants ignore all of these facts when they assert repeatedly and misleadingly that "[c]onstruction of the S-R Line in the Park . . . will require general tree clearing only within the 4.6 acres of newly granted [right-of-way]." Companies' Br. at 13; *id.* at 15 (same); *id.* at 31 n.20 (accusing Plaintiffs of "significantly overstat[ing] the matter" and emphasizing that the Project would affect "only about 4 acres of mature forest"). As the record confirms, the Companies are significantly understating the impacts of the S-R Line, and their mischaracterization of the facts cannot justify the Park Service's non-impairment finding

The Companies also attempt to redefine the "appropriate baseline" from which "the true incremental impacts" of the S-R Line ought to be judged by reference to "the future maintenance of the B-K Line," which according to the Companies, "would require reconstruction of the existing facilities in the foreseeable future in a manner very similar to the S-R Line." Companies' Br. at 34-35. There are several significant flaws with this argument, the most central one being that the Non-Impairment Determination itself does not rely on this justification. Whatever the Companies' rationale now for why the S-R Line's impacts are not an impairment, this Court reviews the Park Service's determination in light of the agency's own stated rationale and "cannot sustain its action on some other basis the [agency] did not mention." *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 50 (D.C. Cir. 2006). Furthermore, the very concept of "a baseline" is inconsistent with the Companies' attempt to rely on speculative future events. Whether or not it is true that the Companies can reconstruct the B-K Line in much the same way as the S-R Line without requiring any approvals from the Park Service is a question to be decided if and when the Companies attempt to do so.

B. The Agency's Non-Impairment Determination Is Unjustified

In seeking to justify its Non-Impairment Determination, the Park Service insists that the document itself provides a satisfactory rationale. *See* Gov't Br. at 21-24. However, the explanations and conclusions in the Non-Impairment Determination bear no rational relationship to the severe unmitigated harms described in the Final EIS and throughout the record. Moreover, the Non-Impairment Determination is fundamentally arbitrary because the agency failed to articulate any standard for distinguishing between impacts that impair park resources and the identified adverse impacts that will flow from construction of the S-R Line. To survive review, the Park Service "must examine the relevant data and articulate a satisfactory explanation for its

actions including a rational connection between the facts found and the choice made." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 100 (D.D.C. 2006) (internal quotation marks omitted). Here, as in other recent cases that are directly on point, the Park Service failed to meet this standard. *See Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. 2010); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008); *Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006).

1. The Park Service's Reasoning Is Not Sustainable On the Record

Defendants claim that unlike in *Bluewater Network* , *Greater Yellowstone*, and *Mainella*, the Park Service here "articulated a specific rationale, with respect to each affected Park resource, for its finding that the impacts from the S-R Line would not result in impairment." Companies' Br. at 34.[4] Importantly, though, the agency's duty goes beyond merely *articulating a rationale* – the articulated rationale also must not "run[] counter to the evidence before the

[4] The Companies also attempt to distinguish *Bluewater Network* and *Mainella* on the grounds that these cases involved "very different factual circumstances" in which "the Park Service acted in a manner that represented either a reversal of a prior position or an exception to an established rule." Companies' Br. at 33 (noting that "[a]n agency bears a heightened burden to provide a reasoned explanation for a change in its position"). But these facts had no bearing whatsoever on the courts' holding in those cases that the agency's Non-Impairment Determination was arbitrary and capricious. The *Mainella* court mentions no heightened scrutiny of any kind, whereas the *Bluewater Network* court explicitly rejected the need to apply "a heightened standard of review for policy reversals." 721 F. Supp. 2d at 22 ("[I]t is not relevant . . . whether an agency is reversing existing policy or simply creating a new one; instead, what is relevant is whether the agency supplied a 'rational connection between the facts found and the choice made.'") (citation omitted).

Additionally, Defendants try to distinguish the pertinent holdings in *Bluewater Network*, *Mainella*, and *Greater Yellowstone* on grounds that those cases did not involve existing property rights. *See* Gov't Br. at 24; Companies' Br. at 33. This is an irrelevant distinction, however, as the existence of a property right has no bearing on the question whether an activity causes impairment. Impairment is defined as "*an impact* that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values." NPS Mgmt. Policies § 1.4.5 (emphasis added). The question before the agency in making the Non-Impairment Determination, therefore, is one about *impacts*, which has nothing to do with legal constraints associated with existing property rights.

agency." *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Despite Defendants' attempt to persuade this Court to limit its review to the agency's "decision documents," rather than "the FEIS, DEIS, or earlier documents (including internal briefing memoranda)," Gov't Br. at 21, it is well-established that "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision *based on the record the agency presents to the reviewing court*." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citation omitted); *see also Mainella*, 459 F. Supp. 2d at 90 ("Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.") (internal quotation marks and citation omitted).[5] Here, the agency's rationale in the Non-Impairment Determination runs counter to the record that was before the agency.

In an effort to defend the conclusory assertions in the Non-Impairment Determination regarding impairment, the Park Service claims that Plaintiffs "disregard key language" in the Non-Impairment Determination that allegedly supports the agency's conclusions. Gov't Br. at 23. The "key language" highlighted by the Park Service merely reveals the extent to which the agency's conclusions are contradicted by the record. With respect to visual impacts, for instance, the Park Service protests that Plaintiffs "fail to mention the discussion immediately

[5] The Park Service also places undue emphasis on Regional Director Dennis Reidenbach as the agency decisionmaker, claiming that statements by other Park Service officials "who were not the final decision-makers" should be ignored. *See* Gov't Br. at 21. This effort to limit the scope of the Court's review also must be rejected. The "whole record" to be considered under APA review, includes "all documents and materials that the agency directly or indirectly considered." *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 3 (D.D.C. 2006) (internal quotation marks and citation omitted). Here, memoranda, briefing statements, and the like written by agency staff throughout the review process were directly or indirectly considered by Director Reidenbach in making his decision. These documents are therefore part of the whole record and can be considered by this Court.

following" the agency's conclusion that the "the adverse impacts of the selected alternatives will not impair visual resources." Gov't Br. at 23. The "key language" reads as follows:

> The selected alternative follows the route of the existing transmission line. The narrower width of the permanent ROW corridor, and allowing areas not needed to maintain the line to succeed to forest inside the ROW, will reduce the visibility of the ROW, resulting in a similar appearance to what has been traditionally been [sic] seen along the existing line. The larger structure will be visible from more areas in [the Delaware Water Gap] and along [the Appalachian Trail] than the existing structure and will be a greater intrusion on [Appalachian Trail] visitors that use that section of the trail. The towers within [the Appalachian Trail], however, will be wholly within the existing ROW, which will not be expanded within [the Appalachian Trail.]

Non-Impairment Determination at 12 (quoted at Gov't Br. at 23).

This language must be read in context with the language that precedes it, in which the NID concedes that the S-R Line will "result in unavoidable adverse impacts because the larger transmission line structure will remain a visible intrusion that degrades the existing scenic quality." NID at 12. To the extent that the Park Service attempted to soften this statement regarding "visible intrusion" with the "key language" quoted above, that language is at odds with the facts disclosed in the record. First, the fact that the Project follows the route of the existing B-K Line and the fact that the portions of the line crossing the Appalachian trail will remain wholly with the existing right-of-way do not support a conclusion of non-impairment. Just the opposite, one of the most important reasons why the S-R Line implicates impairment is that it follows the path of the smaller B-K Line. As discussed in Section I.A above, the B-K Line crosses "a particularly sensitive area" of the Delaware Water Gap, with rare and unique communities comprising 52 percent of the right-of-way. FEIS at 508, 680 (AR 48369, 48541). The Park Service recognized this area as "one of the most biologically significant areas in the park," AR 113472, which led it to view "removing the existing [B-K Line] from the Hogback [Ridge]" as a critical agency goal. AR 72865. Consequently, Alternatives 3-5 required removal

of the existing B-K Line and restoration of the right-of-way as a necessary mitigation measure. *See* FEIS at 364 (AR 48225). Given this context, the agency's reliance on the facts that "[t]he selected alternative follows the route of the existing transmission line" and that it "will be wholly within the existing right-of-way, which will not be expanded within [the Appalachian Trail]" do not support a conclusion of non-impairment. NID at 12.

Next, the Non-Impairment Determination points to the "narrower width of the permanent ROW corridor" and reasons that "allowing areas . . . to succeed to forest inside the ROW . . . will reduce the visibility of the ROW, resulting in a similar appearance to what has been traditionally been [sic] seen along the existing line." NID at 12. Again, the record before the agency contradicts this reasoning. Throughout the Final EIS, the Park Service noted that restoration of cleared vegetation "could take more than 50 years or perhaps complete restoration would never occur." *See, e.g.*, FEIS at 39 (AR 47900).[6] Even assuming, however, that areas inside the right-of-way eventually "succeed to forest," there is no reason to believe these trees would grow taller than the existing tree canopy. The towers for the S-R Line are 195 feet tall, more than twice as tall as the 80-foot-tall towers of the B-K Line. *See* ROD at 1 (AR 111759). The surrounding tree line is 120-130 feet tall. FEIS at M-110 (AR 49779). 120-130-foot-tall trees next to a 195-foot-tall transmission line "with larger, more numerous conductors and devices such as bird

[6] The Park Service incorrectly claims that the FEIS states only that "mature forest" will not be restored within fifteen years, and on this basis, it points out "not all forested habitat is mature." *See* Gov't Br. at 24 n.14. In fact, however, the FEIS did not indicate that only *mature* forest required this long and potentially indefinite period for restoration. *See, e.g.*, FEIS at 38, 39, 396 (AR 47899, 47900, 48257). The agency concluded in the FEIS that re-seeded areas generally would not return to their original condition within 15 years, 50 years, or possibly ever. *See* Plaintiffs' Br. at 31-32. The Companies further argue that Plaintiffs "significantly overstate[] the matter" because "only about 4 acres of mature forest actually will be cleared for the Project." *See* Companies' Br. at 31 n.20. As discussed in Section I.A, however, this is a highly misleading depiction of the Project that fails to identify the vegetation clearing that will accompany access and spur road construction, pulling and splicing sites, and other construction-related activities.

diverters," cannot reasonably be said to "result[] in a similar appearance to what has been traditionally been [sic] seen along the existing line." NID at 12. Moreover, this rationale fails to accord with the agency's acknowledgement in the ROD that "impacts that degrade the scenic and other intrinsic values of the parks" were unmitigated and required compensation . . . of $66 million. *See* ROD at 4 (AR 111762). In short, the agency's conclusion in the NID that the S-R Line actually would have a "similar appearance to what has been traditionally been [sic] seen" directly contradicts the agency's own findings in the FEIS and ROD. NID at 12. Where, as here, "the evidence in the administrative record [does not] permit[] the agency to make the decision it did," the agency's conclusions must be set aside. *Mainella*, 459 F. Supp. 2d at 90.

The Park Service fares no better in highlighting "key language" that allegedly supports the finding of no impairment for the Wild and Scenic Middle Delaware River. *See* Gov't Br. at 23-24. Regarding the Middle Delaware, the agency acknowledged that "many of the values for which the river was designated will be perceptibly changed" and "[a]dverse impacts to visual qualities of the river will extend beyond the river itself." NID at 13. The agency nevertheless concluded that there would be no impairment based in part on its earlier conclusion that there was no impairment to the Delaware Water Gap's visual resources. As explained above, however, that reasoning failed to provide a "rational connection between the facts found . . . and the final conclusions reached," *Bluewater Network*, 721 F. Supp. 2d at 30, and consequently provides no basis for the Park Service's conclusions of no impairment for the Middle Delaware.

The Park Service further emphasizes that the Non-Impairment Determination described how Alternative 2 would cross the Middle Delaware "generally perpendicularly at only one location," "will not follow the river," and that "no access roads [would] be visible" from the river – presumably suggesting that this "articulated rationale" satisfied the arbitrary and capricious

standard of review. Gov't Br. at 24 (quoting NID at 13). But the agency cannot square this rationale with the record. The agency concluded in the Final EIS that *despite these facts*, the Project "would result in significant long-term degradation of the scenic values for which the river was designated." FEIS at 696 (AR 48557). The agency's rationale also fails to account for the ROD's acknowledgement that "impacts that degrade the scenic or other intrinsic values of the parks" were not mitigated and required compensation. ROD at 4 (AR 111762). Again, there is a fundamental disconnect between the agency's stated "rationale" in the Non-Impairment Determination and the conclusions reached at the culmination of the NEPA process.

Finally, the Companies suggest that Plaintiffs overstate the case about the inconsistencies between the Non-Impairment Determination and the record, noting that Plaintiffs in their opening brief "point to only one example" regarding re-vegetation of disturbed areas. Companies' Br. at 31 n.20. However, as the preceding discussion makes clear, the inconsistencies between the Non-Impairment Determination and the record are many. Yet another example is the agency's conclusion in the Non-Impairment Determination that "[w]ith implementation of [] mitigation measures [identified in the Avian protection Plan, such as installation of bird diverters], the selected alternative will not impair special-status species or their habitat." NID at 8. This conclusion is not rationally connected to the FEIS's conclusion that the effectiveness of these mitigation measures "is unknown." FEIS at 443 (AR 48304). Moreover, with respect to the agency's conclusion of no impairment to habitat, the Park Service's conclusion in the Non-Impairment Determination is inconsistent with its conclusion in the FEIS that Alternative 2 would violate Fish and Wildlife Service's Bald Eagle Guidelines because of its placement near communal roost sites. *See* FEIS at 474 (AR 48335).

Since the agency has failed to support its conclusions with record evidence, this Court need "not defer to the agency's conclusory or unsupported assertions." *Mainella*, 459 F. Supp. 2d at 76 (citing *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). Instead, the Court should set aside the Park Service's unjustified finding of non-impairment.

2. The Park Service Does Not Articulate Why the Identified Impacts Do Not Amount to Impairment

Compounding the Park Service's failure to articulate a rationale supported by the record is the agency's failure to explain *why* the adverse impacts it identified do not rise to the level of impairment. The Non-Impairment Determination is fatally flawed by the absence of any "logical link" between the recognition of significant harm from construction of the S-R Line and the ultimate conclusion of no impairment. *See Bluewater Network*, 721 F. Supp. 2d at 30.

In *Greater Yellowstone*, for instance, the Court reviewed the Park Service's conclusion that a plan authorizing snowmobile use on Yellowstone National Park did not impair the park's natural soundscapes. 577 F. Supp. 2d at 201-02. There, in the absence of any "objective standards" for measuring the impacts of snowmobiles on soundscapes, the agency had defined various levels of impact and concluded that the snowmobile plan would have "major . . . adverse, and short-term" impacts in terms of percent time audible, and "minor, adverse, and short-term" impacts in terms of sound level. *Id.* at 201. Under the agency's own impact definitions, this would amount to an overall impact to soundscapes classified as "major." *Id.* Yet the Park Service concluded that no impairment would occur. *Id.* The D.C. District Court found this conclusion "fundamentally arbitrary and capricious" because the Park Service "entirely fails to explain why a finding of minor, moderate, and major adverse impacts on soundscapes does not constitute impairment, let alone the lesser threshold of 'unacceptable impacts.'" *Id.* at 201-02.

Citing the court's decision in *Mainella*, the *Greater Yellowstone* court found itself "equally perplexed as to why any impact characterized as 'major and adverse' does not constitute an unacceptable impact, let alone impairment. This is a distinction NPS again fails to explain." *Id.* at 202.

Similarly, in *Bluewater Network*, the court faulted the Park Service's analysis of impacts to water quality, where the agency had translated quantitative data into impact levels (e.g., negligible, moderate) and finally to an ultimate conclusion about impairment or the lack of impairment. 721 F. Supp. 2d at 27-30. The court found that a defect in the agency's analysis was "the absence of any logical link between the impact thresholds (e.g. negligible, minor, moderate, or major), and the ultimate conclusion that [jet ski] use does not impair park resources under the Organic Act." *Id.* at 30. "Why," the court asked, "would a 'major' impact not qualify as an 'impairment' when a major impact means that chemical, physical, or biological effects 'would be detectable and would be frequently altered from the historical baseline or desire water quality conditions'?" *Id.* (citing administrative record). Citing *Mainella* and *Greater Yellowstone*, the court concluded that the Park Service's "reasoning . . . offers the Court, and the public, little or no basis for understanding why an identified impact fails to rise to the level of an impairment." *Id.*

Defendants argue incorrectly that in *Bluewater Network* and *Greater Yellowstone*, the courts "found record evidence that impacts from the authorized recreational activities would depart from or violate objective standards that did apply," whereas no objective standards apply

in the present case. Gov't Br. at 25-26.[7] In those cases, however, the flawed analysis that the Court found fundamentally arbitrary was unrelated to objective standards and instead arose from the agency's failure to "provide a rational link between its objective factual data and its ultimate conclusions regarding non-impairment." *Bluewater Network*, 721 F. Supp. 2d at 31. Here, as in those cases, there are objective facts in the record identifying the impacts of the S-R Line. What the Park Service fails to do, once again, is to provide a logical link between those disclosed impacts and the agency's ultimate conclusion that the S-R Line would not impair the Parks – that is, the agency provides no reasoned explanation for why certain adverse impacts are merely adverse impacts and not impairing impacts.[8]

For instance, the Park Service concludes that the S-R Line – even with mitigation to minimize impacts, including using non-reflective neutral paint and re-vegetating disturbed areas – "will still result in unavoidable adverse impacts because the larger transmission line structure will remain a visible intrusion that degrades the existing scenic quality of the area that it traverses." NID at 12. The agency nevertheless concludes that there will be no impairment of

[7] The Park Service's reliance on *Hells Canyon Alliance v. U.S. Forest Serv.*, to support its claim that aesthetic impacts cannot be objectively measured, is irrelevant. *See* Gov't Br. at 26 (citing 227 F.3d 1170, 1184 (9th Cir. 2000)). That was not an Organic Act case in which the court was analyzing impairment. *Hells Canyon* merely found that under NEPA, it was acceptable for an EIS to contain only narrative findings where subjective considerations were implicated. 227 F.3d at 1182.

[8] The Companies claim that Plaintiffs fail to acknowledge the distinction between an adverse impact and impairment. Companies' Br. at 30. But in fact, it is the agency that has failed to articulate a satisfactory explanation between the identified adverse impacts and impairment. Although they are immaterial, it is nevertheless worth noting that the cases cited by the Companies to show the distinction "between an adverse impact and impairment" are inapposite. Two of the three cases cited, *Intertribal Bison Coop. v. Babbitt*, 25 F. Supp. 2d 1135 (D. Mont. 1998), and *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000), did not even address the question of impairment under the Organic Act. In the third cited case, *W. Watershed Project v. Salazar*, 766 F. Supp. 2d 1095, 1115 (D. Mont. 2011), the agency had failed to make any written determination regarding impairment, and there was no discussion in the opinion about what constituted impairment.

visual resources. *Id.* Setting aside the failure to ground any rationale in the record, the Park Service leaves unanswered the key question of *why*. Why do these unavoidable adverse impacts not amount to impairment? What standard is being applied to make that assessment? The Park Service's failure to articulate the "logical link" between the identified "unavoidable adverse impacts" and the ultimate conclusion that there is no impairment renders its reasoning "opaque, at best" and its final determination "impermissibly conclusory." *See Bluewater Network*, 721 F. Supp. 2d at 31.

Similarly, the Park Service identifies "[a]dverse impacts to visual qualities of the river" from "[t]he presence of the taller towers, thicker and more numerous lines, and bird diverters [that] will be seen not only as boaters pass below the wires, but as they approach from both upstream and downstream directions." NID at 12. Again, setting aside the fact that the agency's purported rationale fails to square with the record evidence, the Non-Impairment Determination must be set aside as "fundamentally arbitrary and capricious" because the agency does not articulate why these particulate adverse impacts to visual qualities "do[es] not constitute an unacceptable impact, let alone impairment." *Greater Yellowstone*, 577 F. Supp. 2d at 202.

To the extent Defendants point to language in the Non-Impairment Determination relating to degradation of the "overall intactness" of a park resource as an implicit standard for determining impairment, this approach fails. For instance, the Non-Impairment Determination notes that "[o]verall, the visual resources of the parks will remain intact." NID at 12. Similarly, the agency's determination of no impairment for geologic resources concluded that the identified significant adverse impacts "will not change the overall integrity of the geologic formations and paleontological resources" in the park. NID at 4. Along the same lines, the Park Service noted, in reaching its non-impairment determination for the Middle Delaware, that "[t]he integrity of

the [Middle Delaware] will be maintained." NID at 13. If this language in the Non-Impairment Determination suggests an implicit standard for impairment that rests on degradation of the *overall* resources in the park, the Park Service failed to articulate *why* this standard is the right one. *See Bluewater Network*, 721 F. Supp. 2d at 30 ("[T]o reason that an impact is not an impairment in part because it does not reach a certain standard without explaining why that standard is the right one omits a critical step in the agency's reasoning."). As part of this explanation, moreover, the agency must "explain why impacts should need to reach such a seemingly drastic point" in order "to trigger the protections of the Organic Act." *Id.* at 36 n.30.

In short, Defendants would have the Court believe that the Non-Impairment Determination provides a reasonable explanation to support the Park Service's conclusions, but in actuality, the agency's statements and findings in the Non-Impairment Determination are contrary to the record and unsupportable in the law. Regional Director Reidenbach may exercise his professional judgment, but in doing so, he is accountable for upholding the Park Service's statutory mandate and basic principles of administrative decision-making, which requires articulation of "a satisfactory explanation for [the agency's] actions including a rational connection between the facts found and the choice made." *Mainella,* 459 F. Supp. 2d at 100.

C. Existing Property Rights Did Not Compel Selection of Alternative 2

While Defendants do not dispute the Park Service's authority to prevent impairment of the Parks, they maintain that the agency had no discretion to prevent the Companies from implementing Alternative 2b. *See* Gov't Br. at 26-29; Companies' Br. at 25-27. Based on this proposition, they argue that the Park Service did its best to protect the Parks in selecting a slightly less damaging alternative (although by no means the least damaging alternative considered by the agency). *See* Companies' Br. at 24. This argument is wrong. Despite the

Companies' self-serving assertions about the breadth of their existing easement rights, it was fully within the bounds of the Park Service's authority to prevent the Companies from going *outside* of their existing right-of-way to cut "danger trees" on national park lands. Since the Companies do not have a right to cut danger trees outside of their existing right-of-way, this is not a case where the court even needs to reach the question whether existing property rights trump the Organic Act, as Defendants implicitly suggest. The Companies need a new right-of-way to construct the S-R Line, and the Park Service has broad discretion to deny any right-of-way that will adversely impact the Parks.

Thus, the Park Service was not hostage to any existing property right that would allow for construction of Alternative 2b without the agency's approval. The correct assumption driving the multi-year NEPA process was that all of the identified alternatives except for Alternative 2b were viable and within the agency's authority to select. *See* Underhill Decl. ¶ 9. The so-called "legal considerations" that the Park Service ultimately relied on to select Alternative 2 cannot justify the agency's failure to prevent impairment and avoid adverse impacts to the greatest extent possible as the Organic Act requires. ROD at 18-19. Even if Defendants were correct that the S-R Line will not impair the Park – which they are not – the Park Service is still obligated "to conserve park resources and values" under a conservation mandate that

> applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values.

NPS Mgmt. Policies § 1.4.3. Whatever discretion the agency may have in implementing the conservation mandate, "at the very least, [the Park Service] is required to exercise its discretion in a manner that is calculated to protect park resources and genuinely seeks to minimize adverse

impacts on park resources and values." *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 193 (2008) (internal quotation marks and citations omitted).

In assessing the validity of the Park Service's "legal" rationale for selecting Alternative 2, the "pertinent question before the Park Service," as the Companies have articulated it, was whether "the existing easements give PPL the right to clear danger trees outside of their ROW." Companies' Br. at 26. Because Alternative 2b would be built entirely within the Companies' existing right-of-way, the Companies would need to cut danger trees on park lands outside of their existing easement to construct and operate Alternative 2b safely and without fire risk. *See* AR 77449. If the Companies' existing easements give them the right to cut danger trees outside of their right-of-way, then the Companies maintain that they would not need any new ROW and that they would therefore be entitled to a special use permit to exercise their existing easement rights. *See* Companies' Br. at 25-26.

Reference to the Companies' existing easement rights reveal, however, that this argument is a non-starter. In support of their argument, the Companies do not cite to any easement but rather to their own letter to the Park Service in December 2010, in which they asserted their rights to remove danger trees outside of their existing right-of-way. *See* Companies' Br. at 26 (citing AR 77449). The language quoted in that letter tracks the language in several representative easement agreements docketed by the Companies at ECF No. 21-2. The language reads:

> And, further, in consideration of said payments, we do hereby *release and quit claim the said Pennsylvania Power & Light Company, its successors, assigns and lessees, of, and from any and all damages, loss or injury that maybe at any time caused by* or result from the construction, reconstruction, operation and maintenance of the said lines, or the trimming or cutting down of any and all trees which, in the judgment of the said Company, its successors, assigns and lessees, may interfere with the construction, reconstruction, maintenance or operation of the said lines or menace the same.

ECF No. 21-2 (emphasis added). Critically, this language constitutes a *release from damages* caused by tree clearing, and not an affirmative authorization for the Companies to clear trees. Moreover, nothing in this language suggests that the Companies may trim or cut trees *outside of the right-of-way*. In fact, the relevant deeds held by the United States for the lands in question, *see* ECF No. 22-7, reserve to the Companies the right to construct, operate, and maintain its electric lines along the specified right-of-way as well as:

> the right to cut down, trim, and remove and to keep cut down and trimmed by mechanical means or otherwise any and all trees, brush or other undergrowth *on said piece or parcel of land* which in the judgment of said Vendor, its successors, assigns, and issues, may at any time interfere with the construction, reconstruction, maintenance or operation of said electric lines . . . .

ECF No. 22-7 (emphasis added). In other words, the plain language of the deed makes clear that the Companies only have a right to cut trees on the land within their right-of-way. *Id.*[9] Given this plain language, which Defendants fail even to acknowledge, the Companies could not construct the S-R Line without obtaining a new right-of-way from the Park Service.

[9] Defendants now insist that the Companies' have a right to cut danger trees outside of their right-of-way or that they have at least a credible argument that such a right exists. This was not, however, the position that the Park Service originally took during the NEPA process. Former Superintendent of the Appalachian Trail, Pamela Underhill, who was involved in the review process for the S-R Line from beginning to end, confirms the agency's understanding during the NEPA process:

> While I understand that the Applicants now take the position that the Park Service was constrained to approve one of these alternatives [2 or 2b], that was not the agency's view during the environmental review process. On the contrary, the extensive analysis of alternatives in the multi-million dollar EIS process was premised on the understanding that the Applicants could not build the new S-R Line within their existing right-of-way, which narrows to 100 feet in some places, and that the Park Service therefore had discretion to deny the application outright or to require a re-routing of the proposal along a new right-of-way.

Underhill Decl. ¶ 9.

Because the Park Service has broad authority to deny right-of-way requests, the agency could not fairly premise its selection of Alternative 2 on grounds that it could not prevent Alternative 2b. A new right-of-way is a privilege to be granted by the Park Service only upon a finding that the right-of-way "is not incompatible with the public interest." 16 U.S.C. § 5. As a matter of course, the Park Service cannot find that a right-of-way is in the public interest if it contravenes the agency's preservation mandate under the Organic Act. Thus, the NPS Management Policies provide that "[i]f not incompatible with the public interest, rights-of-way issued under 16 U.S.C. § 5 or 79 *are discretionary and conditional* upon a finding by the Service that the proposed use *will not cause unacceptable impacts on park resources, values, or purposes*." NPS Mgmt. Policies § 8.6.4.2 (emphasis added). Park Service regulations further provide that an applicant, by accepting a ROW, consents "[t]hat the allowance of the right-of-way shall be subject to the express condition that the exercise thereof will not unduly interfere with the management and administration by the United States of the lands affected thereby." 36 C.F.R. § 14.9. In addition, the Park Service Director's Order # 53 for Special Park Uses, which include right-of-ways, emphasizes that the agency may permit a special park use "*if* the proposed activity will not . . . [c]ause injury or damage or park resources; or [b]e contrary to the purposes for which the park was established." Director's Order # 53 § 3.1 (emphasis added). In short, it is not the case, as the Government argues, that the Park Service can only deny a right-of-way request based on consideration of the public interest exclusive of adverse impacts to the Parks. *See* Gov't Br. at 15. On the contrary, the Park Service can and must "exercise its discretion in a manner that is 'calculated to protect park resources' and genuinely seeks to minimize adverse impacts on park resources and values." *Greater Yellowstone*, 577 F. Supp. 2d at 193 (citing *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 446 (D.C. Cir. 1995)).

Here, the agency had both the authority and duty to choose alternatives less damaging than Alternative 2. All of the alternate routes considered by the agency were considered viable. *See* AR 41513, 57159. Defendants are incorrect that Alternatives 3-5 are infeasible because the B-K Line cannot be moved from its present right-of-way. *See* Companies' Br. at 10. There is no evidence in the record that the B-K Line "must remain in place in its current location." *Id.* The source the Companies cite for this assertion (AR 77426-29) is the Companies' own letter to the Park Service, which in any event does not indicate any reason why the B-K Line must "remain in place in its current location" within the Parks. *See* AR 77426-29. At most, what the letter states, and what PJM has indicated is that the B-K Line cannot be *completely removed*. See AR 77427; *see also* AR 78555 (PJM letter cited in Companies' Br. at 10). Alternatives 3-5 do not contemplate entire removal of the B-K Line, however. Under these alternatives, the Companies would remove the B-K Line, *and relocate it* along the same right-of-way as the S-R Line (that is, along other existing transmission and distribution lines, rather than the Companies' B-K Line ROW). All of the action alternatives, in short, including the Companies' own proposals (Alternatives 2 and 2b), would require removal of the B-K Line and replacement of that line. The Companies fail to provide any support, other than their own self-serving assertions, that the B-K Line cannot be re-routed within the Parks.

In addition to being viable options, all of the alternatives with the exception of Alternative 2b were less damaging than Alternative 2. As the ROD acknowledges, "[a]lternatives 4 and 5 both have far less impacts on park resources and values than the other action alternatives and . . . would meet the test of protecting park resources and values to the greatest extent possible without unduly interfering in the property rights of the applicant." ROD at 19. Notably, the Park Service had in fact *selected Alternative 4* as the agency preferred

alternative, as was discussed at a July 21-22, 2011 roundtable meeting attended by more than two dozen federal agency staff and officials."[10] At that meeting, agency staff noted that this preferred alternative would be announced in the draft EIS and associated newsletter. *Id.* Just two week later, however, on August 9, 2011, days after the August 4, 2011 meeting between Secretary Salazar and the Companies, a Park Service briefing statement indicated:

> At this time, the Agency has not decided on a Preferred Alternative. . . . Because the alternatives have such differing advantages and disadvantages no one alternative has been identified as the agency preferred. Approval is being requested . . . to release [Draft]EIS without an identified agency preferred alternative.

AR 73314. This reversal, which culminated in the selection of Alternative 2, was fatally inconsistent with the Park Service's duty to preserve the Parks under the Organic Act.

II. THE PARK SERVICE VIOLATED THE WILD AND SCENIC RIVERS ACT

The Park Service violated the WSRA when it approved permits for a Project that, by the agency's own admission, "would result in significant long-term degradation of the scenic values for which [the Middle Delaware] was designated, which would be contrary to the directives in section 10(a) of the Wild and Scenic Rivers Act to 'protect and enhance' those values which caused the river to be included in the system." FEIS at 696 (AR 48557). Defendants' argument

[10] *See* Meeting Notes, First PDEIS Roundtable Meeting (July 21-22, 2013) (attached as Exhibit 1 to Declaration of Hannah Chang). These meeting notes were obtained through a Freedom of Information Act request submitted by Plaintiffs, and counsel for the Park Service has assented to its addition to the Administrative Record.

that the Park Service complied with the WSRA fails, because ultimately the agency must argue against its own findings and the record it created.[11]

In the WSRA, Congress mandated that rivers designated as part of the wild and scenic rivers system "shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. Specifically,

> [e]ach component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.

WSRA § 10(a), 16 U.S.C. § 1281(a). In light of the Park Service's acknowledgment in the FEIS that the Project will cause significant long-term degradation of the Middle Delaware's scenic values in violation of this provision's "protect and enhance" language, FEIS at 696 (AR 48557), Defendants confine their argument to protesting Plaintiffs' apparent failure to consider the "substantially interferes" language in this provision. Thus, Defendants' chief contention relates to the existing use of the B-K transmission line and the characterization of the S-R Line as a project that does not "substantially interfere with public use and enjoyment of" the Middle Delaware's scenic values. *See* Gov't Br. at 30-32; Companies' Br. at 37-38.

This argument falls flat, however, because the Park Service must contend – not with *Plaintiffs'* interpretation of the WSRA – but with the agency's own findings in the record, which demonstrate the agency's view of the Project as one that would substantially interfere with the

[11] As noted in Plaintiffs' Brief at 5 n.5, the Middle Delaware is "a part of the national park system" and is subject to both the Organic Act and the WSRA. 16 U.S.C. § 1281(c). "[I]n case of conflict between the provisions of" these statutes, "the more restrictive provisions shall apply." *Id.* As set forth in Section I, *supra*, the Park Service violated the Organic Act's mandate to prevent impairment to the Middle Delaware.

Middle Delaware's scenic value. In the FEIS's section on Wild and Scenic Rivers, the agency concluded with respect to Alternative 2 that:

> The presence of large and obtrusive infrastructure in a relatively undeveloped zone would be a distraction that would detract from the experience visitors seek when coming to the parks. It would degrade the regionally unique and unusual wilderness-like viewshed the MDSR provides. Large structures also *introduce non-conforming elements* to the parks' cultural landscapes and historic sites affected by this alignment and detract from the characteristics that qualify them for protection. This, in turn, would have adverse impacts on the MDSR through the degradation of the scenic values for which the river was designated. The visual change *would affect a relatively large area and a large number of users*. A crossing at this location poses *high risk for irreparable damage to significant ecological communities and drastic scenic degradation*.

FEIS at 696 (AR 48557) (emphasis added). Thus, despite Defendants' attempts in litigation to characterize the S-R Line as the continuation of an existing use that would not substantially interfere with the public's enjoyment of the river's scenic values, the agency itself considered the S-R Line "large and obtrusive infrastructure" that would constitute a "non-conforming element" of the landscape and "would affect a relatively large area and a large number of users" with a high risk of "drastic scenic degradation." *Id.*

The Park Service cannot rationally reconcile its decision to approve the Project with these facts. It tries, by referring the Court to the Non-Impairment Determination's "stated rationale for the conclusion that the Project will not 'substantially interfere'" with river values. Companies' Br. at 37. But for all the reasons already addressed in Section I.B above, this stated rationale – the "key language" that the Park Service finds so central to its case – finds no support in the

record.[12] It is not, as Defendants would have it, that "Plaintiffs merely disagree with the Park Service's assessment of the impact of the Project on the scenic value of the river." Companies' Br. at 36. The *record* disagrees with the Park Service's conclusion that the S-R Line's impacts are consistent with the WSRA's mandate. *See* 16 U.S.C. § 1281(a). Moreover, Defendants cannot reasonably point to mitigation measures, such as "non-reflective neutral colored paints," Companies' Br. at 31, to justify the Park Service's conclusions about the Middle Delaware when the ROD explains that "impacts that degrade . . . scenic and other intrinsic values" "*cannot be directly remedied through other mitigation.*" ROD at 4 (AR 111762) (emphasis added). Regional Director Reidenbach's exercise of discretion exceeded the bounds of rationality because his conclusions were completely untethered to the evidence before the agency. Accordingly, the Court should grant Plaintiffs summary judgment on this claim.

III. THE PARK SERVICE VIOLATED NEPA

A. The Park Service Failed to Consider and Disclose the Compensatory Mitigation Plan Associated with Alternative 2 and Must Now Supplement the EIS

During the NEPA process, the Park Service developed a key component of the action alternative that it would eventually select – that is, a compensatory mitigation plan – without

[12] Defendants cite a number cases relating to existing uses to persuade the Court that the presence of the existing B-K Line obviates any concern that the S-R Line would substantially interfere with public enjoyment of the Middle Delaware's scenic values. *See* Gov't Br. at 31; Companies' Br. at 38. Ultimately, all of these cases are distinguishable because in none of them did the agency establish the clear record it does in the present case of the proposed project's new, severe, and unmitigated impacts. *See, e.g.*, *Hells Canyon*, 227 F.3d at 1178 (cited in Companies' Br. at 31). In *In re Montana Wilderness Ass'n*, for instance, the existing uses were described as "inconspicuous." 807 F. Supp. 2d 990, 1000 (D. Mont. 2011) (cited in Companies' Br. at 38). *Rivers Unlimited v. U.S. Dep't of Transp.*, did not consider a WSRA claim at all but rather considered whether a proposed project was a "use" subject to the Transportation Act. In that context, the Court noted that views from the river were already interrupted not only by power lines, but also by "existing crossings, landfills, sewage overflow pipes, clearings for farmland, and other semi-industrial uses" – facts hardly analogous to the Middle Delaware's scenic values. 533 F. Supp. 2d 1, 5 (D.D.C. 2008) (cited in Gov't Br. at 31).

ever disclosing this plan to the public. The Park Service and the Companies suggest, on the one hand, that it was appropriate for the Park Service to negotiate this $66 million compromise associated with Alternative 2 outside of the NEPA process because it was allegedly "not a factor in NPS' decision concerning alternatives for construction." Gov't Br. at 33; *see also* Companies' Br. at 42-43. But this begs the question why the Companies agreed to give the Park Service $66 million. On the other hand, the Park Service and the Companies argue that NEPA's requirements were met because "[t]he general approach to compensatory mitigation was outlined in the final EIS." Companies' Br. at 42; *see also* Gov't Br. at 33-34. However, the generic summary of potential compensatory mitigation measures in the DEIS and FEIS cannot satisfy NEPA's public process and disclosure requirements.

According to the Park Service, compensatory mitigation was "the subject of extensive analysis by both NPS and the companies from the time the permit application was initially filed." Gov't Br. at 33. Given that compensatory mitigation was integral to the Companies' application from the outset, and thus "the subject of extensive analysis," there is no justification for the Park Service's failure to provide any useful information or analysis regarding compensatory mitigation in either the DEIS or FEIS. Crucially, NEPA seeks to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also* 40 C.F.R. § 1506.6(a) (requiring that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures"). In this way, NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349.

1. Compensatory Mitigation is a Key Element of Alternative 2

Defendants' effort to cast the $66 million dollar mitigation fund as extraneous to the Park Service's decision to approve the Companies' proposed Alternative 2 is not credible. By the Park Service's own account, the Secretary of Interior made it clear that approval of the Companies' proposal would be conditioned on the receipt of compensatory mitigation funds. *See* Gov't Br. at 9-10 (describing how at an August 4, 2011, meeting, "[t]he Secretary . . . asked the companies to agree to a certain figure ($61 million) for compensatory mitigation in the event that their proposal was selected"). Thus, while Defendants insist that there were no guarantees that Alternative 2 would ultimately be selected, *see* Gov't Br. at 10; Companies' Br. at 43, it was decided early on that selection of Alternative 2 was contingent on compensatory mitigation – in other words, that compensatory mitigation was an indispensable component of Alternative 2.[13]

NEPA requires the disclosure of mitigation measures "to ensure that environmental consequences have been fairly evaluated." *Methow Valley*, 490 U.S. at 352; *see also* 40 C.F.R. §§ 1502.14(f); 1502.16(h). Here, the public had a right to know about and weigh in on a compromise to allow a damaging alternative to go forward in exchange for cash compensation. This is precisely the sort of "relevant information" that NEPA's procedures are intended to ensure "will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Methow Valley*, 490 U.S. at

[13] While the Park Service admits that the Companies reached an "agreement" with the Secretary of Interior, it insists that no decision was made to approve the Companies' proposal and that the agreement had no bearing on the ultimate decision to select Alternative 2. Gov't Br. at 10. This narrative strains credulity. Pamela Underhill, then-Park Superintendent of the Appalachian Trail, who was charged with implementing the NEPA process for the S-R Line understood that "the ROD implements a decision made within the Department of the Interior (and outside of the environmental review process under the National Environmental Policy Act) to approve the Applicants' proposal if it included substantial cash mitigation funds." Underhill Decl. ¶ 7.

349; *see also Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 371 (D.C. Cir. 1981) (NEPA requires discussion of "relevant issues and opposing viewpoints").[14]

2. The Compensatory Mitigation Plan is Not the Product of Informed Decision-Making under NEPA

Defendants wrongly contend that there was sufficient discussion of compensatory mitigation in the DEIS to ensure that the Park Service "considered environmental concerns in its decisionmaking process" and to "provide[] a springboard for public comment." Companies' Br. at 40 (quoting *Methow Valley*, 490 U.S. at 349). The cursory reference to compensatory mitigation that appears in the DEIS and FEIS is not "a discussion and analysis" as the Park Service suggests. Gov't Br. at 34. The DEIS and FEIS provide a bullet point list identifying generically what "[c]ompensation would . . . allow[] for," including "acquisition in fee or easement of lands" and "implementation of the parks' . . . plans." AR 47933-34. Despite the fact the Companies and the Park Service were allegedly discussing compensatory mitigation from the start of the NEPA process, the DEIS and FEIS do not disclose the existence of ongoing negotiations and identify only a theoretical *possibility* of compensatory mitigation in nearly identically-worded two-page sections. *Compare* AR 47933-34 *with* AR 46561-62. Even after the FEIS identified Alternative 2 as the preferred alternative, the agency provided no further detail about anticipated compensatory mitigation, failing to mention even that compensatory mitigation would be part of any decision to approve the preferred alternative. *See* AR 47937.

[14] Indeed, the ROD identifies three of the Plaintiff organizations (the Appalachian Trail Conservancy, New York-New Jersey Trail Conference, and the Appalachian Mountain Club) as groups that would complete projects "to rehabilitate, improve, and protect" the Appalachian Trail using money from the Middle Delaware Compensation Fund. ROD at 23 (AR 111781). These groups are stakeholders with expertise in the affected Parks who could have provided valuable insight on the design and adequacy of compensatory mitigation and who are now called upon to implement the decision they were never given an opportunity to comment on.

NEPA demands more transparency. Plaintiffs are not arguing that the Park Service was required to disclose the "details of all meetings or discussions," Companies' Br. at 40-41, or "all the specifics of the compensatory mitigation measures," Gov't Br. at 34-35.[15] What Plaintiffs are seeking is "sufficient detail" to allow for public comment that would ensure an informed decision. *Methow Valley*, 490 U.S. at 352. A "mere listing of mitigation measures, without supporting analytical data" is necessarily insufficient. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002) (internal quotation marks and citation omitted); *Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (finding that a "perfunctory description of general mitigation measures" does not satisfy NEPA). The FEIS's list of four generic categories of compensatory mitigation measures did not give Plaintiffs or the broader public any sense of the trade-offs to be considered in arriving at a compensatory mitigation agreement or the potential for compensatory mitigation to be genuinely meaningful in light of the S-R Line's adverse impacts. Nor did it give Plaintiffs or the broader public even an opportunity to comment on the agency's methodology for arriving at a compensatory mitigation figure.[16]

[15] The Park Service fails to distinguish *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (cited at Plaintiffs' Br. at 39-40). Although that was an Endangered Species Act ("ESA") case, the critical point that the agency overlooks is that the Organic Act imposes a substantive prohibition on impairment that is analogous to the ESA's prohibition on take of endangered species. Just as the D.C. Circuit found in *Gerber* that a conservation plan to minimize and mitigate impacts to species must include a map or information about the property so that the public could "meaningfully comment on the mitigation value" of the parcel, 294 F.3d at 179, so too, in the present case, the public was entitled to understand the general location of the lands to be acquired in order to meaningfully comment on whether these acquisitions could in fact compensate for the S-R Line's impacts.

[16] Defendants claim that Plaintiffs fail to "point to any substantive deficiency in the compensatory mitigation that [Plaintiffs] might have raised if given the opportunity to comment." Companies' Br. at 3-4; *see also id.* at 41. Without knowing the substance of the compensatory mitigation as a result of the Park Service's failure to comply with NEPA, it is hard

Moreover, the Companies insist that the Park Service was under no obligation "to invite comment on the ultimate dollar value" of the compensatory mitigation fund, but they offer no legal or practical reason why. Companies' Br. at 40-41. Given that the Companies and the Interior Department were expressly contemplating $61 million in compensatory mitigation in connection with Alternative 2, the adequacy of that amount was a critically important issue that could and should have been informed by public comment. *See Methow Valley*, 490 U.S. at 349. Indeed, the record indicates that the Park Service arrived at the $61 million figure hastily, without much, if any, deliberation, which made it all the more important for the agency to ensure a more considered vetting in the NEPA process.

Specifically, the $61 million figure was based on an email written by the Delaware Water Gap Superintendent on the night before the August 4, 2011 meeting between the Companies' representatives and the Secretary of Interior. The email explained that "the agency] ha[d] been working on a conservation strategy with the project proponents almost since the beginning of their permit request being deemed complete" but that "[a] critical element that has not yet been completed . . . is how it will be determined what formula are appropriate to help assess financial damages from impacts." AR 79638. In this regard, the email explained:

> There will need to be detailed determinations and evidence of how these impacts are determined and *how they can be offset* by funds established to acquire acreage that create connectivity on a landscape space, that provide visual and other buffers for the protection of the visitor experience and help to provide the citizens with

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to fathom on what "substantive deficiency" Plaintiffs might have commented. The Park Service also claims that the DEIS and FEIS fulfilled their role as springboards for public comment because "Plaintiffs themselves submitted comments concerning mitigation." Gov't Br. at 37 (citing AR 87225-32). In fact, the document referenced is a letter from Plaintiffs requesting an opportunity to comment on the "undisclosed mitigation measures." *See* AR 87226 (noting that the Park Service had recently taken the position in a letter to Plaintiffs that the Administration's "fast-tracking" of the S-R Line "does not allow for additional opportunities for public review and comment").

> *compensation to offset the impact and potential impairment of the nationally significant resources in discussion*.

AR 79638-39 (emphasis added).[17] These identified questions are critically important, and the Park Service's failure to invite input on them defies NEPA's fundamental purpose to inform decision-making that significantly affects the environment. *See Methow Valley*, 490 U.S. at 352-53 (recognizing the NEPA "requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated).

In light of the Park Service's failure to disclose adequately the agency's plans for compensatory mitigation, and the significant new information presented in the ROD regarding these activities, NEPA requires the Park Service to supplement the EIS. *See* 40 C.F.R. § 1502.9(c)(1)(ii). A supplemental EIS is required "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). The expenditure of $66 million to undertake land acquisitions and to implement stewardship activities in and around the Parks will have significant environmental impacts that have not yet been considered under NEPA, and an SEIS is required accordingly. *See* Plaintiffs' Br. at 40-41.

B. The Park Service Failed to Take a Hard Look at Reasonable Alternatives

The Park Service failed to "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposed Project. 40 C.F.R. § 1502.14(a). Defendants claim that because non-transmission alternatives were not part of "*the Companies'* proposal to build the

[17] Notably, the compensatory mitigation estimate was "directed at the actual proposals by the applicant named alternative 2 and alternative [2b]." AR 79639.

transmission line," "[i]t was not the proper role of the Park Service to second-guess" the need for the S-R Line by considering these alternatives. Companies' Br. at 44. However, non-transmission alternatives relate directly to the viability of the No-Action alternative, and as with other reasonable alternatives, the Park Service is required to consider the No-Action alternative rigorously and objectively. *See* 40 C.F.R. § 1508.25(b)(1).

Moreover, setting aside the question whether it was the "proper role of the Park Service" to examine the regional transmission operator's determination, it was certainly the Park Service's role to protect the Park and to act within its statutory mandates when reviewing and deciding whether and how to approve the proposed Project. *See* FEIS at i (AR 47834) ("The purpose of the federal action is to respond to the applicant's proposal *considering the purposes and resources of the affected units of the national park system, as expressed in statute, regulation, policy,* and the NPS objectives in taking action.") (emphasis added). In light of the agency's awareness from the start of its review that the Project could impair the Parks, *see* AR 73114; Plaintiffs' Br. at 12-15, it was incumbent on the agency under its Organic Act mandate to rigorously evaluate all possible alternatives to avoid impairment and to avoid and minimize harm to the greatest extent practicable. In fact, the record shows that the Park Service itself understood this obligation:

> If there is an alternative that would protect resources, the NPS would have to choose it, as it is their job to protect the resources of the park units. Other utilities have put forth two other options to PJM that could be viable alternatives to transmission lines; these other options could provide a basis for selecting the No Action Alternative.

AR 72903. Having recognized that certain alternatives would support selection of the no action alternative, the Park Service could not permissibly decline to consider those alternatives, particularly in light of its obligation to minimize harm to the Park to the greatest extent possible.

C. The Park Service Failed to Take a Hard Look at the Full Scope of the Project's Impacts

The Park Service failed to take a hard look at the S-R Line's full impacts, including those outside of the "visual split locations" defined by the Park Service as just beyond boundaries of the Delaware Water Gap. *See* Plaintiffs' Br. at 44-45. The agency apparently misunderstands this claim as one that attempts to define "the Project" as the entire transmission line from end to end. *See* Gov't Br. at 43-44 (suggesting that Plaintiffs view "construction of the entire length of the S-R Line" as the proposed federal action). In fact, Plaintiffs' more modest argument is that the agency did not "consider the full scope of harm that construction of the length of the S-R Line might inflict *on resources and values within the Delaware Water Gap.*" Plaintiffs' Br. at 45; *see also* NID at 2 (acknowledging that "[i]mpairment may also result from sources or activities outside the park").

Indirect impacts are those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Here, the grant of requested right-of-way and special use permits allows for construction of the S-R Line on either side of the Parks. To the extent that such construction affects resources within the Parks, those indirect impacts must be analyzed under NEPA. *Id.* At a minimum, the Park Service knew what the entire route of the S-R Line would be if Alternative 2 or 2b were approved. *See* FEIS at 237 (Fig. 47) (AR 48098). The agency was therefore required to look beyond Park boundaries and assess indirect impacts in a meaningful way when it analyzed those alternatives. *See* 40 C.F.R. § 1508.25; *Mainella*, 459 F. Supp. 2d at 103-05. As explained in *Mainella*, NEPA requires the Park Service to evaluate impacts on the national park unit from activities outside the park because the agency's "authority to regulate access to parks under the Organic Act puts the agency in a markedly different position than agencies" who need not

review impacts "because of a lack of authority to take any action affecting environmental impacts." 459 F. Supp. 2d at 103-105.

The Park Service's attempt to distinguish *Mainella* by invoking the Supreme Court's decision in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), is unavailing. *See* Gov't Br. at 44-45. As the district court in *Mainella* explained, its holding is wholly consistent with *Public Citizen*:

> The holding in *Public Citizen* extends only to those situations where an agency has 'no ability' because of lack of 'statutory authority' to address the impact. . . . [By contrast, the Park Service] has the ability – which it has exercised – to consider the impacts from surface activities in making the impairment determination pursuant to section 1 of the Organic Act in connection with the [relevant permitting decision]. If . . . NPS determined that adjacent surface activities [outside park boundaries] would impair park resources and values under the Organic Act, the Act would leave the Park Service no choice but to withthold the [requested permit] until [the Park Service] had addressed the threat of impairment in some other manner.

Mainella, 459 F. Supp. 2d at 105. Based on this straightforward analysis, the *Mainella* court went on to apply the Supreme Court's "rule of reason," concluding that "it makes sense for [the Park Service] to assess the impacts from surface activities [outside of the national park] because there is a reasonably close causal relationship between such impacts and [the Park Service's] decision to grant an operator access" to resources within the park. *Id.*

The situation here is no different than the situation in *Mainella*. Here too, it makes sense to assess impacts from construction of the S-R Line outside the Parks because the Organic Act mandate to prevent impairment is concededly at issue, and there is a more than "reasonably close causal relationship" between the agency's grant of right-of-way and special use permits and the siting of the S-R Line on either side of the Park. The agency's failure to undertake this required analysis is another reason for setting aside the FEIS and ROD.

CONCLUSION

For all the reasons set forth above, Plaintiffs request that this Court deny Defendants' cross-motions for summary judgment; enter summary judgment in Plaintiffs' favor; find that the ROD and EIS are contrary to law; enjoin all activities approved by the ROD and by the permits granted pursuant to the ROD as well as any Project-related activity outside of the parks that preclude prevention of impairment and a meaningful consideration of alternatives on remand; and remand the matter to the Park Service for an environmental review and decision in compliance with its statutory obligations.

Respectfully submitted this 7th day of June 2013,

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