

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL PARKS CONSERVATION)
ASSOCIATION, et al.,)
)
Plaintiffs,)
)
v.)
)
S.M.R. JEWELL, et al.,)
)
Defendants, and)
)
PPL ELECTRIC UTILITIES CORPORATION and)
PUBLIC SERVICE ELECTRIC & GAS)
COMPANY,)
)
Intervenor-Defendants.)

Case No. 1:12-cv-01690-RWR

**PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION AND
REQUEST FOR AN EXPEDITED HEARING**

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Appalachian Mountain Club, Appalachian Trail Conservancy, Association of New Jersey Environmental Commissions, Delaware Riverkeeper Network, National Parks Conservation Association, New Jersey Highlands Coalition, New York–New Jersey Trail Conference, Rock the Earth, Sierra Club, and Stop the Lines (collectively, “Plaintiffs”) respectfully submit this motion for a preliminary injunction to enjoin any vegetation clearing and construction, including access road construction, in the Delaware Water Gap National Recreation Area (“Delaware Water Gap”) pursuant to the National Park Service’s October 1, 2012, Record of Decision (“ROD”) approving a right-of-way and special use permit for the Susquehanna-Roseland transmission line (“S-R Line”), until this Court has an opportunity to decide Plaintiffs’ claims. Pending a decision on the

merits of Plaintiffs' legal claims, this preliminary relief would preserve the opportunity to afford meaningful relief and prevent damage to the Delaware Water Gap, the Appalachian National Scenic Trail, and the Middle Delaware National Scenic and Recreational River.

Plaintiffs have conferred with counsel for the Park Service and for Intervenor PPL Electric Utilities Corporation and Public Service Electric & Gas Company (jointly, "Companies"). Both the Park Service and the Companies oppose this motion. Counsel for the Companies has informed Plaintiffs that the construction schedule set forth in the parties' Joint Status Report filed with this Court on June 28, 2013, remains the same. *See* Joint Status Report, ECF No. 51. The Companies intend to begin clearing vegetation and constructing access roads within the Delaware Water Gap on September 3, 2013. Thereafter, beginning October 1, 2013, the Companies plan to undertake additional construction work in the Park, including construction of tower foundations for the new S-R Line. *See id.* Beginning November 1, 2013, the Companies will start dismantling the existing transmission line (referred to as the "B-K Line"). This rapidly-impending construction in the Delaware Water Gap demonstrates that expedition of this Court's consideration is essential. Accordingly, Plaintiffs request that this Court set a hearing on this motion for a preliminary injunction as soon as possible. *See* Local Civil Rule 65.1(d).

The Park Service has unlawfully granted permission for construction of the S-R Line through the parks in violation of the agency's affirmative duties under the National Park Service Organic Act, 16 U.S.C. §§ 1 to 18f-3, and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. Additionally, the Park Service's environmental review of the S-R Line, as memorialized in the Final Environmental Impact Statement ("FEIS") issued on August 31, 2012, and the ROD, fails to satisfy fundamental requirements under the National Environmental Policy Act of 1969,

42 U.S.C. §§ 4321-4375. The massive, high-voltage, 195-foot tall S-R Line will permanently scar the landscape and damage unique geological and ecological resources in three treasured national park units. Indeed, the Park Service has concluded that the S-R Line, as approved in the ROD, “would adversely affect multiple protected resources inside the parks, in some instances irreversibly” and “would degrade the integrity of resources and the scenic landscape” of the parks. *See* AR 47941, 48541. Entry of a preliminary injunction, therefore, is necessary to prevent imminent and irreparable harm to Plaintiffs and their members, who are frequent visitors to the parks and have deep and abiding recreational, aesthetic, and spiritual ties to the natural beauty, remote solitude, and spectacular scenery offered by these protected public lands.

As is set forth in Plaintiffs’ briefing on the pending motion and cross-motions for summary judgment, *see* ECF Nos. 38, 44, Plaintiffs are likely to succeed on the merits of their claims. Furthermore, the equities favor the entry of preliminary relief until this Court has an opportunity to reach a decision in this proceeding. Accordingly, Plaintiffs request that this Court grant their motion for preliminary injunction and expedite a hearing so that the motion may be considered before construction-related activities begin in the Delaware Water Gap.

Respectfully submitted this 19th day of August, 2013,

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Case No. 1:12-cv-01690-RWR

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR RENEWED MOTION FOR A PRELIMINARY INJUNCTION AND
REQUEST FOR AN EXPEDITED HEARING**

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INTRODUCTION

Appalachian Mountain Club, Appalachian Trail Conservancy, Association of New Jersey Environmental Commissions, Delaware Riverkeeper Network, National Parks Conservation Association, New Jersey Highlands Coalition, New York–New Jersey Trail Conference, Rock the Earth, Sierra Club, and Stop the Lines (collectively, “Plaintiffs”) renew their motion for a preliminary injunction to halt construction of the Susquehanna-Roseland transmission line (“Project” or “S-R Line”) in the Delaware Water Gap National Recreation Area (the “Park” or the “Delaware Water Gap”), the Middle Delaware National Scenic and Recreational River (“Middle Delaware”), and the Appalachian National Scenic Trail (“Appalachian Trail”) (collectively, the “parks”), until this Court has an opportunity to decide the parties’ pending summary judgment motions. Intervenor PPL Electric Utilities Corporation and Public Service Electric & Gas (PSE&G) (jointly, “Companies”) will begin road building and tree clearing in these treasured national parks on September 3, 2013, to be followed closely by excavations and heavy construction to install foundations for the new 195-foot tall towers that will slice through the parks.

There is no serious dispute between the parties that if full implementation of activities authorized by the Companies’ special use and right-of-way permits is allowed to proceed as planned during the pendency of this litigation, Plaintiffs will suffer irreparable harm and lose the opportunity to obtain meaningful relief. Federal Defendants (“National Park Service” or “Park Service”) admit that construction of the approved Project will “irreversibly” harm multiple resources in the parks, “degrade the integrity of resources and the scenic landscape” of the parks, and “appreciably diminish key aspects of the parks that visitors [have] come to enjoy.” Nat’l Park Serv., *Susquehanna to Roseland 500kV Transmission Line Right-of-Way and Special Use*

Permit Final Environmental Impact Statement; Appalachian National Scenic Trail, Delaware Water Gap National Recreation Area, and Middle Delaware National Scenic and Recreational River 80, 397, 680-81 (2012) (“FEIS”) (AR 47941, 48258, 48541-42). Because irreparable damage to the parks and to Plaintiffs’ interests is imminent, Plaintiffs request that this Court bar construction-related activities in the parks until the Court reaches a decision on the merits of Plaintiffs’ claims under the National Park Service Organic Act, 16 U.S.C. §§ 1 to 18f-3 (“Organic Act”); the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287; and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4375 (“NEPA”).

STATEMENT OF FACTS

Plaintiffs incorporate by reference and refer the Court to the Statement of Facts set forth in Plaintiffs’ Memorandum of Law in Support of their Motion for Summary Judgment, ECF No. 38 at 6-26. In addition, Plaintiffs state the following:

I. BACKGROUND

Plaintiffs come once again before this Court to request a preliminary injunction to prevent imminent and irreparable harm that will result from construction of the S-R Line in the Delaware Water Gap before a decision is reached in this pending suit. On December 6, 2012, Plaintiffs filed a motion for preliminary injunction, to prevent irreparable harm from the construction that was at that time scheduled to begin in the winter of 2012. *See* Pls.’ Mot. for a Prelim. Inj., ECF No. 14. In their opposition, the Companies indicated that they intended to undertake only “Phase I” work prior to October 2013. Specifically, the Phase I work would entail:

- (1) surveying and marking the boundaries of the ROW and access roads, as well as environmentally sensitive areas to be avoided; (2) establishing approximately three miles of access roads to and within the ROW corridor, and (3) conducting geotechnical test borings at the locations of the new monopoles to evaluate

subsurface conditions for the engineering and design of the foundation structures
.....

Cos.' Mem. of Points and Authorities In Opp'n to Pls.' Mot. for a Prelim. Inj., ECF No. 21 at 11.

The Phase I work was "scheduled to begin as soon as mid-February 2013" while "[t]he actual construction of the new line, including removing the existing 230 kV line structures and constructing foundations and erecting the new monopoles, will not commence before October 2013." *Id.*

In response to these representations by the Companies, Plaintiffs stated in their reply brief that they would not to seek to enjoin the limited surveying and geotechnical borings described as part of the Phase I work. *See* Pls.' Reply in Supp. of Mot. for Prelim. Inj. 2, ECF No. 23.

However, they maintained their request that this Court enjoin all other activity related to construction of the S-R Line in the parks, including tree clearing and road construction. *Id.*

Ultimately, after briefing was completed on Plaintiffs' motion, the Companies stipulated that they would "not begin the construction of access roads (previously scheduled to occur during the Phase I work beginning [in February 2012]) prior to September 3, 2012, and [would] not undertake any other construction work on the Project within the Park prior to October 1, 2013."

See Cos.' Mot. for Order to Defer Action on Pls.' Mot for Prelim. Inj. 2, ECF No. 28. On this basis, Plaintiffs consented to the Companies' motion for an order to defer action on Plaintiffs' preliminary injunction motion and to set an expedited summary judgment briefing schedule. *See* Pls.' Resp. to Def.-Intervenors' Mot. for Order to Defer Action on Pls.' Mot. for a Prelim. Inj., ECF No. 29. On February 25, 2013, this Court issued a Scheduling Order denying Plaintiffs' preliminary injunction motion without prejudice and setting forth an expedited schedule for summary judgment motions. *See* Scheduling Order, ECF No. 32.

II. IMMINENT CONSTRUCTION IN THE PARKS

In a Joint Status Report filed on June 28, 2013, after completion of the summary judgment briefing, the Companies advised the Court that they still plan to commence construction within the parks on September 3, 2013. *See* Joint Status Report ¶ 1, ECF No. 51. Specifically, the Companies would begin clearing vegetation to build roads in the parks immediately after Labor Day weekend on September 3, 2013. *Id.* On or after October 1, 2013, the Companies plan to undertake further construction, including construction of the new tower foundations, and beginning November 1, 2013, the Companies plan to start dismantling and deconstructing the existing 230 kV B-K line. *Id.* In a phone call on August 7, 2013, counsel for the Companies informed counsel for Plaintiffs that this construction schedule remains unchanged.¹ *See* Decl. of Hannah Chang (Aug. 18, 2013).

In the most imminent construction to begin in two weeks, the Companies will clear swathes of vegetation and lay down permanent access roads cutting through the Delaware Water Gap. As previously described by the Companies, the road building in this “Phase 1” of construction in the parks includes building 3.54 miles of new 20-foot wide roads in the Delaware Water Gap. *See* Decl. of Walter David Ashley ¶ 11, ECF No. 21-1 (“Ashley Decl.”). Among the vegetation that will be cleared for this road construction will be approximately 4.6 acres of mature trees in previously undisturbed public land on which the Companies now hold a newly granted right-of-way pursuant to the challenged Record of Decision (“ROD”). *See id.* ¶ 12.

¹ In an August 16, 2013, press release, PSE&G announced: “Public Service Electric & Gas Company and PPL Electric Utilities will start construction of the Susquehanna-Roseland power line project in Delaware Water Gap National Recreation Area on Sept. 3.” Press Release, Power Line Construction Set to Begin in Delaware Water Gap National Recreation Area (Aug. 16, 2013) (“PSE&G Press Release”), http://www.pseg.com/family/pseandg/powerline/pdf/august16_2013_release.pdf.

Within a month of commencing access road construction, the Companies will introduce heavy equipment into the Park to drill and install massive new concrete tower foundations for the S-R Line. This construction, to begin October 1, 2013, will place foundations for 26 new transmission towers along 4.3 miles across the heart of the Delaware Water Gap – approximately 6 new towers per mile. These installations will require extensive excavations in rare geologic formations to a depth of at least 15 to 30 feet. FEIS at 38, 360 (AR 47899, 48221). Subsequently, the Companies will start dismantling and deconstructing the existing B-K Line. Removal of the B-K Line’s existing 22 transmission towers in the Park, to begin November 1, 2013, will involve mechanical chipping of the existing tower foundations and use of large cranes to aid in removal of the existing towers. *Id.* at v, 38-39 (AR 47838, 47899-900). Twenty-three crane pads of 10,000 square feet each will be cleared and constructed across the Delaware Water Gap, along with two pulling and splicing sites of 240,000 square feet each, to facilitate all of this heavy construction in the Park. *Id.* at 38, 55 (AR 47899, 47916).

III. HARM TO PLAINTIFFS’ MEMBERS

Members of Plaintiff organizations are individuals who deeply treasure the natural beauty and uninterrupted landscape of the Delaware Water Gap, the Middle Delaware, and the Appalachian Trail, and who regularly visit these parks to revel in the outdoor recreation and opportunities for peace and solitude that abound there.² These members frequent areas of the parks that will be harmed directly by the S-R Line, and indeed the Park Service has conceded that the S-R Line will be constructed in an area of the Delaware Water Gap that “contains high

² See Plaintiffs’ Declarations submitted with this brief: Decls. of Sandy Batty, Maya K. Van Rossum, Linda M. Rancourt, Julia Somers, Edward K. Goodell, Marc Ross, Jeff Tittel, and Thomas Y. Au. See also Declarations of Plaintiffs’ Members submitted with this brief: Decls. of Jeremy Apgar, Joan Aichele, John P. Brunner, Candice Cassel, George Fluck, Gregory L. Gorman, Jan King, Lee Larson, Elizabeth Marshall, Lenore Steinmetz, Gary Szalc, Anne Tiracchia, and Stanley Tomkiel.

concentrations of many important and unique natural features” and is the destination for “a large proportion of [Park] users.” FEIS at 680 (AR 48541). As a result, Plaintiffs’ members face impending destruction of special places that are central to their lives.

For more than three decades, New Jersey resident and member of the Association of New Jersey Environmental Commissions Gary Szelc has been visiting areas of the Delaware Water Gap that will now be harmed imminently and permanently by construction of the S-R Line. Decl. of Gary Szelc ¶¶ 2-5. Mr. Szelc makes fifteen to twenty trips to the Park each year to hike, backpack, bike, rock climb, and take nature photography. *Id.* On these trips, Mr. Szelc also canoes, kayaks, and rafts on the Middle Delaware and frequently passes the famous Walpack Bend area of the river and enjoys stopping at Watergate Recreation Site. *Id.* Both of these locations will experience permanent adverse impacts as a result of construction of the S-R Line. *See, e.g.*, FEIS at 614 (AR 48475) (“Alternative 2 would cross close to a unique river feature, the Walpack Bend, which is a premier visitor attraction in [the Delaware Water Gap]. Installation of new taller towers would introduce a noticeable visual intrusion that would diminish scenic quality.”); *id.* at 680 (AR 48541) (“[A]lternative 2 would result in impacts to visitor use and experience, with the most intense impacts at Watergate Recreation Site.”).

John Brunner, a member of the Delaware Riverkeeper Network, is another member who is entering his third decade as a regular visitor to the Delaware Water Gap. Decl. of John Brunner ¶ 3. Mr. Brunner has taken every freshman class at the United Nations International School canoeing on the Middle Delaware for the past 21 years. *Id.* ¶ 5. On these canoe trips, Mr. Brunner takes the students past the Walpack Bend section of the river. *Id.* In Mr. Brunner’s words, it has been “an honor to be able to take [students from all over the world] through one of our nation’s treasured protected areas. . . . It will be a tremendous loss to no longer be able to

take these students to an area that is preserved and unimpaired and that showcases our nation's natural riches." *Id.*

Joan Aichele is an Appalachian Mountain Club hike leader who leads multiple hikes in the Delaware Water Gap each year, including along the Appalachian Trail, where she takes her groups "to enjoy the endless views of the Delaware River and the valleys on either side of the Kittatinny Ridge." Decl. of Joan Aichele ¶ 6. She cherishes these experiences and often, up on the Kittatinny Ridge, she and her hiking group "sit for hours in awe of the quiet and beauty." *Id.* Once constructed, the S-R Line will bisect the Kittatinny Ridge and slice across the views that Ms. Aichele loves. This will harm the experiences of many others as well, for whom the Appalachian Trail on Kittatinny Ridge is a special place. Jeremy Apgar, a member of and staff cartographer for the New York-New Jersey Trail Conference, produces a map set entitled "Kittatinny Trails" that includes maps of more than 275 miles of marked trails throughout the Delaware Water Gap, including the Appalachian Trail along the Kittatinny Ridge. Decl. of Jeremy Apgar ¶ 2. In creating the maps, Mr. Apgar hiked multiple sections of the Appalachian Trail along Kittatinny Ridge, and although he "love[s] visiting the Delaware Water Gap . . . for a variety of reasons," "at the top of the list is the opportunity to experience and photograph the beauty of New Jersey and Pennsylvania from scenic overlooks" along the Kittatinny Ridge, *id.* ¶ 10 – opportunities that will be degraded forever if the S-R Line is constructed as proposed.

A number of Plaintiffs' members moved to their current homes to be close to the Delaware Water Gap. Lee Larson, a Hardwick, New Jersey, resident and member of Stop the Lines, has been visiting the Park since 1980 and moved to her current residence "because of the pristine beauty of the area and the proximity to the [Delaware Water Gap]." Decl. of Lee Larson ¶ 5. Ms. Larson lives less than one mile from the existing B-K Line and the soon-to-be-

constructed S-R Line and is a frequent visitor to areas of the Park that will be harmed by the S-R Line, including Millbrook Road, Millbrook Village, Old Mine Road, and the Van Campen Glen Trail. *Id.* ¶ 3; *see, e.g.*, FEIS at 607-11 (describing adverse impacts to these locations in the Park). In Ms. Larson’s words, “[t]he areas I visit in the National Recreation Area and on the Delaware River possess so much natural beauty and are so important to me that they are sacred to me.” *Id.* ¶ 5. Ms. Larson will grieve the loss of beauty if the S-R Line is permitted to intrude into these areas. *Id.*

Elizabeth Marshall, a member of the New Jersey Highlands Coalition, also chose to live in Hardwick, New Jersey, and has lived there for the past thirteen years, because she frequently visits the Park with her friends, children, and husband. *See* Decl. of Elizabeth Marshall ¶¶ 3, 8. Ms. Marshall visits the Park fifteen to twenty times each year, and her most recent visit was just last Wednesday, August 14th. *See id.* ¶ 8. In her declaration, Ms. Marshall describes that day:

With me were three teenagers, two dogs, and one adult. We sat and swam at the edge of the Delaware River. There were several other people sunbathing in that area (north of River’s Bend), two snorklers, and many kayakers and canoers on the river that day. Driving home I had my son take a photo of the existing powerline right of way from the overlook, because I feared that the next time we returned to the park, that area would be under construction for the S-R Line.

Id. Ms. Marshall’s concern arises from her review of the National Park Service’s FEIS for the S-R Line, which describes, among other harms, the permanent and irreparable harm to “six rare and unique ecological communities [in the Delaware Water Gap] – only one of which [Ms. Marshall has] not visited.” *Id.* ¶ 9.

STANDARD OF REVIEW

To obtain injunctive relief, Plaintiffs must show: “1) a substantial likelihood of success on the merits, 2) that [they] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest

would be furthered by the injunction.” *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009) (alteration in original) (internal quotation marks and citation omitted). This Circuit has traditionally employed a “sliding scale” in evaluating these factors, under which an “unusually strong showing on one of the factors” means the movant “does not necessarily have to make as strong a showing on another factor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009); *see also Holiday CVS, LLC v. Holder*, 839 F. Supp. 2d 145, 157 n.8 (D.D.C. 2012) (noting that the sliding scale approach “remains the law of this Circuit”). Although the standard provides some flexibility in balancing the factors, a movant must still “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Sweis v. U.S. Foreign Claims Settlement Comm’n*, 2013 WL 2986252, No. 13-366(GK) *3 (D.D.C. June 15, 2013).

ARGUMENT

Plaintiffs make strong showings on all four factors and consequently are entitled to preliminary injunctive relief. As is evident in Plaintiffs’ briefing on the pending motion and cross-motions for summary judgment, which are incorporated by reference, Plaintiffs are likely to succeed on the merits of their Organic Act, Wild and Scenic Rivers Act, and NEPA claims. *See* Pls.’ Mot. for Summ. J., ECF No. 38; Pls.’ Reply in Supp. of Mot. for Summ. J., ECF No. 44.³ Moreover, there can be no legitimate dispute that Plaintiffs’ members will suffer irreparable harm if construction of the S-R Line is undertaken before this Court’s decision on the merits. An injunction to prevent irreparable harm to extraordinarily valuable public resources pending the resolution of this litigation protects the strong public interests at stake. Finally, the balance of equities tips in favor of preliminary relief.

³ Plaintiffs rest their contention about the strong likelihood of success on the merits on their previously-filed memoranda and address only the three remaining factors in this brief.

I. IN THE ABSENCE OF PRELIMINARY RELIEF, IRREPARABLE HARM IS LIKELY TO OCCUR BEFORE THIS COURT REACHES A DECISION ON THE PENDING SUMMARY JUDGMENT MOTIONS

The harms to Plaintiffs and their members described in the Statement of Facts and the attached declarations warrant preliminary injunctive relief, because these imminent harms are “both certain and great” and “actual and not theoretical.” *Brown v. District of Columbia*, 888 F. Supp. 2d 28, 31 (D.D.C. 2012) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The irreparable harm facing Plaintiffs will begin in two weeks, when the Companies begin clearing vegetation and constructing new roads through the Delaware Water Gap on September 3, 2013, and will continue into the fall and winter of 2013 and early 2014 as the Companies install the new transmission towers, deconstruct the existing towers, and string electric wires across the center of the Park. All of this construction is expected to be completed within six months. *See* PSE&G Press Release. Under these circumstances, there plainly “is a clear and present need for equitable relief to prevent irreparable harm.” *Fed. Mar. Comm’n v. City of Los Angeles*, 607 F. Supp. 2d 192, 202 (D.D.C. 2009).

Irreparable harm to Plaintiffs will arise from the near-term commencement of tree clearing and road building in the parks. The road construction that will begin in approximately two weeks will entail vegetation clearing and construction of 3.54 miles of new access roads within the Park and the crossing of three wetlands as well as the Appalachian Trail. *See* Ashley Decl. ¶¶ 11, 17; *see also* Fig. 5 of Ex. 1 to Ashley Decl. Notably, “[i]n conjunction with the access road work,” 4.6 acres of trees in the right-of-way newly granted to the Companies pursuant to the challenged ROD will be cleared. *See* Ashley Decl. ¶ 12. The cutting and removal of trees on these previously undisturbed park lands would obviate meaningful relief for Plaintiffs who challenge the validity of the Park Service’s decision to grant that right-of-way.

Moreover, it is not the case, as the Companies have previously represented, that “[t]he rest of the construction access roads within the ROW will be located within areas that have long been cleared of trees as a result of ROW maintenance activities.” *See id.* In fact, photographs taken on August 11, 2013, show that the locations where access roads are planned even within the ROW are lush, heavily vegetated natural habitat. *See Exhibit 1 attached to Decl. of Cathy Reuscher (Aug. 16, 2013).*

Any assertion that cleared areas will be restored to their pre-existing condition, *see, e.g., Ashley Decl.* ¶¶ 11, 17, is contradicted by the record. In the FEIS, the Park Service concluded that vegetation clearing related to construction activities, including road construction, would have permanent and effectively irreversible impacts. *See FEIS at 38 (AR 47899)* (noting that the time for areas cleared for access roads to return to present conditions is “*50 years or perhaps never*”) (emphasis added); *id.* at 39 (AR 47900) (noting that “[e]xisting vegetation would be cleared to permit the construction of spur roads” and “[t]he applicant would be responsible for the restoration of these spur roads,” but concluding that “return to existing conditions could take *more than 50 years or perhaps complete restoration would never occur*”) (emphasis added). These conclusions about the irreparable nature of the harm that would flow from road construction and tree clearing are confirmed by former Appalachian Trail Superintendent Pamela Underhill, who was deeply involved in the Park Service’s review of the Project. *See Decl. of Pamela Underhill* ¶¶ 3, 6 (Aug. 15, 2013) (“Underhill Decl.”) (noting that “[t]he access roads that the Applicants intend to build will, in and of themselves, result in significant harm to the Park” and these effects “will not be remediated for many decades, if ever”).⁴

⁴ This declaration is identical to the declaration at ECF No. 23-1, which was submitted by Plaintiffs in support of their original preliminary injunction motion. Ms. Underhill stands by the statements made in her earlier declaration and re-signed the declaration on August 15, 2013.

In addition, the access roads to be built in September will cross and permanently alter three wetlands. The Park Service's Final Wetlands Statement of Findings indicates that "[s]ite preparation and construction of the access roads [for Alternative 2] would destroy all wetland functions and values." Nat'l Park Serv., Final Statement of Findings for Exec. Order 11990, "Protection of Wetlands" and Exec. Order 11988, "Floodplain Management" 30 (Sept. 2012) (AR 71852). Specifically,

Heavy equipment operation in the ROW during the construction of access roads across a ROW in a forested wetland has been shown to interrupt the natural hydrologic regime of the forested wetland and cause the impoundment of water The construction of access roads both adjacent to and through wetlands will fragment the wetlands, resulting in changes to hydrology and impeding water movement, ground-level wildlife movement, and the seed distribution of wetland plants. Access roads would also reduce the ability of wetlands to perform functions such as groundwater discharge/recharge, sediment/toxicant retention, nutrient removal, flood flow alteration, and/or storage, and production export may be temporarily decreased due to temporary disturbance adjacent to the land. Access roads will also cause the wetlands' stormwater/nutrient assimilative capacity to be lost

Id. The imminent road building in the Park, in other words, will inflict significant and permanent impacts to ecological resources in the Delaware Water Gap.

The Supreme Court has recognized that environmental damage, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable."). Indeed, the FEIS catalogues the irreparability of the harms that will be inflicted by the approved Project. *See* FEIS at 724-25 (AR 48585-86); *see also id.* at 680 (AR 48541). Defining "[i]rreversible impacts" as "effects that cannot be changed over the long term or are permanent," and "[i]rretrievable commitments" as "resources that, once gone, cannot be replaced," the Park Service concluded in the FEIS that

“long-term impacts such as those to vegetation; landscape connectivity, wildlife habitat, and wildlife; and visual resources would occur and would be irreversible during the period of analysis.” FEIS at 724-25 (AR 48585-86). Moreover, the selected Alternative 2 “would result in the irreversible and irretrievable commitment of geologic resources” because “construction of the towers involves drilling bedrock and approximately seven of the towers would be sited in geologic resources that are rare or unique.” *Id.* According to the Park Service, “[t]hese impacts would be permanent and irreversible and could not be mitigated.” *Id.* Former Superintendent Underhill affirms the conclusion in the Draft and Final EIS that construction of the S-R Line along Alternative 2 “will result in serious, enduring harm” to the affected parks. Underhill Decl. ¶ 5.

In short, the record is clear that the construction required to erect the S-R Line will cause actual and irreparable harms to the parks. The interests of Plaintiffs’ members, who hold close and vital ties to the affected areas, consequently will be irreversibly harmed. *See supra* Statement of Facts.⁵ Where the Park Service has authorized activities that will undisputedly cause irreparable harm, and there is no guarantee that this Court will reach a decision on the merits before that harm is inflicted, preliminary relief is warranted. *See, e.g., Nat’l Wildlife Fed’n v. Burford*, 835 F.2d 305, 324-25 (D.C. Cir. 1987) (upholding issuance of preliminary injunction where possible further action, otherwise fully authorized, “would result in permanent loss of . . . lands to public access and enjoyment” before a decision on the merits).

⁵ Plaintiffs allege more than mere procedural harms arising from NEPA violations, although these procedural violations bear noting because “[i]f plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury,” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). Here, Plaintiffs allege that the Park Service has failed to comply with substantive mandates under the National Park Service Organic Act and the Wild and Scenic Rivers Act.

II. THE PUBLIC INTEREST FAVORS PRELIMINARY RELIEF

Strong public interests – in avoiding irreparable environmental harm to beloved national parks and in ensuring compliance with the law – weigh heavily in favor of a preliminary injunction in this case. First, the “well-established public interest in preserving nature and avoiding irreparable environmental injury” favors preliminary relief. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (internal quotation marks and citation omitted); *see also Or. Natural Desert Ass’n v. Singleton*, 75 F. Supp. 2d 1139, 1152 (D. Or. 1999) (finding that “[t]he public interest in requiring the [Bureau of Land Management] to implement the Congressional mandate contained in the [Wild and Scenic Rivers Act] is manifest, as is the public’s interest in preserving and enhancing the extraordinary values of the [protected river]”).

The public interest in this suit includes the interests of the more than 5.2 million people who visit the Delaware Water Gap each year and the additional two to three million people who hike some portion of the Appalachian Trail each year, FEIS at 7-8 (AR 47868-69). These members of the public make the Delaware Water Gap one of the top ten most-visited national park units in the national park system, *see id.*, and these millions of visitors will experience what the Park Service has described as an “appreciabl[e] diminish[ment of] key aspects of the parks” as a result of the S-R Line. *Id.* at 80, 681. Inasmuch as the Park Service acknowledges the S-R Line will “degrade the integrity of resources and the scenic landscape” in these national park lands, *id.*, which are the property of the American public, the public interest weighs heavily in favor of preliminary relief until this Court has an opportunity to decide the merits of Plaintiffs’ claims. *See Nat’l Wildlife Fed’n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985), *aff’d*, 835

F.2d 305 (D.C. Cir. 1987) (“[A] preliminary injunction would serve the public by protecting the environment from any threat of permanent damage.”).

Moreover, the public interest at stake in this case goes even beyond an interest in preserving resources and values in these three national parks and encompasses the entire national park system. In approving a concededly damaging project in these parks, the Park Service sets a precedent for the entire national park system under its care. As the Park Service itself noted repeatedly in the FEIS,

[p]ermitting the project would adversely affect multiple protected resources inside the parks, in some instances irreversibly. 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. *This could establish precedent that may invite similar proposals by other applicants in the future*, and create an expectation of like treatment for those proposals; it may make it difficult to deny such proposals. [The Delaware Water Gap] and [Appalachian Trail] both contain numerous other utility crossings, which makes the risk of such precedent particularly concerning for these parks. Furthermore, as units of the national park system, wherein all parks are entitled to equal protection, *creating such a precedent could have ramifications for parks nationwide*. The location of this particular crossing through the center of [the Delaware Water Gap] could make such a precedent even more potent. Installing the S-R Line on this alignment may invite future utilities proposing to follow the same route.

FEIS at 397 (AR 48258) (emphases added). In her declaration, former Park Superintendent Underhill gave further voice to this same concern about the threat to the integrity of the national park system:

Over my career with the National Park Service, I confronted many proposals for development within, across, or adjacent to the Appalachian Trail that would have contributed to an incremental and insidious derogation of the very values that have made the Trail the precious resource it is today. This has included proposals for housing developments, wind farms, communication towers, transmission lines, telephone lines, roads, and rock quarries. My role, and the role of the NPS, was to ensure that ever present development pressures did not trump our mission to protect the Parks for future generations. In my opinion, that core mission has been compromised with the approval of the S-R Line. This compromise sets a troubling precedent. For the Appalachian Trail and the [Delaware Water Gap], it

creates the special concern that future transmission lines could be more likely to be proposed. The Appalachian Trail is particularly vulnerable to this kind of intrusion. Over the past ten years alone, I am aware of close to a dozen such proposals. More broadly, if the harms associated with this project are not deemed to impair Park resources in violation of the Organic Act, what will prevent comparable damage in the heart of other treasured National Parks?

Underhill Decl. ¶ 10. As substantial as the public interest already is in the preservation of the Delaware Water Gap, Middle Delaware, and the Appalachian Trail, in other words, the ramifications of the Park Service's decision in this case go far beyond the approval of this one transmission line project.

In addition, there is “a strong public interest in meticulous compliance with the law by public officials.” *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993); *see Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997-98 (8th Cir. 2011) (noting that “the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications” is “just as important as” public interest in economic factors, such as jobs and “increasing energy output in the region”) (internal quotation marks and citation omitted). Here, the record strongly supports Plaintiffs' claims that the Park Service short-circuited its NEPA review by discussing and agreeing to approve the Applicants' proposed route across the parks — the most damaging alternative — in exchange for a commitment to provide cash mitigation funds. *See* Pls.' Mot. for Summ. J. 39-45, ECF No. 38; *see also* Underhill Decl. ¶ 7 (“[I]n my view, 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.”). In light of this record, the public interest favors preliminary relief to ensure that the irreparably harmful consequences arising from procedurally flawed and unlawful agency decision-making do not occur before review by a court. *See, e.g., Brady Campaign to Prevent*

Gun Violence, 612 F. Supp. 2d at 26 (granting the plaintiffs’ request for a preliminary injunction after concluding that there was a high likelihood that the Department of Interior had failed to comply with NEPA and that preliminary relief was in the public interest because there “is no question that the public has an interest in having Congress’ mandates in NEPA carried out accurately and completely”).

III. THE BALANCE OF EQUITIES FAVORS PRELIMINARY RELIEF

In evaluating the balance of equities, courts consider whether injunctive relief would “substantially injure other interested parties.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As a general matter, this consideration “is not a particularly decisive factor.” *Mylan Pharm., Inc. v. Sebelius*, 856 F. Supp. 2d 196, 218 (D.D.C. 2012). Here, the requested preliminary injunction would not injure the Park Service, as the agency has no stake in construction of the S-R Line. *See* FEIS at 3 (AR 47864) (noting that “[t]he purpose and need for action by the NPS . . . is distinct from that of the applicant” and that “[t]he purpose of the federal action here is to respond to the applicant’s proposal”). Moreover, any inconvenience or harm to the Companies as a result of preliminary relief maintaining the status quo, must be viewed in the proper context of a 145-mile long transmission line that need not be in service until June 2015, if at all, and of the overwhelming public interest in preventing irreversible harm to treasured public resources. As the Companies have been eager to point out, the S-R Line is 145 miles in length, with only 4.3 miles of the transmission line crossing the Delaware Water Gap. *See, e.g.*, Def.-Intervenors’ Cross-Mot. for Summ. J. 7, ECF No. 39. The currently scheduled in-service date for the entire S-R Line is June 2015. *See* Decl. of Joann P. Bauer ¶ 16 (“Bauer Decl.”), ECF No. 21-2. These circumstances and this schedule mean that the Companies cannot

persuasively maintain that they *must* begin construction in the Delaware Water Gap on September 3, 2013, at the risk of jeopardizing the S-R Line's in-service date.

First, it is not at all certain that the June 2015 target date for the S-R Line is indelible. The evidence suggests that it is not, and the electric reliability concerns asserted by the Companies appear to be overstated. The in-service date for the S-R Line already has been delayed three years without causing an emergency, and since the S-R Line was first ordered in service in 2007 by the regional transmission operation ("PJM"), the need for the line has become increasingly attenuated. While PJM's 2008 Regional Transmission Expansion Plan ("RTEP") found a need for the line based on 50 projected reliability violations, subsequent analyses have revealed at most five violations that occur only in the most unlikely worst-case scenarios that inform grid system planning, so-called "double circuit towerline" ("DCTL") contingencies. *See* PJM, 2010 RTEP at 217 (2011), *available at* <http://www.pjm.com/~media/documents/reports/2010-rtep/2010-section10.ashx>.

These potential issues have not only diminished since the S-R Line was originally ordered into service, they are also proving amenable to relatively inexpensive ongoing operational fixes that do not rely on new transmission capacity. For instance, PJM's current operational solution represents a shift away from a more expensive approach that would have kept a power plant operating on contract beyond its scheduled retirement date. *See* PJM, 2011 RTEP at 15 (2012), *available at* <http://www.pjm.com/~media/documents/reports/2011-rtep/2011-rtep-book-1.ashx> (explaining that "[t]he near term solution" for the current three-year delay "is to operate to the DCTL violations in real time operation and adjust generation and implement Demand Side Response (DSR) as required to maintain grid reliability"). PJM's most recent update on the status of the S-R Line notes that "PJM will continue to operate to double

circuit tower line limits in real-time operation until the line is placed in-service.” PJM, 2012 RTEP at 7 (2013), available at <http://pjm.com/~media/documents/reports/2012-rtep/2012-rtep-book-1.ashx>.

Even assuming that the June 2015 in-service date is immovable, to date, the Companies have not shown how the construction schedule for a 145-mile transmission line with an in-service date of June 2015 absolutely necessitates construction of the four miles in the Delaware Water Gap beginning *September 3, 2013*. The Companies previously represented that “[t]he construction schedule for the entire Project is constrained by the need to work around scheduled outages for the existing 230 kV line [the B-K Line, or Bushkill-Kittatinny Line], which is a critical link in the PJM grid.” Bauer Decl. ¶ 16.

The first scheduled outage for the existing 230 kV line in Pennsylvania started in October 2012. Other major 230 kV line outages have been approved or are in the approval process with PJM. They include the Peckville to Blooming Grove 230 kV line outage (March 2013 to January 2014), Bushkill to Kittatinny 230 kV line outage (October 2013 through January 2014), the Blooming Grove to Bushkill 230 kV line outage (February 2014 to through [sic] March 2014), the Stanton to Lackawanna 230 kV line outage (May 2014), and Lackawanna to Peckville 230 kV line outage (January 2014).

Id. The B-K Line outage is thus scheduled at present for October 2013 through January 2014. But even assuming that the outage cannot be rescheduled, the Companies have not shown that it requires a September 3, 2013, commencement of access road construction in the Park to take advantage of the four-month outage. Nor have the Companies shown that a preliminary injunction that could delay construction beyond October 2013 would inevitably lead to a failure to meet the June 2015 in-service date for the entire S-R Line – particularly when other segments of the existing 230 kV line outside of the parks have scheduled outages as late as March 2015. *See* Bauer Decl. ¶ 16. At most, the Companies have represented only that delay in “the

construction work in the Park planned for late 2013 and early 2014 . . . *could* affect the overall Project schedule.” Bauer Decl. ¶ 19 (emphasis added).

The Companies’ questionable assertions about the absolute need to begin work on September 3, 2013, also should be considered in the context of the equities faced by Plaintiffs. Plaintiffs brought this suit to protect public park lands that are dear to them. *See* Compl. for Declaratory and Inj. Relief ¶¶ 8-18, ECF No. 1. These four miles – although portrayed by the Companies as a minor, even negligible, portion of a much bigger project – run through the very heart of the nationally important resources that Plaintiffs have committed themselves to protect, crossing highly sensitive areas of the Delaware Water Gap, Appalachian Trail, and Middle Delaware River that are renowned for spectacular scenery and home to rare geological and ecological resources. Over the course of this litigation, Plaintiffs have carefully tailored their requests for relief to allow the Companies to undertake all work within the Parks that would not jeopardize Park resources. *See* Pls.’ Reply in Supp. of Mot. for Prelim. Inj. 2, ECF No. 23; Pls.’ Resp. to Def.-Intervenors’ Mot. for Order to Defer Action on Pls.’ Mot. for a Prelim. Inj., ECF No. 29.

At this juncture, Plaintiffs have no other recourse. The start of tree clearing and road building in the Delaware Water Gap in two weeks’ time will inflict irreparable harm on the parks and on Plaintiffs’ interests and severely undercut Plaintiffs’ ability to secure meaningful relief if they prevail on the merits of their legal claims. If that construction is allowed to begin and to continue, this Court’s review and Plaintiffs’ efforts to protect the parks from the consequences of unlawful agency action would be fruitless.

CONCLUSION

For all the reasons set forth above, Plaintiffs request that this Court issue preliminary injunctive relief prohibiting any and all construction-related activities for the S-R Line in the Delaware Water Gap National Recreation Area.

Respectfully submitted this 19th day of August 2013,

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