UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, et al., Plaintiffs, v. KENNETH SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; DENNIS REIDENBACH, in his official capacity as Northeast Regional Director of the United States National Park Service, 1849 C Street, N.W. Washington, DC 20240, 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 prohibit implementation of the 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") through the Delaware Water Gap National Recreation Area, the Middle Delaware National Scenic and Recreational River, and the Appalachian National Scenic Trail (collectively, the "parks"), until this Court has an opportunity to decide Plaintiffs' claims. Plaintiffs also request that this Court enjoin any construction activity in connection with the S-R

Line within a twenty-mile radius of the Delaware Water Gap National Recreation Area. 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 parks within the relevant area of impacts identified by the Park Service.

Plaintiffs have conferred with counsel for the Park Service and for the proposed Intervenors. Both the Park Service and the proposed Intervenors oppose this motion. Counsel for proposed Intervenors has informed Plaintiffs that certain construction-related activities in the parks – including surveying, geotechnical boring, and clearing for and construction of access roads – is planned to begin in early 2013 and to be completed before the end of March 2013. This information, together with the Statement of Facts in the accompanying memorandum of law, demonstrates that expedition of this Court's consideration is essential. Accordingly, Plaintiffs request that this Court set a hearing on their 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 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. Construction of the S-R Line through the parks will take only eight months to complete in its entirety. This massive, high-voltage, 195-feet tall transmission line will permanently scar the landscape and damage geological and ecological resources in these treasured national parks. Indeed, the Park Service itself 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.[1] 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 national lands.

As is set forth in Plaintiffs' supporting Memorandum of Law, Plaintiffs are likely to succeed on the merits of their claims. Furthermore, the equities favor the grant 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 parks.

Respectfully submitted this 6th day of December, 2012,

/s/ Hannah Chang
Hannah Chang
Abigail Dillen
Lisa Perfetto
Admitted *Pro Hac Vice*
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: 212-791-1881
Fax: 212-918-1556
hchang@earthjustice.org
adillen@earthjustice.org
lperfetto@earthjustice.org

[1] Final Environmental Impact Statement for the Susquehanna to Roseland 500-kilovolt Transmission Line, Appalachian National Scenic Trail,; Delaware Water Gap National Recreation Area and Middle Delaware National Scenic and Recreational River 80, 680 (2012), *available at* http://parkplanning.nps.gov/documentsList.cfm?parkID=220&projectID=25147.

/s/ Jennifer Chavez
Jennifer Chavez (D.C. Bar No. 493421)
Earthjustice
1625 Massachusetts Avenue NW, Suite 702
Washington, DC 20036-2212
Phone: 202-667-4500
Fax: 202-667-2356
jchavez@earthjustice.org

Aaron Kleinbaum
Alice Baker
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
Phone: 973-424-1166
Fax: 973-710-4653
akleinbaum@easternenvironmental.org
abaker@easternenvironmental.org

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, et al., Plaintiffs, v. KENNETH SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; DENNIS REIDENBACH, in his official capacity as Northeast Regional Director of the United States National Park Service, 1849 C Street, N.W. Washington, DC 20240, Defendants.	Case No. 1:12-cv-01690-RWR

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES(S)**

STATUTES

REGULATIONS

FEDERAL REGISTER ENTRIES

OTHER AUTHORITIES

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") seek a preliminary injunction to halt implementation of 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 ("Project" or "S-R Line") and to prohibit construction of the S-R Line within a 20-mile radius of three treasured national park units during the pendency of this Court's consideration of Plaintiffs' claims. As authorized by Defendants ("National Park Service" or "Park Service"), the S-R Line would slice through 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") in an area of these parks that is renowned for spectacular scenery, home to rare geological and ecological resources, and much beloved by the public, including Plaintiffs' members.

The Project, as reviewed and approved by the Park Service, will severely impair these three park units. In the agency's own words, the Project will "degrade the integrity of resources and the scenic landscape" in 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, 681 (2012) ("S-R EIS"), *available at*

http://parkplanning.nps.gov/documentsList.cfm?parkID=220&projectID=25147. The damage to the parks, moreover, will be irreversible. *Id.* at 680, 724-25. With construction outside the parks ongoing and construction within the parks imminent, Plaintiffs request that this Court bar construction-related activities in and around the parks so that the Court has an opportunity to consider Plaintiffs' meritorious 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"), before damage to park resources and ongoing construction precludes any meaningful relief.

STATEMENT OF FACTS

I. THE PARKS

The Delaware Water Gap, home to "some of the best-known scenic landscapes in the northeastern United States," encompasses 67,210 acres along the Delaware River in New Jersey and Pennsylvania. S-R EIS at 7-8. The Delaware River – the longest undammed river in the eastern United States and one of the cleanest rivers in the nation – flows through the Park. *Id.* This section of the river, designated the Middle Delaware, cuts through the Appalachian Mountain to form the famed Delaware Water Gap. *Id.* The valley of the Water Gap is characterized not only by unique geologic features and diverse ecosystems, but also "has the most significant, intact concentration and diversity of known archeological resources in the northeastern United States." *Id.* at 11. In addition, 27 miles of the Appalachian Trail, a 2,175 mile-long footpath traversing fourteen states and designated as the nation's first national scenic trail in 1968, runs along the Kittatinny Ridge within the Park. *Id.* at 8, 92.

The Delaware Water Gap encompasses the second largest acreage of any unit in the Northeast Region of the National Park system and is one of the largest public open spaces in the

northeast United States. *Id.* at 11. The Park offers valuable and increasingly rare opportunities for the enjoyment of unbounded landscapes and rural solitude in the mid-Atlantic corridor. *See id.* More than 5.2 million people visit the Park each year to hike, bike, cross-country ski, rock climb, boat, fish, swim, and camp. *See id.* at 7. Additionally, an estimated two to three million people per year hike a portion of the Appalachian Trail. *See id.* at 8.

In the late 1920s, when the lands in the Delaware Water Gap region were still privately owned properties not yet designated for special protection as part of the national park system, Applicants[1] (or their predecessors) acquired rights-of-way on which they constructed the 230-kilovolt Bushkill-to-Kittatinny transmission line ("B-K Line"). *See id.* at L-267. The towers for the B-K Line are approximately 80 feet tall, *id.* at 4 – well below the surrounding tree canopy, which averages 120-130 feet tall, *id.* at M-110. There are no existing access roads to the right-of-way, *id.* at v, and after constructing the B-K Line, Applicants allowed much of the right-of-way to revegetate. As of May 2010, portions of the right-of-way within the Park had not been cleared "in decades." *Id.* at M-28.

The B-K Line's right-of-way crosses 4.3 miles of the center of the Park, in "one of the most undeveloped areas of the park," which "contain[s] large swaths of contiguous mature forest, few manmade intrusions, unique geological formations, a globally significant rare plant community, and abundant opportunities for solitude." *Id.* at 680. The right-of-way bisects Park resources "recognized for their superlative biodiversity," *id.* at 514, "including rare limestone formations that support unique calcareous wetlands such as Arnott Fen, . . . the Hogback Ridge wetlands and the Van Campen Brook riparian area," *id.* at 396. The right-of-way slices across the north-south Kittatinny Ridge, an important migratory corridor for birds, *id.* at 460, and is

[1] The applicants for the requested permits, PPL Electric Utilities Corporation and Public Service Electric and Gas Company (jointly, "Applicants"), have moved to intervene in this proceeding.

located next to "one of only two known communal roosts for wintering bald eagles," *id.* at 79. Additionally, the right-of-way crosses areas of the Park "with high concentrations of cultural resources." *Id.* The right-of-way also passes near the "most natural and least developed section of the [Middle Delaware]," *id.* at 673, crossing the river just downstream of Walpack Bend, a "unique river feature" and "premier visitor attraction" within the Delaware Water Gap, *id.* at 680. The right-of-way crosses the Appalachian Trail as well, at a stretch that is "known for the solitary and wilderness-like experience it offers." *Id.* at 673.

II. THE PROJECT

It is along this right-of-way that the Park Service has approved construction of the S-R Line to connect the Susquehanna Substation in Berwick, Pennsylvania, to the Roseland Substation in Roseland, New Jersey. *See* ROD at 1-2 (attached to the Decl. of Hannah Chang (Dec. 6, 2012) ("Chang Decl."), Ex. 1); *see also* S-R EIS at 247-48 (Figs. 49, 50) (attached to Chang Decl., Ex. 2). The S-R Line as approved by the Park Service ("Alternative 2" or "Applicants' preferred route") would remove the existing single-circuit 230-kilovolt B-K Line and replace it with a much bigger and far more intrusive double-circuit 500-kilovolt line. *Id.* at 1. New 195-foot-tall towers would replace the B-K Line's approximately 80-foot-tall towers. *See* S-R EIS at 4. The new towers would hold an additional circuit, carrying both the 500-kilovolt S-R Line as well as the B-K Line initially energized at 230 kilovolts but built to carry 500 kilovolts. *See id.* at 30, 36. "The configuration of the conductors for the S-R Line would be vastly different than that of the B-K Line. Instead of 6 lines, the S-R Line structures (which would be twice as tall as the B-K Line structures) would carry a total of 20 lines." *Id.* at 442.

To accommodate this new construction, the Park Service has decided to grant an expanded right-of-way in addition to a special use permit for construction. *See* ROD at 2. The

existing B-K Line right-of-way has historically been cleared to a width between 80 and 150 feet within the deeded width of 100 to 380 feet. *Id.* at v; *see also* ROD at 3. Construction of the S-R Line will require additional clearing of vegetation, up to a 200-foot right-of-way. *See* ROD at 3.

Construction of the Project in the parks is expected to take eight months. *See* ROD at 4. Construction will entail removal of the existing 22 transmission towers for the B-K Line through mechanical chipping of the existing tower foundations above ground. S-R EIS at v, 39. The below-ground foundations will remain in place. *Id.* at 39. After clearing of the additional right-of-way, 5.3 miles of access roads, including approximately 1.9 miles outside of the existing right-of-way, will be constructed. *See id.* at 55. Additionally, Applicants will clear and build an unspecified number of miles of spur roads, 70 acres of construction staging areas, 23 crane pads of 10,000 square feet each, 5 to 6 wire pulling locations of 40,000 square feet each, and 2 pulling and splicing sites of 240,000 square feet each. *Id.* at 38, 55. Six new transmission towers will be installed per mile, for a total of 26 new towers within the Park. *Id.* at 38. The towers will be built on 6- to 9-feet wide concrete foundations. *Id.* at 38, 41. Installation of these towers will require excavation to a depth of at least 15 to 30 feet. *Id.* Seven of the towers will be constructed in and require excavation of rare geologic formations, and seven towers will be constructed in geologic formations that "have fair to poor stability." *Id.* at 360.

III. THE PROJECT'S ADVERSE ENVIRONMENTAL IMPACTS

The Park Service concluded that "[p]ermitting the project would adversely affect multiple protected resources inside the parks, in some instances irreversibly." *Id.* at 680. Specifically,

> Alternative 2 would cause *significant adverse impacts* to geologic resources; wetlands; vegetation; landscape connectivity, wildlife habitat, and wildlife; special-status species; rare and unique communities; archeological resources; historic structures; cultural landscapes; socioeconomics; infrastructure, access and circulation; visual resources; visitor use and experience; wild and scenic rivers; park operations; and human health and safety.

Id. at viii (emphasis added). With respect to the Middle Delaware, the Park Service conceded that the chosen alternative "would result in significant long-term degradation of the scenic values for which the river was designated, which would be contrary to the directives in section 10(a) of the Wild and Scenic Rivers Act . . . ." *Id.* at 696. Based on "the abundant evidence of the environmental damage that would occur if the project were to move forward," *id.* at 75, the agency determined that "alternative 2 has the potential to result in a very high level of impact on a variety of important resources . . . *higher than some of the other action alternatives evaluated and much higher than the environmentally preferable alternative* (Alternative 1: No Action . . .)," *id.* at 74 (emphasis added).

The Park Service concluded that the Project "would result in considerable, and in some cases, severe adverse impacts on visitor experience," *id.* at 680, as "[t]he taller towers and wider [right-of-way] would create a dramatic visual disturbance where very little disturbance currently exists," *id.* at 623, and "would degrade the wilderness viewshed and cultural landscape," *id.* at 77. These impacts "would affect a relatively large area, a large number of users, and would exist for the life of the project," *id.* at 680, and "have the potential to violate the Organic Act" by making park resources "unavailable for the enjoyment of future generations," *id.* at 80.

The agency also concluded that Alternative 2 would "disturb or degrade habitat for wildlife and special status species." *Id.* at 76. The "larger, taller transmission lines crossing Kittatinny Ridge nearly perpendicularly" would bisect this major migratory bird flyway, increasing the likelihood of bird collision. *Id.* at 76, 475. The alignment crosses an area containing a bald eagle winter roost and is "in the flight path between the roost and foraging areas." *Id.* at 175. Currently, the B-K Line is "barely above the tree canopy and upon leaving the roost, the eagles fly over the lines to foraging areas," *id.*, but with the S-R Line suspended by

towers more than 100 feet taller, "the potential for collision or electrocution of eagles" flying to and from the roost "could increase," *id.* at 474. The Park Service acknowledged that:

> The high risk of bird collisions as a result of creating an aerial hazard on a major migratory flyway coupled with the unknown extent of the potential mortality of and injury to migrating birds and the uncertainty as to the effectiveness of mitigation measures is counter to the protection afforded migratory birds under the Migratory Bird Treaty Act. The siting of a transmission line adjacent to a bald eagle roost is counter to the recommendations in the National Bald Eagle Management Guidelines and mitigation of the risk of eagles colliding with the lines is uncertain . . . .

Id. at 481.

Additionally, significant impacts to geologic resources would result from "installation of towers in areas with a high slope, in unstable or weathered areas, and in rare or unique geologic features." *Id.* at 362. The agency acknowledged that geotechnical boring "would cause direct environmental impacts." *Id.* at L-47. The potential for adverse impacts to these "non-renewable resources . . . [that] cannot be replaced or made whole" would be "high." *Id.*

Rare and unique communities, which are subsets of the ecosystem recognized for their contribution to biodiversity, *id.* at 204, encompass 52% of the Project's route, *id.* at 508; ROD Attach. A at 8 ("The alignment for the selected alternative will intersect three park-managed outstanding natural features (Arnott Fen, Hogback Ridge, and Kittatinny Ridge), and five rare and unique vegetation communities (Delaware River riparian corridor, hemlock forests, lichens, talus slopes, and Van Campen Brook riparian area)."). The fact that rare and unique communities "are non-renewable . . . makes any impacts to them all the more serious as they cannot be replaced if lost." S-R EIS at 514; *see also id.* at 396. "The long-term effects of construction" in these areas are "difficult to predict accurately because of the nature of these communities . . . ." *Id.* at 514. For instance, extensive excavation would be necessary to install two new towers near Arnott Fen, an exemplar of globally imperiled calcareous wetlands. *Id.* at

207, 508. Because "Arnott Fen exists as a distinct combination of physical and biotic features," "seemingly small changes in hydrology . . . may result in disproportionately, unpredictably large changes . . . ." *Id.* at 514.

Approximately twelve acres, the majority of which are mature eastern hemlock/northern hardwood forest, "which is rare in [the Park]," would be cleared from Hogback Ridge, fragmenting the ridge's forests and "essentially . . . divid[ing the] park into a north and south section." *Id.* at 510. The Project also would adversely affect ten wetlands, including four that "provide the most functions and values of any other wetlands along the other alternatives . . . ." ROD Attach. B at 17. All of these impacts "are more acute because the parks provide uninterrupted naturalness in a developed region." S-R EIS at 680.

IV. THE PARK SERVICE'S ENVIRONMENTAL REVIEW

The Park Service published its notice of intent to prepare an EIS for the proposed project in 2010. *See* 75 Fed. Reg. 3486 (Jan. 21, 2010). In its Draft EIS released November 21, 2011, the Park Service did not select a Preferred Alternative, but it identified the no-action alternative as the Environmentally Preferred Alternative.[2] *See* Nat'l Park Serv., Susquehanna to Roseland 500kV Transmission Line Right-of-Way and Special Use Permit Draft Environmental Impact Statement; Appalachian National Scenic Trail, Delaware Water Gap National Recreation Area, and Middle Delaware National Scenic and Recreational River vii (2011) ("Draft EIS"), *available at* http://parkplanning.nps.gov/dewa. In the Draft EIS, the Park Service's analysis, which revealed Alternative 2 to be the most damaging alternative considered, noted that the proposed

[2] In August 2010, the Superintendent of the Appalachian Trail noted that there are "one or two [alternatives to the proposed Alternative 2] that would be better for the Delaware Water Gap and acceptable to us." David Pierce, *Opposition dominates power line hearing*, Pocono Record, Aug. 18, 2010, http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20100818/NEWS/8180314.

route "poses high risk for irreparable damage to significant ecological communities and drastic scenic degradation that could violate the Organic Act (impairment)." *Id.* at 686.

On October 5, 2011, the Administration announced that the S-R Line would be among the pilot projects for which the Rapid Response Team for Transmission, consisting of nine federal agencies including the Department of Interior, would "accelerate" permitting and construction. *See* Press Release, Council on Envtl. Quality, Obama Administration Announces Job-Creating Grid Modernization Pilot Projects (Oct. 5, 2011), http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/October_5_2011. At a January 24, 2012, tribal consultation related to the environmental review of the S-R Line, the Superintendent of the Delaware Water Gap noted that the Park Service and Applicants "need to come to an agreement because of increasing political pressure." S-R EIS at M-111.

In March 2012, the Park Service identified Alternative 2 as its preferred alternative notwithstanding its EIS analysis indicating that Alternative 2 could impair Park resources. *See* Press Release, Nat'l Park Serv. Ne. Region, National Park Service Identifies Preferred Alternative for Proposed Susquehanna-Roseland Transmission Line (Mar. 29, 2012), http://www.nps.gov/appa/upload/NPS-Susquehanna-Roseland-3-29-release.pdf. The Park Service released the Final EIS on August 31, 2012, *see* 77 Fed. Reg. 53,226 (Aug. 31, 2012), identifying all of the significant adverse impacts of the Project described in Section III, *supra.*

The EIS considers six alternatives. Aside from Alternative 1, the no-action alternative, the five alternatives considered are different routes for the transmission line. *See* S-R EIS at v-vii. Alternative 2 is Applicants' proposed route using the B-K Line right-of-way, as described above. *See* S-R EIS at 50, 56. Alternative 2b, Applicants' alternate proposal, also would use the B-K Line right-of-way, but would not require widening the right-of-way. *Id.* at 56. Because the

S-R Line would be built on a narrower right-of-way in this alternative, it would require two more towers than Alternative 2, which would be constructed within the 100-feet-wide portion of the right-of-way. *Id.* All five action alternatives considered in the EIS would have significant adverse impacts on multiple park resources. *See id.* at vii-viii.

The Park Service identified "visual split locations" ("VSLs") for each alternative – that is, "[t]he geographical point outside the parks at which it becomes physically possible for the applicant to route the line as it sees fit." S-R EIS at 33. For most of the resources examined in the EIS, the Park Service defined the study area as the area between the VSLs for that alternative. *Id.* So, for instance, although Alternative 2 crosses 4.3 miles of Park Service lands, the study area for the alternative is slightly more expansive, covering 5.6 miles of the right-of-way. *See id.* at 37-38 (Tables 2-3) (attached to Chang Decl., Ex. 3); *see also id.* at 427 (Fig. 70) (showing alignments within the study area in solid lines and alignments outside of the study area in dotted lines) (attached to Chang Decl., Ex. 4).

For purposes of assessing impacts to visual resources, the Park Service employed a different study area based on a "zone of visual influence" ("ZVI") that was "defined at 20 miles from the [Delaware Water Gap] boundary and the [Appalachian Trail] centerline." *See* Delaware Water Gap NRA and Appalachian Trail Visual Resources Technical Report (attached to the Declaration of Robert Proudman (Dec. 5, 2012) ("Proudman Decl.")). As the Park Service acknowledged, "due to the nature of scenic views, . . . visual changes outside defined [Park Service] ownership boundaries still have the potential to directly impact views as seen from adjacent protect areas, including those owned and managed by the [Park Service]." *Id.* at 593. This is especially so where "many park resources are located at geographic highpoint locations within park boundaries, offering broad vistas of the landscapes outside [Park Service]

ownership." *Id.* The Park Service therefore analyzed each alternative "according to a unique corresponding ZVI study area" defined as 20 miles offset from the Delaware Water Gap and the centerline of the Appalachian Trail "overlain onto an area defined as 20 miles offset from each alternative alignment." *Id.* "[T]he intersection of the two areas became the ZVI study area for the given alternative." *Id.*

V. THE RECORD OF DECISION

In the ROD signed on October 1, 2012, the Park Service selected Alternative 2, Applicants' preferred route, because the agency concluded that the no-action alternative was not a realistic option. While acknowledging that "the no action alternative would be the best choice if the only consideration were protection of park resources and values," the agency noted that it "cannot ignore the fact that the applicant owns a property interest in the existing powerline corridor" and that "[t]he applicant asserts that these existing rights are sufficient to allow it to build an alternative design to the line (Alternative 2b) without the grant of additional rights." ROD at 18. The Park Service concluded that Alternative 2b is "insufficient to meet current safety standards." *Id.* at 19 (noting that "independent transmission line engineers engaged by NPS disagree" with Applicants' assertion that Alternative 2b can be built safely).[3] Nevertheless, despite its doubts about Alternative 2b's safety and feasibility, the Park Service assumed that the Applicants could implement Alternative 2b without Park Service approval and, on this basis, it rejected the no-action alternative in favor of Alternative 2, which it viewed as slightly less damaging than Alternative 2b. *See id.*

A. The Non-Impairment Determination

[3] The Park Service's disagreement with Applicants' view of Alternate 2b's safety and feasibility is documented in Appendix D of the S-R EIS.

Despite the significant adverse impacts described in the EIS and acknowledged in the ROD, the Park Service concluded that the Project will not impair park resources and values. *See* ROD Attach. A (attached to Chang Decl., Ex. 5).

B. Compensatory Mitigation

Applicants proposed compensatory mitigation in their January 30, 2012, comments on the Draft EIS. *See* S-R EIS at L-274. In the proposal, Applicants offered to fund the Park Service's acquisition of land outside of the Delaware Water Gap. *See* S-R EIS at L-274 to L-276. Even though the Park Service had yet to approve any compensatory mitigation, Applicants already had "engaged and provided funds . . . to begin acquiring interests in private properties," and were in "dialogue with landowners" over certain tracts of land. *Id.* at L-276. Applicants had not disclosed any information about these land acquisitions to the public and were willing to share information with the Park Service only if the agency also agreed not to disclose this information to the public. *See id.* The Park Service did not discuss the proposed compensatory mitigation in the Final EIS. A May 25, 2012, "Plan for Compensatory Mitigation" from Applicants is included in Appendix N to the Final EIS as "Applicant Materials Received Subsequent to the DEIS" provided for "informational purposes only" and "*not analyzed or otherwise included in the FEIS.*" *See* S-R EIS App. N (emphasis added).[4]

The Park Service presented the "Middle Delaware Compensation Fund" (the "Fund") for the first time ever in the ROD. *See* ROD at 15. In the ROD, the Park Service announced that

[4] This May 2012 plan is substantially the same as the proposal attached to Applicants' January 30, 2012, comments on the Draft EIS – down to calculating the same impact acreage (38,221 acres), valuing the lands at the same amount ($9,500 per acre), and reaching the same value for affected resources ($36,494,241). *Compare* S-R EIS App. N "Plan for Compensatory Mitigation" *with* PPL, CMP Contribution Methodology (2012), *available at* http://www.pplreliablepower.com/NR/rdonlyres/836A0C89-9722-4A75-94A5-9D69F2D2A4AA/0/CMPContributionmethodologyNPS7.pdf.

Applicants would deposit into the Fund $56 million "as will be described in a memorandum of agreement to be entered with and managed by The Conservation Fund." *Id.* Nowhere in the EIS or the ROD is there any explanation of how this figure was determined. According to the ROD, money from the Fund would be used to "[a]cquire lands from willing sellers that can be included in the boundaries of [the Appalachian Trail] and [the Delaware Water Gap] as compensatory mitigation for lands over which [right-of-way] rights are granted." *Id.* The ROD neither identifies the lands that would be purchased nor specifies whether and how such lands will be chosen and managed.

VI. HARM TO PLAINTIFFS' MEMBERS

The area of the parks that will be affected by the S-R Line "contains high concentrations of many important and unique natural features" and is the destination for "a large proportion of [Park] users." S-R EIS at 680. These visitors include Plaintiffs' members, many of whom live near and/or regularly visit the Delaware Water Gap, canoe or kayak on the Middle Delaware, and hike on the Appalachian Trail.[5] These individuals have recreational, aesthetic, educational, and spiritual ties to the unique oasis offered by these parks, which will be irreversibly harmed by the imminent construction of the S-R Line.

Plaintiffs' members include individuals who have been visiting the parks for decades. *See, e.g.*, Decl. of Joan Aichele ¶ 3 ("Aichele Decl."); Decl. of Martha Carbone ¶ 3 ("Carbone Decl."); Decl. of Lee Larson ¶ 5 ("Larson Decl."); Decl. of Lenore Steinmetz ¶ 3 ("Steinmetz

[5] *See* Plaintiffs' Declarations submitted with this brief: Decls. of Susan L. Arnold, Mark J. Wenger, Sandy Batty, Maya K. Van Rossum, Ronald J. Tipton, Julia Somers, Edward K. Goodell, Marc Ross, Jeff Tittel, Thomas Y. Au, David Slaperud. *See also* Declarations of Plaintiffs' Members submitted with this brief: Decls. of Joan Aichele, Tanya McCabe, Lenore M. Steinmetz, Janet Goloub, Karen Lutz, Gary Szelc, John P. Brunner, Marc Magnus-Sharpe, Alexander Brash, Candice Cassel, Elizabeth Marshall, Stanley Tomkiel, Jeremy Agpar, Daniel Hoberman, Tim Carbone, Susan Honig, Martha Carbone, George Fluck, Gregory L. Gorman, Anne Tiracchia, Lee Larson, Elliott Ruga.

Decl."). Many of these members regularly visit the parks, whether two or three times a month, *see* Aichele Decl. ¶ 3, or nearly every day, *see* Larson Decl. ¶ 3. Plaintiffs' members also include individuals who live near the Delaware Water Gap and in close proximity to the B-K Line right-of-way itself. *See, e.g.*, Decl. of Anne Tiracchia ¶ 1 ("Tiracchia Decl."). Indeed, some of Plaintiffs' members chose their residence specifically because of the close proximity to the Delaware Water Gap. *See* Larson Decl. ¶ 5.

Plaintiffs' members hike, cross-country ski, bicycle, paddle, kayak, canoe, and picnic regularly in the Delaware Water Gap, Middle Delaware, and Appalachian Trail. *See, e.g.*, Decl. of Gregory Gorman ¶ 3 ("Gorman Decl."). Some members enjoy bird watching in the park, *see* Larson Decl. ¶ 10, including observing hawk migration in autumn, *see* Aichele Decl. ¶ 14. Plaintiffs' members particularly treasure the opportunity to spot bald eagles. *See, e.g.*, Decl. of Magnus-Sharpe ¶ 10 ("Magnus-Sharpe Decl."). Plaintiffs' members also enjoy viewing wildlife in the park, including black bears, red foxes, deer, turkeys, and turtles. *See* Aichele Decl. ¶ 10.

Whatever the activity they most often enjoy in the parks, Plaintiffs' members regularly visit and have special connections to the areas of the parks that will be adversely affected by the S-R Line. Marc Magnus-Sharpe, a member of Plaintiff Delaware Riverkeeper Network, for instance, has led educational trips for New York City school children in the Delaware Water Gap for the past eight years and has scheduled these trips through the end of the 2013 academic year. *See* Magnus-Sharpe Decl. ¶ 5. On these trips, Mr. Magnus-Sharpe hikes with students on the Kittatinny Ridge and near Walpack Bend and sometimes camps at the Rivers Bend campground. *Id.* ¶ 6. Lee Larson, a member of Stop the Lines, walks nearly every day in and around Millbrook Village, Old Mine Road, Watergate Recreation Site, and the Van Campen Glen trail. *See* Larson Decl. ¶ 3. Others of Plaintiffs' members visit Millbrook Village, *see, e.g.*, Decl. of

Gary Szelc ¶ 4, the "historical setting" of which the Park Service has conceded would be adversely affected by the S-R Line, *see* S-R EIS at 678. Still others regularly hike and bike on the McDade Trail. *See, e.g.*, Carbone Decl. ¶ 4; Tiracchia Decl. ¶ 4; *see also* S-R EIS at 677 ("Visitors hiking or mountain biking the McDade Trail would experience a wider canopy opening where alternative 2 would cross the trail."). Many of Plaintiffs' members also drive or bike regularly on roads in the parks that will pass under the S-R Line's much taller transmission towers, including Old Mine Road. *See* Decl. of Alexander Brash ¶ 4 ("Brash Decl."); *see also* S-R EIS at 579-80 (describing the adverse impacts of the S-R Line construction on Old Mine Road). Some of Plaintiffs' members have volunteered their time to build and maintain trails in areas of the park that will be affected by the S-R Line. *See* Steinmetz Decl. ¶ 5.

The words of Joan Aichele, an Appalachian Mountain Club member who leads hikes in the park, reflect the deep connection felt by so many of Plaintiffs' members towards the parks:

> My favorite hiking trip, and the one I most enjoy leading, heads north through one of the most spectacular areas in the [Delaware Water Gap], along the Van Campen Glen trail, with numerous waterfalls, hemlock trees and rhododendron forests. I always return through the Watergate Recreation Area and Millbrook Village, taking time to look at the historic buildings. Hikes in Van Campen Glen are among the most popular activities I lead on a regular basis. They have everything I look for in a hike: natural beauty, history and wildlife. Sometimes it feels like we are the only people on earth when we are out on these trails, a rare experience in today's hectic world. . . . Every time I drive home after spending time in the [Delaware Water Gap], I find myself smiling. My spirit has been renewed, and all I had to do was to put on a pair of hiking boots and get out there.

Aichele Decl. ¶ 8. There is no question that Ms. Aichele's recreational and aesthetic interests, like those of other members of Plaintiff organizations, will be harmed by the S-R Line approved by the Park Service. *See* Section III, *supra*; *see also, e.g.*, S-R EIS at 393, 396-97 (describing the Project's permanent adverse impacts to the Van Campen Brook area); *id.* at 607-13, 676-81

(describing the Project's permanent adverse impacts to, among other locations, Van Campen Glen Trail, Watergate Recreation Area, and Millbrook Village).

VII. THE IMMINENT CONSTRUCTION OF THE S-R LINE IN THE PARKS

Construction of the S-R Line in the parks will occur during the winter. *See* S-R EIS at L-309; ROD at 5. PSE&G indicates that "[t]he major construction of [the segment going through the New Jersey side of the Delaware Water Gap] will begin in fall/winter of 2013, but construction of some access roads and foundation in non-wetland areas may begin in the July - August, 2012 timeframe." Susquehanna-Roseland, PSE&G, http://www.pseg.com/family/pseandg/powerline/sr_segment4.jsp (last visited Dec. 5, 2012) (attached to Chang Decl., Ex. 6). Already, construction activities are occurring in Andover Township, which is approximately ten miles from the eastern boundary of the Park. *See* Construction Schedule, http://www.pseg.com/family/pseandg/powerline/pdf/SRConstruction-Schedule.pdf (last visited Dec. 5, 2012) (attached to Chang Decl., Ex. 7).

STATUTORY BACKGROUND

I. THE PARK SERVICE'S DUTIES UNDER THE NATIONAL PARK SERVICE ORGANIC ACT AND THE WILD AND SCENIC RIVERS ACT

Congress charged the Park Service with a bedrock duty to prevent impairment to park resources and values. *See* Organic Act, 16 U.S.C. §§ 1 to 18f-3. In establishing the Park Service in 1916, Congress directed the agency to manage and regulate the use of areas in the national park system in conformity with their "fundamental purpose," that is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* § 1. Congress reaffirmed this core mandate in 1978, clarifying that "the promotion and regulation of the various areas of the National Park System . . . shall be consistent

with and founded in the purpose established by [the Organic Act], to the common benefit of all the people of the United States." *Id.* § 1a-1. To this end, Congress emphasized that:

> the protection, management, and administration [of national park units] shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which those various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

Id.; *see also* Nat'l Park Serv. Management Policies § 1.4.2 (2006) ("NPS Mgmt. Policies"), *available at* http://www.nps.gov/policy/mp2006.pdf (interpreting the "derogation" and "impairment" language as "a single standard for the management of the national park system").

In its official interpretation of the Organic Act, to which adherence by the agency is "mandatory unless specifically waived or modified," NPS Mgmt. Policies at 3, the Park Service identifies the non-impairment mandate as its "primary responsibility":

> While Congress has given the Service the management discretion to allow impacts within parks, that discretion is limited by the statutory requirement . . . that the Park Service must leave park resources and values unimpaired unless a particular law directly and specifically provides otherwise. This, the cornerstone of the Organic Act, establishes the primary responsibility of the National Park Service. It ensures that park resources and values will continue to exist in a condition that will allow the American people to have present and future opportunities for enjoyment of them.

Id. § 1.4.4.[6] The agency defines impairment 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." *Id.* § 1.4.5. These resources and values encompass "the park's scenery, natural and historic objects, and wildlife," including "scenic features; . . . natural landscapes; . . . water and air

[6] Courts defer to the NPS Mgmt. Policies to the extent the Park Service relies on the policies in reaching the challenged decision. *See Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 20 n.13 (D.D.C. 2010). Here, the Park Service considered and relied on the NPS Mgmt. Policies in reaching its final decision. *See, e.g.*, S-R EIS at 391, 436, 506; ROD Attach. A at 1-3.

resources; soils; geological resources; paleontological resources; archeological resources; cultural landscapes; . . . native plants and animals; appropriate opportunities to experience enjoyment of [these identified] resources . . . ; and any additional attributes encompassed by the specific values and purposes for which the park was established." *Id.* § 1.4.6. The Management Policies further specify that:

> An impact would be more likely to constitute impairment to the extent that it affects a resource or value whose conservation is
>
> - necessary to fulfill *specific purposes identified in the establishing legislation* or proclamation of the park,[7] or
> - key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park, or
> - *identified in the park's general management plan* or other relevant NPS planning documents as being of significance.[8]

Id. § 1.4.5 (emphases added). "Before approving a proposed action that could lead to an impairment of park resources and values, an NPS decision-maker must consider the impacts of the proposed action and determine, in writing, that the activity will not lead to an impairment of park resources and values. If there would be an impairment, the action must not be approved." *Id.* § 1.4.7. To guarantee avoidance of impairment, the Park Service implements a policy of avoiding unacceptable impacts – that is, "impacts that fall short of impairment, but are still not

[7] The legislation establishing the Delaware Water Gap National Recreation Area directs management of the park "for public outdoor recreation benefits" and "preservation of scenic, scientific, and historic features contributing to public enjoyment." Pub. L. No. 89-158 §§ 1, 5, 79 Stat. 612 (1965) (codified at 16 U.S.C. §§ 460o, 460o-4). Similarly, the legislation establishing the Appalachian Trail designates it as a national scenic trail, "so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which" the trail passes. Pub. L. No. 90-543 § 3(b), 82 Stat. 919 (1968); *see also id.* § 5(a)(1).

[8] As the Park Service noted in the ROD, the "preservation of the scenic, scientific, and historic features" in the Delaware Water Gap National Recreation Area is the second management priority in the park's General Management Plan. ROD Attach. A at 11; *see also* Nat'l Park Serv., Delaware Water Gap National Recreation Area General Management Plan Summary 6 (1987), *available at* http://www.nps.gov/dewa/parkmgmt/upload/DEWAGMPSummary1987.pdf (identifying "public outdoor recreation benefits" as the first management priority).

acceptable within a particular park's environment." *Id.* § 1.4.7.1. Park managers are prohibited from permitting "uses that would cause unacceptable impacts." *Id.*

In addition to its duty to avoid impairment and unacceptable impacts to park resources and values, the Park Service is required to manage the Middle Delaware in compliance with the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. The Wild and Scenic Rivers Act implements a Congressional policy recognizing that certain rivers and their immediate environments "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" and establishes a commitment to protect these rivers and their immediate environments "for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. To comply with the Wild and Scenic Rivers Act, the Park Service must administer the Middle Delaware so 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." *Id.* § 1281(a). The Park Service's administration of the Middle Delaware must give "primary emphasis" to protecting the river's and surrounding area's "esthetic, scenic, historic, archeologic, and scientific features." *Id.*

II. THE ENVIROMENTAL REVIEW REQUIRED UNDER NEPA

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4375, requires federal agencies to take environmental considerations into account "to the fullest extent possible" in making decisions, 42 U.S.C. § 4332; 40 C.F.R. § 1500.2; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 684 (D.C. Cir. 1996). In so requiring, NEPA implements procedures that "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

In preparing an EIS," 42 U.S.C. § 4332(C), the Park Service must include a "full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1; *see also* 42 U.S.C. § 4332(C). The EIS must be prepared so as to "serve practically as an important contribution to the decisionmaking process" and cannot be "used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5; *see also id.* §§ 1502.2(f), 1506.1. NEPA thus serves the dual purpose of ensuring that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" as well as "guarantee[ing] that the relevant information [concerning environmental impacts] will be made available to the larger audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

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 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*, 555 U.S. 7, 22 (2008); *see also Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 48 (D.D.C. 2011).

ARGUMENT

Plaintiffs are entitled to preliminary injunctive relief because they make strong showings on all four factors. As is set forth below, Plaintiffs are likely to succeed on the merits of their Wild and Scenic Rivers Act, Organic Act, and NEPA claims. Their members will suffer irreparable harm in the absence of a preliminary injunction. At the same time, a delay in implementation of the ROD would postpone the irreparable adverse impacts that the Park Service has acknowledged will occur as a result of the Project and would not substantially injure Applicants. Finally, an injunction to prohibit construction in and around the parks would serve the public interest in protecting extraordinarily valuable public resources.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

This Court reviews agency action under the Wild and Scenic Rivers Act, the Organic Act, and NEPA pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Under the APA, courts hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Although this standard is deferential, courts do not defer "to the agency's conclusory or unsupported assertions." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). A court must undertake "a thorough, probing, in-depth review" of the challenged agency action, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971), to "ensure that [it is] founded on a reasoned evaluation of the relevant factors," *Marsh v.*

Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (internal quotation marks omitted). An action must be set aside where the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

A. The Park Service's Approval of the Project Violates the Wild and Scenic Rivers Act

The Park Service's approval of an alternative that will concededly inflict significant, enduring harm on the Middle Delaware violates the Wild and Scenic Rivers Act. Congress designated the Middle Delaware as a part of the nation's wild and scenic rivers system, *see* Pub. L. No. 95-625 § 705, 92 Stat. 3467 (1978) (codified at 16 U.S.C. § 1274(a)(20)), which includes rivers and their immediate environments that "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. § 1271.[9] Section 10(a) of the Wild and Scenic Rivers Act requires the Park Service to administer the Middle Delaware "to protect and enhance the values which caused it to be included in said system . . . ." 16 U.S.C. § 1281(a).

In the EIS, the Park Service concluded that the Project "would result in significant long-term degradation of the scenic values for which the river 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." S-R EIS at 696.

[9] The Park Service recently released a report on the Delaware River's "outstandingly remarkable values," which identifies five such values for the Middle Delaware: cultural, ecological geological, recreational, and scenic. *See* Nat'l Park Serv., Delaware River Basin: National Wild and Scenic River Values 3 (2012), *available at* http://www.nps.gov/dsc/ne/DelawareRiver Basin_Sept2012.pdf.

Thus, by the Park Service's own admission, the decision to approve the Project violates the Wild and Scenic Rivers Act. Where, as here, the agency has identified negative impacts that are incompatible with protecting the values that led to the river's designation, the agency cannot lawfully authorize those impacts. *See, e.g.*, *Or. Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182 (D. Or. 1998) (finding that the Bureau of Land Management violated Section 10(a) by allowing livestock grazing despite findings of negative impact on the designated river). Because the record establishes a violation of the Wild and Scenic Rivers Act, Plaintiffs should succeed on the merits of their Wild and Scenic Rivers Act claim. *See* Complaint ¶¶ 101-03.

B. The Park Service's Approval of the Project Violates the National Park Service Organic Act

Just as the approval of an exceedingly damaging project violates the Wild and Scenic Rivers Act, it also violates the Organic Act. The Park Service's discretion in managing the national park system is "bounded by the terms of the Organic Act itself," which requires the agency's stewardship to leave parks "unimpaired for the enjoyment of future generations," 16 U.S.C. § 1. *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 193 (D.D.C. 2008). As discussed above, impairment is an impact 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; *see also* ROD Attach. A at 1 (citing NPS Mgmt. Policies § 1.4). In making an impairment determination, the Park Service "must examine the relevant data and articulate a satisfactory explanation for its action 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) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)) (internal quotation marks omitted). The Park Service's approval of the Project,

which it recognized would "degrade the integrity of resources and the scenic landscape" and "have the potential to violate the Organic Act," S-R EIS at 80, fails to meet this standard.

1. The Park Service Did Not and Cannot Articulate a Rational Connection Between the Identified Impacts and a Non-Impairment Determination

The Park Service approved a Project that it acknowledged would have "significant adverse impacts" on fifteen resource areas, *see* S-R EIS at viii – impacts that, according to the agency, are "higher than some of the other action alternatives evaluated," *id.* at 74 – and would make resources "unavailable for the enjoyment of future generations," *id.* at 80. The Park Service is well aware that impairment is defined as "an impact that . . . would harm the integrity of park resources or values," S-R EIS at 756, and the agency recognized that "[u]nder the enabling legislation and Organic Act, the [Park Service] is charged with protecting the scenic, natural, cultural, and archeological resources at each park," *id.* at 80. At the same time, the agency concluded that the Project will result in impacts that "would degrade the integrity of resources and the scenic landscape." *Id.* The agency further noted that "[p]ermitting the project would adversely affect multiple protected resources inside the parks," and that "[a]llowing such adverse effects . . . would be contrary to NPS practice and principle of protecting and improving these resources." *Id.* at 397. Moreover, the Park Service noted in the ROD that compensatory mitigation was for "resources *lost or degraded* through project construction, operation, and maintenance." ROD at 4 (emphasis added); *see also* ROD Attach. A at 5.

Despite its recognition that resources would be lost or degraded as a result of the Project, the agency appears to assume that it can avoid finding impairment in part because of compensatory mitigation. But nothing in the Organic Act or the Park Service's policies contains such a loophole. As the agency itself conceded, "while the impacts of an action may be brought

below the threshold of impairment by modifications of the action to reduce or avoid impacts, mitigation in the form of compensation cannot be used to avoid a determination that the impacts of an action would impair park resources within the meaning of the Organic Act." Letter from Dennis Reidenbach, Reg'l Dir., Ne. Reg. Nat'l Park Serv., to Abigail Dillen, Earthjustice, et al. 1-2 (May 29, 2012) (attached to Chang Decl., Ex. 8). More profoundly, it is unclear how land acquisition outside the parks could compensate for the loss of the incomparable views and exceptionally valuable natural resources at the heart of the Delaware Water Gap – resources that the Park was established to protect. Given the agency's own concessions regarding damage to core Park resources, it necessarily failed to provide a reasoned justification for allowing the Project to go forward as planned. Far from supporting the agency's decision, then, its Non-Impairment Determination illustrates why a project that "would degrade the integrity of resources and the scenic landscape," S-R EIS at 80, must be found to "harm the integrity of park resources or values" in violation of the Organic Act. NPS Mgmt. Policies § 1.4.5.

At the outset, the Park Service failed to provide a "specific and detailed explanation as to how it arrived at [its] conclusion." *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 30 (D.D.C. 2010). "[W]ithout such an explanation, there is no rational connection between the facts found . . . and the final conclusions reached (. . . [i.e.] non-impairment)." *Id.* For instance, the agency noted that the Project will "result in unavoidable adverse impacts because the larger transmission line structure will remain a visible intrusion that degrades the existing scenic quality of the area that it traverses." ROD Attach. A at 12. In the very next sentence, the Park Service concluded: "However, the adverse impacts of the selected alternative will not impair visual resources." *Id.* Similarly, in ascertaining impairment to the Middle Delaware, the Park Service noted:

> [M]any of the values for which the river was designated will be perceptibly changed. Adverse impacts to visual qualities of the river will extend beyond the river itself and will be experienced by visitors who view the river from locations beyond the immediate crossing. The presence of taller towers, thicker and more numerous lines, and bird diverters will be seen not only as boaters pass below the wires, but as they approach from both upstream and downstream directions.

ROD Attach. A at 13. Yet, the agency concluded, without more, that "[a]lthough adverse impacts to the scenic qualities of the [Middle Delaware] are expected . . . , there will be no impairment of the qualities that caused the river to be included in the wild and scenic river system." *Id.* The agency cannot permissibly rely on such conclusory assertions that adverse impacts will not result in impairment. As the court pointed out in *Sierra Club v. Mainella*, "[t]he problem with these conclusions is that there is little or no explanation of how NPS reached them." 459 F. Supp. 2d at 100; *see also id.* at 106 (finding insufficient "NPS's lack of explanation as to how it reached its conclusions, typically simply describing the impact followed by a conclusion that the impact was not an impairment").

Here, as in *Sierra Club v. Mainella*, the Park Service did not (and cannot) make a rational connection between the fact that the Project will degrade scenic views and the conclusion of non-impairment. Park scenery is among the resources that the Park Service is required to protect from impairment, and the Delaware Water Gap National Recreation Area in particular was established precisely to preserve "scenic . . . features contributing to public enjoyment," Pub. L. No. 89-158 § 5, 79 Stat. 612, 614 (1965) (codified at 16 U.S.C. § 460o-4). *See* 16 U.S.C. § 1; NPS Mgmt. Policies § 1.4.6; *see also* ROD Attach. A at 2 (citing NPS Mgmt. Policies § 1.4.6). The Park Service's own policies establish that an impact "would be more likely to constitute impairment" if it affects a resource whose conservation is identified in the park's enabling legislation or general management plan. NPS Mgmt. Policies § 1.4.5. Moreover, the park's management plan identifies the preservation of scenic features as a management priority. *See* fn.

7, *supra; see also* S-R EIS at 593 (acknowledging that "the Organic Act and the enabling legislation for all three park units specifically identifies scenery as a key resource"). Given the importance of scenic values in the Delaware Water Gap, the Park Service was obliged to provide a credible explanation why enduring "degrad[ation]" of the landscape does not constitute impairment. ROD Attach. A at 12. "Merely describing an impact and stating a conclusion of nonimpairment is insufficient." *Sierra Club v. Mainella*, 459 F. Supp. 2d at 100. The Park Service's failure to set forth its "rationale for finding that the impact described is not impairment," *id.*, renders NPS's reasoning "opaque, at best," and its final determination "impermissibly conclusory," *Bluewater Network*, 721 F. Supp. 2d at 31.

In addition to its failure to provide a defensible explanation of its decision, the Park Service's non-impairment analysis is marred by inconsistencies. To justify a finding of non-impairment, the agency repeatedly relied on assertions that disturbed areas "will be seeded after construction with an NPS-approved conservation seed mixture" and "allowed to succeed to forested area over time." ROD Attach. A at 6 (discussing vegetation); *see also id.* at 7 (same regarding landscape connectivity and wildlife habitat); *id.* at 8 (same regarding special status species); *id.* at 9 (same regarding rare and unique communities). However, the EIS concluded that affected areas, even if seeded, would not return to their original condition within 15 years, 50 years, or possibly ever.

> Following construction, all temporary sites disturbed during construction would be returned to preconstruction conditions and would be seeded with an NPS-approved conservation seed mixture and allowed to succeed back to forested habitat over time. However, the mature forest that would be removed . . . would not be replaced within the 15-year analysis period covered by this EIS and would be hindered by soil compaction sustained during construction activities . . . .

S-R EIS at 511; *see also id.* at 39 ("The applicant would be responsible for the restoration of these spur roads . . . . However, based on the time taken to reach those existing conditions . . . ,

return to existing conditions could take more than 50 years or perhaps complete restoration would never occur.") (emphasis added); *id.* at 38 (noting that the time for cleared areas to return to present conditions is "*50 years or perhaps never*") (emphasis added); *id.* at 396 ("[C]leared wetland areas would not recover during the period of analysis to become a fully functioning forested wetland."); *id.* at 411 ("[M]ature forest removed for construction would not be replaced within the 15-year analysis period covered by this EIS . . . ."); *id.* at 414, 437, 477, 507 (same). Given these findings, the Park Service's reliance on the assertion that affected areas would "succeed to forest over time" to reach a conclusion of non-impairment, *see, e.g.*, ROD Attach. A at 6-9, is plainly irrational.

Further, the Park Service failed to connect the impairment threshold to "any objective standards that have been announced or evaluated." *Bluewater Network*, 721 F. Supp. 2d at 33. In *Bluewater Network*, the court found the Park Service's impairment analysis "profoundly flawed" in part because of the agency's reliance on descriptors and qualifiers, such as "frequently," "minor," and "moderate," to describe impacts. 721 F. Supp. 2d at 33, 37-38. Because "[t]here is no way of knowing the objective meaning of" such terms, the court found that the agency's analysis could not survive the arbitrary and capricious standard of review. *Id.*

> [The Park Service] never connects its obligations under the Organic Act and duties under its own policies to the language defining the impacts. . . . The conclusory labeling of impacts bears no identifiable relationship to NPS' guiding policies, and therefore the agency's determination of impacts on various aspects of visitor experience cannot be meaningfully reviewed.

Id. at 37; *see also id.* at 36 ("There are no objective standards given by which the level of impact can be gauged."). Likewise, in *Sierra Club v. Mainella*, the court rejected "descriptors of the impacts," such as "minor" and "moderate," which it deemed "wholly uninformative." 459 F. Supp. 2d at 100. The court found that such "unbounded term[s] cannot suffice to support an

agency's decision because it provides no objective standard for determining what kind of differential makes one impact more or less significant than another." *Id.* at 101. Even the Park Service's attempts to define these descriptors – describing a "major" impact as one "with substantial consequences on a regional scale for long periods of time or something severely adverse," for instance – failed to pass muster. *Id.* (internal quotations marks omitted). The court concluded that the agency's definitions "still leave identifying the intensity of the impact . . . entirely up to the agency." *Id.* In the face of this unbounded discretion, "[t]he Court c[ould] identify no principled basis for calling one [impact] 'minor' and one 'moderate,' or declining to call any given impact 'major' – only the application of a conclusory label." *Id.* at 102.

The Park Service's Non-Impairment Determination is riddled with similarly conclusory labels and undefined terms. For example, the agency concludes that "[a]lthough impacts to geologic resources will be significant, the adverse impacts will not result in impairment" because they will not "*substantially change* the scenic landscapes of the Appalachian Ridge and Valley Province . . . ." ROD Attach. A at 4 (emphasis added). Similarly, the Park Service noted that archeological resources would not be impaired "because known archeological sites will be avoided *for the most part* or the effects will be limited to *just a portion* of the site . . . ." *Id.* at 10 (emphasis added). With respect to historic structures, the Park Service found significant adverse impacts to seventeen historic resources, but concluded that impairment would not occur "because this is only *a small percentage* of the historic structures throughout the parks." *Id.* (emphasis added).[10] Likewise, although the Park Service concluded that the Project could have adverse effects on eighteen cultural landscapes, it found no impairment "because *only a small portion* of the cultural landscapes throughout the parks will be affected." ROD Attach. A at 11 (emphasis

[10] *But see* S-R EIS at 535 (noting that the Project "would adversely impact the historic structures within the parks, which is counter to their enabling legislation and mandates").

added). What constitutes a "substantial change," "a small percentage," or "only a small portion"? The Park Service does not say, and its failure to provide objective standards by which to evaluate impacts renders these descriptions arbitrary and capricious.

This defect relates closely to the agency's ultimate failure to rationally support its non-impairment determination. "[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." *Bluewater Network*, 721 F. Supp. 2d at 30 (emphasis added). In *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008), the court found it "perplex[ing]" that an "impact characterized as 'major and adverse' does not constitute an unacceptable impact, let alone impairment." *Id.* at 202 (finding the Park Service's non-impairment conclusion "fundamentally arbitrary and capricious" because the agency failed to "expla[in] how the most adverse impacts can still be considered acceptable"); *see also Bluewater Network*, 721 F. Supp. 2d at 36 n.30 ("The agency fails to explain why impacts should need to reach such a seemingly drastic point to trigger the protections of the Organic Act.").

In the present case, the Park Service dismissed the possibility of impairment to geologic resources, for instance, because the impacts it identified would not "substantially change the scenic landscapes of the Appalachian Ridge and Valley Province and the Southern Appalachian Plateau Province." ROD Attach. at 4. But, as the court asked in *Bluewater Network*, "[h]ow can such a draconian definition of impairment be consistent with the agency's obligation under the Organic Act . . . ?" 721 F. Supp. 2d at 36. In short, as it did in *Bluewater Network v. Salazar*, *Greater Yellowstone Coalition v. Kempthorne*, and *Sierra Club v. Mainella*, the Park Service once again "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." 721 F. Supp. 2d at 30. The agency's failure

to reach a reasonable conclusion based on its own factual determinations regarding the concededly significant damage anticipated from the S-R Line violates the Organic Act and contravenes the agency's central mandate to protect Park resources.

2. The Park Service Failed to Provide a Reasoned Analysis for Approving a Project with Significant Adverse Impacts.

The Park Service's approval of Alternative 2 – an alternative that it concluded had "the potential to result in a very high level of impact on a variety of important resources," S-R EIS at 74, and indeed, the highest impacts of all the alternatives considered, *id.* at vii-viii – cannot survive review under the arbitrary and capricious standard because the Park Service did not "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *PPL Wallingford Energy*, 419 F.3d at 1198. The agency approved Alternative 2 because, in its view, "selection of the no-action alternative would present the NPS with significant uncertainty, and a strong probability that the eventual outcome would be worse for park resources than the selected alternative." ROD at 18. This decision, made in spite of the agency's conclusions in the EIS about the Project's degradation of Park resources, *see, e.g.*, S-R EIS at 680-81; *see also* Section III in Statement of Facts, *supra*, demonstrates that the Park Service irrationally gave in to unfounded fears at the expense of its statutory obligation to protect the parks from impairment.

The agency's rationale for approving the Project cannot be reconciled with the extensively documented conclusions throughout the EIS that Alternative 2 is the very worst of the alternatives in terms of meeting the agency's overriding mandate under the Organic Act. *See, e.g.*, S-R EIS at vii-viii. The Park Service expressly "agrees that the no action alternative would be the best choice if the only consideration were protection of park resources and values." ROD at 18. Nevertheless, the agency hypothesized "two possible results of the selection of the

no-action alternative." *Id.* The Park Service conjectured that it was "unlikely" that the applicant would simply "abandon the project." *Id.* Instead, "[t]he applicant asserts that [its] existing rights [in the B-K powerline corridor] are sufficient to allow it to build an alternative design to the line (Alternative 2b) without the grant of additional rights." *Id.* Without addressing the validity of this assertion, the Park Service speculated that Applicants

> *may* decide to pursue alternative 2b, as analyzed, asserting its present property rights, and *if* it were prevented from constructing within its present rights, it *might* assert a "takings" claim against the United States. [This] is a particularly undesirable option for the NPS as, in its view, . . . alternative 2b is less preferable than the selected alternative.

Id. (emphasis added). "Under these circumstances, NPS [] rejected the no-action alternative in favor of the selected alternative, which, while causing more impact than failure to construct would, causes less impact than Alternative 2b." *Id.*

This "analysis" does not withstand scrutiny. First, the Park Service had concluded that Alternative 2b is not even a viable option because it does not meet "current safety standards." *Id.* at 19. Second, Alternative 2b requires Park Service approval. Even if Applicants could construct Alternative 2b without widening the existing B-K Line right-of-way, deconstructing the B-K Line and installing 28 195-foot tall transmission towers would require, at the very least, a special use permit from the Park Service.[11] *See* 36 C.F.R. § 5.7 ("Constructing or attempting to construct . . . [a] power line . . . upon across, over, through, or under any park areas, except in accordance with the provisions of a valid permit . . . is prohibited."). In light of the Park Service's finding that Alternative 2b is unsafe and the agency's authority, and indeed responsibility, to regulate power line construction in parks and to prevent activities that would

[11] The Park Service seems to assume that Applicants could build Alternative 2b without the agency's permission. *See* ROD at 18. If this were true, though, it defies logic that Applicants would have spent the past two years seeking the agency's approval to build Alternative 2.

harm Park resources, the Park Service could not rationally approve Alternative 2 out of fear that Applicants would unilaterally implement Alternative 2b.

The agency's speculation that Applicants would assert a takings claim if the Park Service selected the no-action alternative and barred Applicants from constructing Alternative 2b does not make the agency's decision any less arbitrary. The agency provided no analysis supporting its conclusory assumption that Applicants would prevail on such a takings claim. *See* ROD at 18 ("[S]election of the no-action alternative would present . . . a *strong probability* that the eventual outcome [Alternative 2b] would be worse for park resources than the selected alternative." (emphasis added)). Such speculation about possible outcomes cannot serve as a basis for choosing an alternative that impairs Park resources in violation of the Organic Act. In short, by framing Alternative 2b as the worst possible outcome, the Park Service created a false choice between Alternatives 2 and 2b. The Park Service's approval of the Project as proposed by Applicants is therefore unlawful, arbitrary, and capricious.

C. The Park Service's Inadequate Environmental Review Violated NEPA

The Park Service failed to comply with NEPA in approving the Project without adequate consideration of alternatives, including mitigation measures, and without full disclosure of the Project's adverse environmental impacts.

1. The Agency Did Not Adequately Consider Mitigation Measures

An EIS must "include a discussion" of "[m]eans to mitigate adverse environmental impacts," 40 C.F.R. § 1502.16(h); *see also* §§ 1502.14(f), 1508.25(b)(3), "in sufficient detail to ensure that environmental consequences have been fairly evaluated," *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352. The "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" because

"[w]ithout such a discussion, neither the agency nor other interested groups or individuals can properly evaluate the severity of the adverse effects." *Id.*

The mitigation measures set forth in the EIS, *see* S-R EIS App. F, and the ROD, *see* ROD at 4-15, are so vague and general as to prevent both the Park Service and the public from understanding the Project's full environmental consequences. A number of mitigation measures are simply requirements to submit plans, with no specifications regarding the contents of these plans or the extent to which they will actually mitigate anticipated harms. *See* S-R EIS at F-5, ROD at 5 (requiring a spill prevention and response plan); S-R EIS at F-7, ROD at 6 (requiring a long-term, park-specific vegetation management plan); S-R EIS at F-7, ROD at 6 (requiring an invasive species management plan); S-R EIS at F-10, ROD at 8 (requiring species-specific conservation and mitigation plans); S-R EIS at F-14, ROD at 12 (requiring a construction staging plan); S-R EIS at F-14, ROD at 12 (requiring a plan to control unauthorized public access and use on NPS lands that could result from the proposed project); S-R EIS at F-16, ROD at 14 (requiring a plan to avoid or minimize impacts to park visitors).

For instance, one "mitigation measure" simply requires the submission of "a detailed drilling plan for NPS review and approval." ROD at 4; S-R EIS at F-5. The agency finds drilling "particularly worrisome in areas with limestone substrate, which could fracture in unpredictable ways . . . . If this happens, it could change wetland functions and alter the composition of the vegetation and wildlife communities therein, creating a cascading effect that further compounds the impacts." Draft EIS at 682; *see also* S-R EIS at 362, 510. The agency's "mitigation" of this potential harm by requiring Applicants to submit a drilling plan without any guidance on how to avoid or minimize these harms provides little assurance that the agency "fairly evaluated" the consequences of drilling in the sensitive geology of the parks.

Other mitigation measures consist of mandates to minimize impacts without detail or information about how such impacts will in fact be effectively minimized. For instance, the EIS concludes that Applicants must "[d]evelop a buffer zone around areas of sensitive geologic resources," which would "protect these areas from drilling and excavation activities, limiting impacts." S-R EIS at F-5. The agency does not explain how such a buffer zone could be implemented, given that portions of the Project will be constructed *in* sensitive geological resources. *See id.* at 359-61. Although NEPA does not require a "complete mitigation plan be actually formulated and adopted," *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352, here, the perfunctory listing of general mitigation measures, without more, falls far short of providing the "sufficient detail" that ensures "environmental consequences have been fairly evaluated," *id.*; *see also Nw. Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439 (1988) ("A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.").

2. The Agency Failed to Prepare a Supplemental EIS Addressing Significant New Information About Compensatory Mitigation

NEPA requires an agency to supplement an EIS where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). A supplemental EIS is required if "new information shows that the remaining action will affect the quality of the environment . . . to a significant extent not already considered." *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting *Marsh*, 490 U.S. at 374). Full disclosure and analysis of mitigation measures is fundamental to compliance with NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 351-52. Under NEPA, the agency must "rigorously explore and objectively evaluate all reasonable alternatives" and in doing so, "[i]nclude appropriate

mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. §§ 1502.14(a), (f). Such mitigation includes, among other things, compensating for impacts by "replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20.

The Park Service introduced the Middle Delaware Compensation Fund for the first time in the ROD. Applicants would deposit at least $56 million dollars[12] into the Fund to:

- Acquire lands from willing sellers that can be included in the boundaries of [the Appalachian Trail] and [the Park] as compensatory mitigation for lands over which [right-of-way] rights are granted.
- Carry out wetlands restoration projects elsewhere within [the Appalachian Trail corridor] and [the Park] as compensatory mitigation for wetlands impacted by [right-of-way] clearing and maintenance.
- Carry out historic preservation projects elsewhere within [the Appalachian Trail] and [the Park] as compensatory mitigation for historic properties impacted by line construction.

ROD at 15. The public has no information about the lands or acreage that will be purchased through the Fund. Neither is there any indication or certainty that land acquisitions will be purchased and managed in a way that genuinely offsets damage to existing parklands. Moreover, the "wetlands restoration projects" that will be undertaken to compensate for damage to wetlands have not even been selected, nor their efficacy and impacts considered.[13]

As described in Section V.B. under Statement of Facts, *supra*, the Park Service had never previously identified compensatory mitigation measures. Prior to issuance of the ROD, the Park Service had not even confirmed that compensatory mitigation would be implemented. *See, e.g.*,

[12] In a report prepared for the Park Service, the impacts associated with the Project actually are estimated at $89 million. Human Use and Ecological Impacts Associated with the Proposed Susquehanna to Roseland Transmission Line (2012), *available at* http://parkplanning.nps.gov/document.cfm?parkID=220&projectID=25147&documentID=49117.

[13] In the Final Statement of Findings ("SOF") for wetlands and floodplain management, *see* ROD Attach. B at 43, 46-49, the Park Service generally identifies nine compensatory mitigation projects for wetlands, and concedes that it needs "a better understanding of what functions and values the projects can provide, [the] practicality of completing the projects, expected success of the project, and other factors" before selecting the appropriate projects. *Id.* Attach. B at 43.

S-R EIS at 75 ("[T]he NPS approach would be to first work with the applicant to incorporate all practicable measures to avoid or minimize adverse impacts . . . . Compensation would only be considered for adverse impacts that cannot be completely avoided."). The Park Service's introduction of the Fund in the ROD therefore constituted "new information." This new information – the expenditure of at least $56 million to acquire unidentified lands to include in the parks and to undertake as-yet-undetermined restoration projects whose impacts and effectiveness have not been considered and disclosed to the public – will undoubtedly affect the quality of the environment to a significant extent never previously considered and "provides a seriously different picture of the environmental landscape." *Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (internal quotation marks omitted). The agency's failure to prepare a supplemental EIS addressing this new information therefore violates NEPA, *see* 40 C.F.R. § 1502.9(c)(1)(ii), and circumvents NEPA's "informational role" of "giv[ing] the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process and . . . provid[ing] a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349.

3. The Agency Did Not Consider a Reasonable Range of Alternatives

The Park Service evaluated six alternatives, all of which were different routes for the S-R Line, *see* S-R EIS at v-vii, and impermissibly failed to consider other reasonable alternatives that could afford better protection to the parks. In preparing an EIS, agencies must "[r]igorously explore and objectively evaluate *all reasonable alternatives*" to a proposed action. 40 C.F.R. § 1502.14 (emphasis added). This consideration, "the heart of the [EIS]," requires agencies to "present the environmental impacts of the proposal and the alternatives . . . , thus sharply

defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

The Park Service's refusal to examine alternatives, such as "[t]he use of distributed energy generation sites and localized renewable energy," S-R EIS at 71, fails under a rule of reason. *See Natural Res. Def. Council. v. Hodel*, 865 F.2d 288, 294-95 (D.C. Cir. 1988) (noting that a "rule of reason" governs the range of alternatives that an agency must discuss). The agency claimed that it need not consider non-transmission alternatives because "ordering the adoption of such systems is beyond the authority of the NPS." S-R EIS at 71. This is an insufficient reason to avoid consideration of a feasible alternative. *See* Forty Most Asked Questions Concerning CEQ's National Envtl. Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 17, 1981) ("An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable."); *see also Natural Res. Def. Council v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) (finding that reasonable alternatives need not be "limit[ed] to measures the agency or official can adopt"). The requirement that the agency consider "to the *fullest* extent possible" alternatives that would reduce environmental damage, *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971), is such that "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate," *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir.1995) (internal quotation marks and citation omitted). Here, the Park Service's review is inadequate because it failed to examine viable alternatives.

4. The Agency Did Not Take a Hard Look at the Project's Direct, Indirect, and Cumulative Impacts

When preparing an EIS, an agency must consider the environmental consequences of the proposed action, including its direct, indirect, and cumulative impacts. *See* 40 C.F.R. § 1508.8.

Here, the Park Service's narrow definition of the study area engendered a myopic view of the Project and prevented the agency from taking the requisite hard look.

The study area for assessing impacts in the EIS varies by resource, but for nearly all the resources, the Park Service limited the study area to the VSLs, which are just outside the boundaries of the Delaware Water Gap. *See* S-R EIS at 355, 384, 406, 426, 460, 498.[14] The agency's rationale for doing so was twofold: "[b]ecause the location of the S-R Line outside the study area cannot be determined at this time," *id.* at 406, and "because the NPS cannot dictate where the line would actually go," *id.* at 387. Both of these reasons are unpersuasive. First, the agency's claim that it cannot determine the location of the S-R Line outside of the VSLs is belied by its accurate depiction in the EIS of the entire length of the line from Berwick, Pennsylvania, to Roseland, New Jersey. *Compare* S-R EIS at 237 (Fig. 47) (attached hereto as Chang Decl., Ex. 9) *with* Susquehanna-Roseland Project, PPL, http://www.pplreliablepower.com/index.htm (last visited Dec. 6, 2012) *and* Susquehanna-Roseland, PSE&G, http://www.pseg.com/family/pseandg/powerline/index.jsp (last visited Dec. 6, 2012).

Second, the Park Service'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 under NEPA "because of a lack of authority to take any action affecting environmental impacts." *Sierra Club v. Mainella*, 459 F. Supp. 2d at 103-05. In *Sierra Club v. Mainella*, the Park Service argued that it need not consider impacts caused by activities outside park boundaries in its NEPA analysis because it "has no authority to regulate surface operations outside park boundaries or otherwise prevent their impacts, and thus . . . cannot be considered a cause of those impacts."

[14] The broadest area of analysis used by the Park Service was in analyzing impacts to visual resources. *See* S-R EIS at 593. Even in this analysis, however, the Park Service limited its conclusions by differentiating between locations inside and outside the conventional study area (defined by VSLs). *See id.*

459 F. Supp. 2d at 103-04 (internal quotation marks omitted) (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004)). The court rejected the argument, noting that "[t]he 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." 459 F. Supp. 2d at 105. By contrast,

> [The Park Service] has the ability . . . to consider the impacts from surface activities [outside the boundaries of the park] in making the impairment determination pursuant to section 1 of the Organic Act . . . . If . . . [the Park Service] determined that adjacent surface activities would impair park resources and values under the Organic Act, the Act would leave [the Park Service] no choice but to withhold the [requested approval] until [the Park Service] had addressed the threat of impairment in some other manner.

Id. In other words, because as the Park Service recognized, "[i]mpairment may . . . result from sources or activities outside the park," ROD Attach. A at 2; *see also* S-R EIS at 593, and because the Park Service is statutorily mandated to prevent impairment, a proper NEPA analysis must consider impacts outside the boundaries of the national park unit "because there is a reasonably close causal relationship between such impacts and [the Park Service's] decision to grant" the applicant access to the park. 459 F. Supp. 2d at 105. Indeed, the agency's refusal to examine impacts beyond a narrowly delimited study area largely defined by Park boundaries prevented it from fully considering the Project's impacts *within* the parks. For instance, without considering the impacts, including erosion and sedimentation, from construction of the S-R Line *outside* the parks but within the Delaware River Basin, the agency could not fully assess construction impacts on water resources *inside* the parks.

In the present case, the Park Service turned its statutory obligation on its head by limiting the analysis – both for purposes of NEPA and the Organic Act – to the VSLs, which are by definition dictated by *Applicants*' plans, rather than by a consideration of how impacts outside the parks could affect resources inside the parks. The agency effectively conceded, for instance,

that it did not properly consider the impacts of the S-R Line on landscape connectivity: "The assessment of landscape connectivity in its traditional sense of continuity of habitat on a regional scale cannot be accomplished . . . . Because the location of the S-R line outside the study area cannot be determined . . . , *a direct analysis of the impacts on landscape connectivity at the regional scale is not possible*." S-R EIS at 424 (emphasis added). In examining indirect impacts – that is, impacts "caused by the action and [] later in time or farther removed in distance," 40 C.F.R. § 1508.5 – the agency further conceded that, "[b]ecause the location of the S-R Line outside the study area cannot be determined at this time," "potential impacts outside the study area" (i.e., indirect impacts) can be addressed only "*generally*" and "cannot be evaluated per alternative," S-R EIS at 355-56, 384, 406, 426, 460-61, 498 (emphasis added). But a "general" analysis is precisely what is not permitted under the hard look standard. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999) (holding that "very broad and general statements devoid of specific, reasoned conclusions" cannot satisfy NEPA).

II. PLAINTIFFS' MEMBERS WILL SUFFER IMMINENT AND IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION

The harms to Plaintiffs and their members described in Section VI of the Statement of Facts, *supra*, warrant preliminary injunctive relief because these harms are "certain, great and actual – not theoretical – and imminent." *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (citation and emphasis omitted); *see also City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 127 (D.D.C. 2006) ("'Irreparable harm' is an imminent injury that is both great and certain, and that legal remedies cannot repair.") (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). 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.").

The EIS catalogues the irreparability of the harms that will be inflicted by the S-R Line.[15] *See* S-R EIS at 724-25; *see also id.* at 680. The Park Service, 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," *id.* at 724, concluded:

> Alternative[] 2 . . . would result in the irreversible and irretrievable commitment of geologic resources. The construction of the towers involves drilling bedrock and approximately seven of the towers would be sited in geologic resources that are rare or unique. These impacts would be permanent and irreversible and could not be mitigated. . . .
>
> Under alternative[] 2 . . ., tree removal in forested wetlands would result in the conversion of wetland habitat type from a forested wetland to an emergent or scrub shrub wetland. Because northern forested wetlands may take 50 years to reach maturity (Kusler 2006, iii) and because trees in the ROW under alternative[] 2 . . . would be removed and then maintained, wetland areas within the ROW would not recover during the period of analysis to become fully functioning forested wetlands. Mitigation would be required for the loss of wetlands, but would not fully offset impacts. . . .
>
> Other 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.

Id. at 725. By the Park Service's own admission, then, implementation of the ROD is certain to cause actual and enduring harms that cannot be repaired by legal remedies. Once Applicants are permitted to construct the Project within the parks, whether that involves clearing trees to build access roads, geotechnical boring, or installation of tower foundations, the damage cannot be

[15] Indeed, as reflected in their NEPA claims, Plaintiffs argue that the harms described by the agency fail to account for the full scope of consequences that should have been considered.

undone. The interests of Plaintiffs' members, who hold close and vital ties to the affected areas, consequently will be irreversibly harmed. *See* Section VI in Statement of Facts, *supra.*[16]

At present, Applicants already are engaged in construction approximately ten miles from the park – well within the twenty-mile "zone of visual influence" identified by the Park Service in assessing impacts to visual resources. Ongoing construction likely already has impacts on scenic views within the parks, in other words. Moreover, counsel for Intervenor-Applicants has informed undersigned counsel that the first phase of construction within the parks is expected to be completed before the end of March 2013. Unless this Court halts construction in the parks and within the twenty-mile zone of visual influence delineated by the Park Service, construction will proceed – with potentially impairing impacts on park resources – before this Court can decide the merits of the case. Moreover, without a halt to construction, Applicants' ongoing construction of the S-R Line outside of the parks and up to the park boundaries may well constrain any meaningful consideration of alternative routes if Plaintiffs prevail on the merits, making construction through the parks a foregone conclusion and precluding any grant of meaningful relief. Plaintiffs therefore present a "clear and present need for equitable relief." *Wis. Gas Co.*, 758 F.2d at 674 (internal quotation marks and citation omitted).

III. INTERESTED PARTIES WOULD NOT BE SUBSTANTIALLY INJURED BY A PRELIMINARY INJUNCTION

In evaluating the balance of equities, courts consider whether injunctive relief would "substantially injure other interested parties." *Chaplaincy of Full Gospel Churches v. England*,

[16] Plaintiffs do not allege only procedural harms arising from NEPA violations, although these too 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.

454 F.3d 290, 297 (D.C. Cir. 2006). As a general matter, this consideration "is not a particularly decisive factor." *Mylan Pharm. 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* S-R EIS at 3 (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"). Applicants also would not suffer substantial injury as a result of a delay in construction of the S-R Line in the affected parks. Applicants do not expect the S-R Line to go into service until June 2015. *See* Susquehanna-Roseland: An Electric Reliability Project, PSEG, http://www.pseg.com/family/pseandg/powerline/index.jsp (last visited Dec. 6, 2012).[17]

IV. THE PUBLIC INTEREST FAVORS ENTRY OF A PRELIMINARY INJUNCTION

In cases involving preservation of the environment, the balance of harms generally favors the grant of an injunction. *See Amoco Prod. Co.*, 480 U.S. at 545 ("If such injury is sufficiently likely . . . , the balance of harms will usually favor the issuance of an injunction to protect the environment."); *see also Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985) ("[A] preliminary injunction would serve the public by protecting the environment from any threat of permanent damage."). The harm to the public from damage to the national parks is well understood. As the Park Service itself recognized, "[v]isitors and citizens of the United States . . . [w]hether they never visit the parks or frequent them on a daily basis . . . expect those

[17] Although Plaintiffs should not be required to post more than a nominal bond, if any, *see California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985), they would not oppose expedited briefing of the merits to minimize any alleged costs of delay.

places to hold a special meaning and to be unimpaired for them and for the future generations. The Organic Act guarantees that expectation." S-R EIS at 354. The agency further explained:

> People expect to come to a pristine place, and perhaps hike along one of the most famous trails in the world; to view the magnificent vistas, wildlife, waterfalls; and to escape the mundane trappings of civilization for a few hours, days, or weeks. Hunters, fishermen, hikers, windshield tourists, swimmers, canoeists, boaters, and other tourists expect to find and explore what they do not find in their everyday environments. They expect what the Organic Act, the enabling legislation of all three units, the Redwood Act amendments, and General Authorities Act dictate.

Id. Where, as here, the Park Service approved a Project that it acknowledged will cause significant and irreversible harm to multiple resources within three national park units and failed to provide a reasoned explanation for its decision, injunctive relief pending review of the decision is in the public interest. There also "is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely." *Brady Campaign*, 612 F. Supp. 2d at 26. Moreover, "[t]he public interest in requiring the [Park Service] 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 Middle Delaware. *Or. Natural Desert Ass'n v. Singleton*, 75 F. Supp. 2d 1139, 1152 (D. Or. 1999).[18]

CONCLUSION

For all the reasons set forth above, Plaintiffs request that this Court issue preliminary injunctive relief prohibiting the Park Service from implementing the ROD and from allowing construction of the S-R Line within a 20-mile radius of the Delaware Water Gap National Recreation Area, the Appalachian Trail, and the Middle Delaware.

[18] The strong public interest in ensuring that the Park Service comply with its "primary responsibility" under the National Park Service Organic Act, NPS Mgmt. Policies § 1.4.4, as well as its duties under the Wild and Scenic Rivers Act and NEPA, is not undermined by any alleged need for the S-R Line. As Plaintiffs have pointed out, the regional transmission planning organization has indicated that, at present, demand response resources are sufficient to address electric reliability. *See* S-R EIS at L-167.

Respectfully submitted this 6th day of December 2012,

/s/ Hannah Chang
Hannah Chang
Abigail Dillen
Lisa Perfetto
Pro Hac Vice Admission Pending
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: 212-791-1881
Fax: 212-918-1556
hchang@earthjustice.org
adillen@earthjustice.org
lperfetto@earthjustice.org

/s/ Jennifer Chavez
Jennifer Chavez (D.C. Bar No. 493421)
Earthjustice
1625 Massachusetts Avenue NW, Suite 702
Washington, DC 20036-2212
Phone: 202-667-4500
Fax: 202-667-2356
jchavez@earthjustice.org

Aaron Kleinbaum
Alice Baker
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
Phone: 973-424-1166
Fax: 973-710-4653
akleinbaum@easternenvironmental.org
abaker@easternenvironmental.org

Counsel for Plaintiffs