

DELAWARE RIVERKEEPER NETWORK
• EARTHJUSTICE • EASTERN ENVIRONMENTAL LAW
CENTER • NATIONAL PARKS CONSERVATION
ASSOCIATION • NEW JERSEY ENVIRONMENTAL
FEDERATION • NEW JERSEY HIGHLANDS COALITION
• ROCK THE EARTH • SIERRA CLUB • STOP THE LINES

January 31, 2011

John J. Donahue, Superintendent
Delaware Water Gap National Recreation Area
& Middle Delaware National Scenic and Recreational River
HQ River Road, off Rt. 209
Bushkill, PA 18324
(570) 426-2418

Pamela Underhill, Superintendent
Appalachian National Scenic Trail
P.O. Box 50
Harpers Ferry, WV 25425
(304) 535-6278

National Park Service
Denver Service Center - Planning Division
Attn: Morgan Elmer
12795 W. Alameda Parkway
P.O. Box 25287
Denver, CO 80225-0287

Dear Superintendents Donahue and Underhill and Ms. Elmer,

Thank you for the opportunity to provide feedback on the Draft Environmental Impact Statement (“DEIS”) for the Susquehanna to Roseland 500kV Transmission Line Right-of-Way and Special Use Permit. On behalf of the Delaware Riverkeeper Network, National Parks Conservation Association, New Jersey Environmental Federation, New Jersey Highlands Coalition, Rock the Earth, Sierra Club, and Stop the Lines, we offer the following comments, noting at the outset that we appreciate the National Park Service’s intensive effort to analyze and disclose this project’s environmental impacts on the Delaware Water Gap National Recreation Area, the Appalachian National Scenic Trail, and the Middle Delaware National Scenic and Recreational River (collectively “Parks”).

While further analysis is needed to assess (1) the viability of alternatives to building the proposed 500kV line and (2) adverse impacts, including cumulative impacts,

outside the Parks, the DEIS conclusively demonstrates that the proposed Susquehanna to Roseland line would impair Park resources in violation of the National Park Service Organic Act. As the Park Service's own analysis makes clear, the agency cannot grant the requested right-of-way and special use permit without fundamentally degrading the unique natural, scenic, and cultural resources that these Parks were established to preserve. While recent news reports suggest that PPL Electric Utilities Corporation (PPL) and Public Service Electric and Gas Company (PSE&G) (collectively "the applicants") may be contemplating mitigation efforts in the form of land purchases or conservation easements, it is not possible to eliminate impairment to areas of special significance by expanding Park boundaries.

We urge the Park Service to deny the requested right-of-way and special use permit. The applicants have presented the agency with a false choice between conserving the Parks as the law requires and maintaining electric reliability. Circumstances have changed dramatically since 2006, when a need for the Susquehanna to Roseland Line ("S-R Line") was identified by PJM Interconnection ("PJM"). The reliability issues that the line was intended to address have largely been resolved; load demand in the areas that the line would serve continues to decline, as reflected in PJM's repeated downward adjustments to its load forecast; robust growth of energy efficiency and demand response resources continues to exceed PJM's expectations (as reflected in its modeling assumptions); and development of significant new generation capacity, including local renewable generation, has gone forward or is planned in New Jersey. All of these factors, both individually and collectively, suggest that the \$2 billion S-R Line is an expensive solution to a problem that no longer exists. However, PJM has yet to undertake new load flow analyses to determine whether the S-R Line is actually needed to ensure electric reliability in 2015 when the S-R Line is scheduled to be in service, or to evaluate whether there are non-transmission alternatives or more modest, less damaging transmission upgrades that would resolve outstanding reliability issues, if indeed there are any.

Absent updated analysis by PJM that affirmatively demonstrates the need to build the S-R Line, there is no adequate justification for accommodating a right-of-way request or granting a special use permit for construction that is inherently incompatible with Park values. The Applicants have made no effort to avoid or minimize harm to the Parks, electing instead to propose a route that runs through areas of singular ecological, scenic, and cultural importance. Moreover, the DEIS makes clear that the Park Service has not been able to identify an acceptable alternative route. Under these circumstances, the Park Service can and must issue a Record of Decision ("ROD") selecting the environmentally preferred "no action" alternative.

I. THE PARK SERVICE MUST PREVENT IMPAIRMENT OF NATIONAL PARK RESOURCES

The Park Service has an overriding mandate to defend against degradation that would inevitably result from construction of the S-R Line through the Parks. The National Park Service Organic Act of 1916 directs the Park Service "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.” 16 U.S.C. § 1. In the so-called ‘Redwood Act’ of 1978, Congress reaffirmed this core mandate with respect to all units within the National Park System, 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 of the people of the United States.” *Id.* § 1a-1. To this end, Congress directed that “[t]he authorization of activities shall be construed and the protection, management, and administration of these areas 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 these various areas have been established.” *Id.*

The Redwood Act and its legislative history “evidence Congress’ intent that the parks be managed so as to avoid any impairment or derogation of park resources and values.” *Southern Utah Wilderness Alliance v. Natl. Park Service*, 387 F. Supp. 2d 1178, 1191 (D. Utah 2005). Specifically, the legislative history provides, “[t]he Secretary is to afford the highest standard of protection and care to the natural resources within . . . the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided.” *Id.* (quoting S.Rep. No. 95-528 at 13-14 (1977)). Further, the Secretary “has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever relief as will safeguard the units of the National Park System.” *Id.* (quoting S.Rep. No. 95-528 at 13-14).

Importantly, this duty entails not only preventing impairment of the Parks but also avoiding adverse impacts to Park resources to the greatest extent possible. As set forth in the National Park Service Management Policies:

The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. *NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values.*

NPS, Management Policies § 1.4.3 (2006) (emphasis added); see also *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183, 190 n.1 (D.D.C. 2008) (recognizing “§ 1.4 of the NPS Policies as the official and enforceable interpretation of the Organic Act”) (emphasis added). Thus, the courts have affirmed that “NPS is required to exercise its discretion in a manner that is ‘calculated to protect park resources’ and genuinely seeks to minimize adverse impacts on park resources and values.” *Id.* at 193 (citing *Daingerfield Island Protection Soc’y v. Babbitt*, 40 F.3d 442, 446 (D.C. Cir. 1994)).

The Park Service is further obligated to afford the Middle Delaware the full protection afforded by the Wild and Scenic Rivers Act. 16 U.S.C. §§ 1271 et seq. “In 1968, the Delaware River within DEWA was designated as a scenic and recreational river.” NPS, Draft Environmental Impact Statement for the Susquehanna to Roseland 500kV Transmission Line Right-of-Way and Special Use Permit, 12 (Dec. 2011) (“DEIS”). As such, the Middle Delaware “*shall* be administered in such manner as to protect and enhance the values that caused it to be included in the wild and scenic rivers system without limiting other uses that do not substantially interfere with public use and enjoyment of these values.” *Id.* (emphasis added); 16 U.S.C.A. § 1281(a). In particular, the Park Service must ensure protection of the river’s aesthetic, scenic, historic, archeological, and scientific features. 16 U.S.C.A. § 1281(a).

A. The National Park Service Has Identified Adverse Impacts that Compel Denial of the Right-of-Way and Special Use Permit

The DEIS identifies major adverse impacts from the proposed S-R Line to Park resources including iconic scenery, historic landscapes, rare ecological communities, imperiled and recovering wildlife species such as bald eagles, defining geologic formation, and the experience of the millions of visitors who visit these extraordinarily popular Parks each year. *See, e.g.*, DEIS at 683-687. The nature and severity of these adverse impacts bears emphasis. Among the very serious threats posed by the project are the following:

- **“Drastic scenic degradation that could violate the Organic Act”** (DEIS at 686): “The presence of large and obtrusive infrastructure in a relatively undeveloped zone would be a distraction and detract from the experience visitors seek when coming to the parks. It would degrade the regionally unique and unusual wilderness-like viewshed for APPA that DEWA and MDSR provide. Larger structures also introduce non-conforming elements to the parks’ cultural landscapes and historic sites affected by this alignment and detract from the characteristics that qualify them for protection. This, in turn, would have adverse impacts on the MDSR through degradation of the scenic values for which the river was designated. The visual change would affect a relatively large area and a large number of users.” *Id.* at 683.
- **A “high risk for irreparable damage to significant ecological communities”** (*id.* at 686): The applicant’s proposal would “cross in the center part of DEWA, including the MDSR. In general, this area is one of the most undeveloped areas of the park, containing large swaths of contiguous mature forest, few manmade intrusions, unique geological formations, a globally-significant rare plant community, and abundant opportunities for solitude. This part of the park is a particularly sensitive area because it contains high concentrations of many important and unique

natural features including, rare limestone formations, the Arnott Fen, the Delaware River riparian corridor, eastern hemlock forests, the Hogback Ridge, the Kittatinny Ridge, and the Van Campens Brook riparian area. Several resources on this alignment are recognized for their superlative biodiversity (e.g., Hogback Ridge and Arnott Fen) and are significant in both park and regional contexts, making any impacts in these locations even more acute.” *Id.* at 684

- **Migratory bird and raptor kills:** “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 could potentially violate the Act.” *Id.* at 686.
- **Taking of bald eagles:** “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 the risk of eagles colliding with the lines cannot be mitigated; therefore, it is likely that the potential loss of eagles through collisions would require a permit from the USFWS for “take” of bald eagles associated with operation of the transmission line.” *Id.*; *see also id.* at 684 (noting that the proposed line would run next to “an important communal roost for wintering bald eagles that is one of only two known winter roosts in DEWA”).
- **Impairment of a Wild and Scenic River:** The applicants’ proposal “would result in significant long term degradation of the scenic values for which the river was designated, which may violate the directives in Section 10(a) of the WSRA to ‘protect and enhance’ those values which caused the river to be included in the system.” *Id.* at 687. Notably, the applicants’ proposal “crosses close to a unique river feature, the Walpack Bend, which is a premier visitor attraction in DEWA.” *Id.* at 684
- **Degradation of cultural resources:** “The crossing area also contains a high concentration of cultural resources including pre-Columbian fishing camps and 32 identified historic structures, owing to a fortuitous combination of topography and land protection.” *Id.*
- **A damaging precedent:** Approval of a right-of-way for the S-R Line “could establish a precedent that may invite similar proposals by other applicants in the future, and create an expectation of like treatment for those proposals; it may make it difficult to deny such proposals. DEWA and APPA both contain numerous other utility crossings, which makes the risk of such precedent particularly concerning for these parks. . . . The location of this particular [proposed Route 2] crossing within DEWA — the center of the park — could make such a precedent even more potent.

Installing the S-R Line on this alignment may invite future utilities proposing to follow the same route. *Id.* at 685.

As the Park Service recognizes, “[a]llowing such adverse effects in order to facilitate private infrastructure expansion would be contrary to NPS practice and principle of protecting and improving these resources, and of removing incompatible infrastructure to do so.” *Id.* at 685. As noted above, the Park Service further acknowledges that allowing the S-R Line to cross through the middle of the Park, through areas of extraordinary significance along Route 2 or 2b, “poses high risk for irreparable damage to significant ecological communities and drastic scenic degradation that could violate the Organic Act (impairment).” *Id.* at 686 (also noting potential for violation of the Wild and Scenic Rivers Act). Based on the analysis presented on the DEIS, the Park Service must conclude in the Final EIS that siting the S-R Line along any of the analyzed routes would result in impairment of the Parks in violation of the Organic Act and the Wild and Scenic Rivers Act.

In evaluating the threat of impairment, the Park Service is obligated to apply its official interpretation of the Organic Act, as set forth in the Management Policies:

Whether an impact meets this definition [of impairment] depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts. An impact is 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; 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.

NPS, Management Policies § 1.4.5.¹ Here, the impacts that will flow from construction of the S-R Line will directly impact resources that the Parks were expressly created to protect.

As explained in the DEIS, “Congress established [the Delaware Water Gap National Recreation Area] DEWA in 1965 to provide for “public outdoor recreation use and enjoyment of the proposed Tocks Island Reservoir and lands adjacent thereto and for the preservation of the scenic, scientific, and historic features contributing to public enjoyment of such lands and waters.” DEIS at 11 (quoting PL 89-158). Contributing to

¹ The D.C. Circuit Court of Appeals has held that the Management Policies as a whole are not judicially enforceable. *See Wilderness Society v. Norton*, 434 F.3d 584, 596-97 (D.C.Cir. 2006). However, 1.4 of the Management Policies, which interprets the Organic Act’s preservation mandate, was noticed in the Federal Register, subject to public comment, and published in final form in the Federal Register. As such, it bears the hallmarks of a rulemaking, and the Park Service has acknowledged that it represents the agency’s formal interpretation of the Organic Act. It has been determined to be judicially enforceable accordingly. *See Greater Yellowstone Coalition*, 577 F. Supp. 2d 190 n1.

its national significance are its “[o]utstanding geologic and natural features [that] form some of the best-known scenic landscapes in the northeastern United States,” *id.*, the essential habitat it provides to sustain plant and animal communities including globally significant natural heritage areas, *id.* at 195, and “the most significant, intact concentration and diversity of known archeological resources in the northeastern United States, as well as outstanding examples of American Indian and European settlements dating from the Early Woodland through Late Colonial historic periods.” *Id.* at 11. The Delaware Water Gap is also “significant due to the exceptional quality of the Delaware River,” which is “the last free-flowing river in the eastern United States.” *Id.*

Like the Delaware Water Gap, the Appalachian Trail is defined by the access to undisturbed woods and wild lands that it provides. A footpath running from Maine to Georgia, it gives hikers an unparalleled opportunity to experience undeveloped natural and scenic landscapes of the Appalachian Mountains. *See id.* at 12. Its national significance is inherently tied to intact preservation of the lands and landscapes it passes through. Notably, the stretch of the Appalachian Trail that would be impacted by the S-R Line now boasts “a very natural and relatively unspoiled viewshed provided by the[] undeveloped lands below it.” *Id.* at 684.

Building a new extra high voltage power line with 200-foot towers across the center of the Delaware Water Gap, across the Middle Delaware, and across the Appalachian Trail will necessarily mar the iconic scenic and historic landscapes that the Parks were established to preserve; it will irreversibly destroy and thus fragment habitat including outstanding value wetlands within rare ecological communities; it will create a major aerial hazard in a key migratory flyway; and it will require blasting (and destruction) of unique geological formations. *See, e.g., id.* at 683-87. Each of these impacts “affects a resource or value whose conservation is necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park” and is “key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park.” NPS, Management Policies § 1.4.5. Further, as the Park Service apparently recognizes, much of this severe damage would be permanent and irreversible. *Id.* at 685. In short, the analysis of impacts provided in the DEIS confirms that the S-R Line would illegally impair Park resources.

The Park Service has discretion to evaluate whether adverse impacts rise to the level of impairment. *See Greater Yellowstone Coalition*, 577 F. Supp. 2d at 193 (“[T]he Organic Act gives the Park Service broad, but not unlimited discretion in determining *what actions are best calculated to protect Park resources.*”) (emphasis in original) (internal quotations and citations omitted). However, the courts have made clear that the agency cannot discount the major impacts it has identified to conclude that damaging activities can nevertheless go forward. Rather, it must provide a convincing explanation why such impacts are acceptable. *See id.* at 195 (rejecting authorization of snowmobiling in Yellowstone National Park because “NPS provides no quantitative standard or qualitative analysis to support its conclusion that the adverse impacts . . . are ‘acceptable’”); *see also Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 29-38 (D.D.C. 2010) (holding Park Service authorization of jet ski use in the National Parks to be”

arbitrary and capricious because NPS' conclusion that PWC use would result in non-impairment under the Organic Act is not based on reasoned explanations"); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 103 (D.D.C. 2006) (holding that the Park Service "failed adequately to explain its conclusion that impacts from nearby surface drilling activities would not result in an impairment of park resources and values."). Given the major adverse impacts that will necessarily flow from allowing construction of the S-R Line to go forward in the Parks, there is no such explanation available to justify the grant of right-of-ways and special use permits. See *Greater Yellowstone Coalition*, 577 F. Supp. 2d at 202 (stating "this Court is equally perplexed as to why any impact characterized as 'major and adverse' does not constitute an unacceptable impact, let alone impairment").

Further, putting aside the question of impairment, the Park Service "has interpreted the Organic Act to prohibit uses which cause 'unacceptable impacts.'" *Greater Yellowstone Coalition*, 577 F. Supp. 2d at 194; NPS, Management Policies § 1.4.7.1. The Management Policies define "unacceptable impacts" as "impacts that, individually or cumulatively, would":

- Be inconsistent with a park's purposes or values, or
- Impede the attainment of a park's desired future conditions for natural and cultural resources as identified through the park's planning process, or
- Create an unsafe or unhealthful environment for visitors or employees, or
- Diminish opportunities for current or future generations to enjoy, learn about, or be inspired by park resources or values, or
- Unreasonably interfere with park programs or activities, or an appropriate use, or the atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.

NPS, Management Policies § 1.4.7.1. Again, in order to grant the requested right of way and special use permit, the Park Service would have to do the impossible and provide a reasoned explanation why the impacts reported in the DEIS could be deemed acceptable in keeping with these standards. See, e.g., *Greater Yellowstone Coalition*, 577 F. Supp. 2d at 194-195.

B. The Impairment of Park Resources Cannot Be Mitigated

There is no apparent way to mitigate harm from the proposed S-R Line to avoid impairment of Park resources. Because many of the mitigation plans set forth in Appendix F of the DEIS have yet to be developed, it is impossible to determine the extent to which they may temper the damage associated with construction in sensitive wetlands,

floodplains, geological formations, and plant and wildlife habits. *See, e.g.* DEIS at 390 (“[T]he NPS would require a NPS-specific, NPS-park approved vegetation management plan.”); DEIS App. F at F-5 (“A blasting plan would be prepared and submitted to NPS for review and approval by a blasting expert before construction.”); *id.* (“A preconstruction surface assessment would be completed prior to disturbance, and that if found, resources will be avoided, or if unavoidable, collected and properly cared for before the start of construction.”); *id.* (“For tower locations abutting and adjacent to limestone fens, alternate techniques, including drilling, would be evaluated to minimize the potential for impact to the fens.”); *id.* at F-10 (“An Avian Protection Plan (APP) would be completed in accordance with the Bald Eagle Guidelines (USFWS 2007) and APLIC standards would be a condition of the applicant’s permit.”); *id.* at F-17 (“Develop an OHV/ATV deterrent plan prior to construction activities.”).

However, regardless of the shape that these various mitigation plans may eventually take, it is clear that significant damage cannot be avoided if the applicants are allowed to undertake all of the roadwork, blasting, bull-doing, tree-cutting, and elimination of ground cover² that is required to complete this major infrastructure project. Certainly, there is no way to mitigate the appearance of 200-foot transmission towers, which will become a dominant feature of the landscape for the foreseeable future. *See, e.g.*, DEIS at 683, 686, Appendix K. In fact, the analysis of scenic degradation in the DEIS most likely discounts the visual impact of the new transmission towers in portraying them as monopoles rather than the lattice towers that may well be required given the results of soil borings.

Where, as here, major adverse impacts are fundamentally unavoidable if the S-R line goes forward, the Park Service cannot rely on mitigation measures to comply with its preservation mandate under the Organic Act and the Wild and Scenic Rivers Act. *See, e.g., Sierra Club North Star Chapter v. LaHood*, 693 F. Supp. 2d 958, 963 (D. Minn. 2010) (rejecting Park Service argument that adverse impacts from construction of bridge over wild and scenic river could be mitigated to become acceptable).

While the DEIS does not analyze the potential for mitigating the S-R Line’s impacts through the acquisition of lands adjacent to the Parks, the applicants have announced their intent to make \$30 million available for this purpose in the event they are authorized to construct the S-R Line along their proposed Route 2. However, an incremental enlargement of the Delaware Water Gap cannot mitigate impairment to core resources that the Park was created to protect. Congress intended to preserve the unique features that lie within the Park’s current boundaries, and the Park Service has no authority to abrogate Congress’ judgment by compromising the resources and values associated with the Park in exchange for lands outside the Park. *See* 16 U.S.C. § 1 (requiring the Park Service “to conserve the scenery and the natural and historic objects and the wild life *therein*”) (emphasis added). If the Park Service could evade the prohibition on impairment simply by acquiring more land outside the Parks, the Organic

² Importantly, the applicants must obtain not only Park Service approvals for these construction activities but also a permit from the Delaware River Basin Commission (“DRBC”) for activities that incur significant disturbance of ground cover affecting water resources. DRBC Rules of Practice and Procedure §2.3.5(13).

Act would no longer afford effective safeguards for Park resources that are subject to development pressure. While acquisition of additional property may often serve to further conservation goals and ecosystem protection, the Park Service cannot rely on a land deal to approve the applicants' proposal.

Moreover, the Park Service cannot base its record of decision on a mitigation plan that has never been disclosed to the public. Under NEPA, the agency must analyze any such plan in the EIS and afford a meaningful opportunity for public comment on that new analysis. *See* 40 C.F.R. §§ 1502.9(1), (4) (requiring agencies to “prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” and further requiring that agencies “[s]hall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement”).

II. APPLICANTS CANNOT IMPLEMENT ALTERNATIVE 2B WITHOUT NATIONAL PARK SERVICE APPROVALS

The Park Service is not consigned to allow the S-R proposal to go forward as contemplated by the applicants if they can feasibly construct the new line within their existing right-of-way. As the DEIS correctly points out, the project likely would require cutting of so-called “danger trees” outside of the right-of-way, and that requirement alone obliges the applicants to secure approval of a right-of-way expansion. DEIS at vi. More fundamentally, however, the applicants do not have the right to undertake activities that will have significant environmental impacts without first obtaining the Park Service's approval. As governing regulations make clear:

Constructing or attempting to construct a building, or other structure, boat dock, road, trail, path, or other way, telephone line, telegraph line, *power line*, or any other private or public utility, upon across, over, through, or under *any* park areas, except in accordance with the provisions of a valid permit, contract, or other written agreement with the United States, is prohibited.

36 C.F.R. § 5.7 (emphasis added). The Park Service's authority to enforce this regulation as to activities undertaken in existing right-of-ways is not in doubt.

First, the Park Service has the authority to prevent activities in right-of-ways that would impair park resources or otherwise result in unacceptable impacts. As several courts have affirmed, the Park Service may lawfully regulate the use of a right-of-way “to protect the scenery and natural beauty of the park lands. *U.S. v. Garfield Cty.*, 122 F. Supp. 2d 1201, 1236 (D. Utah 2000). *Accord, Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994) (upholding the validity of Park Service regulation of activities on right-of-ways); *Adams v. United States*, 3 F.3d 1254, 1258 n. 1 (9th Cir. 1993) (same); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989)

(same); *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994) (same); *Wilkenson v. Department of Interior*, 634 F. Supp. 1265 (D. Colo. 1986) (same). In *Vogler*, the Ninth Circuit held that “Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary’s power to regulate within a national park to ‘conserve the scenery and the nature and historic objects and wildlife therein . . .’ applies with equal force to regulating an established right-of-way within the park.” 859 F.2d at 642 (quoting 16 U.S.C. § 1) (emphasis added). Thus, it is not the case that the applicants can undertake whatever construction they choose within the existing right-of-way, much less proceed without obtaining Park Service authorization. “The holder of a right-of-way, private or public, cannot lawfully take dominant possession and deal with the land upon which the easement exists as if he were the owner of the land, because he is not the owner of the land.” *Garfield County*, 122 F. Supp. 2d at 1242 (further explaining that “[e]asements do not carry any title to the land over which the easement is exercised, and work no dispossession of the owner. Since the interest itself is nonpossessory, the holder of the easement does not have the degree of control over the burdened property that is enjoyed by the owner of the servient estate; complete dominion is inconsistent with a claim of easement.”) (citing 28A C.J.S. Easements § 144, at 347).

Second, any activities that may have a significant environmental impact—as the S-R Line project will indisputably have—must be subject to NEPA review by the Park Service before any construction can proceed. *See, e.g., Garfield County*, 122 F. Supp. 2d at 1235-36 (recognizing that “the Park Service also has a duty imposed upon it by Congress to consider the impact on the environment of projects” in the Parks even with private right-of-ways). As explained by the *Garfield County* court, “[b]eyond evaluating the environmental impact of proposed construction work, where that work would impair the value of the scenery and natural objects of the park, or would otherwise be conducted in derogation of park values, the Park Service has the responsibility to formulate less burdensome alternatives.” *Id.* at 1245. Thus, the applicants cannot build a new transmission line in its existing right-of-way unless and until the Park Service completes its NEPA Review and selects a less damaging alternative. Where, as here “a federal agency has the power to protect public lands,” the courts have “recognized that agency’s power—and duty—to formulate viable alternatives, and if needs be, ‘the responsibility to impose an alternative it deems less degrading upon the nonfederal actor.’” *Garfield County*, 122 F. Supp. 2d at 1245 (quoting *Hodel*, 848 F.2d at 1090–91).

III. THE FINAL EIS MUST INCLUDE ANALYSIS OF A FULL RANGE OF ALTERNATIVES

The Park Service’s consideration of alternatives is critical to meeting its obligations to protect the Parks under the Organic Act and Wild and Scenic Rivers Act, and to provide for an informed decision-making process under NEPA. Under the Organic Act, the Park Service is bound to identify and select the least damaging alternative available. *See, e.g., Daingerfield*, 40 F.3d at 446, n.3 (noting that “the only choice left to the Park Service was to approve the least intrusive interchange possible, which it did, or refuse to approve any interchange at all”); NPS, Management Policies §

1.4.3. Necessarily, this obligation puts a premium on evaluating a full range of alternatives that are consistent with preserving the Park resources and values.

Further, under NEPA, the Park Service is required to “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. 40 C.F.R. § 1502.14(a). Crucially, the purpose of an EIS is “to provide full and fair discussion of significant environmental impacts and to inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Natural Res. Def. Council, Inc. v. Fed. Aviation Admin.*, 564 F.3d 549, 556 (2d Cir. 2009) (internal quotation marks and alteration omitted).

The alternatives analysis required under NEPA, 42 U.S.C. § 4332(2)(C), “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The alternatives analysis must include “the alternative of no action” as well as “reasonable alternatives not within the jurisdiction of the lead agency.” *Id.*; see also 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (“An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.”). This analysis of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14; see also *Monroe Cty. Conservation Council*, 472 F.2d 693, 697-98 (2d. Cir 1972) (characterizing the “requirement for a thorough study and a detailed description of alternatives” as “the linchpin of the entire impact statement”). Courts have made clear that this requirement:

ensure[s] that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (emphasis added).

In order to ensure that this alternatives analysis is not hampered by a rigid concept of what is needed at the outset of the NEPA process, agencies must consider alternatives that meet only part of the stated purpose of the proposed action. See *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (“A discussion of alternatives that would only partly meet the goals of the project may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact.”); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (“[It is not] appropriate . . . to disregard alternatives merely because they do not offer a complete solution to the problem.”).

Similarly, it is essential that the agency does not define the “purpose and need” for the project so narrowly as to preclude consideration of viable alternatives. As the courts have made clear, federal agencies cannot constrain the alternatives analysis through “wholesale acceptance” of the applicant’s definition of the project objective. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997) (explaining that agencies have “the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project”) (citation omitted). While the applicants may prefer to build an expensive new transmission line, which will yield a substantial (12.9 percent) rate of return on investment, construction of the S-R Line is not the goal that should guide formulation of alternatives for study in the EIS. Rather, “the evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action—in this case, maintaining reliability of the electric grid. *Id.* (emphasis added) (citations omitted) (holding that the agency had “ruined its environmental impact statement” by focusing solely on the type of solution favored by the applicant and “never look[ing] at an entire category of reasonable alternatives”).

A. The Final EIS Must Disclose Information Necessary To Evaluate the No Action Alternative

As NEPA requires, the Park Service has given detailed consideration to the impacts on the Parks of maintaining the status quo or the “no action” alternative. However, the DEIS provides no meaningful analysis to inform the ultimate question whether selection of the environmentally preferred no-action alternative is a viable proposition. The DEIS correctly notes that “[u]se of distributed energy generation sites and localized renewable energy is one of a number of possible reactions of PJM and the applicant (and others) if the NPS selects the no-action alternative,” DEIS at 67, but the DEIS reflects no effort to investigate whether the no-action alternative is actually consistent with the basic purpose and need for the project—that is, to ensure grid reliability.

As discussed above, the Park Service’s preservation mandate demands selection of the no action alternative. Given the pressure that the Park Service will inevitably encounter to approve construction of a project that is purportedly needed for reliability reasons, it is incumbent on the agency to avoid a conflict (or the appearance of a conflict) between the Organic Act and National Electric Reliability Corporation (“NERC”) reliability standards. Thus, it is crucial that the agency reach out to PJM and sister agencies with relevant expertise such as the Department of Energy and the Federal Energy Regulatory Commission to reassess the need for a new 500kV transmission line that crosses the Parks.

As the Park Service may be aware, there have been several significant changes in circumstances since the S-R line was ordered into service by PJM and approved by the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utilities. Notably, in proceedings to obtain PUC and BPU approvals, the applicants maintained

that the line was needed in service by 2012 to avoid a raft of alleged reliability issues, but the in-service date for the line has now been pushed back three years without jeopardizing the grid.³

PJM has acknowledged that any reliability issues will be adequately addressed without the line until at least 2015. In its 2010 Regional Transmission Expansion Plan (“RTEP”), PJM concluded that “extending the Reliability Must Run (RMR) status for Hudson Unit #1 into 2012” and “implementing demand resources” could stand in the stead of the Susquehanna-Roseland line in the 2012–2015 time frame. *See* PJM 2010 Regional Transmission Expansion Plan, PJM, 8-9 (Feb. 28, 2011) (“2010 RTEP”).⁴ More recently, at a Transmission Expansion Advisory Committee (TEAC) meeting on August 4, 2011, PJM reported its conclusion based on updated analysis that “sufficient [demand response] exists to control the loadings on the constrained facilities for 2012 through 2014 even without Hudson 1.” Transmission Expansion Advisory Committee, PJM, 36 (Aug. 4, 2011).⁵ As a result, PJM is permitting retirement of the Hudson Unit # 1. *See id.* In short, demand response resources alone have proven sufficient to address the need for the Susquehanna-Roseland line for at least the next three years.

Now, the Park Service should request that PJM address the question whether there is still a need for the line after 2015 in light of: (1) declining electricity demand; (2) diminishing reliability concerns; (3) increasing availability of demand response resources; (4) completed transmission upgrades; and (5) development of new generation that is currently in the transmission queue.

1. Reductions in Electricity Demand

PJM has recognized substantial reductions in the demand for electricity, including in the area that the Susquehanna-Roseland line is intended to serve. On January 14, 2011, PJM released the 2011 Load Forecast Report, in which it presented markedly lower electric demand forecasts than had previously been used as the bases for transmission planning. *See* 2011 PJM Load Forecast Report, PJM Res. Adequacy Planning Dep’t, 1 (Jan. 2011) (“2011 Load Forecast Report”) (“A downward revision to the economic outlook for the PJM area has resulted in lower peak and energy forecasts in this year’s report, compared to the same year in last year’s report.”).⁶ The impacts of these lower peak and energy forecasts have been noteworthy and are only “beginning to unfold in the 2011 [Regional Transmission Expansion Plan (“RTEP”)] cycle of analyses.” 2010 RTEP at 12.

³ In approving the S-R Line, the New Jersey BPU expressly found that “reliability violations are . . . projected to occur as early as 2012 and that the Project is reasonably necessary for [sic] address those violations.” N.J. Bd. of Pub. Utils., Decision and Order, Docket No. EM09010035 at 53 (April 21, 2010) (“BPU Decision”).

⁴ Available at <http://www.pjm.com/documents/reports/~media/documents/reports/2010-rtep/2010-rtep-report.ashx>.

⁵ Available at <http://www.pjm.com/~media/committees/groups/committees/teac/20110804/20110804-reliability-analysis-update.ashx>.

⁶ Available at <http://pjm.com/~media/documents/reports/2011-pjm-load-report.ashx>.

So far, updated analyses based on the 2011 peak load forecasts have resulted in PJM's decision to suspend two major transmission lines, both of which PJM approved in 2007, along with the Susquehanna-Roseland line, to address reliability violations as early as 2012. The Potomac-Appalachian Transmission Highline ("PATH"), a project designed to increase transfer capacity between western and eastern PJM (as the Susquehanna-Roseland is intended to do) originally was identified in PJM's 2007 RTEP with a required in-service date of 2012. *See* PJM 2009 Regional Transmission Expansion Plan, PJM, 6 (2010) ("2009 RTEP").⁷ The 2008 RTEP delayed the in-service date to 2013, and the 2009 RTEP again deferred the project until 2014. *Id.* at 6-7. Assessments based on the 2011 peak load forecasts now have compelled PJM to suspend the PATH project indefinitely. *See* Press Release, PJM, PJM Board Directs Delay in PATH Transmission Line (Feb. 28, 2011)⁸; *see also* 2010 RTEP at 12 ("Based on [the 2011 Load Forecast] and initial power flow assessments of the earliest need for PATH, the PJM Board announced on February 28, 2011 its decision to suspend the PATH project . . .").

The Mid-Atlantic Power Pathway ("MAPP"), another west-to-east transmission project approved by PJM in 2007, originally was deemed necessary by 2013 to address reliability violations. *See* 2009 RTEP at 7, 83. The 2009 RTEP deferred the project until 2014. *Id.* at 83. Now, in light of the 2011 load forecasts, PJM "has decided to hold the MAPP project in abeyance" with a 2019 to 2021 in-service date. *See* Letter from Michael J. Kormos, Senior Vice Pres., PJM, to David M. Velazquez, Exec. Vice President, Pepco Holdings, Inc. (Aug. 18, 2011).⁹ The Indian River-Salem portion of MAPP has been abandoned entirely.

In addition, the 500-kV Branchburg-Roseland-Hudson line, which was originally slated to be in service in 2012, has been abandoned in favor of a more modest alternative—local 230kV upgrades—because there are now fewer and less severe issues in northern New Jersey. In short, the lower projections in the 2011 Load Forecast Report have led PJM to suspend construction of several west-to-east transmission projects that have been part of the RTEP process since 2007.

This downward trend in load demand, which has helped to eliminate the need for the PATH and MAPP projects, has only become more pronounced since 2011. In January, PJM released its 2012 load forecast report and once again indicated that its projections had to be adjusted downward. *See* PJM 2012 Load Forecast Report, January 2012 at 1.¹⁰ In summary, the report states, "The combination of the new economic driver and a downward revision to the economic outlook for the PJM area has resulted in lower

⁷ Available at <http://pjm.com/documents/reports/rtep-report/~/media/documents/reports/2009-rtep/2009-rtep-report.ashx>.

⁸ Available at <http://pjm.com/~/media/about-pjm/newsroom/2011-releases/20110228-RTEP-announcement.ashx>

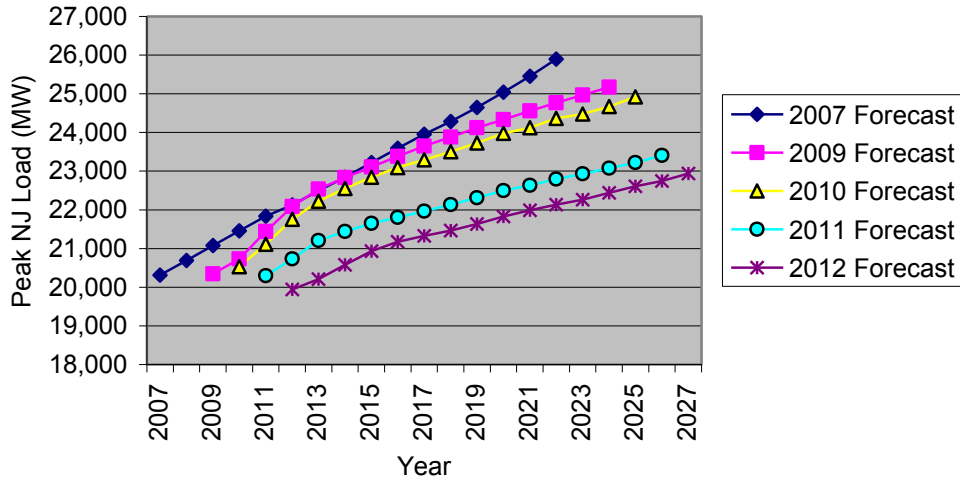
⁹ Available at <http://www.pjm.com/~/media/documents/reports/mapp-letter-to-phi.ashx>.

¹⁰ Available at <http://pjm.com/~/media/documents/reports/2012-pjm-load-report.ashx>. For a useful summary of the report, PJM's slides for presentation to the Load Analysis Subcommittee are available at <http://www.pjm.com/~/media/committees-groups/subcommittees/las/20120105/20120105-pjm-2012-load-forecast-report.ashx>.

peak and energy forecasts in this year’s report, compared to the same year in last year’s report.” *Id.*

The graph below shows how the load forecasts New Jersey’s four utilities have changed since 2007 (the year PJM first identified a need for the S-R Line) up through the latest 2012 forecast.¹¹ In 2007, PJM forecasted that the 2012 peak NJ load would be 22,122 MW. In 2012, PJM forecasts that this level of demand will not be reached until 2022, ten years later. While load growth is not the only driver for transmission, it is one of the most important.

Annual Peak Load Forecasts, NJ Utilities



The current forecast for 2012 peak demand is below the 2007 forecast for 2007. In 2007, there was no concern that a major new transmission line was needed to deliver electricity reliably to New Jersey. Moreover, the decrease in the forecast between 2010 and 2012 is likely greater than the incremental increase in transfer capability that the line would provide—making previous analysis regarding the need for the line irrelevant.

2. Elimination of Reliability Issues

The consistently diminishing need for the PATH and MAPP lines with each passing year—a trend that ultimately resulted in the suspension of those projects in light of the 2011 load forecast—is paralleled in the case of the Susquehanna-Roseland line. PJM first found the Susquehanna-Roseland line necessary in 2007 to address reliability issues beginning in 2012. *See* BPU Decision at 51. The 2008 RTEP projected 2 Category A, 21 Category B, and 27 Category C contingencies that the line was ostensibly intended to address. *See id.* Later, in its March 2009 Retool analysis, PJM projected only thirteen Category B and ten Category C contingencies. *See id.* Then, the 2010

¹¹ Source: PJM Load Forecast reports dated 2007 and January 2009, 2010, 2011, and 2012. The chart shows the sum of non-coincident peak loads, assuming conservatively (as PJM does) that these peak loads will occur at the same time. If they occur at different times, then the New Jersey peak load will be lower than the sum of the peak loads of the four utilities.

RTEP showed a dramatic reduction in alleged reliability issues—from the 23 contingencies identified in the March 2009 Retool to only 5 Category C contingencies, all on 230kV lines. *See* 2010 RTEP at 217.

Category C contingencies, also known as “double circuit tower line contingencies” reflect a test of the electric system that is highly unlikely to play out in reality. Thus, based on PJM’s last analysis, the S-R Line would be constructed to address five extraordinarily speculative reliability concerns that would occur only on lower-voltage transmission lines that are likely amenable to lower cost fixes. Before taking any action that would adversely impact the Parks, the Park Service should request that PJM update its analysis using a 2015 base case that reflects current demand projections as discussed above and current projections regarding the availability of load management resources, as discussed below. While the 2010 RTEP affirmed the need for the S-R Line based on the remaining five reliability issues, PJM has failed to undertake baseline studies after 2012, relying instead on “retool” analysis using updates of the 2007 data base. This outdated analysis cannot serve as a justification either for building a \$2 billion transmission line or compromising the integrity of the Parks.

3. Demand Response and Energy Efficiency

Increased availability of demand response resources is another key factor that should help to eliminate any need for the S-R Line (by further reducing the need to deliver electricity to load centers). The 2011 Load Forecast Report projected significant increases in demand response resources, noting that “[a]ssumptions for future Load Management (LM) have increased significantly from the 2010 Load Report (from approximately 6,800 MW to 9,000 MW).” Ex. E, 2011 Load Forecast Report at 2. The results of the latest Reliability Pricing Model (“RPM”) auction, which were not incorporated into the 2010 RTEP, confirm this increase in demand resources. The 2014/2015 RPM Base Residual Auction, which opened on May 2, 2011, procured 14,118 MW of demand response, a 52 percent increase over the amount of demand resources cleared in the previous year’s auction. *See* Press Release, PJM, Demand Resources and Energy Efficiency Continue to Grow in PJM’s RPM Auction (May 13, 2011), <http://pjm.com/~media/about-pjm/newsroom/2011-releases/20110513-rpm-results-news-release.ashx>. At the same time, energy efficiency programs continue to gain momentum, delivering permanent reductions in load demand.

In 2012, PJM expects reliance on demand response to grow even further. The January Load Forecast Report concludes that “Assumptions for future Load Management (LM) have increased significantly from the 2011 Load Report (from approximately 9,000 MW to 14,000 MW).” 2012 Load Forecast Report at 2. In addition, PJM reports that “Energy Efficiency (EE) impacts have increased from approximately 550 MW to 800MW.” *Id.* (noting that “assumptions for both LM and EE are based on Reliability Pricing Model (RPM) auction results”).

4. Changes to the Grid

Since the S-R Line was first planned, many transmission projects have been completed and new generation facilities have been planned or built. These changes underscore the need for new analysis of need using a new base case that reflects the grid as it is now and how it is expected to be in 2015 when the S-R Line is purportedly needed.

While the Park Service may be reluctant to undertake technical analysis to evaluate the current need, if any, for the S-R Line, that analysis is essential to inform consideration of the no action alternative and other alternatives that could potentially avoid damage to the Parks. The Park Service can and must request new load flow analyses to inform the pivotal question whether the S-R Line is needed or whether the project can be abandoned or replaced with a more modest fix.

B. The Final EIS Must Consider Alternatives in Addition to Alternative Routes

While the DEIS analyzes several alternative routes in detail, it fails to present any alternative other than the no action alternative that would avoid or minimize impacts to the Parks. As the DEIS itself makes clear, “[a]ll of the action alternatives described in this section have alignments that would cross at least two units of the national park system,” DEIS at 29, and each alternative results in unacceptable impacts accordingly. *See, e.g., id.* at 679-714.

In the Final EIS, the Park Service must define the project purpose and need more broadly to allow for consideration of alternatives other than a 500kv line that would ensure electric reliability without impairing or otherwise degrading Park resources and values. As discussed above, the Park Service is under a constant obligation to avoid or mitigate adverse impacts to the greatest extent possible. *See* NPS, Management Policies § 1.4.3. The agency cannot fulfill this obligation without considering alternatives that are consistent with preserving Park resources and values.

Specifically, the Park Service should give earnest consideration to the following alternatives that it summarily dismissed in the DEIS:

- **Underground transmission lines:** The DEIS rejected this alternative “because its construction cost would be five to eight times the cost of conventional construction methods” and “blasting the bedrock for an underground line could produce major irretrievable and irreversible impacts on geology.” DEIS at 67. However, the Park Service cannot reject an otherwise feasible alternative solely because it is more expensive than the applicant’s proposal. The Final EIS should consider whether it may be possible to bury portions of the line without destroying geological formations.

- **Superconductor lines (direct current):** This alternative was also rejected on

cost grounds without any attempt to show that costs of “three to five times that of conventional transmission line construction” would be unaffordable. *Id.* Nor is there analysis of what impacts would result from new converter stations.

- **Aluminum conductor composite core (ACCC):** ACCC conductor is designed to carry twice the current of a conventional conductor, with lighter core allowing the use of more aluminum without a weight penalty. In this way, using ACCC has the potential to enable longer spans between fewer and shorter structures (*i.e.* towers), and it can increase transfer capacity while improving line and reducing line losses by as much as 30 to 40 percent according to vendors.¹² Nevertheless, ACCC was dismissed from consideration in the alternatives analysis on grounds that “it is not a separate alternative by itself.” DEIS at 67. However, to the extent that ACCC has the potential to reduce tower height and perhaps the overall need for towers, it should be given upfront consideration in the EIS, rather than deferring consideration of its use until after the NEPA process is over.

- **Smart grid:** The DEIS dismissed this alternative because it allegedly “does not meet the reliability requirements put forth by PJM.” *Id.* (explaining that “smart grids provide automated switching for transmission lines but do not provide the redundancy required to meet improved reliability requirements for the transmission grid”). However, the Park Service is required to consider alternatives that may partially meet the project’s purpose and need. In any case, it is unclear whether there are any remaining reliability issues for the S-R Line to resolve.

- **Distributed energy generation sites and localized renewable energy:** The DEIS declines to consider these potentially viable alternatives because “ordering the adoption of such systems is beyond the authority of the NPS.” However, as set forth above, agencies must consider alternatives that are outside of their jurisdiction to implement.

In addition, the Final EIS must consider:

- **Alternative Transmission Fixes:** Given the small number of reliability issues in play, the Park Service should investigate alternatives tailored to what has become a modest concern related to lower-voltage transmission lines.

- **Energy Efficiency, Energy Storage, and Demand Response:** The Park Service should analyze whether targeted energy efficiency and/or demand response systems could eliminate the need for additional transmission delivery capacity into the areas that the S-R Line is intended to serve. As the DOE emphasized in a recent national congestion study, “alternatives other than transmission, such as increased local generation (including distributed generation), energy efficiency, energy storage and demand response may be more economic than transmission expansion in relieving congestion” —

¹² See <http://ctccable.com/pdf/ACCCOverview.pdf>.

and more environmentally friendly as well. *See* DOE, *National Electric Transmission Congestion Study*, vi (Dec. 2009) (available at http://congestion09.anl.gov/documents/docs/Congestion_Study_2009.pdf).

- **Lower and less intrusive transmission towers:** The proposed 200-foot towers would ensure that the S-R Line is far more visible than existing power lines in the Parks. Further, the height of these towers dictates the large size of their bases, necessitating more blasting, filling of wetlands, clearing and cutting, and general disturbance of vegetation and wildlife—and significantly more expense, particularly in foundation and materials costs (*e.g.* steel). The applicant has an incentive to overbuild the S-R Line, for which it can recover not only its costs but a very high rate of return (12.9 percent) on investment. The Park Service should not assume that the towers or other infrastructure need to be built to the applicant’s proposed specifications. Nor should it leave the critical engineering decisions to subsequent planning outside the NEPA process as the DEIS currently proposes to do. *See* DEIS at 41 (stating that “[t]he types of towers that would be used in the construction of the S-R Line would be determined during planning”).

As noted above, it appears from the visual representations in Appendix K that the Park Service is assuming that the towers will be monopoles. On the one hand, the Park Service should evaluate whether the use of monopoles represent an alternative that could have slightly lesser visual impacts than lattice towers, but on the other, the Park Service must be mindful of the blasting that monopoles may require and consider other alternatives to minimize harm to geological resources.

IV. THE EIS MUST FULLY DISCLOSE ADVERSE IMPACTS THAT WOULD FLOW FROM CONSTRUCTION OF THE S-R LINE

The EIS must address the full suite of environmental impacts, both direct and indirect, that will flow from construction of the S-R Line together with the cumulative impact of other planned and foreseeable development that will impact the lands within the project’s footprint—both inside and outside of the Parks. *See* 40 C.F.R. §§ 1508.25(c)(1)-(3). As defined by NEPA’s implementing regulations, “direct effects” are impacts “caused by the action and occur at the same time and place.” *Id.* § 1508.8(a).¹³ “Indirect effects” are impacts caused by the proposed action but “are later in time or farther removed in distance.” *Id.* § 1508.8(b). “Cumulative impact” means “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other action.” *Id.* § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

¹³ The words “effect” and “impact” are used synonymously in NEPA’s implementing regulations. *See* 40 C.F.R. § 1508.8.

A. The Final EIS Must Provide a Meaningful Analysis of Impacts Outside the Parks

The DEIS purports to analyze the impacts of the S-R Line outside of the Parks as NEPA requires,¹⁴ but throughout the document, the Park Service fails to provide any meaningful analysis of such impacts on grounds that “[t]he NPS cannot require the applicant to follow a certain route outside the boundaries of park lands.” DEIS at 29. Repeatedly, the DEIS states that “the portion of the route outside park lands is not discussed in detail” for this reason. *Id.*; *see also, e.g., id.* at 371 (“the specific wetland resources that would be affected by the transmission line outside the study area cannot be identified until the route is chosen by the applicant”); *id.* at 404 (“Because the location of the S-R Line outside the terrestrial study area cannot be determined at this time, the indirect impacts on landscape connectivity, wildlife habitat, and wildlife cannot be evaluated per alternative.”); *id.* at 434, 658 (“Because the NPS cannot dictate where the line would actually go, the direct impacts from the construction and maintenance of the transmission line outside the study area cannot be determined.”); *id.* at 480 (“Because the location of the S-R Line outside the study area cannot be determined at this time, the indirect impacts on rare and unique communities cannot be evaluated per alternative.”).

Vague and highly generalized statements regarding the potential for adverse impacts across the project area cannot substitute for the detailed analysis of impacts that NEPA requires to ensure informed decision-making and most importantly, an opportunity to avoid or mitigate environmental harms.

B. The Final EIS Must Provide a Meaningful Analysis of Cumulative Impacts

The DEIS analysis of cumulative impacts both inside and outside the Parks is similarly unhelpful. While the Park Service lists various foreseeable projects and development, the DEIS does not attempt to quantify or otherwise characterize with any particularity how these new pressures on natural, scenic, and cultural resources will collectively manifest. For example, with respect to cumulative impacts on floodplains

¹⁴ As NEPA’s implementing regulations make clear, agencies must consider major federal actions, such as ROW approvals and Section 404 permits, in conjunction with other “connected actions.” 40 C.F.R. § 1508.25 (mandating that agencies “shall consider” connected actions “[t]o determine the scope of environmental impact statements) (emphasis added). “Actions are connected if they . . . [c]annot or will not proceed unless other actions are taken previously or simultaneously” or if they “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* §§ 1508.25(a)(1)(ii),(iii); *see also Alpine Lakes Protection Soc’y v. U.S. Forest Service*, 838 F. Supp. 478, 482 (W.D. Wash. 1993) (affirming that the requirement to consider connected actions “extends to non-federal actions undertaken exclusively by private parties if the federal actions are so interrelated as to constitute ‘links in the same bit of chain’”) (quoting *Morgan v. Walter*, 728 F. Supp. 1483, 1493 (D. Idaho 1989) (quoting *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989)). For a more detailed discussion of the Park Service’s obligation to analyze the entire length of the S-R Line in the EIS, please see the March 12, 2010 scoping comments submitted by Earthjustice and the Sierra Club, which we incorporate by reference.

outside the study area, the DEIS states as follows:

Outside the study area, adverse cumulative impacts on floodplains would be expected from residential, commercial, and transportation development of the area. Adverse cumulative impacts would result from these projects due to the continued growth and urbanization in the area outside the parks, which may reduce natural floodplain functions through direct impacts, such as the placement of structures in the floodplain, or indirect impacts, such as increased runoff due to increased impervious surfaces. Several land protection programs could provide beneficial impacts on floodplain functions. As stated above, the funding for these programs is uncertain and could vary throughout the period of analysis; therefore, the level of benefit resulting from the implementation of any project is also variable. There would be adverse cumulative impacts on floodplains outside the study area.

DEIS at 357. Ultimately, the reader is left with the sole conclusion that cumulative impacts will be “adverse.” This general observation does not allow for a meaningful comparison of alternatives or the development of well-tailored mitigation measures. Nevertheless, the DEIS adopts this approach to cumulative impacts analysis repeatedly.

“A cumulative impact analysis “must be more than perfunctory; it must provide ‘a useful analysis of the cumulative impacts of past, present, and future projects.’” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir.2002) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir.1999)). “To be useful to decision makers and the public, the cumulative impact analysis must include ‘some quantified or detailed information; . . . general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.’” *Northern Plains Resource Council v. Surface Transp. Bd.*, -- F.3d --, 2011 WL 6826409 (9th Cir. Dec. 29, 2011) (quoting *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005)).

C. The Final EIS Must Take a Hard Look at Impacts Not Addressed in the DEIS

In the Final EIS, the Park Service must revisit important issues that it either dismissed from consideration in the DEIS or overlooked. Failure to consider these issues will necessarily render the EIS inadequate.

1. Air Quality

The Park Service must consider the impacts on air quality resulting from the S-R Line. Each of the action alternatives that the Park Service proposes will have significant impacts on air quality during construction, which would involve not only the line itself but also access roads, and, in some alternatives, deconstruction of existing power lines.

This construction will require large diesel trucks to haul heavy equipment through the Parks and the surrounding communities. Bulldozers, dump trucks, and road graders will operate at the site. Cement trucks and tractor trailers will also travel through surrounding communities to operate at the site. All of this equipment will emit exhaust and create fugitive dust that will impact surrounding air quality.

In addition, the S-R Line may have pervasive indirect effects on regional air quality. As the line is expressly intended to open up eastern power markets to coal-fired power generators in western PJM,¹⁵ it can be expected to drive increases in power generation at coal-fired power plants that currently are operating below capacity.¹⁶ Increased reliance on coal in the East Coast has the potential to significantly degrade air quality by increasing emissions and ambient concentrations of air toxics such as mercury¹⁷ and other dangerous pollutants such as fine particulate matter (PM2.5) or “soot,” sulfur dioxide, nitrogen oxides, and ozone. This pollution would harm public health and further exacerbate endemic acid rain and smog problems, which, not incidentally, plague many national parks. While new Clean Air Act regulations may address these impacts to some extent, there are no regulations in place to curb increased emissions of carbon dioxide (CO₂), which is the principal agent of climate change.

The Park Service cannot ignore the increase in coal-fired power production that the S-R Line would encourage. An agency must consider the growth-inducing impacts of its actions. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 675-76 (9th Cir. 1975). Here, the science of air pollution transport from fossil-fuel-fired generation in the Ohio Valley to the states downwind along the Eastern Seaboard is well-established. EPA has studied air pollution transport for decades and has demonstrated repeatedly that power plants are significant contributors to air pollution problems along the Eastern Seaboard.

The pollutants generated by power plants in Pennsylvania and the Ohio River Valley will be transported to the Philadelphia and Newark metropolitan areas. Both metropolitan areas, which include counties in Pennsylvania and New Jersey, are in non-attainment of the National Ambient Air Quality Standards (“NAAQS”) for ozone. Also, several counties in Pennsylvania and New Jersey are designated non-attainment for PM_{2.5}. Increased emissions from the S-R Line would exacerbate the health and environmental risks posed by non-attainment of the NAAQS and impede the ability of these states to come into attainment.

¹⁵ See Testimony of Karl Pfirrmann, President PJM Western Region PJM Interconnection, L.L.C., filed in FERC Docket No. AD05-3-000 (May 12, 2005).

¹⁶ See John Roger, *et al.*, *Importing Pollution: Coal's Threat to Climate Change in the U.S. Northeast*, 11 (2008), available at http://www.ucsusa.org/assets/documents/clean_energy/importing-pollution_report.pdf.

¹⁷ Atmospheric deposition of mercury from polluting sources such as coal plants, the largest contributors to nationwide mercury emissions, have caused both Pennsylvania and New Jersey to issue fish consumption advisories. See EPA, Mercury, <http://www.epa.gov/hg/about.htm> (“Coal-burning power plants are the largest human-caused source of mercury emissions to the air in the United States.”); see also *Commonwealth of Pennsylvania Public Health Advisory: 2012 Fish Consumption*, available at <http://fishandboat.com/fishpub/summary/sumconsumption.pdf> (last visited Jan. 31, 2012); *Fish Advisory*, New Jersey Dep’t of Env’tl. Prot. (2011), <http://www.state.nj.us/dep/dsr/fishadvisories/freshwater-advisories.htm> (last visited Jan. 31, 2012).

In addition, deposition of pollution from coal-fired power plants into water is responsible for mercury contamination of fisheries, acidification, and eutrophication. Effects include changes in water chemistry that affect aquatic vegetation, invertebrate communities, amphibians, and fish. The deposition of nitrogen also contributes to nutrient enrichment in coastal and estuarine ecosystems, which can cause toxic algal blooms, fish kills, and loss of plant and animal diversity. Deposition also can cause chemical changes in soils that affect soil microorganisms, plants, and trees. Plant species composition and abundance may change where nitrogen overstimulates growth, favoring some types of plant species and inhibiting growth of others. The EIS should address the impacts of increased deposition on waterways, wetlands, floodplains, soils, and vegetation.

2. Climate Change and Greenhouse Gases

The Park Service's failure to address climate change and greenhouse gas emissions in the DEIS must be rectified in the Final EIS. "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). "[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of the agency's control does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming." *Id.* at 1217 (emphasis in original) (internal quotation marks and alterations omitted). Thus, even though the Park Service does not control coal plant operations, it still must consider the extent to which its actions will spur increases in CO₂ emissions that contribute to climate disruption.

The DEIS must further consider how adverse impacts associated with the S-R Line would impact the resilience of resident ecosystems in light of threats posed by climate change. For instance, would construction and operation of the S-R Line hinder the ability of plant and animal communities to adjust to climate changes? Over the next fifty years and beyond, the Parks will be increasingly stressed by rapid climate shifts, and it is important to provide as much of a buffer as possible to allow for adaptation.

3. Energy Resources and Conservation

The DEIS does not fully consider the S-R Line's impacts on energy resources and conservation potential. Although the construction of the S-R Line may not affect Park Service facilities, the Park Service has the opportunity to encourage energy conservation in its selection of an alternative. The no action alternative would likely bolster growing reliance on energy efficiency programs.

4. Land Use

While the DEIS recognizes that the S-R Line will affect how land within the park boundaries is used, it does not provide any further detailed analysis of impacts to land

use. However, as the Park Service recognizes, the authorization of the requested right-of-way and special use permit could create a precedent, resulting in many additional Park crossings that incrementally would carve up the Parks. Importantly, the S-R Line is one of several linear utility projects that threatens major adverse environmental impacts in the immediate region. The cumulative impacts of these projects on the land use of the Parks are potentially devastating and must be considered accordingly.

5. Geologic Resources

The DEIS correctly concludes that Alternatives 2, 2b, 3, 4, and 5 would result in adverse impacts to geologic and topographic resources. However, there are several potential impacts to geologic and topographic resources that were overlooked in the DEIS. First, the Park Service states that for the purposes of new tower construction, geotechnical boring would need to occur in order to determine the depth of competent bedrock. *See* DEIS at 350. The geotechnical boring could then be followed the use of chemical compounds that could potentially be released into the environment. The Park Service should assess what compounds will be used, their potential for release, and the potential impacts on soil and geologic resources in the event of release.

Second, in its discussion of impacts to wetlands resources, the Park Service states that Alternatives 2 and 2b would require blasting that could adversely impact unique geologic formations and could lead to a decrease in groundwater availability and quality. With respect to both alternatives, the Park Service states that it does not currently know how blasting would impact unique geologic formations that lie under wetlands that will be impacted, and that a blasting and post-construction monitoring plan would be needed in order to assess these impacts. As discussed above, deferred analysis is not sufficient under NEPA. The Park Service should require the applicants to supply more information on the potential impacts of blasting on these unique geologic formations. Moreover, the applicants should provide a specific blasting plan with respect to each alternative, as well as a post-blasting monitoring plan, and the public should be afforded an opportunity to comment on these plans.

6. Floodplains

The Park Service failed to consider the cumulative impacts of several projects on floodplains. For example, the EIS should assess whether projects including but not limited to the Tennessee Gas Line Proposal, the Columbia Gas Transmission Company pipeline proposal, and the Northeast Supply Link Expansion Project will contribute to adverse impacts on floodplains in the study area. Further, the EIS should assess whether these projects and others, including Marcellus Shale gas development, the Dominion/Allegheny Power Transmission Line project, and other proposed residential and commercial projects in both New Jersey and Pennsylvania could contribute to adverse impacts on floodplains outside the study area. All of these projects could potentially have an adverse impact on the natural flow of rivers and streams and the ability of floodplains to absorb excess amounts of water from increased runoff.

7. Wetlands

The Final EIS must fill in gaps in the DEIS's analysis of impacts to wetlands. The Park Service has not disclosed the impacts of blasting activities along Routes 2 and 2b on wetlands and proper wetlands functioning. This deficiency must be addressed, and a blasting and post-blasting monitoring plan should be provided by the applicant and made available for public review. In addition, while we are pleased that the use of herbicides in wetlands areas in the Parks is not currently contemplated, the Park Service should assess the impacts of potential use of herbicides that may occur in the future and disclose what the impacts would be on wetlands.

8. Vegetation

The DEIS concludes that the applicant's current vegetation management plan is insufficient — a concern we share — and states that the Park Service will have to approve a new vegetation management plan. *See* DEIS at 390. Any such plan must address key issues such as the use of herbicides, the frequency with which vegetation management activities could occur, and reporting and monitoring of vegetation management activities. The Park Service should require the applicant to provide a full vegetation management plan for Park Service approval prior to the issuance of the Final EIS so that the interested public may review the plan and offer comments.

9. Landscape Connectivity, Wildlife Habitat, and Wildlife

The DEIS correctly identifies the loss of habitat connectivity as one of the most severe threats to the survival of many wildlife species. The DEIS further discloses the adverse impacts associated with Alternatives 2 through 5 as a result of the access road construction and widening of the currently existing right-of-way. *See* DEIS at 409-32. In addition, the EIS should include an estimate of the numbers and sizes of construction trucks and other equipment that will be using these access roads, as well as the frequency of vehicle trips. The Park Service should then analyze what impacts the construction equipment could potentially have on the ability of wildlife to move across the impacted landscape.

10. Socioeconomics

The review of socioeconomic impacts in the DEIS failed to address several potential impacts that several of the commenting groups identified in scoping comments submitted to the Park Service on March 12, 2010. The Park Service should address the economic benefits to local communities that arise from proximity to undeveloped public lands and conversely, the detriment associated with construction and operation of a major transmission line.

More broadly, the EIS should fully examine the opportunity costs of energy transmission and generation on federally protected lands in order to ensure that the net

socioeconomic value of the transmission project is maximized. In this analysis, the Park Service should account for all relevant non-market values, including non-use values and impacts on local quality of life and recreational and aesthetic opportunities. One of the most important purposes of public lands is to provide public goods, or non-market goods. Opportunities for solitude, outdoor recreation, clean air, clean water, the preservation of wilderness and other undeveloped areas would be underprovided if left entirely to market forces. Therefore, the Park Service should account for all non-market values provided by the Parks, and assess the devaluing impact of the S-R Line.

11. Visual Resources

The S-R Line will have significant impacts on the visual resources within the Parks as well as more geographically distant locations. The DEIS's visual simulation of impacts within the park is very useful. However, the EIS should also consider impacts on visual resources relative to the time of year, and what the impacts would be if lattice towers rather than monopoles were used.

12. Soundscapes

The EIS does not fully consider noise impacts that may vary seasonally. Under all of the analyzed alternatives, deconstruction/construction is likely to last as long as eight months, and continued maintenance will continue throughout the study period and beyond. For this reason, the EIS should consider the impacts of sound at different times of the year. Although the Parks may see more frequent visitors in during the summer months, sound from construction may be dampened by vegetation. However, in the winter, when most trees have lost their leaves, sounds may travel further or be more intense. Thus, the EIS should consider the impacts of sound relative to the time of year that deconstruction/construction or maintenance is occurring.

Further, the EIS should include consideration of the short- and long-term impacts of increased noise on rare bats, migratory birds, and other sensitive wildlife. The DEIS leaves unanswered questions about how the project's noise disturbances interfere with, or otherwise adversely affect, the displays, mating, foraging, communication, and other behavior of migratory birds and mammals.

13. Wild and Scenic Rivers

The DEIS analysis of impacts on Wild and Scenic Rivers focuses exclusively on the designated segment of the Middle Delaware. However, the Project will have impacts on other Wild and Scenic Rivers outside of the Parks, and these rivers must be considered as well.

14. Migratory Birds

We incorporate by reference the comments on the DEIS submitted by the New Jersey Conservation Foundation.

V. ANY PRE-DETERMINED DECISION WOULD UNDERCUT THE NEPA PROCESS

Public Employees for Environmental Responsibility (“PEER”) have filed comments stating that the Secretary of the Interior and the Director of the National Park Service have made an oral commitment to select the applicant’s proposed alternative (Route 2). Any such pre-determination of the NEPA process raises serious concern that the EIS will not serve its purpose to engender a thoughtful decision-making informed by a thorough analysis of environmental consequences. Further, NEPA’s implementing regulations prohibit agencies from making any irreversible commitment of resources before the environmental review process, including consideration of alternatives, has been completed. See 40 C.F.R. § 1506.1(a).

CONCLUSION

Thank you for the opportunity to comment. Again, we appreciate all of the hard work that has gone into preparation of the EIS and that goes into managing the Parks every day. If you have any questions regarding these comments, please do not hesitate to contact undersigned counsel.

Sincerely,

Abigail Dillen
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: 212-791-1881
Fax: 212-918-1556
adillen@earthjustice.org

William Schulte
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
Phone: 973-424-1166
Fax: 973-710-4653
wschulte@easternenvironmental.org